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Challenges and redressal of matter of medical negligence: A legal study

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Abstract
Every human being is born free and endowed with certain rights and duty to take care. These are most important when one is in a noble profession of medical practice. Medical practitioner takes oath while obtaining his/her degree of M.B.B.S or nursing etc. to serve human being for his/her whole life. This has now become a formality of the courses and its ethical value has lost its importance during present time. Criminal complaints are being filed against doctors under Sections 304A or 336/337/338 of the Indian Penal Code (IPC) 1860 alleging rashness or negligence on the part of doctors. This has given a rise to a situation of great distrust and fear among the medical professionals. Moreover, the negligence associated with the working pattern action or inaction of a medical professional requires an in-depth understanding regarding nature of the job and errors committed by chance, which do not necessarily involve the elements of culpability. Hence, liability of medical professionals must be clearly demarcated so that they may perform their benevolent duties without any fear of legal sword.

Keywords: defensive medicine, fiduciary relationship, medical negligence, standard of care

1. Introduction
Mahatma Gandhi said "That service is the noblest which is rendered for its own sake". The famous Frenchman Volatire said "Men who are occupied in the restoration of health to other men, by the joint exertion of skill and humanity, are above all the great of the earth. They even partake of divinity, since to preserve and renew is almost as noble as to create". The two sayings by the great people are simply suggesting that the person who practices the profession of a doctor is doing a noble work towards the mankind. The world contains two noble professions a teacher and a doctor. A teacher educates and teaches values to an individual for the progress of the humanity and doctor saves life of a human being. But as we observe now that there are many cases and issues raising in the field of medical practices. With increase of business rivalry and competition to earn as much amount of money as possible people in professional field are much in demand and have a high value especially doctors and physicians. If we see in every place there is always a need of paramedics and physicians. A patient who is pain would pay any amount asked by the doctors for his cure. It is because psychologically a person in necessity would do every possible attempts to remove himself from the pain. A doctor duty is to cure the patient. But if this medical professional does any kind of malpractice which leads to the pathetic condition of the patient he should be punishable for the offence committed. An offence done by a Doctor to patient while curing him amounts to 'Medical Negligence'.

First of all we need to define what is negligence. Negligence is the breach of duty caused by the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and a reasonable man would not do. According to Winfield negligence as a tort is the breach of a legal duty to take care which results in damage and undesired by the defendant to the plaintiff. In Roman law, negligence is signifi ed by the terms "culpa" and "negligentia"; as contrasted with "dolus" or wrongful intention. Care or absence of "negligentia" is "deligentia". The use of the word diligence in this sense is obsolete in modern English, though it is still retained as an archaism of legal diction. Negligence is culpable (punishable) carelessness - conduct which involves an unreasonably great risk of causing harm to another. It is the absence of such care as it was the duty of the defendant to use. It excludes wrongful intention in that no result which is due to carelessness can have also been intended and nothing which was intended can have been due to carelessness. Wrongful intention (mens rea) implies design and purpose while negligence implies that somebody is acting carelessly and without that design. Medical negligence is an act or omission by a health care provider which deviates from accepted standards of practice in the medical community and which causes injury to the patient. By these definitions we can see that the law always see the negligence act in comparison to the act done by any common man in ordinary course of business. Medical Negligence can be read under the ambit of professional negligence.

2. Negligence by Professionals
In the law of negligence, professionals such as lawyers, doctors, architects are persons professing some special skill. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing

that task. The Apex Court in *Jacob Mathew v. State of Punjab* [1], explained:

"Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures that person dealing with him that the skill which he professes to possess shall be exercised and exercised with a reasonable degree of care and caution. He does not assure his client of the result."

The Honourable Court referred to the decision of *Bolam v. Friern Hospital Management Committie* [2], wherein Mc Nair, J. observed:

"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."

The degree of care and skill required by a medical practitioner as explained in *Halsbury's Laws of England* [3] is:

" Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way, nor is guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men."

Therefore, a professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

3. Duty in Medical Profession

A person engaged in some particular profession is supposed to have the requisite knowledge and skill needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case depends on the professional skill expected from persons belonging to a particular class. A surgeon or anaesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. In the case of specialists, a higher degree of skill is needed.

4. Medical Negligence- Res ipso loquitur

The principle "Res ipso loquitur means "the things speaks for itself." In a case where negligence is evident, the principle of res ipsa loquitur operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the Respondent to prove that he has taken care and done his duty to repel the charge of negligence.

5. Challenges of Medical Negligence

There are some conflicting areas relating to medical negligence like informed consent, disclosure of information, confidentiality, Patient's autonomy, Euthanasia and Organ transplantation. For the clear understanding of this problem a detailed explanation is necessary. The first controversy is relating to informed consent.

