Judicial Approach Towards the Medico Negligence Cases

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Abstract **- The medical profession is one of the oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded, and the sick. Vedas embodied the rule that, Vidyonarayanoharihi (which means doctors are equivalent to Lord Vishnu). For a long, the medical profession is highly respected, but today a decline in the standard of the medical profession can be attributed to the increasing number of litigations against doctors for being negligent narrowing down to "medical negligence".**

The Hon'ble Supreme Court in the case of Dr. Laxman Balakrishna v. Dr. Triambak, has held that" all medical negligence cases are scrutinized on various questions of fact involved when we say the burden of proving negligence lies on the Complainant, it means he has the task of convincing the court that his version of the facts is the correct one". In the case of Indian Medical Association v. Santha, the Apex Court has decided that the skill of a medical practitioner differs from doctor to doctor and it is incumbent upon the complainant to prove that a doctor was negligent in the line of treatment that resulted in the loss of life of the patient. Therefore, a judge can find a doctor guilty only when it is proven that he has fallen short of the standard of reasonable medical care.

Index Terms **- damages and direct effect, medical negligence, medical profession, , standard of care.**

INTRODUCTION

Medicine is one of the most respected and revered professions the world over. Doctors are regarded as saviors who deliver the people from their afflictions. However, to prevent those who practice this profession from faltering in delivering their duties, code of medical ethics, etiquette, and professional conduct were formulated as guidelines Medical ethics is a system of moral principles that apply values to the practice of clinical medicine and in scientific research. Medical ethics is based on a set of values that professionals can refer to in the case of any confusion or conflict. Everyone in the courtroom taking part in the litigation – from the lawyer to the judge to the witnesses – is governed by certain legal and ethical standards. And experts are no exception. While a uniform code of professional conduct does not exist, certain general ethical rules apply to anyone acting as an expert witness. Likewise, there are more specific standards governing an expert's conduct as it applies within their particular field of expertise.

WHAT IS MEDICAL NEGLIGENCE?

The medical profession is considered a noble profession because it helps in preserving life. We believe life is God-given. Thus, a doctor figures in the scheme of God as he stands to carry out His command. A patient generally approaches a doctor/hospital based on his/its reputation. Expectations of a patient are two-fold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly, they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. Though a doctor may not be in a position to save his patient's life at all times, he is expected to use his special knowledge and skill in the most appropriate manner keeping in mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carries out the necessary investigation or seeks a report from the patient. Furthermore, unless it is an emergency, he obtains the informed consent of the patient before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortious liability. A tort is a civil wrong (right in rem) as against a contractual obligation (right in personam) – a breach that attracts judicial intervention by way of awarding damages. Thus, a patient's right to receive medical attention from doctors and hospitals is essentially a civil right. The relationship takes the shape of a contract to some extent because of informed consent,

payment of fee, and performance of surgery/providing treatment, etc. while retaining essential elements of the tort.

In the case of Dr. Laxman Balkrishna Joshi vs. Dr. Trimbark Babu Godbole and Anr., AIR 1969 SC 128 and A.S.Mittal v. State of U.P., AIR 1989 SC 1570, it was laid down that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor. In the aforementioned case, the apex court interalia observed that negligence has many manifestations – it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence, or negligence per se. Black's Law Dictionary defines negligence per se as "conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of the statute or valid Municipal ordinance or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of public duty, enjoined by law for the protection of person or property, so constitutes."

NEGLIGENCE PER SE

While deliberating on the absence of basic qualifications of a homeopathic doctor to practice allopathy in Poonam Verma vs. Ashwin Patel and Ors. (1996) 4 SCC 322, the Supreme Court held that a person who does not know a particular system of medicine but practices in that system is a quack. Where a person is guilty of negligence per se, no further proof is needed.

