

Status Of Victims Of Medical Negligence; A Critical Analysis

Umeshwari Dkhar

Abstract: Negligence is about causing damage to another because of a failure to exercise reasonable care, it is doing something that a reasonable person in the class of persons to which the defendant belongs would not do, or not doing something that a reasonable person in that class would do.

I. INTRODUCTION

The medical profession is considered as a noble profession. Practice of medicine is capable of rendering great service to the society by providing medical advice, treatment, due care sincerity, efficiency and skill observed by the doctors. Doctors are treated as God by their patients, and so they think that doctors can never commit any mistake. In reality, doctors are also human beings and they could also commit any harm mistakes. Doctors may be negligence on their part, and they may commit errors or may fail to perform their duties despite that they have taken proper care in their day to day medical practice.

Thus, these failures on the part of the doctors to act in accordance with medical standards in practice, which deviates from the accepted standards of practice of medical profession, leading to an injury to the patient is termed as medical negligence.

The concept of medical negligence has been traced back to over four thousand years. A law was promulgated by Babylonian King Hammurabi on the medical negligent act of the doctors. This law provided that a physician should himself lose his hand if during the surgery his patient loses his eye.

In 1374, the first recorded medical negligence suit under English law was filed. The case involved an action brought before the King's Bench against the surgeon, J. Mort, where the plaintiff sustained an injury in his hand as a result of wrong treatment of the surgeon. However, the surgeon was not held liable for the act as it was found that the surgeon acted with due care, so it was not right for him to be held liable.

In 1794, the first medical negligence case was filed in USA, in the case of *Cross v Guthrie*. In this case the patient died as a result of postoperative mastectomy (surgical removal of breast) a complication arose three hours after the operation.

And it was found that the defendant had broken his promise to perform the said operation skillfully and safely, thereby the plaintiff sued the physician for his negligence act. The jury found the defendant liable and awarded damages of 40pounds for loss of companionship.

The present concept of Medical Negligence is not of Indian origin but is patterned on English law, where negligence is a separate tort while in Scotland it is known as delict. As England has been facing medical negligence for a long time and as a result the law has evolved there. India has been relatively free from medical negligence litigation as a result there is no proper law to deal with. In other words we can say that the laws dealing with medical negligence is lagging behind. Hence the English Law has been adopted with suitable modification for the trial of medical negligence cases in India. However the concept of medical negligence is not new in India, it has begun since the beginning of this profession.

As there is no statutory law in India, unlike in England, the court in the case of *Rajkot Municipal Corporation v Manjulben Jayantilal Nakum* held that there is no statutory law in India, unlike in England, regulating the damages for tortious liability. In the absence of statutory law or established principles of law laid by this court or High Courts in consistence with the Indian Conditions and circumstances, this court selectedly applied the common law principles evolved by the court in England on grounds of justice, equity and good conscience. The Common law principle of torts evolved in the court of England may be applied to the court of India to the extent of suitability and applicability to the Indian conditions.

The term medical negligence has not been defined anywhere in any statute. Therefore before understanding the concept of medical negligence, it is required to firstly understand what the term 'Negligence' means. Negligence can

be described as failure to take due care, as a result of which injury is caused. However, negligence excludes wrongful intention because they are mutually exclusive. On the other side medical profession is one such profession where duty has been imposed in strict sense as it is directly linked with the life of human being. Thus, mere acting in good faith to the better of one's belief is not sufficient but one is expected to have the required degree of skill and knowledge.

Negligence means breach of duty caused by doing something which a reasonable man guided by those considerations which ordinarily regulate conduct of human affairs would do or doing something which a prudent or reasonable man would not do.

Medical negligence or professional negligence may be defined as lack of reasonable degree of care and skill on the part of the medical professionals in giving treatment to their patient, resulting in serious injury, damage, loss or even death of the patient.

II. REVIEW OF RELATED LITERATURE

Because of the positive perception of the people and the society in general of the medical profession and the medical doctors as saviors from human suffering and pain, people generally do not probe or question the acts of medical doctors even if some of their acts do not give positive results. Therefore, research studies on the medical negligence are sporadic. However, there have been some articles and studies in the area from many advanced countries. In the recent times, when awareness of the people have increased in India too, people question the failures of medical doctors and ask them to explain it or blame them attributing to their negligence some of the important case laws in this field are:

In the case of Medical Negligence, the Supreme Court in *Suresh Gupta v Govt. of NCT of Delhi*, held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do disservice to the community. A doctor may be liable in a civil case for negligence but mere carelessness and want of due attention and skill cannot be described as so reckless or grossly negligent as to make her/him criminally liable. The court held that this distinction was necessary so that the hazards of medical professionals being exposed to civil liability may not unreasonably extend to criminal liability and expose them to the risk of imprisonment for alleged criminal negligence. Hence, the complaint against the doctor must show negligence and rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Thus, according to the court, such gross negligence alone is punishable.

