MEDICAL MALPRACTICE: POSITION IN TWO LEGAL SYSTEMS

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ABSTRACT

The intention of this dissertation is to understand the position of medical malpractice or medical negligence in two legal systems. In the United States, a medical error caused due to negligence is exclusively subject of tort law; In India, the liability of professional negligence is extensively used. Service of medical experts' falls within the ambit of "services" explained under consumer protection act. Increasing awareness about the rights has accelerated the vulnerability of medical experts of being sued for wrongs. However it was necessary to curb down frequent cases of medical negligence. The system of tort law is criticized from the lens of plaintiff, where burden of proof in on the plaintiff and defendant is excluded from the burden. The paper discusses the alternative ideas that can be adopted systematically to bring better structure into frame. It proposes reform for betterment of medical system. The paper highlights the arrangement of law in both the countries that aims to put down justice.

INTRODUCTION

Medical practitioners are expected to provide their expert service at a certain standard and their failure that causes damage or harm to patients' results in medical malpractice. The medical profession is considered to be one of the gentle professions because professionals deal with human life. It casts a higher standard of due care and responsibility. Dealing with living souls they are given sacred positions. The ingrained essence of the medical profession is primarily to cause no harm to patients; based on the maxim "*primum non nocere*".

The Responsibility of medical specialists is followed by the legal document of Mesopotamia, that is, the code of Hummurabi. The law of medical malpractice can also be traced back to ancient Roman law. This law slowly influenced many countries like America, Italy and India.

Medical malpractice and medical negligence: Medical negligence is the case of causing harm or injury to patients unknowingly. The doctors may accidentally mistreat his patient. But a situation

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where medical practitioners "intentionally" do an act or omit to do a certain act which he is obliged to do, is the case of medical malpractice. Therefore,the intention is the main ingredient of medical malpractices. Any act of medical negligence does not include medical malpractice because the doctor did not aim to harm his patient.

However, to argue for medical malpractice defendant must establish a doctor-patient relationship, negligence by doctor, sufferings due to negligence and specific damages.

It is witnessed that there is an imbalance in records of medical negligence or medical malpractice in different countries. Reports of medical malpractices are higher in high-income countries while lower in low-income countries.

JUXTAPOSITION IN TWO LEGAL SYSTEMS: UNITED STATES AND INDIA ON CODE OF MEDICAL NEGLIGENCE OR MEDICAL MALPRACTICE

History

Medical malpractice law is a section of tort law in the United States which comes from English common law[i]. The legislation is developed over the years both in federal as well as in state courts. However, unlike other countries, the malpractice legislation is dealt under individual state authority in the United States. Popularly the plaintiff wins claim, when he satisfies that he suffered in the bad event by action or inaction of the defendant in which he was negligent.

The word medical malpractice was used somewhere in the mid-eighteen century, derived from the Latin term "*mal praxis*". Sir Willam Blackstones used the term in his commentaries on laws of England and explained it as private wrong, which was written in 1768[ii].

In the history of India, the 'Artha Shastra' of Kautilya halfway 3rd and 4th Century B.C was the sole legislation at that time. Artha Shastra comprises authority, legislation, criminal and civil committee, principles, philosophy of battle, task and accountability of emperor, etc. Physicians were alleged to take the approval from the emperor for practicing medicine and were accountable for inaccurate or irresponsible service.

During the medieval period India was very much influenced by aliens such as Turks and Mohammedans which caused serious dwindle in Indian practice and culture. Portuguese, Dutch,

French and the British also occupied India. The British administered India from halfway 18th Century to halfway 20th Century. Great Britain medico-legal structure was carried in India and Medical Statute was coached in medical schools and colleges. The medical school which was rooted in 1822 was reformed into Medical College in 1835 and many medical colleges were rooted in Madras, Bombay and more in alternative areas of the country. Indian Penal Code came into existence in 1860 in the same way Criminal Procedure came into existence in 1861 and Indian Medical Council was inaugurated in 1933.

Statutory structure

Medical malpractice lawsuits in the United States showed its regular appearance in the 1800s. However, legal allegations for medical errora were commonly witnessed from the 1900s and even today. To win compensation for harm suffered due to medical negligence, authorities of individual states in the United States acts independently. Chapter 38 Department of State of U.S Code extensively declares responsibility of every state which also includes statue for protection from malpractices. Wherein, section- 2702 of the code provides provision for malpractice protection. Therefore, malpractice protection under section-2702 of the U.S code incorporates remedies that are available to the victims of medical malpractice.

