AN ANALYSIS OF MEDICAL NEGLIGENCE

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INTRODUCTION

Medical negligence or clinical negligence is defined as "*failure by a healthcare professional to exercise a reasonable standard of care"*[1]. When the doctor fails to do his job sincerely and with utmost care which results in a lot of harm or even death in adverse conditions, the doctor/medical practitioner is said to have been medically negligent or commit malpractice. The difference between medical malpractice and medical negligence is that, while all medical malpractices is considered medical negligence, all medical negligence is not considered medical malpractice. Medical negligence is a phenomenon which can be related to man's behavior of general lethargy or carelessness but in a more grievous form as negligence/carelessness when comes to the case of human body can result in the death of that person. The origin of medical negligence law or 'legal punishment' for medical negligence can be traced back to the first legal document of the world, "The Code of Hammurabi", the extensive legal document of ancient Mesopotamia. The code of Hammurabi states that, "*If the doctor has treated a gentleman with a lancet of bronze and has caused the gentleman to die, or has opened an abscess of the eye for a gentleman with a bronze lancet, and has caused the loss of the gentleman's eye, one shall cut off his hands"*[2]. The ancient Romans also had legal citations for medical malpractice law.

Medical negligence, especially in the current global scenario of god speed technological advancement, is the most critical health related issues in a country like India today. Litigation relating to medical negligence has been increasing year by year especially after Consumer Protection Act,1986 came into effect[3]. "The need for such knowledge is more now than before in light of higher premium being placed by the Indian forums on the value of human life and suffering, and perhaps rightly so[4] ". The main purpose of this research paper is to make the

[1] Medical Negligence and law in India, Duties, Responsibilities, Rights : Tapas Kumar Koley
[2] The Hammurabi Code of Laws
[3] Consumer Protection Act , 1986
[4] Amit Agarwal, Medical Negligence : Indian Legal Perspective, US National Library of Medicine National Institutes of Health

readers aware of the existing common practices of medical negligence, the terms related to medical negligence like the 4Ds of medical negligence, cases related to medical negligence, Indian legal perspective of medical negligence, Bolam test.

LITERATURE REVIEW

The most important case relating to medical negligence in India is '*Poonam Verma v. Ashwin Patel and Ors'*[5] which is where Supreme Court of India delved into the issue of what is medical negligence. Some other important cases in India like "*Balram Prasad vs Kunal Saha & ors"*[6]*, "V Kishan Rao vs Nikhil Super Specialty hospital"*[7]etc will also be discussed in this paper for the proper legal understanding of the subject. Since medical negligence is a wide topic having lots of sources, both primary and secondary, to get information and knowledge from, it is easy to get a clear idea about the subject. For this specific topic, number of secondary sources are much more than the primary since a lot of articles, journals, and research publications are already there. Some of the books like "Medical negligence and the Law in India : Duties, Responsibilities, Rights"[8] by Tapas Kumar Koley gives the reader a clear idea about the entire concept of medical negligence in India and the different legal aspects pertaining to it. It explains about the medical practitioner's and patient's responsibilities and medical rights as a legal citizen. The TOI (Times Of India) online journal gives immense information about recent incidents of gruesome medical negligence which has caused death in many circumstances and the famous Indian law platform, Indiankanoon[9] helps in referring various legal cases in India relating to Medical negligence. "Law of Medical Negligence and Compensation"[10], a book by R.K Bag, gives a clear idea of the extent of compensation granted and what all are the requirements to get the compensation. The book also explains the requirements and necessities to prove the negligence of the doctor which are

(1) The doctor should have had a duty of care to the claimant.

(2) The doctor breached his duty by falling below the reasonable standard of care

(3) Foreseeable harm occurred to the claimant.

[5] Poonam Verma v. ashwin Patel & Ors , 1996 AIR 2111 SCC(4) 332.
[6] Balram Prasad v. Kunal Saha & Ors , 2013
[7] V. Kishan Rao vs Nikhil Super Speciality hospital, 2010
[8] Tapas Kumar Koley, Medical Negligence and law in India : Duties, Responsibilities, Rights
[9] indiankanoon.org
[10] R.K Bag, Law of Medical Negligence and Compensation

This paper will also discuss the difference in current status of medical negligence between India and other countries.

