

## Medical negligence and Indian law - An overview

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Received: 14/04/2021

Accepted: 07/05/2021

### How to cite this article:

Nagar MM, Garg P, Goyal V, Nema S. Medical negligence and Indian law - An overview. Int J Adv Integ Med Sci 2021;6(2):10-15.

Source of Support: Nil,

Conflicts of Interest: None declared.

**Introduction:** The term medical negligence is an omnibus one, which has come in vogue to refer to wrongful actions or omissions of professional acts in the field of medicine, in pursuit of their profession, while dealing with patients. However, surprisingly this term is not validated anymore in our Indian law. It is a surprise to know that no one in the legal or medical system is clear or aware of what is “minimum standard” of skill which must be there, and to more surprise, all cases are decided and awarded based upon these parameters of skill of minimal standard, but nobody knows what that minimal standard is. Medical science is a science of probability and art of uncertainty, no one in the medical science can declare what would be the definite results of treatment given to a patient, even after best possible efforts. **Discussion:** Negligence is never intentional it is because of the absence of mind not a wilful act, no service giver or any person giving any advise is free from chances of being negligent than why only doctors or medical professionals are victim of consumer laws, alike other profession, this is neither justice to doctors nor beneficial for peoples in the country. **Conclusion:** Medical science is a science of probability and art of uncertainty, no one in medical science can declare what would be the definite results of treatment given to a patient, even after the best possible efforts.

**KEY WORDS:** Consumer protection act, The Medical Council of India (MCI), National Medical Commission, Indian Penal court (IPC)

## INTRODUCTION

Long before an eminent jurist in the UK, Lord Denning has said if you deal a doctor with a pistol of law on his temple, he will protect himself first, rather than pain or pocket of his patients.

Medical profession which is considered best noble service to whole humanity, now a day's kept in the category of business, relationship between doctors and his patients which was of faith and believes now converted into doubts and suspicion.<sup>[1]</sup>

Why there is such a drastic change in practise of this noble profession and the perception of general peoples particularly in India.

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Whether doctors have become more negligent or legal system of this country deals them now differently.

In the perspective of recent legal changes, we will try to analyze whether the recent changes in our legal system is really good, unbiased or even helpful for doctors as well as their so called consumer patients or otherwise.

Negligence is not a new term for legal system of any civilized population; however, it came to the eyes of law maker of our country for its application over medical professionals after the implementation of Consumer Protection Act (CPA) in 1986, onwards.

A noble profession of service of mankind thereafter considered and converted as relationship like business or relationship of consumer and service provider. Is that a welcome step, an unbiased pure and pious form of law, beneficial to common person, the patient or even good for society we will try to evaluate.

Leaving aside the legal language, one should know that what is negligence or a medical negligence.

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The term medical negligence is an omnibus one, which has come in vogue to refer to wrongful actions or omissions of professional acts in the field of medicine, in pursuit of their profession, while dealing with patients. However, surprisingly this term is not validated anymore in our Indian law.

In simple word “what was required but not done or committed, and what has been not required has been done” any such act or omissions is defined as negligence and if done or omitted in medical field or during treatment of patient, by his doctor (the service provider), is a case of medical negligence.

Any such medical negligence if caused harm or loss to the patient is now compensable under provisions of CPA.

A doctor is expected to be a skilful person by his training in medical field and owns a responsibility of proper care to his patients if he accepts relationship as of the treating doctor.

Word “Proper” is very unclear and cryptic, no clear legal or medical parameters are prescribed that what proper means.

The legal system after experience and delivering various judgments could define it as minimum required skilful act, is at least required for a doctor, not to be labeled him negligent, They call it Bolam’s principle of law, which is based on judgment in some case out of this country.

It is a surprise to know that no one in the legal or medical system is clear or aware of what is “minimum standard” of skill which must be there, and to more surprise all cases are decided and awarded based upon these parameters of skill of minimal standard, but nobody knows what that minimal standard is.<sup>[2]</sup>

To solve this technical issue the legal system seeks opinion of specialists in medical field, means opinion of other doctor/doctors, is desired, which is a very strange situation.

No doctor is clear in his mind, nor having any clearly prescribed minimal standard of treatment anywhere in any literature of medical field anywhere in this world, but still gives his opinion, naturally just based on his knowledge, experience and personal biases only. This leads to variable opinions and recommendations which may be very different, even contradictory to one another when given by different specialists in similar cases.

Is that a real justice, certainly not this sort of opinions based on unclear principles and unprescribed minimal standards of care will either harm doctor or his so called consumer patient, besides great uncertainty in the final judgement.

This leads to lots of worries and mental tensions to both the parties expecting fare judgement.

