LAW MANTRA THINK BEYOND OTHERS
(International Monthly Journal, I.S.S.N 2321 6417)
Journal.lawmantra.co.in www.lawmantra.co.in

THE VARIED AMBITS OF EXISTING MEDICINAL LAWS AND THE NEED FOR CLARITY BY SARTHAK ROY*

The intrinsic feature that guides society along is Ethics, and it is more so pertinent for health care providers. Ethics coalesce in itself the means of disciplined study of morality, a concept that encompasses right and wrong behaviour. In ancient India, Charaka Samhita and Sushruta Samhita are the two greatest works dealing with the aspect of medical sciences. Both these works laid staunch emphasis on the selfless and dedicated service by the medical practitioners and projects a scientific approach to life. Medical profession is one of noble and faithful in nature and stands on the edifice of mutual trust between the patient and the doctor. Unfortunately due to the fast moving lifestyle and the corporations coming into play, the self-regulatory standards in the profession have shown steady decline. As pointed out by the Hon'ble Supreme Court in *State of Punjab vs. Shivram*[1], *"The need for external regulation to supplement professional self regulation is constantly growing. The high costs and investment involved in the delivery of medical care have made it an entrepreneurial activity wherein the professions look to reaping of maximum returns on such investments. Medical practice always has had a place of honour in society; currently the balance between service and business are shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. There is need foe introspection by doctors-individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role."*

Until 1986 the number of cases related to medical negligence were few and far between mostly in the realm of Civil wrong namely tortuous liability. However due to consumer awareness, western trend of medico-legal litigations, it was felt that the aspect of medical negligence should be brought under the ambit of Consumer Protection Act 1986. The induction of Medical Negligence under the umbrella of Consumer Protection Act, came through after the landmark Supreme Court case of *Indian Medical Association v V.P. Santa and others*[2] *wherein it was held "Service rendered to a patient by a medical practitioner(except were the doctor renders service free of charge to every patient or under contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of '**service'** as defined in Sec. 2(1)(o) of the Act".*

What is Medical Negligence?

It is pertinent that we delve into the question, what is medical negligence? The classic judicial definition of negligence is noticed in *Blyth v Birmingham Co,*[3] which was

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[1] 2005;7:SCC 1.
[2] 1995(6) SCC 651=AIR 1996 SC 550
[3] Blyth v Birmingham Co.,(1856) 11 Exch 781,784

upheld in *Coupland v Arabian Gulf Petroleum Co.*[4], wherein Alderson J. Said *"Negligence is the omission to do something which a reasonable man, guided upon those consideration which regulate the conduct of human affairs would do, or doing something which a reasonable and reasonable man would not do."* Negligence does not always mean explicit carelessness but a lacuna of the duty of care owed in specific circumstances. The idea of negligence and duty are strictly co relative.[5]

In a recent decision in *Poonam Verma v Ashwin Patel*[6], it was observed that there are various types of negligence per se- it may be active negligence, passive negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, wilful or reckless negligence per se. Black's law dictionary defines negligence per se as, "conduct, whether' of action or omission which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes negligence." It has also been observed that where a person is guilty of negligence per se, no further proof is needed.[7]

Reasons for medical negligence through case analysis

Clinical negligence includes under its ambit some of the following instances:[8]

Making a mistake during surgery

Carrying out a procedure without the patient's consent

Administering the wrong drug to the patient

Making a wrong diagnosis

Clinical negligence can also include not doing things that should be done, such as:[9]

Not giving timely treatment

Not warning the patient or the family about the risks of a particular treatment

In the case of *Harvinder Kaur v Dr. (Mrs.) Sushma Chawla and other*[10] the complainant had undergone caesarean operation in defendant's hospital giving birth to two babies and she got tubectomy also done on the same day. She visited the opposite party for following checkups

