

Obligation and Solution of Medical Negligence

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Abstract

This topic covers the legal provisions, the obligation and solutions in the form of remedy in the cases of medical negligence. Vicarious liability and its application also cover in this paper with respect to medical negligence. The term negligence means, omission or failure to exercise the appropriate care, which is expected in the specified circumstances from specified person or professionals. Law helps to all the victims, who had sustained a loss injury or harm due to the negligence or carelessness of another person. It is a universal fact that mistake or an error can be committed by each and every person in their whole life time, no one is perfect on earth. The only matters are the gravity of negligence, sometime due to the negligence, the injury or damage is not very serious but sometime the damages and injuries are very serious and can be in the form of total disablement or death of a person. Medical profession is considered as one of the noble professions in all over the world, the position of god is given to the doctors. There are various types of negligence caused by various professionals but out of all that medical negligence is one of the types of negligence mostly seen in hospitals, nursing homes, dispensary, clinics etc. and are done by medical practitioners and associate person. As per the law there are various provision stated towards the liability in various sections of law i.e, the civil liability, criminal liability as well as liability arises under Consumer Protection Act 1986. It is evident that the cases of medical negligence occur almost every day in hospitals, now a days it is in very common to hear about the medical negligence cases in news channels social media and through many other mode of technology. This topic covers the legal provisions and the obligation and solutions in the form of remedy in the cases of medical negligence.

Key Words:

Medical negligence, Vicarious liability, Damages, Consumer, Organ transplant, Deficiency in services

Introduction

Human being is a social animal and he believes in the concept of law and order, thus the concept of law is invented for the protection and welfare of all human beings. The law not only provides the rights to the person but at the same time it implicates certain duties on each and every person. Protection of one's rights at the cost of incurring harm to another person is considered as wrong, and it is subject to a matter of an action. Law helps to all the victims, who had sustained a loss injury or harm due to the negligence or carelessness of another person. It is a universal fact that mistake or an error can be committed by each and every person in their whole life time, no one is perfect on earth. The only matters are the gravity of negligence, sometime due to the negligence, the injury or damage is not very serious but sometime the damages and injuries are very serious and can be in the form of total disablement or death of a person. Hence in this entire situation where injury or damages took place due to the negligence or failure to take reasonable care, the liability of negligence arises. All of us expect the flawless work from professionals, having ample of knowledge in their field, number of years' experience, still commit a mistakes, this negligence sustain injury and damages to the other person, in certain situation the parties suffered loss or damage, having a right to fight for the negligence act done by the professionals.

The term negligence means, omission or failure to exercise the appropriate care, which is expected in the specified circumstances from specified person or professionals. Under Law of Tort, negligence is considered as in a situation where person fails or do not exercise a reasonable care in their action, because of which harm can be caused to other person or property. The person suffers loss due to the negligence or carelessness of some other person, in that situation he or she having a right to file a suit against the other person and can ask for compensation or remedy. There are five basic elements of negligence for claim i.e. failure to fulfill the duty and also to take a reasonable care from the defendant part, secondly the defendant breaches the duty through an act, thirdly as a result of which there is a damage sustained by plaintiff and has also suffered for harm or injury. And finally, the injury caused to the plaintiff is a reasonably foreseeable consequence of the defendant's act or omission.

There are various types of negligence caused by various professionals but out of all that medical negligence is one of the types of negligence mostly seen in hospitals, nursing homes, dispensary, clinics etc. and are done by medical practioners and associate person. The medical negligence can be in the form of giving wrong treatment to the patient, prescribing wrong medicine, irrespective of the period of taking the medicine by the patient, wrong diagnose, lack of care during surgery, anesthesia, eye treatment, dental treatment, during delivery of the child. The medical negligence basically is the misconduct by a medical practioner or doctor by not providing enough care as a result of their breach of duties gives rights to patient in order to take action against the loss damage or injury sustained by