In an article by Abhijit Das Ramakant Rai (2004), the author focused mainly on the negligent act of the doctors and the poor quality of the care that the women received in the tubectomy camp in Uttar Pradesh. According to the author, female sterilization has emerged as the methods of choice and despite having a policy of a cafeteria approach, and informed consent, the proportion of contraception adopters using female sterilization is overwhelming. He stated that Uttar Pradesh is the most populous state and it also has some of the poorest

socio-economic indicators of all states. It is often refer to as one of the problem states.

The author views that, the quality of care of sterilization service in Uttar Pradesh has been very poor, around 50.5% of the women suffered post operative complications and reports of death during sterilization are not uncommon in Uttar Pradesh. The Supreme Court in a judgment, delivered on April 24, 2000, clearly stated that the doctor as well as the state must be held responsible for negligence if the sterilization failed.

The author in conclusion clearly stated that, the quality of sterilization operations especially that of tubectomy, is an important reproductive health concern. Therefore, there is an urgent need to ensure that standards of care are implemented and some form of redressal mechanism established which will enable poor women and families to deal with misfortune of a complicated operation.

In an article by Karunakaran Mathiharan(2006), the author stated that the judgment of the Supreme Court on medical negligence has restored an impression of balance in the issue. A decline in the self-regulation standards of the medical profession and a rise in medical negligence can be attributed to the overwhelming impact of commercialization. Currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. Accordingly he stated that, medical practice has always had a place of honor in society; currently the balance between service and business is shifting disturbingly towards business and this is calls for improvement and effective regulation, whether internal or external. There is a need for introspection by the doctors individually and collectively that they must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role.

The Supreme Court in *Balram Prasad v Kunal Saha* while awarding the compensation highlighted the piling medical negligence cases in the country at various forums. It's said. "The doctors, hospitals, nursing homes and others connected establishments are to be dealt with strictly if they are found to be negligent with the patients who come to them pawning all their money with the hope of living a better life with dignity"

In an article by Amar Jesani (1996), the author stated that medical malpractice is already a well entrenched litigation sphere in western countries. Though in India until now there has been precious little happening on this front it seems that more and more medical malpractice claims are being filed since the past five years and over the next decade. So this branch will acquired at least some significance. The present, litigation in case of medical malpractice is not widely prevalent. But the trend is catching on especially in urban areas. While litigation in itself may not serve to wipe out malpractice, the threat of legal recourse can certainly create conditions compelling accountability on the part of the medical profession. Needless to say, the extent of utilization of legal recourse would be pre-determined by its accessibility as well as the extent to which demystified information reaches the masses.

According to Justice Mc Nair in *Bolam v Friem Hospital Management Committee*, "In the case of a medical man,

negligence means failure to act in accordance with the standard of a reasonably competent medical man at the time. That is a perfectly accurate statement so long as it is remembered that there may be one or more perfectly proper standards and if a medical man conforms to one of those proper standards, then he is not negligent.”

III. RESEARCH METHODS

A. METHODS

For this research, the secondary sources of information and data from the law reports, published articles and judgments of Supreme Court and High Courts in the field have been used. Besides primary data, through an interview with an official in the Indian Medical council, having the responsibility to deal with the cases of medical negligence in India has also been used.

B. STATEMENT OF PROBLEM

The proposed study is intended to focus upon the problem faced by the victims of the medical negligence in India, the liability of doctors towards their negligent act, the legislative initiative towards the medical negligent act of the doctors and determining the remedies which are available to the victims of medical negligence as such victimizations cause serious injuries, grievous hurts or even death of the patients, and also to make some recommendations thereby.

C. OBJECTIVES

The objectives of the present research are:

- ✓ To analyse the problem faced by the victims of Medical Negligence in India
- ✓ To examine the liability of doctors towards their negligent act .
- ✓ To analyze the legislative initiative towards the medical negligent act of the doctors.
- ✓ To determine the remedies available to the victims of medical negligence under the Indian laws
- ✓ To suggest some recommendations as to amend the provisions and laws relating to rash and negligent acts, committed by medical professionals.

