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CONCEPT OF MEDICAL NEGLIGENCE

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INTRODUCTION

Negligence is not susceptible of any precise definition. Various meaning may be attributed to negligence. First, negligence connotes careless state of nun which may amount to neck lesser, or indifference. A doctor prescribing drugs wit dangerous side effects without inform the patient of risk of those side effects and without carrying out the recommended test whether such side effects at happening, or not is guilty of carelessness in exposing the patient to the risk suffering from those side effects of the drugs. This meaning of negligence is the basis of criminal liability. Secondly, negligence is a careless conduct without reference to any duty to take care i.e. negligence per Se. The best illustration o such careless conduct is found in cases of contributory negligence. A patient undergoing medical treatment under the care of a quack exhibits such careless conduct. This meaning of negligence is also found in performance of contracted duty. Lastly, negligence refers to a breach of legal duty to take care. Lord Wright points out in Lochgelly lues and coal c. v. M Mullan Negligence means more than heedless or careless conduct, whether in omission or commission, it properly connotes the complex concept of duty. breach and damage thereby suffered by the person to whom the duty was owing. Negligence has two meaning in lay,' of torts.

REVIEW OF LITERATURE

Lords in Donoghue v. Sevonson, treats negligence, were there is a duty to take care, as specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty (neighbor principle).

The definition of' negligence given by I louse of' Lords has been modified by Charles Worth in the following ways:

"Negligence is a tort which involves a person's reach of duty that is imposed upon him to take care, resulting in damage to the complainant". The essential components of the modern tort of negligence propounded by Percy and Eharles wroth are as follows:

I. The existence of a duty to take care which is owed by the defendant to the complainant,

2. The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty and

3. Damages, which is both causally connected with such breach and recognized by the law, has been suffered by the complainant.

Thus, for general concept we can say that negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would (10, or doing something which a prudent and reasonable man would not do. Many rules of negligence law have been changed over the years simply because the public interest has been perceived differently from one time another

After defining negligence now question arises that what Constitutes professional negligence? The public and the medical and the legal professionals should clearly understand what constitutes professional negligence in a nutshell, it is the knowledge about the legal injury resulting in the course of care or service rendered by a professional due to lack of his duty and reasonable care. The proposition that the defendant must have failed to behave reasonably in the circumstances means that a passerby, who renders emergency first aid after an accident is not required to show the skill of a qualified surgeon and is not expected to show the skill which might be required of a professional waking for a reward. Where. however, anyone practices a profession or is engaged in a transaction in which he holds himself out as having professional skill the law expect him to show the amount of competence associated with the proper discharge of the duties of that profession or trade, and if he fails short of that and injures Someone in consequences, lie is not behaving reasonably[9]. Thus the term duty usually refers to a standard or general principle that measures the defendant's obligation to the plaintiff in particular circumstances.

I will confine the attention of present work to negligence by medical professionals. The fact that something went wrong or the patient suffered is no solid ground for litigation. The basic question in litigation is whether the patient has suffered due to negligence on the part of the doctor who provided the service for consideration. For clarification it is essential to understand' the concept of medical negligence.

The profession of medicine has immensely-benefited mankind through restoration of good health. According to the new international Webster's

Rogers W. V.H.. "Wintield and Jolowicz on Tort", l6' ed.. p.S.S5

at *5.56*
' Dobbs. Don. B. "Torts and Compensation", 2'' ed P. 315.
(2001). 3 KLT. p. 55

Comprehensive Dictionary of the English Language medical service means assistance or benefit pertaining to medicine or its practice offered to another, it implies delivering quality medical care

to the community, in treating and caring affliction of the human body.

DUTY TO EXERCISE REASONABLE SKILL AND CARE

A duty exists from the moment a patient approaches the doctor and the doctor examines the patient. Legally, this is ‘also applicable in cases, where a doct6r approaches an injured patient in a roadside accident and even if the patient is unconscious and totally unaware of doctor’s presence. Therefore, the relationship need not necessarily be a contractual one but may also arise when a doctor accepts or undertakes to treat a patient. The doctor then owes a duty to the patient to use diligence, cai’e, knowledge, skill and caution in administering the treatment. This duty to observe reasonable standard of care, is not affected even if he renders the service gratuitous1y

The standard of care is flexible and adaptable to the circumstances because the same standard of skills and competence cannot be expected from ever’ doctor that is why the standard of reasonable care cannot be defined with mathematical precision. Standard of reasonable skill and competence is variable depending upon the qualifications and experience of the doctor.
Under English law as laid down in *Bolam Friern Hospital Management Committee14,* a doctor who act in accordance with a practice accepted as proper by a responsible body of medical men, is not negligent merely because there is a body of opinion that takes a contrary view. The test is the standard of the ordinary's skilled man exercising and professing to have that specie skill. A nun need riot passes the highest expert skill it is well established that it’s sufficient if he exercises the ordinary skill of an ordinary competent exercising that particular art.

