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Judicial Scrutiny and Test of Medical Negligence

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Abstract

COVID-19 epidemic has thrown the healthcare industry into sharp light for the first time. On the one side, healthcare workers are being acclaimed as "Corona Warriors," but there have been stories of patients being denied medical help and safety protocols not being followed, putting the lives of both health care workers and patients in jeopardy.

Medical malpractice claims are on the rise, partially as a result of the rapidly growing number of healthcare providers with inadequate infrastructure, and partly as a result of healthcare workers' weak skills and obsolete information. The Medical Council of India's laxity in implementing strict diagnosis and treatment criteria has exacerbated the situation. The regulator is frequently seen circling its wagons and shielding healthcare practitioners from liability. As a result, patients and their families are increasingly turning to the legal system for help.

However, due to a lack of subject area competence and a lack of detailed norms, even the courts are unable to administer uniform justice. As a result, multiple courts and, at times, co-equal benches of the same court, even the Supreme Court, issue contradictory and conflicting judgements.

A recent Supreme Court judgement dramatically lowered the bar for determining liability in medical negligence cases, stating that even if a healthcare provider makes a mistake in diagnosis, this does not constitute medical negligence.

In the midst of the COVID-19 pandemic's uncertainty, the judiciary remains the only beacon of hope for individuals concerned about a lack of proper medical infrastructure and escalating incidents of medical malpractice.

There is hope that the Supreme Court will take the necessary steps to protect the people's faith and hope. In A.S Mittal V State of UP[1] in the instant case an irreparable damage was caused to the eyes of certain patients who were operated at an eye camp which was organized by the government of Uttar Pradesh. Few patients who underwent surgery were unable to see the light of the day at all i.e even the little vision they had was lost. The Supreme Court coming heavily on the erring medical practitioners held that, "the law recognizes the dangers which are inherent in surgical operations and that would occur on occasions despite of having reasonable care and skill however, a mistake on the part of a medical practitioner which no one with reasonable care would have committed is a negligent act". In the said case compensation was awarded. The important part of this verdict was even though service rendered free of charge does not fall under the ambit of the Consumer Protection Act the court went a step ahead in recognizing that although no direct charges were paid by the patients but the State had paid on behalf of the patients to the medical practitioners who were engaged in the free camp. However, the Punjab

[1] AIR 1989 SC 1570

State Commission did not give relief to the patient who has undergone sterilization operation in the Punjab Government Hospital for free of charge and became pregnant subsequently and gave birth to a child. However, the State Commission was of the view that the complainant was not a consumer because services offered were rendered for free. [2]

In State of Haryana V. Santra[3] the court had held that the decree awarding damages for medical negligence on account of the lady who gave birth to an unwanted child due to failure of sterilization operation because it was found on facts that the medical practitioner had operated only the right fallopian tube and had left the left fallopian tube. The medical practitioner had informed the patient that her operation was completed and it was successfully done and that she would not conceive a child in the future. Thus, a case of medical negligence was reported as she conceived later. Decree for compensation in tort was held justified. But In State of Punjab V. Shiv ram[4] the Supreme Court held that "merely because a women having undergone a sterilization operation becoming pregnant and delivering a child after that, the operating surgeon or his employer cannot be held liable on account of the unwarranted pregnancy or unwanted child. Failure which had occurred due to natural cause, no method of sterilization being fool proof of guaranteeing 100% success, would not provide any ground for a claim of compensation. The Hon'ble Court after reading several books on Gynecology and empirical researches recognized the failure rate of 0.3% to 7% depending on the technique chosen out of various recognized and accepted ones. "

However, the facts of Achutrao Hari BhauKhodwa V. State of Maharashtra [5] brings another perspective of negligence exhibited by the medical practitioners. In the said case it was alleged that a mop was left in the body of the patient which had resulted in the formation of pus and eventually lead to the death of the patient. The court held that the doctrine of res ipsaloquitor had applied and the State is held liable to pay compensation for the negligence of the doctors. In Poonam Verma V. Ashwin Patel[6] the said case reflects yet another reckless act on the part of the medical practitioner. The doctor was a registered medical practitioner and was entitled to practice in homeopathy was found to be guilty of negligence for prescribing allopathic medicines resulting in the death of the patient. The medical practitioner was grossly negligent which is a clear breach of duty. In the instant case the doctor had defined all sense of logic and left behind the ethics. In the said case the appellant claimed defendant a sum of Rs 3,00,000/.- Rupees Three Lakhs Only. After almost a decade after the Poonam Verma Case In Prof P.N Thakur and Another Vs Hans Charitable Hospital and Others[7] before the National Commission, in this case allopathic treatment was given by non-medical practitioner specialized in Unani System. The patient was suffering due to fever and repeated bleeding from nose and the same resulted in rigors in patient as a result of which his condition deteriorated. A small nasal pack was placed anteriorly. The patient died lagter due to choking of air passage. However, no efforts were made to clear blocked airways by the doctor as he did not appreciate the course of action which needs to be followed in that case. The

