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Problems of Medical Negligence and Its Awareness in India

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Abstract – "It is health that is a person's real wealth and not pieces of gold and silver".

-Mahatma Gandhi

Medical Negligence is not only a part of Medical Law but it is related to the Health Law too. The components of Medical Negligence as stated by Winfield are: Existence of a legal duty, Breach of that legal duty and Damage caused by that breach. For all medical practitioners or doctors it is mandatory to know the legal and judicial aspects related to their profession so that their little awareness can make them more alert and responsible towards their patient. The laws on medical negligence in no manner create any kind of apprehension in the mind of doctors to follow super standards of treatment but these laws expect to follow fair methods of treatment which is required primarily for the treatment of disease in order to do justice to the patient or the sufferer because a person approaches some other person trusting his skills and specialized knowledge. So it is the legal duty of that person to exercise diligence as much as expected from his contemporaries. According to Mahatma Gandhi 'Patients see God in doctors and in view of Kevin Alan Lee who said that "Being in such a profession where sick, ill and sufferers are your customers who look upon you as the almighty, an absolute amount of care is expected." Justices Chandramauli K.R. Prasad and V. Gopala Gowda in their decision in the Anuradha Saha case observed that, "The patients, irrespective of their social, cultural and economic background, are entitled to be treated with dignity, which not only forms their fundamental right but also their human right, "Hence, it is the duty of doctors to treat their patients with due care and diligence without any malpractices. And if the doctor's act negligently in that case they can be liable for it according to the Indian laws especially meant to protect rights of victims of medical negligence.

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INTRODUCTION

Negligence is a term that has not received a precise definition till date. However, there are certain consideration on which negligence can be inferred, the simple law of negligence takes into account three elements the existence (1) of a duty to take care, (2) the breach of such a duty , and (3) Harm [Damage] resulting as a consequence of such breach of duty, The law laid down in **"Bolam, V. Firen hospital Management committee"** is the accepted proposition with regards to the test for determination of Medical Negligence in light of principles of negligence in General. "Some failure to do some act which a reasonable man in the circumstances would not do, and if that failure of doing of that act results in injury, than there is a cause of action. How do you test whether this act or failure is negligent" In any ordinary case it is generally said that you judge that why the action of the man in the street. He is the ordinary man, in *Negligence* case it has been said that you judge it by the conduct of the man on the top of a clap ham omni bus, he is the ordinary man. But where you get a situation which involves the use of some special skill or competence, than the test as to whether they has been negligence or not is not the test of the top of the clap man omni Bus because he has 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 possess the highest expert's skill.–It is well established law that it is sufficient if he exercised the ordinary skill of an ordinary competent man exercising the particular art".

At the present time, medical negligence is not a significant problem in India in contrast with the acute situation, which exists in North America and to a lesser extent in Europe. However, cases of medical negligence are beginning to appear in India and it is inevitable that as the extent and standard of medical services develop and as the awareness of the population increase due to advancing literacy and education, such

dissatisfaction amongst patients about real or imagined errors in medical diagnosis and treatment is bound to increase. This is most likely to occur first of all in the more developed centers such as the very large cities, and is likely to be seen first amongst the educated and more affluent classes, as they will be more aware of deficiencies in their medical treatment and will be more likely to go to law in order to obtain satisfaction.

The Indian doctors must have an increasing awareness of this problem, if only they take steps to avoid its occurrence. In the more remote and rural areas, patients tend to be grateful for medical treatment and or not sufficiently aware of possible defects to take any action against the doctor whom they consider is always doing his best to help them. Yet only one has to look at the situation in the United States to see how his attitude can change over the course of time. There, doctors who are at high risks, such as surgeons, spend thousands of dollars (amounting to an appreciable part of their salary) in obtaining insurance against negligent actions. Recently the position has become so serious that even this expensive insurance cover has been hard to obtain, with the results that some surgeons have had to restrict operating for fear of the legal consequences. It is to be hoped that such a situation will never arise in India not that it will even approach the position in the United Kingdom, Which is very much less serious than in north America. In the U.K., all doctors working for the hospital protection service are obliged to belong to a medical organization as a term of service of their contract, in order to belong to a medical organization as a term of service of their contract, in order to protect their employers –the National Health Service –against the financial consequences of malpractice. In the U.K. several non- profit making organization, formed originally from amongst doctors themselves, offer legal advice, payment of legal fees and indemnity from damages for a relatively small annual payment.