D. RESEARCH QUESTIONS

- ✓ What constitutes Medical Negligence?
- ✓ What is the status of Medical Negligence in India?
- ✓ What are the important considerations in determining the liability of the doctors in Medical Negligence?
- ✓ Whether the act of Medical Negligence committed by the doctors causing death to the patient amount to culpable homicide?
- ✓ Whether the punishments prescribed for rash and negligent act under section 304B of Indian Penal Code need to be strengthened?
- ✓ What is the government's role in dealing with the cases arising out of the acts of medical negligence?

- ✓ Whether the Indian Penal Code provision relating to rash and negligence act needs to be amended?
- ✓ What are the Remedies available to the Victims of Medical Negligence?
- ✓ What is the extent and prevalence of medical negligence in the developed countries?
- ✓ How the medical negligence is dealt in the advanced countries?

IV. STATUS OF MEDICAL NEGLIGENCE JURISPRUDENCE IN INDIA

In India the public awareness of medical negligence is growing. The medical profession has now been facing many ethical and legal challenges. More and more cases relating to medical negligence are being filed in India after the passing of the Consumer Protection Act, 1986. Thus, after the enforcement of this Act some patients have filed legal cases against the doctors who were negligent and they have even claimed and received compensation. This has resulted in number of leading judgments and legal decision on what constituted negligence.

In India we do not have any specific law to deal with Medical negligence, which led to a rampant growth of medical negligence cases. However there are certain laws in India under which a doctor is held liable for his negligent Act. Medical professional's liability for its negligent act fall under three heads namely,

- ✓ Civil or Tortious liability
- ✓ Criminal liability and
- ✓ Contractual Liability

A. CIVIL OR TORTIOUS LIABILITY

Negligence under the torts law is a breach of duty caused by the omission to do something which a reasonable man would do guided by those considerations which ordinarily regulate the conduct of human affairs, or do something which a prudent and reasonable man would not do. The persons who possess special knowledge and skill in the medical field use that knowledge to treat others person, and such skilled persons owe a duty of care to the other person. And if any wrong is committed by him in this period, then he is liable to pay damages in the form of compensation to him. In some situation senior doctors or the hospital authorities can also be vicariously held liable for the wrongs committed by junior doctors.

Winfield has defined negligence as a tort which is breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. An act involving the above ingredients is a negligent act. It can very well be stated that negligence comprises of

- ✓ Existence of legal duty
- ✓ Breach of legal duty
- ✓ Damage caused by the breach

a. *EXISTENCE OF LEGAL DUTY*

Whenever a person approaches another trusting him to possess certain skill, or special knowledge then the second party is under a legal duty to exercise due care as is expected to act. So it is not that the legal duty can only be contractual and not otherwise. Failure on the part of such a person to do something which was incumbent so, that which would be just and reasonable tantamount to negligence. Every time a patient visits a doctor for his ailments he does not enter into any written contract but there is an implied contract and any lack of proper care can make the doctor liable for breach of professional duty.

b. *BREACH OF DUTY*

Another essential condition for liability in negligence is that the plaintiff must prove that the defendant committed a breach of duty to take care or he failed to perform that duty.

In *Laxman Balakrishna Joshi v Dr. Trimbak Babu Golbole* the court ruled that 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 the patient owes him certain duties, which are, the duty of care in deciding whether or not undertake the particular case, a duty of care in deciding the treatment and a duty of care in administering the treatment. A breach of any of these duties gives a right of action for negligence.

c. *DAMAGES CAUSED BY THE BREACH*

The court has to award compensation in terms of money based on certain principles for the damages incurred from the negligent act. In India, there are various legislations which give the methods of calculating the losses incurred due to the death of a person or due to the injury suffered by him. The Supreme Court in *Mrs Sudha Rasheed v State of Karnataka*, has given a method of calculating the losses incurred due to the death of a person or due to the injury suffered by him. According to the Supreme Court, the basic principle in awarding compensation is to put the plaintiff in the position he would have been in had the injury not occurred. Damages may be awarded under the head of pain and suffering. This would come within the broader head of general damages. Another head under which damages may be awarded is loss of amenity. Under this, the plaintiff is compensated for loss of any facet of life, which he will not be able to enjoy anymore, because of the accident.

Loss of future earning is another head and is one of the most important heads under which damages are awarded. It is a form of special damages.

