

# MEDICAL NEGLIGENCE IN INDIA

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Medical Profession is one of the most reputed professions in the world as we know that doctors are considered as God because they save our lives and always saves us from disease like Cancer, TB, etc. So they are given much respect in our society and moreover they do their work and research for humans and their development and their main profession is to help people to come out of any diseases. This is their work and so they focus much on their research as it will be helpful to mankind in future. But then a time comes when the saviour doesn't remain the saviour but becomes the devil himself and here comes the main thing of our topic and that is about Negligence in the services rendered by the doctors. Doctor always needs to be focused on their work and they should be always exact in their work because when they are advising someone on their health issues then they cannot take a chance to give them wrong or useless advice or to do anything wrong in surgery because it can cost anybody's life. But it is an irony that we have several cases of medical negligence in our country and this paper is thus a detail study on Negligence in services rendered by doctors.

Now talking about negligence, we should know that negligence is an omission to do something by getting into influence of the human affairs and doing such work which will be done or not by reasonable and sensible man.<sup>1</sup> Now we will too see what exactly is medical negligence, medical negligence can be defined as an act which occurred with the lack of reasonable care or wilful negligence by the doctor in respect to all aspects regarding patient from showing the confidential report of the patient and history to some unknown person to making diagnosis and examination without patient's permission.<sup>2</sup> Moreover we can prove a doctor's negligence when he had a duty of care towards his patient but he breached that duty and the patient suffered injury due to that breach of duty of care. Now we have known that what exactly is medical negligence, so now we will see in what all ways it is done by the doctors, in order to find whether the negligence in service is done by the doctor or not there are certain ingredients being kept so that they are being caught doing wrong things. They are duty of care, breach or failure to show the acceptable level of professional conduct and the damage incurred by that breach as stated above. This all are certain things which are kept as a trap to catch the doctors practicing such things.<sup>3</sup> These are the protection barriers in favour of patients that help them to be saved from such doctors moreover it stops them from doing wrong things. So now we can see the ways in which the doctors actually do the negligence in their services like

- 1) Failure to attend or treat.
- 2) Error in diagnosis.
- 3) Failure to take full medical history.
- 4) Errors in Treatment
- 5) Failure of advice and communication.<sup>4</sup> This all are actually categories of negligence in medical care. There are still more but by this it is evident that the patients in today's time are not safe in our country. But here we will too understand that what actually happens in this all five categories of negligence. So doctors can be held liable for the Failure to attend the patients in case of accidents or emergency because it is the primary duty of the doctor to attend the patient in case of accidents but they should treat them with full level of competence.<sup>5</sup> It too include the thing that if a junior doctor or the receptionist fail to bring the patient to the doctor. Then we have is Error in diagnosis and that

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<sup>1</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 86 (2d .ed 1999).

<sup>2</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 87 (2d .ed 1999).

<sup>3</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 35 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>4</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 70-74 (2d .ed 1999).

<sup>5</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 70 , (2d .ed 1999).

occur when the doctors fail to take full medical history of the patients like, they don't take into consideration of the history of tuberculosis, eye weakness, etc. These are some of the errors which are done by doctors.<sup>6</sup> Then we can see another type of negligence and that is of Error in treatment, now it occurs when they write the prescription in illegible handwriting which cannot be read by the patients, miscalculating the drug doses, giving injections on wrong places and of wrong diseases, etc are included in this.<sup>7</sup> And if we see our last category then it brings to the thing that I mentioned in the initial stage it will be negligence on the part of the doctor if he/she advises their patients wrong or there becomes a gap in communication between the doctor and patient. So this all are the things that are needed to be kept in attention by people. This all are some of the ways in which the doctors can do a mistake.

Now we will see that what all are the Negligence type and what happens in each type of negligence so if we see the following then this all are the types of negligence which also occurs in medical profession,

- 1) Active negligence
- 2) Passive negligence
- 3) Collateral negligence
- 4) Comparative negligence
- 5) Concurrent negligence
- 6) Continued negligence
- 7) Criminal negligence
- 8) Gross negligence
- 9) Hazardous negligence
- 10) Wilful negligence
- 11) Reckless negligence
- 12) Negligence Per se.<sup>8</sup>

They are the 12 types of medical negligence which are also applicable in the field of medical profession so far seen. So we will understand each of them.