The two largest of these organizations have worldwide coverage of membership and a number of Indian Practitioners belong to them. They are the Medical Defense Union and the Medical Protection Society, both based in London. For that practitioner who works in high-risk specialties include orthopedic, surgery, anesthetics, general surgery and obstetrics and gynecology. Medical negligence is some time called*" Malpractice or Mal Praxis "* but this is not quite accurate, as other forms of irregular medical practice (such as criminal abortion) may be*" Malapropism "*but are not medical negligence, which is a dispute between doctor and patient over the standard of medical care.

MEANING OF MEDICAL NEGLIGENCE

Professionals such as doctors are persons having special skill and knowledge possess such requisite qualification that they will profess their skill with reasonable degree of care and caution. Medical negligence is defined as want of reasonable degree of care or skill or will full negligence on the part of medical practitioner in the treatment of patient with whom a relationship of professional attendance is established, so as to lead to bodily injuries or to loss of life.

Medical Negligence is "the breach of the duty owned by a doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or financial disability" Medical Negligence is no different in law from any other type of negligence. Negligence, medical or otherwise, is a civil wrong known as a tort, a difficult concept to describe but which may be thought of a civil wrong not arising out of a contract. Very rarely, medical negligence removed from a civil action between doctor and patient to the criminal courts, while the State prosecutes the doctor for a severe degree of reckless and dangerous behavior, amounting to "Criminal Negligence" Medical negligence can be inferred from a situation where the intervention of medical treatment of a patient has left the patient worse off.

Basically, medical negligence means negligence resulting from the failure on the part of the doctor to act in accordance with medical standards in practices, which are being practiced by an ordinarily and reasonable competent man practicing the same profession, there may be so many instances in which a medical man may act in highly negligent manner. For example, during the course of treatment, a patient suffers injury or dies due to lack of care and reasonable skill –it is negligence similarly commission of illegal acts beyond the scope of duty of the medical practitioner may hold him guilty of a negligent act. In cases of abortion, recklessness can cause a lot of trouble to the doctor, sometimes, anesthesia may prolong and it becomes impossible to revive the patient. This is also negligence. According to "*Charles worth and perky* "on '*negligence'* specialist is one who in case of contract, more skill can be demanded than from a general practitioner. Similarly, prescription of drugs without first examining the patient also amount to negligence.

That medicine is inexact science and it is unlikely that a responsible doctor would intend to give an assurance to achieve a particular result. Not every one or a mere error of judgment can be castigated as negligence in legal sense. But it is only such an error which reasonably competent professional man acting with ordinary care might commit. Errors in treatment can take a multitude forms and for a variety of reasons such as accidental medical injury which is a consequence of the progress of the disease under treatment.

Diagnosis error which could only have been avoided by hindsight un avoidable complication, however, carefully and competently the procedure

was carried out, infections arising under circumstances which made them difficult to avoid, complications of drugs there by carried out in accordance with instructions of the drug manufacturer. The authorities, government or any other Corporation, i.e. who runs a hospital are in law under the same duty as the humblest doctor and since they must use reasonable care and skill to care a patient of his ailment and are bound to act through the staff they employ. They are just as liable for the negligence as is anyone else who employs others to do so his duties for him. This is also because even if they are not servants, they are to be treated as agents with the only exception in the case of such staff selected and employed by the patient himself.

There is very little difference between the obligations undertaken by medical practitioner in private practice and those imposed on his colleagues and counter parts working in the hospital run and administered either by the government or local authorities or philanthropic bodies. All medical practitioners thus owe a duty to their patient to excuse a reasonable care in carrying out their professional skill of diagnosis, advice surgery or treatment.

Whether negligence is establish in any particular case, the alleged act or omission or course of conduct complained of, must be judged not by ideal standards nor in the abstracts against the background of circumstances in which the treatment in question and the true test for establishing negligence on the part of a doctor is as to whether he has been proved guilty if acting with reasonable care .merely because a medical procedure fails it cannot be stated that the medical practitioner did not act with sufficient care and skill and the burden of proving the same rests upon the person who asserts it. The duty of a medical practitioner arises from the fact that he does something to a human being who is likely to cause physical damage unless it is done with proper care and skill. The standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. A doctor can show that he acted in accordance with the general and approved practice. It is not required in discharge of his duty of care that he should use highest degree of skill, since they may never be acquired.

Negligence means omission to do something which a prudent and reasonable person guided by the considerations, which ordinarily regulate human affairs would do something which a prudent and reasonable person would not do. The expert play a vital role in the line is examined in detail and the act or omission is analyzed in the light of various writings by the learned member of profession. The kind of rough manipulation is calculated to cause condition favorable to fat embolism or shock and proves fatal for the patient.

