

A COMPARATIVE STUDY OF MEDICAL NEGLIGENCE LAWS IN INDIA WITH US

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Introduction-

Medical is a noble profession where a doctor saves lives of different peoples, cure sickness and healed them by treatment. Doctor-Patient has a fiduciary relationship and patients see doctor as a god but in reality doctors are just a common human beings like others even they can also commit mistakes which results as medical negligence. The word Medical Negligence itself defines its meaning. It is misconduct by medical practitioner or doctor by not providing proper aid or lack of facilities. Negligence by doctors and medical staff sometimes causes death and increases illness of the people. Due to lack of medical aid and untrained staff 70% of death occurs per year in India, in UK there were 17,338 claims brought in 2016-17, of which 9,675 (55.8 per cent) resulted in damages being awarded. Meanwhile, 67.8 per cent of claims is settled without court proceedings being issued the majority of these resulted in no damages being awarded and in the US the figure is not less than 44000 to 98000. It is not lack of medical skill or knowledge of doctors, but that of team coordination and communication during an emergency that lead to medical errors. Medical negligence is punishable under Torts, IPC, Indian Contract Act, and Consumer Protection Act. It is difficult to prove medical negligence in the court of justice.¹

Aim and Objective of the Paper-

This paper deals with concept of medical negligence in India and focus on the issues related to it and this paper has comparative study between the laws which governs in India and US. In US health care facilities are owned and operate by the private sector.

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Research Problem-

The present paper based on the laws of medical negligence in India tries to highlight the concept of what is negligence caused by the professionals and it tries to find out-

- Why the burden of proof lies on the patients?
- Why the res ipsa loquitur is only a rule of evidence?

Research Mythology-

The methods adopted by the researcher is doctrinal. The researcher has used secondary sources like books, articles by different eminent authors and data is also collected from the reliable online sources.

Negligence-

Negligence is an omission to do something which ought to have been done or an act of commission which ought not to have been done in law. The term Negligence derived from latin word '**Negligentia**' which means 'falling to pick up'. In everyday usage Negligence denotes lack of care and in legal sense it is breach of legal duty. According to Winfield and Jolowicz, Negligence is the breach of a legal duty of care by the plaintiff which results in undesired damage to the plaintiff.

To commit the tort of negligence there are 3 main essentials that are required-

1. Duty to care: This is one of the important essential element of negligence to define the act of negligence. Every person owes a duty towards another person while performing any act. The plaintiff has to prove that defendant owes a specific legal duty towards to him, but he failed to perform it.
2. Breach of duty: The standard of care is required by a person. Plaintiff has to establish that defendant breached his duty by failing to perform a reasonable care. It is not enough prove that defendant owns a duty towards plaintiff.

The law requires three conditions to determine breach of duty:

- The importance of object to be attained.
- The magnitude of risk.
- The amount of consideration for which services are offered.

3. Damage: Another essential condition of negligence is damages. A plaintiff must suffered some damages by the defendant's breach of duty. The plaintiff has to prove damages but in certain cases plaintiff does not need to prove that and the facts itself defines that the negligence of defendant. It is based on maxim "res ipsa loquiter" which means thing speaks for itself. When the circumstances permit the courts to determine that the defendant was negligent and the plaintiff has simply shows the damages which he suffered due to negligence.²

Negligence by Professionals-

Profession is an act or a job for which a person needs special training and skills to perform their job efficiently and without proper education a person is not eligible for that particular profession. Like Architect, Engineering, Medical, Law is the profession which needs appropriate degree, skill or training to continue the profession, if a person engaged in some profession he supposed to perform some duty towards their clients. Any person who suffered some damage or loss he can file a suit against the person who failed to perform his duty.

[2] R.K. Bhangia, Law of Torts & Consumer Protection Act, Allahabad Law Agency, 24th Edition 2017.

Medical Negligence-

Medical profession consider as a noble profession where a doctor or a surgeon has an obligation towards their patients to provide them proper medical care and treatment and assure them for their services but in case of negligence medical staff has not taken reasonable care during the operations or treatment. A person shall be liable for negligence on two things either he had no skill or he did not take reasonable care. A standard care is required during operations each and every doctor or medical professional owes a duty of care towards their patients but when they failed to exercise reasonable care of duty which causes death of the patients or any other severe loss to health, the hospital management are held liable for the damages and have to pay compensation to the victims on the basis of master- servant relationship which is based on maxim “**Respondeat Superior**”. The maxim means let the principle be liable and it puts the master in the same position as if he had done the act himself.

Medical Negligence & Indian Law

In India medical negligence falls under criminal negligence, negligence under torts or civil negligence and negligence under consumer protection act. These laws provide different remedies to the victims in form of compensation or punishment.

Medical Negligence under Criminal Law

Under criminal law intension or motive are the essential element. The term criminal intension means the purpose or design of doing an act which is forbidden by the IPC without just cause or excuse. When the doctor agrees to treat any patient it forms a kind of contract between a doctor and his patient it defines that a patient entrusts himself to the doctor and doctor assure him for his best service. The doctor- patient relationship confers a legal relationship and rights or duties which forms a liability of medical practitioner. If there is rashness and recklessness a practitioner will be liable. To prove negligence high degree of charges would be required.

Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years or with a fine or with both. any person without intention to cause death and have no knowledge that same act will cause death. It provides imprisonment of 2 year or fine or both. To impose this section it is necessary to prove that the death of deceased caused due to rash and negligent act of the practitioner.

The doctor cannot be held liable for the criminal liability unless his negligence went beyond the life and safety of the patient.

Sec.80 and Sec.88 of Indian Penal Code contains defenses for a medical professional accused of criminal liability. Section 80 provides that “Nothing is an offence that is done by accident or misfortune and without criminal intention or knowledge in doing of a lawful act by lawful means and with proper care and caution”.

Section 88 provides that doctor cannot be accused of an offence if he/she performs an act in good faith for the patient’s benefit does not intend to cause harm even if there is a risk and the patient has consented to suffer that harm. This section exonerates doctors and surgeons who make tough decisions in an emergency.³

[3] The Indian Penal Code, Lexis Nexis,35th Edition

Medical Negligence under Consumer Protection

Section 2(1)(o) of the CPA states that the deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise about any service. As per the Consumer Protection Bill 2019 healthcare does not consider as services under the CPA.⁴ Before the bill consumer courts penalize the accused doctors but the removal of healthcare from the list of services the consumer cannot approach consumer courts. However, patients and their can appeal to the High Courts or Supreme Court for the compensation or seeking penalty.

Medical Negligence under Civil Law or Torts:

Negligence under torts consider those cases where services offered by the doctors or hospital staff does not fall under the term service defined as CPA. Victims can claim compensations, and they have to prove the negligence by the doctors or hospital staff. Medical negligence cases are very few which are clear and simple. A lawyer has to access the information from the hospital, expert or the victims. Once the case proceedings has been started the simple case become complex for the courts to determine the medical negligence.

Treatment are sometimes very risky and required extra care and expert practitioners but after ting due care treatment would be unsuccessful, this does not amount medical negligence. Court cannot decide its judgment on what victims or practitioner concerned but it refers the expert opinion and analysis the conditions or consequences of the incident.

[4]<https://timesofindia.indiatimes.com//>

Burden of proof –

Sec.101 of Indian Evidence Act 1872 states that, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. When victims or its family and relatives alleged medical negligence against the doctor or hospital management the burden of proof lies on them. They must prove four elements in the court-

- The doctor owes duty towards the patients.
- There is violation of standard care.
- Patients suffered injury or loss due to their carelessness.
- The injury resulted into damages.

A complainant requires to present the essentials documents of the cases like: medical history, hospital records, medical bills, death certificate or autopsy report to know the actual cause of death. Complainant needs to prove his charges beyond the reasonable doubt and the court does not rely on the what the complainant had been presented in the court, it also seeks expert advice in the case.

If the victim failed to prove his allegation the other side receives the benefit of doubt, and he will be acquitted by the court. The court never presume anyone guilty unless the allegation are not proved beyond the reasonable doubt once it had been proved the burden of proof will lie on the other side.

Sec.102 of Indian Evidence Act 1872 states that, The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

In the case of medical negligence the burden of proof lies on the patients because

they are the only one who approach the court the injury or loss which suffered by the medical staff and seeking for the proper compensation for that they are required to present particular facts of the case in the court. **Sec.103 of Indian Evidence Act1872** states that, The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.⁵

Res Ipsa Loquitur is only a rule of evidence-

The latin maxim means the things speaks for itself and it will when it is clear who acted negligently. When the facts and circumstances are clear like a crystal, the complainant does not require proving anything in the court. Generally, the complainant must prove that the defendant owes a duty towards him before the court but under this maxim the complainant does not require establishing evidences he has to present the circumstantial evidence only, rest proceeding will go further. Res Ipsa is the one of the circumstantial evidence to establish the negligence and it is sufficient to recover the damages. The court presumes that respondent acted negligently and the burden of proof is on him to convince the court that he/ she was not negligent. Doctrine of Res Ipsa has three elements to prove medical negligence that are-

- The event does not occur without negligence.
- Complainant was under care and observation of the medical staff.
- There is no contributory negligence on behalf of complainant.

The jury must examine all these elements before deciding the case. For example, the surgeon left scissors inside the abdomen then the jury infer that it is surgeon negligence since he had entirely control on it.

[5] <https://indiankanoon.org/>

Here are the some landmark judgment of Supreme Courts to figure out medical negligence-

In the case of **Kunal Saha v AMRI (Advanced Medical Research Institute)**⁶ famously known as Anuradha Saha Case, this case was filed in 1998 with the allegation of medical negligence on AMRI hospital and three doctors. The lady was suffering from drug allergy and the doctors were negligent in prescribing medicine which further aggravated the condition of patient and finally led to death. In this case the final verdict was given by the Supreme court on 24th October 2013 and a compensation of around 6.08 crore for the death of his wife.

