UNHEALED WOUNDS, THE WOES OF MEDICAL NEGLIGENCE

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Abstract-

A major problem establishing among the people nowadays is the negligence. We consider doctors as our God but today it has changed due to medical negligence & malpractice. A slight fault in the treatment can cause minor or major health issues even death. The present research deals with problems of litigation associated with it.

Keywords- Medical Negligence, Negligence, Legal Duty, Breach.

Introduction:-

Doctors are considered next to God. Often patients consider Doctor as their God, but the reality is far different than what the patient thinks. God is infallible, but man is fallible. No man is perfect in this world. A person who has great knowledge of medicine and is skilled in the subject of medicine is named a doctor. A doctor can also commit mistake during his practice. A mistake done by him/her can cause serious damage to the patient. Such mistake in medical profession may lead to minor or major health injuries or even death. In such situations these arises a need for a remedy to the injured people so that justice is upheld and this gave rise to the concept of medical negligence.

"Save him at any cost" is the cry we often hear from the relatives of the patient lying in the beds of ICU but what if the doctor fails to save him because of a mere negligence? For a patient, the doctor is like a god and god is infallible. Yesterdays next to god status bestowed upon the doctors have suffered a massive damage today on account of more than a few black sheep among them. Medical Negligence in common parlance is when a medical practitioner deviates from the duty of care which he or she was deemed to observe for his or her patient which results in harming the patient. The cases of negligence are often put under the Law of Torts, but since this branch of law is not fully developed in India and that there are no codified laws on the subject, the cases of medical negligence are often governed under Consumer Protection Act, 1986. However, the negligence is something, which is very difficult to prove. In a clogged dysfunctional legal system, the justice in such cases comes at a great cost.

The methodology adopted for this Socio-legal Research is Doctrinaire. The problem is analysed in the light of the social, medical and legal issues, Constitutional provisions and other relevant statutory materials along with relevant case laws touching on the topic. The method of research is Critical Research Method with Descriptive search design. The data is collected from secondary authoritative sources.

This research deals with the problems such as medical negligence and malpractice. It can be from the side of the doctor, the nurse, or any other person concerned with the patient. This article focuses on following

- Does Infallibility of doctors has become a paradox
- Measures to be taken against repeated negligence observed
- Codified laws that should be brought into legal for justice of patients as well as doctors

What is Negligence?

Negligence in general cannot be described but it is an act recklessly done by a person resulting in foreseeable damage to the other. Negligence is an offense under tort, IPC, Indian Contracts Act, Consumer Protection Act and many more.

What is Medical Negligence?

"No doctor knows everything. There's a reason why it's called "practising" medicine."

Medical Negligence basically is the misconduct by a medical practitioner or doctor by not providing enough care resulting in breach of their duties and harming the patients which are their consumers. A professional is deemed to be an expert in that field at least; a patient getting treated under any doctor surely expects to get healed and at least expects the doctor to be careful while performing his duties. Medical negligence has caused many deaths as well as adverse results to the patient's health. This article focuses on explaining negligence under various laws, professional negligence, medical negligence and landmark as well as recent cases in India. This provides information on liability that can be incurred by the victim of the medical malpractice[1].

Components of Medical Negligence-

Winfield stated that a negligent act comprises of three main components. They are –

- Existence of legal duty
- Breach of legal duty
- Damage caused by the breach

In order to understand the correct meaning of medical negligence it is essential that we carefully analyze these components because only after we analyze these components will we be able to understand the remedies that the law provides us.

1. Existence of legal duty:

Whenever a person approaches another trusting him to possess certain skill, or special knowledge on a given problem the second party is under an implied legal duty to exercise due diligence as is expected to act at least in such a manner as is expected in the ordinary course

[1] Available on- https://www.lawctopus.com/academike/medical-negligence/, Visited on- 22/10/17, Visited at 14:32

from his contemporaries. So it is not that the legal duty can only be contractual and not otherwise. Failure on the part of such a person to do something which was incumbent so, that which would be just and reasonable tantamount to negligence. Every time a patient visits a doctor for his ailments he does not enter into any written contract but there is a contract by implication and any lack of proper care can make the erring doctor liable for breach of professionalduty.