[2] Paramjit Kaur V. State of Punjab III (1997) CPJ 394
[3] (2000) 5 SCC 182
[4] (2005) 7 SC 1
[5] AIR 1996 SC 2377
[6] AIR 1996 SC 2111
[7] II (2007) CPJ 340 (NC)

defendant/ Hospital was held liable for allowing unqualified person to treat such complicated emergency cases.

There are few cases where it is seen that the complainants have requested the relief which is not been given under the Consumer Protection Act, 1986. In those cases, the Courts have refrained to award remedies so claimed. For instance, in the case Parmod Grover and Others V. Manvinder Kaur and Others [8] the complications during pregnancy led to death of the patient. The Complainant alleged medical negligence and claimed for relief in the form of permanently restraining and debarring the medical practitioners from practicing their profession and cancelled their medical certificates. The relief was denied to the complainant as it could not be granted according to the court under section 14 of ten Consumer Protection Act, 1986. Likewise, direction regarding the closure of OP nursing home was also not allowed as per section 14 of the Consumer Protection Act with a direction that the complainant is at liberty to approach the civil court.

In the landmark judgement in Indian Medical Association V. V.P Shantha[9] the ambit of Consumer Protection Act was widened by stating that the Medical Practitioners are not immunefrom a claim for damages on the groun of negligence but had issued several directions of immense significance for ensuring welfare of the consumers.

In KishoriLal V ESI Corporation the appellant was insured under the ESI Corporation and deductions were made from his salary by the employer and the same was deposited at sonipet for treating diabetes, where her condition deteriorated and who was later examined in a private hospital. It was found during that time that she was wrongly diagnosed at ESI Dispensary. The appellant alleging deficiency in service filed a complaint under the Consumer Protection Act. The Hon'ble Supreme Court in its revision petition held that services rendered by the medical practitioners of the said hospital homes run by the ESI Corporation cannot be regarded as service rendered for free of cost as sections such as 39 and 42 of the ESI Act contemplate contributions from both the employer and the employee, which can be deemed to be fee for the service. thus, wife of the complainant was considered to be the consumer as per the Consumer Protection Act.

In Kusum Sharma V. Batra Hospital[10] the Hon'ble Supreme Court has viewed that the law relating to medical negligence, MrDalveerBandari J, scrutinizing the cases of medical negligence both in India aswell as abroad specially that of the United Kingdom has laid down certain principles to be kept in view while deciding the cases of medical negligence. According to the Court, the following principles must be kept into account while deciding whether the medical practitioner is guilty of medical negligence:

1. Negligence is a breach of duty exercised by omission to do something which any reasonable man, guided by those considerations which ordinarily regulate the conduct of the human affairs, would do, or doing something which any prudent , reasonable man would not do.