In the case of **V. Krishan Rao V Nikhil Super Speciality Hospital**⁷ Krishna Rao, an officer in malaria department filed a complaint against the hospital for negligent conduct in treating his wife. His wife was wrongly treated for typhoid fever instead of malaria fever, due to the wrong medication provided by the hospital. Finally, the verdict was given and Rao was awarded a compensation of Rs 2 lakhs. In this case the principle of Res Ipsa Loquitur (thing speak for itself) was applied and the compensation was given to the plaintiff.

In case of **Jacob Mathew v State of Punjab**⁸ the Supreme Court held that in some cases of medical profession the doctors are equipped in certain situation where they have to make choices between a devil and the deep sea. Sometimes in certain situation there must be greater risk in the operation but higher chances of success and in another move there would be lesser risk but higher chances of failure. So the decision, that which course would be followed will depend on facts and circumstances of case.

[6] (2006) CPJ 142 NC.

[7] (2010) 5 SCC 513.

[8] (2005) 6 SCC .

In the case of **V.N. Shrikhande vs Anita Sena Fernandes**⁹ the Supreme Court had held that in cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative- complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.

In a popular case **Achutrao Haribhau Khodwa and Ors v. the State of Maharashtra**¹⁰ the Supreme Court noticed that in the very nature of the medical profession, skills differ from doctor to doctor, and there is more than 1 admissible course of operation. Therefore, negligence cannot be attributed to a doctor so long as he is performing his duty with due care, caution, and attention. Merely because the doctor chooses one course of action over other, he won't be liable.

[9](2011) 1 SCC 53

[10] (1996) 2 SCC 63

Position Under US Law

US is the country where 58% of community hospitals are non-profit, 21% are government-owned, and 21% are for profit. In US healthcare is very expensive and the government does not provide any health benefits to the citizens. Most of the people prefer health insurance which protects them from the medical expenses. In the United States medical malpractice law has traditionally been under the authority of the individual states and not the federal government, in contrast to many other countries. The allegation of medical negligence must be filed on the statute of limitation and to claim compensation a patient has to prove that the medical care which had been taken was inadequate and low quality which resulted in the injury. Once the victim party established that the injury occurs due to the negligence the court will calculate the monetary compensation. Medical practitioner in US has medical malpractice insurance to protect themselves from the medical negligence. In US state court has various jurisdiction to govern the medical malpractice cause every has its own framework and rule for it which are established by the lawsuits which filed under state courts of U.S. There is one exception to law where medical liability raise, in the context of Good Samaritan law. The law protects the physicians from the liability when they provide reasonable assistance to injured or ill person. It removes the fear of prosecution for unintentional or wrongful death. In US the laws varies from jurisdiction to jurisdiction and define the conditions or circumstances for the Good Samaritan. The law only applicable to those people who have proper training of aid and certified by the health organization.¹¹

[11] <https://scholar.google.com//>

Medical Malpractice in US

Screwdriver Implanted in Patient:

The Patient was supposed to have back surgery which involved inserting surgical rods into his spine. The surgeon couldn't find those rods. Instead of obtaining the proper rods or waiting the doctor inserted screwdriver into patient's back. This caused horrible pain and a complete lack of stability of his spine. This patient underwent several back surgeries after this mess and died within two years. His estate filed a malpractice case against the surgeon and recovered \$5.6 million.

Wrong Testicle Removed:

An Air Force veteran went for treatment for possible cancer of one testicle. When Benjamin Houghton went into surgery to remove his diseased left testicle at West Los Angeles VA Medical Center, the surgeons mistakenly removed the right, healthy testicle instead. The medical mistake was traced back to the patient's medical record where the surgeon failed to mark the correct side before undertaking the operation. Mr. Houghton and his wife brought a medical malpractice case against the VA Medical Center for \$200,000.¹²

Suggestions-

- Generally burden of proof lies on the complainant always, and he requires standard evidence against the medical staff. There should be higher law to establish the negligence. Patient should establish his/her claim against the medical staff, but they are unable to prove beyond the reasonable doubt.

[12] <https://leightonlaw.com/>

- The medical profession requires standard care and the staff or practitioner must have proper skill, degree so these things should be taken into consideration while deciding the case.
- They should work efficiently and the management must assure that there is availability of proper equipment and drugs in the hospitals.
- A strict action should be taken by the hospital management against the staff or practitioner in case of negligence.
- The court should give proper amount of compensation in case of injury but when somebody lost his life the court or medical council should cancel the license of the practitioner.

Conclusion-

“**Health is Wealth**” the quotations defines the value of health and it is the real possession of human being. The fundamental principle of medical profession is **Primum Non Nocere** which means first no harm to the patients. Medical profession deals with human life i.e it is called as noble profession. The reason behind medical negligence is untrained staff, lack of equipment, miscommunication between doctor and patients. In India or US there are nos. of medical cases registered and the law is almost similar, patients has to prove the negligence on the part of the practitioner. Once it is proved the medical practitioner are held liable for the negligence, victims receives the compensation but in the case of death of patients or any grievous injury the court or medical council of the country should cancel the license of the practitioner.