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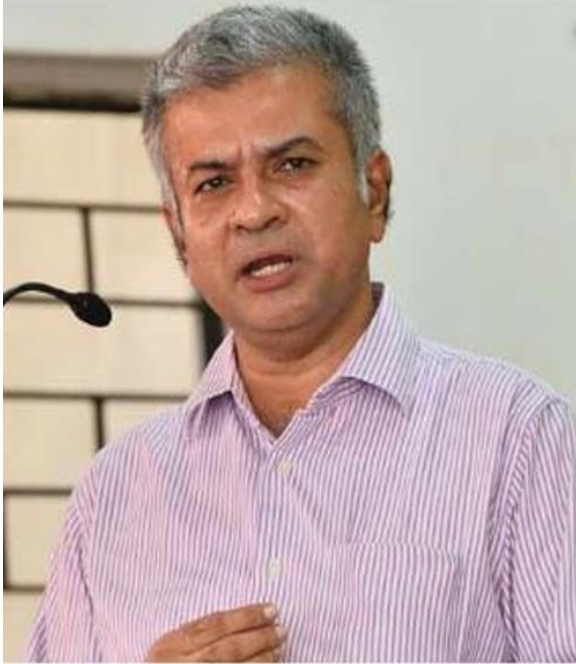
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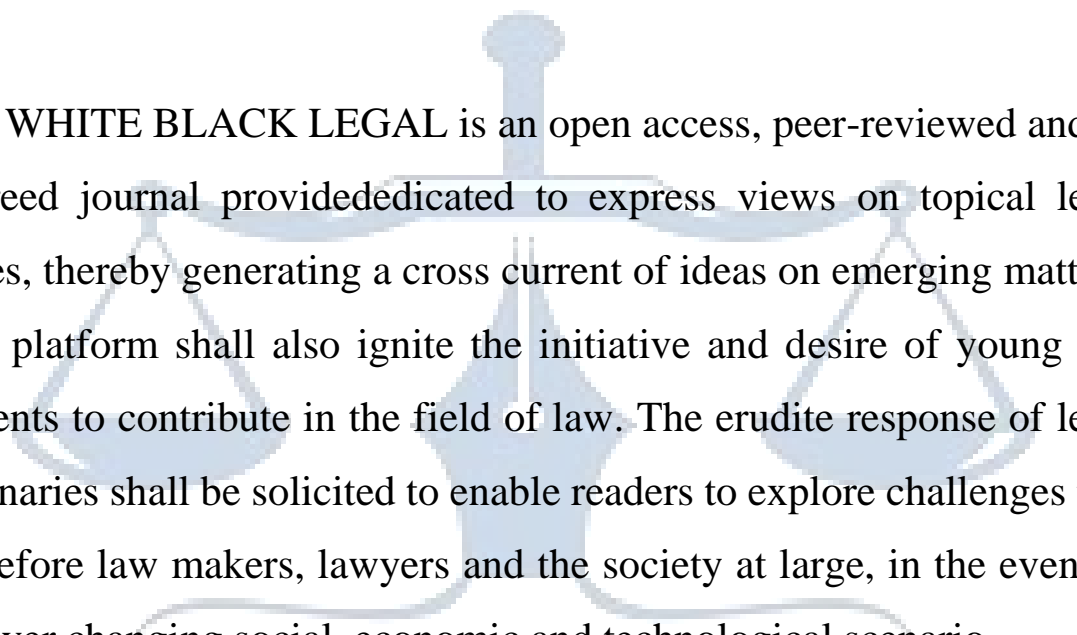
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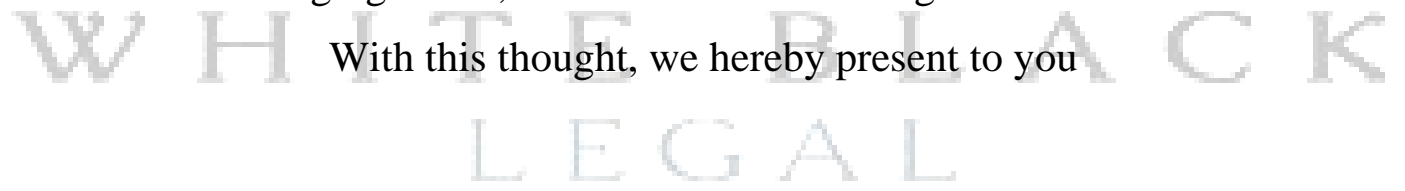
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you



# **MEDICAL NEGLIGENCE IN INDIA: A CRITICAL ANALYSIS**

AUTHORED BY- AAYUSHI PANCHAL

## **Concept of Negligence**

Ever wondered how every human being hold a duty towards the other, this duty could be in any form, duty to Inform, to take care, to provide help, necessities, including others.

However, if this duty is legal in nature, breach of such duty results in Negligence.

Negligence in simpler words could be breach of a legal duty which results in undesired damage or an act which a reasonable man would not do. As per law, Negligence is civil wrong, and it is also a wrong under the criminal and consumer law as well.

The case of *Moni v. State of Kerala*,<sup>1</sup> the court held that “In case of a Medical Man, negligence means failure to act by the standards of reasonable competent medical man at the time. There may be one or more perfectly proper standards, and if he conforms to one of these standards, then he is not negligent.”

