Medical Negligence: Duties & Liabilities of Medical Practitioners

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Abstract

Once the life of a human being is lost on account of callous attitude of a medical practitioner in due performance of his skilful duties, then the medical professional must be fastened with the liability for his/her wrong doings of professional practice. Through series of legal decisions narrating the skill of a practitioner and its performance with established scientific principles and its abrogation leading to mishaps in due performance were thoroughly discussed and there are occasions when the medical professionals are fastened with liability and were evaluated. In some situations the principle of res ipsa loquitur i.e. "the thing speaks for itself" is invoked in case of medical negligence, however, with extreme care. Indian Supreme Court has also taken the view that in certain circumstances no proof of negligence is required beyond the "accident" or "injury" itself. On the other hand public awareness of medical negligence in India is growing. Hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. After the enactment of Consumer Protection Act, 1986, patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. Therefore the need of the hour is to know in clear terms about medical negligence and duties & liabilities of medical practitioners and through this paper the author clarifies the position of medical professionals vis-à-vis medical negligence.

Key words : Medical negligence, Civil liability, Criminal liability, Medical practitioner, Duties.

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence.

Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional. In the case of *the State of Haryana vs Smt Santra*,[i] the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill".

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i. (2000) 5 SCC 182: AIR 2000 SC 1888: 2000(1) CPJ 53 (SC)
ii. JT 1995 (8) SC 119; AIR 1996 SC 550; 1995 (6) SCC 651; 1995 (3) CPJ 1 (SC); 1995 (3) CPR 412 (SC)

Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions specified in the case of *Indian Medical Association vs V P Shantha*[ii]. Doctors are not liable for their services individually or vicariously if they do not charge fees. Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered a "service" as defined in Section 2 (1) (0) of the Consumer Protection Act, 1986.

However, a doctor can be held liable for negligence only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would not have made the same error.

In a key decision on this matter in the case *of Dr Laxman Balkrishna Joshi vs Dr Trimbak Bapu Godbole*[iii], the Supreme Court held that if a doctor has adopted a practice that is considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong.

Certain conditions must be satisfied before liability can be considered. The person who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty; and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting expert opinion.

The principle of *res ipsa loquitur* comes into operation only when there is proof that the occurrence was unexpected, that the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor and not any other person was negligent.

Supreme Court in Indian Medical Association vs. V.P. Shantha & Others[iv] .

iii. 1968 ACJ 183 (SC);AIR 1969 SC 128; 1969 (1) SCR 206.
iv. JT 1995 (8) SC 119; AIR 1996 SC 550; 1995 (6) SCC 651; 1995 (3) CPJ 1 (SC); 1995 (3) CPR 412 (SC).

Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of 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 medical professionals.

Professionals such as doctors are persons having special skill and knowledge and possess such requisite qualifications that they will profess their skill with reasonable degree of care and caution. Medical negligence is defined as want of reasonable degree of care and skill, or willful negligence on the part of medical practitioner in the treatment of patient. The essential components for liability for negligence are as follows:

a) The existence of a duty to take care, which is owed by the defendant (doctor) to the complainant(patient).

b) The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty and damage, which is both casually, connected with such breach and recognized by the law.

Duties of a Physician towards patients and non-patients:

"Immunity from suit was enjoyed by certain professions on the grounds of public interest. 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 skill and care."

A duty is an act which one ought to do. Not to do a duty would be a wrong. The act of duty may be a positive one or a negative one. In the latter, not doing an act when one ought to constitutes a wrong.. Duties, like wrongs are of two kinds, being either moral or legal. In professional practice there is a third kind-namely ethical. When the law recognizes an act or non-act as a duty, it commonly enforces its performance, or punishes disregard of it. For the physician, legal duties are laid down in the Indian Medical Council Act (Central statute) and various State Medical Council Acts (State statute). Ethical duties are laid down in a code-The Indian Medical Council-Code of Medical Ethics. Clause 10 and clause 13 of the Code of Medical Ethics relate to "Obligations to the Sick" and "The patient must not be neglected " respectively.

