



ORIGINAL RESEARCH PAPER

Law

MEDICAL ETHICS & MEDICAL NEGLIGENCE – A SYSTEMATIC PURVIEW WITH JUDICIAL INTERPRETATION

KEY WORDS: Medical Ethics, Misconduct, Criminal & Civil Negligence, Doctor's Liability.

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ABSTRACT

In every profession or calling certain kind of ethical code of conduct is always a sine quo non for its effective functioning and accountability. So far as Medical profession or Health Care Utility is concerned, it also plays a most vital role in protecting the society by providing its best expert medical service which in turns saves the life's of millions of people who are in need of these services of professionals and organizations when they are in bad state of health conditions. The Constitution of India incorporates provision guaranteeing everyone's right to the highest attainable standard of physical and mental health. Article 21 of the Constitution of India guarantees protection of life and personal liberty to every citizen. The Hon'ble Supreme Court of India has held that in **State of Punjab Vs. Mohinder Singh Chawla (1997)2 SCC 83**. – "That right to health is integral to the right to life and the government has a constitutional obligation to provide health facilities.

INTRODUCTION:-

A patient who approaches a doctor or hospital on the basis of their reputation is on the other hand expects from them a reasonable standard of care, skill and expertise which a man of ordinary prudence would have expected in a similar circumstances. When a doctor or hospital on the other hand fails in providing the reasonable standard of care, protection and skill in their respective field of practise and as per there prescribed professional ethics and code of conduct, then it amount to violation of their professional ethics and may also entail them to face criminal charge for medical negligence which causes hurt, grievous hurt or loss of life of any patient.

Black Law Dictionary defines "ethics" as "of or relating to moral action, conduct, motive or character...professionally right or befitting, conforming to professional standards of conduct.". According to Black Law Dictionary 'Negligence' is defined as "The failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation, any conduct that falls below the legal standard established to protect others against unreasonable risk or harm, except for conduct that is intentionally, wantonly, wilfully disregardful of others rights".

A doctor must maintain a higher standard of professional conduct and must give utmost priority to human health by preserving it and without any bias. According to the world Medical Association of Declaration of Geneva 1948, a member of medical professional shall solemnly pledge that the health of the patient shall be the doctor's first consideration.

SCOPE OF STUDY:-

- What is medical negligence?
- What are the factors responsible for such negligence?
- What are the laws available to deal with such negligence?
- How this problem affecting by bringing bad reputation towards the profession?
- How to reduce such incidence and bring more accountability and protecting the interest of the patients and their life from such medical malpractices?

CONCEPTUAL ANALYSIS OF THE PROBLEM:-

Now days it is very phenomenon to take notice of cases pertaining to medical negligence as being reported in our news paper, television and other print Medias. The major factors that contribute to such problem areas like lack of professional doctors, and many of them are not even adhering to their prescribed medical code of conduct or ethics because they become more and more money minded and as

such give more value to money then in serving patients. The situation is deteriorating day by day because the doctors and hospitals who are providing their services satiating their commercial purpose first by giving more time to their private clinics, other hand neglecting the patients interest and adhering to corrupt practices, which effect proper care, treatment and diagnosis of the patients.

Medical Negligence are divided in to two types as per Judicial Interpretation of Statues.

1. **Criminal negligence**, which is dealt with Indian Penal Code 1860.

The degree of skill and care required by a medical professional is stated in **Halsbury's Law of England(4th Edition Vol-30) Para-35 :-**

"The Practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor the very low degree of care and competence, judged in the light of particular circumstances of each case. Is what the law requires and a person is not liable for negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is guilty of negligence if he has acted in accordance of a practice accepted as proper by a responsible body of medical men skill in that particular art, even though a body of adverse opinion also existed among medical men."

The subject of negligence of medical professional definitely calls for, to be dealt with a difference, than in comparison with other kind of professional negligence. The Hon'ble Supreme Court of India has held in the case of **Jacob Mathew Versus State of Punjab** "To prosecute medical professional for negligence under criminal law it must be shown that the accused did something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do so. (Para-49). The Jurisprudential Concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be negligence in criminal law. For negligence to amount to an offence, the element of mensrea must shown to exist. For an act to amount to criminal negligence the degree of negligence should be much higher. i.e gross or a very high degree.(Para 49-(5)).