Professional negligence or medical negligence may be defined as want of reasonable degree of care and skill or willful negligence on the part of medical practitioner in the treatment of patient with whom a relationship of professional attendant is established, so as to lead his bodily injury or to the loss of his life.

A doctor was not being held negligent simply because something went wrong. He was not reliable for mischance or misadventure on for an error of judgment. He was also not liable for tacking one out of two or for favoring one school rather than another, he was only liable whence fell below the standard of a reasonably competent practitioner in his field so such so that his conduct might be deserving of census or inexcusable nature .if one just thinks of times when a trouble due to lack of proper care.

For negligence of any kind to be proved, it must be shown that: that the doctor had a duty of care to the patient; that the doctor was in breach of that duty, i.e. .failed in that duty; that the patient suffered damage as a result. Note that all the three of these condition must be present at the same time; otherwise no charge of negligence can be maintained.

Even if a doctor owing a duty of care to his patient was in obvious breach of that duty, no action for negligence can be sustained if the patient did not suffer any damage{bodily or financial} as a result. An extreme example, if a doctor tells patient to treat his condition with acid and the patient quite sensibly ignores this recommendation and goes to another doctor for treatment, he cannot sue the first doctor for negligence, because he did not take his advice and therefore suffered no damage as a result.

The duty to exercise skill and care exists when a doctor- patient relationship is established. This relationship may be formed extremely easily and is by no means dependent upon any formal acceptance of a patient by a doctor, or the payment of a fee. This may be true even if the patient is unconscious and quite unaware of the doctor's presence. It is somewhat ronic that action for negligence had been brought by a patient against a doctor who acted as a *"good Samaritan"* following some roadside accident, but the legal position is quite definite. The number of such actions became so frequent in the United States within recent years.

That the passing physician became extremely reluctant to render aid in emergencies and some states brought in legislation to prevent actions for Negligence arising from casual treatment at the scene of accident. Thus a doctor, who deals with a patient with the intent of acting as a healer, established a doctor–patient relationship immediately. Therefore from the moment on, he was under a legal obligation to exercise a duty of

skill and care. Any breach of this duty is ground for a negligent action.

A doctor is not negligent if he does not offer his service in an emergency to a person who is not already his patient, though the ethic of this action might be questionable, as the moral duty of all doctors is to assist their fellow men as much as possible. However, if he chooses not to treat the patient –and thus is quite legitimate in a non-urgent situation he has no duty of care towards that patient.

Where a doctor examines a patient for some other purpose than providing advice and treatment, he is not present as a healer –no relationship is established and thus no duty of care exists. A doctor conducting a medico-legal examination for any purpose such as life insurance, evaluation of disability, drunkenness, sexual assault etc. not there in his capacity as a healer and no duty of care arises. In these circumstances, there is a duty not to inflict any damage upon the patient and thus for example, if a needle is negligently broken off whilst taking a blood sample ,the patient may have a right action .if however ,a doctor reports to an employer ,insurance company or compensation board that the patient is healthy-when in fact is or not-the patient has no claim for negligence against that doctor for any financial loss suffered ,as no duty to take care existed between the doctor and the patient.

A duty exists, however between the doctor and the authority employing him to make the examination, but any incompetence would be a breach of contract with the employer, not a tort with a cause of action for the patient. A doctor must possess a reasonable degree of efficiency and he must apply that proficiency with a reasonable degree of diligence. A highly experienced consultant may be negligent if he fails to apply his greater knowledge with a sufficient degree of care. Conversely ,an inexperienced doctor may be negligent if he attempts to do some procedure which is clearly beyond his capabilities-except in an emergency- even if he strains his capacity to the at most in the attempt.

The degree of competence is not a fixed quality, but varies according to the status of the doctor on the ladder of the medical profession. There is a minimal level of the competence for all doctors who are guarded by the qualifying examination of medical colleges and the supervision of the State Medical Councils and Indian Medical Council, who admit doctors to the register.

This minimum level is set to protect the public from insufficiently-trained doctors, but once they are upon the register, the public may expect that they are sufficiently proficient so as not to constitute danger to their patients.

No doctor is expected to neither possess all current medical knowledge nor be able to apply all known diagnostic and therapeutic techniques. However a doctor of a particular status as regards grading and experience is expected to have a standard of knowledge and capability corresponding to his position in the profession.

A house surgeon is not expected to possess the same skills as a consultant surgeon, therefore he is expected to confine his activities [except in emergencies] to a level of medical care which is with his competence. A house surgeon volunteering to perform a major surgical operation [not in emergency] might be held guilty of negligence if he causes damage to his patient, as that patient had reason to expect him to be sufficiently competent.