In *Ram Behari Lal v Dr J.N. Srivastava*, the plaintiff's wife got pain in her abdomen and she was found normal on operation but the defendant then, removed her gall bladder without her husband's consent. The patient died. It was held that the patient died out of the rash and negligent act of the surgeon and therefore he was liable for the damage. Similarly, in the case of *T.T. Thomas v Elisa*, the Kerala High Court laid down that failure to perform an emergency operation and

death of a patient on account of such failure amounts to negligence on the part of surgeon.

B. *CRIMINAL LIABILITY*

In India, medical negligence cases are lodged mainly in consumer courts, however, it is no longer rare for medical professionals to be charged with criminal negligence. For negligence amounting to a criminal offence, the element of mens rea must be shown to exist. The degree of negligence should be much higher.

Recently, the Supreme Court of India has decided two landmark cases dealing with the criminal prosecution of the medical professionals. The two cases are discussed as under;

The Supreme Court, in *Jacob Mathew v State of Punjab*, made it very clear as to when a medical professional can be prosecuted under criminal law for negligence. In the words of the court:

To prosecute a medical professional for negligence under the criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such nature that the injury which resulted was most likely imminent.

In Suresh Gupta V Govt. Of Nct Of Delhi

The accused medical doctors operated a young man, who had no history of heart ailment, for nasal deformity which was not so complicated or serious. The patient died. Justice D.M. Dharmadhikari observed that, even mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross negligence or recklessness. The Court expressed concern that if the liability of doctors extended to criminal liability then the doctors would be worried about their own safety rather than administering treatment to the best of their ability. The Court felt that this would adversely affect the society at large and the mutual confidence between the doctor and the patient.

C. *CONTRACTUAL LIABILITY*

The relationship between the doctor and the patient is contractual in nature. It is established when a patient approached a hospital for medical care. The subject matter of contract includes good medical services, technical services and so on. The contractual obligation is also for hygiene and health care including good condition of infrastructure of equipments.

In *Robins v Firestone* the plaintiff claimed that he employed the defendant, a physician, for a sum of \$150 to perform an operation for the removal of polyps on the bladder. He alleged that the 'defendant agreed as his part of the contract to perform the operation in a good and workmanlike manner and promised to cure the plaintiff but failed to do so'

the court held that an action was sustainable for breach of contract.

In *Thake v Maurice* the claim for damages was founded on contract and not in torts. The court of Appeal firmly rejected the possibility of an enforceable warranty.

According to Neill L.J., "A reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that speciality: he would not have expected the defendant to give a guarantee of 100% success."

According to Nourse L.J. "Of all science medicine is one of the least exact, In my view, a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms.

Thus, we can see that in India, the law that governs the medical negligence by the doctor's fall mainly under the civil law. Most of the medical negligence cases are lodged in the consumer courts.

V. LIABILITIES OF DOCTORS FOR MEDICAL NEGLIGENCE IN INDIA

The increased awareness among people regarding their rights has put the medical services under sustained public scrutiny. The negligent act of the doctors have now been questions and if the negligent act amount to some injury to any patient, then, such negligent act of doctors are being challenged and they are liable for their act depending on the harms that are caused. The liability of the person committing the wrong can be of two types; civil liability and criminal liability, depending on the harm caused by him to the injured person.

A doctors when consulted by the patient owes him certain duties viz.,

- ✓ to care in deciding what treatment to give and
- ✓ A duty of care in deciding whether to undertake the case
- ✓ A duty of care in administering that treatment

A breach of duty gives a cause of action against the doctors both under the Torts Law, Consumer Protection Act 1986 and civil and criminal law for negligence. In case of civil wrong, action for damage may lie either in

- ✓ law of Torts
- ✓ Consumer Protection Act

In case of Criminal Liability, action lies under three sections 304-A, 378 and 388 of the Indian Penal Code.

A. TORTS LAW

ACCORDING TO SALMOND

A torts is a civil wrong for which the remedy is an action for unliquidated damages and which is not exclusively the breach of a contract, or the breach of a trust, or the breach of others merely equitable obligation"

In the case of Bolam V. Friern Hospital Management Committee

While elaborating on medical negligence, the apex court observed as follows: Negligence is a 'tort'. Every doctor who enters into the medical profession has a duty to act with a

reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill.

