MEDICAL NEGLIGENCE AND JUSTICE DISPENSATION SYSTEM IN INDIA

Poornima Singh, PhD Scholar, Faculty of Law, Delhi University

"The patients, irrespective of their social, cultural and economic background, are entitled to be treated with dignity, which not only forms their fundamental right but also their human right,"[1] - Justices Chandramauli K.R. Prasad and Justice V. Gopala Gowda

ABSTRACT

This Article discusses the various contours of Medical Negligence which had been treated as a tort as well as crime under the Indian Legal System. The Supreme Court till date has been following the BOLAM test but there has been interjections made by the Apex Court in a recent judgment on the blanket approach of BOLAM Test in every case of medical negligence. Moreover, a reference has been made to the practice in United Kingdom which has shifted its approach from BOLAM to BOLITHO. Thereafter, the jural relationship between the doctor and her patient is been discussed which makes the doctor liable for the breach committed. Once this relationship has been established and acknowledged, the issue relating to access of justice to the victims of medical negligence and the method of justice delivery practiced in India had been elaborated. While venturing into the given issue, the researcher found certain lapses in the current execution and implementation of law and had also discussed the accountability of Healthcare provider with regard to pandemic Covid 19 in India wherein suggestions had been poured in to facilitate the working of Medical Sector in a better condition so that justice is accessed and served to all the affected parties.

Keywords: Medical Negligence, BOLAM, Access to Justice, Victims

[1] THOMAS, GEORGE. "The Anuradha Saha Case and Medical Error in India." *Economic and Political Weekly*, vol. 48, no. 47, 2013, pp. 12–14. *JSTOR*, www.jstor.org/stable/23528629. Accessed 7 July 2021.

Introduction

Medical profession around the world has always occupied a pious and respectable position. The ability of the Medical care professional to cure the ailments of the patients deserve a credible salute. This ability of the doctor, indeed bring with itself a huge set of responsibility on the doctors to perform their duty with utmost diligence. Therefore, the relationship between the doctors and their patients had led to the intrigued area of discussion on Medical Negligence in the recent years by several Jurists, Judiciary and Legislatures around the world. Moreover, with the advent of increasing risk of uncertain pandemic diseases like Ebola or Covid 2019, there has been growing demand of quality of healthcare facility to the people which increases the mapping of rules and regulations on the Healthcare facilities.

Background on Indian Legislations to curb Medical Negligence

In India, there are several regulatory statutes and delegated legislations which look into the conduct and working ethics of the medical professionals. For instance, the **Indian Medical Council Act, 2001** was promulgated to maintain uniform standards of medical education and its recognition in India and in foreign countries, the **Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002** was brought into force to regulate the practices of medical professional and lay down guidelines of medical ethics. A few Regulating institutions like **Indian Nursing Council** was established to check the standards of nursing around Indian hospitals and Nursing Colleges. Furthermore, there are other legislations/regulations like Consumer Protection Act, 1987; Pharmacy Act, 1948; Narcotic Drugs and Psychotropic Substances Act, 1985; Medical Termination of Pregnancy Act, 1971;Transplantation of Human Organ Act, 1994; Mental Health Act, 1987; Environmental Protection Act, 1986; Pre–natal Sex Determination Test Act, 1994; Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954; Persons with Disabilities (Equal Opportunities and Full Participation) Act, 1995; that look into the aspect of standards of Healthcare in India.[2]

Over the last few years, India has seen major breakthrough in the Medical science ranging from major technological advancement and the quality of health infrastructure in India. However, it

[2] Achal Gupta, " India: Doctors- Patients Relationship", available at https://www.mondaq.com/india/professional-negligence/936004/doctors-and-patients-relationship(last accessed on 3rd July 2021)

is also true that with the increase in dependency on Healthcare sector, there has been an increase in proliferation of institutes imparting Medical education in India which ultimately results in degrading the quality of medical education and methods of healthcare facilities for the people. India has also been witnessing a tremendous growth in the commercialisation of medical science knowledge which has ultimately resulted in decrease of ethical and moral values of healthcare providers. [3]There are serious allegations against the rising corporatization of the healthcare sector which is adversely affecting the mutual trust relationship between the doctor and his patient.

