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MEDICAL NEGLIGENCE AMID COVID 19 WHOM TO BLAME

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ABSTRACT

There is always a different bonding of trust between patients approaching a doctor that the doctor treats his or her medical problem. The relationship is completely a kind of bind trust of a person's life.

A doctor owes duties towards his patient and a breach of any duties which turned into negligent act by the doctor. The services of the doctors are covered under the provisions of the Consumer Protection Act, Indian Penal Code, Tort and Contract. But what about the situation that arose today is this pandemic period because of Covid 19 can the patient blame for various issues of negligence arising out of medical treatment to their doctors or the hospital management or the government or the individual itself of the Covid 19, which consequently affects their life. Covid-19 has created many challenges including not only the medical management of the patients but also the legal dilemma with regard to provision of health care services establishments. The regulatory bodies of the government formed various new policies to control the situation of this pandemic. Collaborative efforts must be there to handle the current unpredictable situation and who should be blamed regarding all this.

This paper talks about the medical negligence occurring during Covid 19 and how its being dealt.

INTRODUCTION

Covid-19 and medical negligence are like intersecting lines and the point of intersecting is the disaster which we can see in this Covid era. And for this disaster which line is responsible either Covid or medical negligence. And if this medical negligence occurred in Covid era then who should be responsible for this medical negligence, is that doctors who are also dying because of this pandemic, or the hospital or the government who should be responsible for these deaths

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which are caused by medical negligence in this pandemic. And to go further we have to introduce with the meaning of these two terms covid-19 and medical negligence

Covid-19 is a viral infectious disease which gives the experience of mild to high respiratory illness without any special treatment but those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer condition can be turned into serious illness or life threatening. This corona virus firstly discovered on 31st December 2019, when WHO was informed of cases of pneumonia of unknown cause in Wuhan city, China and temporarily named 2019-nCoV and this outbreak to the whole world including India².

Negligence is the breach of duty, if a person fails to behave with that level of care that someone of ordinary prudence would have exercised under the same circumstances³. It also includes the omission when there is duty to act and when this act is the duty of the doctor then we call it medical negligence or we say

Medical negligence is a breach which has been done by the medical practitioner or doctor while doing their course of employment and this is the offence under the Indian Penal code or the tort and Indian contract act.

MEDICAL NEGLIGENCE⁴

Being a doctor is treated as a noble profession because it saves life. We believe life is God-given. A patient always visits a doctor/hospital based on its reputation. While visiting a doctor a patient always thinks that the doctor and hospital will provide medical treatment with all the knowledge and skills as per their requirements and after this, they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff and themselves. Though a doctor is not a God and can't protect their patients out of their efforts or skills but, he is expected to use his special knowledge and skill in the most prudent manner keeping in mind the interest of the patient who has entrusted his life to him. In case of emergency, he must have to ask for the consent of the patient before proceeding with any major treatment, surgical operation. Failure of a doctor and the hospital to discharge this obligation is essentially a tortious liability. A tort is a civil wrong as against the contractual obligation thus, a patient's right to receive medical attention from doctors and hospital is essentially a civil right.

² <https://www.who.int/health-topics/coronavirus>

³ <https://www.britannica.com/topic/negligence>

⁴ <https://www.ncbi.nlm.nih.gov>

The relationship takes the shape of a contract to some extent because of informed consent, payment of fee, and performance of providing treatment etc.

In the case of Dr. Laxman Balkrishna Joshi vs. Dr Trimbark Babu Godbole and Anr⁵ and in the case AS Mittal v. State of UP⁶

It was said that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are -

- a. Duty of care in deciding whether to undertake the case,
- b. Duty of care in deciding what treatment to give,
- c. Duty of care in the administration of that treatment.

A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his doctor. In the aforementioned case, the apex court inter alia observed that negligence has many manifestations- it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence, or negligence per se

In case Poonam Verma vs. Ashwin Patel and Ors⁷,

The Supreme Court held that a person who does not have knowledge of a particular system of medicine but practice in that system is a quack. Where a person is guilty of negligence per se, no further proof is needed.

PROVISIONS RELATING TO MEDICAL NEGLIGENCE

In section 304-A of IPC⁸, if a person commits a rash or negligent act which amounts to culpable homicide then the person will be punished with imprisonment for the term which may extend to two years or with fine or both.

Under section 337 of IPC⁹, if a person commits a rash or negligent act due to which human life or personal safety of others gets threatened. The person will be punished with imprisonment for a term which may extend to six months or with fine which may extend to 5 hundred or both.

