

Research Topic- Medical Negligence (Bangalore and Gurugram)

*- Kshitij Chandra Pandey**

Abstract

In this research paper the researcher has mainly focused on the medical negligence and has tried to find out whether the doctors negligence and the hospital's negligence are the only reasons responsible for the medical accidents. In this research paper researcher has taken cases from the two Medical hubs of India i.e., Bangalore and Gurugram to find out and analyse the factors responsible for the increasing number of medical negligence in the Republic of India. India is the developing country and due to which it doesn't has such developed medical facilities and instruments in the country. As per the report of health ministry in 2018 a total of 2406 cases files in three quarters of medical negligence and 1401 cases has been disposed of by the consumer courts in India. These are only the registered cases of medical negligence there are thousands of cases which are not yet registered. With the increasing number of medical negligence cases in Gurugram in particular the Haryana Government decided to form a panel to investigate into medical negligence cases. After investigation the panel made a conclusion and submitted the report in 2019 and said that only 15% of the cases of medical negligence genuine and found doctors at fault and other 75% cases were not covered under medical negligence by the panel. Similarly in Bangalore Karnataka Medical Council registered 329 cases of medical negligence between 2012-2017 in which only in 33 cases doctor was found to be guilty and other cases are still pending in the court. So in this research paper the researcher has tried to analyse the medical negligence cases in past and has also tried to find out the role of Consumer Protection Act in this aspect.

Keywords :- medical negligence, Panel by Haryana Government, Gurugram, Bangalore.

I Introduction

Negligence has been defined in 'Law of Torts' by Ratanlal and Dhirajlal. Negligence has been discussed as: Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.

Medical negligence is the failure of a medical practitioner or a health care provider to provide proper care and attention and exercise those skills which a prudent, qualified person would do under similar circumstances¹. To conclude if the doctor has been negligent, the judiciary used some test

The most widely recognised of them being the Bolam test. It was first recognised in the case of Bolam vs Friern Hospital Management Committee². It states that if a doctor has acted according to proper and accepted practice, he is not guilty of medical negligence. The other popular test is Bolitho test³, it was first decided in the House of Lords. It states that the defence could not be considered reasonable if the body of doctors or supporting witnesses were not capable of withstanding logical analysis. That means providing a defence is not quite good enough, but that the defence and its body of opinion must be reasonable and responsible. A case which is defended based on a practice which is not reasonable or logical thus cannot be defended.

Bolitho test modified the Bolam test. In Bolitho v City and Hackney Health Authority, 1997⁴, Lord Browne-Wilkinson restricted the boundaries of Bolam, stating:

- (1) "The court should not accept a defence argument as being 'reasonable', 'respectable' or 'responsible' without first assessing whether such opinion is susceptible to logical analysis", and
- (2) "However, where there is a body of medical opinion which represents itself as 'reasonable', 'respectable' or 'responsible' it will be rare for the court to be able to hold such opinion to be other than represented".

* Kshitij Chandra Pandey is a student at IIL, Indore.

¹ Koley, T. (2010). *Medical negligence and the law in India*. 1st ed. New Delhi: Oxford University Press, p.xvi.

² (1957) 1 WLR 582.

³ Bolitho v City & Hackney Health Authority [1997] 3 WLR 1151 House of Lords.

⁴ *Ibid*.

Before the enactment of Consumer Protection Act, 1986, an aggrieved patient or the plaintiff only could seek remedy by filing a complaint against the doctor for monetary compensation in civil courts. The cases were based on the law of torts and Section 1-A of the Fatal Accidents Act, 1855. But to avail to avail legal remedies the aggrieved patient had to spend a huge sum of money and had to wait for decades.

For instance, in *Achutrao Haribabu Khodwa*⁵ vs State of Maharashtra which was filed in the civil court, ended with the final award of Rs 36,000 with costs by the Supreme Court which was obtained 33 years after the death of the patient. These instances and state of justice of justice made medical negligence an almost ignored field of civil wrong but after the inclusion of medical service under the purview of expression 'service' of the Consumer Protection Act, 1986, the scope of justice for medical negligence has widely increased has provided an inexpensive and speedy remedy against medical negligence.

