

Safeguarding Medical Professionals – Challenges and Solutions

Author:- *Kashish Aneja¹ and Rohit Rohilla²*

Abstract:

In today's age filing Medical Negligence suit is an emerging practice threatening one of the most noble of all – The Medical Profession.

This research paper aims to establish the need to protect the interest of medical experts and hospitals, which is in hanging. Medical Professionals need security from frivolous medical negligence cases as these hinder in the efficient discharge of their mandate, thereby jeopardizing the life in their hand resulting in a vicious cycle.

There has been a rising trend in cases filed and compensation granted under Consumer Protection Act for medical negligence. Also, the onus of proof required for proving negligence, is lower as compared to other offences, as it does not require the existence of both intention and knowledge on part of Medical Practitioners further acting as an incentive for the patient. Recognizing this position, the paper analyzes the importance of safeguarding medical professionals by providing practical solutions and their applicability. The paper will undertake a comparative study between the medico-legal aspects of UK, US and India.

The research involves support from case laws and first hand information directly obtained from medical and legal professionals.

Keywords: Medical Negligence, Medical Professionals, Medico-legal, Safeguards

¹ *Students of B.A.LLB (Hons.) (Semester V), Name of Institution: University School of Law and Legal Studies (USLLS), Guru Gobind Singh Indraprastha University(GGSIPU), New Delhi, India . House no. 81, Pocket A-1, Sector 8, Rohini, New Delhi – 110085, India*

² *Students of B.A.LLB (Hons.) (Semester V), Name of Institution: University School of Law and Legal Studies (USLLS), Guru Gobind Singh Indraprastha University(GGSIPU), New Delhi, India . Room no. 118, boys hostel 2, Sector 16 C, Dwarka, New Delhi, Delhi – 110078, India*

Safeguarding Medical Professionals – Challenges and Solutions

INTRODUCTION:

‘We may not be understood as holding that doctors can never be protected for an offence of which rashness/negligence is an ingredient. All that we are doing is emphasizing the need for care and caution in the interest of society; for the services, which the medical professionals render to human beings, is probably the noblest of all and hence there is a need for protecting doctors from frivolous or unjust prosecution. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.’³

There was a time when doctors were thought of as a Godly figure, but today things have evolved the other way round. The initial presumption in the mind of a common man is the negligence on the part of medical professionals (reverse burden of proof in the eyes of common man) which is further corroborated by media in the form of media sensationalization.

In one of the most recent cases, The Bilaspur Chattisgarh Tubectomy Tragedy, the very initial blame, has been pointed towards the Doctor operating, which was done without any substantial reasoning or investigation report, resulting in his suspension. In the following days, there have been reports regarding a strong possibility that Ciproxin 500 tablets, the medication usually prescribed in such procedures, manufactured by Pharmaceuticals may contain zinc phosphide which is an inorganic compound that is used in pesticide products. The signs of its toxicity are indicated by the symptoms shown in the patients operated. Subsequently, the director of the

³ Jacob Mathew vs. State of Punjab 6 SCC 1 (2005)

Pharmaceutical was arrested. Here, without any prima facie evidence on the wrong done by the doctor, as of yet, the doctor has faced a certain degree of harassment causing a scar to a very reputed career. There exists an equal possibility of him being innocent. The question that arises is whether, such treatment with which he was dealt with was a justified one and wouldn't it hinder in the efficient and a fearless discharge of a doctors mandate. This is what this paper endeavours to explore and provide reasons for protection to Medical Professionals followed by suggestions for the same.

There exists a certain exceptional degree of care and responsibility vested on the Medical Professional towards his patient.

In *Parmananda Katara Vs Union of India*⁴ one of the key principles to be followed in the medical profession was laid down – ‘While attending to an emergency, doctor’s first priority is to save the life of the patient. He/she should do everything possible to save the patient and ensure that he is out of danger. All legal formalities stand suspended till this is achieved....Every doctor is bound to provide medical aid to the victims irrespective of the cause of injury; he cannot take any excuse of allowing law to take its course....it is the duty of the medical practitioner to make immediate and timely medical care available to every injured person, whether he is injured in an accident or otherwise.....Life of a person is far more important than the legal formalities.’

With such duties to be performed by the Doctor, and wherein, even the Law is given a back stage at such a situation; there is a need to provide special immunity to doctors to enable them to

‘save life, rather than saving themselves from vexations and speculative claims.’

