MEDICAL NEGLIGENCE AND CONSUMERISM

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Good health is one of the facets of Right to Life which is reiterated time and again by courts. And health includes both physical as well mental health. With the advent & advancement of technology, life style of an individual has been substantially changed. So many new diseases have been cropped up. It is needless to say that due to burgeoning medical techniques cum technologies like ART, ECO, EGC, and stent transplant etc. the doctor patient relationship has undergone substantial alteration. Earlier it was a fiduciary relationship where trust was the seed between the two. Now it has become more contractual. On one hand where hospitals are coming up with the corporate culture being a cluster of myriad of departments like Nephrology, Cardiology, Haematology, Gynaecology, Orthopaedic so on and so far, on the other hand, the patients too have become more aware of their right of getting best treatment within a reasonable price. We see corporate hospitals like Fortis, Apollo which carry a whole set of services like pathology, dispensary, hotels, and restaurants. In such corporate hospitals there are some regular doctors, some of them juniors and few of them may be guest/visiting doctors. Many times it is seen that a particular patient is diagnosed by more than one doctor of same hospital. And inclusion of more and more technological advancement as well of medical technology patients too have become more informed and involved. Many times patients discuss with the doctor all the available diagnosis for that particular ailment and like to make itself the best choice for their medication.

It is again needless to say that few hospitals have adopted bad practises with a sole purpose of minting money out of such patients like anything. So with the medical technological advancement, where there seems a loot in the name of knee transplant, hip transplant so on and so far. And thus a patient as a consumer is in vulnerable position to get deprived of his/her rights of consumerism. Consumer rights are defined as rights of a person who purchases goods for consideration or avails any service in lieu of the sum paid as consideration for personal use or consumption. Consumerism embarks upon spectrum of rights available to the consumer like right to make choice,

right to safety and right to information. **Indian Medical Association v. V P Shanta**[1] is the first landmark judgment in country which affirmed that medical services will come under the purview of service definition of the Consumer Protection Act, 1986. Since then, patients stepped into the shoes of consumer driven right based approach. When we name health care services, today we see its not only the doctor who is covered into it, rather pathological labs, chemists, para medical staff, non-medical staff, lab technician, nurses, ward boys etc. all are encompassed into it. Quite often we hear that some of the corporate hospitals offer some packages to cure some set of ailments. So the traditional picture of health care sector is transformed into a corporate speciality centre which offers cure to almost all the ailments under one single roof. Hence, consumerism of medical services is also supposed to be looked into from many angles.

The whole gamut of legal framework may be summed up into the following:

1. Doctors' **criminal liability (section 304 A IPC, Section 337- causing hurt and 338- causing grievous hurt);**

2. Doctors' **civil liability** in terms of monetary compensation arising out of contractual relationship;

3. Doctors' liability under **professional regulatory boards regulations like before National Medical Council in the form of imposition of penalties pursuant to disciplinary actions against the delinquent under such regulations;**

One may ask why there is increase in medical negligence litigation across India, upon careful examination of the issue, we find that there is awareness amongst the patients as consumers, there is seen a sort of flexibility of the grievance redressed forum which is easily accessible and last but not least, the cost to avail such medical services has been increased exponentially. Because of these mentioned reasons we see a sort of inquisitiveness in the minds of even a common consumer availing medical

[1] 1995 SCC (6) 651

services to know from his/her doctor all the possible available procedures to cure a particular ailment or infirmity.

Medical negligence may be defined as the negligent, improper or unskilled treatment of a patient by a health care professional. This may include negligent care from a nurse, physician pharmacist, dentist or other health care workers. Medical negligence forms the basis for most medical malpractices claims where the victim is claiming injury which he has suffered out of such medical treatment. In case of medical negligence the legal duty is casted upon doctor or say health care service provider and the one who suffered injury is patient. Now in order to ascertain whether a doctor is negligent or not following points' crop up for determination:

a. Whether there is failure of duty of care or not;
b. What would be the standard of care in the given factual matrix of the case;
c. What treatment is supposed to be given;
d. Whether administration of the treatment was done actually in line with the set standards of medication or not;
e. Whether the patient too was negligent in adhering the doses as per time or procedure on time.

An action of medical negligence is to be proved/established before court of law by adducing evidences. And thus the role of **medical records** become significant.

In an important land mark judgment, **Laxman Balkrishna Joshi v. Trimbak Bapu Godbole**[2]a very important observation was made.

