International Journal of Law and Social Sciences (IJLS)

Volume 4, Issue 1, 2018 | P-ISSN No: 2454-8553

MEDICAL NEGLIGENCE AND EVOLVING JUDICIAL ACTIVISM

Laxmish Rai¹

INTRODUCTION

Medical negligence has become one of the most serious and debatable issues in the country in the last few decades. The medical profession is one of the noblest profession, not immune to negligence which often results in the death of the patient or permanent/partial disablement or any other unhappiness which has adverse effects on the patient's health. Out of an estimated 52 lakh medical injuries in India, 98,000 people lose their lives because of medical negligence every year. It is a serious issue for the country that 10 people fall victim to medical negligence every minute and more than 11 people die every hour due to medical error in India. It is not a surprise that even the smallest error committed by a doctor have a life-altering impact on the patients.

Medical Jurisprudence deals with legal responsibilities, particularly those arising out of doctor-patient relationships such as Negligence, Rights and Duties of a doctor, Consent, Professional misconduct, and medical ethics. Medical jurisprudence is applying medical knowledge to the legal field to provide justice in civil and criminal cases. It provides key legal guidelines which should be followed by a medical practitioner. As the field grew, it gave immense power to the medical practitioner as they were now playing a very important role by having an expert opinion in the cases. The area of medical jurisprudence is very ancient but with the advent of technology and the reforms being added to the legal system, this branch is always under development.

The legal system in India follows the common law regime originated in England, which comprises statutes and precedents, which form part of the law of the land. The Indian judiciary is very much

¹ Associate Professor, A J Institution of Hospital, Administration Mangalore

active when it comes to sensitive topics like medical malpractice and negligence. Over the years Indian judiciary has given progressive interpretation to laws on medical negligence and tried to safeguard the patients along with protecting doctors from vicious claims. Beginning with the efforts of the judiciary to include medical services within the ambit of the consumer protection act to providing directions about doctor's liability and quantum of compensation, the judiciary has tried to fill all the shortcomings of the legislation. The Indian Judiciary relying on the constitution of India strives to ensure that every citizen of India gets "complete justice". Article 142 grants power to the Supreme Court for awarding any decree to do "complete justice". In the last few years, Article 142 has become a gigantic part of the Supreme Court which is invoked several times to decide the case on medical malpractice to do "complete justice".

While going through the judgments that have been passed by the Supreme Court under Article 142, one can found that the Court has readily intervened in most of the complex issues related to the environment, health, and religion where the existing laws were found insufficient for the current scenario. Sabyasachi Mukharji C. J expressed the view that we must do away with the 'childish fiction' that law is not made by the judiciary in C. Ravichandran Iyer v. Justice A. M. Bhattacharjee.² The court further stated that the role of the judge is not only to interpret the law but also to lay new norms of law and to mould the law to suit the changing socio-economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. Society expects active judicial roles which formerly were considered exceptional but now routine. The court also went onto say that "law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform an artistic function. He has to inject flesh and blood into the dry skeleton provided by the legislature.

From the above statement, it is clear that not only constitutional interpretation but also statutes have to be interpreted with the changing times and it is here that the creative role of the judge appears, thus the judge clearly contributes to the process of legal development. The courts must not shy away from discharging their constitutional obligation to protect and enforce the human

² C. RavichandranIyerv.Justice A.M. Bhattacharjee&Anr., (1995) 5 SCC 457.

rights of the citizens and while acting within the bounds of law must always rise to the occasion as 'guardians of the constitution', criticism of judicial activism notwithstanding.