[4] Coupland v Arabian Gulf Petroleum Co., (1983) 3 All ER 226, p 228, referred om 2007 Cri LJ, Journal Section at page 151
[5] Ibid
[6] AIR 1996 SC 2111
[7] 2007 Cri LJ, Journal Section, at page 152
[8] Dr Aniruddha Malpani, Medical negligence – how to get justice(Oct 25, 2013) http://www.thehealthsite.com/diseases-conditions/medical-negligence-how-to-get-justice/
[9] Ibid
[10] 2001 (3) CPJ 143 (Punj.SCDRC)

and complained of pain in abdomen for which she was advised to take medicines and to undergo a short wave diathermy(S.W.D). As her condition did not show any signs of improvement, she consulted another doctor, who advised scanning, X-ray and needle test. On the basis of these tests it was found that a sponge was left in her abdomen during her caesarean operation. Thus due to the negligent act of the opposite party the complainant had to undergo another operation, exploratory laparotomy for the removal of sponge from the peritoneal cavity.

The Court held that " Instead of exercising a reasonable degree of skill, care and knowledge, the defendant advised only few pain killers and rest. The defendants should have taken post operative care of the complainant and should have suggested scanning, X-ray or needle test. In spite of being a well qualified(gold medallist) Physician, it was proved on record that the defendant had not taken much care in which a doctor of ordinary skill should have taken. A doctor owes certain duties which must be performed in reasonable manner and with due care and caution. If the doctor does not act prudently with care, the complainant becomes entitled to damages done on account of her negligence and carelessness."

Thus in here what can be seen is that the doctrine of *res ipsa loquitor* can be applied, as the fact of the case itself shows negligence per se by the defendant. In this case, due to the complete absence of duty of care owed, negligence arose and the court rightly entitled the aggrieved party to damages.

Another landmark case, in which the scope of vicarious liability arose, was the case of *Leeki Bai v Sebastian and others.*[11]

In this case, the court upheld that the conditions existing in Women and Children's Hospital and the non-explanation of the cause of death by the Medical College Hospital Authorities show that there was negligence on the part of the second defendant-State Of Kerala. A brief history of the facts of the case shows up that no anaesthetist was available during a particular period of time, in spite of a permanent anaesthetist being associated with the Women and Children Hospital. It was the duty of the second defendants to see that its employees are available at all times in the hospital. If for any reason, a doctor or an expert is not available, the hospital authorities should have taken note of the same and posted another person beforehand. Due to the unavailability of the anaesthetist the surgeons could not conduct surgery at the earliest and thus the patient died when operation was finally conducted. Then afterwards the cause of death was not disclosed by the doctors, nurses and hospital staff. The court held that it was the duty of the hospital authorities to disclose the cause of death to the relatives of the deceased. Herein, it is not only a question of vicarious liability but also one of primary liability of the hospital authority for breach of its own duty of care towards the patient. The court reiterated that the primary responsibility of the Hospital Authorities is to see that there is no negligence on its part or on the part of its employees. The non providing of a doctor or anaesthetist or an assistant is essentially a lapse on the part of the Hospital Authorities and hence they are negligent. The court awarded a total compensation of Rs 1,37,7500/-
Thus herein again the major factor for the cause of negligence was lack of duty of care, due diligence on the part of the hospital authorities and its employees.
In the recent few weeks, the horrors of sterilisation camp from Kannan Pendari village in

[11] 2002 (2) CPJ 363 (Ker-HC) (DB)