An analytical study of tort litigation in India during the period from 1975 to 1985 made by Galanter reveals that out of the total number of 416 tort cases decided by the high courts and Supreme Court, as reported in *All India Reporter*. 360 cases related to the claims under the Motor Vehicles Act and only three cases were related to the medical malpractice.⁶

II Review of Literature

In this research the researcher has taken help from different sources present around. There is mainly two types of sources which researcher has used that is primary source and secondary source. Primary Source include different law books, journals and bare act, Secondary Sources includes the different websites.

III Research Questions

- * Is Consumer Protection Act Successful in bringing idea medical negligence in masses?
- * Are doctors always responsible for medical negligence?

⁵ AIR 1996 SC 2377.

⁶ 5 Indian Medical Association vs V P Shantha 1995 (6) SCC 651 para 51, pp.

* Do medical negligence has put question mark on medical practices?

IV Research Methodology

Methodology means the way of research which researcher has used to collect the data. It is often necessary to include consideration of the concept & theories which underlie the methods. The following project is doctrinal. Doctrinal research includes arranging, ordering and analysis of legal data but this data doesn't include the field work. It include the secondary data.

V Scope of Research

The following research work discusses the kry points that the learned court has also observed as well as what is deduced after going through this research work. Since the Medical Negligence is the vast and long topic. Our discussion would be limited to the medical negligence in the district of Gurugram and Bangaluru.

PARTIES TO THE CASES

1. SheshagiriAppellant(s)

V.

Apollo R.M. Hospital

Chanre Diagonistic LaboratoryRespondent(s)

2. Nagarthna & another

Kumari Varsha

Smt Gangamma

Kumari ChaitraAppellant(s)

V.

M S Ramaiah Memorial Hospital & another

Dr. E. Mahesh

Dr.UmeshRespondent(s)

3. C.S.Nagaraju

S/o. Late C.L. Suryanarayanachar, R/at. No. 35, 2nd

floor, Mathru Shree Nilaya, 1st main road,

Parimalanagar, Kanteerava Studio Road, Bangalore-96.Complainant(s)

V.

Dr. Saji D'Souza

KSAC Hospital, Multi Specialty Ayurveda No. 300, 19th

main road, 5th cross, 6th block, Koramangala,

Bangalore-95.Respondent(s)

4. K. Mukherjee, C2/602, PWO Complex, Sector-43, Gurgaon, Haryana-122002.....Complainant.

V.

PARAS HOSPITAL, Paras Hospital, C-1, Sushant Lok, Phase 1, Sector-43, Gurugram, Haryana-122001.

Dr. Sanjay Verma, Paras Hospital, Paras Hospital, C-1, Sushant Lok, Phase- 1, Sector-43, Gurugram, Haryana-122001..... Respondent(s)

5. Reetu aged 28 daughter of Sri Pal Singh, resident of House No. D227, J.J.Colony, Khanpur, near Pushpa Bhawan, New Delhi-110062.....Complainant

V.

Vibes An Alankar Group Enterprise Vibes Health Care Ltd. A-14/24, Basement & Ground Floor, DLF, Phase-1, Golf Course Road, Gurgaon-122002 (Haryana) authorized person.....Opposite party

NOTE: The researcher also came across 6 cases from Gurgaon which were dismissed because either the complainant didn't proceed with his complaint or the parties didn't appear for the proceeding.

WHAT IS NEGLIGENCE?

The jurisprudential concept of negligence defies any precise definitions.⁷

Eminent jurists and leading judgements it is said have assigned various meanings to negligence. The Apex Court in *Jacob Mathew v. State of Punjab* observes.

“Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinal regulate the conduct of human affair would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property.”

The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of the party complained of towards the party complaining the former's conduct within the scope of the duty: (2) breach of the said duty; and consequential damage.

According to Charlesworth & Percy,⁸ Negligence, in current forensic speech, negligence has three meanings. These are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of duty to take care that is imposed by either common or statute law. All three meaning are applicable in different circumstances but any one of them does not necessarily exclude the other meaning.

⁷ See *Jacob Mathew v. State of Punjab* and another, A.I.R. 2005 S.C. 3180.

⁸ Quoted In *Jacob Mathew v. State of Punjab*, A.I.R. 2005 S.C. 3180.