Since is the patient who is at the receiving end from the alleged malpractices or negligence of the doctors/healthcare providers, it is the need of the hour to look into the sufferings of the patients and their family members. The Hindu reports[4] for a few cases of medical negligence by Medanta Hospital, Gurugram in 2018 wherein the parents of the deceased children are still fighting to seek justice against the negligence of the private hospital and the negligent practices of its doctors. There had been several news reports post Covid outbreak in India where the family of the deceased patients have alleged the death of patients due to the negligent attitude of the hospitals or the doctors. The deceased of such cases, if proved to have lost their lives owing to the negligent practice of the healthcare providers would be termed as "Victims" of the act of Medical Negligence and have the fundamental rights to seek justice under Article 14[5] and 21[6] of the Indian Constitution. Due to judicial pronouncements and several legislation in favour to the rights of the victims that work towards the access to justice for the victims, has led the strengthening of demands for compensation by the victims of the Medical Negligence in India. However, there is still no settled and specific Legislation with regard to curbing the issues of medical malpractices by the healthcare providers which often leads to the settling of the legal issue by the Judiciary on the case to case basis.

Defining and Understanding Medical Negligence

According to Black's Law Dictionary, the legal definition of the word 'Negligence' is ; "[t]he

[3] Norrie, Kenneth McK. "Medical Negligence: Who Sets the Standard?" *Journal of Medical Ethics*, vol. 11, no. 3, 1985, pp. 135–137. *JSTOR*, www.jstor.org/stable/27716387. Accessed 7 July 2021.
[4] Vidya Krishnan, "A cure for medical malpractice" 26. 05.2018 available at https://www.thehindu.com/opinion/op-ed/a-cure-for-medical-malpractice/article23994053.ece(Last visited on 04.07.2021)
[5] Constitution of India
[6] Ibid

omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do or something which a prudent and reasonable man would not do." However, keeping in view the aspect of medical grounds in the acts of negligence, the term 'Medical Negligence' could be understood well by going through the Supreme Court judgment in the case of ***Jacob Mathew v. State of Punjab***[7] wherein the Bench had advocated to rely upon the BOLAM rule as laid down under the common law system.

This rule has consistently been applied by the courts in United Kingdom and India in order to decide over the standard of care and skill of the doctors/hospitals towards the patients. This rule has thus become a guiding light for the judicial pronouncements on medical negligence in the common law countries. In the case of **Bolam v. Friern Hospital Management Committee** [8] **(famously referred herein as the BOLAM Rule)** as under:

"……Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he as not got this special skill. The test is the standard of the ordinary skilled man exercising and profession to have that special skill. A man need not possess the highest expert skill…..It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art…" (Emphasis supplied)

Thus, the above rationale stipulates the requirement for the ordinary set of skills to be possessed by the doctors under which the doctor is least expected to adopt skilful behaviour of medical practice with ordinary care. [9] Thus, any allegation regarding the act of medical negligence of any doctor/hospital needs to suffice the three main grounds, as under:

1. The doctor owes a duty of care towards the patient;
2. There has been a breach of care during the performance of duty by the doctor/hospital;
3. The said breach of duty has caused damage to the patient.

[7] (2005) SCC 01
[8] **(1957) 1 WLR 582**
[9] Ibid

In India, while applying the rule of BOLAM Test in the cases of medical negligence, due consideration is been given to the medical experts opinions in aiding the Courts to decide upon the relevant issues. Section 48 of the Indian Evidence Act,1872 is a fine example of the above proposition. However, the Judiciary has the final authority to decide upon the liability of the doctors/hospitals in the case of medical negligence.

The Supreme Court had for the first time in the case of **Jacob Mathew v State of Punjab**(supra) in 2005 categorically given due recognition to the Bolam Test Rule and had established it to be the settled ratio. But ,this principle laid down in the case of Bolam v. Frien HMC had hugely influenced the Supreme Court decisions in the case of Achutrao Haribhau Khodwa v. State of Maharashtra[10] in 1996, *Dr Laxman Balakrishna Joshi v Dr Trimbak Bapu Godbole*[11] (1969) and ***Indian Medical Association v VP Shanta***[12] (1995) to mention a few.