**Active Negligence:** This kind of negligence happens actually due to lack of proper training and knowledge so this type of action from origin is wrong like giving injection in wrong site.<sup>9</sup>

**Passive Negligence:** Here we can say that this type of negligence occur because there is no action or omission of an act. Like if a doctor gives injection without knowing the history of allergy.<sup>10</sup>

**Contributory Negligence (Collateral Negligence):** This type of negligence is slightly in favour of the doctors because it is this type of negligence in which the patient has not paid much attention to doctor's advice and has failed to follow his advice and thus due to that the injury has incurred to him and so here there is a contribution of patient in his injury and thus this type of negligence is said to be Contributory Negligence.<sup>11</sup>

**Concurrent Negligence:** This type of negligence can be applied to more than one act or omission like some mistake of giving wrong injection to a patient can be done by a single doctor and same can be done by two doctors together.<sup>12</sup>

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<sup>6</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 70 , (2d .ed 1999).

<sup>7</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 74 , (2d .ed 1999).

<sup>8</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 46-47 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>9</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 46 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>10</sup> Refer footnote 9.

<sup>11</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 80 , (2d .ed 1999).

<sup>12</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 47 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

Continued Negligence: This is from my viewpoint the worst negligence because in this type of negligence the doctors leave their patients intentionally or else abandon them as they know they have done a negligent act and omission.<sup>13</sup>

Gross Negligence: This type of negligence is conspicuously wrong because in this type of negligence doctors tend to leave a foreign body.<sup>14</sup>

Hazardous Negligence: This type of negligence is mainly done by that doctors who do not have much knowledge of their equipments and doesn't know it and thus it will come to a time when they use unsterile instruments which later goes to harm the patient.<sup>15</sup>

Wilful Negligence: This is a type of negligence in which the doctors intentionally or deliberately do such things that lead to harm the patient.<sup>16</sup>

Reckless Negligence: This type of negligence is actually done by the doctors who are habituated of taking high risks in their operation and thus sometimes in this way they themselves do the reckless thing in the operation that leads to the harm to the patient.<sup>17</sup>

Negligence Per Se: This type of negligence in actual is the violation of any codified rule and statute and thus this type of negligence shows that doctor didn't worry about the rule breaking and they were negligent in their work.<sup>18</sup>

Now here we are clear with all the types of medical negligence and in which way it is done.

So now we will see that when any person faces the problem of medical negligence then what should they do to avoid such situation or there is a situation coming and it is such that it is needed to file a case then what all things are needed to do it.

But before this we need to understand that there is a relation between doctor and patient.<sup>19</sup> Yes there is a relation between the two because one is not having any knowledge about the medical field and the other is an expert in that field and thus there is a relation being built up between this two. Thus as the patient doesn't know the practice he will put his faith in the doctor and the doctor will be much on his duty to serve the patient. But here we should make one matter clear and it is that, whether registered or not it doesn't matter for relationship to be established between the doctor and patient.<sup>20</sup> Thus relation can be implied or expressed. Now the relation between the two are established when any patient is brought to the doctor and in case of accidents the relation between the doctor and patient is established when the thing about the accident is informed to doctor and thus from then the relation between him and the patient is being established. And when the board of 24 hours service is

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<sup>13</sup> Refer footnote 12.

<sup>14</sup> Refer footnote 12.

<sup>15</sup> Refer footnote 12.

<sup>16</sup> Refer footnote 12.

<sup>17</sup> Refer footnote 12.

<sup>18</sup> Refer footnote 12.

<sup>19</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 3-21 (2d .ed 1999).

See also

1) Dr. JAGDISH SINGH, MEDICAL PROFESSION AND CONSUMER PROTECTION ACT 15-25 (1<sup>st</sup> ed. 1994).

2) Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 5-11 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>20</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 6 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

being kept then it is an open offer for the patient thus then when the patient is brought to the doctor then the relation comes into existence.<sup>21</sup> Then here we should get the knowledge of the thing that when the relation is not established between the doctor and the patient. It is clearly mentioned in Code Of Medical Ethics- Sec. 12. That a doctor is not bound to render service to everyone.<sup>22</sup> So if we understand in simple words then the doctors are not bounded and can and has the right to say no and refuse any patient without rhyme or reasons.<sup>23</sup> He even can say no to a patient if his past debts are left to be cleared and so once a doctor doesn't accept the patient the question of relation doesn't arise.<sup>24</sup>

Now we should too know that till when the relationship exists and the answer to that is till the patient requires the treatment and in the operative case it is extended up to the post operative period.<sup>25</sup> But the relationship can be terminated when

- 1) Treatment is not required by the patient.
- 2) When the patient is dead.
- 3) It can come to an end with the consent of the patient.
- 4) With proper notice the relationship can come to an end.
- 5) It can be then limited by the contract.
- 6) And we can to terminate our relationships with the doctor by going to a new doctor or our relation with doctor will come to an end when our doctor's death occurs.

