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Medical negligence during COVID-19

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Abstract---Medical negligence during COVID-19 affected people who were already grieving the lives of their loved ones. This article will relook at specific instances where medical negligence cost lives. It will explain the meaning and use of medical negligence laws in India, citing several cases that serve as decent examples to be reapplied in COVID-19 cases. Medical negligence is punishable under various laws such as torts, IPC, Indian Contracts Act, Consumer Protection Act, etc. It can be defined as misconduct by a medical practitioner or doctor, and causes many deaths and illnesses each year. This paper covers the legal aspects and consequences of medical negligence, liability of the victim, and aims to spread awareness regarding the same. This paper also explains how Section 304(a) Indian Penal Code provided some respite to those subjected to medical negligence during COVID-19.

Keywords---Medical, Negligence, COVID-19.

Introduction

The sudden rise of COVID-19 cases alerted nations against a global health emergency. As a result, every country made efforts to stop the increase of infection, including bringing awareness and using technology to ramp up medical facilities. Despite these preparations, no one can deny that the medical system exposed its vulnerabilities, pushing many into the cobweb of illegal medical practices, which cost heavily on patients. The following article focuses on medical negligence in the medical field and the implementation of 304(A) IPC during a pandemic like COVID-19. Further, it will bring to light the malpractices that raise a concern on the commercialisation at the hands of healthcare providers. Medical

negligence is a combination of two words. The second word solely describes the meaning, though the meaning of negligence has not been described in a proper way but it is an act recklessly done by a person resulting in foreseeable damages to the other. Negligence is an offense under tort, IPC, Indian Contracts Act, Consumer Protection Act and many more.

Medical Negligence basically is the misconduct by a medical practitioner or doctor by not providing enough care resulting in breach of their duties and harming the patients which are their consumers. A professional is deemed to be an expert in that field at least; a patient getting treated under any doctor surely expects to get healed and at least expects the doctor to be careful while performing his duties. Medical negligence has caused many deaths as well as adverse results to the patient's health. This article focuses on explaining negligence under various laws, professional negligence, medical negligence and landmark as well as recent cases in India. This provides information on liability that can be incurred by the victim of the medical malpractice. It aims at providing information about the topic to create as much awareness as possible.

Negligence

There are distinct definitions for negligence. It is 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. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances.¹ Conduct which is below the standard behaviour established generally for protection of others against unreasonable risk of harm is negligence. As per Winfield, "Negligence as a tort is the breach of a legal duty to the care which results in damage, undesired by the defendant, to the plaintiff." Negligence doesn't arise just because of a wrongful conduct by a person; it is essential that that misconduct has caused a foreseeable harm to the other.² If there's no harm, there's no negligence. In *King v. Phillips*³ it was observed that the question of negligence arises only when there is a direct harm to the plaintiff by the misconduct and the harm should be foreseeable. Damage is an important ingredient to bring negligence under tort.

Negligence as a Tort

A tort is a residuary civil wrong. Duties in tort are fixed by the law and such duties are owed in rem or to the people at large generally. Such wrongs can be remedied by filing for unliquidated damages. There may also be cases where concurrent liability may exist under tort and contract. For instance, if there is a contract existing between a patient and a doctor, then the doctor, for his negligence, will be liable under contract.

¹ *Blythe v. Birmingham Waterworks Co.* 11 Evch. 7S4, nitroglycerin case, 15 wall, 536,21 I Ed. 206

² Sharma J and Bhushan V. *Medical Negligence & Compensation*. 2 nd Edition. New Delhi: Bharat Publications; 2004.

³ [(1953) 1 QB 429]

Negligence under Contract

A contract may have express or implied terms. There are situations where there is a contract between medical practitioners and patients. Even in the absence of an express stipulation to the effect that the practitioner will exercise reasonable skill and care in treatment of a patient, it is taken as an implied duty arising out of the contract. Breach of this duty thus results in violation of the contract.

Negligence as a Crime

Negligence as a crime has a different yardstick. Negligence under tort is determined on the extent of the loss caused whereas negligence under criminal law is dependent on the degree or amount of negligence. Courts have repeatedly held that the burden of proving criminal negligence rests heavily on the person claiming it. Criminal law requires a guilty mind. If there is a guilty mind, a practitioner will be liable in any case. But if, under the criminal law, rashness and recklessness amount to crime, then also a very high degree of rashness would be required to prove charges of criminal negligence against a medical practitioner. In other words, the element of criminality is introduced not only by a guilty mind, but by the practitioner having run the risk of doing something with recklessness and indifference to the consequences. It should be added that this negligence or rashness or must be 'gross' in nature.