The concept of duty involves two elements. First, there is the question whether the doctor has a duty to act at all for the benefit of the patient. Second, once the duty to act arises, the inquiry will consist

about the nature of the duty. The first question involves the existence of duty whereas the second involves the standard of care to be adopted in the discharge of that duty.

Duty- When does it arise and when does it end?

When a doctor does any affirmative act that creates a risk of harm to a patient, a duty of care arises, and thereafter the doctor is required to exercise reasonable care to protect the patient from harm. Thus, once a doctor undertakes to treat a patient he is under a duty to take reasonable care not to harm the patient. What is reasonable care is a matter of fact and will vary from case to case according to the standard of care required of the medical practitioner. A doctor who has not agreed or undertaken to render care to a patient and who is otherwise not subject to the orders of others regarding acceptance of patients generally owes no duty to enter into a professional relationship. A medical practitioner as the employee of a hospital would be bound to treat a patient unless his employer orders him otherwise. However, in *Parmanand Katara versus Union of India*[v], Justice Misra and Oza stated" Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge, the paramount obligation being cast upon members of the medical profession". This comment, however, related to providing emergency care to accident victims in public or private hospitals in an action brought in public interest. The Supreme Court reiterated the duties of a doctor in *Laxman Balkrishna Joshi versus Trimbak Bapu Godbole & Another*[vi] by observing "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 and a duty of care in the administration of that treatment."

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v.A.I.R. 1989 SC 2039.
vi. 1969 (1) SCR 206

Sources for creation of a duty.

Duty based on consensual professional relationship.

The most common basis for creation of a physician-patient relationship is a simple contract. When a physician agrees, that in exchange for a fee, he will treat an individual, an express contract is created. An implied contract-is one that the courts will infer from the circumstances- such as the commencement of treatment with the consent of the patient and with expectation of compensation for the physician. The contract is not looked upon as a service contract unless the doctor charges a specific fee for a specific result.

Duty based upon an undertaking to render medical care.

There are some situations that may not fit in the contract model. A service even given gratis without any promise or expectation of receiving a fee would create a situation where a duty of care is imposed on the physician on the " Undertaking theory ". The undertaking theory is based on the principle of tort liability wherein a physician who undertakes to treat a patient is liable to the patient should the patient suffer harm due to the negligent act or omission of the physician.

Other sources of duty.

A duty may be based on a contractual obligation to a third party. This situation will arise when parents pay for the treatment of their child. Third party liability can also be based on the undertaking theory if the physicians conduct proceeds far enough to constitute an undertaking to perform.

Multiple health care providers.

This duty of care arises when a patient is looked after by many doctors. Each one of the attending physicians owes a duty to the patient and all may become liable to him jointly or severally depending upon the circumstances of each case. Here it is the duty of a doctor who disagrees with the line of treatment being adopted to tell the patient his view, or alternatively remove himself from the case, after giving adequate notice to both the patient and other doctors concerned.

Duration of the duty and abandonment

Having established a relationship a physician is not entitled to terminate the relationship or fail to attend the patient unless he gives reasonable advance notice. What constitutes reasonable notice depends

upon the condition of the patient and the availability or other suitable medical care. A relationship between the patient and the doctor comes to an end if the patient has discharged the physician or has otherwise terminated the relationship. Alternatively an emergency or other circumstances occur that justifies a failure on the part of the physician to attend the patient. A doctor, knowing about his non-availability after a period of time to treat the patient, would be liable to the patient if he fails to attend. Under some circumstances, a physician may not be able to terminate the relationship even after giving reasonable advance notice. Example: a physician has agreed to perform surgery and then decides not to do so, the patient may have an action for breach of contract.

