

# **RMM LAW COLLEGE SAHARSA**

## **LAW OF TORTS**

### **IIIrd Part**

### **Paper -V**

### **TOPIC- Medical and Professional Negligence**

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### **Introduction**

Medical negligence is a combination of two words. The second word solely describes the meaning, though the meaning of negligence has not been described in a proper way it is an act recklessly done by a person resulting in foreseeable damages to the other. Negligence is an offense under tort, IPC, Indian Contracts Act, Consumer Protection Act and many more. Medical Negligence basically is the misconduct by a medical practitioner or doctor by not providing enough care resulting in a breach of their duties and harming the patients which are their consumers.

A **professional** is deemed to be an expert in that field at least; a patient getting treated under any doctor surely expects to get healed and at least expects the doctor to be careful while performing his duties. Medical negligence has caused many deaths as well as adverse results to the patient's health. This article focuses on explaining negligence under various laws, professional negligence, medical negligence, and landmark as well as recent cases in India. This provides information on liability that can be incurred by the victim of the medical malpractice. It aims at providing information about the topic to create as much awareness as possible.

#### *Medical Negligence*

***No doctor knows everything. There's a reason why it's called "practising" medicine.***

To err is human. Though patients see the doctors as God and believe that their disease will be cured and they will be healed by the treatment but sometimes even the doctors make mistakes which can cost a lot to the patients in many ways. Sometimes the mistakes are so dangerous

that a patient has to suffer immensely. ***“In my opinion, our health care system has failed when a doctor fails to treat an illness that is treatable.”*** – Kevin Alan Lee. Being in such a profession where sick, ill and sufferers are your customers who look upon you as the almighty, an absolute amount of care is expected. This kind of mistake is called negligence. If an owner of the restaurant can be sued for providing low-quality food then even a doctor can be sued for providing low-quality treatment and care.

Mistakes or Negligence in the medical profession may lead to minor injuries or some serious kinds of injuries and sometimes these kinds of mistakes may even cause death. Since no man is perfect in this world, it is evident that a person who is skilled and has knowledge of a particular subject can also commit mistakes during his practice. To err is human but to replicate the same mistake due to one’s carelessness is negligence. The fundamental reason behind medical error or medical negligence is the carelessness of the said doctors or medical professionals it can be observed in various cases where reasonable care is not taken during the diagnosis, during operations, sometimes while injecting anesthesia etc.

For example, after a severe operation of a patient, he is likely to get infected by many diseases because of certain reason which can include loss of blood, weakness, high dose of medicines. In due course, a standard care is expected from the doctor to give premedication regarding certain infectious diseases. If a doctor fails to do so due to which a patient suffers from some infection which can cause a lot of harm or even death in adverse cases, the doctor is said to have committed medical negligence or malpractice.

### ***Professional Negligence***

Professionals are persons professing some special skill or job, who are trained to profess in that area especially and bear the responsibility of professing with due care. Such professionals include lawyers, doctors, architects etc. The Supreme Court in **Jacob Mathew vs. State of Punjab [Appeal (crl.) 144-145 of 2004]**, explained: a professional entering into a certain profession is deemed to have knowledge regarding that profession and it is assured impliedly by him that a reasonable amount of care shall be taken to profess his profession. The person can be held liable for negligence if he did not possess the required skills to profess or he failed to take an essential amount of care to profess the said profession.

The law nowhere states that a professional shall be held liable if he fails to perform his skills, it states that a professional shall take a reasonable amount of care and shall possess knowledge as compared to any practitioner in the same field. The skills of different professionals surely

differ from one another even if they are practicing in the same field but what is required is that a professional has knowledge of new advances, discoveries, and developments in his field so as to give essential care to the consumers of his profession. The failure to comply with this which any ordinary professional would have done properly amounts to professional negligence liable under the law.

Similarly, a lawyer is under an obligation to uphold the law and protect the rights of his clients. If a lawyer fails to perform his obligation with due care or does not render true services to his clients, his negligence can ruin someone's life and can damage the law as well. Bar Council of India has made some rules for lawyers towards their clients, judges, and society which every lawyer is bound to follow. If they disobey such rules, they are held liable and the Bar Council of India can take strict actions against them.

### **Jagdish Ram and ors Vs. State of Himachal Pradesh (2008, ACJ 433)**

In this case, the Apex court has laid down that in the law of negligence, professionals such as lawyers, doctors, architect and others are included in the category of those persons who are especially skilled and trained in their respective fields. Any task or work which requires a specialized skill is included in a profession. Any person entering in a profession of any branch requires a particular level of knowledge of that particular branch to be called as a professional and he is expected to exercise his work with reasonable care. He assures his clients that he shall exercise his work with reasonable care and caution but he does not give any guarantee of the outcome. A doctor cannot give full assurance to save someone's life, a lawyer does not give assurance of succeeding but the only assurance they can give is that they will perform their work with reasonable care and will render their reasonable efforts towards their work to satisfy their client.

