

Development of Medical Negligence

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The survival of mankind is awfully surrounded by un-estimate able disease to which challenge profession of medicine has immensely served and benefited because of which it enabled man to survive and perform normal physical actions overcoming the challenge of disease and also perform normal activities with the organs donated by others. Medical practice is capable of rendering a lot to the society provided due care, sincerity, efficiency and skill are observed by medical practitioners/ technicians. Absence of these elements may result into serious undesirable consequences. We have plenty of reports coming to the press media from every corner of the world about blinding of patients after eye operations and deprivation of normal functions of limbs after surgical operations and deaths in hospitals themselves due to sheer negligence of medical professionals in small and big hospitals.

Devil of medical negligence is not only haunting in small towns, cities or metropolitan cities in India itself but the problem is worldwide inviting attention of every sensitive capable social servant in every corner of the society at large. Let us take the example of America claiming to be highly developed advanced country in the world in every branch of science including medical science but the doctors of America are also reported to have committed sheer medical negligence in the course of surgical operation at Boston Hospital who left scissors in the chest of 59 years old patient as reported in New England Medicine Journal.ⁱ

In October 1999 in Germany one 51 years old patient had to pay for the negligence of his surgeon/doctor with loss of his life as the doctor concerned conducted operation on his left lung instead of right lung and the patient died after a year. The medical negligence came to light after an enquiry by a team of doctors who reported the factual position. The doctors of British had left instruments in the Stomach of the patient during operation for 722 times in the year 2008.ⁱⁱ

The doctors of a hospital of Orissa had to pay high cost for leaving towel in the stomach of a lady during surgery. The Supreme Court directed the doctor to pay Rs. 15.00 lac to the lady as compensation and Rs. 30000/- towards the expenses incurred in the surgery. The Bench consisting of Justice B. Sudarshan Reddy and Justice S.S. Nizzar pronounced the Judgment on Monday taking this matter as very serious. The accused doctors, P.N. Mohanti and Mr. dash and left towel in the stomach of Vidya Devi during Operation. Vidya Devi was admitted in Sudha Nursing Home for Operation of Dimbashay Dimb Granthi and Uterus.ⁱⁱⁱ

In a Canadian case the surgeon was found negligent when a pair of forceps was left behind in the patient's abdomen after a caesarean operation.^{iv} The husband of the complainant was operated for 'splenic abscess' but the patient died on the following day. After cremation when relatives reached the cremation ground for collection the 'mortal remains', they found a 'forceps' (15.5 cm long and 6.5cm wide).^v A 23 year old boy approached Dr. John Arthur for blockage in passage of urine, who took him to another clinic for operation. After the operation there was

over-bleeding from the penis and ultimately he had to be admitted to Jipmer Hospital. The hospital authorities reported the matter to the police. Here he came to know that his penis had been cut off (amputated) and only a small stump had been left and he was passing urine only through an artificial hole made at Jipmer hospital. He, in the process, had become permanently impotent.^{vi} A South African man joined the throngs of other victims worldwide who have had their penises amputated either in error or because they were not correctly diagnosed and not referred to a specialist in time.^{vii} A sponge left in the back after surgery.^{viii} The man was not as absolute as he appears. With the step by step advancement of civilization the human life resumed more and more perfection but struggle against adverse factors offering danger to survival continued with civic development like different kinds of diseases and endeavors to control them and consequential deaths. When we talk of human beings simultaneously the parallel shadow of diseases cannot be out of debate which is also on the trend of spread. When the human beings crept on earth since time immemorial the unfortunate aspect of ailment never spared him. Countless diseases have been identified and appreciated by medical sciences but still there is not last count to this evil species of ailment which is bound to spread more dreadfully with the passage of time. Not only this but in times to come unpredictable kind of diseases would be identified and brought on board before the people. Some diseases are hereditary which are transmitted from parents to off-springs which are likely to be cured through future inventions as the medical scientists are ceaselessly at work. Medical scientists are trying their level best to find out an effective check upon such hereditary diseases which may be effectively checked and restrained from traveling from their parent to off-springs.

