

## MEDICAL NEGLIGENCE IN INDIA

### A CRITICAL STUDY

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#### ABSTRACT

Negligence is a civil wrong but sometimes also a wrong under criminal and consumer law. Medical Negligence is the negligence by medical practitioner or doctor by breaching their duties. Any patient expects to get healed and at least expects the doctor to be careful while performing their duties but the medical negligence has caused many deaths and adverse results to the patients' health. There are certain essential constituents of negligence provided by Supreme Court in leading cases some of which includes the legal duty to exercise due care, Breach of that duty & Consequential damages. Medical negligence is a professional negligence and when medical professionals do not obey their duty, they are said to breach their Hippocratic Oath which they ought to follow during their professional life. Although the medical professional is not liable to be held negligent simply because things went wrong from mischance in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct falls below that of the standards of a medical practitioner.

**Keywords -:** Civil Wrong, Negligence, Hippocratic Oath, Professional Misconduct.

## INTRODUCTION

*“In my opinion, our health care system has failed when a doctor fails to treat an illness that is treatable.”*

-Kevin Alan Lee

Medical negligence is extremely important factor for patient. Instances of negligence in the medical profession are not a new phenomenon. Medical Negligence is being committed in all over the world every day. The main purpose of this article is to focus Medical Negligence Law in India. Medical Negligence is an issue of serious human rights concern that directly affects right to life and right to health care. The overwhelming number of incidents of medical negligence in India mostly goes without any legal action, leading to a frustrating situation where public trust is completely lost on the medical service providers. Although the legal remedies available under the existing laws are limited or difficult to access, such efforts give a clear idea about the shortcoming of the existing law and the underlying difficulties in the judicial system. In order to ascertain the legal status of medical negligence the existing legal regime has been measured in this article. The Constitution of India recognizes right to health care and guarantees right to life. Medical services include a wide range of activities; from diagnosis to medicine, surgery and other forms of treatment. In this research the legal system in India relating to medical and health care services and operation of various clinics, laboratories etc. have been discussed and analyzed. This part starts with the assessment of constitutional safeguards; then it infers India's obligation to ensure right to health care under the provisions of the international treaties.

The relationship between a doctor and his patients considered sacred in India. A doctor is in comparison to "God". In the past days, cases of malpractice and negligence in medical field have more than quadrupled. The problem arises in determining the liability, whether or not the doctor was negligent or not, is very technical and subjective question, it's difficult to decide. There is always a possibility of alternative treatment, but that does not mean that the

doctor negligent for the deployment of the first treatment. In this situation, a person who loses his life through a treatment cannot be considered, for compensation and his family is left in a dilemma. Next the doctor will always try to play safe and order more procedures to avoid a liability, in a way which was a burden on the economy.

It is extremely important for medical professionals to understand the meaning of the term 'profession', especially in the current scenario of medico-legal conflict. It has been defined by the Oxford Advanced Learner's Dictionary as a paid occupation especially one that requires advanced education and training.<sup>i</sup> Profession is different from 'occupation' as it requires special skill, training, knowledge and education. The nature of work performed by professionals is extremely specialized, which requires more mental than physical work. The Supreme Court observed in *Indian Medical Association v. V. P. Shantha and Others* that,<sup>ii</sup> "Profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguish from an occupation which is subsequently the production or sale or arrangement for the production or sale of commodities. The line of occupation may vary from time to time."

One of the most important aspects of professional work is that it is bound by some ethical or moral principles, which require a greater degree of honesty and integrity. These principles are besides legal requisites and give professionals respect and a very high status in the community. The medical profession is considered the noblest of all professionals because of its service to the humanity- the unique ability to save life. Even in the present era of commercialization, the profession has been able to hold on to its position to a great extent because a large section of the Indian society still believes that money is not the most important consideration for a medical profession when he undertakes the treatment of a patient. The medical profession is considered a noble service, rather than an occupation, by the society.

Negligence is simply neglect to some care which we are bound to exercise towards somebody. It is something less than misconduct.<sup>iii</sup> Medical negligence is not different in law from any other type of negligence. The basis of liability of professional negligence is negligence.<sup>iv</sup>

Another important concept which medical professionals should know is the definition of ‘medical practitioner’. It has been defined by the Supreme Court of India in the *Poonam Verma case*<sup>v</sup> as:

*“Medical practitioner or practitioner means a person who is engaged in the practice of modern scientific medicine in any of its branches including surgery and obstetrics, but not including veterinary medicine or surgery or the Ayurvedic, unani, homoeopathic or bio-chemic system of medicine”*

## **DEFINITION OF NEGLIGENCE**

Negligence in law is a type of tort or civil wrong but can also a wrong under criminal and consumer law. It means an act of conduct that is culpable because it misses the legal standard required of a reasonable person in protecting individuals against the foreseeable risky or harmful acts. Negligent behavior towards others gives them a right to be compensated for harm of their physical and mental health, property, financial status, or relationships.

