Therefore there must be good relations between the Labour and Management in these organisations. It can be said that law alone cannot solve the problems of the employees a systematic education relating to the Labour Management relations will have to be given. Then only we can achieve peace and prosperity in this unorganised sector.

MEDICAL NEGLIGENCE AND THE LAW

By

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I. Abstract :

After the Consumer Protection Act 1986, came into effect, a number of patients have filed cases against doctors. This article presents a summary of legal decisions related to medical negligence, what constitutes negligence in civil and criminal law, and what is required to prove it. This article describes the various laws which govern the medical negligence in India. It highlights that health has always been a matter of universal concern not only in India but also throughout the world. Legal aspects of medical practice have always constituted an important component of medical education. Hence, from the early stage itself, the doctors and medical practitioners are made well-acquainted with the legal issues which are inherent in medical practice.

II. Introduction :

Public awareness of medical negligence in India is growing. Hospital managements are increasingly facing complaints regarding the facilities, standard of professional competence and the appropriateness of their therapeutic and diagnostic methods. After the Consumer Protection Act 1986 has come into force, some patients have filed cases against doctors and have established that the doctors were negligent in their medical services and have claimed and received compensation. As a result a number of decisions have been made on what constitutes negligence and what is required to prove it.

III Civil Law and negligence :

K.K. Srirama Murthy,[1] has lightly opinioned that, "Negligence is the breach of the 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 care, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of medical profession. In the case of the *State of Haryana v. Smt. Santa*, the Supreme Court held that ever doctor "has a duty to act with a reasonable degree of care and skill."[2].

Doctors in India may be held liable for their service individually or vicariously unless they come within the exceptions specified in the case of *Indian Medical Association v. V.P. Santha*[3]. The doctors are not liable for their service individually or vicariously if they do not charge fees. Thus free treatment at a Non-Government Hospital, Government Hospital, Health Care Centre, Dispensary or

1. *K.K. Srirama Murthy, Faculty Member, ICFAI Law School University Dehradun.*
2. *State of Haryana v. Smt. Santa*, (2000) 5 SCC 182 = AIR 2000 SC 3335.
3. *Indian Medical Association v. V.P. Santha*, AIR 1996 SC 550.

Nursing Home would not be considered a "service" as defined under Section 2(1)(o) of the Consumer Protection Act 1986. The statutory definition of service is as under.

"Service" means service of any description which is made available to potential (user and includes, but not limited to, the provision of) facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both (housing contractor) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

(a) *Vicarious Liability :—*

A Medical practitioner may be held responsible under the civil law for a negligent act of some third party such as a nurse, compounder, student or assistant employed to carry out nursing and medical duties of his patients, if the act was committed in his presence and to which he acquiesced. This is known as 'vicarious liability'. The principle of respondent superior is that as a general rule "a man is responsible for any wrongful act done by his agent or subordinate provided such act is within the reasonable scope of their employment. In *Cassidy v. Ministry of Health*[4], it was decided by the Court of appeal that the hospital authority was liable for the negligence of its paid whole-time medical staff.

However, no human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of disease. A doctor can be held of a failure that no doctor with ordinary skill would be guilty of, if acting with reasonable care[5]. An error or judgment constitutes negligence only if a reasonable competent professional with the standard skill that the defendant professes to have, and acting with ordinary care, would not have made the same error.[6]

In a key decision on this matter in the case of *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole*[7], 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/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, 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's opinion.

Doctors must exercise an ordinary degree of skill[8]. However, they cannot give a warranty of the perfection of their skill or a guarantee of cure. If the doctor has adopted the right course of treatment, he/she is skilled and has worked with a method and manner best suited to the patient; he/she cannot be blamed for negligence if the patient is not totally cured.[9]

(b) Contributory Negligence :

A patient has certain duties towards the doctor and to himself. In carrying out these duties, he is expected to meet the standard of care as a reasonable patient. If he does not or a breach of this standard is the proximate cause of his injury then he is the contributory negligent and patient may be barred from receiving damages. The National Commission in *Md. Aslam v. Ideal Nursing*