If we see the final judgement in cases, the judiciary has already accepted that judicial officers are medical illiterate persons, they are solely depend on either of their personal perception of

general knowledge, legal points involved or the opinion given by specialists in the field (doctors.)

This is already discussed above that in want of prescribed minimal standards of treatment the viewpoint on single or many specialists cannot be similar or cannot be considered as fare.

## OVERVIEW OF CONSEQUENCES

The medical negligence cases can be classified into three types<sup>[2]</sup>

1. Criminal liability
2. Monetary liability
3. Disciplinary action.

Criminal liabilities are pursuant to the provision of the Indian Penal Code (IPC), but there is no separate provision in it for medical negligence.

Civil Liability is been fixed and comes under general law as a monetary compensation. The aggrieved party may take legal recourse in “Lok adalat” also under provision of Legal Service Authority Act of 1987, wherein first a trial of appeasement is done.

Permanent Lok Adalat has conferred powers similar to civil court and has jurisdiction in the cases up to Rs 1 crore.<sup>[2]</sup>

Disciplinary action in cases of medical negligence is governed by the Indian Medical Council (Medical Council of India [MCI] now National Medical Commission [NMC]), under professional conduct, Etiquette and Ethics regulations 2002. Appropriate medical council of states are also authorised to take disciplinary actions, where the name of medical practitioner can be removed temporarily or permanently.

## DUTIES OF A DOCTOR AND MEDICAL NEGLIGENCE

A doctor or medical practitioner owns duty of care towards his patients, he is free to decide whether he should take the case in his hand or not (except in emergency life-threatening situations, where he is duty bound to save the life of patient performing whatsoever best is possible in those circumstances).

He is at liberty to decide the form of treatment on scientific principles as per his qualification, duty to careful administration of the decided treatment, not to proceed for any plan of action beyond his control.

It is also anticipated that the medical professional will show a considerable degree of skill and knowledge with a reasonable degree of care.<sup>[3]</sup>

Any breach of his duties, resulting in harm or damage is considered as negligence.

Before awarding compensation or penalty three basic points has to be proved beyond doubt.

1. There is a relationship of consumer and service provider between doctor and his patient with payment (or promise of payment) of money for that services, (called as consideration in legal terms)
2. The doctor (service provider) was duty bound to a particular duty which has not done either by commission or by omissions, and comes under the legal definition of negligence
3. The act of negligence by a doctor (service provider) has done any injury or damage to the patient.

All three points are must to prove beyond doubt for receiving any compensation or penalty in any case of medical negligence by any doctor.

Deciding criminal liability has no sufficient grounds.

The Supreme Court in case of *Dr. Suresh Gupta versus Govt. Of NCT Delhi* set the standard for bolting criminal liability and added that medical negligence of “gross” or “reckless” in nature will attract criminal liability not merely insufficiency of obligatory care, attention or skill.<sup>[4]</sup> In such cases section 304 IPC cannot be invoked, later the word “gross” was placed before bench of higher strength in the Supreme Court for reconsideration.<sup>[2]</sup>

In *Jacob Methew versus the State of Punjab* case.

Reconsideration by a bench of three judges countersigned that immensity of negligence should be the prerequisite for bolting criminal liability.

The civil and criminal liabilities are not exclusive for the same act of negligence, both actions may be obtainable.

“Neither the very highest nor a very low standard of care and competence can be taken in consideration of the particular circumstances of each case, is what the law requires.”<sup>[3]</sup>

For standard of care by doctors, Bolam’s test is applied which means standard of a normal proficient man exercising and processing to have that distinctive skill” and not of “the highest expert skill.”<sup>[5]</sup>

This is relevant to both diagnosis and treatment.

Errors of judgement do not show a direct consequence of negligence.<sup>[6]</sup>

Gross mistakes would, however, summons the findings of negligence, for example, wrong drug, delegation of duties to a subordinate with less knowledge incapable of performing duties efficiently, removal of wrong limb, performing operation on wrong patient, ignoring warning of drug allergy and leaving swabs or other items inside the patient.<sup>[7]</sup>

Person not certified in particular or a certain branch of medicine, but commencing upon a treatment course in that field has been hold to be negligent.<sup>[2]</sup>

In case of a medical negligence first, the patient has the initial obligation to pursue a case of negligence later the doctor or the hospital is to convince that there is no lack of care or diligence.<sup>[8]</sup>

Only hospital can be made party in such case leaving doctor or staff aside, it is also immaterial that practitioner or staff are permanent or come on visiting bases.<sup>[9]</sup>

High care standard is judged by prevailing circumstances and available means, instruments etc. It is anticipated that generally required means or instruments should be made available and should be used as and when required.

But all this is presumption and usually an afterthought of judging specialists about what minimum was required or to be used.