The law defines negligence as a conduct which falls below the standard behaviour which is established by law to protect others against any unreasonable risk which might cause harm. A person has said to be acted negligently when it sets off from the conduct which is expected from a reasonably prudent man who is acting under similar circumstances. Where there exists a breach of duty, the liability of Negligence arises.

Negligence cannot be defined easily; however, the concept of negligence has been acknowledged and accepted in Jurisprudence. The eminent jurists and the various judgments

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<sup>1</sup> *Moni V. State of Kerala* (SA.No. 832 of 2000(G))

have assigned various meaning to the term Negligence.

In the case of *Jacob Mathew V. State of Punjab and Anr.*,<sup>2</sup> the Supreme Court of India held the 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 an injury to his person or property.

Moreover, in the case of *Kusum Sharma & Ors. V. Batra Hospital and Medical Research Centre & Ors.*,<sup>3</sup> the Supreme Court ruled out that 'if the doctors have performed their duties and have exercised an ordinary degree of professional skill and competence, they cannot be held liable for medical negligence. If in case a doctor acts in accordance with the proper accepted practice by the body with the competent medical practitioners skilled in that area and if the doctor acts in accordance with the practice, then just because a body of opinion takes a contrary view, he will not be held liable for negligence.'<sup>4</sup>

Henceforth, to establish Negligence as per claims in a particular case, the three stages must be fulfilled, they could be called as the essential components of Medical Negligence:

1. Legal duty to exercise due care towards the complainant within the scope of his duty.
2. Existence of a breach of such duty.
3. Damage following such breach. In most cases, the need to take an action against an act of negligence arises when certain damage occurs.

The Supreme Court in the case of *Poonam Verma V. Ashwin Patel and Ors*<sup>5</sup> defined these essential conditions and held that these elements of negligence must be proved by the plaintiff to the satisfaction of the court and only then can the defendant be held liable for the act of negligence. The court has further held that, the cause of action for negligence arises only in the situations where damages occur, damage is considered to be an essential condition of this tort.

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<sup>2</sup> AIR 2005 SC 3180

<sup>3</sup> AIR 2010 SC 1050

<sup>4</sup> *Achutrao Haribhau Khodwa V. State of Maharashtra* AIR 1996 SC 2377

<sup>5</sup> AIR 1996 SC 2111



However, in the situations where the plaintiff fails to prove to the court that any loss or injury or damage was caused to the plaintiff while exercising the duty, in spite of proving that there existed a negligent act by the doctor the plaintiff would not be entitled to claim any compensation for the loss.

While accusing a medical practitioner of a negligent act, the plaintiff which includes either the patient or any legally designated party to act on the behalf of the patient, shall establish the essential elements of negligence before asking for a compensation for the damages suffered. The said compensation shall be paid to return the plaintiff to the original position it would have been in if he had not suffered the damage. The court will attach a monetary value for the expenses incurred by the complainant along with the loss of facility experienced and pain and damage suffered by the claimant. Moreover, through award of such compensation, other than to compensate the claimant for the damages suffered, the court has other objective which includes promoting responsibility and ensuring that such acts of carelessness can be avoided in future.

The plaintiff shall prove that there existed a duty of care from the practitioner to the plaintiff while administering or providing the patient with the treatment, the duty of care so existed, was breached or the medical health professional failed to provide the patient with appropriate amount of standard of care, there was a breach on the part of the practitioner which caused injury to the patient and such injury was directly related to the breach by the practitioner and damages was suffered by the patient.

### **Duty Of Care**

A mere carefulness cannot be a ground for a legal liability whereas, in the cases where law has defined certain amount of duty of carefulness, negligence in such situation may attract legal liability. If the law imposes a duty of carefulness while performing an act, there exists a duty of the practitioner to take care to not perform the act accidentally.

As per law, a duty of care is an obligation imposed on an individual, which requires for him to exercise a Standard of care while performing an action which can likely cause harm to

others. The Indian Law has imposed a duty of care on the medical practitioners for treating the patients. A doctor including the medical professionals have a duty of care to decide whether they want to undertake a case or not, what treatment or therapy to give, what procedure to adopt to administer the problem,<sup>6</sup> with this it is expected that the medical practitioner would use the best of his knowledge and skills combined and would exercise a degree of reasonable care while administering a case. The medical practitioner owes a duty towards their patients which includes for them a full liberty to decide and give the treatment as per his own understanding and knowledge and to administer the treatment being provided and further no to exceed with any treatment plan beyond his control.

As soon as a patient comes up to the doctor with his problem, this duty of care kicks in, and this duty holds a power irrespective if proper consent has been taken from the patient or not. This duty extends to the professionals employed to deliver the care. The duty of care also includes for the doctor to perform all necessary investigations and tests, interpreting the result driven from the concern and the test and provided proper treatment with a follow-up.

The wellbeing of the patient is a duty which a doctor holds, he doesn't just hold a duty, he has to ensure he provides the patient with the accurate treatment but also exercise precaution so that the patient doesn't suffer any harm.

A practitioner not certified to perform a particular act or having no knowledge of the treatment and the medicine and still commencing upon the treatment in that area does amounts as negligence.

It is nowhere described as in what is the general or minimum amount of duty of care expected from a medical practitioner while treating a patient. However, it is expected that the practitioners act with the possible amount of care expected from them to treat a patient.