4. *Cassidy v. Ministry of Health*, (1951) 2 KB 343.
5. Observation of Lord President *Clyde* in *Hunter v. Hanley*, (1955) SLT 213. In : Nathan HL Medical Negligence, London : Butterworths; 1957.
6. *White House v. Jordon*, (1981) 1 All. ER 267, the House of Lord.
7. *Dr. Laxman, Balakrishna Joshi v. Dr. Trimbak Babu Godbole*, AIR 1969 SC 128.
8. *Smt. J.S. Paul v. Dr. (Mrs.) A. Barkataki*, (2004) 10 CLD 1 (SCDRC Meghalaya)
9. *Dr. Prem Luthra v. Iftekhar*, (2004) II CLD 37 (SCDRC – Uttaranchal); *Mrs. Savitri Devi v. Union of India*, IV (2003) CPJ 164; *Dr. Devendra Madan v. Shakuntala Devi*, I (2003) CPJ 57 (NC)

Home[10], held that the patient was not following the advice given to her and it is clear that there is a contributory negligence on the part of the patient. The State Commission in *Jyothi Vivek (Dr.) and Ors. v. Predeep and Ors.*[11], clearly held that the negligence of the patient himself in getting the plaster loosened might be one of the reasons for the deformity. Thus, the negligence of the minor boy (contributory negligence) in tampering with the plaster and giving movement to the fractured elbow without waiting for the full period for the removal of the plaster was the cause of deformity.

(c) Res Ispa Loquitur :

In some situations the complainant can invoke the principle of *Res Ipsa Loquitur* or "the thing speaks for itself". In certain circumstances no proof of negligence is required beyond the accident itself. The National Consumer Dispute Redressal Commission applied this principle in *Dr. Janak Kantimathi Nathan v. Murlidher Eknath Masane*[12].

The principle of *res ipsa loquitur* comes into operation only where 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. In *Achutrao Haribabu Khodwa and Ors. v. State of Maharashtra and others*[13], the patient, *Chandrikabai* was admitted to the civil Hospital for delivery of child. After delivery a sterilization operation was performed. After this operation, the patient developed high fever and also had acute pain, which was abnormal after such a simple operation. Subsequently second operation was conducted by other doctors which revealed that a map (towel) had been left inside the body of the patient. Ultimately the patient died. It was held that, the facts speaks for themselves and the Doctrine of *res ispa loquitur* clearly applies and the plaintiff is entitled for damages and cost. In *PM Ashwin (Master) v. Manipal Hospital*[14], both the legs of the new born baby were burned and scalded permanently on account of extremely hot water bag kept by the nurse in the operation theatre while an operation was going on. The heat was transmitted to the legs of the baby from a metallic platform on which the baby was kept. The doctrine of *res ispa loquitur* was held to be applicable and compensation of Rs.50,00,000/- was granted to the plaintiff.

(d) Constitutionality of medical care from Government :

At one time it was thought that the State was mainly concerned with the maintenance of the law and order and protection of life, liberty and property of subjects. Today we are living in an era of a Welfare State and in this Welfare State, health is considered to be man's most valuable possession since all his activities are influenced by the State of his health

Actually, the Constitution of India does not provide any special rights to the patient. In fact the patient's rights are basically indirect rights which arise from the obligation of a physician or the health care provider under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation 2002.

However, the Directive Principles of State Policy under Art. 42 and 47 of the Constitution of India require the State to make effective provisions for public health and just and human condition of work. It is the primary duty of the State to raise the level of nutrition and the standard of living of its people and the improvement of public health.

However, these rights are non-justifiable in nature. It means that if the State fails to discharge its obligation such failure cannot be questioned in the Court of law and there is no judicial remedy. But this irregularity has been removed by the judicial innovation. The Supreme Court has creatively expanded the

10. National Commission in *Md. Aslam v. Ideal Nursing Home*, (1997) III CPJ 81 (NCDRC); (1997) 2 CPR 109 (NCDRC)

11. *Jyothi Vivek (Dr.) and Ors. v. Predeep and Ors.*, (1998) 1 CPJ 191, (1997) 3 CPR 20.

12. *Dr. Janak Kantimati Nathan v. Murlidhar Eknath Masane*, 2002 (2) CPR 138.

