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Medical Negligence and Fixation of Liability

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ABSTRACT

At the beginning of this article, the effects of medical negligence under large heads are outlined, accompanied by an outline of the essential components of medical negligence and the roles of physicians, along with some examples and the basic levels of treatment prescribed by statute. To differentiate between criminal and civil liability and its implications. Also, how commercialization of the health sector has had adverse effects on doctor and patient liaison. To understand the scope of consumer fora in such cases. The article then deals with the essence of the details needed to be given to the patient for the purposes of consultation and care and ends, after a reference to the general consultation issued by the Supreme Court on the precautionary steps to be taken by physicians and the guidance issued by the Supreme Court for the safety of physicians from abuse in cases of criminal prosecution. Whether these laws are fair and reasonable? How Co-vid have made an impact in all of these.

Keywords: *Medical Negligence, Liability.*

I. INTRODUCTION

Negligence, simply put, is an infringement of the obligation of care that results in injury or damage. What constitutes medical neglect is important to know. A doctor owes the patient who consults him for sickness those tasks. A fault in this obligation results in neglect. A basic understanding of how medical negligence is adjudicated in India's numerous judicial courts would assist a surgeon to practise his specialty without excessive anxiety over facing suspected medical negligence lawsuits. A verdict on medical negligence by the Supreme Court has restored a semblance of order in the matter. The vast effect of commercialisation can be attributed to a reduction in the self-regulatory norms of the medical profession and an increase in medical negligence. The balance between service and industry is currently moving disturbingly towards business, and this calls for increased and efficient internal or external control.

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 [ISSN 2581-5369]

Litigation (civil and criminal) places medicine in an adversarial role, according to a cross-section of medical practitioners, which in turn tends to protective medicine. In addition to civil lawsuits, criminal charges arising in the first instance of the detention of a licenced practitioner by the police are demoralising. Hospital neglect is largely a legal matter, but a patient's death may often result in criminal charges. Such prosecutions against trained medical practitioners have been uncommon in the past, and a rise in such events suggests an increased concern in the external supervision of healthcare and a decline in the esteem enjoyed so far by the profession in India.

It was concluded that the mere fact that a life was lost or that there should be no presumption that some individual has suffered an injury is on account of a rash or negligent act.' The courts in India have repeatedly stated that negligence must be of a gross nature in order for a qualified doctor to be held guilty of criminal negligence. Simple lack of care should only give rise to civil liability. Simple lack of care should give rise to only civil liability. In deciding the issues, the distinction between civil and criminal medical negligence is so thin that critical scrutiny is required.[2] There are two material aspects to the principles of liability governing civil actions and criminal prosecutions based on negligence. First in a criminal case, the negligence which would justify a conviction must be culpable or of a gross degree and not the negligence founded on a mere error of judgement or inherent risks.

The mere lack of care that constitutes civil liability is not adequate. There are degrees of neglect for criminal law purposes; and a very high degree of negligence is required to be proven before the crime is created. Perhaps more of all of the epithets that may be used "reckless" almost fill the situation, as observed by Lord Atkin in the case of *Andrews v. Director of Public Prosecution*[3]. The degree of negligence that would justify a conviction must be more than just omission or disregard of duty. The law distinguishes between the negligence on which a civil liability originates and the negligence on which a criminal prosecution can be based. The limit that separates criminal negligence from civil negligence is blurred in some instances.

This distinction, however is clearly discernible in most cases. In short, mens rea or guilty mind, i.e. rashness or guilty mind of a degree that can be described as criminal negligence, must be present in criminal cases; mere carelessness is not sufficient.[4]

The three Judge Boards of the Supreme Court explained the broad concepts on this issue in

[2] Unreported judgment dated December 5, 1961 of the Bombay High Court in Dr Wagh v. State of Maharashtra, Criminal Appeal No. 607 of 1962 (Kotwal and Chandrachud JJ).
[3] (1937) 2All ER 552.
[4] Municipal Committee, Jullundur City v. Shri Ramesh Saggi, AIR 1970 Punj 137.

 [ISSN 2581-5369]

depth in Jacob Mathew v. State of Punjab and Anr[5]. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. What the law needs is neither the very highest nor a very low degree of care and competence. Negligence can be a criminal liability as well as a wrongful one. Negligence as a crime is of a high standard altogether. Negligence is established under the Tort Law to the extent of the loss incurred. Negligence under criminal law, however is dependent on the degree or amount.