[8] II (2007) CPJ 63 (NC)
[9] II (2007) CPJ 25 (SC)41
[10] (2010) 3 SCC 180

2. Negligence is considered as an essential ingredient of the offence. The negligence inorder to be established by prosection must be culpable or gross and not the negligence based only upon the error of judgement.
3. The medical practitioner is generally expected to bring a reasonable degree of skill and knowledge and he must exercise a reasonable degree of care. Neither very highest not a very low degree of care and competence judging in the light of the particular circumstances of each case required by the law.
4. A medical practitioner would be held liable only where his conduct fell below that of the standards of any reasonably competent practitioner in his field.
5. In the realm of treatment or diagnosis and treatment there is scope for genuine difference of opinion and one medical practitioner is clearly not negligent merely because his conclusions are different from that of the other.
6. The medical practitioners are generally called upon to adopt a procedure which involves higher risk but which he honestly believes as providing greater chances of success to the patient rather than a mere procedure which involves lesser risk but higher chances of failure. If the medical practitioner looking into the gravity of illness has taken higher element of risk to redeem the patient out of his suffering which did not yield the desired result may not amount to medical negligence.
7. Negligence cannot be attributed to a medical practitioner who performs his duties with utmost skill and competence. Merely because the doctor chooses one course of action rather than the other available one, he would not be held liable for the course of action chosen by him which was acceptable to the medical practitioner.
8. It wouldn't be conducive to the efficiency of the medical practitioner if no doctor could administer medicine without a halter round his neck.
9. It is to be considered as the general public duty and obligation to make sure that medical practitioners are not unnecessarily harassed or humiliated letting them perform their professional duties without any fear and apprehension.
10. The medical practitioners need to be saved from such a class of complaints which leads to criminal process as a tool for pressurizing the medical practitioners/hospitals, morefully the private hospitals or clinics for extracting uncalled for the compensation. These kind of malicious proceedings needs to be discarded against the medical practitioners.
11. The medical practitioners needs to be given protection so long as they perform their duties with reasonable skill and competence and with the interest of the patients. The paramount of the medical profession must be the interest and welfare of the patients.

However, the Hon'ble Court did not rest the case here with laying down eleven principles to determine the braech of duty by medical practitioner/hospital but went a step ahead by making the following observation " the aforesaid principles must be kept in view while deciding the cases of medical negligence". The court further adds a word of caution by stating that, "we should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duty with free mind.

The Article 141 reads as follows " Law declared by the Supreme Court shall be binding on all courts within the territory of India.

The above mentioned is a list of basic principles with a direction that they must be kept with a view while deciding the cases of medical negligence which reflects the judicial attitude of the Hon'ble Supreme Court. Any decision, judgement which is passed by the Supreme Court becomes the law of the land. And it will automatically bind on all other lower courts of the country by virtue of the Article 141 of the Constitution of India. Hence, the above mentioned principle needs to be considered as law of the land on medical negligence. On one hand, these principles provide an adequate protection to the doctors and hospitals provided they have exercised their reasonable degree of care which is neither the highest nor low degree of care and competence judged in the light of the particular circumstances of each cases. The doctors need to be given chance to choose among the various available alternatives courses of treatment avalaible and he will choose the best course of action which is in the interest and well being of the patient. On the other hand, they did provide that the medical practitioner would be liable only where his conduct fell below of the standards of a necessary competent practitioner.

This decision is considered as progressive in nature as it provides a safety net to the medical professional against unnecessary harassment and humiliation. This will let them perform their duties without any fear and apprehensions and would save them from undue pressure for extracting uncalled for compensation. ultimately it should be understood that the doctors are not the insurers of life. Error in judgement in prescribing treatment so long as it is within the prescribed medical standards should not incur unnecessary liability to the medical practitioner nor the hospital. This decision would benefit both the doctors/hospitals shall not be put to unnecessary harassment and at the same time any causal, careless or negligent performance of professional duty on their part should be hold liable in negligence. This judgement would likely ensure welfare of the consumer.

In Vinod Jain v. SantokbaDurlabhji Hospital, the petitioner's wife, a cancer patient who was immunosuppressed due to previous chemotherapies, was admitted to a multi-specialty hospital for chills and fever on October 15, 2011. A early diagnostic revealed a WBC level of 15,030, which indicated infection. The existence of an infection-causing organism "Methicillin Sensitive Coagulase Negative Staphylococcus Aureus" was revealed in a blood culture report received on October 18.

According to the medical ledger provided by the responders, the mentioned organism is recognised as an infection-causing agent (pathogen) that can be fatal if not treated properly. Immunocompromised individuals and/or patients with prosthetic device implants should be addressed as a pathogen rather than a contaminant. Furthermore, the mainstay of treatment for a infection is intravenous Vancomycin.

However, the treating doctor misdiagnosed the bacterium by treating it as a contaminant. As a result, intravenous Vancomycin was foregone in favour of an oral pill called Polypod, which was to be supplied through the nasal feed tube after being dissolved in water. The patient was therefore prematurely discharged, despite the fact that her WBC count (16,050) was on the rise, and she slipped into a coma at home on October 23, as the infection had reached uncontrolled proportions. Despite strenuous attempts by numerous hospitals to reduce her WBC count, she died on October 31 from septicaemia that resulted in multi-organ failure. As a result, the patient died as a result of the incorrect diagnosis and treatment.

