

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 3

2024

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Medical Negligence in India: A Critical Study in the Light of Interpretation of Law by the Apex Court

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ABSTRACT

This paper describes the concept of medical negligence, it explains the meaning and essentials of medical negligence in general. The paper throws light on the principles that are being used and considered in the context of medical negligence. All the cases that have happened so far and what were the opinion, suggestion and judgement of the Hon'ble courts along with the principles that were provided by the courts to judge the medical negligence are incorporated in the paper. Not everything was beforehand provided about medical negligence since start, it was the ability and judgemental capability of our judiciary that we've come up to a system of adjudication for medical negligence, therefore precedents and judgements of courts form the core basis of this paper.

Keywords: Medical, Negligence, Reasonable Care, Liability, Doctor, Profession.

I. INTRODUCTION

Vaidyo Narayano Harini', the meaning of this verse is that the doctor is Narayana, the doctor is an incarnation of God.

Even though there are various professions but medical profession is considered one of the noblest profession and profession of utmost importance and therefore the doctors are given position of Gods. For every patient Doctors are God and God is infallible and unerring. Whenever in need and whenever someone's life is on stake they approach doctors to cure and help them as considered possess infallible powers of healing, but such thought is not practical as we are aware even doctors are humans and very much capable of making errors. Doctors can commit mistakes and sometimes maybe negligent. Patients may go through some serious suffering due to negligence of the doctors or assisting staff and due to such situation it becomes confusing to determine who was at fault behind such suffering.

In a country like India high is so committed to rule of law such matters of negligence are taken to courts for judges to make decisions depending on the situation however difficulty arises in

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court for judges because they do not hold any expertise in the medical field and therefore all these decisions are based on expert opinion. Judges make decisions keeping in view the law of land and reasonableness and prudence are the guiding factors.

II. NEGLIGENCE AND ITS ESSENTIALS

Before discussing any further it is important to know what negligence means in legal field. When a person is supposed to do something but does not it leads to omission and such omission leads to breach of duty. Negligence is the breach of duty, where a person is supposed to do something keeping in mind the considerations which a reasonable man is supposed to do or would not do. It is actionable negligence when a person is supposed to show proper care and does not use skill towards the person to whom defendant owes the duty to take care and is negligent and due to such negligent behaviour the plaintiff suffers. So there is a duty at first to take care, there is an obligation on defendant's head that he is bound to perform and if not performed or performed with carelessness may lead to damages.

Therefore it sums up to the following are the constituents of negligence

- Existence of legal duty to care- A person will only be held liable for negligence if that person was under a legal duty otherwise it is just absurd to hold any person liable for just any carelessness.
- Breach of duty which means non performance of the responsibility or obligation one was supposed to do.
- Consequential damage due to breach of duty.

In order for plaintiff to prove negligence to establish their case it is essential that:

- Plaintiff prove that defendant had a duty or obligation towards the plaintiff, duty to take care and act as a prudent man would and also use the skills necessary to perform the obligation.
- Plaintiff must prove that the defendant did not abide by the duty and obligation and breached the duty.
- Following such breach the plaintiff must prove that they suffered some injury and defendant is liable towards such injury and damages.

III. REASONABLE FORESEE ABILITY

If at time of act or omission defendant can see that such actor omission can cause injury then he owes duty to take care and prevent that injury and even though aware of such fact if he fails then he is liable.

In case of *Glasgow Corporation v. Muir*³, Lord Macmillan explained the standard of foresight of a reasonable man as follows :

“The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some person are by nature unduly timorous and imagine every path beset with lions. Others of are robust temperament, fail to force or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from apprehension and from overconfidence, but there is a sense in which the standard of care of the reasonable man involved in its application as subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen. Here there is a room of diversity of views...what to one judge may seem far-fetched to another both natural and probable.”

No liability can be levied on defendant's head if it can be proved that he in any reasonable circumstances was not able to or could not foresee the injury.

IV. MEDICAL PROFESSIONAL

Before knowing about medical profession let us define what a professional is, a professional is a person that does practise something as a full-time occupation and for that services or occupation which he gives he's paid and that person knows the special conventions forms of politeness et cetera associated with a certain profession. Professionals are well aware of all the regulations and code which guide their profession. And so these professionals are subject to professional codes standards and ethics enforced by professional regulatory.

If you talk about professional liability the duties of every professional is mentioned in their codes of conduct and if a professional fails to follow that code of conduct he or she is definitely liable in cases where they fail to adhere to the professional code of ethics. When it comes to law of negligence professionals such as your doctors if we talk in context of this particular topic of medical negligence possess and profess special skills. If you talk about the medical professional they can be held liable for negligence in one of the two findings that are either that medical professionals did not possess the required skills which he professed to have and the other is he did not exercise with reasonable competence in a given case the skill which he did profess.