The courts have reiterated that the person who calls for it is responsible for the burden of establishing criminal negligence. If a practitioner has a guilty mind and his/her negligence leads to recklessness, the person responsible will be held responsible for the act. By virtue of a landmark case of the Indian Medical Association v. V. P. Shantha & others[6] the conduct of medical malpractice was brought under the Consumer Protection Act, 1986 in which the Court noted that: Under this judgement, medical care was described as a "service" that was covered by the Act, and it was also clarified that a person seeking medical care may be regarded as a consumer if for example, certain criteria were met, either treatment or registration was paid. What constitutes medical neglect is important to know. A basic understanding of how medical negligence is adjudicated in India's numerous judicial courts would assist a surgeon to practise his specialty without excessive anxiety over facing suspected medical negligence lawsuits. The primary purpose is to objectively analyse and record different facets of medical negligence liability by medical professionals under the Consumer Protection Act, 1986 (CPA).

(A) Objective

At the beginning of this article, the effects of medical negligence under large heads are outlined, accompanied by an outline of the essential components of medical negligence and the roles of physicians, along with some examples and the basic levels of treatment prescribed by statute. To differentiate between criminal and civil liability and its implications. Also, how commercialization of the health sector has had adverse effects on doctor and patient liaison. To understand the scope of consumer fora in such cases. The article then deals with the essence of the details needed to be given to the patient for the purposes of consultation and care and ends, after a reference to the general consultation issued by the Supreme Court on the precautionary steps to be taken by physicians and the guidance issued by the Supreme Court for the safety of physicians from abuse in cases of criminal prosecution. Whether these laws are fair and reasonable? How Co-vid have made an impact in all of these.

[5] 6 SCC 1] [(2005) 6 SCC 1].
[6] [(1995) 6 SCC 651].

 [ISSN 2581-5369]

(C) Hypothesis

Null Hypothesis: The Medical Negligence is not adequately instigated in the Consumer Protection Act.

Alternative Hypothesis: The Medical Negligence is adequately instigated in the Consumer Protection Act.

(D) Method of Study

For the current research paper, the Doctrinal Research Methodology was used. Doctrinal analysis has been chosen as much of the knowledge for the preparation of the research article has been sought from the available literature, case laws, books and law journals.

II. ANALYSIS

Medical profession has been considered as the most noble and pious professions in the world. Doctors are counted amongst the persons possessing special skills. As any profession, this profession holds a high level benchmark, which gives a sense of security to the person taking his service, and implies trust in him. The profession has always been highly respected, however I the recent times, doctors have been levelled by such allegations which prove to be contrary by the end of the trial. This comes at a cost of reputation, which is extremely important given the fact that show business does play an important role in medical field. The kind of operations and the feedback by the patients play an important role in building ones reputation in market. The anger expressed is somewhat understandable from the patient's view as well, however emotions cannot be overpowered, as it will lead to travesty of the justice system.

It is important to understand that medical profession comprises of medical ethics, which are laid down by Medical Council of India. But in the due course the attitude of the doctors and the manner in which most of them are obtaining a degree is worrisome. The unethical behaviour and incompetence has grown to a great extend which, indeed, fails the main objective of the humanity. Acts done for personal gain by selling organs and body parts of patients, fees sharing so as to create a cartel, commission on prescribing medicines from one particular brand, it has all together taken a toll on the whole profession, which makes the patients or advice seekers a little dubious and cautious about their choice of health expert. While some are dying because of less accessibility, others are enjoying the monopoly that they have built over time and their fee seems to touch the sky.

Considering Medical Negligence, it's important to understand the meaning of the word "negligence", which can be understood as:

 [ISSN 2581-5369]

"A civil tort, which occurs when a person breaches his duty of care which he owed to another due to which that other suffered some hard or legal injury".

The term "duty of care" has been used. Now even generally, we all owe a duty of care to people around, even when we are out and about on the road driving. We always need to ensure that our actions must not do any harm to the others. In case of a breach, the negligent person must compensate the other, however the onus of proof lies on the person alleging such harm. Negligence can have various manifestations like collateral negligence, active negligence, continued negligence, passive negligence, reckless negligence, gross negligence, or negligence per se.[7]

In case of a medical negligence, a doctor can be held liable if it is proved that he/she is accountable for an act which no other doctor with reasonable skill set, acting with reasonable care, would be guilty of. The onus of proof, as in case of any other negligence, lies on the person calling for it.