⁵ 1969 AIR 128, 1969 SCR (1) 206

⁶ AIR 1989 SC1570

⁷ AIR(1996)4 SCC 322

⁸ <https://legislative.gov.in>

According to section 338 of IPC¹⁰, if the person commits a rash or negligent act due to which human life or personal safety of others gets threatened. The person will be punished with imprisonment for a term which may extend to two years or with fine which may extend to one thousand rupees or both.

Medical negligence also comes under Consumer Protection Act

In the case of Indian Medical Association v. VP Shanta and Ors (1995) Supreme Court decided on the issue of coverage of medical profession within the ambit of the Consumer Protection Act, 1986 and said that doctors and hospitals became aware of the fact that as long as they have paid patients, all patients are consumers even if treatment is given free of charge¹¹.

WHAT AMOUNTS OF MEDICAL NEGLIGENCE?

The first and foremost ingredient which is considered to be a negligent in normal way is breach of duty of care and resultant injury. If any doctor deviates from the accepted medical standard of care, then it comes under medical negligence and in this high amount of medical culpability is required to hold a medical professional liable. The victim has the option of both, that civil or criminal action or both against that medical professional on that situation.

Under civil law, negligence comes under tort and consumer protection act, and under criminal law, if death is caused by gross negligence of the doctor then offence under section 304-A of IPC can be framed.

The Delhi High court said that there must be 3 degrees of negligence: lata culpa (gross negligence), Levis culpa (ordinary negligence) and last levissima culpa (slight negligence) and the last 2 are not punishable but the gross negligence is punishable. And the punishment is depending on the facts and circumstances of each case.

The burden of proof lies on the complainant to prove that the doctor acted under gross negligence. And in many situations res ipsa loquitur (things speak for it) applies and if anything accepted under medical profession then the action of the doctor is justifiable and not liable for the same.

⁹ <https://legislative.gov.in>

¹⁰ <https://legislative.gov.in>

¹¹ http://ncdrc.nic.in/bare_acts/Consumer%20Protection%20Act-1986.

There is the test named as Bolam test¹² of medical negligence which has been using to adjudicate cases of medical negligence. And this test is adopted by India from the United Kingdom. This test is laid down in the case – Bolam v. Feiern hospital management committee¹³, and elaborated about the medical practice, what it is and what it should be. And laid down the criteria that have to be fulfilled to fix the culpability of the medical professional-

1. It must be proved that there is a usual and normal practice.
2. It must be proved that the defender has not adopted that practice.
3. It must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

So, it is necessary that to prosecute any doctor for negligence there must be breach of duty which in the given facts and circumstances no medical professional in his ordinary sense and prudence would have done or failed to do.

The supreme court of India in favor of medical practitioner said that, wrong diagnosis is not a ground for medical negligence and the medical practitioner should not be dragged into criminal proceedings unless negligence of a high order is observed.¹⁴

MEDICO - LEGAL ISSUE IN COVID ERA

In today's scenario there is no such public health law in India which can actually handle this situation of COVID-19, India with the help of 123 years old epidemic diseases act, fighting with the COVID-19, there are 483 notifications issued by the government of India related to COVID-19 in the few months of 2020 and there are many guidelines, rules, regulation made by government, doctors, staff and everyone are infected with this corona virus, many FIR are lodged against each other mainly against the doctors. In this situation some measure issues are conferred by the courts to solve the issues related to medical situation we are facing like here is case of Maharashtra regarding medical negligence where court was hearing many PIL on management of resources to COVID-19 which is only the major problem in treatment to negligence for which doctors are attacked by patients' relative.

¹² <http://www.legalservicesindia.com/article/1685/Test-of-Medical-Negligence.html>

¹³ [1957] 1 W.L.R. 582 (26 February 1957)

¹⁴ Jacob Mathew vs. state of Punjab & anr. (2005) 6 SCC 1

The high court had said that doctors are already overworking due to pandemic they must not have to face. Such harassment and the court then said the police must be trained to ascertain which cases required an immediate registration of offence. And also said

States police officers must be aware of the laws and all the latest Supreme Court rulings on the issues related to medico legal in the Covid situation and there must be cell of police who are with the best knowledge to handle these situations. All complaints on medical negligence will go to well trained officers, the bench said¹⁵.

The today's situation is that the police should be more cautious. It should not act on the next moment unless he takes a medical opinion that there is a genuine case of medical negligence.