A professional cannot be held liable for not succeeding in his work if he does his work with reasonable care. A professional can be held liable only when he does not exercise his work with requisite skills and reasonable care.

Whether the person is negligent or not is judged in two ways: either he did not possess requisite skills which he professed to possess or he did not use his requisite skills with reasonable care.

## ***Essentials***

### **Doctor's duty to attend the patient with care –**

Medicine is such a profession where a practitioner is supposed to have requisite knowledge and skill needed for the purpose and has a duty to exercise a reasonable duty of care while dealing with the patient. The standard of the care depends upon the nature of the profession. A surgeon or anesthetist will be determined by the standard of an average practitioner in that field while in case a higher skill is needed.

If the doctor or a specialist doesn't attend a patient admitted in an emergency or under his surveillance and the patient dies or becomes a victim of consequences which could have been avoided with due care from the doctor, the doctor can be held liable under medical negligence. This was held in **Sishir Rajan Saha Vs. The state of Tripura [AIR 2002 Gau 102]** that if a doctor did not pay enough attention to the patients in government hospitals as a result of which the patient suffers, the doctor can be held liable to pay compensation to the patient. Moreover, the liability of the doctor cannot be invoked now and then and he can't be held liable just because something has gone wrong. For fastening the liability, a very high degree of such negligence was required to be proved. A doctor or a medical practitioner when attends to his patients owes him the following duties of care:

1. A duty of care in deciding whether to undertake the case
2. A duty of care in deciding what treatment to give
3. A duty of care in the administration of the treatment

When you go to a doctor, you expect to be seen promptly and attentively, and at a reasonable cost. You expect the doctor to be knowledgeable about the latest advances in his field of specialty, and educate you about your diagnosis and prognosis, and explore the best possible solution to your health issue. In short, you expect to be healed. But for millions of people, what they expect is far from what they receive.

### **Doctors acting in a negligent manner**

It is well accepted that in the cases of gross medical negligence the principle of *res ipso loquitur* is to be applied. The principle of *res ipso loquitur* is said to be essentially an evidential principle and the said principle is intended to assist the claimant. *Res Ipso loquitur* means things speaks for itself; while deciding the liability of the doctor it has to be well established

that the negligence pointed out should be a breach in due care which an ordinary practitioner would have been able to keep. Latin for the thing speaks for itself, a doctrine of law that one is presumed to be negligent if he/she/it had exclusive control of whatever caused the injury even though there is no specific evidence of an act of negligence, and without negligence, the accident would not have happened. A doctor is not an insurer for the patient, inability to cure the patient would not amount to negligence but carelessness resulting in an adverse condition of the patient would.

In **Gian Chand vs. Vinod Kumar Sharma [AIR 2008 HP 97]** it was held that shifting of the patient from one ward to another in spite of requirement of instant treatment to be given to the patient resulting in damage to the patient's health then the doctor or administrator of the hospital shall be held liable for negligence. Also in **Jagdish Ram vs. State of Himachal Pradesh [2008 ACJ 433]** it was held that before performing any surgery the chart revealing information about the amount of anesthesia and allergies of the patient should be mentioned so that an anesthetist can provide ample amount of medicines to the patient. The doctor in above case failed to do so as a result of the overdose of anesthesia the patient died and the doctor was held liable for the same.

### *Liability*

The liability of the person committing the wrong can be of three types depending on the harm or the injury suffered by the injured person they are –

1. Civil Liability
2. Criminal Liability
3. Other Liability

### **Civil Liability**

Civil liability usually includes the claim for damages suffered in the form of compensation. If there is any breach of the duty of care while operating or while the patient is under the supervision of the hospital or the medical professional they are held to be vicariously liable for such wrong committed. And are liable to pay damages in the form of compensation. At times the senior doctors are even held vicariously liable for the wrongs committed by the junior doctors. If someone is an employee of a hospital, the hospital is responsible if that employee hurts a patient by acting incompetently.

