**DUTY OF CARE IN MEDICAL PROFESSION THROUGH THE JUDICAL LENS**

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**Abstract:**

The doctor patient relationship is a special one and cannot be equated with other cases of professional negligence. The medical profession requires a certain degree of knowledge and experience and the duty of care is high as the slightest mistake made by a doctor can have life-changing effect on the patient. According to a report 52 Lakh medical injuries are recorded every year in India of which 98,000 people lose their lives due to medical negligence[[1]](#footnote-1).

The principle of “Duty of Care” was established in *Donoghue vs. Sevenson* in 1932, wherein the general duty to take reasonable care to avoid foreseeable injury to a “Neighbour” was identified. Where a duty of care is breached liability for negligence may arise. A patient’s right to receive medical attention from the doctors and the hospitals is essentially a civil right as the relationship takes the shape of a contract because of informed consent, payment of fees and performance of treatment etc. However the failure of a doctor or hospital to discharge these obligations is essentially a tortious liability as the patient may recover damages from the doctor if the negligence is proved. To determine negligence a three stage test is used to establish fault on the part of the care-giver – there was a duty of care, there was a breach of that duty and the harm was caused as a direct result of such breach. In India, medical negligence is dealt under the provisions of The Consumer Protection Act 1986.

Specific guidelines to evaluate the standard of care are important for the health care providers to work efficiently and to protect the rights of the patients. This article aims to look into the concept of ‘Duty of Care”, and the civil and criminal consequences of negligence as seen through the judicial lens.

**INTRODUCTION**

The world is witnessing a degradation of doctor patient relationship, erosion of mutual trust leading to increasing conflicts. Throughout history however doctors putting their lives in service of others were revered as Gods, the savers of life, the givers of relief and the destroyers of pain. But with this power and status, came an immense responsibility not to err. With advancement of medical science, new innovations, discoveries and research, life expectancy has increased and the doctors are expected to treat patients with near perfection. Increased awareness among patients, spread of education, media influence administrative set ups and governmental agencies are increasingly targeting health care facilities for perceived wrongs committed by physicians, transforming them from the God like persona to mere service providers. Professional negligence has economic, social and legal consequences and therefore the duty of care must be embroided with quality dispensation of medical service.

This transition of the status of a doctor in the eyes of a patient requires the medical professions to be aware of the rights of the patients and the corresponding duties which are imposed upon them. The paper attempts to look into the concept of medical negligence and its import as duty of care for medical professionals including hospitals and medical staff. It outlines its application, the vulnerability it creates, the possible defences and the judicial attitude towards this matter.

**MEDICAL NEGLIGENCE**

The association of the medical sector with motives of profit-making has escalated the number of cases dealing with medical negligence since 1990s. The Consumer Protection Act, 1986 (CPA) has also brought awareness among patients about their rights as consumers and the doctors have been regarded as service providers. The increase in the number of cases under CPA has revolutionised contemporary medical practice as doctors have started practicing defensive medicines and medical indemnity insurance is also on the rise.

A doctor is a professional with special set of skills acquired through learning and practice and a patient dealing with him is impliedly assured that the skill which the doctor professes to possess shall be exercised by him with reasonable degree of care and caution.[[2]](#footnote-2) However what is reasonable degree of care and caution is to be decided at the discretion of the judge based on the facts of each case. Negligence finds its origin in the law of torts and was elaborated in the judgement of *Donoghue v. Stevenson* in 1932 where the principle of “Duty of Care” was established to avoid foreseeable injury to a “Neighbour”.[[3]](#footnote-3) The lack of *mala fied* or *mens rea* keeps negligence in the domain of civil law and gross negligence or deliberately inflicted harm in the domain of criminal negligence. An error of judgement may or may not be negligent and it depends on the nature of error. [[4]](#footnote-4) A doctor cannot be held liable simple because a patient did not recover as expected or another line of treatment was also available. However there is a higher degree of standard of care and duty cast upon doctors as they directly deal with the life and well-being of patients.