There exists number of diseases, their treatment, instruments, however what is the minimal

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<sup>6</sup> Mudur G., 'Indian Supreme Court ruling makes the arrest of doctors harder, BMJ 331(7514) 422 (2005).

amount of care expected from a doctor is still unknown. This leads to a difficulty in understanding the general idea based on each circumstance. This totally depends on the practitioner's own judgment and decision.

For the claimant to file a negligence case against any medical professional, he must prove that a duty of care was imposed on the professional. Violation of any of the obligation imposed on the medical professional gives the patient the right to sue for negligence.

The standard of care is judged keeping in view the knowledge and the equipment available at the time the treatment was performed by the practitioner. The law does not require a standard of care that would make the professional guilty of his negligent act. Not every hospital can be expected to be having full state-of-art-facilities and be equipped with the latest technology and the tools. However, it is upon the law to decide and define the line to prohibit the extreme carelessness and requiring some amount of reasonable care.

Generally, the standard of care is explained as the standard used by a cautious professional in the sector of the profession. The way to hold a medical professional accountable for the act of medical negligence is the Bolam Test. Carelessness could be of any sorts, there could be the presence of the intention to cause harm or no. However, it is difficult to understand and know the degree of intention. The higher the harm, it is more likely that the defendant failed to practice safety. Moreover, the law could also grant its decision based on degree of negligence, the more the act of negligence, the higher the sentence for the professional.

### **Reasonable Duty of Care**

In situations, wherein an act which cannot be defined as rational or sensible comes under the category of a negligent act. A general person cannot be expected to act and advice like an expert similarly, a general medical professional cannot be expected to possess the skills of an experienced and skilled expert professional. One cannot compare the skills and knowledge of a professional working in a remote area with the one working in the cities and hospitals.

A medical professional is required to ensure a reasonable duty of care towards its patient. Just because a practitioner deviated from his usual practice to provide a treatment to the patient

doesn't amount as negligence. However, for the claimant to prove and establish a liability on the part of the practitioner, the claimant shall show:

1. That the practice adopted by the medical professional is not usual and normal practice and there exists a normal & usual practice to provide an effective treatment to the patient.
2. That even after the existence of a better and successful practice, the medical professional did not adopt the expected practice of providing a treatment and rather diverted from its path.
3. Moreover, the course of treatment adopted by the medical professional was not professional at all. It wasn't something a professional with ordinary skill would have taken if he had been acting with ordinary care.

### **Treatment Without Patient's Consent**

The presence of a Doctor- Patient relationship is essential factor to hold a professional accountable for any negligent act. When a patient suffers from a problem and feels the desire to go consult a doctor to find a treatment of the same, knowing well and trusting the doctor with its knowledge and expertise in the field. The patient surrenders his trust, his mind to the doctor to find the solution hoping that the doctor would help or advise him to cure the issue.

The relationship of a doctor and a patient is a fiduciary one wherein the Doctor holds a position of dominance and has an obligation towards the patient to understand the situation, look for the problem and provide the patient with appropriate treatment and care. However, this position can be mis applied if the treatment is done without the consent of the patient.

A patient shall be informed well in advance before the beginning of the treatment all the details starting from a problem to the complete treatment along with consequences and complications which may arise. It is a duty of the doctor to give a detailed information regarding the problem which the patient came with, the procedure to diagnose the problem, available options for treatment and the complications and consequences associated with the treatment. After this, the final decision lands in the hand of the patient or his guardian under certain circumstances, whether they want to go ahead with the treatment prescribed by the doctor or not.

Treating a patient without his consent amounts to Negligence, even though there exist no actual damage.<sup>7</sup>

Every patient has a right to know the treatment he is put on and further the patient can also reject the treatment no matter how effective or beneficial the treatment could be for the patient; the medical practitioners cannot act without the patient's consent. The doctor or any medical practitioner working under or with the doctor should receive a written and informed consent from the patient before initiating any treatment and shouldn't go beyond the given consent to perform its duty. If in case the procedure of the treatment has to go beyond the agreed consent of the patient, the practitioner shouldn't go beyond the consent and meanwhile take a separate consent in case of emergency from the patient or guardian to continue with the treatment and should give a detailed explanation of the requirement of such consent. However, in situations where the primary consent of the patient cannot be taken for a variety of reasons, including the patients being a minor, or of unsound mind or unconscious, the medical practitioners can act upon the substituted consent.

As in the case of *Samaira Kohli V. Dr. Prabha Manchanda*,<sup>8</sup> wherein a 44-year-old lady with a complaint of continued menstrual flow for nine days, on examination was advised to go for general anesthesia laparoscopy to confirm her diagnosis. On visiting the hospital to get the advised test done, the patient signed on the admission and the discharge card which clearly mentioned that the admission was for "Diagnostic and operative laparoscopy". On examination, it was found that the patient was suffering from endometriosis. While the patient was still unconscious the assistant of the respondent took the consent of the patient's mother to perform hysterectomy and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes). When the case came before the Supreme Court, it held that there was no consent for performing the hysterectomy and salpingo-oophorectomy and performance of such surgery was an unauthorised invasion and interference with the body of the patient which amounts to a deficiency in service & an act of assault & battery as per Tort Law. Moreover,

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<sup>7</sup> Puneet Yadav & Prashant R. Dahat, 'Medical Negligence and Criminal Law: An Indian Perspective' available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1591159](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1591159) (last visited on 13<sup>th</sup> March, 2024)

<sup>8</sup> AIR 2008 SC 1385

the patient's permission was not taken to perform an operation which required the removal of organs. Also, the court held that a doctor must obtain the consent of the patient before initiating any treatment and it shall be 'real and valid' and the patient should be given complete and adequate information to enable him or her to make an informed decision.