This applies to all other specialties such as anesthesia, and it is dangerous for any junior doctor to lead his patient to believe that he has skill beyond his expected capabilities. Naturally this statement must be modified markedly if the doctor is in a remote situation where no other medical aid is available or in any emergency situation where he has to act quickly before senior colleagues can be present these circumstances are naturally taken into account if the damaged patient later complains. Again these matters in India will become more apparent as the level and the availability of medical services become more comprehensive and complex and the patient themselves become more aware of their legal rights.

A famous statement by a judge on the matter of negligence stated that “the categories of negligence are never closed “meaning that it is impossible to draw up a complete list of all things which could cause a negligence action as these naturally increase everyday as medical technology advances .anything that doctor does can be grounds for complaint from a patient who may allege that the doctor did not exercise a sufficient degree of care .this may range from complicated surgical procedures down to failure to attend a patient when requested.

Before considering these individual causes, some features of negligent behavior should be mentioned. A doctor is not liable for errors of judgment either in diagnosis or treatment, as long as he applies a reasonable standard of skill. Negligence is not a matter of doctor making mistake ,but not trying hard enough, through lack of care or attention or reckless disregard for the consequences .a doctor can miss-diagnose and miss-treat a patient without being negligent ,even if another practitioner of greater skill would have had more success. A doctor is “not in answer”, as another famous judge once said, and he does not guarantee to provide the best possible care , but only care which is reasonable adequate consist with his professional status.

Thus every doctor does not have to know all the recent advances in his subject and all the latest medicines and techniques. He has to show a reasonable standard of care, which is the average standard which would be applied by most of his colleagues of similar status. Normally the task of proving negligence rests upon the person bringing the action in other words a patient has to prove that the doctor was negligent, though in actual fact this is what is done in refuting the claim of patient.

An exception to the rule that the "burden of proof rests on the plaintiff "is in case where the facts are so obvious that the onus is shifted to the doctor to prove that his own negligence did not contribute to this state of affairs. The primary purpose of the res ipsa loquitur doctrine is to provide fairness to an injured person when direct evidence of **negligence** is absent. In fact, where the plaintiff (patient in medico legal cases) is in a position to produce evidence of negligence, res ipsa loquitur is not applicable. This doctrine of *"res ipsa Loquitur"* means that *"the facts speak for themselves"* For instance, if a patient goes into hospital to have his left leg and on recovering from the anesthetic find that the right leg has been removed [a not uncommon happening in the realms of medical negligence] then the facts are so obvious that the patient and plaintiff does not have to prove the act was negligent, as it obviously could be nothing else. The only defense for the surgeon would be to show that the negligence was not his, but due to somebody else. Departure from accepted medical practice is another hazard. The usual criterion of negligence is the average behavior of other doctors of the same status as the defendant. If it can be shown that the defendant doctor applied on average standard of skill, using conventional methods, then it is unlikely to be proved negligent.

Doctors are expected to keep abreast of general principles in medicine, though this does not extend to every detail of recently published research, as stated above. He is naturally expected to know the level of medicine that is taught to senior medical students and to know general principles of therapeutics, without going into the latest, perhaps more controversial techniques. Specialties are naturally expected to have specialized knowledge and standards in their particular field. The courts allow great latitude ion these decisions about diagnosis and treatment may risk negligent actions if things go wrong.

CLASSIFICATION OF MEDICAL NEGLIGENCE

Instances of negligence would be easy to understand if one understands the meaning of duty he or she is performing like A needle, which breaks while injecting, A cotton wad or gauze which is left inside the body of a patient, after the surgery, A wrong medicine, which is injected. Sterilization which could not be properly read adequate arrangements which were not made in time to meet the emergency, proper instructions which were not issued and failure to communicate the history of the patient to the subsequent doctor, failure to make enquiries regarding previous treatment. Lack of proper checks to tests the side effects if a drug failure to keep the patient under observation.When he required the utmost care, at the relevant time failure to discharge, the duties, on the part of assistants of the doctors, when such duties ought to have been discharged by the doctor himself. Failure o obviate complication in an operation, etc. but it is not that in all cases, one be bound to be held liable to pay damages or be prosecuted. There can be a bona fide error of judgment or a bona fide mistake which is totally non–negligent.

Similarly, if the treatment is done in the best interest of the patient in an irretrievably dangerous situation diagnosis is also reckoned on the above tests above all, the damage may have occasioned on account of some deviation on the part of the patient himself who does not follow the instructions properly, there is a contribute negligence. In such cases doctor cannot be liable to the negligent. In cases where some extraneous event happens, the medical man is not held liable.