In the United States, claim for medical malpractice shall be made within a specified time limit; legally the period is called “statute of limitation”. It set the time limit in which aggrieved can reach the court and institute medical malpractice case. Statute of limitation is different for different states; typically the clock starts on the day the offence occurred. The doctrine does not come in the play where the patient is receiving any kind of ongoing treatment from the alleged doctor. However, the law of state provides the remedy through “discovery rule”, in the case where clock keeps running until the sufferer realizes that he is a victim of medical negligence. The principle brings the rights of aggrieved to file a lawsuit for medical malpractice and doctor’s arrangement for the fair defense at equilibrium.

Pennsylvania was the first state in America to counter advanced signal of malpractice problems in the State. Medical Care Availability and Reduction of Error Act (Act 13 of 2002) were passed by the Governor for transformation. This Medical Care Availability and Reduction of Error Act (Act 13 of 2002) direct three conditions namely fitness responsibility organization which

includes pharmaceutical faults, legislation organization and unstable medical malpractice Indemnity Corporation.

Tort amendment was advertised excitedly within the country to Act-13. Act-13 has been extensively welcomed creation because of its broad application. Before this any individual who is defending for medical malpractice was erect as negligent will be accountable for the damages for all the people who filed the suit of malpractice.

The statutory structure in India has played a critical function to spawn awareness about their rights when in the early period people hesitated to sue for the medical authorities. This became supreme important with degrading standards of medical professional in diagnosing and treating their patients. The condition of medical negligence involving a breach of confidence and trust can be traced from many cases.

Constitution of India

- The Apex Court asserts that the right to life is the crucial entitlement of people and the State holds the constitutional obligation to render health facilities to the residents of the country. Article 21 of the Indian Constitution has some preparations for the residents of the Country. Constitution through Article 21 comforts people the entitlement in concern to physical and mental fitness. However, State owes an obligation towards its citizens to avoid infringement of their right to life.
- Article 32 of the Constitution directs the residents of India with Constitutional Remedies. Constitutional Remedies acts as an essential stick to relieve the people of the country to move in the apex court. Article 32 provides the citizens of India to step forward to insulate their entitlement, that is, right to life before the Court.

Indian criminal law

Criminal law in India has set medial errors on different toeholds. As per section 304-A of Indian penal code, the person shall be held liable for commission of an offence where the act of offence falls within the ambit of IPC and causes death of victim due to gross negligence, whether he has the intention to cause death or had an understanding that it may likely cause death. Section 304-A was infused in the Indian Penal Code in year the 1870 by the Indian Penal Code (Amendment)

Act, 1870. No new offence was originated but was arranged in the scope of offences which occur under section 299 and 300 of the Indian Penal Code, 1860. To claim under this section, death must be caused due to negligent act of the doctor without intervention of the third party[iii].

As stated in the law commission report [iv], criminal liability is foisted on the medical professionals in conditions where a patient dies while inflicting anesthesia while undergoing an operation. Apart from direct liability, meaning the doctor is liable for his negligent act; the doctors may also face vicarious liability, meaning the doctor is responsible for errors committed by employee/servant.

Notwithstanding the rights of patients, section 80 and 88 of the Indian penal code holds defense for professionals charged with medical negligence. Wherein, defense is provided in situations death is caused accidently or in good faith.

Section 377 provides whoever leads to hurt individuals performing any act recklessly or negligently putting in danger human life or personal safety, shall be penalized with custody which may continue to six months or may have to pay penalty or both. However grievous injury shall be punished with imprisonment of 2 years and fine or both[v].

Consumer Protection Act

There has been huge conjecture and talk on whether services provided by medical experts fall within the ambit of "services" explained under section (2) (o) of the act. The apex court while deciding *Indian Medical Association v. VP Shantha* [vi], *ushered the services of medical professionals under consumer protection act. Any flaw, blemish or scant in quality or performance of services below the required standards understood as deficiency of services*[vii].

