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MEDICAL NEGLIGENCE

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Abstract

In the ancient times, placed on a high pedestal, medical field, which required high degree and learning skill, commanded great public awe and respect. Confidence and faith, by people at large, was bestowed on these medical attendants in abundance, and in turn, they showed sincere concern for their patients. Within the framework of duty towards their patients and the superimposed stamp of nobility, the earning of livelihood had become and indeed was looked upon as merely a by-product of their activity. No fixed norms of payment existed; it simply depended upon the goodwill and pocket of the beneficiary of the skill. Since then it has been the most self-sacrificing occupation, without fail, it had to work relentlessly for self-immolation. Just pause and ponder. The doctor continuously consistently and ceaselessly works and seeks to move towards the cure of the very disease which forms his bread and butter. When a patient comes to a doctor for care and the doctor accepts the same, at that moment an implied duty of care arises. Negligence is primarily defined as the result of a breach of duty, a failure to take care, and a breach of duty. Medical negligence is defined as the failure of a doctor to exercise appropriate care and skill toward a patient, which results in physical, emotional, and financial harm as well as permanent incapacity. It falls under the category of both- civil wrong and criminal offence. This paper tries to revolve around the growing concern of medical negligence cases and laws governing it.

Keywords- Negligence, breach of duty, medical profession, judgements, new approach

Introduction

In India, medical negligence has the most critical issue. The medical profession can be considered one of the noblest professions based on our experience. Since doctors treat illnesses, and medical issues, and in the end will cure or heal their patients, patients usually see them as Gods and expect professionals to be as cautious as they can while carrying out their responsibilities.[851] Medical negligence is defined as the failure to provide reasonable care to a patient by a healthcare professional, resulting in harm or injury to the patient. The standard of care is based on what a reasonable healthcare professional would do in similar circumstances. The burden of proof lies on the patient to prove that the healthcare professional was negligent and that the negligence caused harm or injury.[852] While many doctors and healthcare providers deliver exceptional care, cases of negligence do occur due to various factors such as inadequate infrastructure, lack of resources, understaffing, and poor training. Medical negligence can take various forms including misdiagnosis or delayed diagnosis, surgical errors, medication errors, birth injuries, improper treatment procedures, or even failure to obtain informed consent from patients. These incidents not only cause physical harm but also result in emotional distress for patients and their families. Negligence is both a civil and criminal wrong and punishable either by

[851] Medical Negligence, 3.1 JCLJ (2022) 1496

[852] https://www.theansaryassociates.co.in/post/medical-negligence-law-protecting-doctors-patients

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compensation or with imprisonment. As a civil wrong or tort it has been defined "as a breach of legal duty to take care, which results in damage, undesired by the defendant, to the plaintiff." It also means "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 reasonable and prudent man would not do." Under the Indian Penal Code 1860, section 3044 provides that if any death is caused of a person by the rash and negligent act of another person, the latter shall be punishable with imprisonment upto two years, or fine or both. The principles underlying negligence have been outlined and clarified in numerous English and Indian cases.[853]

Negligence can be described as failure to take due care, as a result of which injury ensues. Negligence excludes wrongful intention since they are mutually exclusive. Carelessness is not culpable or a ground for legal liability except in those cases in which the law has imposed the duty of carefulness. The medical profession is one such section of society on which such a duty has been imposed in the strictest sense. It is not sufficient that the medical professional acted in good faith to best of his or her judgement and belief. A medical professional is expected to have the requisite degree of skill and knowledge The question in every case would be whether the medical practitioner in fact attained the degree of due care established by law. Medical negligence is a sub species of this tort (civil wrong) which falls within the larger species of professional negligence. Under our law, medical negligence, like other forms of negligence, is a criminal offence for which a doctor can even be imprisoned. This is so in many other legal systems also. Medical malpractice, however, is not merely the negligence on the part of the care giver; it is a conscious decision of the care giver to offer and/ or force a product, procedure or investigation upon a patient for monetary gain either personally or for the institution.[854] "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 reasonable man would not do. Actionable negligence consists in the neglect of 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 to his person or property..."[855].

Doctor - Patient Relationship : An Analysis

The relationship between doctors and patients is prima facie a healthy one that does not involve any frictions because it is normally the patients who select the doctor for their illness based on the reputation and skills of a doctor. Besides, when treatment is successful, patients are thankful to the doctor even though they have paid the fee. On the other side, medical professionals too thankful to their patients for the trust and confidence placed by their patients in them. However, this relationship has been commercialized during the past few decades and as a result, patients expect over-the-top treatment for their illnesses from doctors. Patients, being more conscious than before, now consider any side effects or issues in treatment as negligence on the part of their doctors. Similarly, doctors, have found alternative sources for their income, do not provide much attention to their patients and are often accused of showing apathy in the course of treatment. Both these instances added to the increase in unnecessary medico-legal cases being filed against doctors. To control such nuisance and discourage litigant mentality, the Supreme Court has laid down guidelines for the criminal prosecution of medical professionals. These guidelines have resulted in a downward

[853] Bijawat, Mahesh C. "HOSPITAL AND DOCTORS' NEGLIGENCE." *Journal of the Indian Law Institute* 34, no. 2 (1992): 254–62. http://www.jstor.org/stable/43951427.

