

THE CONFLUENCE OF LAW AND MEDICINE

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ABSTRACT

The practice of medicine is one of the most regulated professions across the globe and India is not an exception. The Indian law encourages the victims of misconduct and malpractice of the doctors to come forward and seek justice. World Health Organization estimates that over 7 million people across the globe suffer from preventable surgical injuries every year. The Consumer Protection Act, 1986, torts and Indian Penal Code offer remedy to the patients who have been treated negligently. To err is human and the doctors are not above humans. The law expects the doctors to act prudent and not negligent while treating their patients.

INTRODUCTION-

It is said that a doctor is to be more feared than the disease. Nonetheless, the laws of India have been structured and used against doctors in such parlance that a doctor is more feared of a patient than the patient's disease. The long going debate of whether the medical services are services covered under the Consumer Protection Act, 1986 was put to an end by entangling the practice of medicine in India in the clutches of Consumer Protection Act, 1986. Although, the medical code of ethics served as a watchdog over the conduct of doctors in India, the same did not have the power to compensate the patients for misconduct of the doctors. In *Indian Medical Association vs V.P Shanta & Ors.*¹ the Supreme Court held that "*Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Consumer Protection Act, 1986*". It was by virtue of this judgement that the doctors can be held liable under civil laws for their actions amounting to negligence. Under civil laws, at a point

¹ (1996 AIR550)

where the Consumer Protection Act ends, the law of torts takes over and protects the interests of patients. This applies even if medical professionals provide free services. In cases where the services offered by the doctor or hospital do not fall in the ambit of 'service' as defined in the Consumer Protection Act, patients can take recourse to the law relating to negligence under the law of torts and successfully claim compensation.²

NEGLIGENCE AND ITS IMPACT ON PRACTICE OF MEDICINE-

The law and the practice of medicine coincide only when a doctor is negligent in treating his patient and not when the patient dies on injuries himself due to his own doings. In a medical negligence lawsuit, even though a patient has suffered injury or loss attributable to medical practitioner's negligence, the patient's claim to damages may be reduced or disregarded if the patient failed to take reasonable care for his or her own safety, and his or her own negligence has contributed to that injury or loss. If the patient refuses to carry out the precautionary measures or remedial treatment suggested by the doctor, by indulging in activities forbidden by the doctor and further exacerbates the damages he would be liable of contributory negligence. Medical Negligence also known as Medical Malpractice is defined as a doctor's failure to exercise the degree of care and skill that a physician or a surgeon of a same medical specialty would use under similar circumstances.³ In simple terms, when a doctor deviates from the standard of care generally imposed by the society and expected from the doctors, he/she shall be liable for Medical negligence.

TEST FOR HOLDING A MEDICAL PRACTITIONER LIABLE FOR NEGLIGENCE:

The onus to prove negligence lies on the patient/complainant. The following points have to be proved without a reasonable doubt;

² RAHMAN, Talha Abdul Medical negligence and doctors' liability. **Indian Journal of Medical Ethics**, [S.l.], v. 2, n. 2, p. 60, nov. 2016. ISSN 0975-5691

³ Black's Law Dictionary

- a) The doctor owed a duty of care to the patient/complainant
- b) The doctor was in breach of the duty
- c) The patient/complainant suffered damages as a result of the breach of duty by the doctor.

Duty of care-

Provision 2.4 of chapter 2 of The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 states that “*a registered medical practitioner shall not willfully commit an act of negligence that may deprive his patient or patients from necessary medical care.*” Article 21 of the Constitution guarantees protection of life and personal liberty to every citizen. The Supreme Court has held that the right to live with human dignity, enshrined in Article 21, derives from the directive principles of state policy and therefore includes protection of health.⁴ Since Article 21 is as a fundamental right is guaranteed not only to the citizens but also to foreigners, the doctors owe to a duty of care not only on humanitarian grounds but also on legal grounds. A doctor’s duty of care begins as soon as the doctor-patient relationship is recognized. If a doctor can foresee an ability of the injury to the patient/complainant, he owes a duty to prevent such injury and failure to do that makes him liable for negligence. However, law does not impose a blanket duty of care.

Breach of duty-

Not every medical mishap or err will result in a finding of negligence. Breach of duty means failure on part of the doctor to exercise a reasonable degree of care and skill in the treatment of the patient. A question whether the doctor’s conduct amounts to negligence or a breach of duty to use reasonable care is a question of fact and had to be decided from case to case. While determining a breach of duty, courts use an objective standard. Under this standard, the doctor’s action is compared to that of a hypothetical reasonable person. It has been recognized for long that a layperson is in no position to judge what the acceptable level of medical care should be.