The petitioner took his grievances to the State Consumer Dispute Redressal Commission, which ordered the hospital to pay him Rs 15 lakh in compensation. The National Consumer Dispute Redress Commission, however, overturned the order. The petitioner took his grievance to the Apex Court, which dismissed the petitioner's SLP. While doing so, the Court noted that while a misdiagnosis was possible, it did not constitute medical negligence.

Despite a previous ruling by the Court in Malay Kumar Ganguly v. Sukumar Mukherjee, where the misadministration of the steroid "Depomedrol" due to a misdiagnosis was found to be medical negligence, the same was upheld. When discussing medical negligence, the Supreme Court stated:

"It would not be considered negligence if you did not act in accordance with the standard, reasonable, and competent medical measures available at the time. A medical practitioner, on the other hand, must use the reasonable degree of care, skill, and knowledge that he possesses. Medical negligence would be the failure to diagnose with due care, resulting in the wrong treatment being delivered."

It was also stated that"Medical negligence legislation must keep pace with improvements in medical research, both in terms of treatment and diagnostics.The doctor's job is to keep the virus from spreading further.To assess if the infection is getting better, blood tests and cultures should be done on a regular basis.

The above decision was significant because it improved medical negligence jurisprudence and recognised the repercussions of a faulty diagnosis, such as incorrect prescription and the resulting risk to the patient's health.However, in Vinod Jain (above), the Court stated that."There was no evidence to suggest any unexplained deviation from usual protocol, or that the deceased's health was jeopardised as a result of her post-mortem ailments."The Court concluded that there were no unexplained departures from practise and authorised a departure from such protocols, despite its previous findings.

Apart from being a setback for medical jurisprudence, it also violates the doctrine of judicial procedural appropriateness and decorum enunciated by the Supreme Court in Central Board of Dawoodi Bohra Community v. State of Maharashtra, which stated:

It will be open only for a bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier bench of co-equal strength, whereupon the matter be placed for hearing by a bench consisting of a quorum larger than the one which pronounced the decision laying down the law of correctness of which is doubted."

To avoid a miscarriage of justice, the ideal method in the case of Vinod Jain (supra) would have been to either send the case to the Chief Justice of India to set up a larger bench or follow the procedure given down by the Supreme Court in the Dawoodi Bohra Community case.

The core of Western medical research is correct diagnosis followed by correct treatment according to established protocols. Without a correct diagnosis, treatment would be blind and would very likely kill the patient.

Decisions like Vinod Jain damage people's faith in the healthcare industry and the judiciary at a time when the country's healthcare professionals are being praised for their successful response to the

COVID-19 outbreak. The healthcare industry will undoubtedly continue to take centre stage in our lives for weeks, if not years, to come. The likelihood of medical malpractice as a result of the increased strain on the medical system cannot be ruled out.

1. As a result, the moment has come for the Supreme Court to issue thorough guidance in medical malpractice cases. In this sense, the Supreme Court may benefit from the following ideas.
2. The Supreme Court and the Medical Council of India (MCI) should form a committee to reconcile the numerous statutes of law and the MCI's rules and produce complete guidelines for adjudicating medical negligence cases.
3. Medical negligence matters might be adjudicated by specialised courts, or the National Medical Commission's ethics committee could be led by a serving/retired Supreme Court Judge.
4. Section 1.2.3 of the MCI Act, which requires 30 hours of continuing education followed by a written exam every five years, must be vigorously enforced, and a doctor's licence should only be renewed if he or she passes the exam.
5. In medical negligence instances, strict adherence to Sections 191, 192 of the Indian Penal Code, 1860.

Conclusion

In the midst of the COVID-19 pandemic's uncertainty, the judiciary remains the only beacon of hope for individuals concerned about a lack of proper medical infrastructure and escalating incidents of medical malpractice. There is hope that the Supreme Court will take the necessary steps to protect the people's faith and hope.

The Supreme Court in Jacob Mathews case continued to be a leading precedent which had followed the Bolam Test ie. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. In the above mentioned case the Hon'ble Court has held to that effect that the course to follow would depend upon the facts and circumstances of a given case also the procedure adopted must be one which is acceptable to medical science on that day.