Negligence by Professionals

Professionals are persons professing some special skill or job, who are trained to profess in that area specially and bear the responsibility of professing with due care. Such professionals include lawyers, doctors, architects etc. The SC in **Jacob Mathew v. State of Punjab**,⁴ explained: a professional entering into certain profession is deemed to have knowledge regarding that profession and it is assured impliedly by him that a reasonable amount of care shall be taken to profess his profession. The person can be held liable under negligence if he did not possess the required skills to profess or he failed to take essential amount of care to profess the said profession.

The law nowhere states that a professional shall be held liable if he fails to perform his skills, it states that a professional shall take reasonable amount of care and shall possess knowledge as compared to any practitioner in the same field. The skills of different professionals surely differs from one another even if they are practicing in the same field but what is required is that a professional has knowledge of new advances, discoveries and developments in his field so as to give essential care to the consumers of his profession. The failure to comply with this which any ordinary professional would have done properly amounts to professional negligence liable under the law. This paper discusses the Medical Negligence in detail in the following part.

⁴ A.I.R. 2005 S.C. 3180

In *Gian chand v. Vinod kumar Sharma*⁵ it was held that shifting of the patient from one ward to another in spite of requirement of instant treatment to be given to the patient resulting in damage to the patient's health then the doctor or administrator of the hospital shall be held liable under negligence.

Also in *Jagdish Ram v. State of H.P.*⁶, it was held that before performing any surgery the chart revealing information about the amount of anaesthesia and allergies of the patient should be mentioned so that an anaesthetist can provide ample amount of medicines to the patient. The doctor in above case failed to do so as a result of the overdose of anaesthesia the patient died and the doctor was held liable for the same.

Medical Negligence and its relation to the Pandemic?

Anyone working in medicine knows that even a slight misjudgment could lead to hazards and risks, eventually costing someone's life. The standard of care needed in a particular case depends on the professional skill expected from persons of 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. Professionals such as lawyers, doctors, architects fall within the ambit of the law of negligence, as they all own special skills. 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 skill necessary for performing the task. Under the view of the Hon'ble court, referring to the decision of *Bolam v. Friern Hospital Management Committee*, Judge Mc Nair expressed:

"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 a 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 statement gives us an idea that medical negligence can occur at a stage where the professional is either not at par with the knowledge of the patient's health or does the act knowingly. Negligence in legal terms means and barred breach of a duty of care that results in damage. The following three ways make the constituents for 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 duty;
- (2) Breach of the same duty; and
- (3) Consequential damages.

Following this, the landmark case of *Bolton* was held, and it stated that the liability of negligence rests on the reasonable man. The judge described a reasonable man as not any ordinary person but someone who can either threaten society or save it. Therefore, in any ordinary circumstances, the reasonable

⁵ A.I.R. 2008 H.P. 97

⁶ A.I.R. 2007 (NOC) 2498 (H.P.)

man shall prevent any negligence from happening, and this could happen if that person has enough knowledge from his field. The job of a doctor is to ensure that his patients are treated properly and with utmost care. Further, it has been cited in many cases like *Jacob Mathew v. State of Punjab*⁷ that a practitioner can be judged for negligence only if he does not possess the required skill to complete the job or does not exercise caution while treating the patient. It must be noted that a profession is different from an occupation. While the first requires a degree for a job, the latter may not be mandated upon such conditions. Doctors do not enjoy any immunity from torts or contracts because the medical profession requires a degree under which the doctor is liable to his client a duty in torts and contract that he exercises reasonable care in giving advice performing services.

Medical Negligence during COVID-19 and section 304 (A) IPC

India has one of the poorest medical infrastructures around the globe. Even with very few COVID-19 cases in certain states, hospitals experienced a shortage of beds, wards and oxygen cylinders. As numbers rose, it became difficult to access medical aid, especially in smaller cities. The same was also due to a scant doctor to patient ratio in hospitals, which also aggravated due to insufficient medical health professionals. While many doctors risked their lives during this time, a few doctors indulged in forgery and malpractices. On June 25, 2021, two associates from Kanpur were found guilty of causing the death of a patient by negligence. The police lodged FIR and barred the two under the provision of 304(A) (causing death by negligence which does not amount to culpable homicide). A probe was ordered as the doctor and his associate ransacked the accused and extracted nineteen lakh. Further, as the bill was overpriced, the deceased's son went on to ask the doctor for the same. However, the doctor and his staff denied any such accusations and threatened dire consequences. This upset the family and they reported the matter. Finally, the police filed the FIR under 304A IPC, 506 IPC, 504 IPC and 352 IPC and section 56 of the disaster management act.