³ *Glasgow Corporation v. Muir*, (1943) A.C. 448.

(A) Negligence by Medical Professionals

When a person puts himself out there in a position to give medical advise and provides any medical treatment it becomes obvious and implied that he possesses the skills and knowledge in the field of medicine. When a patient consult such person whether he's a medical practitioner or not so in that case that person owes some sort of duties towards the patient and that duty is duty to take care in deciding whether he undertakes the case or not. When such person decides the kind of treatment, suggesting any medicine basically when medical professional takes any patient under their administration and deals with their case it leads to duty of care that whatever treatment is being provided will only help the patient and any carelessness in providing such care or any failure is negligence on behalf of medical practitioner thus giving the patient push to take action against such negligence.

In the case of *Jacob Mathew v. State of Punjab*⁴, the Supreme Court of India thoroughly defined in detail of what is the meaning of negligence by medical professionals.

If we talk about the background of the case, this case revolves around the tragic death of Jacob Mathew's wife the reason of death of Jacob Mathew's wife was alleged medical negligence. Jacob Mathew accused health professionals and hospital involved claiming negligence in the medical care that led to sad demise of his wife the defendants defended that they had exercised due diligence and emphasised that the unfortunate outcome that was plaintiff's wife's demise don't always equate to negligence.

When it comes to professional negligence simply lack of care or some error in judgement or an accident does not provide proof of negligence on the part of medical professionals if the doctor follows and practises treatment which is also accepted by other medical professionals he cannot be held liable for negligence just because a better alternative course or method of treatment was available or simply because there would have been a more skilled doctor who would not have chosen this resort or procedure which the accused followed . What is important to be seen is whether the precautions while doing the treatment were taken or not and precautions should be such that a prudent man of ordinary experience would have opted for such precautions too. It is always the basic precautions and never the special or extraordinary precautions which are taken under consideration and failure of taking such extraordinary precautions which might have prevented the particular miss happening cannot be opted to judge the standard of care in the alleged negligence.

⁴Jacob Mathew v. State of Punjab,(2005) 6 SCC 1.

(B) Degrees of Negligence

In the case of *Smt. Madhubala v. Government of NCT of Delhi*⁵, the Delhi High Court laid down that in civil law there are three degrees of negligence:

1. Lata Culpa, it means gross negligence. It points to such omission of that care which will not be even avoided by most inattentive men.
2. Levis Culpa, it means ordinary neglect. Levis Culpa refers to such conduct which falls below or falls short of what a prudent ideal person should do but this degree of negligence is not as serious as gross negligence.
3. Levissima Culpa, it means slight neglect. This degree of negligence refers to a very minor and an intentional negligence. This can also be described as situations where someone has made a mistake or acted carelessly but the mistake committed was not that serious enough to be considered a major wrongdoing.

After going through these aforementioned degrees of negligence we can arrive at this juncture that a doctor shall not be liable and shall not attract punishment what every of its negligence. As the name itself suggest slight negligence and ordinary negligence or not punishable if the club these two degrees of negligence negate two categories firstly the negligence for which doctors will be held liable and secondary the negligence for which doctor should not be held liable. If we go through various cases we will learn that it is on the judges of the court to divide and and draw the line to clearly define whether the act of negligence is punishable or not therefore the problem is when the dividing line is way too thin.

V. JUDICIAL DECISIONS ON MEDICAL NEGLIGENCE

*Bolam v. Friern Hospital Management committee*⁶, In this case the patient named John Hector Bolam suffered from depression and was under treatment in Friern Hospital in 1954. The patient Mr Bolam received electro convulsive therapy which caused him serious fracture the patient. Mr. Bolam argued that his doctors has been negligent for three reasons, firstly that he was not given any relax and drug however nurses were present on either side of the couch to prevent him from falling off . When he agreed for the treatment the hospital did not warn him and did not made him aware of the potential risk of the procedure and particularly that he would be given the treatment without relaxant and drugs. Mr. Bolam claimed for damages for negligences and for which experts opined that there were two practises which were accepted and followed

⁵Smt. Madhubala v. Government of NCT of Delhi, 2005 (118) DLT 515.

⁶Bolam v. Friern Hospital Management committee, (1957) 2 AII ER.

by the medical professionals that is first treatment with relax and drugs and the other being treatment without relax and drugs and when it comes to warning also there were two practises that for privileged first being to give the warning to the patients and also the other being warning only to be given when the patient hours and enquire about the dress regarding the treatment. The court in this case concluded that the doctors and the hospitals were not negligent.