As early as in 1996 the Supreme Court held in a similar case of Achutrao Haribhau Khodwa v. State of Maharashtra (1996) 2 SCC 634 where a mop was left in the cavity of the patient, that negligence was writ large on the act and it was a case of res ipsa liquitur (facts speak for themselves). Likewise, in a recent case decided by the National Consumer Disputes Redressal Commission on July 29, 2011 Mahendra Panchal (Dr.) v. Hemaben Sanjeev Kumar Kanodiya (F. A. No. 715 of 2007) the apex commission noticed that after a caesarian section surgery, a scissor was left behind in the stomach of the patient. The doctor took the plea that during the surgery, there was a power failure and the foreign object was left behind inadvertently by the nurse. The Commission, in its judgment, observed that "if the power supply went off during operation, it was all the more necessary for the operating surgeon to have been extraordinarily careful to ensure that no foreign material was left in the abdomen". The complainant was allowed a compensation of Rs 3.30 lakh plus interest.

No. Such pleas are outdated as the law settled by now makes the hospitals and the operating surgeons liable even for the negligence of their staff. It has been held that the staff works under their supervision and they cannot shirk from their responsibility.

PRIOR CONSENT OF THE PATIENTS

There exists a duty to obtain prior consent (concerning living patients) for diagnosis, treatment, organ transplant, research purposes, disclosure of medical records, and teaching and medico-legal purposes. Concerning the dead regarding pathological post mortem, medico-legal post mortem, organ transplant (for legal heirs), and for disclosure of a medical record, it is important that informed consent of the patient is obtained. Consent can be given in the following ways:

a. Express Consent: It may be oral or in writing. Though both these categories of consents are of equal value, written consent can be considered as superior because of its evidential value.
b. Implied Consent: Implied consent may be implied by the patient's conduct.
c. Tacit Consent: Tacit consent means implied consent understood without being stated.
d. Surrogate consent: This consent is given by family members. Generally, courts have held that consent of family members with the written approval of 2 physicians sufficiently protects a patient's interest.
e. Advance consent, proxy consent, and presumed consent are also used. While the term advance consent is the consent given by the patient in

advance, proxy consent indicates consent is given by an authorized person. As mentioned earlier, informed consent obtained after explaining all possible risks and side effects is superior to all other forms of consent.

Bolam v Friern Hospital Management Committee [1957] WLR 582 is an English tort law case that lays down the typical rule for assessing the appropriate standard of reasonable care in negligence cases involving skilled professionals (e.g. doctors): the Bolam test. Where the defendant has represented him- or herself as having more than average skills and abilities, that is as a professional "as all doctors do", this test expects standards which must be in accordance with a responsible body of opinion, even if others differ in opinion. In other words, the Bolam test states that "If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent".Bolam was rejected in the 2015 Supreme Court decision of Montgomery v Lanarkshire Health Board.

CRIMINAL PROSECUTION OF DOCTORS

Doctors can be prosecuted for obvious criminal activity like violations of statutory provisions of Acts like the Transplantation of Human Organs Act. The newspapers tell us that the first conviction for fetal sex determination has sent shock waves throughout the country. According to these reports, a sub-divisional judicial magistrate in Haryana sentenced a doctor and his assistant to 2 years imprisonment and a fine of Rs. 5000/- each for violating the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. It is expected that weeding out the black sheep in the profession will go a great way in restoring the honor and prestige of a large number of doctors and hospitals who are devoted to the profession and scrupulously follow the ethics and principles of this noble profession.

However, it is common to implicate doctors in criminal cases alleging negligence in the death of a patient under treatment. In the case of Dr. Suresh Gupta's case (Dr. Suresh Gupta vs. Govt of NCT Delhi, AIR 2004, SC 4091: (2004)6 SCC 42), the Full Bench of the Supreme Court of India consisting of Chief Justice R.C. Lahoti, Justice G.P. Mathur, and Justice P.K. Balasubramanyam declared while reviewing the previous order that extreme care and caution should be exercised while initiating criminal proceedings against medical practitioners for alleged medical negligence. In a well-considered order, the apex court felt that bonafide medical practitioners should not be put through unnecessary harassment. The court said that doctors would not be able to save lives if they were to tremble with the fear of facing criminal prosecution. In such a case, a medical professional may leave a terminally ill patient to his fate in an emergency where the chance of success may be 10% rather than taking the risk of making a last-ditch effort towards saving the subject and facing criminal prosecution if the effort fails. Such timidity forced upon a doctor would be a disservice to society. The court held that a simple lack of care, error of judgment, or an accident is not proof of negligence on the part of a medical professional and that failure to use special or extraordinary precautions that might have prevented a particular incidence cannot be the standard for judging alleged medical negligence.