However, certain criticisms were raised by the unquestionable use of Bolam Test in the medical negligence cases for unsettled and vague grounds for defining "ordinary" with regard to the standard of Doctor's skill and conduct. More so over, the aid of medical experts taken to study the "reasonable conduct " of the alleged doctor led to several different medical experts opinions and approaches leading the Court in absolving of the accused doctor from any liability. [13] In United Kingdom, the House of Lords, in 1996, for the first time, questioned the ground laid down in Bolam case and preferred to go for 'logical analysis'[14] to determine the cases of medical negligence. In this case of ***Bolitho v City and Hackney Health Advisory***[15], the House of Lords held that the final authority to decide the liability of the erring doctor would lie only upon the Court despite of several diverse approaches and expert opinions of the doctors on the given case. Thus, the different Medical expert opinions would not absolve the erring doctors easily from any liability in the case of Medical negligence. The Court in the given case laid down the method of "logical analysis" to be used only by the Courts to understand and finally

[10] 1996 SCC SC 2
[11] 1969 SCR SC 1
[12] 1995 SCC (6) 651
[13] Bonney, G. L. W., et al. "Doctors And Medical Negligence." *BMJ: British Medical Journal*, vol. 300, no. 6726, 1990, pp. 746–747. *JSTOR*, www.jstor.org/stable/29707287. Accessed 7 July 2021.
[14] M P Ram Mohan, Vishakha Raj, " Medical Negligence and Law: Application of Bolam and Bolitho Rule in India" Economic & Political Weekly October 19, 2019 vol VII no 42 *JSTOR*, www.jstor.org/stable/ Last accessed 03 July 2021
[15] All ER, HL, 4

determine after the medical expert opinions. Thus, a lot of value of medical expert opinions as held in the Bolam case was diluted in the Bolitho case.

In India, the Supreme Court in Jacob Mathew had laid down the Bolam Rule as a ratio and precedent to be applied in the cases of Medical Negligence. The question of setting up a medical expert committee to examine a case and make prima facie observation before the Consumer fora could serve a notice on the respondent doctor/hospital was considered by the Supreme Court in *Dr Martin D'Souza v Mohd Ishfaq*[16] (2009). Accordingly, the expert opinion has a huge role in deciding upon the culpability and allegations against the erring doctor. However, the final determining power stays with the Court to decide upon the liability of the erring doctors.

Thus, it can be said that the Bolam rule test is applied in India as a rule of interpretation but not as an objective law.[17]

The Current Indian Position on Bolam Test

The Hon'ble Supreme Court in the recent case of **Maharaja Agrasen Hospital and Others vs Master Rishabh Sharma and Others**,[18] has reiterated the grounds that comprises the act of Medical negligence, as under:

1. The duty of care to be exercised by the doctor in performing their medical practice
2. The failure on the part of the doctor to inform the risk involved in the treatment
3. The damage suffered by the victim patient in the event of non-disclosure of risk by the doctor
4. This risk is of such a nature that had the doctor informed the patient, it could have had been avoided
5. This breach of non-performance of the duty by the doctor result into actionable claim of negligence by the victim patient.

[16] 2009 SCC SC 3
[17] Available at < https://asiindia.org/medical-negligence-the-judicial-approach-by-indian-courts/> last accessed 04 July 2021
[18] 2019 SCC SC 1658

However, in the given judgment (supra), the Supreme Court had expressed its reservations in following the Bolam Test in totality in all the cases of Medical negligence. The emerging trend by the UK Courts of shifting their focus from Bolam to Bolitho had indeed been acknowledged by the Supreme Court whereby the better interpretation and understanding of the approach of standard skill and duty of care by the doctor had been examined in length.[19]

Legal forums to approach against Medical Negligence in India

A case of tort before the Consumer Forum claiming for compensatory damages and filing of FIR for charges under Section 304-A IPC remains the preferred options amongst the petitioner/complainants for seeking justice from the Courts. However, there are certain other statutes which provides for certain relief to the victims of the medical negligence. These certain forums are as under:

1. Indian Medical Council Act, 1956: the established body under this statue is the Indian Medical Council which has the jurisdiction over the professional ethics of the doctors practicing in India. It prescribes the rules of professional conduct and medical ethics for the doctors to practice in India.[20] The Council has the power to cancel the practice registration of the doctors if proved to commit medical malpractices. However, the Council lacks the power to grant any kind of compensation to the victims of medical negligence.