Indian tort law or civil law

Where the consumer protection act ceases to function or act of offence do not fall within the definition of "service" to provide compensation, the victims can resort to allege under tort law. Under tort law burden of proof is on the plaintiff to prove that his suffering was due to the negligent act of doctor or hospital. In Dr. Lakshman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole[viii], there were certain elements explained that has to be satisfied to claim liability.

Cases

Stratton vs. Swanlond[ix] was the first case on medical malpractice decided by Chief Justice John Cavendish in 1374. In the above case, the defendant surgeon swanlond was sued for breach of contract, where he assured to settle the maimed hand of the plaintiff- stratton for reasonable fees. However, the matter was dismissed and the doctor escaped from the liability due to procedural error in filing the writ of a complaint by the plaintiff. But certain principles were laid down which are still followed while making decisions. The professionals will be made liable for the negligence, if a patient suffered harm or injury due to negligence. The professionals could only escape from the liability where due care is taken.

Anuradha Saha case was one of the leading cases in India on medical malpractice where apex court directed Advance Medicare Research Institute (AMRI) to pay compensation for medical negligence that resulted in the death of Anuradha Saha, 36 years old child psychologist. Anuradha complaining about rashes and fever approached Dr. Sukumar Mukherjee medical practitioner at Nightingale Diagnostic Centre in Kolkata. The doctor suggested higher than the recommended dose of storied called Depomedrol which turned out to be main cause of whole issue. The husband of Anuradha Saha claimed that his wife was prescribed 80 mg of depomedrol while the maximum recommended dose of storied was 40 mg-120 mg in one or two doses in a week. However this leads to damage of blood vessels in the skin and caused inflammation. On 11th may Anuradha was admitted to AMRI hospital and by 12th may she was diagnosed with Toxic Epidermal Necrolysis (TEN), even then there was so serious change in treatment. On May 28 she died out of complexity of steroid overdose. Her husband kunal filed criminal and civil case against Doctors and both the Hospital for extra negligent act by them. In the year 2004 the Trial Court approves the Dr Abani Roy Choudhary to let off from the recorded case. Calcutta High Court acquits Dr Mukherjee and Dr Baidyanath Halder for criminal negligence. Kunal husband of the Anuradha moves to Supreme Court.

National Consumer Dispute Redressal Committee dismisses the case. On 2009 Supreme Court hold the acquittal of both the doctors for criminal negligence and accepts that Kunal must be given his damage. The court redefine medical negligence to consist of overdose of medicine and not explaining the patient about the side effects, also not taking extra care in disease of high destruction rate and hospital for their poor service.

In 2009 NCDRC reviewed the case and awarded Kunal allowance of Rupees 1.73 crore. In the year 2013 Supreme Court increased the allowance to Kunal from 1.73 crore to 5.96 crore from AMRI Hospital and Doctors with interest @ 6% after which the allowance was more than 12 crore rupees highest allowance till now.

Surrogate to medical negligence wrong

Where medical professionals and hospitals are obliged to follow critical guidelines in practicing their skills are surmise to be more careful and resulting in fewer lawsuits for medical responsibility. These clinical guidelines are written documents that explain pertinent treatment for patients. Along with the United States government Agency for Health Care Research and Quality many private and public organizations have issued such guidelines.

Alternative dispute resolution refers to the agreement where parties agree to settle the conflict of medical negligence out of the court, to the third party. However, this approach also deters the service provider to be negligent. It is also cost effective and faster approach. Adversaries to this approach claim that arbitrators are biased as they may be supplied by the defendant's entities. In addition, it is criticized that parties have limited rights and lesser scope to appeal for decision[x].

Enterprise liability offers a more efficient system of malpractice, where an organization could keep a check on physicians at a comparably lower cost. The health care entities effectively work as intermediately between physicians and patients. In addition, where medical blunder is caused due to systemic error rather than individual negligence of a physician, the liability of these errors could ameliorate in the entire system. Therefore the implementation of enterprise liability would upgrade the whole province of medical malpractice liability insurance.

Statistics

According to the report of the Journal American Medical Association, the third leading reason for death in the US is medical negligence or medical errors. Yet there are very few cases which are brought out for claims[xi]. However it is opined that strong evidence are called for litigation on medical error claims in the United States. In the study of Johns Hopkins[xii] published by *THE BJM* in 2013, he stated that more than 25000 die annually in the US due to medical negligence. The report furnished that most of the cases were because of systematic issues and because of

intrinsic poor doctors. Therefore this may include bad coordination in team, absence or undertone safety measures or other ententes.