**BASIC ELEMENTS OF DUTY OF CARE**

A professional may be held liable for negligence if he does not possess the requisite skill which he professes to possess or if he does not exercise with reasonable competence the skill which he possesses.[[5]](#footnote-5)

Negligence comprises of three essential elements-

1. Duty to exercise care and foreseeability of damage
2. Breach of such duty
3. Consequent damage

**1. Duty to Exercise Care and Foreseeability of Damage**

Duty of the Doctor towards the patient starts at the very moment when the doctor accepts to treat the patients. This duty is one of the basic prerequisite of the medical profession. Duty of care is one of the constituent elements of the charge of negligence that can be brought against the doctor for tortious liability under the Consumer Protection Act and criminal negligence under section 304 of I.P.C. It is to be noted that the duty to exercise reasonable care comes into existence with the acceptance from the end of the doctor to treat the patient. So if the doctor denies treating the patient there can be no question of negligence as in such a case there was no acceptance from the end of the doctor to treat the patient and there is no doctor –patient relationship. However in cases of emergency, the doctor cannot deny treatment.[[6]](#footnote-6) The court held that this duty on the doctors stems from Article 21 of the Constitution which casts an obligation on the state to preserve life.[[7]](#footnote-7) Thus in situations where there is no threat to the life of a patient, the doctor would not owe a duty to care in the absence of a doctor-patient relationship. It is also important to note that the duty to exercise care can exist irrespective of the financial consideration received by the doctor. Thus civil or criminal negligence can occur even if a patient is treated without fees. The relationship between the doctor and the patient may even start if there was no personal communication between the doctor and the patient party. For example when a patient is admitted to a Hospital for surgery the patient party may not have personal communication with the anaesthetist. But in such a case the anaesthetist owes duties to exercise reasonable care towards the patient. Before a patient initiates a case of negligence, it must be made certain that all the constituent elements of negligence are present. It must also be seen whether the medical professional had the right to render treatment to the patient and the duty must be owed in an individual capacity and not merely to the public at large.[[8]](#footnote-8)

In the case of *Murphy Vs Brentwood Dist. Council* [[9]](#footnote-9), a tripartite test was laid down to determine whether to impose such duty to exercise care or not. The three factors laid down in the above mentioned case are as follows:-

a) **The test of foreseeability of the loss in question**.

The duty of care includes an element of foreseeability on the part of the medical practitioner. Till today no standard formula has been involved by the legislature or the Judiciary to determine the foreseeability of the loss. The foreseeability test is developed from the famous *Donaghue v. Stevenson case.*[[10]](#footnote-10)Generally the Courts of India determine this factor depending on the facts and circumstances of a particular case. But there exists certain standard of foreseeability for the courts to apply in arriving at an equitable conclusion. In the case of *Mr. M. Ramesh Reddy-Vs- State of Andhra Pradesh,[[11]](#footnote-11)*a patient had slipped in the bathroom of a Hospital and died due to fungus. Here the Hospital held liable by the Andhra Pradesh Consumer Court for lack of sanitation as there was foreseeability of the loss in question. Therefore both quality of foresight and proof of legal injury are important. The patient has to prove the damage was reasonably foreseeable and not remote.

b) **The test of proximity**

Negligence can be successfully claimed when the complainant can show that the injury suffered by the patient was a direct outcome of the negligence of the doctor. It is important to show that the breach of duty by the doctor “brought about” the injury suffered by the patient. The test of proximity helps to establish the liability of doctor, nurse, hospital administer or pharmacists in cases of medical negligence. This is well accepted norms that where the doctor patient relationship is not present the proximity would be too remote. For example in the cases of first aid emergency, pre-employment medical examination, medical examination for life insurance or in medical examination at the instance of the court, proximity is remote. In the case of *Spring Meadows Hospital –Vs- Harjot Ahluwalia[[12]](#footnote-12)* the Apex Court held that where the Hospital employs an un-qualified nurse or delegates the duty to a junior doctor who he is aware of not being capable of performing the duty, the Hospital and the doctor would be held liable for medical negligence as the case passes both the test of foreseeability and proximity. In another case namely *Rajamal vs State of Rajasthan[[13]](#footnote-13)* the State Govt. was held vicariously liable for lack of trained staff, inadequate resuscitative facilities because ensuring that necessary equipment are available in the Hospital to perform the procedure for which a patient has been admitted is sufficiently close in proximity. Once foreseeability is located, the court proceeds to find out proximity.