Bilaspur, Chattisgarh have come into the forefront. Close to 83 tubectomy operations were carried in roughly over three and half hours by a single doctor, which roughly to amounts to giving a mere 2 and half minutes for each operation and which in turn lead to the death of 15 women while many are grasping for survival. As further truths come into light, allegations of corrupt and malpractice have also come into play wherein it is being widely alleged that the antibiotics prescribed were laced with rat poison. In a country like India, this still follows the archaic target driven approach to operative sterilisations. Health workers are incentivised to bring en mass the poor illiterate women to such ghastly ill equipped camps, operating in the garb of health camps. Herein, no surveillance is carried out about the facilities available or the instruments acquired from. In the case of *Ramakant Rai vs Govt of India*,[12] wherein Public Interest Litigation (PIL) petition requesting the Indian Supreme Court to direct the Union of India and all Indian state governments to implement the Ministry of Health and Welfare's Guidelines on Standards of Female Sterilization, enacted in October 1999 was sought. The petition further sought compensation for victims of medical negligence in sterilization procedures, as well as accountability for violations of the guidelines. Reproductive Rights, Right to Health, Women's Rights. The Supreme Court first, issued directives not only for the States highlighted in the petition but to the entire country. Second, the case is also significant as the Court underscored the need for uniform guidelines in performance of sterilization procedures for women and men, including requirement of informed consent, punitive action for violations, and compensation for victims. But in spite of the orders of the Supreme Court, these are widely flouted. Large and widespread malpractices happen in such "Camp Method", which tries to meet earmarked targets and thus leading to various incidents of negligence.

In India, criminal negligence is covered under section 304 of the IPC, wherein it lays down punishment for death caused by rash and negligent act of the offender, which encompasses the cases of death caused by negligent attitude of medicos. But in light of the recent supreme court decision on August 4, 2004 in *Dr Suresh Gupta v Government of NCT of Delhi*[13], section 304 of the IPC has been rendered much less stringent. The court stated that to fix criminal liability on part of doctors, the standard negligence required should be proved so high that it can be described as 'gross negligence' or 'recklessness', not merely lack of necessary care, attention and skill. But the judgement although lauded by the medical fraternity has received its fair share of criticism as well for failing to define the terms "gross negligence" or "recklessness". What would the botched up sterilization camps in Bilaspur amount to? Are the parties responsible for the massacre liable for Criminal Negligence?

The probable solutions to these scenarios of medical negligence

The case of *Indian Medical Association v V.P Santa and others*[14] the Consumer Protection Act took under its purview the medical service rendered by the doctor. But why is it, inspite of its implementation, such widespread cases of Medical Negligence keep cropping up? The answer lies in the contradictory aspect of the guidelines set forth by the Supreme Court for the service rendered by medical practitioners. One of the guidelines says: "Service rendered at a govt. Hospital/health centre/dispensary where no charge whatsoever is made from any person availing of the services and all patients are given free service is thus outside the

[12] W.P (C) No 209 of 2003
[13] AIR 2004 SC 409:2004 Cri Lj 3870
[14] 1995(6) SCC 651=AIR 1996 SC 550

purview of the expression of "service". The payment of a token amount for registration purpose only a hospital/nursing home would not alter the position". In such instances like those of sterilisation camps conducted, the government appointed doctors would thus escape liability from the Consumer Protection Act, as the patients are given service free of charge. So what happens when negligence takes place under the gamut of "free service". To hold such government appointed camps to task in case of negligence, a separate law should be enacted and set in place. Or even for that matter, the RTI act's implementation on the activities and procedures in sterilisation camps can bring the government to task as these are government initiated process. For this some exception clauses specially relating to fiduciary relationships as per the RTI ACT, 2005 needs to be reworked

The aspect of free consent especially informed consent should be obtained from the patients by the medical practitioners. Due to poverty and illiteracy in India, Government should undertake health care awareness schemes, wherein basic knowledge about patients' rights can be spread for a transparent functioning. The medical institutes should also be held liable for the negligent acts of its medical practitioners.
The health ministry should set up a structured Central and State laws, pertaining to the acts of negligence and the method of arriving at a compensation for the same. The health ministry can also appoint legal luminaries specialising in medico legal aspect to overlook instances of medical negligence and assist the judiciary during the decision making process, as the Judges may not be very well versed with the clinical aspects to a medical negligence case. In Medical Negligence, depending on past precedents can never be a solution as most of the cases differ in one aspect or the other.

No human being is infallible and so are the doctors. *"Of all sciences 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 clear and unequivocal terms"*. This observation of Lord Nourse in Thake vs Morris[15] brings out the real essence of the culpability of an act in an action for negligence.

[15] 1986;1 AII ER 497 (CA)