Nowhere it medical literature it is taught or prescribed what are the minimum requirements of means and instrument for general care of any patient, there are so many diseases, many different circumstances and different requirements for medication, materials or instruments. List may be exhaustive or may not be possible to keep in all by any general practitioner, there is no prescribed or suggested list of required materials by any regulating medical authorities. This leads to great difficulty in deciding what minimum standard is there for a given circumstances. All this depends upon personal decision of the practitioner or personal bias of the specialists asked to give their opinion in a case of medical negligence.

For example, if a patient has developed very low oxygen saturation, level in his body, due to unknown reasons in some remote area and was required to be shifted to a bigger hospital for mechanical ventilatory support meanwhile during shifting the patient becomes comatose and passed away, in this case, previous hospital was fastened civil liability by state commission for medical negligence.

Working mechanical ventilator was declared necessary in a hospital before operation, but ventilator is generally operated by a separate anaesthesia specialist, a patient may develop any such complications or requirements, at any time after surgery, but an anaesthetic doctor practically may not be present round the clock in all operating hospitals in the country, so practically no operation will be possible in absence of a qualified, trained anaesthetic doctor, equipped with working mechanical ventilator in all operating hospitals in remote Ares especially, or operation will than only be possible in a very few limited hospitals only with enormously exhaustive number and list of patient, practically disastrous to the patients requiring emergency surgeries.

Both parties have the opportunity to seek specialist’s opinion, but courts take its own judgement after getting opinion of such specialists, though they are not expert in the fields of medical sciences.<sup>[10]</sup>

## INFORMED CONSENT

Informed consent is necessary for any treatment by a doctor, which explains the ailment, diagnosis, procedures for diagnosis, options of treatment and its complications and consequences, all these must be understood by a patient through his doctor in his understandable manner and language, all this must be in written form in presence of witnesses within the legal provisions of a valid written informed consent. Thereafter final decision for treatment or procedure is decided by the patient or his guardian, as per legal provisions.

There must not be blanket consent (same general printed consent format for many types of different procedures/treatment). For each procedure clear written informed consent should be there and procedure must not go beyond that consent, if any extension or added procedure is required in any or emergency situation, a separate informed consent must be taken, explaining the than circumstances and requirements.

It is said that “adequate information” is to be furnished to a patient so that he is able to build a fair judgement, remote possibilities may not be disclosed.

Lack of informed consent or any procedure/treatment without it is a case of medical negligence.

## ROLE OF JUDICIAL SYSTEM

A carefully balanced approach by legal system in medical negligence cases is desired.

It should have a balance between decision and autonomy of a doctor to drive a decision without fear with free mind and also the rights of a patient.

A few pronouncements of the Supreme Court in this matters are the commission should have to understand that every doctor has different perspective, for instance, some have more medical while some have more conservative approaches. This court has no sympathy for doctors who are negligent, it must also be said that after placing the medical profession under CPA the frivolous (fictitious) complaints against doctors have increased by leaps and bounds particularly after the medical profession was placed within the preview of the CPA.

As the courts and consumer forum are not experts in the medical sciences they must not substitute their own views over that of specialists, this way the medical specialists who are asked to give their opinion in any case of medical negligence must be very careful as the decision of court is very much depends on their expert opinion they must also be clear of legal provisions and about the fact that their opinion must consider and mention any circumstances for doctor’s decision of a specific treatment, in light of those circumstances, and the doctor has used minimum standard of care and skills, as per his training and qualifications, does not require to apply the highest degree of skills and care.

## WHAT DOCORS ARE REQUIRED TO DO

Various steps the doctors/hospital/nursing homes should take include.

a. Current practices, infrastructure, paramedical and other staff, hygiene, and sterility should be observed strictly  
In the case of Sarwat Ali versus Professor R. Gogi (OP no. 181 of 1997 decided on July 18, 2007 (NCJ) 52 cataract operations were performed between September 26, 1995 to September 28, 1995, in an eye hospital.

Fourteen patients lost their vision in the operated eye. Enquiry showed that in operation theatre two autoclaves were not working properly, which is used to sterilize instruments, cotton, pads and linen etc. and damage occurred due to its absence in working condition.

The doctor was held liable.

b. No prescription should be given over the telephone call without examination of the patient, except in acute emergency condition

(Now with permission to telemedicine by regulating body the NMC doctor can do this, within conditions and methods as described by it).

c. Doctors should not believe solely on patient’s version about his symptoms, but analyse the case and investigate when necessary

d. A doctor should not experiment with his patient, even after his written consent, unless necessary

e. In doubtful cases, a proficient must be consulted, In case of Indrani Bhattacharjee (OP No. 233 of 1996 decided on Aug 9<sup>th</sup>, 2007 –(NC), the patient was diagnosed as a case of mild lateral wall ischemia, as the doctor prescribed medicine for gastroenteritis, The patient expired, the doctor was held liable, saying that he must have advised to take counsel from a cardiologist, in writing

f. Full records of diagnosis and treatment etc. Should be maintained.