Later, It was also observed that the doctor gave the patient a wrong injection, resulting in her death. Many cases of black marketing of oxygen cylinders were reported when cases spiked again during the second wave. One such incident is from Karnataka, where the man tried selling cylinders at exorbitant prices and the police later arrested him. With an upsurge in cases, many people were struggling to find beds and wards, and at their expense, private hospitals were charging thrice the amount than usual. Meanwhile, those who failed to comply with such unreasonable prices lost their family. The government at its end was also not so swift since the lockdown was not pre-announced, and even when it opened up, the cases were on the rise, leading to an increase in deaths.

Even vaccines were being given at a higher price in private hospitals. However, after the government's interference, the vaccine is now administered free, at least in government facilities. But even during these challenging times, some businesses have maintained a steady rise in their income by not giving accurate details of their products. For example, Patanjali, a renowned brand, claimed that

⁷ Supra note 4.

their ayurvedic 'Coronil Kit' was tested by WHO. Believing this narrative, many opted for the same instead of relying on allopathic medicines, which was the actual need. Although medical professionals and researchers rebuked these claims, it was already too late as many blindly consumed these 'medicines'. It was much later that Patanjali was also called out for spreading lies during the pandemic.

Due to the under-reporting of COVID-19 deaths, the medical fraternity could not provide adequate facilities, and because of this, the hospitals became overcrowded. Due to such overcrowding, many succumbed to black markets and outrageous demands by medical professionals. However, even after charging exorbitant prices, proper medical treatment was not extended. Unfortunately, at the time, not many attorneys were willing to provide medical negligence on families' health and couldn't raise awareness in society, leading to the deaths of innocent people.

In a non-Covid case, *Sishir Rajan Saha v. The state of Tripura*⁸, the petitioner's son, Ashim Saha, while coming from Agartala to Udaipur on a scooter, met with an accident. He was admitted to the emergency ward of the GB Hospital, Agartala. The senior specialist doctor, Dr P.Roy, was not available in the hospital. He repeatedly called to attend to the patient. However, he was busy attending to his private patients and did not bother to come to the hospital to attend to the accident victim. Unfortunately, Ashim Saha succumbed to his injuries. Due to the same, Dr Roy was held liable to pay Rs. 1,25,000 as compensation for the death of the deceased. Directions were also issued to all the government hospitals to upgrade the medical services. Thus, going by this case, if a specialist doctor does not care to attend to a patient admitted to the hospital's emergency ward and the patient dies, the doctor would be liable to pay in compensation.

Conclusion

It is not stated that doctors are negligent or irresponsible but while performing the duty which requires a lot of patience and care, often many practitioners fail or breaches their responsibility towards the patient. Medicine which is one of the noblest professions requires setting a realm which can benefit the victims of various diseases. Many doctors even the specialist sometimes neglects small things to be taken care of while practicing which may result in damages to the patients that could have been avoided or sometimes even the death of the patients.

This type of professional negligence needs more focus than to include it in other laws or statutes. An independent and unique legislature shall be set up to govern the malpractice. In our country recently in a case *Krishna Iyer v. State of Tamilnadu and Others*⁹ the Apex Court awarded a compensation of 1.8 crores on July 1, 2015 as she lost her eyes in 1996. This is highest amount of compensation awarded in the country. Many activists and the victims of medical negligence have been alleging to get redressal against malafied acts of medical practitioners and doctors. Not just for medicine, the law shall be made applicable

⁸ AIR 2002 Gau 102

⁹ 2015 STPL(Web) 1239 SC

to all the professionals practicing in different areas which require a requisite amount of skill and duty of care. People in our country are already victims of many diseases and are dying due to same, let's make efforts to reduce these deaths and focus on improvising the profession so that people do not die in the place where they come to get healed.

To protect the rights of every individual's law and order should go through checks and balances at regular intervals. Seeing the plight of doctors and how they still manage to treat patients, some kind of immunity should be provided. To resolve many disputes monetarily, terms shall be used more than civil liabilities. There is also a contrary view that doctors shall be relaxed from criminal liabilities during the pandemic. Still, the question arises: will it violate the patient's right to law and order? It becomes difficult to conclude any decision through the grey areas of medical litigation, but criminal liability can be lowered down to keep everything in balance.

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