**THE LAW OF MEDICAL INACCURACIES**

**A study of medical negligence cases decided by District Consumer Disputes Redressal Forum of South Delhi and North 24 Paraganas West Bengal.**

**Abstract**

Ankuran Dutta, managing trustee of Anamika Ray Memorial Trust, Guwahati, had claimed that around 52 lakhs medical injuries are recorded every year in India and 98,000 people in the country lose their lives in a year because of medical negligence. [[1]](#footnote-1)These statistics are alarming and encouraging at the same time. This inspired the authors to conduct a study on medical negligence and examine two of India’s major areas - South District of New Delhi, the national capital, and North 24 Paraganas of West Bengal, the place from where the famous Anuradha Saha’s case began. Both the districts have large number of hospitals with the nation’s best doctors and specialists. Also the residents’ of these districts are well educated and aware. Authentic Statistical Data has been used to analyse the success rate of Medical Negligence claims and an attempt to suggest a better recourse for the judiciary has been made.

**Theoretical framework**

Medical Negligence- Medical Negligence is the lack of duty of care by medical professionals towards his or her patients. A lack in this duty results in tort of negligence. The standard of care expected is that of an ordinary competent medical professional exercising ordinary degree of professional skill.

A doctor owes a duty of care to their patients (L.B.Joshi v. T.B. Godbal)[[2]](#footnote-2) .A deficiency in this duty results in tort of negligence. The inclusion of medical service under the purview of expression ‘service’ of the Consumer Protection Act, 1986 (hereafter referred to as CPA) has provided an inexpensive and speedy remedy against medical negligence but the Consumer Protection Act, 2019 does not consider medical negligence as a service inaccuracy, instead claims it to be a crime against the victim. Litigants in India also have the choice of taking of their cases of medical negligence to civil courts, State Medical Council and serious offences could be tried under Code of Criminal Procedure.

When the doctor fails to meet the professions customary standard of adequate care, the patient can sue him for negligence. The standard of care expected is that of an ordinary competent medical professional exercising ordinary degree of professional skill. A medical professional is not guilty of medical negligence if he has acted in accordance with a practice accepted as proper by a responsible body of a medical men skilled in that particular art. (Bolam v. Friern Hospital Management Committee[[3]](#footnote-3), Jacob Mathew v. State of Punjab[[4]](#footnote-4)). The Supreme Court in Martin D’souza v. Mohd Ishaq[[5]](#footnote-5)directed the consumer forum to first refer the matter to competent doctor/committee of doctors and issue notice to the concerned doctor/hospital only when there is prima facie case of medical negligence in the report.

**Research Problem**

The expert medical opinion can be produced by both the parties. The Court can itself call for an expert opinion. However there is no clarity on the structure and composition of the body of medical experts. The test presumes that the doctors will act with integrity. Duty of Doctors towards Exposure of Unethical Act: Para 1.7 of MCI Regulations, 2002 reads: A Physician should expose, without fear or favour, incompetent or corrupt, dishonest or unethical conduct on the part of members of the profession. However, in the Parliamentary Standing Committee report on the Indian Medical Council (Amendment), Bill 2013 submitted to Rajya Sabha, the committee noted that medical professionals looking into these allegations were found to be very lenient towards their colleagues guilty of negligence and that none of these doctors are willing to testify another doctor as negligent and consequently the percentage of prosecution in the medical negligence cases by MCI is almost negligible (para 72).

**Research Question-**

1. What is the nature of medical negligence cases in South Delhi and North 24 Paraganas West Bengal?

2. Whether the District Consumer Disputes Redressal Forum, South Delhi and North 24 Paraganas West Bengal relies on ‘Bolam test’ which uses testimonies by body of medical experts to ascertain negligence?

**Data Source**

1. Delhi State Consumer Disputes Redressal Commission -South Delhi available at <https://dscdrc.nic.in/>.
2. West Bengal State Consumer Disputes Redressal Commission-North 24 Paraganas West Bengal available at <https://wbcdrc.nic.in/>.
3. Computerisation and Computer networking of Consumer forums in country (ConfoNet)

available at <https://confonet.nic.in/default.htm>l.

