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REVIEW PAPER

Origin and progress of medical negligence litigations in India

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Jani CB*
Address for correspondence:
*Self-Employed Medico Legal Consultant-JSM Medico-Legal Associates
Regd. Office: Ahmedabad-13, Gujarat, India
Website: www.jsmmla.in
E-mail: drcbjani@jsmmla.in
Mobile: +917862037366.
Professor and Head Forensic Medicine SAL Institute of Medical Sciences, Ahmedabad-60

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ABSTRACT

Allegations of "deficiency in service" or "medical negligence" have drawn more focus from the medical fraternity than before since there were amendments in the Consumer Protection Act as well as laws related to criminal medical negligence in recent years. The historical perspective of laws related to medical practice, especially alleged medical negligence, is discussed chronologically. In addition, a few case law excerpts concerning patient care are also articulated in brief. A potential fear of such litigations coupled with various observations by Hon'ble authorities have also been given brief weight to conclude the author's perception.

Keywords: *CPA 2019, BNS 2022 and Defensive Medicine.*

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INTRODUCTION

The new year of 2024 has arrived, with recent years flooded with "*alleged medical negligence.*" News items in print and electronic media have impacted the much-debated "*deficiency in service*" concerning medical professionals. *"Allegation of medical negligence is easy to put forward, difficult to prove and even more difficult to disprove once proved."* The so-called *"decriminalization"* of S.304a of IPC was perceived as a mis-projection and misconception by many arenas. Now it is crystal clear that it is not decriminalized; the relatively new "*Bhartiya Nyay Sanhita*" has categorically included registered medical practitioner and "*death due to rash and negligent death*" in the form of S.106 which quantifies imprisonment in different circumstances but practically remains same as S.304-a of IPC- that is say 2(two) years so far as medical fraternity is concerned.

The present article aims to review historical aspects of medical negligence litigations in India and some situation-specific aspects pivoting around "*alleged medical negligence*" litigations in recent years.

DISCUSSION

The calendar year 1995, almost two and half decades back, is crucial when discussing medical negligence and accountability or culpability of medical professionals. IMA Vs V.P. Shantha and[1] can be recollected as the first footstep-changing scenario of medical practice in India. This judgement has clarified that "*a medical practitioner can be regarded*

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as rendering service under Section 2(1) of the Consumer Protection Act, 1986."

Almost 365 days a year, we come across news items about "*alleged medical negligence*" in all media types. Even such consumer cases have occupied a significant (and alarming too!) chunk on official and commercial web portals providing orders/judgements of such nature.

Apart from citizens of non-medical backgrounds, we also find few cases where a doctor is a complainant against doctors and hospitals.[2,3,4] With due respect to the legal rights of either party to the case, we must introspect and contemplate why and which way the entire healthcare system is heading.

Today, we can't think of patients without health insurance (personal level or government scheme, i.e. Ayushman Bharat) and doctors without professional indemnity insurance. After registration with the medical council and various licences for medical practice, "*professional indemnity insurance"* is inevitable assistance looked for not by choice but by compulsion. Insurance companies are offering excellent "*indemnity insurance*" packages. The premium the doctor pays initially affects the pocket of the patient/ relatives subsequently. After an undesired setback in the year 1995, the Indian Medical Association came forward with a "*Professional Protection Scheme (PPS)",* which is quite admirable and hence, various speciality-wise associations also adopted a "*collective approach*" to the emerging challenge.

THE CONSUMER PROTECTION ACT, 2019 NO. 35 OF 2019 [9th August 2019] has a few features adverse to the medical fraternity. The most important being S.41, which shall be read as "*Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Commission, shall be entertained by the State Commission unless the appellant has deposited fifty percent of that amount in the manner as may be prescribed...*". This means a doctor shall deposit 50% of the amount awarded by district commission. Subsequently, that will be "*a capital expenditure in books of account*" of a doctor unless and until Hon'ble NCDRC or Apex Court reverts it as appellate authority!

Apart from historical aspects, a few aspects of medical practice deserve mention when discussing alleged medical negligence. Analysis of many consumer forum/commission judgements related to medical negligence allows a prudent person to draw some conclusions in the form of Dos and don'ts.

Complete and correct diagnosis of illness is a first and foremost area which is essential. The specificity and sensitivity of a particular diagnostic test are of immense importance since the possibility of a cure is exclusively and directly interrelated at this stage. Even the interpretation of test results and advice on further tests/ investigations are crucial. Many times, patients/ relatives perceive it as an investigation at the cost of their expenses. Still, a rational exercise by a prudent doctor can minimize such suspicion if it can't be removed completely. The choice of diagnostic modality at a particular centre is usually not accepted during litigation. A view is taken by the trial authority that the patient should have been referred to a higher centre even though personal communication (undocumented) with the patient/relatives insists the doctor should manage the case at the same centre except in case of a life-threatening emergency.