MEDICAL NEGLIGENCE – *RES IPSO LOQUITUR*

It is well settled that in case of gross medical negligence the principle of *res ipsa loquitur* can be applied.⁹ The Hon'ble Apex Court in *V. Kishan Rao v. Nikhil Super Speciality Hospital*¹⁰ considered at length the principle and gave certain illustrations¹¹ on medical negligence where the principle of *res ipsa loquitur* could be applied.

The principle of *res ipsa loquitur* is said to be essentially an evidential principle and the said principle is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred.¹² Explaining the principle in *Scott v. London & Katherine Docks Co.*¹³

In *Ashish Kumar Mazumdar v. Aishi Ram Batra Charitable Hospital Trust*,¹⁴ the plaintiff in the hospital fell out of the window of the hospital room. Applying the rule of *res ipsa loquitur*, a three-judge bench of the Supreme Court held the hospital liable stating it to be a clear case of absence of due care of the hospital.¹⁵

DATA ENTRY

i. Outcome of cases 2009-2019 (Medical Negligence proved/not proved)

Sl. No	Outcome	Cases (n= X)	Percentage
1	Medical Negligence proved	03	60%
2	Medical Negligence not proved	02	40%

⁹ Spring Meadows Hospital v. Harjot Ahluwalia, A.I.R. 1998 S.C. 1801.

¹⁰ (2010) 5 S.C.C. 513.

¹¹ See Cavan v. Wilcox, (1973) 44 DLR 3d 42; Eady v. Tenderenda, (1975) 2 S.C.R. 599; Rietz v. Brussel, (No. 2) (1979) 1 WWR 31.

¹² Michael Jones, Medical Negligence quoted in Soni Hospital v. Alum Biyer, A.I.R. 2011 Mad. 208 at 214.

¹³ (1865) 3 H. & C. 596.

¹⁴ A.I.R. 2014 S.C. 2061. See also Shyam Sunder v. State of Rajasthan, A.I.R. 1974 S.C. 890; Scott v. London & St. Katherine Docks, (1865) 3 H & C 596.

¹⁵ Law of torts, R.K. Bhangia, twenty-fourth edition, 2018, Page No. 270-271.

The ratio of medical negligence proved to non-proved ones is almost equal with proved cases being slightly more.

ii. Outcome of the case based on expert opinion

Sl. No	Outcome of case based on expert opinion	Cases (n=X)	Percentage
1.	Cases decided on the basis of expert opinion	03	60%
2	Cases decided without relying on expert opinion	01	20%
3	Cases dismissed due to lack of expert opinion	01	20%

60% of cases were decided on the basis of expert opinion and another 20% were dismissed due to lack of it which clearly implies that even the lower court of India heavily rely on the Bolam's test.

iii. Details with respect to the use of expert opinion by the parties

Sl. No (n=X)	Complainant's allegation supported by expert opinion	Defendant's defense supported by expert opinion	Court ordered Constitution of body of expert	Observations
1.	01			"That the complainant needs L4, L5 stabilization, Decompression

				and Fusion treatment which would cost Rs.1,25,000/- for further treatment.”
2.			01	“That the expulsive haemorrhage during cataract surgery is a very-very rare vision threatening complication. Unfortunately, this has happened with this patient. There was no negligence on part of treating doctor.”
3.			01	“That patient was not treated by qualified and authorized doctors as by their own admission one of the treating doctors was B.D.S. (Dental

				<p>Surgeon) and the other doctor was B.A.M.S, registered in Himachal Pradesh and who was not authorized for treatment in other states. Also, it seems that the OPs are avoiding to appear before the board inspite of repeated reminders.</p> <p>The treatment was given by unauthorized persons and it was a case of sheer negligence.”</p>
--	--	--	--	--

In two out of three cases where expert opinion was taken, the court ordered constitution of a body of medical expert.

iv. Profile of Hospitals

Sl. No	Description of Hospitals	Cases(n= Y)	Percentage
1	Single doctor clinics	-	-
2	Polyclinics	01	20%

3	Private Hospitals	04	80%
4	Government Hospitals	-	-

Private hospitals are substantially more involved in cases of medical negligence than the government hospitals and clinics.

v. Reasons of medical negligence

Sl. No	Reasons	Cases (n=Y)	Percentage
1	Negligence of the doctor	01	20%
2	Negligence of hospital support staff	01	20%
3	Lack of equipments	0	0%
4	Others	01	20%

There is not a trend in reasons when it comes to particular medical negligence and there are many different types of medical negligence cases spread across the country.

vi. Medical Negligence cases based on the area of specialisation

Sl. No.	Area of Specialisation	Cases (n=Y)	Percentage
1.	Haematologist	01	20%
2.	Orthopaedics	01	20%
3.	Dermatologist	01	20%

4.	Nephrology	01	20%
5.	Ophthalmology	01	20%

As in the case of reasons for medical negligence, the medical negligence cases pertaining to particular area of specialisation are also generalised and it is not that a specific area of specialisation of doctor has more medical negligence cases than others.