the patient. It is also evident that many of the times the doctors or the hospitals does not take the responsibility of negligence committed by them, they try to protect themselves and their respective hospital. They never accept their liability, and the facts which come out after the investigation is very shocking that due to the negligence of the hospital and doctor the damages occurred. Medical negligence is committing from last so many years but in the year 2017 many cases of medical negligence is reported, during the preliminary investigations the hospitals and doctors had tried to safeguard them by their statement but later during and after the completion of investigation it is seen that the doctors and hospitals are responsible for the medical negligence took place in their hospitals. It is very ashamed that in spite of accepting their mistake they try to purchase the victims, their family members and other evidence by paying them money, protect themselves from exposing in a negative way. The cases of medical negligence are increasing day by day. Hence there is an urgent need to find out the solution and remedies in the cases of medical negligence.

As per the law there are various provision stated towards the liability in various sections of law i.e, the civil liability, criminal liability as well as liability arises under Consumer Protection Act 1986. Civil liability of the person arises in the cases where the person having special knowledge and skill of a particular profession or field and fails to take a reasonable care of another person during that specified time, as a result of which another person sustain a damages, due to the negligence or carelessness of the experts. As per the maxim Ubi Jus Ebi Remedium it means where there is a violation of law there is a remedy and hence a victim has a right to file a case and seek remedy in the form of damages. Even if the wrong done by doctors or by any of his assistant, the vicarious liability arises towards the doctor or against the hospital where the matter of negligence took place.

Whereas the matter of criminal liability arises in the situation where the patient dies due to the harsh negligence of the hospitals, doctors and all the team members of the medical, during operation or towards giving the wrong treatment or wrong diagnose of the patient. The main object of the criminal law is to punish the offenders in the form of giving punishment for the negligence or the carelessness done by him towards the innocent person, whereas the aim of civil law is to provide remedy for the damages sustained by the innocent person from the unlawful act of another person.

Under Consumer Protection Act liability of the doctors or hospital arises when the relationship between the doctor and the patient is buyer and seller, for eg. The patient approach doctor for his better treatment by paying him money for the service which doctor will provide to the patient, in that situation it is the duty of the doctor to ensure that no consumer should be cheated or being exploited by the producers. If any harm is caused to the consumer due to the negligent act of the seller then the liability of the seller arises under Consumer Protection Act 1986. As soon as patient becomes consumer, the necessity to protect his rights and interest arises, because paying money to doctor for

getting services arises a buyer and seller relationship between both of them. Whenever a consumer finds defects in goods or deficiency in services from negligent act of the doctor, he is having a right not only to apply for civil remedy or criminal remedy but can also take the protection or shelter under the Consumer Protection Act.

Medical profession is considered as one of the noble professions in all over the world, the position of god is given to the doctors. For quick and better treatment, following the instruction and guidance of the doctors is expected from the patient and his family members, but on the other hand misusing the trust of the patient and his family members, doctors create a panic situation, leave no other option towards the patient or their relatives except saying yes for that treatment of the doctors. As a normal human being, not having enough knowledge of the medical field people generally accept the treatment prescribed by their doctors. Many of the time it is also seen that many of the test, investigations are actually not required but still doctor recommend to patient's not only that they force them to do that test from particular laboratory, the reason for that they give is that laboratory report is flawless, but in reality there is a cut which doctor receives from that particular lab. Prescribing of the particular place for investigations, test, medicines and hospitals are mostly because of cuts and not because of the genuineness of that particular place or person. Scam in Organ transplantation, various surgeries, surrogacy, ivf treatment for test tube baby is increasing at alarming rate. Now a days due to the greed and hunger for money the doctor's hospitals and nursing home playing with the life of an innocent person, converting this noble profession into commercialization.