The apex court laid down the following guidelines regarding the prosecution of cases: cases of doctors being subjected to criminal prosecution are on the increase. The criminal process once initiated subjects in the medical professionals to serious embarrassment and sometimes harassment. Statutory rules or executive instructions incorporating certain guidelines are to be framed and issued by the Government or State Government in consultation with the Medical Council of India. A private complaint may not be entertained unless the complainant produces prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

In the case of Jacob Mathew (Dr.) vs. State of Punjab and Anr. III (2005) CPJ 9 (SC) (Criminal Appeal) where a cancer patient in an advanced stage died due to non-availability of an oxygen cylinder in the room, the Supreme Court considered three weighty issues: first, negligence in the context of the medical profession necessarily calls for treatment with a difference; second, the difference between occupational negligence and medical negligence has to be properly understood; and third, the standard to be applied to hold a medical professorial as negligent has to be carefully considered. The apex court further held that there is no case that the accused doctor was not a qualified doctor to treat the patient was made and

therefore the accused-appellant can not be prosecuted under Section 304 A of IPC for the non-availability of an oxygen cylinder though he may be liable under civil law.

In the case of Samira Kohli vs. Dr. Prabha Manchanda and Ors. I (2008) CPJ 56 (SC), the apex court held that consent given for diagnostic and operative laparoscopy and "laparotomy if needed" does not amount to consent for a total hysterectomy with bilateral salpingo opherectomy. The appellant was neither a minor nor mentally challenged or incapacitated. As the patient was a competent adult, there was no question of someone else giving consent on her behalf. The appellant was temporarily unconscious under anesthesia, and as there was no emergency. The respondent should have waited until the appellant regained consciousness and gave proper consent. The question of taking the patient's mother's consent does not arise in the absence of an emergency. Consent given by her mother is not valid or real consent. The question was not about the correctness of the decision to remove reproductive organs but failure to obtain consent for removal of the reproductive organs as a performance of surgery without taking consent amounts to an unauthorized invasion and interference with the appellant's body. The respondent was denied the entire fee charged for the surgery and was directed to pay Rs. 25000/- as compensation for the unauthorized surgery.

COVERAGE OF DOCTORS AND HOSPITALS UNDER CPA

In the case of the Indian Medical Association vs. V.P. Shanta and Ors., III (1995) CPJ 1 (SC), the Supreme Court finally decided on the issue of coverage of the medical profession within the ambit of the Consumer Protection Act, 1986 so that all ambiguity on the subject was cleared. With this epoch-making decision, doctors and hospitals became aware of the fact that as long as they have paid patients, all patients are consumers even if treatment is given free of charge. While the above-mentioned apex court decision recognizes that a small percentage of patients may not respond to treatment, medical literature speaks of such failures despite all the proper care and proper treatment given by doctors and hospitals. Failure of family planning operations is a classic example. The apex court does not favor saddling medical men with ex gratia awards. Similarly, in a few landmark decisions of the National Commission dealing with hospital death, the National Commission has recognized the possibility of hospital death despite there being no negligence.

EXPERT TESTIMONY

The expert witness plays an essential role in determining medical negligence under the US system of jurisprudence. By and large, courts rely on expert witness testimony to establish the standards of care germane to a malpractice suit. Generally, the purpose of expert witness testimony in medical malpractice is to describe standards of care relevant to a given case, identify any breaches in those standards, and if so noted, render an opinion as to whether those breaches are the most likely cause of injury. In addition, an expert may be needed to testify about the current clinical state of a patient to assist the process of determining damages.

