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SUPREME COURT AND MEDICAL NEGLIGENCE: NECESSARY PROTECTION OR LICENSE TO KILL

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INTRODUCTION

At the present time we are living in an era of welfare state and in this welfare state mental and physical health is considered to be the most precious and valuable possession of the people and is the very basis of human personality. Health as a basic human right should be viewed holistically and its positive aspect, that is, well being should be acknowledged which would lead to achievement of a socially or economically productive life. Negligence in the framework of medical profession inevitably calls for a treatment with an improper care and lack of obligatory action to be taken. "*Medical Negligence*" started engaging the attention of jurists more than a century ago in England. *However*, in India, the Apex Court gave its first judgment in 1965.

Medical Negligence comes into action when the treatment provided by a health service provider (such as doctor, hospital, surgeon, physician etc) falls below a suitable standard. Medicine is a convoluted practice and the doctors are not expected to be 100% correct. It is sometimes unsuccessful and injuries can sometimes take place but that does not mean that there has been any negligent act done by a doctor. The patient has a right to be treated with a reasonable degree of care, skill and knowledge. Increasing pressure on hospitals, falling standards of professional competence and the complexity of therapeutic and diagnostic methods all contribute to Medical Negligence.

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Like most cases of negligence, medical negligence have civil, criminal and in recent times, consumer aspects. However, all the remedies available, the criminal remedy is the harshest. A mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is nothing short of negligence. The right to equality encompasses within itself the right of a poor patient to get adequate treatment and medicines from the state irrespective of their costs. But the law recognizes the dangers which are inherent in operations, where the operation is a race against time; the court will make greater allowance taking into account the "*risk-benefit"* test.

Only those treatments which go beyond being a simple reasonable mistake or error can be called as negligent treatment. It also includes delay in diagnosing a condition, impediment in providing the appropriate treatment, failing to endow with reasonable care and other essential care which is needed to be taken. The patient has a right to be treated with a reasonable degree of care, skill and knowledge. There is an assortment of constitutional provisions which provides for the protection of the rights of the deceased patient or the legal custodian of the deceased and also there are various cases which shift the gear towards the side of the doctors which are called in the court of law by the patients for their grievances. There is a variety of precedents which protects the doctors by being held criminally negligent.

The environment in India is still in favour of medical practitioners since the patients/consumers are primarily and practically ignorant of their rights against "medical negligence" and Indian belief in destiny compels the consumers not to take things so seriously as they should be taken. *Notwithstanding* this drawback, whenever medical profession in all its hues and colours has faltered and their negligence exposed, Indian judiciary has come down heavily upon them so as to protect the interests of the common man. Service rendered to a patient by a medical practitioner by way of consultation, diagnosis and treatment, both medical and surgical, was held to fall within the 'ambit' of service as defined in *Section 2(1) (o) of the Consumer Protection Act, 1986.*

The *High Court* of Rajasthan in *Sobhag Mal Jain V. State of Rajasthan & Others*[2] held that "A doctor who fails to attend his patient or who is dilatory in attending, maybe guilty of negligence if a reasonable doctor would have appreciated that his attendance was necessary in his patient's interest"

[2] AIR 2006 RAJ 66

"A Doctor has duty to monitor the treatment given to the patient, particularly where the treatment carries a high risk of an adverse reaction. This duty obviously extends to post operative condition which the patient may develop".

The negligence committed by the doctor's which results in stern injuries and sometimes death also has been very critically discussed in recent times. At one time it was thought that the foremost concern of the state is the maintenance of peace, law, order, security and protection of life of the people the state. Such a role of the state is no longer a valid notion. The directive principle of state policy under the Constitution of India requires the state to make effective provisions for public health and also for the humane circumstance of work.

The obligation of the state to ensure the creation and sustaining of conditions congenial to good health is cast by the constitutional directives contained in *Articles 39 (e) (f), 42 and 47* in part *IV* of the Constitution of India. *Article 21* of the Constitution of India guarantees the protection of life and personal liberty by providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law. As a result of the liberal interpretation of the words *"life"* and *"liberty", Article 21* has now come to be invoked as a residuary right which has resulted in a no. of petitions seeking unique treatment of children in jail, redressal against failure to provide instantaneous medical aid to the injured persons. This article casts an obligation on the state to safeguard the right to life of every person, preservation of human life being paramount magnitude.

In *Parmachand Katara V. Union of India*[3], the Supreme Court declared that right to medical aid is an integral part of right to life. It is an obligation on the state to preserve life by extending required medical assistance. In fact, the Apex Court has held that right to health and medical care is a fundamental right under the constitution of India.

Further, the Supreme Court in *Paxchim Banga Khet Mazdoor Samiti V. State of WB*[4] held that providing adequate medical facilities for the people is an essential part of the obligation undertaken by the government in a welfare state. *Article 21* imposes an obligation on the state to safeguard the right to life of every person and reach of which can move the Supreme Court on high court through writ petition, under *Article 32* and *226 of Constitution of India*.