As result of this case the legal system developed and implemented Bolam Tests way to measure medical negligence.

(A) About Bolam Test

Although the test evolved in 1957 the basic key of the Bolam test remain same but with changing time it must be moulded and adapted to fit with the present time. The base premise of determining whether the action of medical professional align with actions of the other medical professionals if in their position and sometimes it can change according to their degree of experience.

The case of *Bolitho v. Hackney Health Authority*⁷, was used to amend the rules around the Bolam Test.

According to the facts of the case, a child was brought to the hospital who suffered respiratory failure and was not able to breathe. The doctor didn't attended the child which led to severity of the situation. Failure of respiratory system gave rise to cardiac arrest and the child suffered brain damage due to such failures this ultimately leading to his death. Parents of the child (claimants) argued that the situation would have not worsened if there child was intubated the moment he was brought to the hospital and answer to the claimant's argument doctor replied even if they attended the child they would'nt have opted to intubate him, which meant that in any event the child would have died. The doctor's employer (defendant) supporting the argument presented expert evidence that other doctors who would have come across same situation would've done the same thing.

The issues that arose in the case were:

- Whether the doctor breached her duty to take care by failing to attend the child?
- Whether the doctor would still be held liable for breach of duty to take care if she would have attended the child but not intubated him?
- Was it doctor's failure to attend the child that led to patient's death?

⁷Bolitho v. Hackney Health Authority, [1998] AC 232.

The House of Lords gave verdict in favour of the defendant and stated that there was no need and reason to challenge evidence provided by expert which was not intubating the child was reasonable. And yes the doctor did failed to attend the child and breached her duty but she would not be held liable for the death of child because in any circumstance the child would've not been able to make it and die eventually.

When Bolam test is applied, what is important is that the court must be satisfied that professional body on whose opinion the defendant is relying upon has and deliver a logical and defensible basis to approve and justify defendant's practice being reasonable.

The case of Bolitho helped to clarify and establish the meaning of a responsible body, it defined it as a body who based there opinion on foundation of logics.

The Bolam Test and Bolitho Test together forms a twin pillar to assess and analyse medical negligence. The explanation to bring amends to the Bolam test stated that in cases where despite a professional body supports and opines on defendant's conduct, the defendant can still be held liable even though all distinguished experts in the field are of particular opinion they will have to demonstrate the reasonableness of that opinion. In rare cases if demonstration fails to establish any logic, the judge is entitled to hold the responsible body as not reasonable.

In *Achutrao Haribhai Khodwa v. State of Maharashtra*⁸, Apex court held that skills of medical professional differs from doctor to doctor and keeping in consideration the nature of profession is such that treatments preferred by doctors are different. Courts will definitely ponder on the part that whether doctor has done negligence or not if he has performed his duties the best he can. Eventhough different doctors choose different course of treatment and if the doctor has attended the patient and treated the patient with due diligence and the treatment provide is acceptable to other medical medical professional then the court will be contended even though if the patient after reasonable efforts is not able to survive or suffers permanent ailment, it will be difficult to hold the doctor responsible of any negligence.

In *Kunal Saha v. Advanced Medical Research Institute*⁹, the facts of the case reads as that Anuradha a child psychologist along with her husband KunalSaha accustomed to the US arrived in Kolkata for vacation. Amidst the vacation Anuradha developed fever and started to have skin rashes, after Anuradha consulted with her friends and she came across Dr. Sukumar Mukherjee. As per Dr. Mukherjee's instructions she was injected with first dose of depomedrol injection 80mg and after few days Anuradha's condition worsened and so she was admitted to AMRI

⁸ Achutrao Haribhai Khodwa v. State of Maharashtra, AIR 1962 SC 933.

⁹Kunal Saha v. Advanced Medical Research Institute, AIR (2014) 384 SSC.

Hospital. Later when she was reexamined she was given second dose of the same aforementioned drug. Mrs. Saha's condition worsened ever more her skin started to shed, there were green patches on her back. Consequence of all the medication and treatment Anuradha Sarah passed away due to 'Toxic Epidermal Necrolysis'(TEN). Kunal Saha filed a complaint in National Disputes And Redressal Commission. The judgement of the sad case came in October 2013, and Kunal Saha was awarded approximately 6 crore rupees for his wife's death. Such large amount of compensation was given on the basis of the amount of money Anuradha would've earned in her course of work in the Sand also keeping in consideration that the judgement came after 15 years of Anurdha's death.