Moreover, the case of Malay Kumar Ganguly V. Sukumar Mukherjee,<sup>9</sup> the Supreme Court in its judgment emphasised on the importance of a doctor to engage with its patient while providing a treatment especially in cases where when the line of treatment is contested, litigation can be based on the lack of informed consent.

Further, in the case of Dr. Shyam Kumar v. Rameshbhai Harmanbhai Kachhiya,<sup>10</sup> where an operation was conducted for cataract and glaucoma, but retina was weakened and the patient lost his eyesight and no medical records were produced, the court held that conducting the operation without obtaining the informed consent of the patient was improper. The court further held that a patient cannot be deprived of such information.

## **Breach Of Duty**

In situations where the doctor's practice fails to meet the standard of care which is expected from a reasonably competent professional working in the same field and under the same circumstances, it amounts to breach of his duty.

It is the most essential aspect which needs to be proved to prove a case of medical negligence by a medical professional.

One of the most renowned cases based on professional standard is of Bolam v. Friern Hospital Trust,<sup>11</sup> wherein a patient sustains fractures while getting ECT treatment and claimed that the care by the medical professionals was negligent under anaesthesia as he wasn't given a muscle relaxation before undergoing the procedure and he was not duly informed for any risk of

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<sup>9</sup> AIR 2010 SC 1162

<sup>10</sup> I(2006)CPJ16(NC)

<sup>11</sup> 1957 1 WLR 582

fracture before going with the procedure. However, negligence could not be established in this case, as evidence was provided within time that during that time, administering muscle relaxation was not a universal practice. Moreover, it was argued that if in case a doctor acts in accordance with a practice which was considered acceptable by a responsible body of doctors, the claimant must show that no reasonable doctor acting in the same circumstances would have acted in that way.

There is no special consideration for the lack of experience for a medical professional, they are expected to work with the same standard of care and safety as on their first and last day. However, to establish a case of medical negligence against a medical professional, the claimant shall establish that:

**1. Standard of care**

The doctor failed to act as per the standard of care expected from a reasonably skilled medical professional working in the same field and under the same circumstances. But the standard of care expected depends on the condition of the patient, the resources available at the time of treatment and other crucial factors.

**2. Opinion of an Expert**

To Establish a breach of duty, an expert opinion plays a key role as it helps to determine if there was a breach of duty on the part of the practitioner. When a claimant files a complaint before the court, the decision of the court depends upon the statement of a qualified and experienced expert.

**3. Sufficient Evidence**

The complaint shall provide enough evidence to prove that the actions of the medical professional were below the standard of care and a harm has been caused to the patient.

**4. Causation**

It needs to be proved before the court that the breach of duty by the medical professional has contributed and caused injuries and harm to the patient. In other words, the claimant needs to prove existence of a link between the negligence on the part of the medical professional and harm caused to the patient.

Additionally, once proved that the medical professional happened to breach his duty, the court may pronounce its decision based on the injury suffered by the patient by the breach of duty of the medical professional causing medical negligence.

### **What is expected out of a medical practitioner?**

A doctor before being awarded with the degree of medicine is required to take an oath which is known as 'Hippocratic Oath'. This oath asks the doctor to practice medicine with compassion, integrity, and honesty.

A healthcare professional is expected to be compassionate towards the patient, a practitioner is expected to always remember the obligation they have towards the patients, they are expected to be honest and loyal and use best of their knowledge and resources to save a patient's life and treat the ill. It is expected that if in case certain case is out of the doctor's control, they should summon other doctors with necessary skills and ability.

While a patient entrusts all his confidence on the doctor, patients expects that the doctor would be a little secretive about the patient's problem.

If in a situation, a doctor agrees to treat a patient or is in full capacity to treat the patient, he is expected to be fully attentive and active with the patient's case.

While the courts act as a neutral party and favours neither party, the courts never favour the medical practitioners acting negligently, however the shallow complaints filed against the doctors and medical professionals have seen a sudden increase especially after the Medical Services have been put under the Consumer Protection Act. The doctors fear for their life, respect, and reputation in the society before providing a patient with a treatment, because sometimes despite their best efforts, skills, and knowledge there could be instances of failure.

There have been instances where while performing surgeries even after the doctor's best efforts, the patient dies. These instances do not indicate that the doctor acted negligently, there should be strong evidence to support the claim before blaming the doctor for negligence.



## Laws In India

It is expected that the judiciary maintains a balance in cases involving medical negligence by maintaining a balance between decision making and not hampering the rights of the patient at the same time.

As per the Section 304A IPC, it says that “whoever causes death of a person by a rash or negligence act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine or both.”<sup>12</sup> Henceforth, in cases where a patient dies due to a negligence by a medical practitioner, the medical practitioner can be held criminally liable.

Moreover, with certain rights relating to the patient in situations of medical negligence, there exists certain exceptions which allows certain defence for the practitioners under Section 80 & Section 88 IPC.

Section 80 says that Nothing constitutes a crime which is committed in a reasonable and legitimate manner, with adequate attention and caution, by accident or any misfortune and without any criminal intention.<sup>13</sup> However, Section 88 says that If a person acts in a good faith, in the interest of the other person or does not intent to cause a harm even though a risk exists, and the patient has given a consent, it does not constitute a crime.