When the human knowledge primitively was at naught then under ignorance man believing in superstition used to take the known disease as discretion of God and also found their treatment in superstition and in case of death used to take it as the ultimate will of God. Man continued suffering this cruel superstition approach for quite long say for centuries and afterwards his scientific knowledge unfolded this truth before the human society. Science with gradual advancement proved that with the passage of time the bacterial development and virus have also developed to add to the quantum of disease consequently the human life was affected dangerously. For some of the diseases effective treatment has been found and for some research is under process and progress. With the luxurious advancement of human beings the diseases have not only developed but have appeared in new form to challenge. Negligence is also one of the causes of spread of disease.

In ancient times in India system of medicine or medical science was well developed which was known as **Ayurveda** and scholars of this branch of medical science were called **Ayurvedic Chikitsak** who were capable of rendering effective treatment for any disease. **Meharishi Charak** is known world over as a father of Ayurveda. Archaic medicines play vital role in the progress of nationalistic pride. Sigerist recognized the powerful role of traditional medicine as a symbol of nationalism. He noted that India was in a period of transition awakening to a new life and looking into the future. According to him, the people look back to their culture history with pride.^{ix}

Practice of medicine is as old as existence of human race with the awareness in the society and the people in general gathering consciousness about their rights. The law of 'negligence' has undergone enormous change and development in the past fifty years. Mostly this has involved an expansion of liability but quite often the courts have retreated and cut back on the extent of

liability. This in turn leads to inconsistency and uncertainty. The reason for this is complex but they have in part to do with conflicting policy objectives.

NEGLIGENCE

‘Negligence’ means either subjectively ‘a careless state of mind’ or objectively ‘careless conduct’. Negligence is not absolute term, but is a relative one. To determine whether an act would be or would not be negligent, it was relevant to determine if any reasonable man would foresee that would cause damages or not. If the answer was in the affirmative, it was a negligent act.^x According to Dias, Liability in negligence is technically described as arising out of damage caused by the breach of a duty to take care. Winfield has defined that “Negligence’ as a tort is the breach of a legal duty to take care which results in damage, undesired by defendant, to the plaintiff. Thus its ingredients are:

- (a) A legal duty on the part of A towards B to exercise in such conduct of A as falls within the scope of the duty;
- (b) Breach of that duty; and
- (c) Consequential damages to B”

‘Negligence’ is, a question of law or fact or of a mixed fact and law depending entirely upon the nature of a duty, which the person charged with negligence, has failed to comply with or perform in the particular circumstances of each case. A very convenient classification has been formulated corresponding to the degree of negligence entailing liability measured by the degree of care undertaken or required in each case i.e.

- (1) Ordinary; which is the want of ordinary diligence
- (2) Slight, the want of great diligence; and
- (3) Gross, the want of slight diligence.

The Classic judicial definition of ‘negligence’ is noticed in *Blyth v. Birmingham Co.*,^{xi} wherein Alderson, J. said “Negligence is the omission to do something which a reasonable man, guided upon those considerations which regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do”. Negligence does not always mean absolute carelessness but want of such a degree of care as is required in particular circumstances.

In medical jurisprudence, a practitioner is said to have adopted reasonable care if the practices he had adopted to treat the patient are in conformity with the accepted or prevalent practice of the day. A seminal case in the matter of accepted methods as an evidence of the reasonable care required by the medical professional in *Marshall v. Lingsey County Counsel*^{xii}, where the Court categorically held that “A defendant charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice”. The offence alleged to have been committed in the cases of medical crimes must be shown to be foreseeable by the doctor. In a recent decision in *Poonam Verma v. Ashwin Patel*^{xiii}, it was observed that negligence as many manifestations – it may be active negligence, passive negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal Negligence, gross negligence *per se*. Negligence *per se* is defined in Black’s Law Dictionary as, “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 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 negligence." It has also been observed that where a person is guilty of negligence per se, no further proof is needed.^{xiv} In a matter of negligence the law of crime is codified in the Indian Penal Code 1860 and the most of relevant sections dealing with it are 336, 337, 338 and 304A, 312, 313 and 314 of Indian Penal Code 1860.