The Classical statement of law in **Bolam Case** All ER at Pg.121 D-F has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular, and holds good in its applicability in India. The Hon'ble SC has held in the case of **Jacob Mathew Vs.**

Submitted : 15th July, 2019

Accepted : 19th September, 2019

Publication : 15th December, 2019

State of Punjab (Supra) that the prosecution of doctors for criminal negligence has been increased now a days. Sometimes such prosecutions are filed by private complaints and sometimes by police on an FIR being lodged and cognizance taken, The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law U/s 304 A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standard (Para-51). Hence the Hon'ble SC has laid down certain mandatory guidelines which has to followed by the Court and Investigation officers before proceeding against a medical professional for negligence where the doctor is accused of rash or negligent act which are as follows (para-53):- "A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be experienced to give an impartial and unbiased opinion applying Bolam"s test to the fact collected in the investigation".

In **Dr. Suresh Gupta Versus Government NCT Delhi** :- The Hon'ble SC relied upon the decision of the House of Lords as laid down in *R. Versus Adomkaka* 1995 1 AC 171, the observation as made is stated below:-

"Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the state."

The Hon'ble SC also held in the case **INS Malhotra (Ms) Versus Dr. A. Kriplani & others** "That indiscriminate prosecution of medical professions for criminal medical negligence is counterproductive and does no service or good to the society."

The doctors are also prosecuted under criminal negligence for violating the acts and statues like Transplantation of Human Organs Act where the concerned doctors make transplantation of human organs without following the procedure established by law under the statue, the Prenatal Diagnostic Techniques (Regulation & Prevention of Misuse) Act 1994 where the concerned doctor determines the sex of the foetus in violation of the law and where they also do miscarriage which is not allowed under the law as per the Medical Termination of Pregnancy Act 1971, etc.

2. CIVIL NEGLIGENCE -

It is further divided into two statues (a) Tortious liability- Law of torts (b) Medical Negligence under Consumer Protection Act 1986. Application also made to Permanent Lok Adalat (PUS) under L.S. Act 1987.

In the case of **Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr., AIR 1969 SC 128 and A.S. Mittal v. State of U.P.**, it was laid down that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that

basis recover damages from his doctor.

DUTY ON THE PART OF A HOSPITAL AND DOCTOR TO OBTAIN PRIOR CONSENT OF A PATIENT

There exists a duty to obtain prior consent (with respect to living patients) for the purpose of diagnosis, treatment, organ transplant, research purposes, disclosure of medical records, and teaching and medico-legal purposes. With respect to the dead in regard to pathological post mortem, medico-legal post mortem, organ transplant (for legal heirs), and for disclosure of medical record, it is important that informed consent of the patient is obtained.

Samira Kohli vs. Dr. Prabha Manchanda and Ors., the apex court held that consent given for diagnostic and operative laparoscopy and "laparotomy if needed" does not amount to consent for a total hysterectomy with bilateral salpingo ophorectomy. The appellant was neither a minor nor mentally challenged or incapacitated. As the patient was a competent adult, there was no question of someone else giving consent on her behalf. The respondent was denied the entire fee charged for the surgery and was directed to pay Rs. 25000/- as compensation for the unauthorized surgery.

Indian Medical Association vs. V.P. Shanta and Ors., III (1995) CPJ 1 (SC), the Supreme Court finally decided on the issue of coverage of medical profession within the ambit of the Consumer Protection Act, 1986, With this epoch making decision, doctors and hospitals became aware of the fact that as long as they have paid patients, all patients are consumers even if treatment is given free of charge.

Pravat Kumar Mukherjee vs. Ruby General Hospital and Ors., the National Commission delivered a landmark decision concerning treatment of an accident victim by the hospital. The respondents demanded an immediate payment of Rs. 15000/- and discontinued treatment for 45 minutes, the people from the crowd present were forced to take the patient to National Calcutta Medical College, which is about 7-8 km from the current hospital. The patient died on the way and was declared dead upon arrival at the National Calcutta Medical College.

The National Commission allowed the complaint and the Opponent Ruby Hospital was directed to pay Rs. 10 lakhs to the Complainant for mental pain agony. The Commission observed as follows: "This may serve the purpose of bringing about a qualitative change in the attitude of the hospitals of providing service to human beings as human beings. A human touch is necessary; that is their code of conduct; that is their duty and that is what is required to be implemented. In emergency or critical cases, let them discharge their duty/social obligation of rendering service without waiting for fee or for consent". However, it remains to be seen whether the above award has brought in any attitudinal change in the medical fraternity.