c) **The test of fairness to impose the duty of care**

When a duty is pinned onto the doctor it should not be too harsh and should rather be just, fair and reasonable.[[14]](#footnote-14) Fairness here implies the principles of non-discrimination and impartiality and a sense of equality. In the case of *Martine F D’Sauza[[15]](#footnote-15)* the patient alleged that he had lost his hearing due to the side effect of prescribed antibiotic. The doctor in this case was able to satisfy the court that the drug was inevitably necessary in the treatment of the patient for saving his life. The Court here observed that though there exists foreseeability it would be unfair to impose such a duty upon the doctor so as to hold him negligent.

Just means legally right or lawful. Thus it is not just a moral obligation but a duty under existing law. In *Samira Kohli v. Dr Prabha Manchanda*,[[16]](#footnote-16) the doctor had removed the ovaries when the patient was under anaesthesia after obtaining consent from the mother. But it was held to be a tort of assault and battery.

The test of reasonability is ambiguous and is decided on the facts of each circumstance.

**2. Breach of Such Duty**

Breach of duty is the omission to do something which a reasonable man guided by that consideration which ordinarily regulate the conduct of human affairs would do or doing something which a prudent man under the same circumstances would not do. Breach of duty by a doctor is made when he fails to perform standard degree of care like an average doctor of his time. Breach of such duty gives the patient right to take action against the doctor for negligence. Thus it can be said that breach of duty in medical profession implies to deficiency of care. The only condition to establish such deficiency in duty is “*causa causans*” which means direct and proximate cause for injury or damage. Whether a duty of care has actually been breached or not largely depends on standard of duty that is applied in each case. The breach can be apparent from the act itself.

Two tests popularly known as the Bolam Test and the Bolitho test have come to form the yardstick of what should be the standard of care in medical negligence cases and when it is concluded that the doctor has breached his duty of care.[[17]](#footnote-17) The Bolam principle was laid down in the case of *Bolam Vs Friern Hospital Management Committee*.[[18]](#footnote-18) This principle says that standard of care to be maintained by the Doctor must be of that of a reasonable body of medical men in the same area of medicine. Simply it implies that standard of care which is expected of a Doctor is the standard of average skill, knowledge and experience. In various cases like *Achutrao Haribhau Khodwa Vs State of Maharashtra[[19]](#footnote-19)* and *Poonam Verma vs. Ashwin Patel[[20]](#footnote-20)* the Indian courts have reaffirmed the Bolam Principle. The court is concerned with is not that of a highly educated, exceptionally skilled, experienced medical professional but the accepted standard of medical care.

Another principle which can be discussed in the same context is the Bolitho test which was laid down in the case of *Bolitho vs. City and Hackney Health* *Authority.*[[21]](#footnote-21) The said Bolitho test was mentioned by Indian Supreme Court in *Samira Koholi Vs. Doctor Prova Manchanda and Another[[22]](#footnote-22)* and in the case of *Binitha Ashok Vs. Lakshmi Hospital*.[[23]](#footnote-23) The Bolitho Principle implies that the Bolam Principle would not bind the Court if the medical opinion is unable to withstand the logical test of the Court. In such a case the Court has the right to reject the Bolam Principle. The Bolitho test thus increases the burden on the Medical practitioner and helps in implementing the larger interest of the public.