DOCTOR – PATIENT RELATIONSHIP: AN ANALYSIS:

The relationship between doctors and patients is prima facie a healthy one that does not involve any frictions because it is normally the patients who select the doctor for their illness based on the reputation and skills of a doctor. Besides, when treatment is successful, patients are thankful to the doctor even though they have paid the fee. On the other side, medical professionals too thankful to their patients for the trust and confidence placed by their patients in them. However, this relationship has been commercialized during the past few decades and as a result, patients expect over-the-top treatment for their illnesses from doctors. Patients, being more conscious than before, now consider any side effects or issues in treatment as negligence on the part of their doctors. Similarly, doctors, have found alternative sources for their income, do not provide much attention to their patients and are often accused of showing apathy in the course of treatment. Both these instances added to the increase in unnecessary medico-legal cases being filed against doctors. To control such nuisance and discourage litigant mentality, the Supreme Court has laid down guidelines for the criminal prosecution of medical professionals. These guidelines have resulted in a downward trend in the filing of false medico-legal cases and reduced the harassment of doctors.

Doctor's prosecution can be initiated for various reasons other than negligence or deficiency of service. Statutes such as the Transplantation of Human Organs Act ³ provides for liabilities of doctors who carry out illegal transplantation. However, the Supreme Court has clarified that litigations must not be brought against doctors which are aimed at maligning the reputation of the doctor. The Court has instructed the Central and State governments to frame essential guidelines in consultation with the Medical Council of India to safeguard the medical professionals and prevent malicious litigation. The Court has also held that complaints against medical

³ The Transplantation of Human Organs and Tissues Act, 1994, \$ 18, No. 42, Acts of Parliament, 1994 (India).

professionals shall be brought only with some prima facie evidence to support the allegation against them.

RIGHT TO HEALTH: JUDICIAL APPROACH

The right to health of an individual has been cited by the judiciary in various cases. All these cases have contributed to the development of the medico-legal system in India over the years. In Parmananda Katara v. Union of India,⁴ it was held by the Supreme Court of India that medical professionals, whether they are working in the public or private sector, have the obligation to provide medical aid to persons who are sick and injured without insisting on completion of legal formalities or procedure established under the Cr.P.C. It recognized that the State is under an obligation to protect life under the Constitution. The Court noted that this obligation is delegated to those who are responsible to provide treatment for saving lives, which includes medical professionals.

Further clarity on right to health was given by the Court in Paschim Banga Khet Mazdoor Samity v. State of W. B, ⁵wherein the government hospitals cite the non-availability of beds as a reason for not providing treatment, violate Article 21 of the Constitution. In Kirloskar Brothers Limited. v. Employees State Insurance Corporation, ⁶ the Court held that workmen also have the fundamental right to health. It further expanded the obligation of the state to ensure the right to health from the State to the employer, making employer responsible to observe the right to health of their workmen.

In the area of medico-legal cases, the law, which is not quite developed in comparison to Western countries, the burden has mostly been on the Courts of the country to lay down guidelines to regulate the course of such cases. The decisions of the Courts in India play a most important role in medico-legal cases as they provide better clarity than existing legislation in medical law. The

⁴ Pt. ParmanandKatara v. Union of India, AIR 1989 SC 2039.

⁵ Paschim Bang KhetMazdoorsamity v. State of West Bengal, (1996) 4 SCC 37.

⁶ Kirloskar Brothers Ltd. v. Employees' State Insurance Corporation, (1996) 2 SCC 682.

Court's decisions are based on any existing statute, principles of natural justice and the opinions of experts appointed by the Courts as amicus curiae.

JUDICIAL ACTIVISM IN THE ARENA OF MEDICAL NEGLIGENCE: A CASE SURVEY

DR. LAXMAN BALKRISHNA JOSHI VS. DR. TRIMBAK BAPU GODBOLE

In this case, ⁷the respondent son suffered an injury in his left leg. The accused doctor while putting the plaster used manual traction with excessive force with the help of three men, although such traction is never done under morphia alone but done under proper general anaesthesia. This gave a tremendous shock causing the death of the boy. On these facts, the Supreme Court held that the doctor was liable to pay damages to the parents of the boy.

On appeal filed by the appellant before the Supreme Court, held that when a patient arrives before such a person for treatment, a duty of care is owed to the patient. The duty of care concerns deciding whether to undertake the case, what treatment is to be given and how the treatment is to be administered. The Court held that a breach of even one of the duties could give rise to the institution of medico-legal proceedings by the patient against the medical practitioner.