In 1856, B. Alderson, J. gave the classic definition of negligence in *Blyth v. Birmingham Waterworks Company*<sup>vi</sup>. It was defined as,

‘The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which

a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.’

This definition is quoted even today in negligence suits throughout India.<sup>vii</sup> The Supreme Court of India, in *Jacob Mathew v. State of Punjab and Another*<sup>viii</sup>, defined negligence as: Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. . . the definition involves three constituents of negligence.

1. A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of duty.
2. Breach of the said duty;
3. Consequential damage.

#### ***Negligence as a State of Mind:***

Negligence and wrongful intent are two alternative forms of *mens rea*. Out of these two alternative forms one form is essentially required by law as an essential condition for establishing liability of wrongdoer. The willful wrongdoer or intentional wrongdoer is one who desires to do harm. The negligent wrongdoer is one who does not sufficiently desire to avoid doing it.<sup>ix</sup>

So, negligence as a state of mind does not mean an act in order to produce them. But it means indifference or carelessness in guarding whether the act is going to happen or not.

#### ***Negligence as a Careless Conduct:***

Careless man is one, who does not care or who is not sufficiently anxious that his activities are going to cause loss to others. It does not mean breach of a duty to take care, but simply

means careless conduct on the part of the wrongdoer. Negligence with careless conduct is opposite of diligence.<sup>x</sup>

***Negligence as the Breach of Duty to take care:***

Negligence as the breach of duty to take care is simply a neglect of some care which we are bound by law to exercise towards somebody. Under the law of negligence, professionals such as Lawyers, Doctors, architects and others are the persons possessing some special skill. Any task which is required to be performed by these professionals wants a special skill. For a medical accident or failure, the responsibility may lie with medical practitioner, and equally it may not. So, such negligence necessarily be treated with some difference.<sup>xi</sup>

Generally, 'Medical Negligence' means failure to act in accordance with the standards of a reasonably competent medical man at that time. It is the breach of a duty owned by doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or financial disability.<sup>xii</sup>

The professional is judged by these two standards. So, the professional can be held liable for negligence when he was not possessed of requisite skill which he professes to hold and when he does not exercise it with reasonable care and caution.<sup>xiii</sup>

## **ESSENTIAL CONSTITUENTS OF NEGLIGENCE**

The essential constituents of negligence have been defined by the Supreme Court in the *Poonam Verma case*<sup>xiv</sup> as:

- a. A legal duty to exercise due care,
- b. Breach of duty, and
- c. Consequential damages.

All these constituents of negligence must be proved by the plaintiff to the satisfaction of the court and only then can the defendant be held liable for negligence.<sup>xv</sup> The Supreme Court held that cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort. If the plaintiff fails to prove that any loss or injury was

caused to the patient, in spite of proving negligence by the doctor, he will not be entitled to claim any compensation.<sup>xvi</sup>

The models in which duties may arise and what amount of care required in their performance will be considered at greater length subsequently, but at present, it is only necessary to state that a legal duty must be shown to have been broken. The plaintiff must show what the duty was and how it was broken. It is not sufficient that a careless act has been done by the defendant, because of which the plaintiff has sustained loss. The liability for an omission to do something depends entirely on the extent to which a duty was imposed to cause that thing to be done. No act is negligent per se; it is only so because it is a breach of duty. Therefore, an act done by one man may be negligent, which, when done by another would not be so because he had no duty with respect to it. If the act is intentional, it becomes fraudulent or criminal.

Hence it is very important that all the components of negligence are understood properly by the members of the medical profession so that they can practice safely from legal point of view.

***Professional Negligence:***

Professional negligence is a subset of the general law of negligence, which is meant to cover situations in which the defendant has represented himself or herself as having more than average skill and abilities. By virtue of the services they offer, professionals hold themselves out as having more than average abilities. The specialized set of rules regarding professional negligence determine the standard against which to measure the legal quality of the service actually delivered by those who claim to be among the best in their areas of expertise. The Supreme Court observed in *Indian Medical Association v. V.P. Shantha and Others* that,<sup>xvii</sup> in matter of professional liability professionals differ from other occupations for the reason that professions operate in spheres cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer

while allowing for the factors maintained above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence, that they should exercise reasonable care in the discharge of their duties.’ From the above judgment, it is obvious that medical professionals are liable for their negligent acts and that will be treated at par with other professionals. Though earlier, medical professionals were held responsible for their negligent act in various courts of our country under the existing civil laws, this judgment brought them under the purview of the Consumer Protection Act, 1986 as well. Steep court fees and long duration of trials in civil courts were the main factors which deterred aggrieved patients from lodging medical negligence suits in India. The judgment in the case of *Indian Medical Association v. P. Shantha and Others* that,<sup>xviii</sup> threw the door wide open for patients to conveniently lodge cases against medical professionals. Medical professionals argued that they are governed by the rules of Medical Council of India, but this view was not accepted by the Supreme Court. It held that:

‘The fact that they are governed by the Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or state Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.’