These are broad guidelines only and not all.

Supreme Court laid down few binding guidelines, before filing criminal cases against doctors to protect them of frivolous and unjust prosecution, till statutory rules or instructions by the government in consultation with MCI, are issued, these are.<sup>[11]</sup>

1. Private complaints may not be entertained unless complainant has produced prima facie evidence in the court in the form of credible opinion given by another doctor
2. Investigating officer should obtained an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam test to the facts collected in the investigation
3. Doctor may not be arrested in a routine manner unless the arrest is necessary for furthering the investigation or for collecting the evidence or if the investigation officer is satisfied that doctor may flee.

This requirement was subsequently sought to be made a necessity by the Supreme Court for initiating the action seeking

imposition of civil penalties but was done away with thereafter for civil actions.<sup>[12]</sup>

## CONCLUSION

Medical science is a science of probability and art of uncertainty, no one in medical science can declare what would be the definite results of treatment given to a patient, even after the best possible efforts.

Lord Denning the eminent jurist of the UK said that one cannot compare medical science with any factory or traffic conditions, if every rule is followed in any factory or by traffic on roads, there will be no accidents, but in medical science even if every rule is followed there is no guarantee that accidents or failure will not occur.

Many different variables, factors, bodily conditions and natural reasons effect the ultimate result of any given treatment by any doctor in this world, therefore near any failure of treatment in a patient or death can not be called as negligence.

It is said that errors of judgment is not a negligence, all legal professionals including judiciary is considered causing no negligence and given universal immunity for any legal action against them (beside other immunities given to judicial officers), advocates because of this perception were given immunity for any legal action in consumer cases and removed of consumer laws, at later dates.

It is considered that judicial system is “fountain of law” to all citizen and it is given immunity for any mistake, considering that it does everything in good faith to provide justice to a person, and also to work without fear and with free mind.

Why the same principles are not applied for medical science and doctors, almost all doctor perform their duties towards patients for their benefit with their full dedication, on the basis of available knowledge and skills to them, why they are not considered as fountains of health, in a similar manner, why they are not given legal immunity of any punitive action just like advocates or judicial system, so that they can also perform their duties with free mind, without tensions and fear of any punitive actions alike advocates, also all decisions and treatment by a doctor is the result after an opinion of him, based on his knowledge, skill and decision after vigorous training schedule, one of the most difficult course in this world.

A serious thinking is required in this direction by competent persons to reform the consumer laws or to remove doctors and medical professionals out of scope of consumer laws, in public interest at large.

Negligence is never intentional it is because of the absence of mind not a willful act, no service giver or any person giving any advise is free from chances of being negligent than why only doctors or medical professionals are victim of consumer

laws, alike other professions, this is neither justice to doctors nor beneficial for peoples in the country.

For example, now doctor by his clinical knowledge, skills and experience knows what the diagnosis of a patient and what treatment is appropriate, but because of fear of legal actions against him he is compelled to do all sorts of costly or very costly investigations, just to justify his diagnosis, keeping proof or exclusion of other possible, similar diseases.

This has not only increased the cost of treatment but time-consuming and now kills the clinical assessment skill of a doctor.

This is also very surprising that an enormous amount of money is awarded to a complainant in consumer cases based on accident claim laws for compensation, it creates a great stress and fear in minds of a doctor, just to avoid any legal actions, now doctors at remote places are now highly fearful to take serious, life-threatening emergency cases, though they are having better chances of survival and recovery if continuous immediate medical care is provided to them, because of fear of legal provisions and monetary penalties now doctor gives initial treatment for short time to temporarily stabilize the condition of patient are rapidly refer him to bigger equipped centres, this not only makes the treatment very costly but there are very high chances of death of a serious patient in the way, due to long treatment is required to stabilize his condition and ill effects or transportation conditions in such serious condition of the patient.

This is also not clear why there are cases and penalties in medical cases only, for example, taxi or train passenger services are also consumer services, but which service provider in such services provide all information's such as road conditions, Ill effects of journey, chances of accidents, technical details of engine or its parts (as expected in surgical operations), results of failure or breakdown of machines or its parts and why not written informed consent is necessary in such other services, why those service providers are not considered negligent in their services in absence of written informed consent as in case of a doctor.

A lot many discussions, consideration is required to re-think about removal of medical services by all concerned in the country, in benefit of law, general public, patients and doctor's interest.

A thorough reviews and their effects on treatment and benefits to the patients is desired by legal and law making bodies with open mind, instead of prejudices.

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