The duty of a medical practitioner arises from the fact that he does something to a human being who is likely to cause physical harm unless it is done with proper care and skill. There is no question of warranty undertaking or profession of skill the standard of care and skill to satisfy the duty in tort is that of on ordinary competent medical practitioner exercising the ordinary degree of professional skill.

As stated above, these are infinite in there variety, but there are certain matters which constantly recur in the annals of medical negligence in North America, Europe and Australia. The list below is by no means comprehensive and the rule should be remembered that "anything that can go wrong, is likely to go wrong " this applies both to apparatus, drugs and to the actions of the doctor himself , together with ancillary staff such as nurses and technicians and other mishaps thus surgical mishaps, casualty and accidental departments, anesthesia , failure to attend, failure to communication, drugs and therapeutic substances, injection and vane puncture hazarded, miscellaneous causes of negligence. All manners of things can go wrong in the operating theatre or in the wards before or after operation. A common error is the selection of the wrong patient can no longer identify himself.

Also, operations on the side of the correct patient, on the wrong digit of the hand or foot and even on the wrong organ of the body have been recorded with depressing regularity. The leaving of swabs, instruments and other foreign bodies in body cavities is a well-known happening and must be

guarded against by rigid operating theatre discipline. Though it is common practice for the theatre sister or senior technicians to count instruments and swabs, it is the surgeon's ultimate responsibility.

When things go wrong, as this is one of the busiest areas of a hospital or medical centre, the urgency and rush can contribute to things going wrong. Failure to diagnosis fractures, failure to properly treat head injuries and innumerable other errors are frequent in casualty departments. Unfortunately it has been practice for many years to staff the casualty department with junior staff whereas due to the high risk of mishaps. A senior doctor should be in charge.

It presents its own hazards but in actual fact many of the tragedies which occur under an anesthesia are not due to the effects of anesthetic itself, but due to the human error or failure of the equipment. The anesthetist is also in charge of other matters apart from the anesthetic, such as intravenous transfusion and these can also lead to mishaps. Airways, intravenous catheters, diathermy, injections and resuscitation all have their own perils, which come under the responsibility of the anesthetist.

Many negligent actions are brought by patient or their representatives because a doctor would not come when he was called especially in the case of children, this can be a most prolific source of complaints and where death occurs before medical attention is secured, then relatives tend to blame the doctor, even if in fact the attendance of a doctor would have made no difference to the fatal outcome. Where one doctor has treated a patient and then passed him on to another doctor, such as in the emergency treatment of a patient who is then referred to his physician, failure of communication between the two doctors has not infrequently led to allegation of negligence. This may be due to the fact that treatment was not continue in the proper manner or not continued at all or the second doctor was not informed of the true state of affairs found by the first doctor, which may lead to permanent disability or even to death.

It is essential that where one doctor treats the patient of another, he should communicate with that second doctor to keep him posted of matters of diagnosis and treatment. Many patients are sensitive or allergic to certain drugs and although this might be known, a doctor may disregard or not take sufficient trouble to find out that this is the case. The administration of such a drug may cause serious harm or even death, which may then be grounds for negligence action.

Whenever a needle is placed beneath the skin, a potential medico legal situation exists, with the possibility of a negligence action arising. Even a simple vane- puncture can go wrong such as the penetration of a nerve or artery with subsequent paralysis or loss of function injecting any substances is also hazard, such as contrast media for gall bladder or renal X-ray investigations, angiograms and many of the rapidly developing diagnostic tests used in modern medicine.

All this, can cause necrosis generalized reaction and even death and although the matter may not be one of negligence, the patient or his representatives may well think so. An even more dangerous situation is the injection of any substance into the spinal canal. Intrathecal injections carry extra hazard and in fact, the decline of spinal anesthesia was due mainly not to any defect in the anesthetic result, but due to the risks of medico–legal complications.

Many cases on record where, paralysis and death have occurred through the wrong substance, being injected into theca, to higher dosage being injected into the theca, than advisable or to substances such as local anesthetics being contaminated with antiseptics, damaging the spinal cord. Remember that whenever a needle is stuck beneath the skin for whatever purpose, there is a greater hazard than in many other types of medical intervention.

Miscellaneous causes of negligence actions include overlooked foreign bodies, wrong dosage of injection or tablets, broken syringe needles, x – ray burns, gangrene from tight plaster cast, paralysis from tight splints, incompatible blood transfusions and many other similar hazards.