The law requires that medical professionals must bring to their task, a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. The law expects neither the very highest, nor the very lowest degree of care and competence in the treatment of patient.

The definition of negligent treatment in *Derr v. Bonne*<sup>xix</sup>, is an excellent statement that defines a physician’s legal responsibility during treatment:<sup>xx</sup>

1. An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average members of the profession in the community in which he practices, and it is presumed



that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment,

2. The contract, which the law implies from the employment of a physician or surgeon, is that the doctor will treat his patient with that diligence and skill mentioned above,
3. He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession,
4. Before a physician or surgeon can be held liable for negligence, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids. In such cases or he must have neglected to do something required by these standards,
5. In order to obtain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown and further that the doctor failed to follow the method prescribed by that standard.
6. It is not required that physicians and surgeons guarantee results, nor that the result must be what is desired, and
7. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence.

***The duty to Exercise Skill and Care:***

It is the first essential condition for establishing liability for medical negligence. Fundamentally the 'duty' is an obligation to take proper care to avoid injury in all the circumstances of the case. Duty to take care is a restriction on the defendant's freedom obliging him to behave in a reasonable manner. In legal sense 'medical negligence' means nothing more or less than substandard care.

The duty to exercise skill and care exists when a doctor-patient relationship is established. This relationship is formed extremely easily. It is formed by any formal acceptance of a

patient by a doctor, or the payment of a fee. In case of an emergency this doctor-patient relationship is formed as soon as Doctor approaches a patient with the object of treating him.

Thus, a doctor, who deals with a patient with an intention of acting as a healer, established a doctor-patient relationship immediately. Therefore, from that moment onwards his legal obligation to exercise a duty of skill and care arises. Any breach of this duty is a ground for a negligent action.<sup>xxi</sup>

Duty to take care is a restriction on the defendant's freedom obliging him to behave in a reasonable manner. In legal sense 'medical negligence' means nothing more or less than substandard case.

Under law of torts, the Neighbor principle helps us to decide whether the duty of care exists or not in a particular case. The neighbor principle is:

"You are to love your neighbor; you must not injure your neighbor" Here neighbors are: "Persons who are so closely and directly affected by the act of wrongdoer that when he is directing his mind to the acts or omissions the consequential damage can be easily foreseen. In case of medical negligence, the neighbors are all the patients which are attended by the doctor"

The basic principle relating the law of medical negligence is Bolam Rule,<sup>xxii</sup> i.e. the test is the standard of the ordinary skilled man exercised and professing to have that special skill. A man need not to possess the highest expert skill, it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical man at the time. There may be one or more perfectly standards, and if he conforms to one of these proper standards, then he is not negligent."

***Breach of that Duty to Take Care:***

The second essential required to be fulfilled for establishing the liability for medical negligence is that there is a breach of the duty to take care on the part of the defendant towards the plaintiff. The breach of duty may be occasioned either by not doing something which a reasonable man would be under similar set of circumstances, or, by doing some act which a reasonable prudent man would not do.<sup>xxiii</sup>

The breach of duty to take care must have resulted in consequential damages to the plaintiff. The onus of providing the negligence is on the part of the defendant in on the plaintiff. He must not merely establish the facts of the defendant's negligence and of his own damage, but must show that the one was the effect of other.<sup>xxiv</sup>

***Consequential Damages:***

In an action for negligence the plaintiff must prove not merely that the defendant was negligent but also that there was actual damage. This damage must be resulted to the defendant in consequence of negligent act which was the direct and proximate cause of damage. Damages are awarded to compensate the plaintiff for the damage caused to him and to place him in the same position in which he would have been, if injury was not sustained.

In actions of tort, compensation is the principle of Redressal and the measure of damages is the exact amount of the injury which the plaintiff has suffered in his person, earnings, life expectancy, etc.<sup>xxv</sup>

**STATEMENT OF PROBLEM**

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fall below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable, if he leaves surgical gauze inside

the patient after an operation. There may be few cases wherean exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before, to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctorbe liable?