ANALYSIS

The district opted by the researcher for conducting his research is Gurugram and Bangaluru Urban and the number of cases analysed are five (2 from Gurugram and 3 from Bangaluru Urban). Out of the 5 cases analysed. the court has applied Bolam's test in 3 cases and in 2 of those cases it has based its judgement on *Martin F. D's Souza Vs. Mohd. Ishfaq*¹⁶, in this case the court directed the consumer forum to first refer the matter to competent doctor/committee of doctors and issue notice to the concerned doctor/hospital only when there is prima facie case of medical negligence in the report. The structure of medical bodies formed for looking into the cases of medical negligence is that of the doctors of the given district, specialising in the field in which there is alleged medical negligence.

The trend observed is that either the complainant has generally failed to bring a medical expert on his own or even if he or she has brought them, the complainant has failed to turn judgement in his own favour by the medical expert not testifying exactly in favour of the complainant. Medical negligence is hard to prove and hardly any action is taken on incompetent doctors. Since 2012, only 167 doctors have been temporarily blacklisted by the Medical Council of India, with the duration of the suspension ranging from three months to five years. Not one doctor has lost his or her medical license permanently.¹⁷

In India, Bolam test has broadly been accepted as the general rule. In *Poonam Verma v. Ashwin Patel and Ors*¹⁸, a doctor registered as medical practitioner and entitled to practice in Homoeopathy

¹⁶ 2009(3) SCC 1.

¹⁷ The Hindu. (2019). A cure for medical malpractice. [online] Available at: <https://www.thehindu.com/opinion/op-ed/a-cure-for-medical-malpractice/article23994053.ece> [Accessed 28 Aug. 2019].

¹⁸ *Poonam Verma v. Ashwin Patel*, (1996) 4 SCC 332.

only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence per se actionable in civil law. In *State of Haryana and Ors. v. Smt. Santra*¹⁹, also Bolam's test has been approved. This case too refers to liability for compensation under civil law for failure of sterilization operation performed by a surgeon. The Court in *Dr. Suresh Gupta Vs. Government of NCT of Delhi*²⁰ held that the test for determining medical negligence as laid down in Bolam's case holds good in its applicability in India.

The Bolitho test has been used by the Indian Supreme Court on only two occasions. It was used in *Samira Kohli v Prabha*, where the court pointed out that "A beginning has been made in Bolitho v City and Hackney²¹ and Pearce v United Bristol Healthcare"²². We have however, consciously preferred the 'real consent' concept evolved in Bolam." Similar was the case in *Vinitha Ashol v Lakshmi Hospital*²³ where the court did not look into the test at all. In *Vinitha Ashok vs. Lakshmi Hospital*²⁴, this Court after referring to Bolam, Sidaway and Achutrao, clarified: "A doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the court's satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible".

In *Balram Prasad v. Kunal Saha & ors*²⁵, the Supreme Court's verdict established gross dereliction of duty by doctors in a high-profile case of medical negligence launched over the death of Anuradha Saha, a US-based psychologist who had been wrongly treated by doctors in Kolkata. It marked the highest compensation ever ordered in a case of medical negligence in India. The court ordered a compensation of ₹5.96 crore, which with interest crosses ₹ 11 crore. More significantly,

¹⁹ *State of Haryana v. Smt. Santra* (2000) 5 SCC 182.

²⁰ *Dr. Suresh Gupta v. Govt. of N.C.T of Delhi* . (2004) 3 Crimes 149 SC.

²¹ *Bolitho v City & Hackney Health Authority* [1997] 3 WLR 1151 House of Lords.

²² *Pearce v. United Bristol Healthcare NHS Trust* [1999] E.C.C. 167.

²³ *Vinitha Ashok Lakshmi Hospital & Ors Vs.* 2005 (6) SCC.

