

Medical Malpractice in India: A Critical Analysis of Liability and Defense Framework

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Abstract

Expectation of a reasonable degree of care is the foundation for alleging a breach of duty. In the wake of recognition of 'right to health' as a fundamental right declared universally. Moreover, the era of consumerism has dug deep into the medical profession making consumers aware of their lawful demands and rights making it a weapon in their hands for civil proceeding for tortuous or criminal prosecution for disregard and for lack in service in the consumer courts. The doctor-patient relationship stands on trust and faith. With the life expectancy being increased for technological and advancement in the medical science, no disease seems to be untreatable and challenged. However, concerns are their professional competence, compliance to therapeutic and laboratory standards of MCI on equipments and facilities, Wrong prescriptions, overdoses and non expertise, improperly equipped hospitals and on specific still continue raise agitations amongst the patients and relatives. Given all the justified reasons, often it becomes very difficult to sustain a claim for all the economic and non economic damages.

Keywords: *medical malpractice, negligence, physician*

Introduction

Ancient world civilizations have imprints of medical negligence being treated as a crime than a tort. However, with time, the judiciary treated it more of a civil wrong than a crime with a reluctance to implicate physicians with any reckless behavior or for deviation from the normal practice standards because of an underlying presumption that a sensible practitioner on good faith intends to extend best possible care and intends to cure. The evolution of common law on professional negligence dates back to the landmark case of Donoghue v. Stevenson . Medical negligence is a subset of professional negligence, requiring an additional perspective through the *Bolam's*¹ test which was accepted and reiterated in the landmark judgment of Jacob Mathew v. and as put by Bingham L.J. could mean

that, "professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field."²

Patient- Doctor Relationship

The doctor-patient relationship is a an relationship of a special trust and confidence with an underlying understanding of duty to act for the benefit of the fiduciary with a strong reliance on the skills and acumen of the doctor, he being in a string influential position .

The relationship of a patient and doctor being build on the highest level of trust and confidence, and health being the dearest assets to a person's wealth and his sustenance of family, any slip of advice, wrong and untimely diagnosis, compromised standard of care and precaution etc. often threatens the sanctity of the profession with allegation of commercialization and money making business. In a land mark case the court held that "the attitude of a patient is poised between trust

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in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure that the superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient.³

Apart from this fiduciary relationship, admittance of a patient under a doctor's treatment leads to a implied contractual obligations (except where it requires consent) utmost good faith, informed consent and assurance of appropriate standards of quality in due course of recovery.

Tortuous Liability of medical Professionals

This is a specific tort of professional negligence where the act or omission falls short of the test of 'reasonable and prudent person. The widely acclaimed judgment of *Jacob Mathew v. State of Punjab & Another*⁴ has been instrumental in deciding the distinction between the jurisprudential concept of negligence in civil and criminal law. It observed that, "for negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution."

For negligence to be proved, the following elements are necessary

a. **Duty of Care**

b. **An act** : There must have been an omission or commission of an act by the doctor which was not supposed to be done

c. **Breach of duty**: "Such act or omission must have been occasioned either by not doing something which a reasonable man, under given set of circumstances, would do, or by doing some act which a reasonable prudent man would not do."

d. **Consequential damage**: Breach in duty has directly resulted in the injury of the person, either economic and non economic.

Any allegation of negligence against the doctor has to be materially substantiated with the best of evidence available in medical science and opinion of the experts.

Criminal Liability of Medical Professionals: Existing Legal Framework in India

The subjective state of mind with a guilty mind is the critical factor in implicating an accused doctor for criminal negligence. As observed in the case of *P.B. Desai v. State of Maharashtra and Another* (2013 15 SCC) it was rightly observed by the Apex court that, "the only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate willingness to subject others to the risk of harm. Thus, negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another to the risk of harm where the actor is aware -of the existence of the risk and, nonetheless, proceeds in the face of the risk."

Further in another case it has been held that, "to prosecute a medical professional for negligence under criminal law, it must be established that he/she did something or failed to do something which, given the facts and circumstances, no medical professional in his right senses would have done or failed to do. The risk taken by the doctor should have been of such a nature that the resulting injury was most likely imminent⁵."

