CHAPTER-VIII
Evolution of Medical Jurisprudence through Laws and Decisions

Introduction

The jurisprudence of Medical Negligence evolved through the legislations and judicial decisions. In the absence of a comprehensive law in this area the evolution of Medical jurisprudence through laws and decisions has been useful for evaluating and understanding the menace in this field. For convenience this chapter is divided into two. The first part deals with evolution from laws and other reflects on the evolution from decisions. In India the law developed through the interpretations, of principles laid down by the English Courts and American Courts.

I. Evolution Through Laws

People are becoming aware, about their rights, measures for damages in tort, civil suits and criminal proceedings. Not only civil suits but the accessibility to a medium for grievance redressal under the Consumer Protection Act, 1986 (CPA), having jurisdiction to hear complaints against medical professionals for ‘deficiency in service,’ has given rise to a large number of complaints against doctors. Criminal complaints are being filed against doctors alleging commission of offence punishable under section 304A or section 336/337/338 of the penal code, alleging rashness or negligence on the part of the doctor, resulting in loss of life or injury of varying degree to the patient. This has given rise to a situation of great distrust and fear among the medical professionals and a “legal assurance”, ensuring protection from unnecessary and arbitrary complaints, is the need of the hour. The liability of medical professionals must be clearly demarcated so that they can perform their benevolent duties without any fear of legal sword. At the same time, justice must be done to the victims of medical negligence and a punitive sting must be adopted in deserving cases. This is more so when the most sacrosanct right to life or personal liberty is at stake.¹

¹ Art. 21 of Indian Constitution
Any reasonable man entering into medical profession requires skill for performing that profession. Each professional also requires a particular level of learning to be called a professional of that branch. It impliedly assures the person dealing with him that he has the skill and that the doctor also possesses the degree of care and caution expected of him. On the same analogy, this assures the patients that doctor possesses the requisite skill in the medical profession which he is practicing and while undertaking the performance of the task entrusted to him, he would be exercising his skill with reasonable competence. This is what all persons approaching the professional, can expect. Judged by this standard, a professional including medical professional may be held liable for negligence on one of the two findings, either he was not possessed of the requisite skill which he professed to have possessed or, he did not exercise with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. Where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the professional is to be judged by the lowest standard that would be regarded as acceptable. Where there is a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a 'Colorpham Omnibus', because he has not got this special skill. The test is the standard of the ordinary skilled man exercising the profession to have that special skill. A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of the ordinary competent man exercising that particular art.² The water of Bolam test has ever since flown and passed under several bridges, having been cited and dealt within several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and well-condensed one.

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² Bolam v. Friern Hospital Management Committee [1957] IWL, [1957]1 W.L.R
Thus a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinary competent practitioner would have. He should be alert to the hazards and risks in any professional task he undertakes. He must bring to any professional task he undertakes, no less expertise, skill and care than other ordinary competent members of his profession would bring, but need bring no more. The standard is that of the reasonably average. The law does not require of a professional man that he be a Paragon combining the qualities of polymath and prophet. A deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (i) that there is a usual and normal practice; (ii) that the defendant has not adopted it and (iii) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. A medical practitioner cannot be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. Several weighty considerations can be pointed out to any forum trying the issue of medical negligence in any jurisdiction. They are (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds;(ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the ‘smoking gun’. The following are the relevant evolution from tort law.

A. Evolution From Tort Law

Tortious liability is the base of medical negligence jurisprudence. Civil Courts creates heavy burden of proof over the plaintiff to prove the case beyond the preponderance of probabilities. Usually the plaintiff does not have any access to the evidentiary proof of what has happened inside the premises of hospital. Everything is under the blanket coverage of hospital authorities and doctors. An ordinary man does not have any access to the documentary evidence. Thus they are unable to prove the case beyond the preponderance of probabilities. This is a constant barrier within the meaning of ‘deficiency of Service’ under Consumer law.\textsuperscript{5} The system does not have any competent mechanism for appreciation of evidence submitted before the consumer court. The medical negligence offences are adjudicated as a silly consumer offence. Even though the consumer courts provide speedy inexpensive and expeditious remedy, it is not meritorious. Another development of law is through the penal law.

B. Evolution From Penal Law

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code, 1860 sets out a few vocal examples. Section 88 in the chapter dealing with General Exceptions, provides exemption for acts not intended to cause death, done by consent in good faith for a person’s benefit. Section 92 provides exemption for acts done in good faith for the benefit of a person without his consent though his acts cause harm to a person and that person has not consented to suffer such harm. Section 93 exempts certain communication made in good faith. The rationale behind these provisions is that no man can so conduct himself as to make it absolutely certain that he shall not be unfortunate as to cause the death of a fellow human being. The utmost that he can do is to abstain from every thing which is likely to cause death and which will make him liable for the punishment of involuntary culpable homicide. The involuntary causing of death, without either rashness or negligence, should under no circumstances be punished as murder. The following statement regarding criminal negligence is

\textsuperscript{5} Section 2(1) (0) of Consumer Protection Act
important “where a person acting as a medical man, it is manslaughter if the negligence was so great as to amount to a crime and whether or not there was such a degree of negligence is a question in each case for the jury. In explaining to the jury the test which they should apply to determine whether the negligence in the particular case amounted to or did not amount to a crime, judges have used many epithets, such as ‘culpable’, ‘criminal’, ‘gross’, ‘wicked’, ‘clear’, ‘complete’. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal disability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed disregard for the life and safety of others as to amount to a crime against the State and a conduct, deserving punishment.”

