CHAPTER III - LITERATURE REVIEW

3.1 Literature Related to Medical Negligence:

Speaking for Indian context, academic and research endeavors revolving around ‘Medical Negligence Liability’ did succeed in generating sizeable quantum of literature. In addition to the influential impact of English Common Law Jurisprudence, the literature under review quite explicitly reflects analysis of judicial decisions rendered by various Courts and Consumer Forums, Research Articles, Text Books and Commentaries.

By and large, the literature under review depicts the following, though not in a segmental and coherent manner:

I. Evolution of medical negligence liability under the legislative ambit of Consumer Protection Act, 1986;

II. Highlights pertaining to Doctors’/Hospitals’ liability for medical negligence and benchmarks of judicial interpretation and dispensation;

III. Paradigm shift in Judicial Interpretation and related afterthoughts;

IV. Criminal liability for medical negligence understanding on the part of Judiciary;

V. Premise of medical negligence liability: Indian Judiciary’s insistence on endorsement on age old English Common Law Principles.

i. Evolution of Medical Negligence Liability under Consumer Protection Act, 1986:

It took almost eight long years to ultimately decide and affirm that medical services come under the ambit of Consumer Protection Act, 1986 and accordingly it was held that an aggrieved consumer is entitled to seek remedies envisaged under Consumer protection Act, 1986 by initiating appropriate procedure before respective Consumer Forum. This was decided by the Supreme Court in Indian Medical Association
Medical Negligence: an Analytical Study Focussing on Legal, Ethical and Clinical Perspectives

Vs.V.P. Shantha & Others in the year 1995\(^1\). This development, in a sense heralded the onset of medical litigation in India. Having said so, the essence of Supreme Court's Judgment mirrors the following propositions:

- In a way, liability under COPRA for deficiency of medical service is akin to the principle of Res Ipsa Loquitur i.e., the thing speaks for itself;

- Principle of Vicarious liability can be invoked to fasten legal liability on the part of Employer or Hospital or Healthcare Establishment;

- Burden of Proof is relatively lighter on the part of complaint only to convince the Forum/Court about application of Res Ipsa Loquitur to the given fact situation. Thereafter, the burden shifts to the opposite party/parties to disprove the same;

- Interpretatively, it is argued that any allegation other than Res Ipsa Loquitur warrants regular Court enquiry but not summary procedure adopted by Consumer Forums.

ii. Highlights pertaining to Doctors'/Hospitals' Liability for medical negligence

Subsequent phase of judicial insight has witnessed, though sporadic and yet times in consistent in nature, attempts to exclude or eliminate the jurisdiction of Consumer Forums over alleged deficiency of service in connection with or related to medical care and/or treatment. Such attempts centered around:

- Whenever alleged deficiency of service warrants medical insight in the form of expert evidence, then the proper Forum would be Civil Court but not Consumer Forum or Commission;

- The Burden of Proof on the part of complainant must be strictly discharged, otherwise the complaint is liable to be dismissed;

- Technical compliance of Civil Procedure is not warranted unless explicitly envisaged by COPRA;

\(^1\) Indian Medical Association v. V.P. Shantha and Ors, (1995) 6 SCC 651: AIR 1996 SC 550
Effective dispensation of Consumer Justice requires appropriate and suitable changes to COPRA particularly focusing on execution of Orders Passed by Forums/Commission;

Complaints without any material substance pertaining alleged deficiency or fictitious petitions or imaginary nature of complaints must be discouraged and if necessary must be subjected to penalty as a relief for the opposite parties.

iii. Paradigm Shift in Judicial Interpretation and related after thoughts:

Later part of 2000 has witnessed a remarkable development in the form of a decision rendered by Supreme Court in Martin D’Souza2: While responding to the concern of unabated and entrenched nature of medical litigation, Supreme Court of India in Martin D’Souza has unequivocally opined:

- Majority of the cases filed before Consumer Forums/Commissions end up in dismissal of complaints either on account of lack of evidence or lack of warranted merit. However, the Professional Doctors’ are subjected to the ordeal of litigation and very rarely Forums invoke the legal principles relating to Joinder or Mis-Joinder of Parties. Many a time, the disposal of a medical negligence case consumes more time than any other consumer grievance case;

- By merely considering the adverse consequence i.e., death or disability or loss of earnings or second/multiple surgeries, alone the patient or aggrieved attendees of patient’s family comes to a conclusion that ‘medical negligence’ is the only cause for such adverse event and accordingly initiates procedure of filing a complaint before Consumer Forum/Commission;

- The COPRA, as matters stand, doesn’t envisage, screening or review of Complaints (Pertaining to medical negligence liability!), as a result admission of such complaint takes place mechanically or as a matter of routine. Be that as it may, as the Complaint fails to reveal a legally sustainable cause of action, gets dismissed, as a matter of fact, at the end;