BREACH OF DUTY OF CARE

In an action for medical negligence it must be proved that the doctor did not discharge his duty to take reasonable care. Breach of duty to take care means omitting something, which a reasonable man would do. or doing something he would not do. Thus, failure to take care is to be interpreted as a failure to exercise reasonable skill and competence expected of an ordinary doctor of ordinary prudence.

DAMAGE SUFFERED BY PATIENT

A patient cannot sue a doctor in the absence of any damage, even though the doctor may have been negligent. The loss suffered by the patient should be measurable and compensated in terms of money. For assessing damages, the pain suffering and financial expenses incurred as a result of injury are taken into account. Depending upon the circumstances past present and anticipated loss of earning capacity and medical expenses directly attributable to the injury is included

DIRECT CAUSATION

The most important element in a case of negligence or a malpractice suit is that the patient must

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prove that the failure to take any action or negligent action by the doctor was the direct cause of harm suffered by him. In most of the cases of negligence res ipsa. loquitor; doctrine is applicable such as foreign body like sponges and forceps retained within the body. operating on a patient on a wrong organ etc.

NEED FOR MEDICAL LIABILITY AND ACCOUNTABILITY

Practice of medicine is as ancient as the existence of human race. Originally the priest functioned as preacher, teacher, judge as well as healer. I-ic was' the first doctor. With the passage of time this job of a doctor graduated into an independent profession. In the earlier era 'doctor' was treated as 'next to God' to a 'friends philosopher and guide' and then to 'respectable professional' and today, to a 'service provider to health consumers'. This downslide in the social position and esteem of doctor seems to be the result of deterioration of social values, materialistic approach to life, commercialization of medical profession, higher expectations and increasing consumer activism.

Earlier, the relationship between the doctor and the patient was considered very sacred. However, from the fifth decade of dissatisfaction among patients as evider, ced by increasing number of doctors and their patients ending up in the law courts. Patients have now become better educated and informed about the nature of' disease and treatment and perhaps, with justification expect better results and more transparency in the treatments

CONSUMER PROTECTION IN MEDICAL SERVICES

Till recently the patients aggrieved by medical negligence did not have any effective adjudicative body for getting their grievances redressed. The Indian Medical Council Act, 1956 as amended in 1964, provides' that regulation made by the council may specify conducts. Which violations shall constitute misconduct? Professional misconduct so specified can be visited by the punishment of suspension or even detention from the rolls of the erring doctor.

This arrangement does not have the desired deterrent effect because council members are prone to play soft vis -&- vis their conferees. Secondly the council was available only at the state headquarters, in that way hardly accessible to the majority of parties. Further, the council has no power to award compensation to the patients for the injury sustained.

There arc of course provisions in Civil and Criminal law offering remedies to aggrieved patients. But criminal law was pressed into services mostly in case of death as if bodily injury lesson than death has resulted from negligence, then charge would be either simple hurt or grievous hurt3, depending on the injury. For punishment under criminal law, prosecution have to proved beyond reasonable doubt and It has to be shown list medical practitioner was grossly negligent in handling the case which Is greater in degree from simple negligence or error of judgment. Thus it has long been recognized that criminal liability of a physician may result from a high degree of negligent

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conduct. What the law calls criminal negligent is largely a matter of degree; it is incapable of a precise definition. To prove whether or not it exists is like charring a Further, the Indian Courts have been very careful not to hold qualified criminally liable for patients deaths that are the result of a mere mistake of judgernent in the selection and application of remedies and when the death resulted merely from an error of judgement or an inadvertent death.

LIABILITY OF MEDICAL PRACTITIONERS

Doctors walking away from operation tables, keeping bandages into patient's stomach, operating left sides instead of right, patients dying unheard in hospitals, hospitals turning away accident victims, doctors removing unauthorized organs from patients and many more are the starke realities of modern medical profession in India. And this has and legal question about medical profession, the liability of the doctors, has and the right of hapless victims to laim compensation from doctors, host claiming compensation as a rightful demand of the poor victim is not a simple proportion, it depends largely on the forth coming remedies provided under law and the methodology available to prosecute such claims.

The whole of medical profession, where nobility has always been taken for granted is under stress and strain now it has been opened to public scrutiny and legal surveillance. In view of spicily transformation in. the medical profession to highly profitable sector, medical profession has succumbed to questionable means to pressure of profitability. In the road to commercialization of medical profession it is likely that doctors would and do resort to unholy activity with adverse effect on the patients. Inspire of medical Code of Conduct the medical profession is increasingly showing scan compassion and respect to its consumers.

Over the years, the classical notion of doctor-patient relationship has undergone a drastic transforinstion. In the earlier era, the relationship bast on trust and confidence. Charging doctor or resorting a legal suit against a for any negligence was unfathomed. However, in due course there been an increase in federal resulting into injury or death of patients, there have been tremendous increase in legal action against doctors.