In civil litigation, expert witness testimony is much different from that of other witnesses. In legal proceedings involving allegations of medical negligence, "witnesses of the fact" (those testifying because they have personal knowledge of the incident or people involved in the lawsuit) must restrict their testimony to the facts of the case at issue. The expert witness is given more latitude. The expert witness is allowed to compare the applicable standards of care with the facts of the case and interpret whether the evidence indicates a deviation from the standards of care. The medical expert also provides an opinion (within a reasonable degree of medical certainty) as to whether that breach in care is the most likely cause of the patient's injury. Without the expert's explanation of the range of acceptable treatment modalities within the standard of care and interpretation of medical facts, juries would not have the technical expertise needed to distinguish malpractice (an adverse event caused by negligent care or "bad care") from maloccurrence (an adverse event or "bad outcome") Standards of admissibility of expert witness testimony vary with state and federal rules of procedures and evidence. Although most state laws conform with the federal rules of procedure and evidence, some do not. The same testimony from a given expert witness, therefore, might be admissible in some state courts but not in federal court and vice-versa

MEDICAL MALPRACTICE

Medical malpractice law is based on concepts drawn from tort and contract law. It is commonly understood as liabilities arising from the delivery of medical care. Causes of action are typically based on negligence, intentional misconduct, breach of a contract (ie, guaranteeing a specific therapeutic result), defamation, divulgence of confidential information, insufficient informed consent, or failure to prevent foreseeable injuries to third parties. Negligence is the predominant theory of liability in medical malpractice actions.

According to Black's Law Dictionary, medical negligence requires that the plaintiff establish the following elements: 1) the existence of the physician's duty to the plaintiff, usually based on the existence of the physician-patient relationship; 2) the applicable standard of care and its violation; 3) damages (a compensable injury), and 4) a causal connection between the violation of the standard of care and the harm complained of.

The Medical Expert's Testimony

A medical expert will address the two questions central to any medical malpractice case:

- Did the doctor follow the standard of care for doctors in the same position?
- Did the doctor's failure to follow the standard of care injure the patient?

Standard of care. The medical expert will testify about what a normal, competent doctor would have done in the situation at issue in the case. The expert will then give an opinion as to whether the doctor being sued lived up to that standard of care. There are no hard-and-fast rules about the standard of care in any given field, so the expert may use evidence like medical publications or medical board guidelines to assist. The jury does not have to take the publications or the expert opinion as the final word in its decision.

Did the failure injure the patient? An expert must also testify about whether the doctor's failure to live up to the standard of care injured the patient. There are often a variety of factors at play in any given medical situation and the doctor's incompetence may not have directly caused the bad outcome. Therefore the expert must explain to the jury how likely it was that the doctor's incompetence was the cause of the injury.

How Soon Do You Need a Medical Expert?

The plaintiff and defendants must have experts, and disclose the substance of their testimony to the court before the trial starts. If either side fails to do so before the court's deadline, the court will decide the case in the other party's favor before the trial begins. The exception is if the case falls into a category that does not require an expert opinion.

Many states also require the plaintiff to get a medical expert's opinion before they can even begin the lawsuit. This opinion usually comes in the form of an expert affidavit (written testimony) or by submitting the known facts to a panel of medical experts.

Who Is Qualified to Be a Medical Expert?

State rules vary as to who may testify as a medical expert. Often, if the case involves malpractice within a specialized medical field, you will need to get a specialist as your expert. An expert might qualify as a specialist through a combination of academic and practical experience, or board certification. If the case involves general medicine, a wider range of doctors will have the experience and training necessary to qualify as expert witnesses.

Some states have special rules designed to prevent "career" providers of expert testimony, requiring that the vast majority of an expert's time be dedicated to practicing medicine.

When Is an Expert Not Necessary?

Sometimes, medical malpractice is so obvious that a medical expert is not needed for the jury to understand the facts. A classic example is when a surgeon leaves a sponge in the patient. This rule (called res ipsa loquitur, or "the thing speaks for itself") has two basic components. An expert witness is not necessary when:

- only the doctor or medical staff had control over whatever it was that caused the injury, and
- the injury could only have been caused by the doctor's failure to adhere to the normal standard of care.

