PROFESSIONAL NEGLIGENCE IN MEDICAL PRACTICE

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ABSTRACT

The doctor’s skills are usually measured only by the success or failure of the treatment. This is to testify that doctor should used standard medical care. If on the other hand, his mistakes arise from his ignorance or want of skill, he shall be inculpated in as far as he is the willful cause of such ignorance. This ignorance is nothing but negligence in medical practice. Medical negligence covers those defects in profession by a doctor where the standard medical care given to a patient is considered to be inadequate. It is also true that not all cases with negligent allegations are guilty of careless or in competent actions in reality. However, every patient will have legal right to expect a satisfactory standard medical care from a doctor even though this can never mean that the doctor can guarantee a satisfactory outcome to the treatment. Here an effort is made to understand the concept of medical negligence.

KEYWORD: Medical negligence, Professional negligence, Malpractice, Malpraxis.

INTRODUCTION

Everybody is subject to the rule of law. It is the price that everybody has to pay for the corresponding benefits of the free and protected society. Law is both refraining and liberating. Every professional man must be accountable and the law is one of the means where by that accountable to the patient, his family and society is revealed and enforced. The doctor must be servant and not the master of his patient and the community. The law should create condition congenial to the advance of medicine to the benefit of the patient, to the protection of the doctor and to the good of the community. It should be clear, comprehensive, balanced, flexible and facilitating.
All professional should be accountable for their failure is entirely acceptable. However to test the accountability of the professional, various methods have been tried over the period of time. In earlier days medical negligence was considered more as a crime rather than as a tort. The tribal and communal law depended on local practice and custom for controlling actions of the members of the medical profession. The oldest known source that mentions medical negligence is the code of Hammurabi which was developed by Babylon’s king. It fixed the fee for the treatment and a penalty for the improper treatment. Romanion civil law was designed to punish medical wrongdoers with a lovely fascist flavor.

In the ancient medical literature Charak Samhita the word Mithya has been used to describe the negligent medical treatment which means false, illusive, incorrect, wrong, improper treatment. Sushrut samhita uses the word Mithyopchara in the sense of improper conduct. It is stated that the physician who act improperly are liable to punishment and the quantum penalties varies according to the status of the victim.

The Manusmriti states that all physicians who treat their patient wrongly shall pay a fine. In case of human being it should be middle level fine. The Kautilya Arthashastram states if the death of the patient under treatment is due to carelessness, the physician should be finished with the middle level penalty and growth of the disease due to negligence or indifference of physician should be regarded as assault or violence. However the damage for medical negligence varies on the basis of severity of injury or loss of life. Yajnavalka samriti mentions 1000 pana as the highest penalty for medical negligence.

With the progress of civilization medical negligence was treated as a tort by the judiciary so that the victim can be provided with damages. Every person who entered a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill.

**Definition and explanation**

Medical negligence is defined as reasonable degree of care and skill or willful negligence on the part of medical practitioner in treating a patient leading to injury or suffering or death.

In the above definition there are two important components and for negligence either one condition has to be proved i.e.
1. Firstly either is lack of reasonable degree of care and skill applied by a doctor while treating a patient. The want of care and skill results in the bodily injury or ill health of a patient or patient has died due to non-application of reasonable degree of care and skill
2. Secondly willful negligence on the part of doctor while treating a patient.

Thus in simple words negligence consists of two acts:
A) Not doing something that a reasonable man under, the circumstances would do (act of omission) or failure do something which an reasonable man is supposed to do
B) Doing something which a reasonable prudent man under the circumstances would not do (act of commission) or doing something which a reasonable man is not supposed to do

Classification
Negligence is legal concept not a medical concept. Negligence is actionable and action for negligence may be brought against doctor in a civil or criminal court. Thus, negligence can be classified as
a) Civil negligence
b) Criminal negligence

Civil negligence
Civil negligence is of bifid in nature: Either a patient bringing charges of negligence or malpractice allegation against a doctor for compensation towards the physical damages suffered by him/her or a doctor bringing charges against a patient who fails to pay his/her dues on the grounds of charges of malpractice on the doctor, during the course of treatment. In civil negligence a patient has approach civil court or consumer redressal forum/consumer court. To be valid, the suit for negligence must be filed in a civil court within three years from the date of alleged negligence. If the court has taken decision on a particular case, the same case can not be reopened in any other court.