In the context of the Indian law, the concept of Medical Negligence can be discussed under:

1. Civil Negligence
2. Criminal Negligence and
3. Negligence under the Consumer Protection Act

These laws provide different rules, remedies, and punishment along with the compensation to the victim.

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<sup>12</sup> IPC, 1860 (No. 45 of 2000) Sec 304

<sup>13</sup> IPC, 1860 (No. 45 of 2000) Sec 80 & 88

## Civil Law

As discussed earlier, negligence is breach of a legal duty to care which results in undesired damage, the important ingredient being the legal duty to care. The law requires breach of the duty and a damage caused by such breach. While contending a healthcare profession for negligence, the claimant has to prove and show that the defendant in the case owed a duty of care towards the patient and further that it has been breached and has caused certain damage.

However, this raised a serious of question regarding what is the ordinary duty of care expected from a doctor & where does the doctors stand in terms of power, responsibility and accountability and Is law suitably easing and beneficial for the doctors?<sup>14</sup> The Supreme Court in 1969 held that a practitioner or a person giving himself out, who is ready to give plausible medical advice and treatment indirectly accepts that he possesses the skill and knowledge to provide treatment. Moreover, if a patient consults such practitioner or person, he holds a duty towards the patient which includes:

1. To decide whether he would undertake the case or not;
2. To decide and administer the suitable treatment.

Ever since the 14<sup>th</sup> Century, the medical malpractices have taken a rise and have been seen as an offence under tort law than criminal law. The position of negligence under Civil law is insignificant as it covers a variety of factors.

It is often argued that Civil Law begins when the Consumer Protection Act ends. If the services which are offered by the Medical Health professional doesn't fall under the ambit of the term 'Services' as defined under the Consumer Protection Act, the victim can turn to the Civil law to claim compensation for such negligence and damage suffered.

In the case of medical malpractices, the burden is upon the claimant to prove to that court that the Medical Practitioner has acted negligently, and the claimant has suffered damages due to such negligence. Such medical negligence could include transfusion of blood from wrong blood group, leaving tools inside the patient's body after an operation and others which results

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<sup>14</sup> Karunakaran Mathiharan, "Supreme Court on Medical Negligence" 41(02) Economic and Political Weekly 2006, at 12.

in injury to the patient.<sup>15</sup>

The medical professionals offering such medical services claims that they have the expertise and skill required, and they have the authority to decide whether they want to take a case or not and provide the patient with the treatment accordingly. However, when a practitioner makes such kind of claims and commitments, it is referred as “Implied Undertaking”. Moreover, the charge the practitioner guilty of the claims, the necessary requirements must be met i.e. an act of omission or commission on the practitioners’ part, act in violation of duty of care of claimant, and breach of duty resulting in damage to the claimant or the patient.

The claimant filing the complaint must authenticate the allegation charges against the medical practitioner by referring it and providing an expert opinion on the same by an expert in the area.<sup>16</sup>



## **Criminal Law**

Negligence to be counted as an offence under Criminal law requires a higher degree of proof. It is not just the lack of necessary care, skill and attention, a gross lack of competence is necessary to hold a practitioner liable for criminal negligence. To measure the criminal liability of a practitioner in a particular case, factors such as the motive behind the offence, harshness of the offence needs to be proved by the claimant. There has been a significant rise in the criminal cases against the medical practitioners.

However, criminal prosecution requires much more detailed observation and therefore, the Supreme Court in the case of *Dr. Suresh Gupta v. Govt. of NCT Delhi*,<sup>17</sup> while reviewing the case declared that extreme care and caution should be exercised while initiating criminal proceedings against a medical professional for any alleged medical negligence. The court felt that the medical practitioners shouldn’t be put through unnecessary harassment. It opined that this would put pressure on the doctors and the doctors would not be able to save the lives if

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<sup>15</sup> Talha Abdul Rahman, Medical Negligence and Doctor’s Liability, 2(2) INDIAN JOURNAL OF MEDICAL ETHICS, 60-61 (2005).

<sup>16</sup> *Dr. Lakshman Balkrishna Joshi v. Dr. Trimbak Babu Godbole*, AIR 1969 (SC) 128.

<sup>17</sup> AIR 2004 SC 409

they'll tremble upon the fear of facing criminal charges.

Criminal liability is imposed as per the provisions of Indian Penal Code, 1860. The provisions under IPC are broad in nature and clearly addresses the issue of medical negligence. Charges of Criminal Negligence requires proof of higher degree of negligence exercised by the medical practitioner. A patient cannot sue a medical practitioner under Criminal Negligence just for mere lack of attention, skill, or necessary care.

Every careless act of a Medical Practitioner cannot be held a Criminal Negligence. Doctor being the life savers shouldn't be put through such extreme and unnecessary harassment. This amount of unnecessary harassment would make them more conscious, and they'll tremble upon the fear of facing criminal charges every time they'll perform their duty and would take away their confidence making them more worried about their own safety than to treat a patient.

In the case of Dr. Mohd. Azam Hasin V. State of Uttar Pradesh,<sup>18</sup> the Supreme Court has held that A doctor cannot be held criminally liable for the death of the patient unless his negligence or incompetence showed the disregard for life and safety of his/her patient as to amount to a crime which is against the State.