There are certain test introduced in order to determine the medical negligence i.e Bolam test which is arised from the English law of tort, it is always used to identify medical negligence, but again in order to prove it the plaintiff has to fulfill certain criteria viz, there was a duty of care between the doctor or nurse and the patient, the act or omission of doctor or nurse breached the duty of care. In the case of Bolam vs. Friem Hospital Management Committee (1957), the court held that, if the similar professionals support the method or way of treating operating the patient in a similar manner and can justify it even if practice was not the standard of care, will not be considered as a breach of standard of care. It is noticed that many of the accused doctors escape from their liability only by the opinion of the experts, who testify to having done the same thing in that particular situation. Later on, this test was criticized and was also modified by Bolitho Test in order to determine the medical negligence by a doctor or nurse. In the case of Bolitho v Hackney Health Authority, 1997, Lord Browne Wilkinson restricted the boundaries of Bolam by stating that

1. "The court should not accept a defense argument as being 'reasonable', 'respectable', or 'responsible' without first assessing whether such opinion is weak to logical analysis and

2. "However, where there is a body of medical opinion which terms itself as 'reasonable', respectable, or responsible it will be rare for the court to be able to hold such opinion to be other than represented.

It is evident that the cases of medical negligence occur almost every day in hospitals, now a days it is in very common to hear about the medical negligence cases in news channels, social media etc. The Bolitho Test makes it possible to get quick remedy as it increases the burden on the medical practitioner and also provide more scope for compensation in the cases of medical negligence's.

Example for this is recent news of medical negligence case in Max Hospital at Delhi, the newborn twins was declared dead but later found one of the baby was alive, the baby died during his treatment at another medical facility in pritampura. Delhi Government had said that "Max Hospital is a habitual offender and three notices were served earlier to it. Further, it has been found guilty in those cases too. "Three notices had been issued to the hospital over lapses involving the EWS (extremely weaker section) quota patients and dengue fever beds. The action taken is in continuation of effect of previous notices,"The Delhi government took an initiative and after investigation of the matter it has been ordered by the government to cancel the max hospital License for the negligent act of the hospital.

Similarly, a medical negligence case against the Fortis Hospital, in Gurugram was reported, were accused of charging the family of a seven year old dengue Patient, who later died and charged almost 18 Lakhs for 15 days of ICU cost, has been levied by the Fortis hospital. The family members of the deceased have said that despite the knowledge that the condition of the patient is deteriorating and beyond cure. "The doctors kept the child in ICU for so many days, but her brain had already damaged gradually which the doctors deliberately did not test. They continued the treatment knowing that her brain was dead,".

The Hadapsar Police arrested three doctors and a nurse for alleged medical negligence leading to the death of a women patient. The doctors are attached with a private hospital at Gadital in Hadapsar. Police arrested them under Section 304 (punishment for culpable homicide not amounting to murder) of the Indian Penal Code (IPC).

Police said 30-year-old Vidya Abhijit Kadam, a resident of Tukai Darshan in Phursungi, was taken to the hospital as she complained of severe pain in her pelvic region. She died during the course of treatment the same day.

Vidya's husband, Abhijit, later registered a complaint with the Hadapsar police accusing the doctors of not ensuring appropriate care and treatment to her deliberately. He had held four doctors and two nurses responsible for her death.

Initially, the police had registered a complaint under accidental death and referred the case to the state's government medical negligence committee at Sassoon hospital. Based on the post-mortem report, the patient's medical history and medical care rendered to her, a panel of doctors at Sassoon found the doctors and nurses responsible for medical negligence that eventually led to Vidya's death.

"Following the committee's report, a case of medical negligence under IPC section 304 (2) police has arrested three doctors and a nurse in the case.

Conclusion and suggestion

It is a real fact that the medical negligence is increasing day by day, it not only affects the deceased but also affect the mind body and soul of their near and dear ones. Strict action for investigation and quick remedy to be provided in the case of medical negligence's. Medical negligence is still a debatable issue in India; it violates the fundamental rights as well as the human rights of the person. Delay in investigation and courts judgments give time to accused for destroying the evidence and witnesses. At the same time, it is very difficult to judge the quantum of punishment in the cases of medical negligence and hence judges take the experts opinion before passing the judgment. The compensation in the medical negligence cases should be just and adequate.

To quote *Mahatma Gandhi*, "It is health that is a person's real wealth and not pieces of gold and silver". So as a moral obligation All the concerned authorities whether it is the hospital, Government, Medical Council or any other institution working towards betterment of healthcare facilities should work together and take steps for the betterment welfare of the society and should not work just to fulfill their greed and hunger for money.

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