⁴ Bandhua Mukti Morcha v. Union of India (AIR 1984 SC 802)

The law, therefore, has taken the position that the standard is that level of care expected of a reasonably competent medical professional, rather than a reasonable prudent person.

THE PATIENT/COMPLAINANT SUFFERED DAMAGES AS A RESULT OF THE BREACH OF DUTY BY THE DOCTOR-

However negligent the doctor might have been, if his action did not result in an injury to the patient/complainant, the patient/complainant cannot sue the doctor for damages and ask for compensation or any sort of relief from any court of law. In order to initiate a proceeding against the defendant, it is mandatory that he must have suffered some amount of injury due to an act of the doctor which the patient/complainant claims to be an act of negligence. The onus of proving that the said act committed by the respondent amounts to negligence lies on the complainant.

The cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort⁵ and if the patient/complainant fails to prove that any loss was caused to the patient, inspite of proving negligence by the doctor, he will not be entitled to claim any compensation.⁶

KINDS OF LEGAL LIABILITY-

Doctors can be held liable only if there is a connection between an act of commission or omission on the part of the doctor and the injury or damage suffered by the patient. A doctor can be held liable in their individual capacity as well as vicariously except where the doctor renders service free of charge to every patient or under a contract of personal service.⁷

⁵ *Jacob Mathew v. State of Punjab & Anr*, (2005) 6 SCC 1

⁶ *Shidhraj Dhadha v. State of Rajasthan*, AIR 1994 Raj 68 and 1993 (1) Raj LW 532

⁷ *Indian Medical Association vs V.P Shanta & Ors.* (1996 AIR 550)

- **Civil Liability-**

A civil wrong is a wrong committed against a private party. The main objective of this category of litigation is to compensate the injured party. In Indian *Medical Association vs V.P Shanta and others*, 1995 (6) SCC 651, Supreme Court held that the Medical Practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable care and skill.

- **Criminal liability-**

The main aim of the civil laws is to safeguard the economic interest of the consumers by compensating them for the injury. When a doctor is criminally liable, the negligence on his part is so grave and serious that it is considered as a crime against the state. A doctor can be held criminally liable when the degree of negligence is higher than that of negligence enough to fasten liability for damages in Civil Law. The negligence which results in a reckless disregard for the life and safety of the patient is categorized as criminal negligence. The essential element of criminal law is *mens rea* which means guilty mind. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences.⁸ Hence, Even if a medical professional acted negligently, to prosecute him under criminal law, it must be established beyond a doubt that he intentionally wished to injure or kill the patient. Usually, criminal law punished only affirmative harm. However, in medical negligence cases, failure to act in a prudent manner may also be a crime. If a medical professional had a legal duty to act and an omission thereof rises above civil negligence to include a level of risk taking indifferent to the attendant risk of harm, then there is a criminal liability.

The wrongful act may be-

- (a) **Intentional or wilful wrong-** this usually doesn't apply in medical practice as no doctor has intention to cause harm to his patient,

⁸ Jacob Mathew vs. State of Punjab and Anr. AIR 2005 SC 3180

- (b) ***Negligent act*** -the doctor fails to take proper care, precaution and is just indifferent to the consequences of his act. Lack of skill proportional to risk undertaken also amounts to negligence;

There are various sections of Indian Penal Code, 1860 under which a doctor may be held criminally liable for his negligent act.

- a) Sec. 90-Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;
- or
- Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent;
- or
- Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

The doctor is under an obligation to disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.⁹

- b) Sec. 304A - Causing death by negligence.—whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide,

⁹ Samira Kohli v/s Dr. Prabha Manchanda & Anr 1(2008)CPJ 56 (SC)

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

- c) Sec. 336- Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred and fifty rupees, or with both.
- d) Sec. 337- Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.
- e) Sec. 338- Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

- **VICARIOUS LIABILITY-**

Vicarious liability is liability of one person for the acts committed by someone else. There are situations where one person is acting on behalf of or under control of or in collaboration with another person such as-

- a. An agent acting on behalf of his principal/employer.
- b. A servant/employee acting under orders of his master/employer.
- c. Partners in a firm having joint responsibility for the activities of the firm.

- In such relationships, one can be held liable for the actions committed by others provided that the actions are related to an in pursuance of that relationship.

Any acts of negligence committed by the doctors who are empanelled to provide medical care and are affiliated to hospitals, the hospitals shall be held vicariously liable for their wrongful conduct.¹⁰

CONCLUSION-

A medical professional should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any task he undertakes reasonable skill that other ordinarily competent members of his profession would bring.¹¹

¹⁰ MAHARAJA AGRASEN HOSPITAL VS RISHABH SHARMA 2019 SCC online SC 1658

¹¹ ibid