After this, the Indian government issued telemedicine guidelines in 25 March, 2020 which permitted the doctors to prescribe medicine, providing counseling and impart health education on phone call or over the chat.

The act authorized the doctors to choose the medium of telecommunication and stated the do's and don'ts for the patients and doctors, the telemedicine guidelines²⁰²⁰ was a significant move in protecting doctors from medico-legal issues¹⁶.

GUIDELINES GOVERNING THE PROTECTION OF DOCTORS UNDER SECTION 304 B IPC

While keeping in mind that the providing medical services is in itself a respects and noble job , supreme court in the case of Jacob Mathew vs. state of Punjab (2005)¹⁷ decided the guidelines governing the prosecution of doctor under section 304B of IPC¹⁸.

1. Ant private complaint may not be entertained unless the complainant produces prima facie evidence to the court in the form of credible opinion given by another competent doctor to support the charge negligence.
2. The investigating officer should, before proceeding against the doctor
Accused of negligence, obtain an independent and competent medical opinion, preferably from a doctor in government service qualified in that branch of medical practice.

¹⁵ https://main.sci.gov.in/supremecourt/Judgement_30-Apr-2021.pdf

¹⁶ <https://www.mohfw.gov.in/pdf/Telemedicine.pdf>

¹⁷ Jacob Mathew vs. state of Punjab &anr. (2005)6 SCC 1

¹⁸ <https://www.indiacode.nic.in>

3. A doctor accused of negligence should not be arrested in a routine manner unless, his arrest is necessary for forward preceding the investigation or unless there is a flight risk.

Later on it was held by the court that for accusing any doctor under criminal medical negligence, gross negligence had to be proved. The court added that, “medical professionals deal with patients and they are expected to take the best decision in the circumstances of the case. Sometimes, the decision may not be correct, and that would not mean that the medical professional is guilty of the criminal negligence.”

In case of – Indian medical association vs V.P. Shantha, 13 November 1995¹⁹

Supreme Court held that the patients aggrieved by the deficiency in treatment, from both private clinics and government hospitals, are entitled to seek damages under the consumer protection act, 1986.

In case- Mohan Dai Oswal Cancer treatment and research foundation case (2019)²⁰

NCDRC held that the Doctor vicariously liable for the acts of his team which assisted the doctor in every sphere in regarding treatment to the patient. The onus is on hospital and doctor to explain the exact line of treatment rendered which resulted in the breach or serious illness.

CURRENT SITUATION

Doctors and healthcare workers responding to a global health crisis—trying to safeguard individuals, families, and communities in adversity with limited resources, personal protective equipment (PPE), and other equipment—have become unintentional targets in the fight against COVID-19. Several incidents of such violence against them have been documented. Although the precise number of such occurrences is unknown, two trainee doctors in New Delhi were allegedly beaten by a neighbor who accused them of spreading the sickness on April 8, 2020. A mob stormed the undertakers on April 19, 2020, disrupting the burial of a neurosurgeon that died after contracting COVID-19 in Chennai. The residents objected because they believed the disease would spread if the surgeon was buried there.⁷ In Indore, central India, a group of public health professionals who were trying to ‘contact-trace’ a person were attacked by a group of 100

¹⁹1996 AIR 550, 1995 SCC (6) 651

²⁰Mohan daioswal cancer treatment and research foundation and others v. prashantsareen and others c/o sarenelectricalspvt. ltd

people who pelted them with stones and forced them away. Doctors are increasingly being spat on and abused, according to reports.

Doctors are confronted with two major issues that restrict their ability to provide medical care.

1. Because Covid-19 is a novel viral strain, clinicians are finding it difficult to comprehend the repercussions and gain expertise. The patient's medical history (hereditary, Diabetics etc.)
2. Covid testing entails a variety of procedures involving many clinical and health organizations, which makes it difficult.

Furthermore, not only are doctors struggling to find the right equipment to deal with the ongoing war-like situation; all of these issues must be considered before holding them accountable.

Not only the hospitals, but also the state, are unable to manage the necessary equipment from the outlets due to a lack of appropriate stock. People had faith in our country's medical system prior to the epidemic, but owing to the current situation, they have lost faith and have changed their perception of this sector. Every one of the experts who are operating in a normal climate as before, e.g., specialists, and individual experts, will not be granted any form of liability protection because they are outside the circle of unnatural conditions being faced and are already in operation. Likewise, anyone involved in unlawful transactions with the purpose of causing havoc gets added to the list.