INDIAN MEDICAL ASSOCIATION VS. V.P. SHANTHA

One of the most important judgments concerning medico-legal cases of India came about in the year 1995. Indian Medical Association v. V P Shantha⁸ brought the medical profession within the ambit of 'service' as defined in the Consumer Protection Act, 1986. It defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries during the course of treatment could now sue doctors in 'procedure free consumer protection courts for compensation. The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service. They

⁷ Dr. LaxmanBalkrishnaJoshi v. Dr. TrimbakBapuGodbole, AIR1969 SC 128.

⁸ Indian Medical Association v. V.P. Shantha, AIR 1996 SC 550.

are service contracts, under which a doctor too can be sued in Consumer Protection Courts. A 'contract for service' means a contract whereby one party undertakes to render services to another, in which the service provider is not subjected to a detailed direction and control. A 'contract of service' implies a relationship of master and servant which involves an obligation to obey orders in the work to be performed as well as the mode and manner of performance. The Consumer Protection Act will also cover if some people are charged, and some are exempted from charges because of their inability of affording such services will be treated as a consumer under Section 2 (1) (d) of the Act. The Supreme Court observed that medical practice is a profession than an occupation and medical professionals provide a service to the patients and thus they are not immune to the claim from damage on the ground of medical negligence.

PASCHIM BENGAL KHET MAZDOOR SAMITY & ORS. VS. STATE OF BENGAL

The duty of care owed to the patient is not only by the doctor or medical practitioner but also by the medical institution or hospital where the patient is undergoing treatment, including Government hospitals. The question addressed by the Court in this case, whether the non-availability of appropriate facilities for providing treatment to the serious injuries suffered by the petitioner in various State hospitals would amount to infringement of his fundamental right to life. The Court held that the right to life upheld by the Constitution under Article 21 imposes obligations on the State to protect the right to life of all persons. Protection of the right to life includes the preservation of the life of persons. Therefore, the State must do everything in its power to provide adequate medical infrastructure to treat patients. In this regard, the Court held that denial of timely medical treatment amounted to a violation of an individual's right to life.

SURESH GUPTA VS. GOVERNMENT OF NCT & ANOTHER

In this case,¹⁰ the appellant a doctor by profession accused under Section 304A of IPC of causing the death of his patient. The surgery performed was for removing the patient nasal deformity. The Magistrate in his order opined that the appellant while conducting the operation for removal of the nasal deformity gave incision in a wrong part and due to that blood seeped into the respiratory

⁹ Paschim Bang KhetMazdoorSamity v. State of West Bengal.,(1996) 4 SCC 37.

¹⁰ Suresh Gupta v. Government of NCT., (2004) 6 SCC 422.

passage and because of that the patient collapsed and died. The Supreme Court held that from the medical opinions adduced by the prosecution the cause of death was stated to be 'not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage.' The court further held that if this act attributed to the doctor, even if accepted to be true, can be described as a negligent act as there was a lack of care and precaution. But for this act of negligence, he was held liable in a civil case and it cannot be described to be so reckless or grossly negligent as to make him liable in a criminal case. For conviction in a criminal case, negligence and rashness should be of such a high degree which can be described as totally apathetic.

JACOB MATHEW VS. STATE OF PUNJAB & ANR

In Jacob Mathew v State of Punjab & Anr,¹¹ the Supreme Court thoroughly dealt with the law relating to (i) negligence as a tort (ii) negligence as a tort as well as crime, (iii) negligence by medical professionals, (iv) medical professionals and criminal law, (v) reviewed Indian judicial precedents on criminal negligence and thereafter reached certain conclusions and framed guidelines regarding the prosecution of medical professionals. The complainant father who was admitted to the hospital developed breathing difficulty and called the doctor for a diagnosis. It took more than 25 minutes for the doctor to arrive. The doctor instructed the provision of oxygen to the patient through an oxygen mask. The patient, however, continued to experience discomfort and tried to get up from his bed but was restrained by the staff. It was found that the oxygen cylinder was empty and before arranging a different oxygen cylinder, the patient died due to his inability to breathe.