2. Breach of legal duty:

There is a certainly a breach of legal duty if the person exercising the skill does something which an ordinary man would not have done or fails to do that which an ordinary prudent man would have done in a similar situation. The standards are not supposed to be of very high degree or otherwise, but just the relative kind, that is expected from man in the ordinary course of treatment

3. Damages caused by the breach:

The wrong, the injury occasioned by such negligence is liable to be compensated I n terms of money and the courts apply the well settled principles for determination of the exact liquidated amount. We must remember that no hard and fast rule can be laid down for universal application. While awarding compensation, the consumer forum has to take into account all relevant factors and assess compensation on the basis of accepted legal principles on moderation. It is for the consumer forum to decide whether the compensation awarded is reasonable, fair and proper according to the facts and circumstances of the case[2].

The liability of the person committing the wrong can be of three types depending on the harm caused by him to the injured person, they are-

1. Civil liability-

As mentioned before, the person who possesses special knowledge and skill in a field and uses this knowledge to treat the other person then he owes a duty of acre to the other person. If a wrong is committed by him in this period, then he is liable to pay damages in the form of

[2] Available on: http://www.legalservicesindia.com/article/article/medical-negligence-in-india-944-1.html, Visited on: 22/10/17

compensation to him. In some situation senior doctors or the hospital authorities can also be vicariously held liable for the wrongs committed by junior doctor.

2. Criminal liability:

There may be an occasion when the patient has died after the treatment and criminal case is filed under section 304A of the IPC of allegedly causing death by rash or negligent act. The commencement or pendency of criminal trial would not act as bar to parallel civil proceedings for recovery of money or a consumer complaint nor can the same be stayed[3].

There are four basic elements to a medical malpractice case. The four elements are duty, breach, causation, and damages.

Duty means that the health care professional owes an individual a duty to act reasonably and appropriately – that he or she was responsible for providing some type of care or treatment to a patient. This requirement is usually met whenever there is a physician-patient relationship. The duty is the duty to act within the "standard of care" (basically meaning reasonable and appropriate care).

Breach means that the health care professional has breached the duty he or she owes to the patient – which they have deviated from or fallen below the standard of care. Just as duty means that a doctor was responsible for providing reasonable care and treatment, breach means that he or she failed to do so.

Causation means that the health care professional's breach of the standard of care caused or contributed to causing some harm to the patient. A simple example would be a patient that goes to a hospital with a broken leg; a first doctor misses the diagnosis and tells the patient to go home. Five minutes later, a second doctor correctly diagnoses the patient and treats the broken leg. The first doctor misdiagnosed the patient, but it didn't cause or contribute to causing any harm because the second doctor provided treatment within minutes.

Damages just mean that the patient sustained harm because of the doctor's mistake. Think of malpractice as the medical equivalent of not paying attention and running a red light. If someone runs a red light and doesn't hit someone, they made a mistake but it didn't hurt

[3] Available on: http://www.legalservicesindia.com/article/article/medical-negligence-in-india-944-1.html, Visited on: 22/10/17

anyone. Similarly, if a doctor makes a medical error but causes no harm to the patient, there are no damages[4].

Infallibility of doctors has become a paradox

Physicians hold the most privileged position. For physicians to sustainably provide that help, they must first and foremost help themselves. Their practices mean a lot to patient and patient life. But as we are progressing the infallibility of doctor is decreasing as there is increased negligence seen.

In Spring Meadows Hospital v. Harjol Ahluwalia [(1998) 4 SCC 39] this Court was dealing with the case of medical negligence and held that in cases of gross medical negligence the principle of res ipsa loquitur can be applied. In Para 10, this Court gave certain illustrations on medical negligence where the principle of res ipsa loquitur can be applied.

In Postgraduate Institute of Medical Education and Research v. Jaspal Singh [(2009) 7 SCC 330] also the Court held that mismatch in transfusion of blood resulting in the death of the patient after 40 days, is a case of medical negligence. Though the learned Judges have not used the expression res ipsa loquitur but a case of mismatch blood transfusion is one of the illustrations given in various textbooks on medical negligence to indicate the application of res ipsa loquitur[5].

Measures to be taken against repeated negligence observed

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

Before dealing with these principles two things have to be kept in mind:

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[4] Available on: http://floridahealthcarelaw.com/what-are-the-elements-of-a-medical-malpractice-claim/, Visited on 23/10/17

[5] Available on: https://indiankanoon.org/docfragment/1092676/?formInput=medical%20negligence%20cases%20death%20by%20doctors%20, Visited on: 23/10/17

(1) Judges are not experts in medical science, rather they are lay men. This it often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective, since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and

(2) A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation[6].