SCOPE OF COMPENSATION FOR MEDICAL NEGLIGENCE

However, negligent a doctor might be, the patient cannot sue him for negligence if no damage has occurred. He must have suffered some loss which can be measured and compensated for in terms of money loss of earnings, either due to absence from work do to disability or due to impairment of his ability to carry on his previous occupation. A man may be forced to take employment at a lower level of earnings because of his disability.

Loss of earnings may also occur because of man's future earning life is shortened, either by disability or by death. "Damages" – money which is awarded by the court and must be distinguished from' damage'– are calculated partly upon this loss of earning capacity and in the case of death or permanent disability, the remaining years until retirement are used to calculate the how much money has been lost.

Expenses incurred as a result of negligence may include medical treatment following disability, nursing care, hospital costs, special treatments, special foods, etc.

Reduction in the expectation of life – and the enjoyment of life may be included in accessing the

damages. The loss of eye – sight, hearing or some other faculty may naturally reduce the quality of life and this in itself becomes commensurable by damages. In particular cases, certain disfigurements or loss of function may lead to a woman not having the expectation of a good marriage or to an actor not being able to obtain good contracts, and these again will be taken into account by the court when damages are assessed.

Pain and suffering, due to the effects of the disability, may be used to assess damages, but are not usually very great compared to the loss of earning, death may be actionable for the benefit of dependent relatives and the main measure used to calculate the effects of death is the loss of earnings power during the years in which the dead man might have been expected to continue his employment. In the case of the death of a child, this is impossible to calculate and therefore damages in the death of a child tend to be small.

Damages awarded for pain and suffering, loss of expectation of life and earnings etc. are called "special damages". It should be noted that there is no fixed scale such as a thousand rupees for the loss of a hand " – it is the status of the person to which the hand was attached that determines the amount of financial damages awarded by the court or more often , settled out of court by the lawyers. The loss of the hand of a craftsman such as a skilled watchmaker is more valuable than the hand of a farm laborer. The potential earnings of senior politician killed by some negligent surgical operation are much greater than that of a railway station sweeper. Also, the death or permanent disability of the young man is more expensive to the defendant than an old man because more years of potential earnings capacity remains same.

A professional charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. It is not required in discharge of his duty of care that he should use the highest degree of skill, since the same may never be acquired by each and every individual. Even deviation from normal professional practice in peculiar and special circumstances is not necessarily evidence of negligence. As regards the standard of care required for the medical man it can be stated that a mistaken diagnosis is not necessarily a negligent diagnosis.

A practitioner can only be held liable in this respect if the diagnosis is so palpably wrong as to prove negligence, that is to say if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part, regard being had to the ordinary level of skill and care on his part regard being had to the ordinary level of skill in the profession.

A company's doctor gave treatment to an ailing employee who later on expired. The cause of death was allegedly attributed to the negligence on the part of the doctor who treated the deceased for suspected venereal disease while actually it was small pox. Before the trial court, inter alias, one issue was framed as to whether the plaintiff proved that the doctor treated the deceased with gross negligence and carelessness.

Instances of nature, as any other action for negligence, the plaintiff has to prove, that the defendant was under a duty to take a reasonable care towards the plaintiff to entitle the plaintiff to claim damage to the plaintiff by failure to use reasonable care, that the breach of duty was the legal cause of the damaged complained of and such damage was reasonable for see able. It is not that the duty cast upon the company's doctor in respect to the company's employees is any higher or lower than the duty of an average doctor towards his patient.

The company's doctor is not duty bound to visit a hospitalized employee who is being treated by another doctor. No such duty is cast on the company's doctor under the terms of his appointment. That the without application of correct principles of law of medical negligence to the facts of the case and on the basis of conjectures and surmises and irrelevant considerations and misunderstandings the evidence on record.

The court should be careful in censuring professional men like doctors in the absence of clear and satisfactory evidence of negligence from which the only possible inferring is one of the negligence, it would be wrong to censure doctor who belong to a learned profession and who are ordinarily expected to maintain high standards professional conduct in dealing with their patient.

The general rule regarding [wrong diagnosis] was also examined in a case where the complainant alleged that the doctors had wrong fully diagnosed his ailment as "single vessel disease "which was subsequently and actually diagnosed as "severe triple vessel coronary disease "it was observed that diagnosis is nothing but framing an opinion on examination, only on such examination the opinion is formed as to the disease from which the patient is suffering. The opinion formed in diagnosis may vary from one medical expert to another expert just like a difference of opinion expressed by the lawyer regarding the factual matrix in the light of legal provisions. Only on the diagnosis, treatment is given; wrong diagnosis and consequent treatment given cannot at all amount to negligence or deficiency in service on the part of such professional.