FIR filed against the doctor accusing of criminal negligence and the doctor approached the High Court for quashing the FIR but the same was rejected. The appellant then approached the Supreme Court and argued that his arrest was arbitrary and there was no instance of criminal negligence on his part in providing treatment to the patient. In its final judgment, the Supreme Court observed that:

¹¹ Jacob Mathew v. State of Punjab., (2005) 6 SCC 1.

"A private complaint shall not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a probable opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigation officer should obtain an independent and competent medical opinion preferably from a doctor in government service, who can normally be expected to give an unbiased and impartial opinion."

With the aforesaid observations, the Court ruled that unless the arrest of the medical professional is necessary to collect evidence or for further investigation or unless the investigating officer opines that the medical professional will not make himself available for prosecution, arrest of the medical professional cannot be made. This case demonstrates the procedure need to be followed in cases where medical professionals are accused of criminal negligence.

POONAM VERMA VS.ASHWIN PATEL & ORS.

In this case, ¹³ a registered medical practitioner entitled to practice Homoeopathy only prescribed an allopathic medicine to the patient. The patient died and the wife of the deceased filed case for the death of her husband on the ground that the doctor was entitled to practice homoeopathy only. In an appeal before the Supreme Court, the Court, in its assessment of the facts of the case, addressed the question of negligence and its manifestations. It observed that "negligence may be active negligence, collateral negligence, concurrent negligence, continued negligence, gross negligence, hazardous negligence, criminal negligence, comparative negligence, active and passive negligence, willful or reckless negligence or Negligence per se." ¹⁴The Court held that where a person is guilty of negligence per se, there is no need for any further proof. The judgment identified that the act of the respondent who was a qualified homoeopathy doctor, practicing and prescribing allopathic medicine amounts to negligence per se. No further evidence required to be produced by the appellant to establish the respondent's negligence.

¹² Id.

¹³ PoonamVermav. Ashwin Patel, (1996) 4 SCC 332.

¹⁴ Id. para40.

V. KISHAN RAO VS. NIKHIL SUPER SPECIALITY HOSPITAL & ANOTHER

The principle of 'res ipsa loquitur' being applied in cases of medical negligence was upheld in V. KishanRao v. Nikhil Super Speciality Hospital & Another, ¹⁵ wherein the appellant got his wife admitted as she was suffering from fever. When the treatment did not have any effect on the appellant's wife, he shifted her to a different hospital, where she died within hours. On appeal before the Supreme Court, it was observed that the patient was shifted from the respondent hospital to another hospital in a 'clinically dead' condition. The Court made an important note that no expert evidence was needed to prove medical negligence. The principle of res ipsa loquitur will operate, which means that the complainant will not have to prove the negligence where the 'res' (thing) proves it. Instead, it is for the respondent to prove that he/she had acted reasonably and taken sufficient care to negate the allegation of negligence. ¹⁶

BALRAM PRASAD VS. KUNAL SAHA & ORS

Balram Prasad v. Kunal Saha & Ors,¹⁷ the respondent along with his wife Anuradha Saha, came from the USA on a visit to their home town. The respondent, a doctor himself, noticed that his wife had a sore throat and low-grade temperature. Within no time, Anuradha's condition became worse and she continued suffering from high fever. On consultation with the opposite party doctor again, it was found that Anuradha was suffering from Angio-neurotic Oedema with Allergic Vasculitis. She was administered depomedrol as a treatment for the same. However, Anuradha's condition had deteriorated to a point where no treatment could save her, and she died after a few days.