Thus, in order to charge the doctors for medical negligence under the civil wrong three essential ingredients must be fulfilled;

- ✓ *EXISTENCE OF LEGAL DUTY*: A legal duty exist whenever a hospital or health care provider accepts a patient for treatment,
- ✓ *BREACH OF LEGAL DUTY*: The hospital or health care provider fails to provide the accepted standard of care,
- ✓ *DAMAGE CAUSED BY THE BREACH*: The losses may be physical or emotional.

The liability in torts may arise in two ways:

- Fault based liability, where mental element is a relevant factor; and
- No fault liability or strict liability. Generally the second type of liability, i.e. no fault liability, is pressed into action when it comes to protection of consumers" rights and interests wherein damage/loss or infringement of consumers" right may take place owing to negligence on part of the service provider/manufacturer (or retailer) of goods.

B. CONSUMER PROTECTION ACT 1986

The Consumer Protection Act, 1986 is one of the most important socio economic legislations for the protection of the consumers. Talking about the negligent in medical service and the consumer protection, there are instances wherein most of the doctors have violated and made prey to the innocent patient. Doctors generally have certain duties towards their patients. Some of the important duties include:

- ✓ To exercise a reasonable degree of skill and knowledge and a reasonable degree of care;
- ✓ To exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment;
- ✓ To extend his service with due expertise for protecting the life of the patient and to stabilize his condition in emergency situations;
- ✓ To attend to his patient when required and not to withdraw his services without giving him sufficient notice;
- ✓ To study the symptoms and complaints of the patient carefully and to administer standard treatment;
- ✓ To carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis;
- ✓ To advise and assist the patient to get a second opinion and call a specialist if necessary;
- ✓ To obtain informed consent from the patient for procedures with inherent risks to life;
- ✓ To take appropriate precautionary measures before administering injections and medicines and to meet emergency situations;
- ✓ To inform the patient or his relatives the relevant facts about his illness;

- ✓ To keep secret the confidential information received from the patient in the course of his professional engagement; and
- ✓ To notify the appropriate authorities of dangerous and communicable diseases.

Thus, a breach of any of these duties will support an action for negligence by the patients.

C. QUANTUM OF COMPENSATION

With regard to the quantum of compensation payable to an injured patients, the Supreme Court observed in the case of *IMA vrs V.P. Shanta and others*, as follows: "A patient who has been injured by an act of medical negligence has suffered in a way which is recognized by the law and by the public at large as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident."

In Spring Meadows Hospital vrs Harjot Ahuwalia

In this case, due to sheer negligence of the appellant-hospital, a child suffered from irreparable brain damage, rendering him into a 'vegetable state' for the rest of his life. The Apex court ordered to pay compensation of Rs 12.50 lakhs to this child and Rs 5 lakhs to his patient.

In Nihal Kaur v Directors PGI Chandigarh

In this case, a foreign matter was left in the body after the operation and the patient ultimately died. A sum of Rs 1, 20,000 was given as compensation to the dependant of the deceased as compensation.

In Kunal Saha's case, On 24th Oct 2013, the Supreme Court of India has made a landmark Judgment in the annals of medical jurisprudence. The court not only adjudicated on how to determine criminal negligence on the part of doctors but also impose greater responsibilities on them. In this case the Supreme Court had awarded the highest-ever compensation in medical negligence.

D. CRIMINAL LAW

The rise in number of criminal cases against the medical professionals probably shows the determination of the society to punish the incompetence medical professionals.

The criminal liability of medical negligence is an extremely controversial issue. Medical professional considered it to be the worst possible means to punish a doctor who has failed to deliver an accepted standard of care. It is not appropriate to punish a medical professional under criminal's law for a negligent act which is committed without any intention.

Thus, In order to established criminal liability, it is important to ascertain whether the doctor intent to harm the patient or not. Even if the medical professional acted negligently, to prosecute him under criminal law, it must be established beyond doubt that he intentionally wished to injure or killed the patient. Usually, criminal law punished only affirmative harm. However, in the case of medical negligence, failure to act in a prudent manner may also be a crime. If a medical professional had a legal duty to act and an omission thereof rises above civil negligence to include a level of risk taking indifferent to the attendant risk of harm, then there is criminal liability.

To impose criminal liability for doctors, negligence under section 304-A of IPC, there must be a direct nexus between the death of the patient and the negligent act of the doctor. In criminal law the burden of proof is much higher on the prosecution as compared to an action under the civil law.

The Doctors may also be criminally liable under the Indian Penal Code for

- ✓ Causing death by rash and negligent act under section 304A, IPC
- ✓ Causing grievous hurt endangering life under section 338, IPC
- ✓ Causing hurt endangering life under section 337, IPC

a. SECTION 304-A OF THE INDIA PENAL CODE 1860

This section is used to frame charges against the rash and negligent driving in a road and causing accident and death of the person by such rash driving.