The court said, "***A person, who held himself out ready to give medical advice and treatment impliedly undertook that he was possessed of the skill and knowledge for the purpose. Such a person owed to his patient certain duties, viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in administration of that treatment. A breach of any of these duties will give a right of action for negligence to the patient. The medical practitioner must bring to his task a reasonable degree of skill & knowledge andmust exercise a reasonable degree of care…***"

[2] (1969) SCR 1 (206).

Legal jargon duty to take care

Duty to take care is one of the ingredients to be proven in an action for medical negligence. Such duty must be a legal obligation and not mere social or moral obligation. This has to be understood in case of medical negligence, suppose a pregnant lady who suffers acute pain in her womb goes for check up to an orthopaedic and such orthopaedic treats her and suppose somehow she miscarriages then in such situation, that orthopaedic would not be liable for medical negligence action. But if it is the case, where such pregnant lady who feels lesser baby movements goes to a gynaecologist and the gynaecologist asks her to come some other day in spite of diagnosing her, then such an act would amount to negligence and would give proper justification to bring an action of medical negligence under the law of tort as well under the consumer protection law.

This legal duty in the scene of establishing an action of medical negligence against a negligent doctor could be of anything as the three propounded in **L.B. Joshi** case.

Essentials of Medical Negligence:

1. Duty towards patient arising out of doctor patient relationship;
2. Deficiency/failure in duty (service);
3. Such deficiency/failure would have resulted in injury (physical/mental);
4. Damages.

It is again very important to understand that in an action brought against the negligent doctor by a patient under the law of tort or for that matter under the consumer protection law, one has to prove that the suffered injury/loss is having direct nexus/link to such breach of legal duty. If there is failure/deficiency in duty to care **whether to undertake a case or not**; **if there is failure/deficiency in deciding what treatment is to give** or **if there is any deficiency/failure in administration of such treatment/failure** then it is clear cut case of medical negligence. It may be understood from another example, suppose a pregnant lady wants normal delivery but as per the medical advice normal delivery may be fatal to the life of both mother as well of infant and thus it is suggested to undergo scissoring and post

operation, lady survives but the infant dies then it may not be a successful case of medical negligence as the decision as to do away normal delivery of the pregnant lady was taken keeping into account the best possible medical advice and there was no breach of any legal duty.

The degree of care in each duty of care actually vary, there cannot be any one standard which may be prescribed for entire medical fraternity that too for cure of all the ailments. Like the degree of care would be different for the hospitals in metros like Apollo, Fortis and the one operating in remote locations like district hospitals or city civil hospitals. The infrastructure, hospital administration too plays a significant role in ascertaining the fact as to the breach of such medico-legal duty.

Causes of Medical Negligence

a. Deficiency in proficiency;
b. Improper performance of such legal duty;
c. Error in adopted procedure;
d. Failure to monitor the procedure;
e. Improper decision making;
f. Failure as to confidentiality;
g. Lack of proper communication.

Let us understand all these reasons one by one. **Deficiency in proficiency** relates to such situation where the doctor is not having requisite qualification which is mandated by Medical Council of India (now National Medical Council) for each medical practitioner before starting the practice. Apart from the doctors, it is seen that many pathological labs are being carried out by non-medical practitioners. Many times it is heard that such and such labs don't give accurate/correct results and when an action of medical negligence is brought against the negligent, it is pleaded in defence that standard of each lab for each pathological test actually vary. Another factor is **improper performance** of such legal duty. It may be understood with this example, suppose a man is having acute chest pain and if he visits to a cardiologist and the cardiologist in spite of doing ECG, ECO to get the best cardiac assessment of such man, advices him to take PAN-D then in such case it amounts to improper performance of such

legal duty and it is medical negligence. Another factor is **error in adopted procedure**. Suppose a patient is having artery blockage and he visits to a cardiac surgeon, such surgeon does angiography and finds out that the patient is suffering from 100% artery blockage and thus performs angioplasty by doing open heart surgery or through stent. But adopting this procedure, leaves any article inside the body then such a procedural error amount to medical negligence. Another important factor is **failure to monitor**. This may be understood with this example, suppose a patient is in OT and undergoing open heart surgery by some cardiac surgeon and the patient has just undergone to angiography so that the correct assessment of the degree of artery blockage can be done, meanwhile the patient dies because of excessive bleeding and the nurse who was supposed to monitor the same omits her legal duty and the doctor too fails in monitoring the procedure which may amount to medical negligence

Another one is **decision making**. Suppose a patient is in district hospital where no ICU facility is available. Upon treatment, doctor comes to know that now the situation of the patient is critical and the patient must be shifted to some nearest ICU but the doctor does not take such decision delays in taking such decision then it may amount to medical negligence.