The Supreme Court made an important observation that there was an increasing trend of medicolegal cases concerning negligence on the part of doctors, meaning that there was a need for strict rules in the conduct of doctors and appropriate penalties for negligent treatment. The Court stated that the compensation, which is the highest amount awarded in a medico-legal case in India, should act as a "deterrent and a reminder" to those doctors and hospitals who do not take their

¹⁵ V. KishanRao v. Nikhil Super Speciality Hospital, (2010) 5 SCC 513.

¹⁶ Id. para47.

¹⁷ Balram Prasad v. KunalSaha, (2014) 1 SCC 384.

responsibility towards patients seriously. ¹⁸This is important because it was the first time the Court awarded compensation as a deterrent to other medical practitioners. The case also saw the first time when the potential income of the deceased was calculated up to 30 years in deciding the compensation instead of the normal practice of taking account of 10-18 years. Thus, the Kunal Saha case continues to be a landmark case in the medico-legal arena as it sets new standards of determination of compensation for medical negligence.

PARAMANAND KATARA VS. UNION OF INDIA & ORS

A report titled 'Law helps the injured to die' published by the Hindustan Times told the story of a hit and run case where the victim was denied treatment by the nearest hospital for the reason that, they are not authorized to handle medico-legal cases and asked to approach another hospital situated 20 km away. The petitioner, who came across the article, filed a writ petition before the Supreme Court. The petition requested the issuance of an order to the Union of India to assure spontaneous medical aid to those injured in an accident.

The Supreme Court held that the right to life was predominant and would supersede medical and legal formalities in the case of medical help during an emergency. There can be no second opinion that the preservation of human life is of paramount importance. That is so because once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. There are no provisions in the Indian Penal Code, Criminal Procedure Code, Motor Vehicles Act etc. which prevent doctors from attending seriously injured persons and accident case. Serving individuals during a medical emergency is the duty of the public as well as the doctors and legislators. No legislation can block a person's right to receive medical treatment under Article 21 and no doctor can be subjected to harassment in the name of the protocol. ¹⁹

SAMIRA KOHLI VS. DR. PRABHA MANCHANDA & ORS

¹⁸ Id. para149.

¹⁹ Pt. ParmanandKatara v. Union of India, AIR 1989 SC 2039.

In this case,²⁰the Appellant visited the Respondent clinic as she was suffering from prolonged menstrual bleeding. Ultrasound was done and thereafter laparoscopy test as directed. Appellant signatures were taken in all documents including consent for surgery. During the laparoscopy test, the Appellant fell unconscious. Subsequently, the respondent's assistant rushed out of the operation theatre and asked Appellant's mother to sign the consent form for hysterectomy under general anaesthesia, and thereby her reproductive organs were removed.

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-oophorectomy. The appellant was neither a minor nor incapacitated or mentally challenged. As the patient was a competent adult and of sound mind, there was no question of someone else giving consent on her behalf. The appellant was temporarily unconscious due to anaesthesia, and as there was no emergency. The respondent could 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 the surgery was performed without taking consent amounts to an unauthorized invasion and interference with the appellant's body. The court believed that it is the duty of the state to safeguard the right to life of every person. Further, there is no common law in India for consent and Indian courts have to rely on the Indian Contract Act.

ANALYSIS OF JUDGMENTS

The medical profession undoubtedly a noble profession and medical professionals occupy responsible positions in society. ²¹However, both civil, as well as criminal legal proceedings, can be initiated against medical professionals for acting negligently. The above-cited cases have produced path-breaking judgments and set the standards which doctors, patients, hospitals,

²⁰ Samira Kohli v. Dr.PrabhaManchanda, AIR 2008 SC 138.

