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Medical negligence in India: A critical study

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***Abstract*---**Medical negligence, now days have become one of the serious issues in India. Our experience tells us that medical profession, one of the noblest professions, is not immune to negligence which at times results in death of patient or complete / partial impairment of limbs, or culminates into another misery. There are instances wherein most incompetent or ill/under educated doctors, on their volition, have made prey the innocent patients. The magnitude of negligence or deliberate conduct of the medical professionals has many times led to litigation. The present paper aims to analyze the concept of negligence in medical profession in the light of interpretation of law by the Supreme Court of India.

***Keywords*---**Negligence, liability, breach, compensation, consumer.

Introduction

Medical profession is the one of the noblest profession among all other profession in India. For a patient, the doctor is like God. And, the God is infallible. But that is what the patient thinks. In reality, doctors are human beings. And, to err is human. Doctors may commit a mistake. Doctors may be negligent. The support staff may be careless. Two acts of negligence may give rise to a much bigger problem. It may be due to gross negligence. Anything is possible. In such a scenario, it is critical to determine who was negligent, and under what circumstances.

In a country committed to the rule of law, such matters are taken to the court and judges are supposed to decide. However, negligence by doctors is difficult to be determined by judges as they are not trained in medical science. Their decisions are based on experts‟ opinion. Judges apply the basic principles of law in conjunction with the law of the land to make a decision.
Reasonableness and prudence are the guiding factors.

We would like to go through these principles in the light of some court judgments and try to understand as to what is expected from a doctor as a reasonable person. As these issues are at the core of medical profession and hospitals are directly affected by new interpretation of an existing law regarding

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medical professionals, it is pertinent to deal with them at the individual level of the doctor, and also at the employer‟s level i.e., hospital.

Negligence

Negligence is the breach of a 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 reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

The definition involves three constituents of negligence:
(1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;
(2) Breach of the said duty; and
(3) Consequential damage.

Essentials

In an action for negligence, the plaintiff has to prove the following essentials:

- The defendant owed duty of care to the plaintiff;
- The defendant made the breach of that duty;
- The defendant suffered damage as consequence thereof.

Let us now discuss these essentials in details

Duty of care to the plaintiff:

It would be absurd to hold any person liable for his every careless act or even for every careless act that causes damage. He may only be liable in negligence if he is under a legal duty to take care. Legal duty is different from the moral, religious or social duty and therefore, the plaintiff (consumer) has to establish that the wrongdoer owed to him a specific legal duty to take care of which he has made a breach. A person is only required to meet the standard of care where he has an obligation or a duty to be careful. Thus it may be said that the “duty” is “the relation between individuals who imposes upon one a legal obligation for the benefit of other”. Put in other terms the duty is “an obligation, recognized by law, to avoid conduct fraught with unreasonable risk of danger to others.” Thus the existence of duty towards the plaintiff becomes important factor for fixation of the liability of the tortfeasor.

Duty depends on reasonable foresee ability of injury:

Whether the defendant owes a duty to the plaintiff or not depends on reasonable forseeability to the plaintiff. If at the time of the act or omission, the defendant could reasonably foresee injury to the plaintiff he owes a duty to prevent that

injury and failure to do that makes him liable. Duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.[1]Lord Macmillan explained the standard of foresight of a reasonable man in ***Glasgow Corporation v. Muir***[2] 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 persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from apprehension and from over confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a 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 room of diversity of views… What to one judge may seem far-fetched to another both natural and probable.

In ***S. Dhanaveni v. State of Tamil Nadu***[3]**,** the deceased slipped into a pit filled with rain water in the night. He caught hold of nearby electric pole to avert a fall. Due to leakage of electricity in the pole, he was electrocuted. The respondent, who maintained the electric pole was considered negligent and was held liable for the death of the deceased.

In ***Mata Prasad v. Union of India***[4] the gates of a railway crossing were open. While the driver of truck tried to cross the railway line, the truck was hit by an incoming train. It was held that when the gates of the level crossing were open, the driver of the truck could assume that there was no danger in crossing the railway track. There was negligence on the part of the railway administration and they were, therefore held liable.

Reasonable foresee ability does not mean remote possibility:

To establish negligence it is not enough to prove that the injury was foreseeable, but a reasonable likelihood of the injury has to be shown because "foresee ability does not include any idea of likelihood at all". The duty is to guard against probabilities rather than bare possibilities. In Fardon v. Harcourt Rivington[5] , the court set out the reasonable man test for foresee ability. "If the possibility of danger emerging is reasonably apparent, then to take precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of reasonable man, then there is no negligence in not having taking extraordinary precautions."