Civil negligence involves:
- Such act on the part of the treating physician which causes some suffering, harm, damages to the patient.
- Damages is such which can be compensated by paying money.
- Does not come under the purview of CrPC and IPC.
- Does not demand legal punishment.

The burden of providing negligence lies on the patient. Here the patient has to prove that:
The legal right of patient had been infringed.
There was existence of a duty of care by the doctor.
Failure of doctor to exercise such duty of care and skill i.e. dereliction of duty by doctor or breach of duty by doctor.
This dereliction of duty was the cause of injury or harm to patient i.e. direct causation.
As a result of injury or harm, the patient had suffered damage.

Thus there are four D’s i.e. 4 element of negligent. The patient should prove all four element of negligence by a preponderance of evidence. It requires enough proof to show that all four elements of negligent claim are true.

**Criminal negligence**

Criminal negligence is gross negligent act that had caused death or severe harm to the patient. The doctor caused a gross neglect for the life and safety of the patient. This is a serious negligence than civil negligence amount to a criminal offense and goes beyond a mere matter of copensataiion. The doctor is liable to be punished under the Indian penal code. Here the patient or relatives of patient brings allegation of criminal negligence against a doctor. In Criminal negligence doctor is prosecuted by the police and charged in a criminal court.

In criminal law, the criminal negligence must be proved beyond reasonable doubt unlike civil negligence. Here the prosecution has to prove all the facts to establish negligence.

Question of criminal negligence may arise:
1. When a doctor shows gross absence of skill or care during treatment, resulting in serious injury or death of patient
2. When the doctor performs an illegal act.

For examples:

i. Amputation of wrong finger or operation on wrong limb or wrong patient.
ii. Leaving instruments, tubes, sponges or swabs in abdomen.
iii. Performing criminal abortion.
iv. Mismanagement of delivery of woman, especially under the influence of alcohol.
v. Incompetent administration of anesthesia.
vi. Administration of wrong substance in the eyes causing blindness etc.
A physician may be liable to both civil and criminal negligence by a single act, e.g. if he performs an unauthorized operation on a patient, he may be sued in civil court for damages and prosecuted in criminal court for assault.

**Medical negligence and criminal law**

In general, the Indian courts have been very careful not to hold qualified physicians criminally responsible for the patient’s death that are the result of mere mistakes of judgment in the selection and application of remedies and when the death resulted merely from an error of judgment or inadvertent death.

It is noted that in criminal law, the negligence must be established beyond reasonable doubt as different from the civil law where the negligence must be established upon a preponderance of probability.

Section 304A IPC deals with criminal negligence whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment up to 2 years with/without fine or both. It covers act as recklessness.

**Contributory negligence**

This is defined as a concurrent negligence by the patient and doctor resulting in delayed recovery or harm to the patient. The negligence of both parties has contributed to this harm. Here patient is also responsible and contributed to the injury/damaged suffered by him. Thus it is a combination of form of negligence. Here damages awarded by the court may be reduced.

Contributory negligence is a good defiance for the physician in civil cases but not in criminal ones. The burden of providing such negligence rests entirely on the doctor. Doctor has to prove patients negligence. But doctor is expected to foresee that the patient may harm himself and to warn accordingly. The usual defiance is that the patient did not give correct history or failed to give the doctor an opportunity to examine the case properly or did not follow the doctor’s instruction regarding laboratory tests, drugs or diet or leaving hospital against doctor’s advice. In such circumstances doctor can not be blamed and the patient has to blame himself for his condition.
Corporate negligence

It is the failure of those in hospital administration/management who are responsible for providing the treatment, accommodation and facilities necessary to carry out the purpose institution, to follow the established standard of conduct. To prove a charge of corporate negligence, the patient would have to show that the hospital was aware that the physician associated with the hospital was providing sub-standard care. It occurs when hospital:

- Provide defective equipment or drugs.
- Select or retains incompetent employees including doctor.
- Fails in some other manner to meet the accepted standard of care and such failure result in injury to a patient to whom the hospital owes a duty.

