

Medical Negligence: Law in Indian Perspective

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Abstract

Medical Negligence is the failure of a medical practitioner or a doctor to provide proper care and attention towards his patient, this negligence is increasing day by day. History shows that perception on medical negligence Doctors hands were cut off if patient died during operation. During such time medical negligence was considered as criminal punishable act than civil wrong. The basic principle concerning to medical negligence is popularly known as "Bolam Rule" & "Bolitho Rule. This principle was propounded by Justice McNair & Lord Wilkinson during their judgement. The Supreme Court of India has stipulated the guidelines "Bolam Rule" & "Bolitho Rule" in India for establish check and balance in the case of medical negligence.

Keywords: Medical Negligence, Medical Negligence and Law In India, Law on Medical Negligence.

Introduction

Relationship between doctor and patient is completely based on trust, however now day's commercialization has influenced the relationship, and transformed this noble profession into business. The arrivals of big corporate hospitals have changed the entire structure of medical profession. The increasing importance of money by medical practitioner has reduced the level of trust and patient has started to approach to the court of law in *India (1)*. Negligence is the failure of a medical practitioner, doctor to provide proper care and attention towards patient, where life came in danger; this negligence is increasing day by day. It is commission or omission of an act by a doctor or medical practitioner which deviates from the accepted standard of medical profession, leading injury to patient in lack of reasonable care and skill. History shows that perception on medical negligence has shifted from crime to tortious approach. The Earlier Civilization (Code of Hammurabi) developed by Baby Ionian King in some 20 century B.C., Doctors hands were cut off if patient died during operation, such examples were wound in Islamic Law, Mosaic Law, Charak Samhita, Sushant Samhita, Manusmriti and Yajnavalka's Smriti. During such time medical negligence was considered as criminal punishable act than Civil wrong(2).

Meaning & definition of Medical Negligence

In Roman law negligence is signified by the terms "Culpa" and "Negligentia", as contrasted with "Dolus" a wrongful intention, care or absence of "Negligentia" is "Deligentia". The use of the word diligence in this sense is absolute in modern English, though it is still retained as archaism of legal diction (3). Negligence can be defined as the improper or unskilled treatment of a patient by a health care professional, medical negligence is considered as malpractice in field of health care. Medical negligence required to prove such as the form of tortious negligence, generally plaintiff required to prove four elements as follows- (1) the medical professional has duty of care, (2)-This duty for care was violated or omitted, (3) - breach of duty caused loss or injury to the plaintiff, (4) - the loss or damage is authorised to challenge to get remedy. We can see the ways in which doctors actually does the negligence during their services like

1. Failure to attend or treat
2. Error in diagnosis
3. Failure to take full medical history
4. Errors in treatment
5. Failure to advise and communicate (4).medical negligence is commission or omission of an act by medical professionals which deviates from the generally accepted standard of practice of medical



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6. community resulting in an injury to patient, he bound by his duty to treat with reasonable degree of skill and care, if he fails to do he shall be liable for negligence. According to Austin "negligence is faulty mental condition which is penalised by the word damages". Salmond says "negligence is culpable carelessness" (5).

Objective of the Study

With the arrivals of big corporate hospitals and transformation of noble relationship into commercialization has changed the mind status of patient towards medical practitioners. A physician or a surgeon does not undertake that he will perform a cure, but he undertakes to bring fair, reasonable and competent degree of skill. This test covers entire field of liability in respect of diagnosis, duty to warn his patient of risks inherent in treatment and also in respect of treatment. Where patient died due to an overdose of anaesthesia and it was found that he was taken for surgical procedure without any testing for adverse effect of anaesthesia which was to be administered, medical negligence was found there and doctors were held liable for death of patient(6). Right to life and right to health are not only guaranteed right under Article 21 of Constitution of India, but Many International documents had secured the right to enjoyment of highest attainable standard of health is enshrined in numerous international human rights treaties. Universal Declaration on Human Rights 10 Dec 1948 states that "The right to standard living of adequate for the health and well-being, including medical care and necessary social services and right to security in the event of sickness & disability"(7). International Covenant on Economic Social and Cultural Rights which India has ratified states that right to health requires availability, accessibility, acceptability, and quality with regard to both health care and underlying preconditions of health. In constitutional prospect right to health is fundamental right under Article 21(8). Indian Criminal law has placed the medical professional on a different footing as compared to an ordinary human. Section 304 A of I.P.C. 1860 states that "whoever causes the death of a person by rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years or with fine or both". Bolam's test has been approved by Supreme Court of India in Jacob Mathew's case. Medical negligence is new area under Indian legal system to be studied for better health issue.