**Data collection and Sampling design-**

South Delhi and North 24 Paraganas West Bengal District Consumer Disputes Redressal Forum’s judgments of medical negligence cases from year 2009 to 2019 will be collected for the study. After the study of all the cases disposed from year 2009-2019 (36), the cases in which negligence was proved (10) will be analysed.

The researcher intends to classify the data collected on the following themes to answer the research questions and to find areas that can be explored further.

Following is the study-

**i. Outcome of cases 2009-2019 (Medical Negligence proved/not proved)**

|  |  |  |  |
| --- | --- | --- | --- |
| Sl. No | Outcome | Cases ( n= 36) | Percentage |
| 1 | Medical Negligence proved | 10 | 27.7% |
| 2 | Medical Negligence not proved | 26 | 72.2% |

**Analysis-**

It can be observed in this table that the ratio of case where medical negligence has not been proved to cases where medical negligence has been proved is more than 2:1. It was only in 27.7% cases in which medical negligence could be proved, which is a clear minority. Majorly the victims were unable to gather enough doctors’ expert opinion due to mainly two factors. Firstly, lack of communication with doctor community and secondly, no doctor would prefer to defame his own colleague. This leads to erroneous decisions by the courts, who were misled by one party’s advantage over the other. Thus the principle of justice, equity and good conscience wasn’t attained due to various lope holes in the functioning of the tort of medical negligence.

It is a frequently raised question that, if in certain cases a practitioner believes a medical practice to be unreasonably dangerous and he knows of a better practice, and as he fails to use his superior knowledge and skill, will he be liable? A principle laid down in Toth v. Community Hospital[[6]](#footnote-6) at Glen Clove, known as the Best Judgment Rule, states that if a medical practitioner possessing superior skill or knowledge is bound by duty to exercise a higher standard, shall be accountable if he fails to do so. However this principle does give rise to another problem. This arose in Burton v. Brooklyn Doctors Hospital[[7]](#footnote-7), where a new treatment, potentially better than the “customary practice”, exposes the patient to certain risks. If these risks materialize, then the practitioner shall be liable for not using the industry standard. Although “respectable minority” rule and “error in judgment” offer some safeguards to the doctors who treat the patients though their best judgment, it is better for the doctor to use his best judgments only in cases where it does not subject the patient to additional risk.

**ii. Profile of Hospitals**

|  |  |  |  |
| --- | --- | --- | --- |
| Sl. No | Description of Hospitals | Cases( n= 36) | Percentage |
| 1 | Single doctor clinics | 6 | 16.67% |
| 2 | Polyclinics | 2 | 05.56% |
| 3 | Private Hospitals | 16 | 44.45% |
| 4 | Government Hospitals | 12 | 33.34% |

**Analysis-**

In this table, it is observed that the maximum number of the medical negligence cases have occurred in private hospitals, followed by government hospitals. This clearly portrays that higher money charges from the private hospitals for their services do not reciprocate with the treatment they provide to their patients. On the other hand, ironically, it is observed that polyclinics which have lesser facilities and lacks the presence of proper equipments as present in private or government hospitals, has the least number of medical negligence cases. Single doctors have lesser number of medical negligence cases as compared to private or government hospitals. However it exceeds polyclinics in the number of medical negligence cases.

Going back in history, hospitals were considered to be charitable institutions and thus were exempted from all forms of liabilities. But in Schleondroff v. Society of N.Y Hosptal[[8]](#footnote-8), the court held the hospital liable for negligence and stated that “hospitals have evolved into highly sophisticated corporations operating primarily on a fee-for- service basis. The corporate hospital of today has assumed the role of a comprehensive health center with the responsibility for arranging and coordinating the total health care of its patients.”

Early decisions of the courts did not address the hospitals’ scope of liability for the negligence of the medical practitioners who generally do not receive any economic compensation from the hospitals. Under torts the most critical factor in determining the liability of the hospitals is the institution’s “right to control” their conduct and activity. This would determine whether the practitioners are “employees” or “independent contractors”. The hospital cannot exercise control over the way of performance of the practitioners as their job requires special skill. However vicarious liability can be proved based upon the doctrine of ostensible or apparent authority. This rule serves as an exception to the general rule that the hospital is exempted from the liability occurring due to negligence on part of independent contractors. In Simmons v. Tuomey Regional Medical Center[[9]](#footnote-9), the court held that the hospitals had undeniable liability for the physicians who practice in their emergency units. In order to prove this, 3 conditions are to be fulfilled, (1) the hospital held itself out to the public by offering to provide services; (2) the plaintiff looked to the hospital, rather than the individual physician, for care; (3) a person believed that the physician who treated him or her was an employee of the hospital. Other than these the hospital has a primary corporate responsibility, failure of which will make the hospital directly liable for negligence. It has corporate liability of general duty of care, custody and supervision and also duty to provide equipment and supplies.