Between finding out whether it is the Civil or Criminal Liability of the Medical Professional which has caused harm to the patient, the court at times finds it hard to weigh the degree of negligence of the medical professional and the carelessness done by him. Criminal Liability requires a proof of higher degree of negligence as per the honourable court held in a case. Moreover, in the case of Poonam Verma V. Ashwin Patel, the Supreme Court made a distinction between 'carelessness', 'rashness' and 'recklessness'. A practitioner would say to be acting negligently when he/she unintentionally breaches his duty by failing to perform the necessary act, and a person who is rash is well aware of the consequences of their actions, but he/she mistakenly believes that the consequences would affect him/her in any way. Moreover, any behavioural act which does not fall within the category of recklessness and intentional misconduct should not be criminally prosecuted.

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<sup>18</sup> AIR ONLINE 2019 ALL 1827

## **Distinction between Civil & Criminal liability**

The major difference between the two can be driven from the fact that the former is a private wrong i.e. wrong against an individual, whereas the latter is Public wrong, which includes breach or violation of rights or duties of public which affects the whole community at large.

It is generally said that jurisprudentially the difference between the negligence in Civil law & Criminal law cannot be drawn. However, the main difference between the two is in the degree of negligence. This difference between the two was clarified by the Supreme Court in the case of Jacob Mathew v. State of Punjab, stating that negligence differs in the case of Civil and criminal law. Further, the court held that it cannot consider a simple lack of care, error of judgment or accident as negligence, if the doctor follows the practice that is a norm in the medical profession at the time. Just because a better alternative course or a method of treatment is available or simply because a more skilled doctor might adopt a different practice or procedure, or failing to use extraordinary precautions that could more likely prevent a particular event cannot be a standard to judge negligence and would also not amount to negligence. The court while reviewing the case observed that to prosecute a medical professional criminally, it must be proved that they did something, or failed to do something which any other medical practitioner/ professional in their ordinary sense and judgment would have done or failed to do.

While discussing negligence, the extent of liability in cases are determined through the amount of damages suffered by either party in tort, whereas in case of criminal law the degree of liability must be higher than negligence itself. The tort law is mainly concerned with providing compensation to the claimants who has suffered a harm, while the Criminal law prosecutes the negligent medical practitioner causing damage to the patient.

In the case of State of Haryana & Ors. V. Smt. Santra,<sup>19</sup> the Supreme Court noted that the responsibility under the civil law is determined by the amount of damage suffered by the patient. Whereas, in the criminal law, to assess the liability the quantity and degree of

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<sup>19</sup> AIR 2000 SC 1888

carelessness by the practitioner is weighed.

## **Consumer Protection Act**

Over the past few years, there has been a drastic increase on whether 'Medical Negligence' falls under the ambit or included in the definition of the term 'Services' as per Section 2(1)(0) of the Consumer Protection Act.

In the case of the Indian Medical Association V. V.P. Shantha, this question whether a patient can file a complaint against a medical professional under the consumer protection act, in context to this question, the Supreme Court held that the person seeking medical attention would be considered a 'consumer' if:

1. The service rendered by the person was not free.
2. If in case the service was free, the charges were waived because of the inability of the patient to pay.
3. The service was provided at a private hospital which charges all its patients.
4. An insurance firm paid for all the services.

If any of the above-mentioned conditions applies then the Patient can file a complaint against the negligent medical health professional for the deficiency of service provided by him in the District, State or National Consumer Redressal Commission.

With the advancement in technology, almost every sector has taken a high jump when it comes to development. Similarly with the introduction of new and advanced methods and equipment's, better infrastructure and technology in the medical sector, a patient expects full satisfaction when he goes to a doctor with his problem. With the commercialisation and quick adoption of the corporate culture in the medical sector, it has led to a breakage in the relationship of a Patient and a doctor.

Both the civil law and criminal law provide remedies to the patient in case of negligence. In case of a serious injury or death, the criminal law is called in action whereas the remedy provided under the civil law was accessible in such cases as the claimant could reach out to the courts to seek recovery of damages. However, a particular case is dragged for too long, with complex procedures and standards to address each case particularly. This results in a long

of time and money being spent on the court procedure to seek justice and at times even discourage the claimant to seek the help of court to seek recovery of damages.

However, a significant shift was seen after the introduction of the Consumer Protection Act, 1986, which is succeeded by the Consumer Protection Act, 2019 which led to the establishment of dispute settlement forums on the district, state, and national level.

Section 3 of CPA, 1986 discusses that the mere availability of an alternative remedy will not prevent a consumer from bringing a complaint before the adjudicating bodies which are established under the CPA.<sup>20</sup>

Earlier, in the Consumer Protection Bill, 2018, the term 'healthcare' was added, which in the present-day CPA, 2019 is not present. The healthcare amendment was presented in the parliament to remove the term 'healthcare' from the list of service. However, due to huge disagreement from the healthcare professionals and the medical field, the CPA was enacted to provide protection to the medical professionals from being targeted by the consumers if healthcare services are included in the definition of 'service'.

However, it has been repeatedly mentioned that the modification in the definition of healthcare would in no way prohibit any consumer from contacting the consumer forum in case of deficiency in the service of a medical professional or medical negligence on the practitioner's part.

Any person, who has been harmed in any way through the malpractices of medical professionals can seek a claim for compensation against such practitioner by filing a complaint of the same. However, as per Section 69(1) CPA, the claimant must submit the complaint within two years from the date of damage occurred and not after that.