Clinical negligence claims are on the rise, owing mostly to the rapidly growing number of clinical medical providers with inadequate framework offices, as well as insufficient capacities. The situation has been aggravated by the Medical Council of India's carelessness in carrying out well established shows for diagnoses and treatment. The administrator is frequently seen putting in place protections and informing clinical benefits professionals about their wrongdoing. Patients and their family are also constantly looking for responses to credible fixes. As can be seen in the current situation, the rising number of deaths is due to a lack of reserve, for example, hospitals are short on oxygen cylinders and ICU beds, which are vital commodities that should be present in hospitals to save the lives of those infected with this terrible virus.

FAILURE OF THE NORMS PROVIDED BY THE GOVERNMENT

Staying up to date on the latest government rules and regional policies, as well as adhering to them diligently is of the utmost importance. A sense of honor constrains the clinical administrator and the association to be set up to cope with any uncertainties that arise from

surrendering or treating a Corona virus suspect or a good comprehension. The affirmation or therapy should include the following:

Failure to conform to the criteria will undoubtedly enrage the public position bodies, resulting in negative actual effects. There have been instances where the sufferer has been treated inhumanely and pitifully. Regardless of their disease, the quarantined patient must flee the hospital to preserve their life; these situations result in a regrettable circumstance.

The PIL was filed before the Allahabad High Court, and the judge decided to form a committee and appoint Nodal Officers in each district to deal with the challenges in PHCs and CHCs.

WHAT AFTER NEGLIGENCE HAS OCCURRED?

The burden of proof is entirely on the complainant to show that the doctor was at fault.

The plaintiff or complainant must show that the doctors or hospitals were negligent.

The “Bolam Test,” which has been utilized in a wide variety of carelessness, not just clinical carelessness, is employed by Indian courts to determine medical negligence.

There are three points that must be met in order to provide a beneficial result:

1. It must ensure that right procedures are followed.
2. It should ensure that the practitioner has received enough training.
3. It should have been demonstrated that the practitioner followed proper procedure in that situation, as a reasonable person would.

To protect the rights of the person/patient, the constitution contains the following provisions:

If the expert is found guilty, he will be penalized under these sections-

- A person is accountable for any form of reckless and careless act amounting to culpable murder committed under Section 304-A of the Indian Penal Code, 1860, and is punishable by imprisonment for a term of up to two years, a fine, or both.

- Under Section 337 of the Indian Penal Code, 1860, the individual will be sentenced to six months in prison or a fine, whichever is greater, if an act committed by the person puts human life or the personal safety of others in jeopardy.
- Under Section 338 of the Indian Penal Code, 1860-, if a person conducts a reckless or careless act that puts human life or the personal safety of others in jeopardy, the offender will be punished with imprisonment for a term of up to two years, as well as a fine.

There were further provisions in the constitution to protect the rights of the practitioner:-

- Section 80 of the Indian Penal Code 1860 stipulates that an act that occurs without any criminal purpose and results in an accident or misfortune will not be considered an offence provided the conduct is done lawfully, in a lawful manner, and using lawful means while taking reasonable care.
- According to Section 81 of the Indian Penal Code, an act will not be considered an offence if it is likely to cause harm, the act was not done with the intent of causing harm, and it was done in good faith to avoid greater probable harm.
- According to Section 88 of the Indian Penal Code, 1860, if an act is conducted in good faith without the purpose to cause injury, even if awareness of the risk is present and the patient consents, no liability arises.

HOW COVID 19 CHANGES THIS POSITION?

Doctors are confronted with two major issues that restrict their ability to provide medical care.

- Because Covid-19 is a novel viral strain, clinicians are finding it difficult to comprehend the repercussions and gain information.
- The patient's previous medical history (hereditary, Diabetics etc.)

Covid testing entails a variety of procedures with many clinical and health organizations, making it difficult to determine the source of a person's problem.

Furthermore, not only are doctors struggling to find the right equipment to deal with the ongoing war-like situation; all of these issues must be considered before holding them accountable.

Not only the hospital, but also the state, is unable to manage the necessary equipment from the outlets due to a lack of appropriate stock.

Many had faith in our country's medical system before to the epidemic, but because to the current situation, people have lost faith in this sector and have changed their perception of it. Every one of the experts who are operating in a normal climate as before, e.g., specialists, operation lists, and individual experts, will not be granted any form of liability protection because they are outside the circle of unnatural conditions being faced and are already in operation. Likewise, anyone involved in unlawful transactions with the purpose of causing havoc gets added to the list.