However, deaths due to medical negligence are quite common in India and large number of cases is not even complained or reaches the state of trial. Even though this section is not directly applicable to medical negligence never the less, section 304-A of Indian Penal Code is attracted if death by rashness is proven.

b. SECTION 337 OF THE INDIA PENAL CODE 1860

This section will apply only when hurt is caused to any person by reason of its being done rashly or negligently, endangering human life and personal safety of others. Personal injury intentionally caused will not fall under this section as it is neither rash nor negligent.

c. SECTION 338 OF THE INDIAN PENAL CODE 1860

This section is used to frame charge against the act which causes grievous hurt by an act which endangers the life and personality of others. To bring a case under this section the prosecution must prove that the accused acted negligently and rashly.

The Supreme Court in *Laxman v. Trimbak* stated that the "The duties which a doctor owes to his patient are clear. 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 viz., a duty of

care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. 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 very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.”

Thus a person to be prosecuted for professional negligence, one must firstly prove the presence of *mens rea*, guilty mind and the negligence must be criminal. Mere carelessness and simple lack of care may only constitute civil liability and not treated as negligence.

Thus, the jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a high degree may provide a ground for action in civil law but cannot form the basis for prosecution.

VI. REMEDIES AVAILABLE TO THE VICTIMS OF MEDICAL NEGLIGENCE IN INDIA

Broadly speaking doctors can be held responsible under three heads

- ✓ Civil Consumer Protection Act, 1986
- ✓ Case in Medical Council
- ✓ Criminal negligence

A. REMEDY UNDER CONSUMER PROTECTION ACT

At present the best remedy a patient can get is through a consumer forum petition. Since the enactment of Consumer Protection Act, 1985 there has been a significant rise in medical negligence cases filed. This can be done by treating medical profession as a service under the Consumer Protection Act. It is now easier to get remedy for a negligent act of a doctor, which is timely and inexpensive, when compared to filing a civil or criminal suit or a writ petition. This is a very welcome development, as it ensures a remedy to aggrieved parties within 150 days from the filing of complaint.

In Vasantha P. Nair v Smt. V.P. Niar

The National Commission upholding the decision of Kerala State Commission had held that a patient is a “consumer” and the medical assistance was a “service” and therefore, in the event of any deficiency in the performance of medical service the consumer courts can have the jurisdiction. It was further observed that the medical officer’s service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act.

In *Laxman Balakrishna Joshi v. Trimbak Babu Godbole*, the apex court has stated that, “a person (doctor) who holds

himself out ready to give medical advice and treatment impliedly undertakes that:

- ✓ He is possessed of skill and knowledge for that purpose;
 - ✓ He owes a duty of care in deciding whether to undertake the case;
 - ✓ A duty of care in deciding what treatment to give; or
 - ✓ A duty of care in the administration of that treatment.
- Further a breach of any of these duties would give a right of action for negligence to the patient.

Thus a surgeon or a doctor will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. However, in case of a specialist, a higher degree of skill is needed.

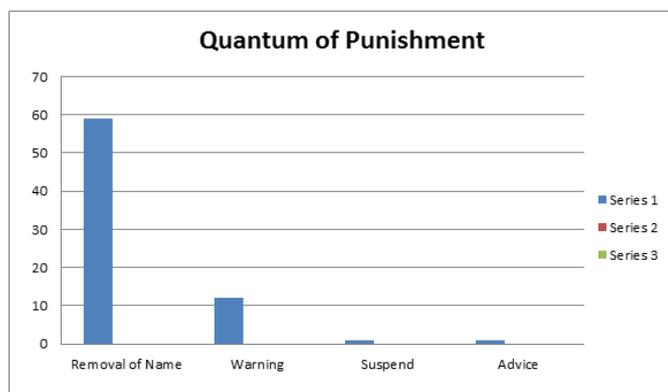
B. CASE IN MEDICAL COUNCIL

In medical negligence if the patient is having any complaint against the doctors, a case against a doctor can be filed in Medical Council. It is the Medical Council which gives the doctors there license to practice, the license can be withdraw if the doctor is found guilty of medical negligence depending on the merits. However, if there is any criminal type complaint the consumer can file complaint with the local Police Station. Or he can file a case with the Consumer Forum, Civil Court and the Criminal Court.