In **Martin F D'souza Versus Mohd. Ishfaq** 2009 (SC) it was held by the Hon'ble Court that:- **Para-41-** A medical practitioner is not liable to be held negligent simply because things went wrong from mischance to misadventure or through an error of judgement in choosing one reasonable course of action treatment in preference to another. He would be liable only when his conduct fell below that of standards of a reasonably competent practitioner in his field.

In **V. Krishna Rao Versus Nikhil Super speciality Hospital & Another** :- Held that expert evidence is not required to be adduced in each and every case of medical negligence and if the parties to the case wants to adduce expert opinion the member of the fora by applying their mind in the facts and circumstances of each case can allow parties to adduce it as evidence.

In some cases on the basis of the maxim '**Res-Ipsa-Loquitor**' the court fixes liability on the doctor. This maxim Res-Ipsa-Loquitor means things speaks for itself, the court in some cases where it founds the negligence of the doctor which is clearly visible without any external aid and which per se amount to be wrong then in such cases court on the basis of this principles of law fixes liability on the doctor without putting any burden on the complainant to prove his case. This principle was applied in the case of *The National Commission in the case of Dr. Ravishankar vs. Jery K. Thomas and Anr.* held that based on the facts and circumstances, the obvious deduction is that the appellant doctor is responsible for leaving behind ribbon gauze resulting in complications. Medical negligence was proved

The Medical Council of India, had made a regulation with the previous approval of the Central Government called as Indian Medical Council Professional Conduct, Etiquette, Ethics Regulation 2002. **(IMCPCEE) Regulation 1.1.2 provides that** - "The prime object of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. Whosoever chooses his profession assumes the obligation to conduct himself in accordance with its ideals. A physician should be an upright man, instructed in the art of healings. He shall keep himself pure in character and be diligent in caring for the sick; he should be modest, sober, patient, prompt in discharging his duty without anxiety; conducting himself with propriety in his profession and in all the actions of his life"

"Similarly the Central Government in exercise of the powers conferred by clause -(1) of sec-33 read with sec-24 of the Homoeopathy Central Council Act 1973(59 of 1973), the Central Council of Homeopathy, with the previous sanction of the central Government, hereby make the following regulation, namely :-

1. These regulations may be called the Homeopathic Practitioners (Professional Conduct, Etiquette and Code of Ethics) Regulations, 1982.

At Regulation-1, 1.2, that at the time of registration each applicant who intends to register his name as a homeopathic practitioner shall pledge his life for the service of the humanity , shall have utmost respect for human life, shall practise profession with conscience and dignity in accordance with principles of Homoeopathy , health of the patient shall be his first consideration, maintain honour for profession and shall also follow other regulations as prescribed . Regulation -3 of the said regulation further provided that the primary object of the medical profession is to render service to humanity with full respect for dignity of man, financial reward is a subordinate consideration. Violation of above is considered as misconduct and dereliction of his duties which a medical practitioner owes towards his patient."

ISSUES-

I.M.C.P.C.E.E Regulation 2002, only applies to Medical Practitioner and does not regulate the Hospitals /Big Health Care Units established as an incorporated bodies as Companies or Firms who are managed either by a private bodies or corporations or under trust for commercial purpose and they may not necessarily be a Medical Professional coming within the ambit of the medical ethics.

The Clinical Establishment (Registration & Regulation Act 2010) has been enacted by the Central Government to Provide for registration of all clinical establishment in the country with a view to prescribe the minimum standards and facilities and services provided by them. The Government has also notified the National Council of Clinical Establishment (Central Government) Rules, 2012 under the Act vide. Gazette notification dated 19th march 2012 and 23rd

May 2012 respectively. Though the above said regulation prescribes certain standards to be maintained by the clinical establishment but due no effective steps being taken to conduct periodical checks by the concerned authorities under the Act and the rules by visiting each and every clinical establishment coming under its preview, this law just remains a sample piece of codified rules only without having any effective enforcement of the same.

ISSUES-

Indian Courts and its Judges are not being expert in medical science hence as a result while adjudication of a medical negligence case they often cannot understand the complexities of medical procedure as adopted by a medical professional in treating a patient and factually understanding that whether it is correct or not and hence relies mostly upon 'expert opinion' who is basically ARE PERSONS belonging to the same fraternity, profession and calling and this accelerates the chance of the report being tainted one as the same fraternity professional cannot always give evidence against the interest of his fellow brother.