[854] https://www.lawyersclubindia.com/articles/medical-negligence-1952.asp
[855] Jacob Mathew Vs. State of Punjab and Ors. Appeal (crl.) 144-145 of 2004

trend in the filing of false medico-legal cases and reduced the harassment of doctors.[856]

Consumer Protection Act, 1986

With the advent of Consumer Protection Act, 1986 creating consumer disputes redressal agencies (C.D.R.As) there is drastic change. This was immediately resented by the community of doctors who raised their shields and challenged the applicability of the Act to them. The reason, put forth by them was threefold. The first set of reasons was regarding the interest of the patients. There could be unwillingness on the part of doctors to treat high-risk cases or cases of emergency for a fear of bring dragged to the consumer in case anything goes wrong. There would definitely be a rise of cost on account of the insurance which the doctors would be compelled to take, moreover over-investigation in order to be on the safe side also involves high cots, which would ultimately be borne by the patients. The second set of reasons referred to was the nature of the relation between the doctor and the patient. There has ever been a relation of trust and faith between the doctor and the patient in India. The function of the doctor was a noble and service oriented one and not to be equated with that of traders solely aiming at profit motive. The third set of reasons was regarding the capability of the adjudicative bodies created by the Act to deal with medical cases. There could be no doctor in the adjudicative body and moreover two members out of the three are non-judicial and could constitute a majority whose decision could be erratic on account of their not being either medical or legal experts.[857]

The discussion on this issue can be conveniently divided into two parts for, cases involving medical negligence have been filed both against the state-run hospitals and doctors working in these hospitals as well as against private medical practitioners and nursing home.

1. Services rendered by government hospitals-
The controversy concerning the inclusion or exclusion of services rendered by medical practitioners and hospitals in general appears to have started from the decision of the Rajasthan State Commission in Consumer Unity and Trust Society, Jaipur v. State of Rajasthan[858] wherein the Rajasthan State Commission had held that complaints against the services provided by government hospitals were not maintainable under the Consumer Protection Act. Appeal filed before the National Commission. According to the National Commission, on a strict reading of the provisions of the 1986 Act as a whole, it was clear that in enacting the statute the intention of Parliament was to provide protection and relief to the four categories of consumers and it was in the context of the general scheme of the Act that the definition of the expression 'consumer' contained in section 2(1)(d)(i) had to be interpreted. The Commission held that in order to satisfy the said definition, a person should have "hired any services for a consideration."34 It was of the view that this was the ordinary, plain, grammatical meaning of the expression 'hire', as popularly understood and it would appear reasonable to assume that it was only in this sense that the word had been used in section 2(1)(d)(ii) of the Act. If Parliament had intended to treat any person who availed himself of any services as a consumer, one should have expected the opening words of sub-clause (ii) to be 'avails himself of any services. According to the National Commission Parliament had instead used the expression 'hire, in contra-distinction with the expression 'avail of occurring in the subsequent part of the same sub-clause. The use of two distinct expressions in different parts of the same sub-clause was an indication that they were not meant to convey the same meaning.

[856] Medical Negligence and Evolving Judicial Activism, 4.1 IJLS (2018) 46
[857] Annoussamy, David. "MEDICAL PROFESSION AND THE CONSUMER PROTECTION ACT." *Journal of the Indian Law Institute* 41, no. 3/4 (1999): 460–66. http://www.jstor.org/stable/43953343.
[858] Consumer Unity & Trust Society ... vs State Of Rajasthan on 23 August, 2022, Original Application No.79/2021 (CZ)

2. Services rendered by private medical practitioners and hospitals- The second controversy concerns applicability of the Consumer Protection Act 1986 to private doctors, hospitals and nursing homes which, too, has started primarily due to the conflicting decisions pronounced by some of the State Commissions. Gulam Abdul Hussain v. Katta Pullaiah Choudary [859]was perhaps the first reported case on the subject. In this case the complainant was the father of the deceased Gulam Abdul Roshan, himself a registered medical practitioner. The deceased had developed an abscess in the private part of his body. On 22 September 1989, he consulted K.P. Choudary, a medical practitioner and a surgeon. The complainant alleged that it was on the advice of Dr. Choudary that the deceased joined the clinic on the same day. He was operated upon and was discharged from the hospital. The deceased developed high fever and pain in his right leg and after two days he was unable to move it due to heavy swelling and severe pain. In that condition, he was taken by his friends to Dr. Choudary. He was treated at his clinic for 3 days till 26 September, when the complainant was asked to take his son to the Osmania General Hospital at Hyderabad for treatment. At about 6 a.m. on 27 September, the complainant got his son admitted in the emergency ward of that hospital. The doctors of this hospital opined that Choudary should have advised the patient to go to this hospital in the first instance instead of opening the abscess by himself. The doctors further declared that the kidneys of the patient had failed due to the opening of the abscess by the opposite party. The patient was kept on dialysis till 3 p.m. The doctors then advised the complain- ant to take his son to another hospital for treatment. While the complainant was taking his son to that hospital, he died. The complainant, father of the deceased, filed a petition claiming compensation of Rs. 5 lakhs alleging that his son had died due to the negligence of the opposite party. The State Commission accordingly observed, that if a doctor makes available his services to potential users for a consideration, there is no reason why such services shall be excluded from the definition of 'service' under the act.[860]

Consumer Protect Act 1986 deals with the civil version of medical negligence cases in India and provide compensation to the aggrieved persons.