The test to determine whether an act or omission amounts to medical negligence was laid down in *Bolam v Friem Hospital Management Committee*, Mr, Justice McNair said, “In the case of a medical man, negligence means failure to act in accordance with the standard of a reasonably competent medical man at the time. That is a perfectly accurate statement so long as it is remembered that there may be one or more perfectly proper standards and if a medical man conforms to one of those proper standards, then he is not negligent.”

Though Medical Councils do not have powers to award compensation or to imprison, it can only warn the doctors, suspend or revoke the license depending upon the merits. However the chances of medical council taking any such steps are slender except in certain cases. Recently the Delhi High Court has upheld the suspension of the license of a city surgeon by the Medical Council of India. On the enquiry the doctor was found negligent and the Medical Council of India suspend his license for a year. However, not a single doctor anywhere in India has ever since independence had his license permanently cancelled.

According to the list published by the Medical Council Of India, New Delhi during January 2011 to 31 January 2013. Copy at the Annexure-I There are 75 doctors who were prosecuted for medical negligence and who were punished based on the merits. According to the data 59 doctors name have been removed from the Indian Medical Registered/State Medical Registered for the period of three or four or five years base on the merits. 12 doctors were only given a warning were as only 1 doctor have been suspended that also during the pendency of the case. And one was strongly advised to be more careful in future. Here is the statistic which is the outcome of the list as provided by the Medical Council of India.



Thus, we can see that, the action taken by the Medical Council of India towards the medical negligence of the doctors are not justifies. No strict action has been taken till date as proved by the statistic data as stated above.

C. REMEDIES UNDER THE CRIMINAL LAW

In order to punish a negligent doctor the patient or relative has to seek redressal in a Criminal Court. Criminal negligence is negligence which amount to a crime. To render a medical practitioner criminally responsible for the death of his/her patient, it must be established that he/she showed such disregard for the life and safety of the patient as to amount to a crime deserving punishment. In criminal case negligence should be gross. Criminal negligence matters are dealt under Section 304-A, Section 337 and Section 338 and of the Indian Penal Code. In order to prosecute a medical practitioner one has to prove malicious intention or gross negligence i.e., a high degree of negligent conduct. Moreover to start a criminal proceeding against a medical practitioner there has to be a prima facie evidence in the form of a credible opinion from a competent doctor, preferably a government doctor in the same field of medicine supporting the charges of rash and negligent act. The liability of a doctor always depends on the circumstances of a particular case. A mere lack of necessary care, attention or skill cannot be a good enough reason to prosecute a doctor as those will not constitute gross negligence. So something more than a mere negligence has to be proved in order to prosecute a doctor. In order to establish criminal negligence in diagnosis or treatment on the part of the doctors he has to be proved guilty of such failure as no doctor of ordinary skill would have been guilty of, if he was acting with reasonable care. It is a matter beyond mere compensation. It involves an utter disregard to the life and safety of others and a conduct deserving of punishment where the degree of negligence is much higher than that of a civil negligence case.

a. BURDEN OF PROOF

The burden of proof of negligence, careless lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctors. In case of medical negligence the patient must establish her/his claim against the doctor.

In *Calcutta Medical Research Institute v Bimallesh Chatterjee* it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the

complainant. In *Kanhaiya Kumar Singh v Park Medicare & Research Centre*, it was held that negligence has to be established and cannot be presumed. 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 his/her treatment or in his/her diagnosis if she/ he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor patient relationship and the attendant mutual trust.

Other than civil and criminal remedies, there are also some constitutional remedies available to the victims of medical negligence.

D. REMEDIES AVAILABLE UNDER THE INDIAN CONSTITUTIONAL LAW

Apart from the remedies available under the three heads as discuss above, the victim of medical negligence can also claim remedies under the Constitution of India for the infringement of his fundamental right.

The Constitution of India guarantees to everyone a right to the highest attainable standard of physical and medical health. Article 21 of the Indian Constitution guarantees protection of right to life and liberties to every citizen. The Supreme Court in *State of Punjab v Mohender Singh Chawla* held that right to live with human dignity, enshrined in Article 21, derived from the Directive Principles of State Policy and therefore include protection of health.

In *Pascham Banga Khet Mazdoor Samity v State of West Bengal*, It was held that Failure of a government hospital to provide a patient timely medical treatment results in violation of the patients rights

Thus, after we have analyzed the remedies available to the victims of medical negligence under the India law. Apart the civil law, there are limited remedies available under the Criminal Law. In fact there is no specific section to deal with the medical negligence under the Indian Penal Code.