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[1] Bourhill v.Young, (1943) A.C 92
[2] (1943) A.C. 448
[3] A.I.R. 1997 Mad.257
[4] A.I.R. 1978 All, 303
[5] (1932) 146 L.T. .391

Breach of Duty

The second important essential to hold the tortfeasor liable in negligence is that the defendant must not only owe a duty of care to the plaintiff, but also he must be in breach of it. The test for deciding whether there has been a breach of duty was laid down in oft-cited dictum of Alderson B, in ***Blyth* v. *Birmingham Waterworks Co.***[6] case, wherein it was held that "*negligence is breach of duty caused by the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.*"

In the above definition of the breach of duty, the emphasis is on the conduct of a *„reasonable man"* which is a mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time.

Breach of Duty must have caused the Damage

The third and last essential of negligence is that the plaintiff is required to prove the causal connection between the breach of duty and the damage, i.e. where some fault is attributed to the defendant, the plaintiff must prove that the defendant was negligent. The same may be seen in Madras High Court decision in ***Pandian Roadways Corp.* v. *Karunanithi***. In this case, three immature boys were riding a bicycle. On seeing some dogs fighting ahead, they lost the balance and fell down. The driver of a bus saw the boys falling but did not immediately apply the breaks, as a result of which the bus ran over the right arm of one of those boys. The failure of the driver to stop the bus was held to be a clear case of negligence on his part. However, if the plaintiff fails to prove negligence on part of the defendant, the defendant would not be made liable. This situation may be explained by a case decided by the House of Lords, wherein the court observed that:

"the party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end, he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed."[7]

Professional

According to the English language, a professional is a person doing or practicing something as a full-time occupation or for payment or to make living and that person knows the special conventions, forms of politeness, etc. associated with a certain profession. Professionals are subject to professional code and standards on matters of conduct and ethics, enforced by professional regulatory authorities and they enjoy high status and respect in the society.

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[6] (1856) 11 Ex 781

[7] AIR 1982 Mad 104

Negligence by Medical Professionals

A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is medical practitioner or not, who is consulted by a patient, owes him certain duties, namely a duty of care in deciding whether he undertakes the case; a duty of care in deciding what treatment to give and duty of care in his administration of that treatment. A breach of any theses duties will support an action for negligence by patient.

In ***Jacob Mathew***[8]case, the Supreme Court of India has gone into details of what is the meaning of negligence by medical professionals. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply.

A case of *occupational* negligence is different from one of *professional* negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

Degree of Negligence

The Delhi High Court laid down in 2005 that in civil law, there are three degrees of negligence[9]:

(i) *lata culpa*, gross neglect
(ii) *levis culpa*, ordinary neglect, and
(iii) levissima culpa, slight neglect.

Every act of negligence by the doctor shall not attract punishment. Slight neglect will surely not be punishable and ordinary neglect, as the name suggests, is also not to be punished. If we club these two, we get two categories: negligence for which the doctor shall be liable and that negligence for which the doctor shall not be liable. In most of the cases, the dividing line shall be quite clear, however, the problem is in those cases where the dividing line is thin. As

[8] 2005) 6 SCC 1
[9] Smt. Madhubala vs. Government of NCT of Delhi; Delhi High Court, 8 April 2005, Citation: 2005 Indlaw DEL 209 = 2005 (118) DLT 515

regards **medical negligence**, the legal position has been described in several leading judgments. Some of these are given below:

The Supreme Court in ***Laxman v. Trimbak***[10]**,** held:
"The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires."

In *Achutrao Haribhau Khodwa v. State of Maharashtra*[11] the Supreme Court said--
"The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence."

In ***A.S.Mittal v. State of UP*** [12]*,* an irreparable damage was done to the eyes of some of the patients who were operated at an eye camp organized by the government of Uttar Pradesh. Some of the patients who underwent surgery could never see the light of the day, i.e. whatever little vision they had even that was lost. The apex court coming heavily on the erring doctors held that, "the law recognizes the dangers which are inherent in surgical operations and that will occur on occasions despite the exercise of reasonable skill and care but a mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one." The compensation was awarded.