MEDICAL NEGLIGENCE

Negligence may be either civil or criminal. When the negligence is of aggravated kind as to be termed as rashness the liability of such act results in shall be criminal in nature. The question as to whether 'medical negligence' is a civil wrong criminal offence has been a question that has been mooted in legal circles for long. In order to address this issue, the essential differences between these two branches of law have to be elaborated. For civil liability, the simple lack of care is enough but in criminal law, a very high degree of neglect is required to be proved. Any decision in a civil case has to be decided by balancing the probabilities whereas in criminal law, the act alleged has to be proved beyond reasonable doubt.^{xv} Most of the cases regarding 'medical negligence' now are generally brought before the Consumer Redressal forums constituted under the Act under the Consumer Protection Act 1986.

As a result of it, the concept of medical negligence slowly and steadily has undergone such a sweeping changes that the day it's not far away when no civil case regarding medical negligence shall be found to be instituted in future.

New concept of negligence in context of medical profession has been propounded in Jacob Mathew's case^{xvi} which laid down that "such a negligence calls for treatment with the difference and also propounds that one can be held liable for medical negligence either when he does not possess requisite knowledge which he has profess to possess or he did not exercise the reasonable competence, the skill which he did not possess".

A new principle regarding liability in criminal negligence has been propounded to the effect in the case of *Martin F.D'Souza v. Mohd. Ishfaq*,^{xvii} that (i) "the negligence must be gross negligence amounting to recklessness (ii) it has also propounded the principle that opinion of expert or committee of expert must be sought and thereafter notice to the wrong doer should be issued". In case of *Dr. Suresh Gupta v Govt. NCT Delhi*,^{xviii} the theory of recklessness or grossly negligence has been propounded, mere negligence is not sufficient.

The gist of the matter is that there must be some sort of relationship, whether it is contractual, fiduciary or by implication, which exposes medical practitioners to the duty of care, skill and knowledge. So far as persons engaged in the medical profession are concerned, it may be stated that every person who enters into the profession, undertakes to bring to the exercise of it, a reasonable degree of care and skill. It is true that a doctor or a surgeon does not undertake that he will positively care a patient nor does the undertake to use the highest possible degree of skill, as there may be persons more learned and skilled than himself, but he definitely undertakes to use a

fair, reasonable and competent degree of skill. This implied undertaking constitutes the real test, which will also be clear from my study in this research work and analysis of the various judgments dealt with this thesis.

Of late, the law regarding medical negligence is specially relating to the field of crime and relating to the cases under the Consumer Protection Act, 1986 is now fastly developing and is passing through an evolutionary processes. Such so many heart rending matters, cases, incidents of patient's death results merely from error of judgment or an accident etc. arising out from the acts of medical negligence of the medical men, rapidly prompted me to study/research as to what remedy does the law provide to such victims of medical negligence.

The law on the subject is an ever growing process. The law of medical negligence in criminal law has travelled a long way and the courts are guided by the precedents both in this country and abroad. As such an attempt has been made to survey the entire range of case law on the subject, up to the date of sending the manuscript to computer typing engineer.

ENDNOTES:

- ⁱ Dainik Bhaskar. 17.01.2003.
- ⁱⁱ Dainik Bhaskar 04.06.2010.
- ⁱⁱⁱ Dainik Bhaskar 17.08.2010.
- ^{iv} *Gloming v. Millar*, (1954) ULR 372
- ^v *Nihal Kaur & Ors v. Director, PGI Chandigarh*, 1996(3)CPJ 112
- ^{vi} *C. Siva Kumar v. Dr. Jolin Arthur & Ors.*, 1998(3)CPR 436
- ^{vii} Medical negligence Cases in South Africa-Internet search
- ^{viii} *Crump v. Piper*, 425 SW 2d 924(M.O.1968)
- ^{ix} Mitra Dr. Jyotir, "Glimpses of Advancement of Medical Sciences "
- ^x *New India Assurance Co. Ltd. v. Ashok Kumar Acharya*, 1994(2)(TAC)469(Ori)
- ^{xi} (1856)11 Exch 781, 784
- ^{xii} KB 516, 540 per Maughan L.J.
- ^{xiii} AIR 1996 SC 2111
- ^{xiv} 2007 CrLJ (Journal Section)P-152
- ^{xv} 2007 Cr.L.J.(Journal Section) P-156
- ^{xvi} *Jacob Mathew v. State of Punjab*, AIR 2005 SC 3180
- ^{xvii} 2009(2) RLW 1094(SC)
- ^{xviii} *Dr. Suresh Gupta v. Govt. NCT Delhi*, AIR 2004 SC 409