VII. SUMMARY AND CONCLUSION

Concluding this argument on medical negligence we can say that doctors play an important role in dealing with the life of the public. People approach them with trust that they will heal the pain they are suffering. However, the rising of the negligent act of the doctors have put the public under a doubt, insecurity and many questions in their mind before they approach the doctors. As we have seen that the doctors can be held liable for medical negligence either for civil liability or for criminal liability depending on the nature of the act how gross it is. Recently, the Supreme Court in *Kunal Saha* case (2013) have awarded the highest ever compensation in a medical negligence case. However the question arose here as

to why this medical negligence was not charge under the section 304-A of the Indian Penal code? According to section 304-A, Whoever caused the death of any person by doing any rash or negligent act not amounting to culpable homicides, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. And in this case the medical negligent act of the AMRI Hospital in treating the wife of Mr Kunal Saha, lead to her death. This falls under the criminal liability.

Thus, we can see that even if the case is falling under the parameters of the criminal liability still the doctors are not criminally charge. However, analyzing the cases of medical negligence in India it has been found that there are very few cases only which went up to criminal liability, most of the cases are being tried under the civil court. The main reason for this may be the absence of proper provisions under the Indian Penal Code dealing with the medical negligence.

Analyzing the data reported by the Medical Council of Indian on the guilty of Medical Negligence and Punishment by the Medical Council of India, New Delhi 2011 to 31.01. 2013. Copy at the Annexure-I There are 75 doctors who were prosecuted for medical negligence and who were punished based on the merits. According to the data 59 doctors name have been removed from the Indian Medical Registered/State Medical Registered for the period of three or four or five years base on the merits. 12 doctors were only given a warning were as only 1 doctor have been suspended that also during the pendency of the case. And one was strongly advised to be more careful in future. Thus, from this report it is clear that no strict actions are being taken against the doctor for their negligence act.

As the cases of medical negligence are rising rapidly in India, the governments must take initiative to stop this malpractice. These situations have led to a need for new law or new provisions in the Indian Penal Code to deal with medical negligence in India.

REFERENCES

- [1] Abhijit Das, Ramakant Rai, Dinesh Singh, "Medical Negligence and Rights Violation" Economic and Political Weekly August 28, 2004
- [2] Anurag K. Agarwal, "Medical Negligence: Law and Interpretation" Indian Instituted Of Management Ahmedabad India,(2011)
- [3] K K S R Murthy, 'Medical Negligence in India' Indian Journal Of Medical Ethics (2013)
- [4] Karunakaran Mathiharan, "Supreme Court on Medical Negligence" Economic and Political Weekly, (January 14, 2006)
- [5] M.S Pandit and Shobha Pandit, "Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective" Indian Journal of UROLOGY,25 September
- [6] Karunakaran Mathiharan, "Criminal medical negligence: The need for a re-look" The National Medical Journal of India, Vol. 15, No 6, (2002) available at www.ijme.in
- [7] Malinee Kazarian, Danielle Griffiths and Margarets Brazier "Criminal responsibility for medical malpractice in France" available at <http://www.academia.edu>
- [8] Vandana Singh, "Medical Negligence And Our Laws-An Overview" available at www.gobookee.org, pdf,
- [9] Amar Jesani "Laws and Health Care Providers" A Study of Legislation and Legal Aspects to Health Care Delivery, available at www.cehat.org
- [10] Rajiv Kumar Khare, Law of Torts, Medical Negligence and Consumer Protection, Center for Consumer Studies Indian Instituted of Public Administration New Delhi, available at <http://consumereducation.in>
- [11] Marc S. Stauch, "Medical Malpractice and Compensation in Germany" (2013) available at scholarship.kentlaw.iit.edu
- [12] Rajiv Kumar Khare, "Law of Torts, Medical Negligence and Consumer Protection" available at www.gobookee.org.file /research pdf
- [13] Colleen M. Flood and Bryan Thomas, "Canadian Medical Malpractice Law In 2011: Missing The Mark On Patient Safety" available at eprints.qut.edu.au/27025/1/c27025.pdf
- [14] B.Sonny Bal, MD, MBA, "An Introduction to Medical Malpractice in the United State" (2008) available at www.clinorthop.org,/journal
- [15] M.Stauch, "The Law of Medical Negligence in England and Germany" Hart Publishing (2007) available at medlaw.oxfordjournals.org