Now we have known of establishment of relationship with doctors and termination of the relation between doctor and patient. But we should too know that there is a consent needed for a doctor to operate the patient in some circumstances. Now consent is actually a mutual understanding between the two persons and they agree upon one thing in the same sense then it can be said that they two have consent for a thing and we can find the parallel understanding of it in section 13 of Indian Contract Act 1872.<sup>26</sup> Now we know that doctor needs consent of a patient to treat him/her. But in some situations they don't need to take consent like Medical Emergencies and of cases of persons suffering from a notified disease like AIDS/HIV +.<sup>27</sup> This is how the concept of consent works in doctor and patient relationship. If we see with the point of Indian Contract Act 1872, then the relation between the doctor and patient is a type of a contract and hence thus it seeks the consent of the patient.<sup>28</sup> After knowing about consent we should know that in what all circumstances we can sue the doctor for his treatment and his work and then we can find that the work done by him was a negligent or not. Here we first discussed about the consent because it is necessary on the part of the doctor and patient to make the things clear and thus the treatment or surgery can be succeeded without the interference of court in it. But sometime when the things are not according to plan and it goes astray then the inclusion of court in our matter becomes evitable. And so for that we should know that there are 67 laws and enactments which help us to fight against this.<sup>29</sup> We should too know that we have separate consumer courts for the cases related to consumer disputes. They are too being kept at district level, state level and national level. This all deals the cases of each and every type of consumer complaint. Now here we will know that in which all circumstances we can file a complaint against a doctor like when the doctor keeps a wrong signboard that leads to mislead their patients

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<sup>21</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 9 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>22</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 9 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>23</sup> Refer footnote 21.

<sup>24</sup> Refer footnote 21.

<sup>25</sup> Dr. MAHENDRA K JOSHI, A-Z MEDICAL LAW 2000 11 (1<sup>st</sup> ed. October 2<sup>nd</sup> 2000).

<sup>26</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 11 , (2d .ed 1999).

<sup>27</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 14 , (2d .ed 1999).

<sup>28</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 12 , (2d .ed 1999).

<sup>29</sup> Dr. R.D.LELE, Dr. JASWANT M. MODY, Dr. PRITAM PHATNANI, P.D.GUPTA, S.M.MASUREKAR, S.P.SHALIGRAM, A.H.JOSHI, THE MEDICAL PROFESSION AND LAW 69, (1<sup>st</sup> ed. 1992).

and thus if this happens to somebody then they can file a case against that doctor like it happened in *Dr Sr Louie & Ors v. Smt. Kannolil & Anr.*<sup>30</sup> This is how you can file a case if a doctor keeps a wrong sign and you get misled. Here it brings to one of the most important point of the medical profession and it is that, Is the doctor liable for the negligence of his junior staff? And answer to this is that if the doctor has not kept a qualified and proper staff under him then obviously he will be liable of the negligence as it is his duty to take proper and qualified staff under him as they too important part of the treatment or surgery done.<sup>31</sup> Now here we too will know the concept of vicarious liability and its relation to medical profession that the hospital will always be liable in each case whether the negligent act is done by their doctor, surgeon, anaesthetic, nurses, etc . whether they are permanent or temporary or visiting or resident or whole time or part time this is because they are the agents of the hospital to give the treatment to the patients. This was the judgement of case *Cassidy v. Ministry of Health* given in.<sup>32</sup> Even the schools and hostel authority can be held liable if they fail to communicate the problem with the child to their parents or fail to inform about their illness to their parents and doctors.<sup>33</sup> The law permits us to sue even the manufacturers of drugs and other medical products if they are find negligent.<sup>34</sup> Then we should too make a thing clear that the persons availing free services are not entitled to file a complaint against any doctor or hospital when they are availing free services, for failure to follow medical ethics, when the doctor is charging more, etc. And any prudent and reasonable person who has taken the services and has paid the remuneration for that service then and only then he will be competent to file a complaint in the court against any medical professional. We always think about how to file a complaint but is simple and people can file their complaint in a simple plain paper and can submit it to the court and there are no fees for this but at Supreme Court level they need to pay only Rs 250 for filing the case. And the complainant can give their complaint to their legal adviser or by registered post. But there is a time limit for filling a case in the court and then is in the limit of 2 years.<sup>35</sup> And in the complaint the complainant needs to write name, age, sex, description of the address of the complainant, then the detail facts about what all wrong thing happened with him that caused him such damage and then after relevant evidence in form of documents, affidavits, etc.<sup>36</sup> And then we too have the time limit for deciding a complaint and that is of till 90 days and case is of some laboratory test then it will take 150 days but in practicality the time taken is much more but it is less than civil suit.<sup>37</sup>