The principle has been unequivocally laid down in the case of *Jacob Mathew v. State of Punjab and Anr.*,[8] wherein I'm the court observed:

"The practitioner must equip himself with a reasonable degree of skill and knowledge and should exercise a reasonable degree of care".

Negligence can be both criminal as well as civil. However, the only term that brings about a great difference between the two is "gross". As a crime, the word negligence has a different standard. It relies on the amount of negligence that has incurred, in contrary to the extent of the loss incurred as under the civil law.

The question has been dealt with great nuance in the case of *Dr. Suresh Gupta v. Government of Delhi*,[9] wherein the court drew a line between the two. It observed that it is an extremely difficult task to weigh the amount of negligence incurred by a medical professional. In order to convict one for the same, a high standard of negligence should be high and the prosecution should establish the gross negligence/ high degree of misconduct on the part of the doctor. Mere lack of proper care and attention can't be availed for prosecution. In contrast, a high degree of carelessness needs to be established to corroborate the allegation under section 304 of the Indian Penal Code, 1908.

[7] Poonam Verma v. Ashwin Patel & Ors., 1996 4 SCC 332.
[8] (2005) 6 SCC 1.
[9] (2004) 6 SCC 422.

 [ISSN 2581-5369]

In the case of *Mohanan v. Prabha G Nair*,[10] the Supreme Court while setting aside the order of the high court holding that the negligence can only be ascertained by going through all the evidences provided at the time of trial. The doctors must not be held criminally responsible until or unless a Prima Facie evidence to the crime is not presented in the court. *Martin F D'Souza and Mohammad Isfaq*[11] The level of treatment must be measured, taking into account the expertise and resources required at the time of the incident. For example, if the argument is that the doctor was negligent because of his inability to use the specific equipment that was meant to be used, the court would decide whether the equipment was "generally available at that time" and was thus available for use.

However, it should be noted that to err is a human nature and anybody can make mistakes and for the same a doctor can avail section 80 and 88 of the Indian Penal Code, 1908 in his defence. Section 80 deals with accident in doing a lawful act and Section 88 deals with an act not intended to cause death, done by consent in good faith for person's benefit.

Medical malpractice has also been brought under the purview of Consumer Protection Act, 1986, through *Indian Medical Association v. V.P. Santha*,[12] wherein medical service was considered as a service and person who seeks a medical assistance can be termed as a consumer. However, the services provided free of costs couldn't be brought under this Act. In *V.N. Shrikhande v. Anita Sena Fernandez*,[13] the court held that there is no straitjacket formula. Each case is different and is to be decided on its own facts.

In recent times, the doctors have been considered as "gods dressed in white" as the pandemic took a toll on the entire world, however, we don't fail to see news, which states about the wrongdoings in wake of pandemic by the doctors. With the recent upsurge, the healthcare sector has seen a unexpected growth, although it did come with government restrictions. Masks, sanitizers and various other commodities have been termed as essential commodities. Another drawback is the way patients are being treated at various healthcare centers across the nation. This has altogether given an increase on the imposition of civil liability on the doctors. In the case of *Indian Medical Association v. V.P. Santha*,[14] Supreme Court came up with exceptions to the cases where the doctors can be held individually or vicariously liable for breach of duty

[10] (2004) CPJ 21 (SC).
[11] (2009) 3 SCC 1.
[12] (1995) 6 SCC 651.
[13] (2011) 1 SCC 53.
[14] (1995) 6 SCC 651.

 [ISSN 2581-5369]

III. LIABILITY

Depending on the harm or injuries sustained by the affected person, the responsibility of the person doing the wrong can be of three kinds. Criminal liability typically requires the argument for damages suffered in the form of restitution. If there is some neglect of the duty of treatment during the procedure or when the patient is under the supervision of the hospital or the medical practitioner, they are found to be vicariously responsible for such misconduct. And in the form of restitution, they are entitled to pay penalties. Senior doctors are often also considered vicariously accountable for the errors made by junior doctors. When someone is a hospital employee, if that employee damages a patient by behaving incompetently, the hospital is liable. In other words, if the nurse is incompetent (is not sufficiently vigilant when treating or dealing with a patient), (Biswas 2012) the hospital is on the hook for any subsequent patient injury. In *Mr. M Ramesh Reddy v. Andhra Pradesh State*, the hospital administrators were held to be negligent, including not keeping the bathroom clean, resulting in the collapse of a patient and her death. The hospital was given a reward of Rs. 1 Lac. Personal Responsibility- There could be an occasion where the patient has died after treatment and a criminal complaint is filed under Section 304-A of the Indian Penal Code for allegedly causing death by reckless or careless act. Pursuant to S. 304A of the IPC, whoever, by a reckless or negligent act, causes the death of any citizen not amounting to a guilty homicide, shall be punishable by imprisonment of up to two years, or by a fine, or both. Hospitals can be charged with neglect for the spread of infection like HIV, HBs Ag, etc. if during the course of care in the hospital, any patient contracts such infection and the same has been shown to have happened due to the lapse of part of the hospital.