Based on the diagnosis, the subsequent aspect is the choice of therapeutic modality. Maybe one medical vs another medical one, medical vs surgical one and open surgery vs laparoscopic surgery. This area warrants consideration of factors, i.e., the qualification and competence of the doctor whether the proposed intervention is within his ambit or area of expertise or not. The choice of the hospital for the performance of such intervention also can't be ignored, as the availability of adequate resources/equipment/ medical facilities in case of complications or any other unforeseen medical developments concerning the patient's health does matter. By and large, standard medical practice/protocols, if adhered to or complied with by doctors, can have a positive impact on the outcome of the litigation since "*Patient showed Dengue NS1 positive and the treatment was started in the ICU as per standard protocol*." was one of the grounds for relief to opponent doctor and hospital.[5]

Pre-intervention communication and proper consent have been considered significant aspects during the trial. If proper "*Ad-Idem*" (common and same mind-bilateral complete and clear communication) is not ensured with the patient, later, the doctor is required to have proper "*Ad Vocate"* (who can communicate the common and same arguments before authority)!

A proper "*body of consent*" is also a dynamic component. This means that a format of valid consent a few years back may not be suitable in recent times. Attempts are also being made to restructure formats of consent. One such recent example is the Institute of Medicine and Law (Mumbai), which endeavoured to restructure the consent forms widely circulated and even made available on their website. (https:// imlindia. com)

Intraoperative complications are also important so that they are diagnosed and managed on time. Failure to do so and referring a patient to a "*higher Center*" can potentially be the foundation or genesis of medical negligence in the patient's mind.

The cause of action by the patient is usually based on the perception of no cure, delay in cure, new disease, deformity, or disability in the form of Loss of earnings and Quality of life. In case of death, the cause of action is by relatives. In later cases, criminal cases may be in addition to civil litigation. Instead, a criminal case is followed later by a consumer/civil case. Demand for a criminal investigation in such deaths by relatives before law enforcement agencies draws the attention of the public at large through media platforms, and "*parallel trial*" by the general public has the potential of not only adversely affecting the legal recourse of the case, but the reputation of doctor/ hospital also is at stake even before judgement is pronounced by competent legal authority.

"*Bolitho test"* is one step ahead/beyond "*Bolam test*". In the Bolam test, opinion about medical negligence is decided based on comparing the facts of a case with standard practice. Usually, the absence of a positive opinion favouring a complaint has been accepted as requisite for such litigations and in the absence of such opinion, the case/ complaint stands dismissed. However, it has been observed in a few cases that the Honourable Commission applied the "*Bolitho test*" (without naming it categorically in judgment) and held the doctor negligent.[6] In one such case involving an ENT surgeon and anaesthetist, an expert committee comprising two specialities and a Forensic Medicine Expert opined that "*Medical Negligence not found"* was overruled by the Hon'ble commission based on the contention that "*Usually, Expert committee members will try to save their senior colleagues*" (original text of judgement in the Hindi language) and compensation was awarded even in the absence of opinion endorsing/ confirming medical negligence.

CONCLUSION

With changing and alarming trends of alleged medical negligence, the medical fraternity is left with no choice but to document (Over documentation) even petty events during medical treatment. Attempts are being made for broader outreach of awareness about medico-legal aspects of medical practice by various fora and biomedical publications. The best example, in my knowledge, is the researchgate portal publication of "*Case-law*" by Dr. Mukesh Yadav (Honourable President of Indian Academy of Forensic Medicine (2022-2025), where intricacies with medical and legal recourses are discussed as deserved.

In the near future, we may witness a new branch in medical practice, that is to say, "*Defensive Medicine*". Whether in the patient's and community's interest, it may be answered only in the coming days (or even years!). But such an approach shall not outweigh or overcast the medical skills of Registered Medical Practitioners, or else that shall warrant revamp of national health policy in a different way (Structured operative procedures, etc.), which may have very little space for professional autonomy of medical fraternity to exercise best choice modality in the interest of the patient.

It was well perceived and documented by Hon'ble Apex court[7] that- "*A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.*"

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The recent judgement by Hon'ble Apex Court[8] narrates the perception by appellate authority as 'At this stage, we may benefit by adverting to what the renowned author and Surgeon Dr. Atul Gawande had to say on medical treatment. He said, "*We look for medicine to be an orderly field of knowledge and procedure. But it is not. It is an imperfect science, an enterprise of constantly changing knowledge, uncertain information, and fallible individuals, and at the same time, it lives on the line. Yes, there is science in what we do, but there is also habit, intuition, and sometimes plain old guessing. The gap between what we know and what we aim for persists. And this gap complicates everything we do.*"

'The above observation by Dr Atul Gawande aptly describes the situation here. *This is a classic case of human fallibility where the doctors tried to do their best for the patient, per their expertise and emerging situations. However, the desired results could not be achieved*. Looking at the line of treatment in the present matter, it cannot be said with certainty that it was a case of medical negligence.'[8]

Ends with the hope that letters such as "*If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine*"[7] come true in terms of spirit in the coming days to a broader scale and louder magnitude.

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