Right to Health

The right to health of an individual has been cited by the judiciary in various cases. All these cases have contributed to the development of the medico-legal system in India over the years.

In *Parmananda Katara* v. *Union of India*[861], it was held by the Supreme Court of India that medical professionals, whether they are working in the public or private sector, have the obligation to provide medical aid to persons who are sick and injured without insisting on completion of legal formalities or procedure established under the Cr.P.C. It recognized that the State is under an obligation to protect life under the Constitution. The Court noted that this obligation is delegated to those who are responsible to provide treatment for saving lives, which includes medical professionals.

Further clarity on right to health was given by the Court in Paschim Banga Khet Mazdoor Samity v. State of W.B.[862] wherein the government hospitals cite the non-availability of beds as a reason for not providing treatment, violate Article 21 of the Constitution. In Kirloskar Brothers Limited. v. Employees State Insurance Corporation[863], the Court held that workmen also have the fundamental right to health. It further expanded the obligation of the state to

[859] 1991(1) C.P.R. 499

[860] Singh, Gurjeet. "CONSUMER PROTECTION ACT 1986 AND MEDICAL PROFESSION IN INDIA: CONFLICTS AND CONTROVERSIES." *Journal of the Indian Law Institute* 37, no. 3 (1995): 324–63. http://www.jstor.org/stable/43951604.

[861] *Pt. Parmanand Katara v. Union of India, (1989) 4 SCC 286 : AIR 1989 SC 2039*

[862] *Paschim Bang KhetMazdoorsamity* v. *State of West Bengal*, (1996) 4 SCC 37

[863] *Kirloskar Brothers Ltd.* v. *Employees' State Insurance Corporation*, (1996) 2 SCC 682

ensure the right to health from the State to the employer, making employer responsible to observe the right to health of their workmen. In the area of medico-legal cases, the law, which is not quite developed in comparison to Western countries, the burden has mostly been on the Courts of the country to lay down guidelines to regulate the course of such cases. The decisions of the Courts in India play a most important role in medico-legal cases as they provide better clarity than existing legislation in medical law. The Court's decisions are based on any existing statute, principles of natural justice and the opinions of experts appointed by the Courts as amicus curiae.[864]

Conclusion

With the advent of the Consumer Protection Act there is better protection for those who pay for their medical services. Since their number is on the increase the coverage will also increase. But two categories remain excluded, those who are denied service and those who cannot pay for the service. There were attempts to bring the last category, which constitute the vast majority within the jurisdiction of the agencies, and it was rejected as contrary to the scheme of the Act. In fact, that category of patients is catered for by philanthropic institutions and Government hospitals. Steps have to be taken in both the cases for a better supervision and a therapeutic audit in order to avoid mishaps. As far as doctors are concerned whatever may be their reasons against the Act, there is no denying the fact that medical service is rendered more and more on commercial line and the treatment is becoming more and more costly. The adjudicating agencies offer sufficient guarantee of justice to them on account of appeals and revisions provided for. They may also take some preventive steps. The first one is to be careful. They may also refrain from dealing with cases beyond their competence and equipment. Ofcourse they will not sent away a person in need of an urgent medical treatment. When in spite of all precautions, a case is filed before a C.D.R.A. the best defence of the doctor is the case sheet, which has to be kept genuinely with entries now and then of the observations and treatment. But doctors may still have a legitimate grudge. When a complaint is taken on file, it may receive publicity tarnishing the reputation of the doctor concerned, even il ultimately the complain fails. This may perhaps be obviated by making conciliation mandatory in the agency before taking the complaint on file. Secondly medicine may be included as one of the qualifications prescribed for being a member of the C. D R.A . When given an opportunity to sit in judgement over the acts of other professionals, doctors will reconcile themselves with others probing their performance. In summing up, a consumer activist has rightly observed: Medical professionals are not the only ones being held liable for professional negligence under the Consumer Protection Act. The long arm of the law extends to almost everyone who renders service for a fee - lawyers, architects, engineers, chartered accountants. Therefore, the inevitable conclusion of the above discussion is that if used properly, CPA which is a benevolent, beneficial and indeed a consumer friendly legislation, can definitely ensure accountability in almost every profession. What is required is the necessary awareness amongst consumers about their rights and above all their willingness to assert for these rights as well as the determination and confidence to expose the negligent and insensitive professionals.[865]

If a doctor or medical professional becomes negligent then repercussions are beared by the consumers and still they are not compensated because of insufficient evidences, doctors used to hide evidences. Court should play an active role in this and may also direct the initial burden on the denfene in cases like this.

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