Samaria Kohli v. Prabha Manchandana and Ors¹⁰, this case focuses on the concept of consent. Appellant Samaira Kohli complained of prolonged menstrual bleeding to Dr. Prabha Manchanda and was advised to get ultrasound done according to which Samaira was advised to visit and get laparoscopy test under general anaesthesia. It was discovered that she was going through Endometriosis while she was unconscious Doctor Prabha's assistant got appellant's mother's consent to perform hysterectomy and 'Bilateral Salpingo Oophorectomy'. The issue was that the patient was minor and was responsible to give consent and as she was mentally sound and adult there was no question that patient's mother was asked for consent to perform the surgery. even though the patient was unconscious due to anaesthesia but there was no hurry that the doctor didn't waited for her to herself give the consent and her reproductive organ was removed. The issue was not about the accuracy of the operation or treatment but about the consent of patient when there was no emergency therefore it was an unauthorised intrusion and interference with patient's body.

Indian Medical Association v. V.P. Shantha¹¹ In this case, Supreme Court held that services rendered by medical practitioner to a patient (excluding the services where doctor provides free service or under a contract of personal service) be it services rendered by way of consultation, treatment and diagnosis (both surgical and medical) would fall within the ambit of definition of 'Service' provided in section 2(1)(o) of the Consumer Protection Act 1986. The judgement turned out to be major relief for all consumers but also now the relationship of doctors and patient have just turned into a provider and consumer relationship which leads to deterioration of fiduciary relationship between Doctor and his patient. This judgement that incorporates the Consumer Protection Act, 1986 in the purview of medical profession will definitely keep check on doctors that they discharge their duties diligently because it is always that the patient's life

¹⁰Samaria Kohli v. Prabha Manchandana and Ors, 2008 AIR SC 855.

¹¹Indian Medical Association v. V.P. Shantha, 1996 AIR 550.

is at stake. It is just not limited to this but slowly doctors who work in paid hospitals fall under this, while those who work in hospitals that provide free medical services will be safe because services rendered for free are not included in the definition of services.

Spring Meadows Hospital v. Harjot Ahluwalia¹² this case focuses on the fact that not only the children were brought to the hospital but even their parents should also be treated as consumers under the consumer protection act, so a parent is very much eligible to claim the compensation under the consumer protection act it was disputed in this very case that the parents would not come under the definition of consumers in the consumer protection act but the court accurately pointed out towards the fact that the contention was false and consumer's definition under the act includes parents.

Laxman v. Trimbak¹³, the court in this case held that a person who keeps himself out ready in the position to give medical advice and treatment automatically undertakes that he is possessed of skills and knowledge and is eligible and entitled to perform the purpose.

Kusum Sharma v. Batra Hospital¹⁴ in this case the honourable Supreme Court has settled the law relating to medical negligence according to the court while deciding whether a medical professional is liable or guilty of medical negligence, there are following and certain well-known principles that must be kept in view :

- When a person omits to do something, which leads to breach of duty it is negligence. A prudent man is guided by certain considerations which ordinarily regulates the conduct of persons human affair it decides what a person would do or would not do.
- In order for the prosecution to establish the main ingredient of offence which is negligence the prosecution must establish that the negligence is either culpable or gross and not such negligence that it is based upon the error of judgement.
- If a medical professional keeps himself out in the position to provide treatment then it is expected that a reasonable degree of skill and knowledge is exercised and there is a reasonable degree of care. The degree of care should be appropriate to the treatment provided and the competence of the medical professional is judged in the light of the particular circumstances of each case.
- A medical professional would be kept in position of liability only when his conduct lies below the standards of the other reasonable competent practitioners in his field.

¹²Spring Meadows Hospital v. Harjot Ahluwalia, (1998) 4 SCC 39.

¹³Laxman v. Trimbak, AIR 1969 SCR (1) 206.

¹⁴Kusum Sharma v. Batra Hospital, (2010) 3 SCC 480.