The Bolam test still continues to be majorly used and the Bolitho test is applied when situation demanding it arises. The defendant doctor cannot be held to be negligent simply because his conclusion deferred from that of his colleagues unless it is proved that he is guilty of such failure which no doctor of ordinary skill would be guilty of, if acting with ordinary care.[[24]](#footnote-24)

**3. Consequent Damage**

The third important aspect of establishing medical negligence is to determine, whether the damage or loss claimed by the claimant, is directly or indirectly the result of breach of duty by the doctor or not. If the loss is indirect further test of foreseeability will be applied when the chances of getting damages will be minimum if the causation is remote.

If the injury or the damage caused itself speaks in clear and unambiguous terms, negligence is proved- *res ipsa loquitor*. For instance when a pair of scissors are left in the abdomen of the patient, during the operation, it unequivocally points towards negligence. When this principle is applied the burden is on the doctor to explain that there was no negligence on his part.

An error of judgement on the part of the doctor may not always amount to negligence. The Supreme Court in *Malay Kumar Ganguly v. Sukumar Mukherjee and Others[[25]](#footnote-25)* held that under the Law of Tort a medical practitioner would be held liable in respect of a wrong diagnosis only if his error is so blatantly wrong so as to prove by itself that it was negligently arrived at or if because of absence of reasonable care on the part of the defendant doctor.

A landmark case in medical negligence claims was *Indian Medical Association vs. V.P Shantha[[26]](#footnote-26)* where the Supreme Court decreed that patients are consumers and can claim relief under the Consumer Protection Act 1986.

The onus of proof of negligence establishing duty of care, standard of treatment, breach of such duty that leads to the proximate injury is generally on the plaintiff.[[27]](#footnote-27) However the entire burden of proof shifts to the doctor if the negligence speaks for itself *(res ipsa loquitor*).

Some defences that can be by Doctors are-

* No existence of doctor-patient relationship: There is no question of breach of duty of care and consequent negligence if there is no doctor-patient relationship.
* Duty of care had ceased during occurrence of injury: When the patient had recovered or abandoned the treatment or dies due to unrelated cause or shifted to another hospital or alternative treatment etc., no duty of care is present.
* Accepted medical practice was used: If a better procedure which is not the customary procedure is used.
* Bona fide error: No negligence is proved if error in judgment of choice of procedure of treatment causes injury if done for best interest of patient.
* Consent was given for treatment knowing about the risks involved: A doctor can only promise to use his highest possible skills in discharging his duty of care but if he had informed consent of patient and relatives of known risks in complicated procedures, he will not be liable for any consequent damage.

**CONCLUSION**

It is the duty and obligation of our civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their profession duties with fear and apprehension. A doctor must owe a duty of care to patients before his or her competency in performing that duty can be judged. Once this requisite doctor-patient relationship is established, the doctor owes to the patient the duty of care and treatment with that degree of skill, care, and diligence as possessed by or expected of a reasonably competent physician under the same or similar circumstances. This means that a medical negligence claim can arise from an absence of knowledge or ability, a failure to exercise reasonable care or failure to use one’s best judgment. A doctor’s duty to exercise reasonable and ordinary care, skill, and diligence is required and applies even when services are rendered gratuitously.

The Supreme Court in *Kusum Sharma vs. Batra Hospital & Medical Research Centre*[[28]](#footnote-28), laid down few important principles for medical negligence. It said that negligence would comprise of :-

* Breach of duty exercised by omission to do something which a reasonable, prudent man, guided by considerations would do.
* Negligence must be culpable/gross and not merely based upon an error of judgment or diagnosis.
* In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is not negligent merely because his conclusion differs from that of other professional doctor.
* Often the doctor adopts a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient. In such cases result may not amount to negligence.
* It is our bounden duty and obligation of civil society to ensure that doctors are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.
* Medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients.
* Under normal circumstances, the onus or burden of proof lies heavily on the patient to prove negligence.