Review of Literature

During the study paper Medical Profession: Advent of Legal Implications by Gaurav Mittal and Trayetanu Singh was studied where author has tried to point out the medical implications, relevancy of criminal law for medical practitioners and doctors, the reasonable standard care (Bolam Rule) to (Bolitho Rule)(9). The research paper of Kiran Gupta "The Standard of Care & Proof in medical profession: shift from Bolam to Bolitho was studied. Right to Health Protection and Preservation via Legislative Enactments and Judicial Pronouncement by Balasaheb Pandhere where author has explained the international provisions for protection of health and

adequate standard of life (10). The cases on medical negligence are cited from The Law of Torts by M.N. Shukla(11), and Introduction to law of Torts by Dr Avatar Singh & Dr Harpreet Kaur (12). A research Paper on "Medical Negligence and Law" by K.K.S.R. Murthy Indian Journal of Medical Ethics was studied where researcher has highlighted the recent rulings of Supreme Court on medical negligence. India has adopted the Bolam Rule from United Kingdom and using to adjudicate the cases of medical negligence.

Medical Negligence

The cases against medical negligence occur every day in Indian hospitals. Around one in 10 patients believed to be a sufferer of a medical negligence during his treatment in hospitals, the proportion of such people proceeds towards court for medical negligence in India. Medical professionals in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case of Indian Medical Association vs. V.P. Santha(13); it ruled that doctor's negligence could be ascertained only by scanning the material and expert evidence that might be presented during trial. In Suresh Gupta's Case 2004 the standard of negligence that had to be proved to fix a doctor's or surgeon's criminal liability set at "Gross Negligence" or "Recklessness" in case of Anita Nagindas Parekh vs. Dr Anil C. Pinto (14), where death was caused due to negligence of in post-surgery case. He was young and healthy man was admitted only for minor surgery. Claim for damages was made 22 year back. He was earning 30 to 50 thousand per year from his business, court awarded 10 lac compensation for loss caused to him due to medical negligence. In the case of State of Chhattisgarh through Collector vs. Manju Bai (15), where negligence of doctor conducting sterilisation operation was neither pleaded nor proved and plaintiff's wife who immediately after sterilization operation did not get pregnancy terminated which was permissible under the law, the child born to plaintiff was held not an unwanted child, no compensation was granted. Kalyani Nursing home vs. P. Chandra Mauli(16), where death of patient was caused due to heavy bleeding after normal delivery through episiotomy, the doctor requisite blood after two and half hour and specialist was called after the condition of patient became critical, the treating doctor was held liable for negligence in his service. In the case of Archana Paul vs. State of Tripura (17) where petitioner were under going laparoscopic sterilization operation were made aware of the failure rate of such operations and they did not follow the instructions of Medical Officer regarding check-ups at regular interval after operation, no negligence was found on the part of medical officers, and it was held that they were not liable to pay compensation, their petition was liable to be held dismiss. Kalawati vs. State of HP (18), where two patient lost their life because they were administered nitrous oxide in place of oxygen, recovery was allowed under writ jurisdiction. Soni Hospital vs. Arun Bal Krishnan Aiyar (19), where an abdominal pad was found inside the body of patient, he suffered from severe pain affecting health and causing mental agony. The pad was removed by

second surgery; the pad carried the label of defendant hospital. The court said that negligence of surgeon was fully established and compensation three lakh was awarded to him.

Standard of Care

To say that a conduct of "careless" or "negligent" is not to defined, but to evaluate it and conduct can only be evaluated in the light of some norms, or standard which the making evaluation has in the mind. The court has therefore forced to adopt a legal measuring or standard of care, to which the defendant's conduct must conform if he is to escape liability in negligence. The standard should be that of an ordinary man placed in the defendant's circumstances. In the case Poonam Verma Vs. Aswin Patel & Other's (20). A doctor was registered as medical practitioner, and was entitled to practice in Homeopathy only. He prescribed the allopathic medicines, consequently death of the patient was caused, and doctor was held guilty for negligence (21).

Medical Professional, Saving Human Life Fighting With Legal Battles

Medical practitioners, professionals, doctors deal with the human life. A correct diagnosis and medicine can heal the patient and incorrect diagnosis and medicine can result in severe consequences for patient. Health care errors are the eight largest causes of death in the world, according to World Health Organization (WHO), over 7 million people across the globe suffer from preventable surgical injuries on yearly basis. India records approximately 5.2 million injuries in each year due to incorrect prescriptions, in earlier time people were afraid of suing medical professionals or hospitals but now Indian society has developed an awareness regarding medical negligence is growing. In the case of Medical Association vs. V.P Shantha (22), a writ was filled in Supreme Court under Article 32 of Constitution of India to decide the scope and jurisdiction of the Consumer Protection Act 1986, specially with respect to the service provided by medical practitioner or service render at hospitals, nursing homes can be regarded as service under Section 2 (1) (O) of the consumer protection Act 1986. The court has held that the object of the Act was to recognise that a consumer is not only involve in purely commercial transactions as the avail of goods and services as in buying and selling, but it also involved in such activities which are not strictly commercial in character and in which some benefits are conferred on the consumer.