2. The Civil Court: the tort of negligence could be initiated in the Civil Courts in India which are ruled by the Code of Civil Procedure,1908. Under such civil suit, the party affected/victim can claim compensation and damages from the alleged Medical practitioner for commiting breach of duty to care towards the patient.

3. The Fatal Accidents Act, 1855: This statue draws its inspiration form the common law of English Fatal Accidents Act,1846. Under the given statue of 1855, the Court can grant of compensation to the family of the deceased victim who die due to the actionable wrong of the respondent.

[19] Supra note 19
[20] Supra note 03

4. The Indian Penal Code: Apart from the civil remedies of compensation or damages, punitive punishment could be sought in the case of medical negligence against the erring doctors. Sections 52, 80,81,88,90,91,92,304-A, 336,337 and 338 of the Indian Penal Code revolves around the charges that could be framed in the event of criminal proceedings against the medical practitioners.

5. The Writ Jurisdiction of High Court and Supreme Court: under the constitutional mandate, these Constitutional Courts have the jurisdiction under Article 32 and Article 226 to award compensation to the victims of medical negligence wherein the State is in the responsible position.

With the enactment of Consumer Protection Act,1986; there has been a parallel dispute redressal mechanism which could provide better protection to the consumers and work in their interest. The judgment of the Supreme Court in the case of ***Indian Medical Association vs. V. P. Shantha*** [21] brought the realm of medical practitioners under the Consumer Protection Act,1986 thus bringing the "services" under the domain of this Act. Besides the civil litigation, the victim of medical negligence has the right to file criminal complaint to initiate criminal proceedings against the alleged Medical practitioner. The Apex Court in the case of Jacob Mathew(supra) dealt extensively upon the area of medical professional and criminal law. The burden of proof was laid down on the complainant/victim to establish the element of negligence on behalf of the doctor. It was laid down that the amount and degree of negligence is determinative of liability of the alleged accused doctor and under the Criminal Law, the degree of negligence has to be higher as compared to the liability of negligence under the Civil law. Here the element of *mens rea* has to be included to determine the act of medical negligence. Section 304A of IPC reads the word "grossly" in order to charge for the offence of negligent act.[22] Herein, the act or omission committed by the accused doctor should be such that the injury caused to the victim patient was most likely life endangering. Also, the maxim of *res*

[21] (1995) 6 SCC 651

[22] Karunakaran Mathiharan. "Supreme Court on Medical Negligence." *Economic and Political Weekly*, vol. 41, no. 2, 2006, pp. 111–115. *JSTOR*, www.jstor.org/stable/4417666. Accessed 7 July 2021.

ipsa loquitur is only the rule of evidence and operates under the Civil Law domain, making it almost inaccessible to work for criminal proceedings.[23]

Furthermore, the Supreme Court in ***Syad Akbar v. State of Karnataka***[24] **had referred to the observation of Lord Atkin in the case of** in ***Andrews v. Director of Public Prosecutions***[25]**,** wherein he stated that for the criminal law, a very high degree of negligence is needed to be proved.

Charles Worth & Percy[26] in their renowned work on Negligence provide certain basis on which professional negligence could be established which are as under:

1. that there is an established usual and normal practice followed by the professionals;
2. the erring doctor did not perform the usual practice/norm/standard of the profession
3. that the act performed by the profession is one which no ordinary professional of that profession would have done under ordinary care.

Moreover, the standard of care is determined in the light of knowledge available at the time of the alleged incident and when the charge of medical negligence is alleged against the doctor due to the failure of certain medical equipment then the charge would fail if it can be proved by the respondent doctor that such medical equipment was generally not available at that given point of time.[27]

Therefore, keeping in view the established precedents and guidelines by the Supreme Court in the cases of Medical Negligence; it can be seen that the Supreme Court has taken a liberal approach in determining the act of Negligence as a Civil liability against the medical practitioners. However, the Court had been strict and restrictive in widening the understanding of medical negligence and brining the doctors under the domain of Criminal Law.