Under the Indian Penal code, case of medical negligence are often filed under section 304-A making a rash and negligent act punishable with imprisonment for a term of two years, or with a fine or with both even though it was not intended either to cause death, or there was any like hood that he shall cause such. However, safeguard measure has been set in much known case of *Suresh Gupta (Dr) v. Govt. of NCT of Delhi*⁶, wherein, the standard of negligence required to be proved against a doctor under section 304A should be so high that it can be described as 'gross negligence' or 'recklessness', not merely lack of necessary care.

Some inherent immunity measures have been carefully crafted to protect practitioners for acts done in good faith. Section 88 of the IPC provides "exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 states that treating without consent of patient is permissible if patient is unconscious, mentally ill or gravely sick. When the time required for disclosure would create a substantial risk of harm to the patient or third parties, full disclosure requirements may not apply. It is implied that the procedure and surgery is done to save the life or limb

of the patient. If possible, surrogate and proxy consent should be taken.”

The court also held that, “while, the medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence⁷.”

Consumer Protection Act:

The advent of Consumer protection Act, 1986 brought a swiping change in the perspective of rights of consumers ranging from right to be informed on quality, standard of services, consumer awareness, redressal for any exploitation of consumers’ interests. Thus, questions have often been raised on patient’s status of being a ‘consumer of services’, medical practitioner’s status as rendering ‘service’ under section 2(1)(0) and circumstances when it can be deemed to a service.

The verdict in *Indian Medical Association v. VP Shantha*, (1995) 6 SCC 651 “settled all the concerns by covering the medical profession within the ambit of ‘service’ excluding those services of consultation, diagnosis and treatment (both medical and surgical) being rendered free of charge or under contract of personal service. However, service rendered at a non-Government hospital/nursing home where charges were required to be paid by persons who were in a position to pay and persons who could not afford to pay were rendered service free of charge would fall within ‘service’ as defined in section 2(1)(0). Thus settlement of legitimate claims arising under section 14(1)(d) and section 2(1)(g), the Consumer Disputes Redressal forums would apply the same principle as is applied before the civil courts. However the allegation of ‘deficiency of service’ would fail in a high risk case where accidental eventualities are not controllable.”

General Safeguards

It is a common knowledge that there is often a tendency to search for a human factor resulting in the unfortunate event and thus attribute the blame with some ‘act or omission’ which is normal reflection of distressed patient or the relatives. The Judiciary is in a process of

continuous efforts in retaining the sanctity of patient and doctor relationship and balancing the interests of the consumers and the service providers, certain safeguards and precautions/guidelines have to be maintained.

With successful implication of doctor for “professional misconduct” and setting Rs 6.08 crore compensation on Advanced Medicare Research Institute (AMRI) to pay for medical negligence, the famous case of *Kunal Shah v. Dr. Sukumar Mukherjee And Ors* clearly underlines some precautionary approach to be adopted by the Courts. It stated that “on receipt of complaints against a doctor or hospital, the consumer forum or criminal court, before issuing notice, should first refer the matter to a competent doctor or a committee of doctors, specializing in the field where negligence was attributed. Only after that doctor or committee “reports that there is a prima facie case of medical negligence should notice be issued to the doctor/hospital concerned. Stating that, no sympathy will be shown for doctors who are negligent, it reinforced a patient’s right to know the line of treatment being followed by doctors, including the risks involved in the treatment.”

The Constitutional bench in *Lalita Kumari v. Govt. of U.P* (2014) 2 SCC 1, provided a safeguard making an exception to mandatory registration of FIR, and held that there can be no registration of FIR against medical practitioners without preliminary inquiry.

Additionally, it requires individual medical practitioners and hospital administration to ensure;

a) Transparent Disclosures: “To secure the consent of the patient, an entailing (a) nature and procedure of the treatment; (b) any possible side effects of the medication; (c) availability of alternatives if any; (d) an outline of the substantial risks; and (d) adverse consequences of refusing treatment.”

b) Maintaining of Medical records

Conclusion and Suggestion

Every mishap, untoward incident or death during medical treatment need not necessarily points to the reckless conduct of the doctor and thus, criminal prosecutions without sufficient and satisfactory medical opinion pointing to their guilt could result in building mistrust amongst the patients and a great disservice to the community at large. In the field of medical profession service may vary from doctor to doctor however

adhering to the standard principles of service. Skills of the doctor also vary from person to person. Therefore it is said that, “negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.”

Ethical Clearance: Not required, as the research article is based on medical malpractice and liabilities of professional negligence. The research is doctrinally undertaken.

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