My own grandma passed away because of the doctors' incompetence. Because of the doctor's carelessness, he was too rushed to rush for his next surgery that he failed to sterilise the instruments and as a result there was this transfer of some bacteria into her blood that contaminated her whole system and eventually resulted in her death.

In the case of Dr. Suresh Gupta (Srivastava n.d.)-Supreme Court of India, 2004-the court held that the legal situation was very plain and well established that the doctor was responsible under civil law for paying the fee when a patient dies due to medical negligence. Criminal law for felony under section 304A of the Indian Penal Code, 1860 would apply only where the neglect was too gross and his conduct was as irresponsible as to risk the patient's life.

Parts 52, 80, 81, 83, 88, 90, 91, 92 304-A, 337 and 338 of the Indian Penal Code 1860 contain the rule of medical malpractice in India. Due to the Indian Medical Association's landmark case vs. V. P. Shantha & others, the conduct of medical malpractice was placed under the

 [ISSN 2581-5369]

Consumer Protection Act, 1986. In this case, the decision described medical treatment as a "service" covered by the Act and further explained that a person requiring medical attention was a "service" covered by the Act. If those conditions were satisfied, attention could be called a customer. The treatment offered was not free of charge or with a nominal registration fee; if free, the payments were forgiven because of the failure of the patient to pay; the operation was at a private hospital, where all patients were charged; or a service provided by an insurance agent that was paid for. This suggested that, as a breach of contract, certain types of patients could also sue errant health care providers for restitution under the Consumer Protection Act, 1986. Under the CPA, only hospitals and physicians who delivered all services free of charge to all patients were not accountable. And patients who do not fall into the definition of customers under the Act can however be entitled to sue for damages under the Torts Act. The duty is, however on the patient to show negligence.

IV. TASK PLAN TO SEEK COMPENSATION

Under common laws, the rule of torts takes jurisdiction and protects the rights of patients at a time where the Consumer Protection Act closes. This applies regardless of the likelihood of free administration being provided by restorative experts. In circumstances where the administrations rendered by the expert or healing centre do not fall under the category of 'gain' as described in the Consumer Protection Act, (Sarda 2016), patients should take action plan to the legislation that acknowledges carelessness under the law of Torts and get compensation. In Ireland, most victims of medical negligence may not have adequate medical experience to show that medical negligence has caused an illness, a worsening of a disease, or otherwise caused harm. It is also important to get the competent medical advice of specialist physicians and medical specialists when seeking medical negligence benefits in Ireland.

V. LITERATURE REVIEW

Mistakes within the healthcare industry can result in minor to major injuries which do include death. It has been widely accepted that to err is human but to replicate the same due to carelessness is sheer negligence. The main reason behind it is there are plethora of cases wherein reasonable care isn't practiced while diagnosis, during operation, giving anaesthesia, which can prove to be life threatening.[15] However, it doesn't mean that failure to diagnose in good faith can land a doctor behind the bars. It should be noted that a there is a difference between error of judgment and error of judgment due to negligence, while the former doesn't

[15] Amit Agarwal, Medical Negligence: Indian Legal Perspective, Annals of Indian Academy of Neurology, Medknow Publications.

make one liable under medical negligence, whereas the latter does. Delay in diagnosis, error in surgery, unnecessary surgery, wrong administration of anaesthesia, forced child birth through C section are some defined wrongs.[16]

In order to prove negligence one needs to prove that the defendant owed a duty of care to the plaintiff/ patient, breached the duty and as a result of which the plaintiff suffered damages.[17] But what constitutes a duty of care? The doctor has a duty to decide whether he wants to undertake the case, what kind of treatment to give, the administration of treatment and the aftermath. It is during this period if patient suffers damages and doctor is held responsible. The kind of liability varies depending on the nature of negligence.[18]

In *Kusum Sharma v. Batts Hospital*,[19] it was held that a doctor knowing the fact the the treatment may involve high risk, however, he honestly believed that the step might provide a great chance to redeem the patient from his suffering. Such kind of a case was not considered under Medical Negligence.