As a practical matter, it's not wise to assume that you don't need an expert because your case is "obvious." Sometimes the doctor's incompetence is obvious, but not whether the incompetence caused the injury. Other times, the defendant will convincingly argue that the doctor did not have exclusive control over the situation. It pays to have a medical expert waiting in

the wings in case the court finds that the res ipsa loquitur rule doesn't apply to your case.

THE SCOPE OF LIABILITY

The law, as it relates to the professional negligence of a doctor who testifies in a medical malpractice trial, is still too new to offer guidelines in terms of the financial risks associated with this activity. Financial settlements between litigants are usually confidential; therefore the scope of the risk may not be known until a legal opinion that is on point is published by a court. However, some guidance is available from a related field, namely that of legal malpractice. Legal malpractice refers to a client suing a retained attorney who negligently handled a legal claim, thereby depriving the client of the possible benefits of that claim. Such lawsuits are to lawyers what medical malpractice is to doctors, and examining the elements of these legal malpractice claims may be useful in thinking about the financial risk undertaken by a testifying doctor.

Legal malpractice claims are thought of as a lawsuit within a lawsuit. The client who sues a hired attorney for legal malpractice must prove two things. One, that the attorney acted negligently as a professional; the elements of such are similar to proving professional negligence against a doctor. Two, the client must also prove the likelihood of success in the underlying lawsuit, namely the claim that was mishandled by the attorney. Essentially, the aggrieved client must show that, but for the negligence of the attorney (for example, late filing of a suit and missing the statute of limitations), the client would have prevailed in the claim that the attorney was hired to handle. If these elements can be proven to the applicable standard, then the defendant's attorney is liable to the client, for damages that the client would have received in the underlying lawsuit.

It is reasonable that the financial liability associated with a negligent expert witness testifying for a plaintiff alleging medical malpractice will be measured similarly, ie, by the damages that the plaintiff could not collect, if the plaintiff can show that negligent testimony was the cause of an adverse judgment. In terms of a negligent expert who testifies for a defendant doctor, the reasonable measure of damages may be the avoidable financial harm to which the defendant is exposed, by virtue of the erroneous testimony. The statute of limitations for tort claims against a medical expert who testifies negligently will vary by state law and will be similar to the statutes governing tort claims in general.

CONCLUSION

A patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The relationship takes the shape of a contract retaining the essential elements of the tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor. The doctor has a duty to obtain prior informed consent from the patient before carrying out diagnostic tests and therapeutic management. The services of the doctors are covered under the provisions of the Consumer Protection Act, 1986 and a patient can seek redressal of grievances from the Consumer Courts. Case laws are an important source of law in adjudicating various issues of negligence arising out of medical treatment.

In terms of quality in good practices, it appears to be the responsibility of the court to decide on the value of expert reports, and whether to waive a report for bias or unreliability. On the other hand, it is for the expert to renew licenses and assure the court of their qualifications to deliver work to the standard expected. There are discussions taking place at the domestic level with policymakers, practitioners, courts, and academics (though not always all of them, or between them), with some solutions, delivered.

Doctors and patients are not generally seen as adversaries. Actually, doctors are generally seen as healers and saviors. At the same time, the livelihood of doctors and the medical fraternity depends on patients. In other words, doctors are there because patients need them. But with commercialization, this relationship has not retained the age-old sanctity that is a matter of great concern to the medical profession. Medical professionals were greatly agitated when it was held that the services rendered by the medical fraternity are covered under the Consumer Protection Act. One of the reasons was undoubtedly a small percentage of failures of treatment that dogs the profession despite due care and caution. Just as raindrops result in a stream, a small percentage of unsuccessful cases may result in a good number of

dissatisfied patients and a plethora of cases against a hospital or a doctor taking a toll on its or his time and hard-earned reputation. Secondly, the ease with which a consumer case can be filed is likely to encourage frivolous and speculative complaints intended to exploit the consumer jurisdiction. The apex court has recognized this fact and ruled against criminal prosecution of doctors unless gross negligence is established.

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