---

2 Martin F. D'souza v. Mohd. Ishfaq, 2009 (3) SCC 1
Medical Negligence: an Analytical Study Focussing on Legal, Ethical and Clinical Perspectives

- Qualitatively, allegations revolving around medical negligence are different from other types of deficiency of service, thereby warranting appropriate and adequate insight from medical science and practice;

- Hence, any complaint against a medical doctor or a hospital, at the outset, requires to be referred to an expert doctor or panel of doctors to examine and evaluate whether such a complaint reveals a prima facie (on the face of it!) evidence as to such allegation or not. If it reveals, then the Consumer Forum/Commission has to send appropriate Court notice to Doctors/Hospitals and thus formally initiates the Court Proceedings.

iv. Criminal Liability for Medical Negligence:

Supreme Courts’ judgment in Jacob Mathew’s case\(^3\) has put at rest the obtaining misgivings about Criminal Prosecution of medical doctors. The Judgment reflects the following propositions:

a) The premise of criminal prosecution of Doctors under Section 304-A is quite clear and explicit. However, the issue is, whether there should be any difference between ‘negligence’ as a ‘tort’ and ‘negligence’ as a crime;

b) In sizeable number of cases which are otherwise tort cases, the aggrieved patients approach Police Stations and insist upon of FIR registration under Sec. 304A. This trend in a way clearly epitomizes singular motivation on the part of patient attendees to harass, embarrass and shame the medical doctor;

c) If it continues unabated or unchecked, this trend will undeniably shake and erase the obtaining degrees of faith and commitment in medical doctors, which in a sense, destroys the essence of social fabric. Hence, there is a need for effective intervention;

d) Therefore, for criminal prosecution, the negligence requires to be gross in nature. Otherwise, it doesn’t justify infliction of Criminal Punishment.

Accordingly, the burden on the part of prosecution is of higher degree warranting judicious discharge. However, this particular interpretation has been overruled by a Three-Judge Bench and clarified that procedurally this requires some safeguards rather than purportedly undertaking a function which truly falls under the ambit of legislature;

e) Accordingly, the Supreme Court reasoned that, before formally initiating Criminal Prosecution, it is incumbent on the part of Investigating Police Officer to collect and collate required insight and inputs from medical doctors of the concerned specialization. Only in the light of which, an appropriate decision to commence the procedure must be taken. Till that time, arrest should not take place as a matter of routine.

v. Premise of medical negligence liability - Indian Judiciary’s insistence on endorsement of English Common Law age old Principles:

Speaking for Common Law perspective and context, the essential premise of legal principle pertaining to medical negligence liability has evolved from Bolam and then moved on in transforming itself into a new perspective altogether in Bolitho and more particularly in Whitaker.

In English context, voices challenging the continued influence of Bolam have multiplied beyond contemplation. Radical stand has vociferously been expressed in Australian Jurisdiction in Whitaker.

In fact, the core essence of this contentious debate has in a sense been resurfaced in a recent case i.e., Malay Kumar Ganguli & Dr. Kunal Saha v. Dr. Sukumar Mukherjee, 2009 (3) CPJ 17 (SC) of Supreme Court.

In this regard, the unambiguous stance taken by Supreme Court (as decided in couple of cases) reflects the following propositions:

i. Despite Judicial endorsement (in English, Canadian and Australian Jurisdiction) as to progressive stand which qualitatively and substantially

4 Bolam v. Friern Hospital Management Committee, [1957] 1 W.L.R. 582
deviates and differs from Bolam, quite consistently, Supreme Court of India continues to endorse ‘Bolam’ as the foundational premise of medical negligence liability;

ii. Apparently, Supreme Court in one such judgment has reasoned that the obtaining degree of medical litigation doesn’t warrant deviation from Bolam;

iii. Similarly, it seems that the ever expanding horizons of private health care as opposed to almost invisible Public health care has influenced the Supreme Court to pursue its reliance on Bolam rather than shift its allegiance to emerging trends in this regard;

iv. However, it is necessary to appreciate that the Supreme Court has not failed to comprehend the reasons for such paradigm shift with regard to essential premise of medical negligence liability;

v. Perhaps, this is the reason why, the Supreme Court did not hesitate to record and reason that in future, in case if the social context embraces such, focus will definitely shift from Bolam to Whitaker.

A detailed analysis and glimpse of literature review in context, quite clearly reveals that ‘Medical Negligence Liability’ has not been researched from management perspective, which the present research endeavour attempts to undertake.
REFERENCES:

ARTICLES:


17. Sarla Gupta, May, 2005, Medical negligence in the field of telemedicine; Criminal Law Journal, Vol.02, No.05, p.146-150.


BOOKS:


WEBSITES:

1. http://The National Family Health Survey (NFHS-3) - India - National Family Health Survey 2005-2006 (NFHS-3) India Reports Health Education to Villages.html downloaded on 02.04.2010