RESEARCH METHODOLOGY

The researcher has used doctrinal method of research for this paper since medical negligence is a subject that is growing into one of the major aspects in the world of law. In this paper, the researcher has described about medical negligence majorly from the legal point of view and minorly in the social point. Websites, books and databases which have been used for writing this paper has been mentioned towards the end of the paper. The researcher has used enough and more footnotes for the readers to explore more into the case laws, keywords and terms from the paper. Although the paper is descriptive in general, bulleted points for the important aspects have also been included.

RESEARCH QUESTION/STATEMENT OF PROBLEM

This research paper will be able to answer some of the readers' questions like

1. What is the difference between medical malpractice and medical negligence
2. What are some examples of commonly seen medical negligence
3. What are the different terms and aspects associated with medical negligence
4. What is the global and Indian perspective of medical negligence
5. Medical negligence in Indian legal aspect
6. Recent infamous incidents of medical negligence
7. What are some cases related with medical negligence law
8. What is Bolam test.

DIFFERENCE BETWEEN MEDICAL NEGLIGENCE AND MEDICAL MALPRACTICE

From the two terms *negligence and malpractice* itself, the readers can almost figure out the difference between the medical negligence and medical malpractice. A common man's

differentiation between the two would be that, medical negligence is what occurs when the medical practitioner in question is careless about the patient and the latter undergoes a medical condition which might be grievous hurt or in extreme conditions, death. The common man definition of medical malpractice would be something that occurs when the medical practitioner conducts an act which is illegal according to the medical law dictionary and against medical ethics.

"In Poonam Verma vs Ashwin Patel the Supreme Court distinguished between negligence, rashness, and recklessness. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of her/ his act. A reckless person knows the consequences but does not care whether or not they result from her/ his act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability."[11]

In legal language, they are differentiated elaborately by different people in different ways. PICKET LAW FIRM[12] has described them as:

"Medical negligence is the breach of the duty of care by a medical provider or medical facility. It has an element of intent that medical negligence does not have in it. The doctor or provider knew he should have done something to treat the patient but he failed to do so knowing that his failure may result in harm to the patient. It was not intentional in that he wanted to harm the patient but it was intentional because he knew that by doing so the risk of harm was present. For example, a doctor decides to forego an expense diagnostic test because the person's insurance company will not pay for the expense of running the test; therefore, the doctor would bear the financial burden if he the test."

On the other hand, "medical negligence does not involve intent. Medical negligence applies when a medical provider makes a "mistake" in treating patient and that mistake results in harm to the patient. While the act or omission is definitely negligence, it does not rise to the point of medical malpractice because the medical provider did not commit the action either with the intent to cause harm or the knowledge that the patient might suffer harm. An example of

[11] K K S R Murthy, Medical Negligence and the Law, INDIAN JOURNAL OF MEDICAL EHICS
[12]http://wdpickett-law.com/faqs/what-is-the-difference-between-medical-malpractice-medical-negligence/#:~:text=Medical%20malpractice%20is%20the%20breach,medical%20provider%20or%20medical%20facility.&text=Medical%20negligence%20applies%20when%20a,in%20harm%20to%20the%20patient.

medical negligence may be when a nurse accidentally leaves a sponge inside a surgical wound. She did not intend to harm the patient but her action may not rise to the level of medical malpractice. Only an experienced medical malpractice attorney is qualified to evaluate the case based on the facts to determine whether a medical malpractice lawsuit is required or a medical negligence lawsuit would be better given the set of facts in your case."

The literal definitions of both will not make much of a difference to the person who is the victim of any of the two. The person who will care about the difference between the two will be the victim's attorney. According to Thomas Robenault[13], a famous legal practitioner, there are four compulsory elements for an act to be medical malpractice.

i. Presence of a legal duty

ii. Breach of that duty

iii. A connection between the injury caused and the cause

iv. Measurable harm from the injury

Irrespective of the action or omission which led to the medical injury, these four elements must be satisfied for an act to be medical malpractice.