**iii. Medical Negligence cases based on the area of specialisation/ management**

|  |  |  |  |
| --- | --- | --- | --- |
| Sl. No. | Area of Specialisation/ Management | Cases  (n=36) | Percentage |
| 1. | Cardiology | 4 | 11.11% |
| 2. | Orthopaedics | 3 | 08.34% |
| 3. | Mental Health | 1 | 02.78% |
| 4 | Gynaecology | 6 | 16.67% |
| 5 | E.N.T. | 2 | 5.56% |
| 6 | Ophthalmology | 6 | 16.67% |
| 7 | Cancer Specialist | 1 | 02.78% |
| 8 | Urology | 2 | 5.56% |
| 9 | Paediatrician | 2 | 5.56% |
| 10 | Deficiency | 3 | 08.34% |
| 11 | General | 4 | 11.11% |
| 12 | Dentistry | 1 | 02.78% |
| 13 | Foods and Beverages Management | 1 | 02.78% |

**Analysis –**

In the above study it can be observed that the maximum negligence cases were cases of gynaecology and ophthalmology. General and Cardiology cases were the next in number. Following the list till the end at the bottom with the least number of cases we have dentistry, cancer, food and beverages management and mental health cases. The rate of complications is higher in the women’s health related problems and the issues of sensory organs - eyes. For several years women’s health has been categorised into two main heads, pregnancy and child care. But this approach of looking into women’s health is incorrect. Numerous women’s health related issues are reported with delay which further increases the risk of medical inaccuracies. Sensory organs are the vital part of the human body, but they are sensitive and vulnerable to complications. Various patients of ophthalmologists are the ones who either suffered or are suffering with some other diseases and their eye problem is a result of the aggravation of other disease they possess. Therefore the rate of revival in such cases is very less and majorly it compounds the problem.

**CONCLUSION-**

In the above study it has been found that the maximum cases did not favour the complainants as they could not produce expert opinion. In cases where the court arranged for expert opinion it is observed that the opinions favoured the doctors. It’s a general observation that the medical experts don’t tend to give opinion against the practitioners of the same profession.

Medicine is regarded as the most noble and humanitarian professions. According to the Black’s Law Dictionary, Negligence can be defined as the Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.

Since medical science deals with human life and health, it is expected that the duty of care of hospital authorities and Doctors would be more compared to other cases. In this study, the medical negligence cases of 2 districts namely North 24 Parganas (West Bengal) and South Delhi for the past 10 years have been examined. It has been found that the number of medical negligence cases filed in North 24 Parganas is greater than any other type of case under the Consumer Forum. It is established that in case of a suit for damages against a doctor for negligence, the burden of proof is upon the plaintiff to prove that the defendant had been negligence and that negligence caused injury to the plaintiff of whom the plaintiff complained.[[10]](#footnote-10)

When we take into consideration the famous medical negligence cases of India such as Kunal Saha v. A.M.R.I (Advanced Medical Research Institute) famously known as Anuradha Saha Case[[11]](#footnote-11) and V. Krishan Rao v. Nikhil Super Speciality Hospital 2010[[12]](#footnote-12) – It is found that the court gave decisions in favour of the complainant but on statistical analysis only 10 cases out of 36 cases in the above mentioned districts have terminated in favour of the complainant in the past 10 years.

The Supreme Court in State of H.P v. Jai Lal and Ors laid down the concept of expert opinion.

“The water of the Bolam test has ever since flown and passed under several bridges, having cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched, as neat, clean and a well condensed one.”[[13]](#footnote-13) It is well accepted in India.

“A Court may prefer one body of opinion to other, but that is no basis for a conclusion of negligence.”[[14]](#footnote-14)Though it says that the court may prefer the opinion of any side, what has been observed in this study is that the patients failed to come up with expert opinion.