When a physician-patient relationship is unilaterally terminated without reasonable notice or justification, it is said that the physician has abandoned the patient. Abandonment involves a conscious absence of reasonable notice. A physician is liable to the patient for abandonment should the patient suffer harm.

Incapacity of the physician that was not reasonably anticipated and which prevents the physician from giving timely notice should prevent liability of the physician. However, when the patient merely fails to pay or does not co-operate in the treatment will not relieve the physician, who, without reasonable notice, abandons or negligently fails to attend the patient.

Scope of duty:

A private practitioner may choose to limit the conduct of his practice with respect to such matters as clinic hours, house calls and after hours visits to the home of his patient. A physician may also limit the type of practice. The physician should inform his patients of them in advance unless the same is already known.

Duty in non-therapeutic relationships and services

A physician may owe a duty of care to someone even though the physician contracts with or is paid by someone else. Examples include examination of insurance applicants; of claimants for personal injury, disability and medical benefits; of applicants for employment and of prospective employees. Here, the physician would be liable if he negligently actively injures the examinee and also for acts of omission - for example, a physician fails to diagnose a treatable disease. The practical fallout is on physicians who are examiners for Life Insurance, Corporations and other Government and non-Government agencies who use their services for various purposes. An examining physician is also expected to exercise reasonable care with respect to accuracy of any tests and findings actually communicated to the

examinee. Failure to accurately report on laboratory tests would make the physician liable both to the examinee and to the person who has paid for the examinee.

Potential duty and liability to non-patients

An important issue to determine is the liability of the physician to a non-patient who may sustain injury due to negligent misdiagnosis of a patient's condition, where a third party is injured due to unintentional act of the patient. Example: a physician may be liable if he negligently failed to diagnose epilepsy and to warn the patient of possible fainting and the patient thereafter lost control of his vehicle and injured the pedestrian-plaintiff. There is thus a duty to protect others by warning the patient about the effects of prescribed medication on his ability to operate a motor vehicle. Similarly, a physician would be liable to a non-patient if he fails to notify communicable disease to public officials when he is required to do so. A non-patient child gets meningitis from an infected classmate whose physician had failed to notify public officials of his patients meningitis, the physician would be liable to the non-patient.

Application of Doctrine of res ipsa loquitur in medical negligence cases:

The doctrine of *res ipsa loquitur* is not of universal application and has to be application and has to be applied with extreme care and caution to the cases of professional negligence in general and that of the doctors in particular. Else it would be counterproductive. Simply because a patient has not favorably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable, per se, by applying doctrine. Res *ipsa loquitur* is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonably explanation as to the cause is coming forth from the defendant.

No where it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule and accordingly it may be interpreted that a case under Section 304-A IPC cannot be decided solely by applying the rule of res ipsa loquitur. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless.

Bolam Test :

Since 1957, the Bolam Test has been the benchmark by which professional negligence has been assessed. It is based on the direction to the jury of a High Court Judge, McNair J, in *Bolam Vs. Friern Hospital Management Committee*[vii]. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

The statement of law has been subsequently approved by the House of Lords in a number of important test cases as the basis of liability in medical negligence cases : *Maynard vs. West Midlands Regional health Authority (diagnosis)*[viii], *Whitehouse vs. Jordan (treatment)*[ix], *Sidaway vs. Benthem Royal Hospital Governors (disclosure of information and consent).*[x]

The Bolam test has been criticized as a state of the art descriptive test based on what is actually done, whereas in negligence cases generally, the test is a normative test based on what should be done. This has made it more difficult for plaintiffs to succeed in medical negligence cases and was commented on by the Pearson Commission who noted the difference between the success of negligence claims generally (60%-80%) as opposed to medical negligence claims (30%-40%). Negligence or recklessness?