²¹ Meera T, Medicolegal cases: What every doctor should know, 30 J. MED SOC 132, 134 (2016).

lawyers and courts must follow during the hearing of medico-legal cases. However, to establish an appropriate legal regime that addresses medico-legal cases, it is necessary to analyze the judgments and identify those aspects of the judgments that are truly novel and pioneering. An analysis of the judgments brings about certain important principles, which are as follows:

- 1. All doctors owe a duty of care to their patients. Hence, doctors shall be held liable for negligence when there is a breach of duty of care.
- 2. Negligence is a subjective issue and should be assessed on a case to case basis. To prove negligence, it must be shown that a medical professional, who is expected to be working skillfully in providing his medical treatment and owes a duty of care to persons who depend on his/her skills, causes loss and suffering by exercising his skill without reasonable care.
- 3. Though the medical profession is a skilled profession and involves a great amount of risk, the standard of care is generally higher and should be taken into consideration in medico-legal cases.
- 4. Negligence can arise not only from positive acts of providing incorrect treatment to patients but also from negative acts such as not maintaining the patient's case file, not informing the patient about consequences of risky medical procedures and not entertaining the patient's request to receive a second opinion. ²²
- 5. Where a doctor provides free medical treatment to all patients, his/her treatment cannot be classified as 'service' as defined under the Consumer Protection Act. However, where a doctor provides free service to a certain class of patients but charges other patients, such doctors shall be classified as 'service' as defined under the Act.
- 6. Misrepresentation by doctors regarding their qualification in a particular field of medicine also attracts the charge of negligence along with other criminal charges.
- 7. A medical professional cannot be held liable where he/she has performed his/her duty with utmost care taking all necessary precaution regardless of the outcome of the treatment.

²² Malay Kumar Gangulyv.Sukumar Mukherjee, (2009) 9 SCC 219.

- 8. Medical professionals should not be unnecessarily harassed or subjected to unwarranted treatment and threats of criminal prosecution unless necessary. The opinion must be sought by the investigating officer from a doctor working in a government hospital and unless there is a possibility that the accused will not turn up during prosecution, he/she should not be arrested.
- 9. As per the Latin maxim "qui facit per alium facit per se", meaning that anyone who acts through another does the act himself, hospitals, nursing homes and even the State can be held vicariously liable for the negligent acts of doctors employed by them.
- 10. Criminal negligence requires a higher standard of negligence on part of medical professionals in medico-legal cases. The medical professional should have acted with 'gross negligence or 'recklessness' to such an extent that his behaviour can be considered a threat to society.
- 11. Where the facts of the case demonstrate that there was negligence per se on behalf of the doctor, no further evidence was required to be produced to prove the medical professional's negligence.
- 12. The burden of proof generally lies on the complainant. However, where the maxim 'res ipsa loquitur' is applicable, the burden of proof shifts on the opposite party to demonstrate that there was no negligence.
- 13. Compensation awarded in medico-legal cases can not only be ordinary in nature but also exemplary to act as a deterrent or reminder to medical professionals to take their profession seriously.

The aforesaid principles evolved from the judgments passed by the Supreme Court of India prove that the medico-legal regime of laws has been developed to a great extent by the judiciary. This has mostly been due to the lack of attention that the medico-legal regime has received from the legislature. The Courts have often been forced to establish a law about medico-legal cases.

CONCLUSION

In conclusion, the decisions provide a detailed account of the method in which the law established by Courts in medico-legal cases has evolved over the years. The judiciary in India has been the pioneer in the establishment of medico-legal law and procedure. This is demonstrated by the judgments in the various cases analyzed in this article, all of which address different aspects and issues which arise in medico-legal cases. The Courts have considered aspects such as 'res ipsa loquitur', criminal negligence, negligence per se, vicarious liability and exemplary damages in several cases and provided sufficient clarity on their applicability in medico-legal cases. The judgments of the Courts have not been altered by Acts of Parliament and have continued to be applicable.

The analysis of the judgments provides insight into the vital aspects of medical and procedural law that have been considered by Courts while deciding on the outcome of medico-legal cases. This is followed by a scrutiny of the judgments which outlines the limitations that persist despite the revolutionary decisions made by Courts. It is important to note that several issues have not been resolved by Courts and many others have been created due to inconsistency between judgments passed by Courts. Therefore, the ideal remedy to establish a uniform medico-legal regime would be through an Act of Parliament which taken account of the various important judgments passed by Courts as well as the limitations that are prevalent in the current medico-legal regime.