There is another yet unfortunate trip where the patients vulnerably fall and because of which genuine doctors suffer. A patient suffered moderate pain in his chest and approached a doctor who

diagnosed it as normal chest pain and gave medicines but the situation worsened and required hospitalization.

It was actually found to be critical condition known as cardio – genie shock. The so – called doctor was using an invalid registration certificate in alternative medicine to practice allopathic system of medicine. It was held to be a prime facie case of medical negligence to prescribe drugs for minimizing chest pain. Respondent acted against the medical ethics that the respondent was neither registered nor qualified. He was a registered pharmacist, having diploma in pharmacy and also diploma in x-ray technology, it stood established that the respondent could not prescribe and administer allopathic medicines.

Such practitioners are named as “quacks” quick is a person who does not have knowledge of a particular system of medicine but practices in that system of medicine and a mere pretender to medical knowledge or skill or to put it differently a “charlatan “ they are guilty of negligence per se. The case raises questions of general importance, practical significance, the right to practice medical profession and also right to life which includes health and well-being of person.

The patient not only alleged negligence in the matter of performance of contract operation but also alleged fabrication and manipulations of documents. The standard of care expected of a medical man is neither too high nor too low. All that the law expects from him is to exercise reasonable care expected of a skilled medical practitioner, further, the circumstances under which a doctor is functioning and the tension borne by him while dealing with several cases also cannot be overlooked.

The skill of medical practitioner differs from doctor to doctor. The very nature of profession is such that there may be more than one course of treatment which may be advise able for treating a patient, courts would be slow indeed in attributing negligence on the part of doctor if he has performed his duties to the best of his ability and with due care and caution.

Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient , but as long as the doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence but cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.

Allegations of negligence against a medical practitioner should be considered very seriously and the allegation should be fool proof and standard of proof of fault also should be of high degree and probabilities.

A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties. A duty of acre in deciding whether to undertake the case, a duty of care in deciding what treatment is to be given or a duty of care in the administration of that treatment.

A breach of any of these duties gives a right of action to the patient for the negligence; 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 is wanted. Such ordinary care and competence judged in the light of the particular circumstances of each case is what the law requires. It is a widely required proposition of law that a person will be guilty of negligence, if he undertakes a task which he knows or ought to know that he is not qualified to perform it that the duty of medical practitioner is based on the fact that he is handling a human being which is likely to cause physical damage unless proper care and skill are applied, a physician who diagnosis and treats a person for a disease or a surgeon who performs an operation on a patient to remove or rectify a defect is presumably making an undertaking that he possesses the required skill and knowledge for the purpose.

ROLE OF JUDICIARY AND SCOPE OF MEDICAL NEGLIGENCE IN INDIA

Public awareness of medical negligence in India is growing, hospital managements are increasingly facing complaints regarding the facility, standard of professional competence, and the appropriateness of their therapeutic and diagnostic methods after the consumer protection act, 1986, has come into force some patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service and have claimed and received compensation. As a result, a number of legal decisions have been made on what constitutes negligence and what is required to prove it.[1]

The judiciary of this country has consistently endeavored to meet the expectations of society in upholding the rule of law and dispensing justice to all, with the passage of time increasing public opinion on matters concerning law has facilitated its development societal expectations from the judiciary have considerably increased with the increase of public awareness toward their rights.[2] The courts in India have responded in multiple ways in the changing situation and immensely

contributed in the growth and development of law.[3] In a span of more than two decades of working of the Supreme Court of India it has decided several thousands of cases which have had vital bearing on the life of the citizens individually and also on the nation as a whole.

The burden of proof of negligence carelessness or insufficiency generally lies with the complaint. The law requires a higher standard of evidence than otherwise; to support an allegation of negligence against a doctor in case of medical negligence the patient must establish her/ his claim against the doctor that the onus[4] of proving negligence and the resultant deficiency in service was clearly on the complaint.

That the negligence has to be established, and cannot be presumed.[5] Even after adopting all medical procedures as prescribed a qualified doctor may commit an error the national consumer disputes redressal commission and the Supreme Court have held in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/his treatment or in her/ his diagnosis if she/he has acted in accordance with the practice accepted as proper by a reasonable body of medical professional skilled in that particular art , though the result may be wrong , in various kinds of medical surgical treatment, the leading to death cannot be ruled out , it is implied that a patient willingly takes such doctor –patient relationship and the attendant mutual trust .

The landmark judgment passed by Hon'ble Supreme court has provided breathing space for medical practitioners this should be utilized to reduce unethical practice,[6] to improve doctor –patient relationship and to strive for service to the humanity, Medical council of India should be strengthened and allotted more powers including the creation of an independent different acts and rules as framed by government of India.