The Supreme Court of India hearing the appeal, in *Dr. Suresh Gupta vs. Govt. of Delhi*[xi], doubted the correctness of the view taken and expressed the opinion that the matter called for consideration by a Bench of three Judges. The referring Bench in its order dated. 9/9/2004 assigned two reasons for their disagreement with the view taken in Dr. Suresh Gupta's case (i) negligence or recklessness being 'gross' is not a requirement of Section 304A of the Indian Penal Code (homicide by rash and negligent Act) for fixing criminal liability on a doctor. Such an approach cannot be countenanced. (ii) different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent.

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vii. (1957) 2 ALL ER, 118.
viii. (1985) 1 ALL ER 635 (HL)
ix. (1980) ALL ER 650.
x. (1985) 1 ALL ER 643 (HL); (1985) EWLR 480 (HL)

By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence is being done to the plain and unambiguous language of Section 304A of IPC. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter, shall decide, placed at a different pedestal for finding out, whether rashness or negligence was involved. In the instant case, the cause of death was found to be "not introducing a cuffed endotracheal tube of proper size so as to prevent aspiration of blood from the wound in the respiratory passage". The Bench formed an opinion that this act, attributed to the doctor, could be described as an act of negligence as there was lack of due care and precaution.

The Judgment may be interpreted as an indicator that 'gone are the days when doctors and nurses could base their practice on the principles of beneficence, non-malfeasance and therapeutic privilege alone. They must now be able to defend their actions and have their reasons scrutinized and tested for logicality'. Earlier, the suggestion that the 'doctor knows best' led Lord Wolf to comment that the court would no longer apply a deferential view to this doctrine, meaning that the medical fraternity should be more open to scrutiny with regard to their decision making.

Doctors' Liability under the Consumer Protection Act

In 1995, the Supreme Court decision in Indian *Medical Association v VP Shantha* brought the medical profession within the ambit of a 'service' as defined in the Consumer Protection Act, 1986 . This defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries in the course of treatment could now sue doctors in 'procedure-free' consumer protection courts for compensation.

The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the Consumer Protection Act). They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.

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xi AIR 2004 SC 4091.

A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The 'contract of service' is beyond the ambit of the Consumer Protection Act, 1986, under Section 2(1)(o) of the Act.

The Consumer Protection Act will not come to the rescue of patients if the service is rendered free of charge, or if they have paid only a nominal registration fee. However, if patients' charges are waived because of their incapacity to pay, they are considered to be consumers and can sue under the Consumer Protection Act.

Doctors' Liability under tort law

Under civil laws, at a point 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. The onus is on the patient to prove that the doctor was negligent and that the injury was a consequence of the doctor's negligence. Such cases of negligence may include transfusion of blood of incorrect blood groups, leaving a mop in the patient's abdomen after operating, unsuccessful sterilisation resulting in the birth of a child, removal of organs without taking consent, operating on a patient without giving anaesthesia, administering wrong medicine resulting in injury, etc.

In India as in England, it is well settled that medical malpractice cases are governed by the general principles of law of torts. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence, administrative negligence or negligence 'per se'.

It was also observed that where a person is guilty of negligence per se, no further proof is needed (*Poonam Verma v Ashwin Patel and Ors.*[xii] Negligence therefore consists of two acts. The act of not doing (omitting) something, that a reasonable man, under the circumstances, would do (act of omission);

and doing something which a reasonable prudent man under the circumstances would not do (act of commission).

It is not necessary that the duty neglected should have arisen out of a contract between the patient and the doctor. However, the duty may arise by a statute or otherwise; and if it is neglected, resulting in an injury to any person, he will get a right to sue for damages. There cannot be a liability for negligence unless there is a breach of some duty. Hence, no case of actionable negligence will arise unless the 'duty to be careful' exists.

xii. (Supreme Court Civil Appeal No. 8856 of 1994. Decided on 10th May, 1996).

Death due to medical negligence is an offence, which can be agitated both in the criminal court, under the Indian Penal Code or in the consumer court under the relevant sections of the Consumer Protection Act or alternatively the same may also be agitated in the civil courts under the Law of Torts. Section 304A of the Indian Penal Code deals with death caused by a rash or negligent act.