⁴ AIR 2039 (1989)

NEGLIGENCE: An Overview

Negligence as a tort:

The concept of negligence, as a tort, as has been acceptable to Indian jurisprudential thought is well stated in Ratanlal & Dhirajlal, Law of Torts (Twenty-fourth Edition 2002, edited by Justice G.P. Singh).⁵

“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. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.”⁶

Negligence as Crime:

⁵ Jacob Mathew v. State of Punjab and another, A.I.R. S.C. 3180 (2005)

⁶ p.441-442, Ratanlal & Dhirajlal, Law of Torts (Twenty-fourth Edition 2002, edited by Justice G.P. Singh)

Under the Indian Penal Code, whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.⁷

The provision mentioned here above, is directed to the offences, where neither intention nor knowledge to cause death is present. It deals with homicide by negligence where death is caused because of the rash and negligent act of the offender.

As laid down by the apex court in *State of Gujarat v. Haiderali*,⁸ Section 304A has to make room for the graver and more serious charge of culpable homicide.

Now, from the authorities discussed here above, one can say that it is easier to opt for filing a suit seeking relief against tortious liability for negligence than filing a complaint under Indian Penal Code, because of following reasons:

1. For filing a criminal complaint, death is one of the essential ingredient thereby making it graver and more serious charge, while under law of tort no such condition is there.
2. Higher degree of negligence is demanded in order to establish a criminal offence than is sufficient to create civil liability.⁹
3. There exists no need to prove intention or knowledge on part of the Doctor for a tortious claim, making it all the more easier.
4. It is easier to approach a consumer court rather than regular district courts.

Thereby, it is a rising trend of filing civil suits for medical negligence and as a whole, the medical fraternity is exposed to legal liability and enormous compensation. It is turning out to be a matter of vengeance for families who lose their loved ones, even without any default on part of the doctor.

⁷ Section 304A, Indian Penal Code 1860

⁸ AIR SC 1012 (1976)

⁹ Quoted in *Andrews v. Director of Public Prosecutions*, A.C. 576 [1937]

MEDICAL NEGLIGENCE IN INDIA:

As discussed above, following are three ingredients of negligence:

1. A legal duty to exercise due care.
2. Breach of the said duty.
3. Damage.

Medical negligence has no dissimilar ingredient than mentioned above. It is only that, doctors are the defendant in medical negligence cases, oftentimes.

Duty to exercise due care- *when emanates.*

The duty of a doctor to exercise due care either arises out of a contract or tort law. The duty of care to be exercised by a doctor shall be of such nature as expected from an average practitioner of class to which he belongs. The same has been held by the Andhra Pradesh High Court in *Dr. P. Narsimha Rao v. G. Jayaprakasu*.¹⁰

The test for determining medical negligence as laid down in *Bolam's Case*¹¹, holds good in its applicability in India, as observed by Supreme Court in *Jacob Mathew v State of Punjab*¹². The observation made in this case was as follows;

¹⁰ A.I.R. A.P. 207 (1989).

¹¹ 1 W.L.R. 582, 586 [1957].

¹² A.I.R. S.C. 3180 (2005)

“Where you get a situation which involves the use of some special skill or competence, then 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.....A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”

Hence, there is a need to understand that, the negligence on part of a doctor can only be proved by a medical practitioner as a certain degree of special skill is required. Speculations among media and general public should be no grounds of scrutinizing and harassing the doctor, even at the stage of pre-trial.

Governing Laws:

The National Commission, in *Vasantha P.Nair v. Smt. V.P. Nair*,¹³ has laid down that a patient is a ‘consumer’ and medical assistance is ‘service’ and the consumer courts have the jurisdiction in the cases of deficiency in medical service.

With regard to liability of Doctors under this Act, the apex court has laid down following guidelines in *Martin F.D’Souza v. Mohd. Ishaq*,¹⁴

- that medical practitioner would be liable only where his conduct fell below that of the standard of reasonably competent practitioner in his field;
- that negligence of doctor must be gross negligence amounting to recklessness;
- that, a doctor is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another.

From the above discussion we can say that there is a lot of room to exercise discretion on this subject and hence, the decision taken by different doctors for a similar case scenario could be different. This creativity in the form of discretion needs to be protected.

¹³ I C.P.J. 685 (1991).

¹⁴ A.I.R. S.C. 2049 (2009).

The Supreme Court, in *Jacob Mathew v State of Punjab*¹⁵, was of the view that Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India, but till now no such step has been taken in this regard.

COMPARISON – USA AND UK

USA:

In response to concerns that there is a crisis in medical malpractice litigation, many states have adopted a variety of administrative and legislative actions, collectively referred to as “tort reform” measures.¹⁶ These reforms aim to bring an end to such lawsuits in which a particular offender pays the damages if other defendants have inadequate holdings (in cases of joint and several liability); and also to reduce the quantum of damages available to the injured party.