Relevance of Consumer Protection Act for Medical Practitioner

Supreme Court decision in Indian Medical Association vs. V.P Shantha brought the medical profession within the ambit of "service" as defined in the consumer Protection Act 1986. The legal duty that a doctor towards patient becomes a service that he provides in return for money in such circumstances patient is consumer for doctor and rights of every consumer is protected under Consumer Protection Act. The object of this act is no consumer can be cheated, caused harm due to negligence act of the

seller. Doctor's job is considered as a service and now day's doctor treat patient only for return of money therefore patient automatically becomes consumer and requirement to protect his rights. This Act provided large number of remedies to injured consumers, thus the patient of negligent doctors can not only ask for a remedy through civil suit but they can also take shelter under the Consumer Protection Act 1986 (23). Civil law for medical practitioner the position regarding negligence under civil law is very important as it encompasses many elements within itself. Under the torts law or civil law this principle is applicable even medical professional provides free services. It can be asserted that where consumer law ends, tort law begins. Where in a case service was offered by the doctor, or the hospital it did not fall under the meaning of service as defined under Consumer Protection Act 1986, patient was allowed to proceed under tort for negligence and claim compensation. Here the onus (burden of proof) is on the patient, and he has to prove that because of doctor's negligence he has suffered injury. In the case of State of Haryana vs. Smt. Santra (24), a poor woman who already had many children opted for sterilization, developed pregnancy and ultimately gave birth to a female child in spite of sterilization operation which obviously has failed. Supreme Court held that women is entitled to claim full damages from the State Government to enable her to bring up the child at least till she attains puberty. Supreme Court held that every doctor "has a duty to act with reasonable degree of care and skill". However no human is perfect and even the most renowned specialists can commit a mistake in diagnosing a disease, a doctor can be held liable for negligence only if one can prove that he/she is guilty if acting with reasonable care. An error of judgement constitutes negligence only if a reasonable competent professional with the standard skill that the defendant professes to have.

Dr Suresh Gupta vs. Government of N.C.T. of Delhi & Another (25) the appellant was a doctor charged under the Section 304 A, I.P.C. for causing death of patient by negligence to his patient. The operation performed by him was to nasal deformity, the magistrate who charged the appellant stated in his judgement that the appellant while conducting operation for removal of nasal deformity gave incision in a wrong part and due to that blood seeped into the repertory passage and because of that patient collapsed and died. The high Court upheld the order of magistrate observing that adequate care was not taken to prevent seepage of blood resulting in asphyxia. The Supreme Court held that this negligent act was contributed by doctor; there was lack of proper care and precaution. For this act of negligence he was liable.

Criminal Negligence

Indian Penal Code 1860 under Section 304 A states that " whoever caused the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may be extended to two years or fine or both" thus when a person is engaged in committing of an offence under defined

meaning of I.P.C. and caused death by rash or negligent act, but without intending to cause death or thinking it likely if he caused death that, shall not be liable for punishment of offence which falls under the general exception under the I.P.C. In the case PoonamVermavs.Ashwin Patel (26), the Supreme Court of India has distinguished between negligence, rashness and recklessness, Supreme Court held that a negligent person is one who individually commits an act or omission and violates a positive duty, A person who knows the consequences of rash but foolishly think that that will not occur as result of his act. A reckless person is one who knows about the consequences but does not care for result. The conduct which falls under recklessness and deliberated wrong doing should not be the subject of criminal liability. A doctor cannot be held criminally liable for death of patient, unless it is shown that he was negligent towards his duty or incompetent, with such disregard for the life and safety of his patient, it shall amount to the criminal liability against the state (27). Section 80 & 88 of the Indian Penal Code 1860 explains the general defences against doctor accused of criminal liability. Section 80 of the Act explains (accident doing in lawful act), nothing is an offence which is done in accident or by misfortune, without any criminal intention or knowledge. The accident doing act in lawful manner by lawful means with proper care and caution shall not amount to criminal liability on accused. According to Section 88 of IPC act not intended to cause death, done by consent in good faith for the benefit of person, nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or any person for whose benefit it is done in good faith, and who has given a consent whether express or implied, to suffer that harm, or to take the risk of that harm.