Doctors' Liability under criminal law:

In certain cases, negligence is so blatant that it invites criminal proceedings. A doctor can be punished under Section 304A of the Indian Penal Code (IPC) for causing death by a rash or negligent act, say in a case where death of a patient is caused during operation by a doctor not qualified to operate. According to Supreme Court decision, the standard of negligence required to be proved against a doctor in cases of criminal negligence (especially that under Section 304A of the IPC) should be so high that it can be described as 'gross negligence' or 'recklessness', not merely lack of necessary care. Criminal liability will not be attracted if the patient dies due to error in judgment or accident. Every civil negligence is not criminal negligence, and for civil negligence to become criminal it should be of such a nature that it could be termed as gross negligence.

Very rarely can a doctor be prosecuted for murder or attempt to murder as doctors never intend to kill their patients, and hence do not possess the required level of guilty intention. When doctors administer a treatment involving the risk of death, they do so in good faith and for the patient's benefit. A doctor can also be punished for causing hurt or grievous hurt under the IPC. However, Sections 87, 88, 89 and 92 of the IPC provide immunity from criminal prosecutions to doctors who act in good faith and for the patient's benefit. But the defence must prove that the doctor acted in good faith and for the patient's

benefit. For example, a doctor who consciously or knowingly did not use sterilised equipment for an operation cannot be said to have acted in good faith.

Conclusions:

The law of medical negligence is a subject matter of a number of judicial decisions of Courts in India and in England.

The essence of said decisions is that professional negligence or medical negligence may be defined as want of reasonable degree of care and skill or willful negligence on the part of a medical practitioner in the treatment of a patient, with whom a relationship of professional attendant is established, so as to lead to his bodily injury or loss of his life. Further, one of the tests of medical negligence is that something which is required under medical practice to be done and was not done or what was done was contradicted at the same time. It is also a settled principle of law that a specialist is required to know the latest technique for management of the patient and if he is ignorant about it, then he could be considered to be negligent in following his profession.

Many in the medical World resent the intervention of law and courts in matters of professional ethics. They assume a justifiable reason for that attitude. Lawyers know little of science and technology, particularly the frontier science of biomedical research. Therefore, the medical community would prefer issues to be settled within the peer group rather than outside the profession.

However, law cannot be totally avoidable so long as technology can be abused and exploitation can happen in the name of experimentation. Human Rights have become central to governance, and no activity can escape the moderation of the human rights discipline. Wherever there are rights, there are duties as well, and implementing rights and duties is the business of law and courts. Of course, if ethics prevails, law becomes unnecessary. Though law and ethics have the same centre, that is, human beings in society, they have a different circumference. In a sense, law also is a moralizing force, and we say in jurisprudence that law is the minimum of morals. Certain violations of ethics may not be violation of law, but all violations of law are violations of ethics as well.

A physician is expected to uphold the dignity and honor of his profession. Once having undertaken a case, the physician should not neglect the patient. The doctor declares, while taking their pledge at the time of registration, that they would maintain the utmost respect for human life and practice

their profession with conscience and dignity, and that the health of the patients would be their first consideration.

The doctor-patient relationship has undergone a sea change since a decade. The relationship between the two based on trust, sacredness and confidence, has become the talk of olden days and now it rings hollow. Since commercialization has crept into practically in every field, the medical profession is no exception to it. The doctor-patient relationship has deteriorated considerably. As a medical practice assumes the character of any industry with tradable products and services, more and more ethical norms will change to legal rights and duties enforceable through civil and criminal courts.

Overall the question of professional negligence is problematic because, to a certain degree, each profession sets its own standards and may to that extent be considered "self-regulating". The arguments are complex. The difficulty for the law is to strike a balance between the interests of the professionals and those who rely on them. There is a form of legal pendulum that can swing either way depending on the policy issues involved but this is sometimes of little comfort to those who feel that they have not found justice in the legal system.

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