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<sup>20</sup> Priya Adlakha, Nihit Nagpal, India: Medical Negligence India, MONDAQ, 29 April 2021, available at: <https://www.mondaq.com/india/dodd-frank-consumer-protection-act/1062944/medical-negligence-india> (last visited on 10th February, 2024)

Moreover, with the introduction of CPA, major relief has been provided to the patients and provides two types of remedies which can be availed under CPA.

Section 39 of CPA provides for such remedies, the section 39(1)(a) & section 39(1)(f) provides for remedies against deficit and section 39(1)(d) provides for damage caused by the negligence. Moreover, in case of a misconduct by the medical practitioner, the claimant may seek either both or one of the reliefs.<sup>21</sup>

## **Vicarious Liability**

The concept of Vicarious Liability is to hold a party responsible for the actions or negligence of the other party. It is quite common in the case of an Employer-Employee, wherein the employer is held liable for the actions of its employee especially those which take place during the work.

However, when this concept is related with the medical negligence, it is generally related to the institution with which the practitioner is associated. In such situations, the complainant should verify if the institution or the hospital has control over the practitioner. This concept is vital in the cases of medical negligence as it confirms that there will be a financially responsible party to compensate the complainant in case of the negligence or harm suffered.

The term of employment is between the hospital and the practitioners, and just because such terms cannot be stated, it is not that the hospital cannot be held liable. Patients visits the hospital with a hope to get accurate and sincere treatment and pays the necessary fees prescribed by the hospital staff, in return the patient expects proper care and treatment and in case wherein there exists a deficiency in the services of the practitioner, or any negligence, the hospital shall also be held liable with the practitioner and they cannot be allowed to escape from such liability. The hospital cannot escape just because of mere non-existence of a master-servant relationship between the hospital & the practitioner.

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<sup>21</sup> The Consumer Protection Act, 1986 (No. 68 of 1986)



In several situations, after successfully performing a surgery in local areas where experts are not available, the specialist at times leave the post-operative care on the competent doctor locally available. However, it is to be noted that the mere failure of the specialist to supervise the post-operative care personally would not amount to negligence on his part, if the competent doctor to whom the responsibility of post-operative care has been imposed is competent enough.

Moreover, the National Consumer Redressal Commission (NCDRC)<sup>22</sup> has held that in cases wherein the operation is performed in a particular institution, the institution holds a duty to provide the post-operative care and treatment to the patient. There have been instances wherein foreign doctors have carry out operation in India and the post-operative care and treatment cannot be provided by the doctor post the operation as the doctor may not be available in the country for too long. But this is not the same in all cases, the medical practitioner may be held liable for negligence, if the medical practitioner or the visiting surgeon not even once inquiries about the condition of the patient and leaves the post-operative care and treatment of the patient on another practitioner or surgeon who is not able to perform his/her duty properly and look after the patient which leads to the death of the patient. In such situation, the medical practitioner can be held liable and made a party to such negligence.

Additionally, in negligence cases against the government hospitals, the courts have held the State vicariously liable for the negligence on the part of medical practitioners which includes the doctors & other staff, or in case of lack of proper equipment's to treat the patient or the staff to take care of the patient.

In the case of R.P. Sharma V. State of Rajasthan,<sup>23</sup> the mismatched blood transfusion led to the death of the woman, in this case the court held the State vicariously liable for the act of negligence of the blood bank officer and the doctor transfusing the blood. The court ordered for the State of Rajasthan to recover the damage amount from the doctors.

Similarly in the case of Rukmani V. State of Tamil Nadu,<sup>24</sup> the court held that the medical

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<sup>22</sup> [1993 (3) CPR 414 (NCDRC)]

<sup>23</sup> 2003ACJ2093

<sup>24</sup> AIR 2003 MADRAS 352

practitioners and the State must be held responsible for the failure of sterilisation operation which is responsible for the additional births in the families and is creating financial burden on the family.

## Compensation

Before awarding the complainant with any compensation for the negligent act of the medical professional, the complainant needs to prove certain points to receive compensation which includes:

There exist a relationship of Service Provider and consumer between the Doctor/medical practitioner and the Patient and certain amount of money has been paid for the service rendered.

The doctor was bound to perform a particular duty which he/she failed to perform and the act of the negligence by the medical practitioner has caused injury, damage, or harm to the patient.

While initiating a suit against medical negligence, the patient has the obligation to pursue the case, later it is upon the doctor or medical practitioner to prove their innocence by proving that there was no lack of care on the part of the practitioner.

Compensation under law is computed on the basis of “restitutio in integrum” which is to ensure that the person seeking damages for the wrong committed is in the position that he/she would have been had the wrong not been committed, in other words, it implies that the complainant or the victim should be compensated for the financial loss caused because of the negligence of the medical practitioner, including future medical expenses and suffering and damage experienced by the victim. The victim suffering damages because of medical negligence may choose and decide as how they’d like to address the issue, they may approach the State Medical Council, the Consumer court, or the Civil Court. However, for the victims desiring to get compensation for the damages suffered usually approaches the Civil or Consumer court as the compensation in some form provides insurance to the victim.

If the victim or the complainant successfully proves that the medical practitioner was negligent in performing its duties, or the act was negligent then such type of compensation awarded to the victim can provide him/her with resources which includes medical costs, cost of the litigation procedure, future medical expenses, and others.