Medical negligence - a civil wrong or criminal offence:

The term negligence is used for the purpose of fastening the defendant with liability under civil law (the law of torts) and, at times, under the criminal law. But often it is alleged by the plaintiffs that negligence is negligence and that no

[10] AIR 1969 SC 128
[11] AIR 1996 SC 2377
[12]AIR 1989 SC 1570

distinction can be drawn between the two so far as it relates to breach of his duty and resultant damage. Explaining the difference between the two, Lord Atkin in his speech in *Andrews* v. *Director Public Prosecution*, stated: "… Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law there are degrees of negligence; and ***a very high degree of negligence is required to be proved*** before the felony is established."[13]
Thus for negligence to be an offence, the element of *mens rea* (guilty mind) must be shown to exist and the negligence should be gross or of very high degree.[14]

In Criminal law, negligence or recklessness must be of such a high degree as to be held„gross". The apex court in ***Jacob Mathew* v. *State of Punjab***, has explained that; "the expression „rash and negligent act" occurring in section 304-A of the I.P.C should be qualified by the word „grossly". To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which has resulted was most likely imminent."[25] From the above it may be inferred that the distinction between civil and criminal liability in medical negligence lies in the conduct of the doctor which should be of gross or reckless or of a very high degree.

Medical negligence and hospitals

Hospitals in India may be held liable for their services individually or vicariously. They can be charged with negligence and sued either in criminal/ civil courts or Consumer Courts. As litigations usually take a long time to reach their logical end in civil courts, medical services have been brought under the purview of Consumer Protection Act,2019 wherein the complainant can be granted compensation for deficiency in services within a stipulated time of 90 - 150 days.

Liability of hospitals in cases of negligence

Hospitals liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to the deficiency of the hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment. This liability is according to the principle of „respondeat superior" meaning „let the master answer". Employers are also liable under the common law principle represented in the Latin phrase, "qui facit per alium facit per se", i.e. the one who acts through another, acts in his or her own interests. This is a parallel concept to vicarious liability and strict liability in which one person is held liable in Criminal Law or Tort for the acts or omissions of another. An exception to the above principle is

[13] (1937) 2 All ER 552 (HL)
[14] *See*, Charlesworth & Percy on *Negligence*, 10th Edn, 2001, para 1.13;

„borrowed servant doctrine" according to which the employer is not responsible for negligent act of one of its employee when that employee is working under direct supervision of another superior employee [e.g. Where a surgeon employed in one hospital visits another hospital for the purpose of conducting a surgery, the second hospital where the surgery was performed would be held liable for the acts of the surgeon].

Medical Profession – Whether Under Consumer Protection Act

In one of the earliest significant ruling in ***Vasantha P. Nair* v. *Smt. V.P. Nair***, the National Commission upholding the decision of Kerala State Commission had held that „a patient is a "*consumer*" and the medical assistance was a „*service"* and, therefore, in the event of any deficiency in the performance of medical service the consumer courts can have the jurisdiction. It was further observed that the medical officer"s service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act."[15]

In ***Indian Medical Association* v. *V.P. Shantha and Ors***.[16], the apex court has put an end to this controversy and has held that patients aggrieved by any deficiency in treatment, from both private clinics and Government hospitals, are entitled to seek damages under the Consumer Protection Act, 1986. A few important principles laid down in this case include:

1. 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 C.P. Act.*
2. The fact that medical practitioners belong to medical profession and are subject to disciplinary control of the Medical Council of India and, or the State Medical Councils *would not exclude the service rendered by them from the ambit of C.P. Act.*
3. The service rendered by a doctor was under a contract for personal service rather than a contract of personal service and was not covered by the exclusionary clause of the definition of service contained in the C.P.Act.
4. A service rendered free of charge to everybody would not be service as defined in the Act.
5. The hospitals and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one"s employer under the service conditions.

Conclusion

Thus, after critically analyzing the present paper I came up to following conclusion. There are two possibilities in cases of negligence – either it is negligence of the doctor or it is negligence of the staff. There may be a possibility of negligence, both of the doctor and the staff. In most of the cases, it will be a case of joint and several liability, and both the doctor and the hospital will be

[15] 1991) C.P.J. 1685
[16] AIR 1996 SC 550

liable. The division of liability between the two of them will be decided according to the understanding between the two. As far as determining negligence is considered, courts have to depend on the advice of experts, except in cases of blatant violation of protocol and doing things which are considered to be unreasonable and imprudent. The level of subjectivity in such decisions is quite high and the purpose of law to be certain and specific is defeated to a large extent. Recent decisions are a good step in the direction of making this murky area a bit tidy, however, a lot needs to be done by the courts in the shape of clearer judgments so that the layman can benefit. As of now, the judgments leave a lot of room for discretion, which at times may be exercised by different persons, including doctors and judicial officers, in an undesirable manner. The law on the subject needs to be more precise and certain. That will surely give a better understanding about the “reasonable man”.

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