13. *Achutrao Haribabu Khodwa and Ors v. State of Maharashtra and others*, AIR 1996 SC 2377

14. *PM Ashwin (Master) v. Manipal Hospital*, (1997) 1 CPJ 238, (1997) 1 CPR 393.

outline of Art-21 of the Constitution. In *Paramananda Katara v. Union of India*[15], the Supreme Court held that right to medical aid is an integral part of right to life. It is an obligation on the State to preserve life by extending required medical assistance. The apex Court held that right to health and medical care is a Fundamental Right under Art 21 of the Constitutions of India. In *Paschim Bang Khet Mazdoor Samiti v. State of West Bengal*[16], the Court held that providing adequate medical facilities for the people is an essential part of the obligation undertaken by the Government in a Welfare State. Art 21 of the Constitution imposes an obligation on the State to safeguard the rights to life of every person and breach of which may move the Supreme Court or High Court through writ petition.

IV Criminal Law and Negligence :

Sec.304-A of the Penal Code 1860 states that "act not amounting to culpable homicide shall be punished with imprisonment for a term of two years or with fine or with both"

Under criminal law for a person to be prosecuted for professional negligence proof of *mens rea*, *i.e.*, guilty mind is required and the negligence can fairly be described as criminal. Mere carelessness and simple lack of care may constitute civil liability and it cannot be treated to be enough to prove a charge of death of a patient by negligence.

In the *Santra's* case the Supreme Court has pointed out that liability in civil law is based upon the amount of damages incurred but in criminal law, the amount and degree of negligence is a factor in determining liability. Further certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence and the character of the offender.

In *Poonam Verma v. Ashwin Patel*[17], the Supreme Court distinguished between negligence, rashness and recklessness. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of his act. A reckless person knows the consequences but does not care whether or not they result from his act.

Thus in the case *R. v. Adomako*[18], the House of Lords held that a doctor cannot be held criminally responsible for a patient's death unless it is shown that he/she was negligent or incompetent in discharging the duty for the life and safety of his patient which amounted to crime against the State.

If the patient survives and suffers from the effect of alleged grievous injuries, sustained during the treatment, the medical practitioner can be framed under either Section 337 or 338 of IPC.

Sections 80 and 88 of Indian Penal Code contains defense for doctor/accused of criminal liability. Section 80 "nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in doing of a lawful act in a lawful manner by lawful means and with proper care and caution". Section 88 says that a person cannot be accused of an offence if he performs as act in good faith, for the other's benefit and does not intend to cause harm even if there is a risk and the patient has expressly or impliedly given consent.

V. Burden of proof :

The burden of proof of negligence, carelessness or insufficiency generally lies with the complainant. The law requires a higher standard of evidence to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish his claim against the doctor.

In *Amar Singh v. Frances Newton Hospital and Anor*[19], the Court held that the burden of proving negligence lies on the complainant *i.e.* he has the task of convincing the Court that his version of the fact is correct one. In

15. *Paramananda Katara v. Union of India*, AIR 1989 SC 2039
16. *Paschim Bang Khet Mazdoor Samiti v. State of West Bengal*, (1996) 4 SCC 37
17. *Poonam Verma v. Ashwin Patel*, (1996) 4 SCC 332.
18. House of Lords decision in *R. v. Adomako*, (1994) 3 All ER 79.
19. *Amar Singh v. Frances Newton Hospital and Anor*, (2000) 1 CPJ 8.

Calcutta Medical Research Institute v. Bimalesh Chatterjee[20], it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant. Similarly in *Kanhaiya Kumar Singh v. Part Medicare and Research Centre*[21], it was held that negligence has to be established and cannot be presumed.

Even after adopting all medical procedure as prescribed, a qualified doctor may commit an error. The National Consumer Dispute Redressed Commission and the Supreme Court have held in several decisions that a doctor is not liable for negligence or medical deficiency if some wrong is caused and acted in accordance with the practice accepted as proper by a reasonable body of Medical Profession skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust.

VI Following are some of the civil cases where the medical negligence has been proved and a compensation is granted to the complainant by the National Consumer Disputes Redressal Commission and the Supreme Court.