Ankuran Dutta, managing trustee of Anamika Ray Memorial Trust, has claimed that around 52 lakh medical injuries are recorded every year in India and 98,000 people in the country lose their lives in a year because of medical negligence.

"It is a matter of serious concern for the entire nation that 10 people fall victims to medical negligence every minute and more than 11 people die per hour in the country due to medical error. It is the eighth leading cause of death in the world," Dutta, who is also associate professor and head of department of communication and journalism at Gauhati University, has said.

According to Dutta, the statistics of 98,000 people who die due to medical error has been borrowed from the television programme 'We the People' of NDTV, where Dr K K Aggarwal, honorary secretary general of the Indian Medical Association (IMA) was also a panellist. Another statistics of 5.2 million medical injuries being recorded in India has been taken from a research paper titled 'A Study of Medical Negligence Cases decided by the District Consumer Courts of Delhi' by Mukesh Yadav and Pooja Rastogi, which was published in the Journal of the Indian Academy of Forensic Medicine.

PURPOSE OF STUDY-

Though to deal with medical negligence, laws are there in vogue and mostly it is contemplated as a civil wrong hence punishment to the wrong doer is awarded only by way of awarding monetary compensation which is to be paid to the victim or the family of the victim in case where the patient dies due to the wrongful act of the medical professional. Here the medico-legal adjudicatory system clearly fails to understand that no amount of money can ever compensate the loss of the life of the patient for the wrong committed by the doctor but still it is the only remedy available to the victim as because prosecuting the doctor under criminal law is almost not tenable unless the act which amounted to be criminal negligence to be so gross as no medical person of an ordinary skill would have committed the same act under similar circumstances.

Sometime's doctors and medical professionals are also meted with unnecessary prosecutions which is initiated by the victim's or the family's of the victims where the operation or treatment did not yield the expected result or did not completely cured the patient, but not specifically due to any fault or negligence on the part of the doctor but because of other personal exigencies. This also hampers the medical professionals to provide their service in a consistence and effective way without and fear. Many litigations are later on dismissed by the courts either being tainted or done with a

malafide motive just to harm the reputation of the medical professional and in grab monetary gain by way of claiming compensation from the medical professionals through Courts. To handle this kind of situation there is currently no effective machinery which can protect the interest of the medical professionals who are unnecessarily dragged in to litigations and it also affects their performance and waste their time as they being engaged in defending their case in Courts.

REVIEW OF LITERATURE:-

I had specifically conducted cases of medical negligence in Consumer Courts, High Courts, Permanent Lok Adalat (Public Utility Services) Courts , Criminal Courts and conducted the cases protecting the interest of the Medical professionals and Hospitals Concerned. The Laws covering the subject matter are I.P.C, Criminal Procedure Code, Pre-Natal Diagnostic Techniques Act, The medical Termination of Pregnancy Act, Consumer Protection Act, Legal Services Authorities Act, Civil Procedure Code etc and Judgements of Supreme Court, National Consumer Dispute Redressal Commission.

RESEARCH METHODOLOGY:-

The methodology applied in doing the research on this theme are qualitative, imperative and also past case analysis has been done with emphasis on judicial interpretation and relevant medical negligence text books and journals previewed in order to ascertain the standard of care as required by a doctor and in violation of which liability can be bestowed for medical negligence on the medical professionals and hospitals.

RESEARCH FINDINGS:-

In India there is no Standardised Law or statue dealing with specifically medical negligence cases and basically it is either considered as Criminal Negligence under the provisions of I.P.C or Civil negligence under Consumer Protection Act 1986 or Permanent Lok Adalat (PUS) constituted under Legal Services Authority Act 1987 or sometimes even by filing Civil Suit under C.P.C. In case of criminal negligence the burden of proof is so high on the side of the prosecution who is bound to adduce expert evidence as a mandatory requirement to prosecute a medical professional for his wrong as committed by him and this mostly becomes cumbersome and ultimately the accused mostly gets scot free due to the procedural loopholes. In Civil cases there is no standard procedure prescribed in law pertaining to negligence by doctors and mostly the Consumer Fora or Permanent Lok Adalat or Civil Courts are basically guided by principles of natural justice and fair play and also discretion of the court to ascertain liability on a medical professional depending on the facts and circumstances of each case. The Presiding officers of Courts though not having any Special knowledge in the branch of that medical science still they adjudicate matters even it seems that the medical procedure involved in a particular case is very complex one and while adjudicating on the basis of their discretion it is not always seems to be fair and justifiable keeping the interest of the medical professionals as concerned to the case and hence the doctors are directed to pay compensation even if they are not professionally wrong.