In other words, if the employee is negligent (is not reasonably cautious when treating or dealing with a patient), the hospital is on the hook for any resulting injuries to the patient. In **M Ramesh Reddy vs. State of Andhra Pradesh [2003 (1) CLD 81]**, the hospital authorities were held to be negligent, inter alia, for not keeping the bathroom clean, which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1 Lac was awarded against the hospital

### **Criminal Liability**

There may be an occasion when the patient has died after the treatment and criminal case is filed under Section 304A of the Indian Penal Code for allegedly causing death by rash or negligent act. According to S. 304A of the IPC, whoever causes the death of any person by a rash or negligent act not amounting to culpable homicide shall be punished by imprisonment for up to two years, or by fine, or both. Hospitals can be charged with negligence for transmission of infection including HIV, HBsAg, etc. if any patient develops such infection during the course of treatment in the hospital and it is proved that the same has occurred on account of lapse on part of the hospital then the hospital can be held liable for lack of reasonable duty to care.

### ***Other Liability***

Further, In **Dr. Suresh Gupta vs. NCT of Delhi [Appeal (crl.) 778 of 2004]** Supreme Court of India held that the legal position was quite clear and well settled that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation. Only when the negligence was so gross and his act was as reckless as to endanger the life of the patient, criminal law for the offence under section 304A of Indian Penal Code, 1860 will apply. sections 52, 80, 81, 83, 88, 90, 91, 92 304-A, 337 and 338 contain the law of medical malpractice in India.

The conduct of medical malpractice was brought under the Consumer Protection Act, 1986, due to the landmark case of the **Indian Medical Association vs. V. P. Shantha & others [1996 AIR 550]**, The judgment in this case defined medical care as a “service” that was covered under the Act, and also clarified that a person seeking medical attention may be considered a consumer if certain criteria were met. They are –

1. The service provided was not free of charge or for a nominal registration fee;

2. If free, the charges were waived because of the patient's inability to pay;
3. The service was at a private hospital that charges all patient's; or
4. Any service rendered which was paid for by an insurance firm.

This meant that certain categories of patients could now sue errant health care providers for compensation under the Consumer Protection Act, 1986, as a breach of contract. Only facilities and doctors that provided all services free of cost to all clients were not liable under the CPA. However, even patients that do not fall under the category of consumers under the Act can sue for negligence under the law of Torts. The burden to prove negligence, however, is on the patient.

### ***Landmark Cases:-***

#### **Pravat Kumar Mukherjee vs. Ruby General Hospital and ors. (AIR 2007 cal 77, 2006 (4) CHN 689)**

A landmark judgment by National Commission of India was delivered in this case. The complaint was filed by the parents of the deceased boy named Samanate Mukherjee, a 2nd year B. Tech student of Netaji Subhas Chandra Bose Engineering College. The complaint was filed in National Commission of India. The boy was hit by Calcutta transport bus and rushed to the nearest hospital. When he was admitted to the hospital he was conscious and he showed his medical insurance card, which clearly stated that he will be given Rs. 65,000 by the insurance company in case of an accident. The hospital started treating him on the basis of the insurance card but in the middle of the treatment the hospital demanded an urgent payment of 15000 and on the non- payment of money, hospital discontinued the treatment of the boy. Due to the discontinuation, he was rushed to another hospital but he died before reaching the hospital.

The National Commission held the ruby hospital liable in this case and provided a compensation of Rs.10 Lakhs to the parents of the boy.

#### **Balram Prasad vs. Kunal Saha [(2014) 1 SCC384]**

Dr. Kunal Saha, a US bases Indian origin doctor filed a complaint against Advanced Medical Research Institute (AMRI) and doctors for medical negligence. Dr. Saha had come to Kolkata with his wife for vacations in summer where his wife had a complaint of skin rashes. She consulted Dr. Sukumar Mukhejee, who prescribed her injection to be taken on daily basis. This injection affected the health of the patient and due to which she got admitted in AMRI hospital

where she was treated wrongly which deteriorated her condition and subsequently shifted to Mumbai Breach Candy Hospital where she died in the middle of the treatment.

Dr. Saha then filed a civil and criminal complaint against the hospital and doctors and demanded Rs. 5 crore as compensation. As his wife contributed to the house and she was also working and earning. Her sudden death had affected Dr. Saha emotionally as well as financially. The Apex court, in this case, has held that sudden death of his wife affected him emotionally as well as financially. He is entitled to adequate compensation for the loss of gratuitous service rendered by his wife. Court has enhanced the compensation amount of 1.73 crores which was awarded by National Consumer Redressal Commission to 5.96 crores.

#### **V. Krishna Rao vs. Nikhil Super Speciality Hospital [(2010)5 SCC513]**

This is a case of Res Ipsa loquitor. Krishna Rao, an officer in malaria department field admitted his wife in the hospital for the treatment of malaria. The hospital without examining her and without conducting any test started treatment of typhoid. Due to the wrong treatment, the condition of Krishna's wife got worse and she died during the treatment. Her medical reports clearly show the negligence of the hospital. The court held the hospital liable and awarded a compensation of Rs 2 lakhs to the plaintiff from the defendant.