COMMON EXAMPLES OF MEDICAL NEGLIGENCE

- *Prescription of wrong medication or administration of drugs that are harmful or illegal.*

Indian Medical Council Regulations, 2002[14] states that "every physician should prescribe drugs with generic names in legible and capital letters and he/she shall ensure that there is a rational prescription and use of drugs"[15]

Medical Council of India, rule number 1.4.2[16] governs writing of prescription and it states that "all doctors in India are required to abide by the laws that regulate the practice of medicine and

[13] https://www.lawyersthatfightforyou.com/
[14] Indian Medical Council Regulations Act, 2002, Constitution of India
[15] https://www.researchgate.net/
[16] Indian Medical Council Act, 1956.

also follow the provisions of State Acts like Drugs and Cosmetics Act, 1940[17]; Pharmacy Act, 1948[18]; Narcotic Drugs and Psychotropic substances Act, 1985[19]; Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954[20]"

- *Careless prenatal care and negligence in childbirth*

Pregnant women often visit their OB-GYN to make sure that the health of their unborn infant is perfect and has no complications. Women rely on their healthcare provider on a large extent to ensure the aforesaid. Some of these physicians do not take care of their patients (in this case, pregnant ladies) with proper care which will lead to complications in pregnancy and the results at times can be tragic.[21]

Anesthesia administration

The administration of anesthesia is one of the most complicated and hardest parts in the field of medicine. Contrary to what people think is so simple is in fact a very risky act. If in liquid form, at times, just one extra drop of anesthesia (which is called anaesthesia overdose) can lead to lifelong coma of the person to whom it was administered. Anaesthesia overdose due to pure negligence which shoulf be proved only from thorough study, is a punishable act acording to cases like Kannayya Chettiar and Anr vs Nair Service Society and Ors[22] and V. Revathi vs Union Of India & Ors[23].

GLOBAL PERSPECTIVE OF MEDICAL LAW

International health law is one of the most emerging field of Public Intenational law. It is an argument that protection of health is a subject that should be spoken of in a global podium and in the international law aspect. Currently, international health law is not a wide scoped and well-developed field. But as every subject is upgraded into international level, eventually

[17] The Drugs and Cosmetics Act, 1940 is an Act of the Parliament of India which regulates the import, manufacture and distribution of drugs in India
[18] Pharmacy Act, 1948.
[19] "The Narcotic Drugs and Psychotropic Substances Act, 1985, commonly referred to as the NDPS Act, is an Act of the Parliament of India that prohibits a person the production/manufacturing/cultivation, possession, sale, purchasing, transport, storage, and/or consumption of any narcotic drug or psychotropic substance"
[20] "The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 is an Act of the Parliament of India which controls advertising of drugs in India. It prohibits advertisements of drugs and remedies that claim to have magical properties, and makes doing so a cognizable offence"
[21] https://gladsteinlawfirm.com/blog/negligent-prenatal-care/
[22] Kannaya Chettiar & Anr. vs Nair Service Society & Ors. on 26 April, 2018
[23] V. Revathi vs Union Of India & Ors on 25 February, 1988

medical field will be too. There is an urgent need to upgrade the health field into global aspect like international trade, international economics, international law etc. According to an article by Brigit Toebes on https://link.springer.com/ [24], international law should be internationalized because of reasons like

- "the rights of patients to affordable medicines are often at tension with the recognition of excessive intellectual property rights (i.e. patents) of the pharmaceutical industry."
- "governmental measures to curb smoking are often counteracted by international trade in tobacco products and excessive advertising for tobacco products."
- "health workers in armed conflicts are frequently confronted with a disrespect of international humanitarian rules, which hampers them in the exercise of their duties."

MEDICAL NEGLIGENCE IN INDIA

History

The earliest civilization that is known to us is the Indus Valley Civilization which existed around 3000-2000 BC. Famous medical historian Henry Sigersist said that Mohenjodaro's public amenities were superior to any other civilization's at that time. During those times itself the men who took care of other people's health were considered a sacred profession and anyone who converted that profession for lucrativeness and those who refused to show the required respect to that profession were punished by the head of the civilization. Oath by Charak in 1000BC and Hippocratic Oath of 460 BC exemplifies the earlier statement.

Current Indian legal Perspective

Section 304A of IPC[25] (Indian Penal Code) clearly states the liability of a person who, by his rash or negligent act, causes the death or grievous hurt of another person. This act is particularly not about medical negligence but about criminal negligence.