Sl.No.	Name of the parties and case	Decisions given by the Court
1.	Kurien Abraham and others v. Dr. Omana Jacob and others, (2007) Med. LR 189	Deficiency-in-service was proved and compensation of Rs.2,70,000/- was granted to the complainant
2.	Shridevi Hospital and Shridevi Diagnostic and Research Centre, Tumkur v. P. Subhash (2007) Med LR 314	Medical negligence has been proved and forum has awarded the compensation of Rs.2,25,000/- to the complainant.
3.	Dr. Atul Raj v. N. Ramanathan and other (2007) Med. LR 655	The deficiency-in-service has been proved and the doctors were directed to pay Rs.3,00,000/- as compensation to the complainant.
4.	Dr. Balagopal Perinthalmanna v. K.V. Radhakrishna Menon and others, (2007) Med LR 657	Deficiency-in-service has been proved and the compensation of Rs.1,50,000/- has been granted to the complainant.
5.	Dr. Yogendra A. Pandya and others v. Mrs. Harshaben C. Patel and others, (2007) Med. LR 486	The National Commission held that it is a case of gross deficiency in service.
6.	P.M. Aswin (Master) v. Manipal Hospital (1997) 1 CPJ 238, (1997) 1 CPR 393.	The medical negligence was proved and the Court awarded the compensation of Rs.1,50,000/- to the complainant.
7.	Ram Babu v. Anjani Kishore Pd. (1998) 2 CPR 223, (1998) II CPJ 684 (Bihar SCDRC)	The deficiency-in-service has been proved and the Court awarded the compensation of Rs.1,90,000/- to the complainant.
8.	Samira Kholi v. Dr. Prabha Manchanda and others, 2008 (1) CTC 392	The deficiency-in-service has been proved and the Court awarded the compensation of Rs.5,00,000/- to the complainant.

Following are some of the criminal cases where the medical criminal negligence has been proved and the punishment has been awarded to the accused doctor.

Sl.No.	Name of the parties and case	Decisions given by the Court
1.	Sukaroo Kobirej v. Empress (1887) ILR 14 Cal. 566.	The Court held that the accused was criminally negligent as he was not educated in surgery.

20. *Calcutta Medical Research Institute v. Bimalesh Chatterjee*, I (1999) CPJ 13 (NC)

21. *Kanhaiya Kumar Singh v. Park Medicare and Research Centre*, III (1999) CPJ 9 (NC)

2.	PM De'Souza v. Emperor, AIR 1920 All. 32, (1920) 21 Crl. LJ 367	The Court found the accused as guilty under Section 304-A of IPC for causing death by negligence.
3.	JAMA, 15th April 1922, 1139	The Court awarded the sentence of imprisonment for 12 months to the accused.
4.	Haring, et al v. Banks (NJ) 146 A 67; JAMA, 12 April 1930, 1170	The negligence was proved and the judgment was rendered in favour of patient.
5.	Lancet, 28 January 1931 Page No.213	The Court sentenced the unqualified practitioner to three months imprisonment.
6.	Khusaldas v. State of Madhya Pradesh, AIR 1960 MP 50, 1960 Cr. LJ 234	The accused was found guilty under Section 304-A of IPC. for causing death by negligence.
7.	Ram Nivas v. State of Uttar Pradesh 1998 Crl. LJ 635 (All)	The Court held that the accused was guilty of causing death by rash and negligence act.

VII Supreme Court and Medical Negligence and Necessary Protection :

In *Suresh Gupta v. Government of NCT of Delhi*, the Court clearly clarified that where a patient dies due to negligent medical treatment by doctors, they can be made liable in civil law by paying compensation/damages in law of torts and if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient he would also be made criminally, liable under Section 304-A of IPC. However it held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do great disservice to the community. A doctor cannot be tried for culpable or criminal negligence in all cases of medical mishaps or misfortunes.

In *Mohanan v. Prabha G. Nair and another*[22], it ruled that the doctor's negligence could be ascertained only by scanning the material and expert's evidence that might be presented during a trial. A doctor may be liable in a civil case for negligence but mere carelessness or want of due attention and skill cannot be described as so reckless or grossly negligent as to make him criminally liable. The Court held that the distinction was necessary so, that hazards of medical professionals being exposed to civil liability may not unreasonably extend to criminal liability and expose them to the risk of imprisonment for alleged criminal negligence.

Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable.

In case of *Bolam v. Friern Hospital Management Committee 1957*, the test for establishing medical negligence was set. "The doctor is required to exercise the ordinary skill of a competent doctor in his field. He must exercise this skill in accordance with a reasonable body of medical opinion skilled in the area of medicine". In *Jacob Mathew v. State of Punjab*[23], the Supreme Court directed the Central Government to frame guidelines to save the doctor from unnecessary harassment and undue pressure in performing their duties. It ruled that until the Government framed such guidelines, the following guidelines would prevail.

A private complaint of rashness or negligence against a doctor may not be entertained without *prima facie* evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officers should give an independent opinion, preferably of a Government doctor. Finally doctors may be arrested only if the investigating officer believes that he would not be available for prosecution unless arrested.

VIII Ethics and Medical Professions.

Law in India does not prescribe any sets of rights for the welfare of patients. The term "gross" or "reckless" is also not referred under Section 304-A of IPC, due to which the benefit of doubt is given to the accused/

22. *Mohanan v. Prabha G. Nair and others*, (2004) CPJ 21 (SC), of 2004 Feb 4.

23. Criminal Appeal Nos.144-145 of 2004.

doctor. Further the burden of proof in action for negligence rest with the plaintiff, but the plaintiff find difficulty to find a person of same profession to come and attest the carelessness and negligence of fellow doctors. The patients feel helpless in such situation and lose their claims. There is no separate/special law to govern the negligence. Medical profession is governed by code of medical ethics and etiquettes which are laid down by Medical Council of India; however they are only for internal self regulation of profession. Commoditization of health services is another basic reason for fast spreading misconduct amongst the medical professionals. The unethical practice has gone to the level where the basic purpose of medical profession *i.e.* service to humanity fails. Few unethical practice like fee sharing, cut practice, particularly prescribing a company's medicine, selling of body parts *etc.*, for personal monitory gain are openly discussed among them but they never come upto the surface due to lack of concrete proof.

Further, the level of illiteracy, poverty and unawareness of legal set up of the county, poor economic conditions of patients in large number would have encouraged the doctors to give scant regard for the patients particularly in Government Hospitals. The rich could sue doctors for compensation for proven negligence or carelessness and fight it out in Courts but the poor section could not afford this. Further the Court is showing soft corner towards the doctors because the Court is of the opinion that they well qualified, skilled and knowledge person may not commit mistakes. Further the Court is of the opinion that the criminal process once initiated, subjects to the medical professional to serious embarrassment and 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 he has suffered in his reputation cannot be compensated by any standard. Hence the doctor cannot be held liable criminally unless proved negligent. These are the main factors due to which there is a great decline in doctor – patient relationship.

IX Conclusion :

The service which medical professionals render to us is the noblest one. Aryans embodied the rule that "Vidya Narayano Harihi" (which means doctors are equivalent to Lord Vishnu)

Professionals like doctors, lawyers *etc.*, are in the category of persons professing special skills. Any man practising a profession requires particular level of learning, which impliedly assures a person dealing with him, that he possesses such requisite knowledge, expertise and will profess his skill with reasonable degree of care and caution. It should be taken into consideration that the professional should command the "*corpus of knowledge*" of his profession. Since long the medical profession is highly respected but today the standard of the medical profession has declined as a result the number of litigations has been increased against doctors.

Medical negligence is from the time immemorial but due to the recent development in consumerism and human rights, the litigations have been increased. Throughout the civilized world, the public has become more compensation minded. It is a common observation that medical practitioners, hospitals are being attacked by family members of patient for alleged medical negligence. The doctor – patient relationship is one of the most unique and privileged based on mutual trust and faith. But presently there is a great decline in the doctor-patient relationship. The reason may be communication gap between them, commercialization of heath services, and high expectation from doctors or increased consumer awareness.

To error is the inherent nature of mankind however, the mistakes of medical professional which may result in death of a person or permanent impairment can be particularly costly but the law does not aim to punish doctors for all their mistakes but only those mistakes which are committed out of negligence. Mistake occur but which occurs from carelessness and negligence cannot be let-off. Medical science has conferred great benefits to us but these benefits are attended by unavoidable risk which the patient must know.