Recorded facts speak in a court of law and serve as best witness in case of clinical negligence claims. Proper documentation and record keeping is the best habit which helps doctors in proving his competency and disproving negligent behaviour and guards them against spurious and malafide complaints. Using effective communication skills has immense value in establishing good doctor patient relationship. Professionalism with ethical values can bring back the lost faith among patients. In case of mishap or in critical cases, daily documentation, proper patient counselling, giving realistic expectations and ensuring open honest communication channel is very important. Record keeping for future reference and during follow up in case of a complication becomes useful. It also helps in early recognition of adverse effects if any along with adoption of remedial strategies for an unhappy patient who may seek advice or treatment elsewhere. These are some practices which doctors should adopt to prevent being subject to negligence case. To safeguard against such situations, a common consent for diagnostic and operative procedures and for a particular surgical procedure / or additional procedure which may become necessary during the course of surgery, can be taken.

The doctor-patient relationship has long been recognized as one of the traditional categories of fiduciary relationship, a relationship in which the patient places special trust, confidence, and reliance in, and is influenced by the doctor who has a fiduciary duty to act for the benefit of the patient. The fiduciary nature of the doctor-patient relationship is the most fundamental characteristic of the doctor-patient relationship based not on self-interest but trust at its core. The medical professionals are entitled to get protection as long as they perform their duties with reasonable skills and competence and in the interest of the patients. Malicious proceedings and unnecessary humiliation deserve to be discarded for the interest and welfare of the society.

1. https://www.indiamedicaltimes.com/2016/05/25/98000-people-lose-their-lives-because-of-medical-negligence/ [↑](#footnote-ref-1)
2. Jacob Mathew v. State of Punjab AIR 2005 SC 3180 [↑](#footnote-ref-2)
3. [1932] A.C. 562 [↑](#footnote-ref-3)
4. Poonam Verma v. Ashwin Patel AIR 1996 SC 2111 [↑](#footnote-ref-4)
5. Mahadev Prasad Kaushik v. State of U.P. AIR 2009 SC 125 [↑](#footnote-ref-5)
6. Parmanand Katara vs. UOI 1989 AIR 2039 [↑](#footnote-ref-6)
7. ibid [↑](#footnote-ref-7)
8. Lily Srivastava, *Law and Medicine*( New Delhi: Universal Law Publishing Co. Pvt.Ltd,2013),p.72. [↑](#footnote-ref-8)
9. [1990] 2 AII ER 908 [↑](#footnote-ref-9)
10. [1932] AC 562 [↑](#footnote-ref-10)
11. 2003 (1) CLD 81 (AP SC DRC) [↑](#footnote-ref-11)
12. 1998(2) SC 680 [↑](#footnote-ref-12)
13. AIR 1996 Raj 80 [↑](#footnote-ref-13)
14. Tapas Kumar Koley, *Medical Negligence and the Law in India,* 1st Ed.,(Oxford: Oxford University Press, 2010), p. 158 [↑](#footnote-ref-14)
15. AIR 2009 SC 2049 [↑](#footnote-ref-15)
16. AIR2008 SC 1385 [↑](#footnote-ref-16)
17. Yetukuri Venkateswara Rao, *Law Relating to Madical Negligence,* 1st Ed. (Hyderabad: Asia Law House 2006), p. 51. [↑](#footnote-ref-17)
18. [1957] 1 WLR 582 [↑](#footnote-ref-18)
19. (1996) 2 SCC 634 [↑](#footnote-ref-19)
20. (1996) 3 CPR 205; (1996) 4 SCC 332 [↑](#footnote-ref-20)
21. [1997] 4 AII ER 771 [↑](#footnote-ref-21)
22. AIR2008 SC 1385 [↑](#footnote-ref-22)
23. (2001) 8 SCC 731 [↑](#footnote-ref-23)
24. K. Kannan, Medicine and Law, 1st Ed. ( Oxford: Oxford university Press 2014) , p. 315 [↑](#footnote-ref-24)
25. (2009) 9 SCC 221 [↑](#footnote-ref-25)
26. AIR 1996 SC 550 [↑](#footnote-ref-26)
27. Tapas Kumar Koley, *Medical Negligence and the Law in India,* 1st Ed.,(Oxford: Oxford University Press, 2010), p. 72 [↑](#footnote-ref-27)
28. 2010 AIR (SC) 1050 [↑](#footnote-ref-28)