Lawsuits for medical negligence have become very common in recent years[xiii]. The pervasive occurrence suggests the practitioner to carry professional liability insurance to avoid legal territory in their professional conduct in case of unintentional harm[xiv]. This insurance covers the costs of award and claim.

Economic elucidation for medical malpractice

Cases of malpractice give rise to some kind of negligence which has an overarching effect. Irrespective of the matter of medical error ends with judgment or settlement, they involve high-cost outcomes. Moreover, in addition it also involves litigation cost which is a spike for parties. Whenever a lawsuit of medical negligence is brought before a health care institute it damages the public image and people would think twice before they reach such institute for treatment. To rebuild reputation and combat negative public image they considerably need to work on negative publicity.

The main purpose of law in the realm of medical malpractice is to turn down the rate of accidents and also to compensate for the harm caused to aggrieve. The statue works for two central theories; deterrence theory and compensation theory. The deterrence theory concerns to reduce the possibility of accident and to lessen the damage. The tort law deters doctors and health care institutes by preventing injuries. The professionals and organization can prevent these accidents by use of latest technologies and take precautions for hygienic surroundings. The medical malpractice law holds doctors responsible because he can reduce these inappropriate events by being more cautious about his services, which moreover lessen the costly outcomes. The compensation theory aims to compensate for the cost of the loss resulting from medical malpractice. Tort system aims to award compensation proportionate to the harm suffered; the award is neither less nor more but brings the aggrieved to same wealth status as he may be before the accident.

However in some cases of medical negligence this monetary compensation does not justify the suffering and the harm caused. Where a person is paralyzed for this entire life or is in a coma with no expectation that he may recover, no relief may forgo the injury. A person will not be able

to enjoy pleasures of life no matter how long medical science would keep him alive. Howbeit the court of law believes that the person distressed from the happiness of life could be compensated for his impoverishment.

CONCLUSION

This paper has over looked the issue of medical malpractice or medical negligence from perspective of law in two legal systems. The constitution of medical negligence has evolved over then time through statues in both countries as well as through interpretation by courts of law. There are certain strictures against laws in India. For instance the patient who alleged for medical malpractice needs solid evidence to fight for his claim in the court of law. It is strenuous for the patient to exactly locate the damage and establish the relation with a physician. However, the principle of burden of proof in tort law which is on the plaintiff must be overlooked again.

Although medical insurance has helped to avoid risk and deters the tort law effect on physicians. But considering the present-day situation where the generation has yet not availed the insurance services, there is a high need to develop a more strong market for medical insurance services.

The paper analyses possible approaches to lift the system in the medical field. Improvising the medical malpractice liability, turning over border of proof and alternatives for medical malpractice are some means which can vibrate the system and make it efficient. Moreover, it is also the moral obligation of medical professionals and health care organizations to take care of the real wealth of people. Each positives and negatives must be scrutinized with concerning each other; keeping track of health care services and doctors.

[i] Speiser SM. American Law of Torts, Vol. 4, Sec.15.10. West; 1987.

[ii] James C. Mohr, American Medical Malpractice Litigation in Historical Perspective, 283 JAMA 1731, 1731 (2000) (discussing 3 WILLIAM BLACKSTONE, COMMENTARIES *122)

[iii] Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap,* 4 BOM LR 679

[iv] Available at http://lawcommissionofindia.nic.in/reports/rep196.pdf

[v] Section 378 IPC

[vi] AIR 1996 SC 550: (1995) 6 SCC 651
[vii] Section 2(1) consumer protection act, 1986
[viiiviii] AIR 1969 (SC) 128
[ix] Y. B. 48 Edw. 3, fol 6, pl. 2 (1375) (Eng.) (decided in 1374, but published in 1375) reprinted in Carlton B. Chapman, Stratton vs. Swanlond: The Fourteenth-Century Ancestor of the Law of Malpractice, 45 PHAROS 20–22 (1982).
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[xii]opkinsmedicine.org/news/media/releases/study_suggests_medical_errors_now_third_leading_cause_of_death_in_the_us
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