Composite negligence

Injury is caused to the person without any negligence on his part, but as a result of the combined effect of the negligence of some other persons (two or more) and the persons responsible for such damages is known as composite tortfeasors.

Ethical negligence

Ethical negligence is the violence of the code of Medical Ethics. In this no financial composition is payable unless there is also civil form of negligence. If a complaint is made and the facts proved, the name of doctor may be erased from the Medical register. This term should be better avoided.

Medical mal occurrence

Also called as inevitable accidents or act of God. It is a legal term which defines a less than ideal outcome of medical care and mal occurrence is often unrelated reasonable risks of quality of care that was provided. It is often said diversity in biology is a rule of nature. Thus every individual may show varying biological variation. So in some indivisual, despite giving good medical care and skill the patient may suffer or does not respond properly to treatment. This is known as medical mal occurrence.

The inevitable accident is an accident not avoidable by any such precautions as a reasonable man can be expected to take.e.g.breaking of a needle during intramuscular injection due to sudden muscular spasm, or damage to the recurrent laryngeal nerve during thyroidectomy If the doctor had exercised reasonable degree of care and skill and in spite of this the patient do not respond or medical mal occurrence develops, the doctor would not be held responsible.
Defenses against negligence

In case alleged negligence by doctor, following arguments may be helpful for defense:

- No duty owed to patient.
- Duty discharged according to prevailing standard.
- Patient was guilty of contributory negligence.
- The case is of therapeutic or diagnostic misadventure.
- The case is of medical mal occurrence.
- The case is of reasonable degree of error of judgment.
- The damage was the result of third party intervention without her/his knowledge.
- The time limit allowed by the law for lodging such a complain is over.

Precaution against negligence

The following general guideline should be remembered to avoid a charge of negligence:

- Obtain informed consent of the patient.
- Establish good rapport with the patient.
- Keep full, accurate and legible medical records.
- Employ ordinary skill and care at all times.
- Confirm diagnosis by laboratory tests.
- All necessary immunization should be done.
- Always check the instruments and equipments prior to its use.
- Consult professional colleague whenever necessary.
- Sensitivity test should be done before using any preparation.
- No female patient should be examine in solitary.
- Keep yourself informed of technical advances and standard procedures of treatment.
- Seek consultation whenever necessary.
- Do not criticize or condemn the professional ability of another doctor.
- Do not exaggerate nor minimize the gravity of the patients condition.
- Do not leave patient unattended during emergency.
- Do not order a prescription over telephone.
- Always obtain consent for an operation.
- Proper pre and post operative instruction should be given.
- Death from an anesthesia or operation, should be informed to the police.
- No procedure should be undertaken beyond ones skill.
No experimental method should be adopted without the consent of the patient.

Anesthesia should be given by qualified person.

Participate in medico legal seminars.

Maintain good records of accidents, suicides, medication errors or problems.

Always issue medical certificate with due care.

Do not make statement admitting fault on your part.

Guidelines on medical negligence by Supreme Court of India

Negligence is a breach of duty or an act which a prudent and reasonable man will not do.

Negligence to be established by the prosecution must be culpable or gross and not merely based upon an error of judgment.

Medical professional is expected to bring a reasonable degree of skill and knowledge along with reasonable degree of care.

A doctor is liable only where his conduct fell below the standard of a reasonably competent practitioner.

Difference of opinion can not be cited as negligence.

Merely because a doctor chooses one course of action in preference to the other one available, he would not be liable if the action chooses by him was acceptable to the medical profession.

It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

It is our duty not to harass or humiliate medical professionals unnecessarily so as to allow them to perform their duties without fear and apprehension.

Doctors have to be saved from complaints who use criminal process as a tool for pressuring them or hospitals and clinics for extracting uncalled for compensation.

Doctors are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients.

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