Confidentiality as well communication plays a significant role in medication. There are few ailments which require privacy as to its treatment like HIV or some disabilities or say some diagnosis or clinical counselling if such private information is disclosed not having any legal justification then it amounts to medical negligence. **Communication gap** can be understood with this illustration. Suppose for a particular ailment, the doctor gives certain prescription of medicines in which dose and time are very important, but the patient or say chemist who prescribes drugs fails to narrate the exact prescription to the patient then it amounts to medical negligence.

Bolam Test and Medical Negligence

In **Bolam v. Friern Hospital Management Committee**[3] a test was propounded to determine the degree of care in an action brought for medical negligence. **Mc Nair J**. observed, "***When you get a situation which involves the use of some special skill or competence, then the test whether there has been any negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill…. A man need not***

[3] (1957) 1 WLR 582, 586.

possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

This test is famous as **Bolam test**, which is applied by Indian courts too in series of judgments. In landmark judgment of **Jacob Mathew v. State of Punjab**[4] the Hon'ble Apex court explained at a great length the various dimensions of Medical Negligence, be it civil or criminal, standard of care and reasonableness etc. The court observed two main grounds on which a doctor can be held liable for medical negligence:

a. The doctor lacks the requisite skill/art, which he professes to have possessed;
b. When the doctor fails to exercise, with reasonable competence in the given case, the skill/art which he possess. Standard to be applied as set forth in Bolam Test.

Thus in Jacob Mathew case, the court applied Bolam Test which was subsequently applied in catena of judgments. The Court observed, "***When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong & therefore somebody must be punished for it. However, it is a well-known that even the best professionals, what to say of the average professionals, sometimes have failures. A lawyer cannot win every case in his professional carrier but surely he cannot be penalised for losing a case, provided he appeared in it and made his submissions."***

In a recent landmark case, **Anil Kumar Gupta v. Banaras Hindu University**[5] filed before NCDRC, Coram of **Justice R. K. Agarwal (President)** and **Dr. S. M. Kantikar (Member)**, upheld the State Commission's majority order with regard to alleged medical negligence. The said revision petition was filed against the order by U.P. State Consumer Dispute Redressal Commission, Lucknow. It was the case of left knee joint and four loose bodies were seen during **arthroscopy** (a surgical procedure in which doctors used to look at, diagnose and treat problems inside joints) & their size were 1.5,1.25, 1 & 1 cm. A large body of more than 5 cm is difficult to be removed by arthroscopy. Therefore, doctor preferred open surgery. It was further the case, where the patient was informed in case, if arthroscopy was not successful, open surgery would be done. The court upheld that nothing amounts to negligence in the present matter. It was observed further, "***a medical error, is only considered***

[4] AIR (2005) SC 3180
[5] Revision Petition 5028/2008, decided on 05.10.2020.

negligent if the health care practitioner has failed to take reasonable care. Each medical error or failure cannot be medical negligence. Just because a person, suffers a bad outcome from medical treatment does not mean that they have an automatic right to sue for compensation."

Samira Kohali Judgment and Informed Consent law in Medical Negligence–

In **Samira Kohali v. Prabha Manchanda**[6], the appellant an unmarried woman of 44 years, advised to undergo surgery, was explained, when she signed the consent form that the procedure for surgery to be undergone by the appellant as diagnostic operative laparoscopy, laparotomy may be needed. While she was still unconscious, consent of her mother for performing **hysterectomy**[7] under general anaesthesia was obtained. Appellant's reproductive parts were removed. The said consent was obtained for removal of uterus but the respondent removed ovaries and fallopian tubes too. The Constitutional Bench of the Apex Court examined the matter in the light of the factual matrix of the case. The court upheld in unambiguous and unequivocal terms that the doctor had to seek and secure real and valid consent before the commencement of the treatment. Consent given for a specific treatment or procedure will not be valid for some other treatment method or valid consent. The only exception to this rule is where the additional procedure though unauthorised, is necessary in order to save the life or preserve the health of a patient. In case of mental ailments the consent of his guardian is required. **Blanket consent or consent obtained by securing signatures on dotted lines is not a valid or real consent**. A patient has full right to know and take decisions regarding the treatment which he wants his body to go through except in certain emergent situations. The noble notion of informed consent is ingrained in the idea where the benefits of treatment is explained to the patient, risk which may accrue out of such treatment either immediate or remote, other alternative treatment, if any, must be explained to the patients with all merits and demerits.

What may not amount to Medical Negligence?