Clinical negligence claims are on the rise, owing mostly to the rapidly growing number of clinical medical providers with inadequate framework offices, as well as insufficient capacities. The situation has been aggravated by the Medical Council of India's carelessness in carrying out well established shows for diagnoses and treatment. The administrator is frequently seen putting in place protections and informing clinical benefits professionals about their wrongdoing. Patients and their family are also constantly looking for responses to credible fixes.

As can be seen in the current situation, the rising number of deaths is due to a lack of reserve, for example, hospitals are short on oxygen cylinders and ICU beds, which are vital commodities that should be present in hospitals to save the lives of those infected with this terrible virus.

If a person dies due to the shortage of materials, who will be accountable for the costs of the irreplaceable loss to his family?

The doctor will not be held liable in this scenario.

In addition, it has been observed that most of the time, the patient is admitted to the hospital when the condition worsens and the complications become irreversible.

It became a difficult challenge for doctors to save the patient from such serious consequences, which led to bias that the doctor did not take the correct medication, resulting in an accident. This is supported by the findings of the study, which found that 52 percent of patients died within 24 hours of being admitted to the hospital, 32 percent survived for 24-72 hours, and 16 percent died after that time.

SUGGESTIONS

Clinical carelessness is a result of the rapidly growing graph of the number of clinical benefits providers with an insufficient structure, which is almost inferable from the absence of

capabilities and outdated data on clinical benefits specialists. The situation has been made worse by the Medical Council of India's approval of well-established shows in diagnosis and treatment. Patients and their families are always looking for a reaction to legal treatments, and the regulator is frequently seen putting up guards and assuring clinical benefits professionals of their demonstrations. Even the courts are unable to render consistent judgments in cases of medical malpractice. As a result, there has been a rise in conflicting decisions across courts, including the Supreme Court.

Another decision by the Supreme Court has significantly weakened the cut-off point for determining liability in clinical carelessness cases, stating that where a clinical consideration expert may have made an incorrect examination or determination, a comparable will not be the same as clinical carelessness.

Before engaging in any actions against medical professionals, standard guidelines should be established and re-examined as circumstances change, ensuring that no one is left without legal assistance. Putting tremendous responsibilities on clinical professionals is, by all accounts, uncalled for, notwithstanding the extraordinary circumstances. For patients infected with Corona virus, a Base Standard of Care should be established and supported by the government and the ICMR (Indian Council for Medical Research).

To improve the existing situation, examine the following points: -

1. A brief history of the patient's illness should be included in the discharge statement.
2. For the time being, doctors and other medical personnel should be held responsible for gross carelessness rather than minor negligence.
3. Hospitals should familiarize them with Indian criminal code sections 191 and 192 so that they are aware of the repercussions in the event of any negligence.
4. In the event of medical negligence, a fast-track court should be established where the plaintiff receives an early verdict.

There is a clear need for an agency that can look at the present situation and analyze issues that have arisen, as well as conduct critical analysis before taking any measures or making any decisions.

In the middle of the COVID-19 pandemic's weakness, the legal authority is the only image of desire that needs to alter the actual worries of medical occupants who are suffering from a lack

of sufficient clinical offices and an increase in cases of clinical negligence. There are expectations that the Supreme Court will make significant improvements in order to preserve the predictability of the legal system.

CONCLUSION

The COVID-19 status is fluid and changing due to geographical differences. The epidemic is here to stay, and there might be many more on the way. We've had a lot of difficulties, not because of the sickness, but because of our dread of the unknown.

While Indian laws impose limitations on practice, they also provide safeguards to protect the medical practitioner's interests.

Professional regulatory organizations across the globe, notably the American Medical Association (AMA) (Code of Medical Ethics Opinion 8.3), require doctors to offer emergency medical care during catastrophes. The code, on the other hand, acknowledges that the medical workforce is a finite resource that must be used wisely while striking a delicate balance between current dangers and the need to provide care in the future.

Physicians have a moral obligation to treat, but they also have the same human rights as the rest of the population and must be safeguarded against contagious illnesses. Hospitals, professional regulatory bodies, and governments must ensure and provide the necessary resources to protect staff caring for infected patients, including not only personal protective equipment (PPE), but also training, environmental controls, and policies and procedures to prevent the spread of infection.

Achieving a balance between efficiency and creativity is critical. In the midst of the present epidemic, it is critical to be aware of existing legislation as well as our rights and responsibilities.