[24] International health law: an emerging field of public international law, Brigit Toebes, 6 April 2016, https://link.springer.com/

[25] "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

It is only after the introduction of Consumer Protection Act, 1986[26] that the number of complaints against doctors and hospitals has grown, in India. Till the act, there were not any laws in India strong enough and effective, for the public to go against doctors and hospitals. As described the researcher earlier, there are certain elements which must be compulsorily satisfied, so as to consider an act by a qualified medical physician as negligence because even the best doctor in the world may commit a mistake. Some of the most important laws or acts in India regarding medical negligence or a physician's misconduct is as follows:

- The Indian Medical Council Act, 1956
- Indian Medical Council (Professional Conduct, Etiquette, and Ethics Regulations 2002
- Indian Medical degree Act 1916
- Indian Nursing Council Act 1947
- Delhi Nursing Council Act 19976
- The Dentist's Act 1948
- AICTE Rules for Technicians 1987 (8)
- The Paramedical and Physiotherapy Central Councils Bill 2007
- The Pharmacy Act 1948
- The Apprenticeship Act 1961

CASE LAWS

- In the case *State of Haryana and Ors vs Smt. Santra (2000)*[27], after the thorough study of facts of the case, the Supreme Court stated that "the doctor who performed the procedure had been negligent by failing to perform any action on one of Smt. Santra's fallopian tubes. Therefore, the question at issue in this case was who had to bear the expenses of bringing up the child. The Supreme Court considered analogous case law from United Kingdom, Scotland, United States, South Africa, New Zealand and

[26] "The Consumer Protection Act, 1986 was an Act of the Parliament of India enacted in 1986 to protect the interests of consumers in India. It was replaced by the Consumer Protection Act, 2019"
[27] State Of Haryana & Ors vs Smt. Santra on 24 April, 2000

Australia finding that there was no consensus: in some cases, courts refused to grant damages for birth of a child, viewing this as being against public policy, whereas in many others, damages were offset against the benefits derived from the pleasure of having and bringing up that child. The Court also considered cases where damages were granted if the sterilization had been undertaken for social and economic reasons."

- In the case Indian Medical Association vs V P Santha[28], the Supreme Court after the thorough study of case facts, judged that "Medical Services are treated as in ambit of "services" under Section 2(1) (o) of the Act."

- In the case Whitehouse vs. Jordan[29], "The claimant was a baby who suffered severe brain damage after a difficult birth. The Lords found that the doctor's standard of care did not fall below that of a reasonable doctor in the circumstances and so the baby was awarded no compensation."

- In the case *Kishan Rao vs Nikhil Super Specialty hospital*, the Supreme Court held that "certain cases, principle of res ipsa loquitor will be applicable **and** in the said case, the plaintiff was awarded an amount of Rs. 2 lakh from the defendant as there was a pure case of negligence on the part of defendant."

- In *A S Mittal vs State of UP, "*the law recognizes the dangers which are inherent in surgical operations and that will occur on occasions despite the exercise of reasonable skill and care but a mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one." Compensation was awarded.

- The apex court has explained in *State of Punjab v. Shiv Ram*[30] , that "merely because a woman having undergone a sterilization operation becoming pregnant and delivering a child thereafter, the operating surgeon or his employer cannot be held liable on account of the unwarranted pregnancy or unwanted child. Failure due to natural causes, no method of sterilization being fool proof or guaranteeing 100% success, would not provide any ground for a claim of compensation."

[28] Indian Medical Association vs V P Santha. AIR 1996 SC 550
[29] Whitehouse vs. Jordan (1981) 1 All ER 267 the House of Lords.
[30] State of Punjab vs Shiv Ram

BOLAM TEST

Bolam vs Friern Hospital Management Committee[31] is a landmark English case law in medical negligence and is considered a celebrity case in the history of medical fraternity. The brief facts of the case are as follows:

Mr. Bolam was a voluntary patient at Friern hospital in England in 1957 who had recurrent depression. He in belief in the medical system of the hospital had agreed to ECT (Electro Convulsive Therapy). His physician being negligent had given Mr. Bolam unmodified ECT i.e., no muscle relaxant, no anesthesia and he was not restrained during the procedure and hence he had violent seizures due to which he suffered fractures of the hip.

The Bolam Test is basically a peer review system for medical professionals which is used to assess whether they were negligent in anyway during diagnosis, treatment and follow-up care to a patient. A doctor must demonstrate that he/she acted in a manner in which a responsible body of medical practitioner/professional in the same field would deem that it was reasonably appropriate.

CONCLUSION

From the research paper, it can be concluded that there are two possibilities for negligence. Which is done by the doctor/physician or the one occurring because of the quality of the utensils and machines used in the hospital. Be it medical negligence or malpractice, it is relating to the life of human beings and hence should be given maximum importance in the field of law and only then will it be given priority by the population since law is above all.

[31] Bolam vs Friern Hospital Management Committee [1957] 1 WLR 582

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