Criminal liability is not an accepted principle in medical negligence, because there are very few cases filed against the doctor reporting negligence arising out of personal vengeance. It is a rare possibility in medical negligence cases. If the courts impose criminal liability, the doctors will not be ready to attend to any risky cases. The doctor would be reluctant to help out even in the most urgent case. Thus criminal law has little significance in the medical negligence cases, in India. The main source of evolution of law is through judicial decisions. The following are the discussions relating to judicial law making in India.

11. Evolution from Decisions

The main source of evolution of law is through judicial decisions. The following are the discussions relating to judicial law making in India. Court rendered some landmark decisions like in Indian Medical Association v. V.P. Shanta where the medical profession was included within the meaning of ‘deficiency in services’ under Consumer Law. This decision contributed speedy, inexpensive, accessible and expeditious remedy to the complainant. Supreme Court at the same time criticised the competency of consumer court to appreciate medical evidence. This was a revolutionary outcome of the judicial decision.

In the case of Achutrao Haribaukhodwa and ors v. State of Maharashtra the court had adopted a uniform rule for typical case of negligence. Supreme court took the same stand in several other decisions. The rule laid down was that if there is any case of ‘Res Ipsa Loquitur’ court would decide the matter in favour of complainant and declare the case as a typical case of negligence.

In Vineetha Ashok v. Lekshmi Hospital the court declared that if there is any mistake in the process of diagnosis, it cannot be considered as a case for medical negligence. Thus the court made a valuable contribution in upholding the professional freedom of doctors.

In Poonam Varma’s decision, the court framed a new law to avoid the service of quack-doctor. It was an endeavour from the part of the court to uphold the dignity of medical profession. Here the court had taken a strict stand to improve the standard and quality of profession.

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7 (1998) 8 SCC 296, AIR 1996 SC 550
8 (1996) AIR 1996 SC 634
9 2001 (3) KLT 606 (SC)
10 AIR 1996 SC 2111
In *X v hospital Z*,\(^{11}\) court held that the right to disclosure of medical information for the protection of life of another and their family will prevail over right to privacy of individual patients. This stand of the court protected the privilege of the doctors to disclose confidential medical information in cases relating to a situation under the reasonable apprehension of endangering public health.

In *Spring Medow’s Hospital* case,\(^{12}\) court declared that the parents can act as potential consumers on behalf of minor child. They can bring the compensation suit before court. This was the positive stand of court to provide maximum access to justice.

The Supreme Court decided a number of cases in this area, and doing so they largely referred to English cases. They adopted the principles of English law to decide the case. The following are the outcome of this study in brief relating to law of medical negligence that developed through judicial decisions

1. Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those consideration which ordinarily regulate the conduct of human affairs would do, or for something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three, ‘duty’ ‘breach of duty’ and ‘damage’.

2. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional consideration applies. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not

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\(^{11}\) (1998) 8 SCC 296

\(^{12}\) AIR 1998 SC 1801
proof of negligence on the part of a medical professional. So long as he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions it can be checked whether those precautions were taken without the standard of an ordinary medical practitioner, which has found to be sufficient in this situation. A failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So, also the standard of care, while assessing the practice as adopted is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3). A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skill in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the Yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4). The test for determining medical negligence as laid down in Bolam’s case holds good in its applicability in India.
(5). The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mensrea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher ie, gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis of prosecution.

(6). The word ‘gross’ has not been used in section 304 A of IPC, yet it is settled that in criminal law, negligence or recklessness, to be so held, must be of such a high degree as to be ‘gross’. The expression rash or negligent act ‘as occurring in section 304A of the IPC has to be read as ‘grossly’

(7). To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which resulted in the cause of action.

(8). Res Ipsa Loquitur is only a rule of evidence and operates in the domain of civil law especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res Ipsa Loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

(9). A doctor has to seek and secure the consent of the patient before commencing a “treatment” (the “treatment includes surgery also). The consent so obtained should be real and valid which means that the patient should have the capacity and competence to consent and his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what he is consenting to
(10) The “adequate information” to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved which may frighten or confuse a patient and result in refusal of consent for a necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoiding the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(11) Consent given only for a diagnosis procedure cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure through unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(12) There can be a common consent for diagnostic and operative procedure where they are contemplated. There can also be a common consent or a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.
The nature and extent of information to be furnished by the doctor to the patient to secure the consent, need not be as stringent and of high degree as mentioned in Canterbury, but should be of the extent which is accepted as normal and proper by a body of medical man skilled and experienced in the particular filed. It will depend upon the physical and mental condition of the patient, the nature of treatment and the risk and consequence attached to the treatment.

Several landmark decisions over the years have made a strong impact on the medical jurisprudence in India. The judiciary has kept in mind the interest of the medical professionals and also the right of patients. However one of the most important contributions made by the Indian Judiciary in this area was by highlighting the professional freedom of the doctors and other professionals in the medical field. This is very important as professional will be willing to put in efforts only if they know that they won’t be taken to court for every action or inaction. They will be willing to take more risks.

Conclusion

When the courts set to decide the cases of professional negligence there were two sets of interest which were at stake, the interests of the plaintiff and the interest of the defendant. A correct balance of these two sets of interest should be maintained by the court rendering justice. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. This implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. The present legislations are not competent to analyse this issue effectively. The law should provide some weightage for the interest of the patients as they are the ultimate sufferers of this situation. Medical negligence is a complicated issue and we need some comprehensive and effective law for taking the problem and thereby protecting the rights of both patients and doctors.

13 Samirakoli v. Dr.Prabha Manchanda (2008) 2 SCC p.33