Codified laws that should be brought into legal for justice of patients as well as doctors

In the case of Ramdeo Prasad Singh (Supra), a complaint was made against the doctor alleging medical negligence and demanding compensation. In the said case, a child was suffering from Syndactyl i.e., fingers of both hands and toes of both feet were fused and an OP surgeon through a four-stage operation separated fingers of left foot but could not separate two fingers of the right foot. The District Forum directed the OP doctor to pay Rs. 50,000/- as compensation to the Complainant. The appeal filed against the said order was allowed by the State Commission. A revision was filed before the Hon'ble National Commission. Its finding was that no expert evidence was filed by the Complainant/revision petitioner in support of medical/surgical negligence nor even an extract of any medical text was submitted to support allegations of medical negligence. Rather it was established that the treating surgeon was not only having average skills but he had extra-ordinary skills and created a bright future to a deformed child. It was observed that instead of appreciating the services of a gifted surgeon the Complainants have filed a baseless complaint only to collect money and harass the doctor. As against the above cited case, the present case is one where the efficiency of the surgeon/doctor who

[6] In the case Martin F.D'souza vs Mohd. Ishfaq on 17 February 2009, Available on: https://indiankanoon.org/docfragment/1092676/?formInput=medical%20negligence%20cases%20death%20by%20doctors%20, Visited on: 23/10/17

performed the caesarian operation has not been questioned. The Complainant in the present case has mainly questioned the administration of anaesthesia on the patient by a doctor who is not a specialist in anaesthesiology attributing to medical negligence on the part of the OP Hospital management. In our considered view, the principle of law as laid down in the above cited case is not applicable to the present case.

Jagdish Vs State of AP; (2009) 1S CC 681 on death by medical negligence and wrong diagnosis of child patient.

Suresh Gupta (Dr.) Vs State of NCT of Delhi (2004) 6 SCC 422 on degree of medical negligence necessary to fasten the doctor with liability for death due to medical negligence.

Surendra Chauhan Vs State of MP; (2000) 4 SCC 110 on common intention to cause miscarriage which resulted in death.

Kishore Lal Vs Chairman, ESI Corporation; (2007) 4 SCC 579 on medical negligence on the part of the ESI doctors, hospitals or dispensary.

In the very recent case of Jai Prakash Mehta Vrs. Dr. B.N. Rai and Anr [2014 (1) CPR 13 NC] the Hon'ble National Commission, relying on the judgments of the Hon'ble Supreme Court summed up the three essential issues pertinent to what constitutes medical negligence, one of which is 'whether the doctor in question possessed the medical skills expected of an ordinary skilled practitioner in the field at that point of time'. Applying the said principle it found that medical negligence was proved because the doctor in question being an ENT specialist did not prima facie possess the medical skills to treat a serious burn injury and yet continued to do so. In the instant case too, the O.P. Hospital engaged Dr. E. Momin who is a child specialist and did not possess the medical skills to administer anaesthesia to the deceased. It cannot be disputed that administration of anaesthesia is an inherently risky part of any operation and requires a specialist anaesthesiologist to administer and monitor the effects on a patient. Prior to any medical procedure requiring anaesthesia, the anaesthesiologist is required to review the patient's medical record, history, prior medications, allergies and time requirements of the operation to determine the best combination of drugs to use and procedure to follow. If the anesthesiologist fails to properly do so, he or she poses increased risk of complication, injury or even death of a patient. We may also beneficially recall here that in Vinod Prasad Nautiyal

vs Smt Savitri Uniyal & Ors (FA No. 79 of 2005, decided on 20.5.2011) the Hon'ble National Commission agreed with the view of the Hon'ble State Commission that, where an operation was performed with no arrangements for a qualified anesthetist, no expert opinion was required to establish that it constituted an act of professional negligence. Hence we cannot but conclude that this is a case of medical negligence.