Reasonable Standard Care (Bolam Rule) & Reputation of Medical practitioner (Bolitho Rule)

The basic principle concerning to medical negligence is popularly known as "Bolam Rule". This principle was propounded by Justice McNair in the famous case of BolamvsFriern Hospital Management Committee (28), the Court established that in determining whether a defendant has fallen below the required standard of care, regard must be shown to the responsible medical opinion, and to fact that reasonable doctors may differ. A practitioner who acts in conformity with an accepted current practice is not negligent merely because there is body of opinion which would take a contrary view. Medical negligence of medical practitioner is always judge with the reasonable standard care taken by other medical practitioner in that area. Reasonable standard of care is that where an ordinary member of that profession has those skills would exercise in in the circumstances in question. Liability in case of medical negligence arises not when the patient has suffered an injury, but when the injury has resulted due to conduct of medical professional which is below the standard of reasonable care. Supreme Court of India has stipulated the guidelines of Bolam Rule in India, in a case on 15 February 1995 the informant's father was admitted in a private ward of a hospital, on Feb 22

patient felt difficulty in breathing, the complainant's brother who was presented in the room called a doctor, after some time doctor visited the patient, an oxygen cylinder was conducted to the mouth of patient, but breathing problem increased further. Patient tried to get up, but medical staff asked him to remain on the bed. The oxygen cylinder was found empty. However there was no arrangements for other cylinder in the hospital, brother of complainant tried to arrange the cylinder but failed and wasted 5-7 minutes, another doctor came and declared that patient was died. A complaint was filed for negligence of doctors under Section 304 A and 34. Court gave the decision that a doctor accused of rash or negligent cannot be arrested in routine manner because the charge has been levied against him unless his arrest is necessary for furthering the investigation or for the collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld. Court further stated that the criminal process once cited against doctor to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated or discharged, but the loss which he has suffered in his reputation can not be compensated by any standard.

From Bolam to Bolitho Rule

Bolitho vs. City & Hackney Health Authority (29), Lord Wilkinson observed "The court is not bound to hold a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis recorded with the sound medical practice. The judges before accepting a body of opinion as being responsible, reasonable, and respectable, will need to be satisfied that in the forming their views the experts have directed their minds to the question of comparative risk and benefit, and have reached a defensible conclusion on the matter.

On the standard of care required by medical profession that a doctor could be liable for negligence in respect of diagnosis and treatment, despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate that the professional opinion was not culpable of withstanding logical analysis, the judge would be entitled to hold that body of opinion was not reasonable or responsible. *Malay Kumar Ganguly vs. Sukumar Mukherjee & Others* (30), is one of the prominent leading cases on "Bolitho Rule". The patient and her husband were settled in U.S.A. for vacation they came to India in 1998, the wife (Anuradha) felt fever along with skin rash on 25 April 1998, and on 26 April Dr Mukharjee attended and examined Anuradha on her parental home on a call. Dr Mukharjee assured that patient and her husband to quick recovery and

advised her to take rest but did not prescribe any medicine. After two week again skin rash appeared more aggressively, Dr Mukharjee was again contacted, Anuradha was taken to his chamber, after examining Dr Mukharjee prescribed Depomedrol injection 80 mg twice daily, Anuradha's condition was rapidly became worsted over few next days. Accordingly she was admitted in Advanced Medicare Research Institute (AMRI) in the morning of 11 may 1998 under supervision of Dr Mukharjee. Anuradha was also examined by Dr Baidhyanath Haldhar, Dr Haldhar found the she was suffering from Erithima plus Blisters, on or about 17 may 1998 Anuradha was shifted to Breach Candy Hospital Mumbai as her condition further became out of control. She died on 28 may 1998. The court held that defendants are liable under Civil law but not under Criminal Law. Further it was held that Court is not bound by the evidence of the experts which is to a large extent advisory in nature.

Conclusion & Suggestion

There are many criticisms asserting medical negligence in India. Medical negligence is new area under the purview of Indian legal system. As the awareness about right and duties is increasing day by day more and more people have started complaining for doctor's negligence. The Consumer Protection Act is the landmark development as it helps creating a check and balance in the system and made medical professional more accountable. Supreme Court decision in Indian Medical Association vs. V.P Shantha brought the medical profession within the ambit of "service" as defined in the consumer Protection Act 1986, that the legal duty of a doctor towards patient becomes a service that he provides money in return. Health care errors are the eight largest causes of death in the world, according to World Health Organization (WHO), over 7 million people across the Globe suffer from preventable surgical injuries on yearly basis. India records approximately 5.2 million injuries in each year due to incorrect prescriptions. India requires more policies and preventive law of commercialisation of such noble professionals who are called as God of this earth for protection of rights and life of patient.

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