The Consumer court and the civil court in India have the authority to decide upon the cases and decide the amount of compensation. The decided amount of compensation by the court will be paid based on the liability and as per the decision and direction of the judge, ensuring that the party guilty of negligence is made to pay for its act of negligence causing damages to the other party.

The compensation for the victim is calculated not just based on the injury or damages suffered, or death but based on the living standard and income of the victim. Moreover, the compensation is based on after assessing the earning and paying capacity of the practitioner.

However, this raises a question of how much is one's life worth?

In most cases the defendants have ascertained that the method to determine the compensation is 'multiplier method', this method was created to facilitate awarding the compensation in relation to the accidents of motor vehicle to calculate 'no-fault' liability.

### **Opinion of a medical Expert**

A case of Criminal Medical Negligence cannot be registered without an expert opinion from the Expert Committee of Doctor. The court in the case of Indian Medical Association V. V.P Shantha held that "No case of Criminal Negligence can be registered for a medical negligence by medical practitioner without a report of expert opinion from the Expert Committee". The opinion of an expert plays a pivotal role in the cases of medical negligence as the opinion from an expert offers a third-party professional opinion in the on-going case. Such expert provides an objective and unbiased expertise on the matter which helps the court in understanding the composite medical issues and concepts relating to the case. The expert analyses the facts of the case, reviews the medical records, and assists the court in determining whether the medical practitioner performed his/her duty well and met the standard of care expected and further

provides an understanding to the court, whether the medical practitioner breached the duty of care or not.

Additionally, such opinion is required by the court as it helps the court to understand various medical terminologies the procedure of the treatment which the court is at time, unaware of. This opinion boosts the believability of the claimant's claim against the practitioner and the court relies upon such an opinion to decide on the case and pronounces the liability of the practitioner and the compensation to be paid to the claimant based on such opinion of the expert.

## **Conclusion**

The relationship between a doctor and patient is form of partnership which is built on trust, mutual respect, and empathy. It is a relationship where one has no knowledge about the medical treatment and the other is an expert in the field. The primary objective of the medical profession is to provide healthcare facilities to the people with respect for the dignity of the profession and the man. The patient having no knowledge puts in his full faith on the doctor to serve the patient with due care and attention and provide him/her with appropriate medical assistance. The doctor should value the confidence entrusted by the patient upon him to provide quality treatment.

The relationship between the two is established as soon as the patient reaches the doctor or is brought for treatment to the doctor. However, since the time the patient reaches the doctor, the duty of care of the practitioner towards the patient kicks in. While treating the patient the doctor has to exercise the standard of care expected from him any breach of such standard of care could results in injury, damage to the patient.

In case of such damage, the patient can knock the doors of the court to seek justice and compensation for the damage caused because of the negligence of the doctor. Medical Negligence would always be a part of the practice of medicine as not every human is perfect & there is at least some degree of scope for human error. It is not always possible for things to go right, there could be instances wherein the medication may leave some side effects, or

may not work for an individual, or at times even a surgery could go wrong, or there could be an error in identifying the disease including others. It is not just for the beginners, but the most experienced and renowned medical professionals can also commit a mistake.

Moreover, due to the lack of proper and adequate facilities, care towards the patient, lack of hygiene patients opt to visit a private hospital instead of a government hospital for treatment. It is true that a major portion of the success of a practitioner depends upon the co-operation of the patient which includes proper disclosure of the medical history, regular check-ups, and others.

However, before holding a medical professional guilty for an act of medical negligence, the claimant shall prove it before the court that the practitioner is guilty of the offence of negligence which no other professional with such ordinary skills would be guilty of if acted with reasonable care.

Additionally, every profession must keep in mind the repercussion if there exists a failure of performance of duty, while some professions require a heavy price to be paid in case of such failures, the non-performance or failure in the performance of the other does not cost much. This is based on the situation and the nature of the act of performance. However, in no way can the act of negligence be defended especially when the rights of the aggrieved person are curtailed. Because of the divinity attached with the medical profession, any form of mistake or negligence on the part of the medical profession would make the concerned authorities to inspect and can cost the professional their license to practice.

Such acts of negligence do not only affect the life of the victim and the people associated but causes a huge impact on the life of the one who is convicted of such an offence.

There should be an authority concerned to act upon when the rights of a person are disturbed especially in the medical capacity to keep in check and prevent such acts from happening in the future. The punishments associated with such negligence by the medical practitioner usually involves fine, imprisonment, and revocation of the license of the practitioner.

There exists a scope of error in every field, every profession so eventually it would be wrong to seek perfection however, the plausible solution would be to exercise due care, follow protocols, take as much preventive measures as possible to safeguard the people. Not reaching out to the medical professionals to seek treatment could never be a sane decision as one cannot treat himself/herself, the aid, assistance, and support of the medical professionals would always be required. The profession requires a systematic rule of checks and balance to ensure the safety of the people and ensure that the practitioners perform their duty with diligence. The practitioners shall continuously try to improve their knowledge and skills and should be open to adapt new techniques and method of performance of their duty. More importantly, there is no better and stronger weapon than Education, it is a key to stop the significant rise in the medical negligence cases in India. Where on one hand the people are not aware of their rights which includes the medical rights, the non-qualified, in-competent practitioners are assigned to perform medical practices which majorly results in accidents, damage, or injury to the patients.

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