[6] AIR (2008) SC 138.

[7] A surgical procedure to remove woman's uterus or womb. The uterus is a place where a baby grows when a woman is pregnant. After the hysterectomy procedure, the woman have no longer periods and she cannot become pregnant. Sometimes, the surgery also removes the ovaries and fallopian tubes.

The jurisprudence of medical negligence in consumerism has developed some valid defences, it is not medical negligence if a doctor does not admit the case of the patient, it is not a medical negligence where doctor refuses to attend the patient outside clinic timings, but emergency cases will be an exception to this. Where the patient omits to take proper and timely doses of medication then in such cases, it is not a case of medical negligence. Where a patient hides or omits to disclose previous medical history and later he suffers some injury or harm on being diagnosed by such doctor and such injury or harm has caused due to concealment of such material medical history, it might not be a case of medical negligence. Where a patient is on medication under some doctor and suffers injury or harm due to any preceding or intervening event, he cannot bring an action of medical negligence against such doctor. Now a days in medical profession, the association of doctors have formed various societies to protect the collective interest of the medical fraternity by prescribing certain Standard Operating Procedures (SOPs) like Neurological Society, Cardio society, Gynaecologist Society etc. which prescribes standard norms for particular procedure and if such norms are not adhered than it may amount to Medical Negligence.

Res ipsa loquitur & Medical Negligence

In order to bring an action for medical negligence, if there are situations or circumstances which itself discloses/reflects/proves that the doctor was negligent then there is no need to prove such negligence. Cases where it is seen where articles like towel, scissor etc. is left inside the body of the patient then in such cases the negligent behaviour of the doctor is evident. Or cases where doctor performed operation or surgery on wrong side. All these are examples of *res ipsa loquitur*. In **A. H. Khodwa v. State of Maharastra**[8] the patient undergone a sterilization operation after child birth. A mob was left inside the abdomen of the patient, by the doctor performing the operation. This resulted in peritonitis and because of this plaintiff died after a few days. The doctor was held liable for medical negligence.

[8] (1996) ACJ 505 (SC)

Conclusion

The jurisprudence of medical negligence as developed till date by the Indian judicial system right from VP Shanta case to Jacob Mathew and further many more cases actually set the tone of consumerism in medical services. As per my opinion the whole gamut of this law, now the time has come, should try to strike a careful balance between the professional autonomy of a medical practitioner and of a patient's right to get a fair, accessible and reasonably charged medication. Needless to say, today the corporate picture of the health care sector poses serious threat to the rights of a patient. We see, in the name of corporate speciality health care services, there is a chain of various players involved in the health care sectors like, pharmaceuticals, test labs etc. over charge from their patients and in this game, usually the doctors are involved who write many unwanted check-ups, lab test which even don't have any remote connection with the ailments. It is again to mention that overcharging from patients, referring to unwanted and non-desirable lab test would also amount to actionable medical negligence.

Each medical error does not give automatic right to the patient to sue. Each case has to be examined in detail after hearing submissions of both the parties. Thus, role of medical records as well of medical history is very much required.

The court should allow for greater participation of medical experts in dispensation of justice. Expert evidence is admissible in court of law under **section 45** of the Indian Evidence Act, 1872 whenever a court is unable to form an opinion as to the question pertaining to the medical science.

Unless the *nitty gritty* of medical profession is understood, it is tough to fix what is the standard of care, standard of reasonableness in the given facts and circumstances of the case and what are the circumstances which warrants emergency. Just because, some injury is caused to the patient during medication, the patient does not get right of *sui generis* of brining an action of medical negligence. Likewise, the dimensions of medical profession has widened, the chances with nuances of growing action of medical negligence has also increased exponentially. ***The notion of informed consent***

in the domain of medical negligence actually embraces the idea of reasonable disclosure, adequate disclosure and complete disclosure[9].

Patients as consumers are more aware with all the available medical techniques and procedures. They want to discuss with the doctor all the possible either immediate of remote repercussions arising out of such treatment, they do the cost analysis too and also other available possible medication. Hence, the domain of medical negligence is widened enough. At the same time, there is a dire need when the pecuniary jurisdiction of District Consumer Commission is increased from **20 lacs to 1 crore**[10]which actually necessitates the requirement of being familiar with nuances of medical negligence to this consumer dispute commissions urgently. For that purpose, proper training and infrastructure must be provided by the resource persons of the relevant field experts.

[9] Samira Kohli v. Prabhamanchanda, AIR (2008) SC 138.
[10] Section 34 of Consumer Protection Act, 2019