5.1 Informed Consent

There is a general belief among doctors in India that it is not possible to get informed consent because of rampant illiteracy. They believe that patients are unable to make reasoned choice because they could not appreciate the intricacies of alternative medical treatment, procedures or drug trials and so, often a paternalistic view is taken "The doctor knows best."

In contrast every human being has a right to determine what shall be done with his or her body. A surgeon who performs a operation without the patient's consent commits an assault for which he is liable. People would quarrel with a doctor who by disclosure information has withdrawn from his duty in confidentiality. In this context the patient would be entitled to know what, and how much, information is being disclosed and; to whom it was being disclosed. So disclosure of information is another problematic area in the medical ethics and disclosure of information also attracts conflicts. In Canada and many of the American States the Courts have imposed an obligation upon a doctor to disclose information about a proposed medical procedure in order to understand the patient's right to a rational choice whether to undergo the procdure. This reflects good medical ethics. In England, majority of the Judges decided that the proper standard of disclosure must be followed by "reasonable doctor", in the treatment process. This was decided in *White House v. Jordan* [4] and also in *Maynard v. West Midland RHA* [5]. In normal circumstances, the surgeon who complied with a practice accepted by responsible body of the profession would not be negligent.

5.2 Organ transplantation and Medical Ethics

There is a growing demand for organ transplants, like kidneys, and these demands often raise ethical nightmares. A small number of kidneys are donated by relatives and the large majority of transplants are carried out on a commercial basis. Organ transplantation is inherently a risky process where death of the patient is likely to occur and if in such a situation, a patient's death is found to have been caused due to doctor's negligence, can a doctor be held liable for the negligence?

5.3 Terminally ill

A physician preserves human life and prevents death. As long as the patient breathes, it is the duty of the physician to offer treatment *(tatvat pratikriya karya yavae chvasiti manavati)* [6]. There is another view, on when to stop treatment. The physician may withdraw treatment when the condition is definitely moribund *(upkeshnam prakristuheshu)* [7]. However,

[1] A.I.R. 2005 S.C 3180
[2] [1957] 1 W.L.R. 582, 586
[3] Fourth Edition, Vol. 30, Para 35. Quoted in Jacob Mathew v. State of Punjab, AIR, 2005, S.C. 3180.
[4] (1981)1 WLR., 246
[5] (1984)1 WLR., 634
[6] Paragraph 2 of the Code of the Medical Council of India.
[7] Paragraph 3 of the code of Ethics of the Medical Council of India.

in cases of negligence, doctor attempts to defend himself by contending that the patient was terminally ill and could not have been saved even by adopting the best standards of care. In such situation, the law somewhere fails to address the grievances of the family of deceased.

5.4 Strict Liability v Negligence Rule

The law, which currently applies to medical liability, sets negligence standard and is based on the principle of torts. As pointed out earlier, mostly the cases of medical negligence are of unilateral accidents where only the injurer (i.e. the medical practitioner) may reduce the risk for accident by taking precautions. In this situation, if the applicable rule is strict liability, the injurer pays the damage in each case of accident. Therefore, the injurer, guided by his private considerations, takes all relevant social costs into account, internalizes the risk for damage and conducts himself professionally at socially optimal care and activity levels.

In theory, the optimal level of care is achieved through the application of both rules but the two liability rules differ in terms of behavior directing differential effects on potential injurer and victim's payoffs and risks allocated between the two. Strict liability is applicable only in rare case. The drugs, injection, glucose, and blood transfusion to the patients, may sometimes cause harm to the patient. The patient may not be able to prove negligence in such cases. Neither English law nor Indian Law accept the application of strict liability to the health services. If strict liability is made applicable, hospitals will stop providing the drugs and treatment due to the strict liability.

The superiority of the negligence rule over strict liability in the context of medical liability can also be argued on the basis that the former generates more information about the due and the efficient level of care. It requires the court to look into issues relevant for conveying the information needed by the market through the way of investigations: Has the doctor acted optimally, including appropriate professional up-to-datedness? Has the hospital acted optimally, for example, in purchasing the appropriate medical gear? The negligence mechanism thus ensures that the courts provide the market invaluable information focused on exposing the hidden actions and qualities of the doctor. On the other hand, a strict liability rule dispenses with such investigations, thus conveying much less information to the market. Negligence rule indirectly motivates the doctors and hospitals to adjust the appropriate medical procedures through time.

5.7 Medical Malpractice Insurance

Although not compulsory in India, usually every medical practitioner should have a liability insurance known as 'Professional Liability/Indemnity Insurance', which covers negligent malpractice resulting in an injury of a patient. Malpractice insurance has an important social value because it spreads risks and thereby protects the physician against the financial catastrophe that could result from even a single large finding against him. In this way, insurance supports the well functioning of the health system. Another benefit of such insurance is that, it creates certainty for risk-averse physicians. When people are risk averse, they prefer lower certain income rather than higher uncertain income. Hence, physicians prefer spending on these insurance premiums rather than bearing the risk of having to pay incalculable damages in case of an injury to the patient.