The traditional test used to establish breach of duty is to measure the standard of care received against the Bolam standard. You might wish to recall Mc Nair’s comments in this case, encapsulated in the principle that a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of professionals skilled in that particular art. This means that if a responsible body of professionals would support the defendant’s action then that standard (according to the Bolam test is acceptable (even if there is a body of opinion that is to the contrary).[[15]](#footnote-15)

The expert opinions given by the doctors were all in the favour of their fellow doctors. The ‘standard of care’ which is expected from the doctors is to come up to the standards of his fellow peers in order to be unchallengeable. This misinterpretation of law which leads to one sided judgements in most cases. The law talks about the standard of ‘reasonable care’, and a doctor does not act ‘reasonable’ just by acting as other doctors would.[[16]](#footnote-16)The test has been perceived as being too high a burden for claimants, too deferential to doctors and lacking in external objectivity.[[17]](#footnote-17)

Is there a way to modify the lope holes in Bolam? The judgement of the House of Lords in Bolitho was a shift from Bolam. While the later talks only about ‘reasonable care’ and ‘ordinary practice’ which is inclined towards the support of the medical practitioners and help them escape liability quite easily. On the other hand Bolitho demands the court cannot justify a opinion as ‘reasonable’ without doing a logical analysis of the opinion.

The Bolitho has been used in India by the Supreme Court twice once in the Samira Kohli v. Prabha[[18]](#footnote-18) and Vinitha Ashok v. Lakshmi Hospital[[19]](#footnote-19). It should be adopted more often in Indian cases as it make quicker to get relief and increases the burden on the medical practitioners and thus increases the scope for compensation.

Perhaps the court systems in India are not yet able to counter this problem at the very elementary level. There should be a radical change in the way judges interpret the laws of medical negligence.

1. Activists launch drive against 'medical terrorism’, ToI Guwahati, May 15th, 2016 (05:38 IST),  
   <https://timesofindia.indiatimes.com/city/guwahati/Activists-launch-drive-against-medical-terrorism/articleshow/52275073.cms>. [↑](#footnote-ref-1)
2. L.B. Joshi v. T.B. Godbal AIR 1969 SC 128. [↑](#footnote-ref-2)
3. Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582. [↑](#footnote-ref-3)
4. Jacob Mathew v. State of Punjab (2005) 6 SSC 1. [↑](#footnote-ref-4)
5. Martin D’souza v. Mohd Ishaq (2009(3) SCC 1. [↑](#footnote-ref-5)
6. *Toth v. Community Hospital*, 22 N.Y.2d 255. [↑](#footnote-ref-6)
7. *Burton v. Brooklyn Doctors Hospital 88 A.D.2d 217 (1982).* [↑](#footnote-ref-7)
8. *Schleondroff v. Society of N.Y Hosptal 105 N.E. 92 (*N.Y.*1914).*  [↑](#footnote-ref-8)
9. *Simmons v. Tuomey Regional Medical Center*, 330 S.C. 115. [↑](#footnote-ref-9)
10. Anto Nio Dias v. Fredreick Augustus, AIR 1936 PC 154. [↑](#footnote-ref-10)
11. Kunal Saha v. AMRI (Advanced Medical Research Institute) (2006) CPJ 142 NC. [↑](#footnote-ref-11)
12. V. Kishan Rao v. Nikhil Super Speciality Hospital (2010) 5 SCC 513. [↑](#footnote-ref-12)
13. Jacob Mathew v. State of Punjab ( 2005) 6 SCC 1. [↑](#footnote-ref-13)
14. *Id* at 9. [↑](#footnote-ref-14)
15. Samanta & Samanta: Medical Law Concentrate. [↑](#footnote-ref-15)
16. Kenneth Mc Norrie, Medical Negligence: Who Sets the Standard? Journal of Medical Ethics, Vol. 11, No. 3 (Sep., 1985), pp. 135-137. [↑](#footnote-ref-16)
17. Jacob Mathew v. State of Punjab ( 2005) 6 SCC 1. [↑](#footnote-ref-17)
18. Samira Kohli v. Prabha Manchandan & Anr. 1 2008 CPJ 56 SC. [↑](#footnote-ref-18)
19. Vinitha Ashok v. Lakshmi Hospital 2001 8 SCC 731. [↑](#footnote-ref-19)