- A doctor cannot be held negligent if the conclusion of his treatment differs from that of the other professional doctors, because in the realm of diagnosis and treatment there is a scope for genuine difference of opinion.
- Often there are situation that a doctor adopts such treatment that involves higher element of risk but also he believes that the treatment would turn out to be fruitfully successful for the patient in comparison to the procedure that involves lesser risk but will turn out to be a failure, therefore in such case it must be seen that the procedure exercised is done keeping in consideration the gravity of illness and is done to redeem the patient out of his sufferings. If somehow the treatment fails it would not amount to negligence.
- A doctor cannot be held liable for the negligence as long as he performed his duty with reasonable skill and care and competence but me early because a doctor opted for some another course of treatment and action in preference to another one available the doctor will not be held liable such course of action is acceptable by other medical practitioners.
- It would not help kor bring any efficiency to the work of medical practitioner if they are administering their work with a halter around their neck.
- As part of a civil society we are bounded by this obligation that we ensure that we do not unnecessarily harass medical professionals and humiliate them so that they can perform their duties, there is no need of fair in apprehension because it will not bring any effectiveness in their treatment.
- Such complaints must be discarded which uses criminal process as a tool for pressurising medical professionals hospitals particularly private hospitals or clinics to extract heavy compensation, such proceedings deserve to be discarded and medical petitioners should be protected against such complaints.
- There must be some sort of protection that must be provided to the medical professionals as long as they are performing their duties with reasonable skill and competence and they're working in the interest of patients health.

(A) Whether Medical Negligence is a criminal wrong or civil wrong

Negligence is used as an umbrella term to bring defendant's under purview of civil (law of torts) as well as criminal law. In order to bring distinction and explain the difference, Lord Atkins in his speech in *Andrews v. Director Public Prosecution*¹⁵ said that, simple lack of care and minor negligence will be brought under the purview of civil liability as it is not enough to

¹⁵Andrews v. Director Public Prosecution, (1937)2 AII ER 552 (HIL).

bring out the purpose of keeping in criminal law as there are certain degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Therefore for negligence to be considered as an offence rather than it taught a higher element of mens rea that is guilty mind must be proved and the negligence should be of very high degree. In the case of *Jacob Matthew versus State of Punjab* the apex court explained that the expression rash and negligent act under section 304 A of I.P.C should qualify to the degree of gross to prosecute a medical professional for negligence under criminal law. It must be proved that the medical practitioner did something or fail to do something which other medical practitioner in his ordinary senses and course of action would not do or would not feel to do.

(B) Liability of hospitals in cases of negligence

Hospitals in India can be held liable for negligence either directly or vicariously. Direct liability points towards hospitals in efficiency and efficiency in providing safe and suitable environment for treatment as promised whereas hospitals Liability which comes vicariously points towards the fact that the employer is liable for the negligent act of its employees. The hospital is not only liable for his own acts of commission and omission and but also for the negligence of its employees till the time the employee is working under the course and scope of the employment. And the liability is according to the principle of 'respondeat superior' which means 'let the master answer'. The latin phrase 'qui facit per album fact per se' means the one who acts through others, acts in his own interest. An exception to such principle is the doctrine of 'borrowed servant' according to which the employer is not responsible for the negligent act of his employee if the employee is working under the guidance and supervision of a senior.

*Joseph @ Pappachan v. Dr. George Moonjerly*¹⁶ in this case court held that the person who runs hospital are similar under the law as the doctors, whenever they accept the patient for treatment they must work with reasonable care and as hospital cannot itself listen to stethoscope and hold the scalpel they do it through the staff they employ. Therefore if staff is negligent while delivering their duty so is the hospital.

*Aparana Dutta v. Apollo Hospitals Enterprises Ltd*¹⁷ in this case the court held that even though the terms under which a doctor is employed in hospital stays between him and the hospital but it cannot be used to shift the liability off from hospital's head. Hospital is expected to provide medical facilities and care and in cases of any lack and deficiency of service or care the hospital will be liable.

¹⁶Joseph @ Pappachan v. Dr. George Moonjerly, [1994 (1) KLJ 782 (Ker. HC)].

¹⁷Aparana Dutta v. Apollo Hospitals Enterprises Ltd, [2002 ACJ 954 (MAD HC)].

VI. CONCLUSION

After analysing the conclusion drawn from the paper is that when it comes to life of a person any sort of carelessness is not justified and therefore appropriate care is to be taken by the medical practitioner, hospital, staff. It is also true accidents and mis happenings are inevitable but what must be taken in consideration that the doctor took reasonable care and did his best efforts. Where patients are likely to dawn the liability of the negligence on doctor's head but emphasis should be given on each detail on doctor's conduct. In case of negligence when it comes doctors working in hospitals the liability is joint but the division of liability between two will be decided on basis of understanding. Judiciary plays a very important role in determining whether there is negligence or not and so far it is the courts through there decisions who have created and delivered precedents in order to be used further to deal with such cases, take example of Bolam Test and Bolitho Test, both these are outcomes of judicial decisions. Therefore so far it is the efforts of judiciary that shaped the dealing mechanism on how to deal with the cases of medical negligence and provide rightful remedies.

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