[3] AIR 1989 SC 2039
[4] JT, 1996 (8) SC 43

The other germane proviso is *S. 304-A of the IPC* which says that whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. The *Supreme Court* in *Dr. Suresh Gupta's Criminal Appeal*[5] held that to sustain a prosecution for the offence under Section *304-A of IPC* and to fix criminal liability on a doctor or a surgeon, the standard of negligence required to be proved should be so high that it can be described as "*gross negligence*" or "*recklessness*", not merely lack of appropriate and obligatory care. Elaborating further, the court said to establish the criminal liability against doctor for causing the death of his patient during treatment, "the act complained must show negligence or rashness of such a high degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable". The question has caused heated debates throughout the medical community, as well as involving specific, if not partisan position from the police and the legal community.

As far as criminal cases against doctors are concerned it is lodged mainly following the unnatural death of a patient under their care. The section employed is generally *304 of IPC*. For a rash or negligent act not amounting to *culpable homicide* and carries a maximum punishment of *two years*, or *fine*, or both.

Until this Judgment cane out, a precedent was set by the decision of the *Supreme Court in Mohanan V. Prabha G. Nair*[6]. In this case instead of asking repeatedly by the husband regarding the shifting of his wife to some other hospital, the doctor advised against the shift saying that the patient had no serious problems and that everything would turnout all right. His wife in the seventh month of pregnancy underwent medical intervention and delivered a dead child next day. She also passed after three days. Subsequent events obviously proved otherwise.

From the above mentioned case a *principle* can be laid down that to hold a doctor criminally liable for a patient's death, it must be established that there was negligence or incompetence on the doctor's part, which went beyond civil liability. Criminal liability would arise only if the doctor did something in this disregard to the patient's life and safety.

[5] 2004 (6) SCALE 432
[6] 2004 CPJ 21 (SC)

However in *Dr. L.B. Joshi V. Dr. T.B. Godbole*[7], the Supreme Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. He owes a duty of care to the patient in deciding whether to undertake the case and what treatment to give. A breach of such duty gives a right of action to the patient for negligence of the doctor.

To safeguard the rights of the doctor there are also provisions in *IPC* which protects the doctors from being held criminally negligent. *Section 80 of the IPC* says that "nothing is an offence which is done by misfortune, and without any criminal intention or knowledge in the doing of a lawful act, in a lawful manner, by lawful means and with proper care and caution. In other words if a person commits an act by accident or misfortune without a criminal intention, using lawful means and with proper care and caution, his action cannot be labeled as criminal offence.

Also *Section 88 of IPC* provides that nothing which is not intended to cause death is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm. In other words, an act, not intended to cause death, and done in good faith and with the consent of the other party, cannot be labelled an offence even if it leads to the other party's death or disability. It may also be mentioned here that the word '*good faith'* used here has a special meaning. It means an act done with due care and attention.

The Supreme Court judgement in Jacob *Mathew V. State of Punjab*[8] is a land mark judgement as the apex court has framed the guidelines under which a doctor could be held criminally liable on account of professional negligence or deficiency of services. Relying upon the facts the apex court held that the doctor could not be prosecuted for it. The Supreme Court also said that extreme "*care and caution*" should be exercised while initiating criminal proceedings against medical practitioners for alleged medical negligence and drew up elaborate safeguarding including avoiding arrest unless it was inevitable.

[7] AIR 1969 SC 128
[8] AIR 2005 SC 3180

Drawing elaborately from established law and practice, the bench ruled that this was necessary "*for, the service which medical renders to human beings is probably the noblest of all and hence there is a need for doctor from unjust prosecutions"*. Medical practitioners do not enjoy any immunity from an action in tort, and they can be sued on the ground that they have failed to exercise the reasonable skill and care.

Thus, it can be said that inspite of remedy under different laws the patient of medical negligence are still suffering and they need additional protection especially the patient form the Government hospitals. Consumer law can be a great help provided the consumers should be sentient of their rights.

CONCLUSION:

From the above discussion it can be *concluded* that inspite of the various remedies falling under the ambit of law the patient still, especially from the government hospitals are suffering from the cause of "*medical negligence*" and are kept away from the implications of law to it. Despite of the *Consumer Protection Act, 1986*, patients are finding it very difficult to raise their voice against an act of Medical Negligence. It is difficult to establish the standard of care in medical negligence. Coupled with the expense of bringing a legal action, *this limits medical litigation*. *Now*, the next forwarding step that the government should activate is the general awareness of the consumer's law among the common people of the "*Union of India*". The remedy lies in the awareness and enforcement of the health rights of the citizen through courts, but it more lies in the cure of improper and corrupt approaches in the seemingly healthy ones whose obligation is to prove for adequate health care.