How to Avoid Litigations in Medical Practice

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"Decoding Principles of Medical Negligence"

The dictionary meaning is "negligence" is - want for proper care or attention, carelessness, disregard, omit to do, leave uncared, etc. All these regular meanings are included when we define medical negligence. The concept of negligence comes under the common law of torts, Indian Penal Code (Criminal negligence) and law of contracts..

When we talk about Medico-legal cases, we intent to look for medical negligence only. Deficiency of services and unfair practice are dealt under various laws specially Consumer Protection Act.

There are three essential elements to label it as Medical Negligence.

1. **Establishment of doctor-patient relationship.**

   A legal duty to exercise due care by the doctor towards the patient
2. **Breach of said duty**
3. **Consequential damage.**

1. Establishment ofdoctor-patient relationship-

This relationship is implied or created through direct or indirect contractual element.

Privity of contract between patient and the doctor needs to be established but does not simply mean that there must be direct discussion between them. E.g. anesthetist called by the surgeon of his choice has entered into this relation through he has never seen or talked to the patient before.

A person who holds himself ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for thepurpose. Such a person when consulted by a patient owes him certain duties viz.

a. A duty of care in deciding whether to undertake the case.
b. A duty of care in deciding what treatment to give.
c. A duty of care in the administration of that treatment.

2. Breach of Duty

Any breach of any of above mentioned duties becomes negligence to the patient, which is actionable.

The doctor is expected to show a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged on the light of the particular circumstances of each case is what the law requires.

Breach of duty could be either act of commission or act of omission or both.

a. Act of commission: A doctor commits or does something which other prudent, reasonable doctor would not do, in similar circumstances. e.g. giving gastric lavage in kerosene poisoning; giving death certificate without ascertaining its cause or even identification.
b. Act of omission: A doctor omits to do

something which other prudent reasonable doctor would not have omitted to do in similar situation, e.g. not testing for allergy before giving penicillin or xylocaine, not examining and doing relevant investigations before undertaking anesthesia, etc.

In both these subdivisions, the doctor's act is judged by method of "comparison" with his peers and here comes the role of expert opinions and witnesses to prove or disprove the claims of negligence

3. Damage to the patient caused by the alleged act of negligence: To complete the definition of actionable negligence, there must be sufficient nexus between that act and the resultant damage-physical, psychosocial, mental, economic, etc. If no damage has resulted from a negligent act, there is no actionable negligence and hence, compensations are declined.

In a nutshell, the four essential ingredients in a case of medical negligence when action can be taken against a doctor are:

1. There has to be doctor-patient relationship and therefore, doctor owed a duty of care to him.
2. There is breach of that responsibility or duty by the doctor (or his staff. etc.).
3. Breach of the duty is either gross or act of omission or commission.
4. This has resulted in damage to the patient.

Vicarious Liability

A doctor is responsible for the tortuous acts of his subordinate. The principle applied here is respondent superior-master-servant relationship. The servant is guided and controlled by the master.

The classic case is Ahaluwaliavs Spring Meadow Hospital, where the hospital had to pay over 15lacs as compensation. Injection Chloroquin was wrongly administered to a boy of 4 years IV by an unqualified nurse resulting in cerebral damage, though no such order was given by any doctor. Another case is that to sciatic nerve injury due to, IM injection given by a well experienced nurse.

Malpractice: Any breach of morality ethics or duty in performing professional work is malpractice and is a broader term than well-defined medical negligence. It mainly comes under purview of medical council. To use prescription pads with chemist's address, system of kickback, no display of charges to do cross-specialty practice, etc. are included under this.

Wrong Diagnosis-Mistaken Diagnosis: If reasonable efforts made to arrive at a diagnosis and the doctor acts according to his learned judgment about the case, he is not negligent simply because the final diagnosis/outcome was quite different.

In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligence merely because his conclusion differs from that of other professional doctor.

Contributory Negligence

If a patient does not comply with the suggestions or advice given by the doctor

Regarding his management, patient is responsible for the final outcome-either partially or fully, e.g. not taking prescribed treatment, not keeping follow-up, non-compliance about investigations, etc. However, it is advisable to write full instructions on prescription paper, discharge card, etc. Just like informed consent, it is important to note down informed denial.

Well known cases of contributory negligence areof Steve Jobs , suffering from Pancreatic cancers and Yuvraj Singh suffering from germ cell cancer. In both cases they went for alternative therapy against medical advice. Later regretted their decisions as came back with disease progressed.

Burden of Proof

Onus of proof is on the person alleging negligence, i.e. on patient. This burden shifts to the defendant, i.e. doctor or hospital and this implies that he has to prove his non-negligence in situations, where there is no free access to the patient as in OT, ICCU, etc.

To prove medical negligence is difficult and essentially requires medical expert evidence. It must be beyond doubt as the doctor's reputation and status are at stake.

Nowadays, consumer forums are rightly asking the complainants to bring on record expert medical

opinion on their behalf, unless these fall under res ipsaloquitor.

Negligence under 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 i.e. gross or of a very high degree.
- The word 'gross' has not been used in Section 304A 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 qualified by the word 'grossly'.
- 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 in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury, which resulted, was ost likely imminent.
- **Gross Negligence or res ipsaloquitor**, i.e. negligence written on face of the case facts. In such cases, negligence is palpable, easily deducible, require very little proof, and is very difficult to defend. Examples of these are amputating wrong limb; leaving a swab inside abdomen/wound, administering wrong anesthetic gas; administration of a drug to a patient with known allergy to it, etc.

The test with regard to the negligence of a doctor was laid down in Bolam V. Friern Hospital committee Bolan case (1957) 1 W.I.R. 582, 586. It was to the effect that a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. (Achutrao Hatibhau Khodwa & others v. State of Maharashtra &ors.(1996)2SCC 634).

In Kusum Sharma/s case the Supreme Court has once again settled the law relating medical negligence. The Apex Court after scrutinizing the cases of medical negligence both in India and abroad specially that of the United Kingdom has laid down certain basic principles to be kept in view while deciding the cases of medical negligence.

Even though Supreme Court accepted Bolam test as providing the standard norms in cases of Medical Negligence, in the country of its origin it is questioned on various grounds. Bolam test has been criticized as it opts for the lowest common denominator. Opinion is gaining ground in England that Bolam test should be restricted to those cases where an adverse result follows a course of treatment, which has been intentional and has been shown to benefit the other patients previously. This should not be e xtended to certain type f medical accidents merely on the basis of how common theyare.

But as per wisdom of apex court in India,principles laid down in Bolan test are suitable in our country as of now. In Future one might think of higher degrees of standards

Some important landmark judgments regarding Medical Negligence

VP Shanta and others vs IMA

Bolam test Bolam V. Friern Hospital committee Bolan case (1957) 1 W.I.R. 582, 586

Jacob Mathew v. state of Punjab and Anr.(2005)6 SCC 1

V .KirishanRao v. Nikhil Superspeciality Hospital and anr.(2010)5 SCC 513

Maynard v West Midlands Heath Authority (1984)1 WLR 634

AchutraoHaribhauKhodwa and others v. state of Maharastra and others (1996) 2 SCC 634

Kushum Sharma V. BatraHospita, (2010)3 SCC 480