Lastly, the facts and circumstances of the present complaint case being somewhat similar, it would be beneficial to reproduce here the following observations of the Hon'ble Supreme Court made in Balram Prasad vs Kunal Saha & Ors. (supra) in paras 148 and 149 thereof :

"Before parting with the judgment we are inclined to mention that the number of medical negligence cases against doctors, Hospitals and Nursing Homes in the consumer forum are increasing day by day. In the case of Paschim Banga Khet Mazdoor Samity Vs. State of West Bengal, this Court has already pronounced that right to health of a citizen is a fundamental right guaranteed under Article 21 of the Constitution of India. It was held in that case that all the government Hospitals, Nursing Homes and Poly-clinics are liable to provide treatment to the best of their capacity to all the patients[7].

Discussion

Since there is no laws against these negligence but only the compensation but it cannot be justified in behalf of patient. On the contradictory it can be viewed as if allegation on their duty equanimity.

All the laws made till date are indirect no such codified laws exist as we say the consumer protection act has mentioned about medical negligence. But it only has compensation for the patient. But the justice demands more than just compensation.

[7] Shri Uttam Sarkar vs The Management Of Tura Christian ... on 7 February, 2014, Available on: https://indiankanoon.org/docfragment/1092676/?formInput=medical%20negligence%20cases%20death%20by%20doctors%20, Visited on: 23/10/17

Also in Indian penal code mentions causing miscarriage a punishable act any negligence found is birth of child causing death in punishable. But these things only things only restricted to compensatory amounts.

Since none of the laws provide the justice to the patient it should be certain laws made against negligence to reduce the risk further.

Since liability of the doctor in difficult to prove as it is can be the doctor the nurse or the hospital. Therefore a reform of the medical liability system should be considered as part of comprehensive response to surgical medical malpractice premiums that endanger people access quality medical care.

Bolam's test for providing negligence

A test that arose from English tort law, which is used to assess medical negligence Bolam holds that the law imposes a duty of care between a doctor and his patient,but the standard of that care is a matter of medical judgment.

Under Bolam, the plaintiff seeking to prove medical negligence needs to (1) show that there was a duty of care between the doctor or nurse and the patient, which is usually a straightforward exercise, and (2) that the act or omission of the doctor or nurse breached the duty of care. In Bolam v Friend Hospital Management Committee [1957], the court held that there is no breach of standard of care if a responsible body of similar professionals supports the practice that caused the injury, even if the practice was not the standard of care. The ruling meant that the accused doctor needs only to find an expert who would testify to having done the same thing. Thus, Bolam was criticized for its overreliance on medical testimony and personal judgment of experts chosen by the defendant.

The law distinguishes between liability flowing from acts and omissions, and liability flowing from misstatements. The Bolam principle addresses the first element and may be formulated as a rule that a doctor, nurse or other health professional is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion, even though some other practitioners adopt a different practice. In addition, Hedley Byrne & Co. Ltd. v Heller & Partners Ltd. [1964] AC 465 created the rule of "reasonable reliance" by the claimant on the professional judgment of the defendant.

"Where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, and a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise."[3]

Because of the nature of the relationship between a medical practitioner and a patient, it is reasonable for the patient to rely on the advice given by the practitioner. Thus, Bolam applies to all the acts and omissions constituting diagnosis and consequential treatment, and Hedley Byrne applies to all advisory activities involving the communication of diagnosis and prognosis, giving of advice on both therapeutic and non-therapeutic options for treatment, and disclosure of relevant information to obtain informed consent.

Barnett v Chelsea & Kensington Hospital [1968] 1 All ER 1068. Three men attended at the emergency department but the casualty officer, who was himself unwell, did not see them, advising that they should go home and call their own doctors. One of the men died some hours later. The post mortem showed arsenical poisoning which was a rare cause of death. Even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time. Although the hospital had been negligent in failing to examine the men, there was no proof that the deceased's death was caused by that negligence[8].

Conclusion

With the growth in negligence and malpractices the laws have become rigid in order to combat the issues arising out of it. But at the same time it is important for a doctor to perform freely. Therefore, the SC ruled that it is not enough to drag the cases of negligence under the purview of criminal acts as it would make the doctors wary to make the last ditch effort to save the patient for the fear of being tried under criminal offences.

Today we may not be in a crisis, but its not too far down the road. There must be some serious changes made in the medical system. The doctors need to change their attitude and the compensation system should change as well. In either of the situation something must be done before a hospital I considered more dangerous than a lion's den.

[8] Available on: https://en.wikipedia.org/wiki/Bolam_v_Friern_Hospital_Management_Committee#Significance, Visited on:25/10/17