Thus now we are clear with the things related to medical negligence and filling a suit against those who are doing this but still we have one thing left to be known and that is the relation of Medical Profession with IPC, TORTS, Consumer Protection Act 1986 and Indian Contract act 1872.

In order to understand the relevance of Medical Services with Consumer Protection Act 1986 we should refer the definition of the services in the act in which we can find that the activity for which a reasonable or valuable remuneration is taken then that can be called services and doctors do the same work of giving the patients the advice and treatment and taking fees in exchange of that. So medical profession is thus included in this case and the clauses of deficiency in service and negligence is all being described as same for this profession and thus it will be relating to this.

Moreover we can find the compensation clause of the act which awards the plaintiff as much as the injury and justice is thus related with it and it too happens here that the patients who are actually being trapped in this web of negligence by medical professionals.

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<sup>30</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 100, (2d .ed 1999).

<sup>31</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 115, (2d .ed 1999).

<sup>32</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 115, (2d .ed 1999).

<sup>33</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 79, (2d .ed 1999).

<sup>34</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 134, (2d .ed 1999).

<sup>35</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 436, (2d .ed 1999).

<sup>36</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 437, (2d .ed 1999).

<sup>37</sup> Dr. JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 440, (2d .ed 1999).

Now we will see the relation of Medical Professional and its negligence with Indian Penal Code.

We can see the relevance in form of sections of this Government Gazette. They are as follows

- 1) Section 269 which deals about negligent act by which an infection can spread of dangerous disease and can cost someone's life.
- 2) Section 270 which deals about malignant act by which an infection can spread of dangerous disease and can cost someone's life.
- 3) Section 274 which deals about adulteration of drugs.
- 4) Section 275 which deals about sale of adulterated drugs.
- 5) Section 276 which deals about sale of drugs as different drugs or different preparation.
- 6) Section 284 which deals about negligent conduct of doctors regarding the poisonous substances.
- 7) Section 287 which deals about negligent conduct in respect of operation of machinery.
- 8) Section 304-A which is about negligence which causes death of a person.
- 9) Section 312 which deals with negligence which causes a woman a miscarriage.
- 10) Section 313 which deals about negligence related to causing miscarriage without woman's consent
- 11) Section 314 which is about dealing with the death of the plaintiff when the doctor was miscarrying a baby.
- 12) Section 315 which deals about intentionally to kill the baby inside or to try to kill the born baby after the birth.
- 13) Section 316 deals with culpable homicide which will be consequence of causing death of quick unborn child.
- 14) Section 317 deals with the responsibility of the parents that they cannot leave a child under the age of 12 years.
- 15) Section 318 deals with concealment of birth by secretly disposing the dead body of a baby.<sup>38</sup>

This all sections are evidence that the Medical Profession is almost covered in IPC. Still we have Torts in which we can find some elements of Medical Profession like in Negligence in which the Medical Negligence is being included.

And we too can find the elements of Medical Profession in Indian Contract Act 1872 in which we came to know that there is a consent included between the relation of doctor and patient. Thus whenever there is common consent by two people for same work then that becomes a contract. Thus we too can see The Indian Contract Act 1872 for making inferences of some cases of medical negligence.

Thus from this whole paper we can conclude that Doctors always perform professionally and they act in an Ethical manner but a times come when they become devil but then we too have many ways to save ourselves from this.

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<sup>38</sup> ANIL AGGARWAL, Dr. A.P. CHAUDHARI, MEDICAL PROFESSION AND THE CONSUMER PROTECTION ACT, 270-273, (1<sup>st</sup> ed. 1998).

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