Proposals were also made for replacing the trial and jury system with a less formal process involving experienced decision makers with the view to handle such cases more efficiently and to wipe out over kind hearted juries.

The American Medical Association has proposed establishing a state medical board to discipline physicians and resolve medical malpractice claims.¹⁷

Designs have been made to promote pre-litigation settlement of disputes between parties. Extensive legal tools, such as depositions of parties to the litigation, have been developed to

¹⁵ A.I.R. S.C. 3180 (2005).

¹⁶ Hicks TC. William H. Harridge lecture: the medical malpractice crisis in surgery. *Am J Surg.* 2008;195:288–291.

¹⁷ Goldrich MS. Report of the Council on Ethical and Judicial Affairs. Washington, DC: American Medical Association; 2004.

encourage litigants to discover facts, assess the merits of their arguments, and hopefully reach independent resolution of the case. Thereby, few cases will actually make it to trial.

UK

The British medical malpractice system relies on its courts to adjudicate patient complaints. Most doctors in England are insured by the National Health Service (NHS) that handles all the legal and business aspects of medicine. NHS employee doctors are not personally liable for malpractice claims and do not have to buy malpractice insurance coverage. Funds for the NHS indemnity come from the government's general fund.

The NHS Litigation Authority (NHS LA) handles negligence claims on behalf of NHS organisations and independent sector providers of NHS care in England who are members of the NHS LA's schemes.

CONCLUSION AND SUGGESTIONS

While one cannot deny the fact that there are genuine cases involving medical negligence, the issue that constantly bothers the medical fraternity is that quite often, irreparable damage is caused to a doctor or the hospital on account of a large number of speculative complaints. At the end of the day, prolonged litigation adversely affects the reputation of a doctor or hospital even though he/it eventually wins the case.

The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end, he may be exonerated by acquittal or discharge but the loss, which he has suffered in his reputation, cannot be compensated by any standards.¹⁸

Suggestions:

- There is a need to have safeguards at the earliest possible stage of filing/initiation of a law suit so as to pin point frivolous cases in order to prevent, as much harassment and exploitation of the doctor.

¹⁸ Jacob Mathew vs. State of Punjab 6 SCC 1 (2005)

- Physicians are typically unaware of the intricate logistics, structure, and functioning of the legal system until faced with a lawsuit alleging medical malpractice. Hence a need to educate and make them aware about medico legal issues.
- There exists a need to educate the public at large that medicine is an inexact science. One cannot predict with certainty an outcome in many cases.
- In India, for medical negligence there aren't any specific guidelines for compensation as the calculation method for it is the same as laid down for Motor Vehicle Claims in *Sarla Verma & Ors. Vs. Delhi Transport Corp. & Anr*¹⁹. It is the need of the hour to identify a specific calculation method in order to prevent the persecution of a doctor.
- There might be a possibility of overlapping duties, resulting in conviction of doctors for the negligent acts of others. Thus, the duties of each member working in a hospital should be clearly marked off.
- As discussed earlier, proper guidelines, rules, regulations, etc., should be laid down, as also directed by the Supreme Court of India in *Jacob Mathew vs. State of Punjab*²⁰.
- In order to de-formalize and expedite the process, a panel of independent doctors shall be appointed involving experienced decision makers with the view to handle cases more efficiently.
- A more secure Indemnity Program should be worked out, to protect every doctor, on the lines of UKs' National Health Service (NHS), wherein, the entire funding comes from the government's general fund.
- Bodies such as Medical Council of India are to resolve medical malpractice claims. Under this proposal, the Council can amend the rules pertaining to medical negligence and lay down consistent damages etc.
- Encourage resolution by Alternate Dispute Resolution in order to reduce litigation, thereby controlling media trials and unnecessary sensationalization, finally safeguarding the medical fraternity.
- There should be a National Uniform Healthcare and Medico-Legal Policy. *The Medicare Service Person and Medicare Service Institution (Prevention of Violence and Damage to*

¹⁹ 6 SCC 121 (2009)

²⁰ 6 SCC 1 (2005)

Property) Act as prevalent in states like Haryana, West Bengal, and Delhi can be said to be a beginning to a safer medical environment.

Medical professionals in order to give in their best, need protection from uncalled legal liability and threats. While doctors who cause death or agony due to medical negligence should certainly be penalized, but it must be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counter productive and are no good for society. They inhibit the free exercise of judgment by a professional in a particular situation, which should rather be appreciated, encouraged and protected. These are the foremost steps to be taken for enhancing and revolutionizing the Healthcare Industry in our Nation.