But, medical malpractice insurance has a disadvantage too. With an insurance cover, since a physician does not suffer a monetary loss from having to pay compensation (apart from the insurance premium); he simply passes on his liability to the insurance company. Thus, even if the liability system has a deterrent effect on the physician, it could be neutralized by the insurance system. The physicians thus may not take appropriate care, which they would have taken if they had to face any unforeseen liability themselves. In particular, the problems of moral hazard and adverse selection emerge which need to be considered in this context.

The Problems of Moral Hazard

Moral hazard means when the behaviour of the insuree changes after the purchase of insurance so that the probability of loss or size of the loss increases. This occurs as a consequence of unequal information between the insurer and the insuree. In the context of medical negligence, this means that after getting insurance a doctor would have no incentive to undertake the efficient level of care. This would lead to higher chances of negligence or greater loss to the patient. The root cause of such a problem is the fact that the insurer does not know the exact riskiness of the doctor and hence his insurance premiums are too not tied to the expected liability of the doctor.

The Problems of Adverse Selection

Adverse selection occurs when in ignorance of differences among policyholders; an insurer attracts those of above-average risk. This may occur if low-risk insurees drop out of the market rather than paying premiums designed to cover average risk. An insurer who raises rates may attract the worst risks and end up with higher claim costs and lower profits. A physician might not take the efficient level of care, because he does not have to pay the damages himself. When he takes fewer precautions, damages might be more frequent or larger than without the insurance. As a consequence, to cover his costs, the insurer will raise premiums.

The Problem of Defensive Medicine

One of the most confused areas involved in the malpractice discussion concerns the allegations of defensive medicine. Physicians have been vocal in their claims that the current malpractice situation encourages them to engage in protective maneuvers that are expensive but have relatively little value. Some state that the growing litigation induces them to use expensive, and sometimes risky, diagnostic procedures to provide a record protecting them against liability, should their behaviour be at issue. To the extent that this occurs, it unnecessarily inflates the costs of medical care. Other physicians claim that the threat of litigation forces them into a defensive posture when performing certain procedures or treating certain types of injuries associated with high rates of litigation. In neither case is there much hard evidence that defensive medicine significantly distorts the process of medical care. From a purely economic point of view, an

important question about the existing malpractice mechanism is the extent to which it increases the total aggregate costs of medical practice by reinforcing conservative decisions. As resources for medical care become more limited relative to the increasing technological possibilities, medical planners will have to develop means to establish priorities and to determine which procedures truly enhance outcome.

6. Conclusions and suggestions

Therefore, it can be concluded that Medical Negligence is a complex subject, involving many grey areas which need to be scrutinized and resolved by the Legislature and the Judiciary. Another thing that deserves to be mentioned is that, the incidence of medical negligence is quite distinct from the filing of claims. A defining feature of the medical liability system is that most events of medical negligence do not result in a legal claim, and most claims of malpractice are not tied to any act of negligence. Possible reasons for this could be that the injury was too minor to warrant a lawsuit, or that lawyers are only willing to take on claims for "attractive" clients. Alternatively, some people are simply not litigious in nature, or do not wish to damage a long-standing relationship with their doctor, especially. Yet another explanation is that patients simply do not recognize that they have suffered an injury due to negligence.

All the concerned authorities whether it is the Hospital, Government, Medical Council or any other institution working towards betterment of healthcare facilities should work together and take steps to provide:

- Quality healthcare
- Adequate healthcare
- Accessibility to basic healthcare.

7. References

1. Dr. GA D'Costa, *et al*., Health care & Rights of Patients, Voluntary Health association of India, Edn, 2007.
2. Dr. Jagdish Singh, Vishwa Bhushan. Medical negligence and Compensation, 4th Edn, Bharat Law Publications, 2014.
3. Dr. Lily Srivastava. Law & Medicine, IInd Edition, Universal Publishing, 2013.
4. Dr. Niraj Kumar. Medical Profession and the Consumer Protection, Bharat Law House, 2012.
5. Dr. Bangia RK. Law of torts, including compensation under the Motor Vehicles Act and Consumer Protection Laws.
6. Herring, Medical Law and Ethics, IIIrd Edition, Oxford Publishing, 2010.
7. Mason JK, Laurie GT. Law and Medical Ethics of Mason & McCall Smith, IVth Edn and VIIth Edition, Oxford Publishing, 1999-2011.
8. Mechael A Jones. *Medical Negligence*, 4th Edn - 1st South Asian edition, Sweet & Maxwell, 2010.
9. Bag RK. Law of Medical negligence and compensation with supplement, 2nd Edn, Eastern Law House, 2011.
10. Tapas Kumar Koley. Medical Negligence and the Law in India: Duties, Responsibilities, Rights, Oxford University Press, 2010 Edn