CONCLUSIVE REMARKS AND SUGGESTIONS:-

The ethical procedure and laws governing the medical negligence are meant to protect the interest of the patients and their constitutional rights of getting better health care service from the medical professionals who are experts in their respective area or fields. However it must be accepted for sure that irrespective of having those laws and ethics still medical negligence cases are rampant out in India and as reported in almost in all Hospitals/ Clinic/health Care units and Nursing Homes, Pathological laboratory etc. In this article however an attempt has been made to point out the present

legal provisions relating to the medical negligence and how effectively it can be dealt with by bringing some amendments and changes in the present system and the laws governing them. In this article also effort has been made to by referring certain recommendation that may be adopted by the state in order to effectively improve the health care delivery system and accountability of medical professionals in a very rational way. It is also imperative to bring certain scientifically proven mechanisms to adjudicate medical negligence cases by adopting comprehensive laws which punishes the medical professionals for their negligence. Mass training and awareness campaign are also suggested among doctors, patients and medical staffs.

REFERENCES

1. State of Punjab Vs. Mohinder Singh Chawla (1997)2 SCC 83
2. Black Law Dictionary 553(6th edition 1990).
3. Black Law Dictionary 1133-1136(9th edition 2009).
4. World Medical Association. "WMA Declaration of Geneva". WMA. Retrieved 14 October 2017. „Declaration of Geneva adopted by General Assembly of the World Medical Association at Geneva 1948. wikipedia- the free encyclopaedia. (https://en.wikipedia.org/wiki/Declaration_of_Geneva)
5. Jacob Mathew Vs. State of Punjab (2005) 6 SCC 1: 2005 SCC (Cri) 1369: A.I.R SC p.g 3182(H)
6. Bolam Vs. Friern hospital management Committee, (1957) 1 WLR 582: (1957) 2 ALL ER 118.
7. Dr.Suresh Gupta Vs. Government NCT Delhi, AIR 2004 SC 4091: 2004 (6)SCC 42
8. Ins. Malhotra(Ms) Vs. Dr. A Kriplani & others 2009(4) SCC 705, para-49
9. Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr., AIR 1969 SC 128 and A.S.Mittal v.State of U.P., AIR 1989 SC 1570.
10. Samira Kohli vs. Dr. Prabha Manchanda and Ors. I (2008) CPJ 56 (SC)
11. Indian Medical Association vs. V.P.Shanta and Ors., III (1995) CPJ 1 (SC)
12. Pravat Kumar Mukherjee vs. Ruby General Hospit' al and Ors, II (2005) CPJ 35 (NC)
13. Martin F D'souza Versus Mohd. Ishfaq 2009 3 SCC.
14. V.Krishna Rao Verus Nikhil Super speciality Hospital & Another CPR 2010(3) 101(SC)
15. The National Commission in the case of Dr. Ravishankar vs. Jerry K. Thomas and Anr, II (2006) CPJ 138 (NC)
16. Indian Medical Council Professional Conduct, Etiquette, Ethics Regulation 2002. published in Part-III, Section-4, Gazette of India on the 6th April, 2002, and amended vide MCI notification dated 22/02/2003 & 26/05/2004.
17. Homoeopathic Practitioners (professional Conduct, Etiquette & Code of Ethics) Regulations 1982, Approved by the Central Government vide. Ministry of Health & Family Welfare letter No-V.27021/7/81-Homeo, dated the 12th August 1981 and published by the Central Council of Homoeopathy vide. Notification No-2 in Part-III, Section-4 of the Gazette of India Extraordinary dated the 16th March 1982
18. India Medical Times-India Most credible News Portal engaging doctors from across specialities and regions in India. Its readers include top decision makers and influencers such as Policy Makers; Heads of Regulatory Bodies, Top Management of Hospitals, Path Labs; Leading Medical Practitioners; Principals, Deans & Heads of Department of Medical Colleges, Medical Superintendents. <https://www.indiamedicaltimes.com/2016/05/25/98000-people-lose-their-lives-because-of-medical-negligence/>.
19. Indian Acad Forensic Med. Jan-March 2015, Vol. 37, No. 1 ISSN 0971-0973. <http://http://www.medind.nic.in/jal/t15/i1/jalt15i1p50.pdf>.