²⁴ *Ibid.*

²⁵ *Balram Prasad v. Kunal Saha & ors* AIR 2013 SC 1098.

justices S.J. Mukhopadhaya and V. Gopala Gowda held out their 210-page verdict as a “deterrent and a reminder” to the medical community—a first in a medical negligence case in India. The case was filed by Anuradha’s husband Kunal Saha, himself a doctor.

Saha said, “Medical negligence is rampant in India. My fight was not only about compensation. It is both medical and ethical. Doctors are protected no matter how big the error, especially by the medical councils, which are notorious and corrupt. The government has also been a miserable failure in protecting patients.” The case came after 15 years of toiling and Mr. Kunal Saha as mentioned above, was himself a doctor so it was easier for him to collect evidences of negligence and get experts in the field of medicine to testify for him, this was an exemplary case and the same cannot be said for every other medical negligence case in the country, as the researcher observed by studying the cases; the injured party faces various challenges to prove medical negligence whereas even a guilty can get away by using his connections and his own expertise.

This problem is further escalated by the fact that the burden of proof is on the plaintiff. So, if a patient alleges malpractice in medical, the law will require a higher standard of evidence to support it. Here, for an ordinary human or a patient, it becomes very difficult to determine the exact damage and the causal relation between the injury and the fault of the doctor.

Another important case of medical negligence in India is, *V. Krishna Rao v. Nikhil Super Speciality Hospital*²⁶, 2010, 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* (legal principle for a ‘thing speak for itself’) was applied, and the compensation was given to the plaintiff.

Another trend which is seen is that the number of medical negligence cases is far more in private hospitals and private doctors when compared to Government hospitals. This can be explained by the fact that free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered “service” as defined in Section 2 (1) (0) of the Consumer Protection Act, 1986. This also translates to the fact that the organisations and other government hospitals are not as careful private ones while practicing medicine, that can easily mean

²⁶ *V. Krishna Rao v. Nikhil Super Speciality Hospital* (2010) 5 SCC 513.

that the medical negligence incidents are more in case of government hospital but they are not reported because they are free of cost.

CONCLUSION

Though the Consumer Protection Act, 1986 has been very successful in bringing the idea of medical negligence to the masses but it has its own shortcoming and they need to be addressed, so that a common man mustn't face difficulty in proving medical negligence, incompetent doctors face stringent actions and those serving medical service for free are also not careless.

The most common type of medical negligence is seen in operations and during the delivery of the child etc. A number of cases has been filed against doctors who negligently leave their surgical instruments in the body of the patient etc, still a number of doctors leave their instruments in the stomach of the patient which could be fatal.

The high costs and investments involved in the delivery of medical care have made it an entrepreneurial activity wherein the professionals look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. There is a need for introspection by doctors individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active²⁷

BIBLIOGRAPHY

STATUTES

- The Consumer Protection Act, 1986.
- The Medical Council Act, 1956.

BOOKS

²⁷ Karunakaran Mathiharan. "Supreme Court on Medical Negligence." *Economic and Political Weekly* 41, no. 2 (2006): 111-15. <http://www.jstor.org/stable/4417666>.

- Koley, T. (2010). *Medical negligence and the law in India*. 1st ed. New Delhi: Oxford University Press.
- Law of Torts, Ratanlal & Dhirajlal, Twenty-fourth Edition 2002, edited by Justice G.P. Singh.
- Law of Torts, R.K. Bhangia, Twenty-fourth Edition 2017, Allahabad Law Agency.

JOURNALS

- Murthy, K. (2019). Medical negligence and the law. *Indian Journal of Medical Ethics*, IV (3).
- Chaudhuri, Mohuya. "Families Demand Reform of India's Medical Negligence System." *BMJ: British Medical Journal* 348 (2014). <https://www.jstor.org/stable/26513116>.
- Karunakaran Mathiharan. "Supreme Court on Medical Negligence." *Economic and Political Weekly* 41, no. 2 (2006): 111-15. <http://www.jstor.org/stable/4417666>.

NEWSPAPER ARTICLE

- The Hindu. (2019). A cure for medical malpractice by Vidya Krishnan, <https://www.thehindu.com/opinion/op-ed/a-cure-for-medical-malpractice/article23994053.ece>.