In such situation he should not be held liable. Science advances by experimentation, but experiments sometimes end in failure e.g. the operation on the Iranian Siamese twin<sup>xxvi</sup> or the first heart transplant by Dr. Barnad in South Africa.<sup>xxvii</sup> In such cases it is advisable for the doctor to explain the situation to the patient and take his written consent. Several instances of negligence are reported from government hospitals too. But unfortunately, the consumer law is silent here as government hospital comes under the “non-paid” service.

Thus, several loopholes exist.

Supreme Court of India in *Indian Medical Association v. V. P. Shantha*’s case<sup>xxviii</sup> held that the medical profession is included within the meaning of service under Consumer Law. Protest against this decision arose from different corners but the court confirmed their stand. Thus, medical service comes under Consumer law. No doubt, due to this decision, the doctors became more cautious in treatments and a form of defensive medication slowly took over. In such cases, the patients would be advised to undergo several tests even before the preliminary diagnosis, so as to obviate any litigation againstdoctors. The ultimate sufferer is the patient himself as the treatment becomes expensive and there is a delay in initiating the treatment.

## ENDNOTES

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- <sup>i</sup> Oxford Advanced Learner's Dictionary 5<sup>th</sup> Edn.  
<sup>ii</sup> 1995 (3) CPI 1 and 1995 (6) SCC 651.  
<sup>iii</sup> B. M. Gandhi, "Law of Tort", 680 L1987).  
<sup>iv</sup> State of Punjab v. Shiv Ram, (2005) 7 SCC 3.  
<sup>v</sup> Poonam Verma v. Ashwin Patel (1996) 4 SCC 332; AIR 1996 SC 2111 at para 41.  
<sup>vi</sup> Court of Exchequer, 1856. 11 Exch. 781 and 156 ER 1047.  
<sup>vii</sup> Quoted in the cases: Poonam Verma v. Ashwin Patel and Others; Jacob Mathew v. State of Punjab and Another and Dr. Kunal Saha v. Dr. Sukunlar Mukherjee and Ors. Op. No. 240 of 1999, decided on 1\* June 2006 by NCDRC.  
<sup>viii</sup> (2005) 6 SCC 1.  
<sup>ix</sup> John Salmond, Charlesworth on negligence, 21 (6th Edn.)  
<sup>x</sup> Ibid.  
<sup>xi</sup> Jacob Mathew v. State of Punjab and Another (2005) 6 SCC 1.  
<sup>xii</sup> H.M.V. Cox, Medical Jurisprudence and Toxicology, 77 (6th Edn., 1990)  
<sup>xiii</sup> Martin F. D'souza v. Mohd. Ishfaq, (2009) 3 SCC 6.  
<sup>xiv</sup> (1996) 4 SCC 332.  
<sup>xv</sup> Jacob Mathew v. State of Punjab and Another (2005) 6 SCC 1  
<sup>xvi</sup> Sidhraj Dhadda v. State of Rajasthan AIR 1994 Raj. 68 and 1993 (1) Raj. L. W. 532  
<sup>xvii</sup> 1995 (3) CPI 1 and 1995 (6) SCC 651.  
<sup>xviii</sup> Ibid  
<sup>xix</sup> 38 Wn. 2d 876, 231 P., 2d 637, Wash, 1951  
<sup>xx</sup> Singh, et. al., 2007 pp 995-6  
<sup>xxi</sup> Ibid  
<sup>xxii</sup> Bolam v. Friern Hospital Management Committee [1957] 2 AllER 118; The Bolam rule get recognition in Jacob Mathew v. state of Punjab and Another (2005) 6 SCC 1.  
<sup>xxiii</sup> Poonam Verma v. Ashwin Patel (1996) 4 SCC 332; AIR 1996 SC 2111 at para 16.  
<sup>xxiv</sup> Supra note 18  
<sup>xxv</sup> W. Wyatt-Paine, The Law of Torts, 140 (7<sup>th</sup> Edu., 1921)  
<sup>xxvi</sup> Surgeons in Singapore have tackled the most critical phase of the world's first operation to separate adult twins joined at the head. Doctors began the surgery Sunday on 29-year-old sisters from Iran, and say they are pleased the risky procedure is going well.  
Available on: <http://www.voanews.com/a/a-13-a-2003-07-07-54-iranian-67469217/385973.html> (visited on 23rd March, 2020)  
<sup>xxvii</sup> On 3 December 1967, South African doctor, Dr Christiaan (Chris) Barnard, performed the world's first human to human heart transplant at Groote Schuur Hospital, Cape Town.  
Available on: <http://www.sahistory.org.za/dated-event/dr-chris-barnard-performs-worlds-first-human-heart-transplant> (visited on 23rd March 2020)  
<sup>xxviii</sup> (1995) 6 SCC 651.