Similarly in *Jasbir Kaur v. State of Punjab*,[20] a newly born kid was take away by a cat and was found bleeding near the bathroom, it was held that the hospital was negligent in providing enough care to the new born. A doctor must exercise a reasonable degree of care that is set for the profession.[21]

In *M.M. Ramesh Reddy v. State of Andhra Pradesh*,[22] the hospital authorities were held negligent as the bathroom was not clean and due to which a patient fell and died on the spot. There is a Latin maxim, res ipsa loquitur, which means the thing speaks for itself. While in some cases, the plaintiff must prove to the court of the negligence that has caused damage to him, in some cases the negligence and the degree of which proves on its own, can avail compensation. Examples of such incidences includes leaving an object inside the body while operating, wrong leg/limb is operated etc.[23]

One can file a complaint under section 304, 337 and 338 of the Indian Penal Code, 1908 which talks about negligent act amounting to culpable homicide, negligent act threatening the personal safety of the patient and negligent act which affects personal safety of others.[24]

[16] Shubhodh Asthana, Medical Negligence in India, blog.ipleaders.in.
[17] Ibid.
[18] AMLEGALS, June 2020, MEDICAL NEGLIGENCE- Can it be pardoned?
[19] (2010)
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 [ISSN 2581-5369]

VI. Conclusion

It may be inferred that the Supreme Court offers the requisite security, not the licence to destroy, in the light of the judgement provided by the Honourable Supreme Court and the discussions conducted in the different cases decided upon. The current case deals very specifically, in both civil and judicial respects, with the pros and cons of the idea of Medical Negligence. This decision would undoubtedly bring about a harmonious relationship between doctor and patients, and fake frivolous cases will be minimised as a consequence.

None would argue that in the world of nursing, delinquency often needs to be dealt with sternly, as with any other discipline. It is not impossible to distinguish the causes. It is just a matter of determining the contours of "crime" that can give rise to detrimental legal implications. The result of therapy is of limited importance in the practise of medicine for the imponderables are numerous. In the course of setting the criteria of responsibility, two conflicting considerations, one of which is as significant as the other, need to be balanced: one involves the right of a practitioner to arrive at a decision and the other of the patients of which the presence of the discretion of the medical professional is not sought to be foreclosed, but rather its misuse and recklessness with which it may be insane. In the course of arriving at an equilibrium, Indian courts are slim, maybe not unreasonably, heavily in support of doctor.

The statute does not aim to make any undue interference into the domain that only medical practitioners rightfully belong to and judges do not want to force their own expertise on them. The legal framework still does not follow a full hands-off policy and scrutinises the conduct of medical practitioners and aims to discipline any who fell behind the minimum level, and the minimum standard measure is also strongly informed by the current medical traditions and beliefs and the body of information applicable at the specific date. The expectations are not too high and transparency is strengthened in some situations by fastening the responsibility so no one can be resistant to inspection. In this respect, the statute zealously respects the independence of medical practitioners and thoroughly recognises that prescribing unreasonably high expectations can have a kind of chilling impact that is not beneficial, but the law still aims to safeguard and protect the rights of a patient to expect a minimum quality of treatment.

VII. Suggestion

The Medical Council of India should also provide a clause in the Medical Council of India Act that the State Council should dispose of any lawsuit against a negligent doctor within six months, not only to deal efficiently with medical incompetence, but also to safeguard the rights of poor patients. An uncertain court date by restorative practitioners for criminal carelessness

is counter-beneficial and does not supply the general population with any management or greatness. There must be a connection between the necessity of responsibility, fault, and equity. In reference to clinical calling and carelessness, the academic makers of Mistakes, Medicine and the Law feature the relation between moral blame, fault and equity. While the experts' desires must be realistic and the usual templates attainable, this implies appreciation of the principle of customary human error and human confinement in the execution of complicated errands. It is proposed that for medical negligence, significant responsibility must be given. The damages for the act of incompetence must be made serious.

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 [ISSN 2581-5369]

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