A panel should be formed by medical council of India / State medical council at each district level which will look after medical negligence cases. The panel should consist of three members from medical profession, one from judiciary and one from social activist group the private complaint regarding medical negligence[7] should proceed to this panel first which will study the matter in details.

The same judicial procedure is to be followed as followed in cases of disciplinary control over medical practitioners and it must be time bound inquiry, after inquiry, if the medical practitioner is found guilty of medical negligence, it will provide punishment in the form of temporary or permanent erasure of the name of medical practitioners from the medical register. The result of the enquiry will be informed to the complaint and the complaint will decide whether to file a case against the medical practitioner in court or not. This should also provide scientific basis for investigating agencies to proceed further as per law of the land.

That the "continuing medical education workshops should be arranged by medical council of India /state medical to refresh the knowledge of medical practitioners and to increase awareness among medical practitioners regarding newer technologies[8] and developments in medical sciences, which will be beneficial to the patients and society at large.

The role of disciplinary committee which looks after the violation of code of medical ethics is crucial as it is necessary in changing scenario to hold inquiry, suo motto regarding unethical[9] practice among medical practitioner and take necessary action.

The limit of penalty imposed on opposite party if the complaint made against medical practitioners is found to be frivolous in section—26 of the consumer protection act in 1993.

Preservation and production of medical records, history chart, treatment chart, and investigations case, production or non-production thereof can reuse presumptions[10] in the judicial mind.

That providing adequate medical facilities for the people is an essential part of the obligations undertaken by the government in a welfare state. Article-21 imposes an obligation on the state to safe guard the right to life of every person, check and balances envisaged under various provision of laws dealing with dereliction on the part of doctors have not been much of a remedial measure and the recalcitrant attitude of some of the members of the profession have raised doubts about the redressed of grievances and to find a way out to contain the malpractices, in this regard the effect of the consumer protection act is not a surprise.

It is not that measures to check such dereliction are absent. In the olden days, concentration was more towards crimes and punishment. Heavy penalties and deterrent punitive measures were sanctioned. There are so many stringent legislations which can check malpractices,[11] it is high time that good sense prevails and the learned members of this noble profession themselves suggest some plausible and effective measures at their own level to check malpractices so that propriety and professional dignity is not put at stake.

It is the duty of legislature to enshrine such provisions in the consumer protecting act and also in other related laws for a mandatory scrutiny of all cases of medical negligence before they are put to trial, this scrutiny should be done by medical experts and any such cases which are prima facie

acts of negligence should be subjected to the summary jurisdiction of consumer form.

The substantive and procedural part of the statute would, inter alia, ensure two things, one that false and malicious cases would not see the light of day and genuine claims will not fail for want of proper testimony.

CONCLUSION

Medical profession is governed by code of medical ethics and etiquette as laid down by Medical Council of India. It is expected that medical practitioners should abide by these codes of medical ethics although the code of medical ethics is for an internal self-regulation of the profession.It is an obligation on the part of medical practitioner to fulfill certain rights and expectations of patients it would be useful and apt to state that medical profession is regarded in highest esteem because of the nature of service they provide to humanity this consideration has always weighed with judges deciding cases involving doctors. If a doctor fails to exercise reasonable skill and care[12] in the exercise in the performance of such duty that is considered a service to humankind, he should not be allowed to take refuge of the nature of duty which he has, in a sense, disregarded by not being reasonable on his own part. There is enough protection given to doctors when they are property exercising their skills, for all other purposes and contingencies, they should be placed along with other professionals.

The appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period from the register the name of any registered practitioner who has been convicted of any such offence as implied in the opinion of the medical council of India and or state or who after an enquiry at which opportunity has been given to such registered practitioner to be heard in person or by pleader, has been held by the appropriate medical council to have been guilty of serious professional misconduct.[13] The appropriate medical council may so remove shall be restored.

That the instances of offences and professional misconduct which are given do not constitute and are not intended to constitute a complete list of the infamous acts which may be punished by deletion from the register, and that by issuing this notice the Medical Council of India / or State Medical Council are in no way precluded from considering and dealing with any form of professional misconduct on the part of a registered practitioner circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories.

In such instances, as in all others the Medical Council of India and / or State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India / State Medical Councils, with the increase in commercialization of medical services it is only fair that, while maintaining the, sanctity attached to the profession, negligent doctors must not be and have not been allowed to go free. Thus judiciary has been providing a useful check and preventing carelessness[14] thereby protecting and safeguarding human lives.

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