The Present Justice Dispensation System for the Victims of Medical Negligence

[23] *Res ipsa loquitur* means, roughly, "the thing speaks for itself". Courts developed the concept of *res ipsa loquitur* to deal with cases in which the actual negligent act cannot be proved, but it is clear that the injury was caused by negligence.
[24] **MANU/SC/0275/1979**
[25] **[1937]** A.C. 576
[26] Supra note 13
[27] Supra note 17

The victims of the actionable wrong have the right to compensation under the Indian Legal System in India. The Courts have the jurisdiction to grant damages/compensation to the victims of the medical negligence against the accused healthcare providers. However, if we look at the amount of compensation granted by the Supreme Court, till now, there has not been a consistent growing trend of increased amount of compensation. It was only in the case of ***Balram Prasad vs Kunal Saha & Ors*** [28] that the Supreme Court granted the compensation of 06 crore to the family of the deceased victim who died due to the negligent act of the doctors and Hospital in Kolkata.

Kunal Sinha, son of the deceased victim, a doctor in the USA, fought for the right of his deceased mother to prove the negligent act of the doctors and hospital towards the patient. This huge amount of compensation in the case of medical negligence was seen as an appreciable approach for instilling a sense of accountability in the mind of doctors/hospitals towards the patients. Sinha[29], in his article writes that this huge amount of compensation in Negligence cases would serve tow fold purpose:

1. it provides for an adequate amount of support to the family of the victim

2. the compensation would act as a deterrent on the private doctors/hospitals who still work unregulated due to the absence of any specific legislative enactment.

However, there are several medical experts who defer on the grounds of huge monetary compensation been paid in the medical negligence cases. The reason behind this concern is the insecure and risky profession of doctor which involves human life. The idea of huge monetary compensation seems laudable from the victims perspective but looking at the public interest policy and the idea of justice to all the parties concerned, this compensatory ritual , if benevolently followed in all the cases, would cause huge mental and economical stress on the doctors who will have to work under the fear of being sued and would not be able to explore the medical science by venturing into path breaking medically advanced treatments. We are living in a democratic country and the rule of burdening the doctors to pay huge compensation

[28] CIVIL APPEAL NO.2867 OF 2012

[29] Saha, Kunal, and Devi Shetty. "Are Large Compensation Payouts for Negligence Good for Medicine in India?" *BMJ: British Medical Journal*, vol. 349, 2014. *JSTOR*, www.jstor.org/stable/26516982. Accessed 7 July 2021.

amount would be similar to the law laid down under Hammurabi Code in 2030 BC wherein the hands of the doctors were chopped for their negligent behaviour.[30]

The Practice followed to curb Medical Negligence in USA : the concept of Malpractice Insurance and the capping of is negligence compensation is prevalent in order to balance the interest of both, the doctors and patients(victims). The doctors, in order to escape any kind of allegation been imposed upon them have started to practice defensive medicine on a large scale which in return had cost a huge burden on the State Medical insurance budget. Similar kind of practice is been followed in several European nations in order to protect the interest of doctors and patients.[31]

Looking at the aspect of criminalising and punishing the doctors for the act of medical negligence in India, the data revealed by the Minister of State for Health says that, in 2017, 69 cases of medical negligence were awarded punishment by the Medical Council of India (MCI). This formed 44% of the cases referred to MCI by the state medical councils. In 2018, 28% or 40 cases referred to MCI by state medical councils awarded punishments to doctors and in until June 2019, 46% or 28 doctors were punished by MCI for medical negligence. [32] However, this share was seen most from the complaints made to the State Medical Council bodies by the people living in cities. Most of the cases relating to malpractices by private health clinics, private doctors goes unreported or does not attain media attention. Moreover, it has been alleged that the Medical expert committee formed to look into the criminal complaints against the doctors comprises that of doctors itself who seem to go lenient towards examining the act of the colleague accused doctor or healthcare provider. Also, there is a lack of an external regulatory or quasi-judicial body which could hold doctors accountable for their actions without any biasness. Under the present adversarial system, the onus to prove the negligence of the doctors is upon the patients (victims) and thus the technicalities involved in the questioning to the victim or her family members becomes a nightmare for the layman who has no knowledge to answer the medical questions.

[30] THOMAS, GEORGE. "The Anuradha Saha Case and Medical Error in India." *Economic and Political Weekly*, vol. 48, no. 47, 2013, pp. 12–14. *JSTOR*, www.jstor.org/stable/23528629. Accessed 7 July 2021.
[31] Ibid
[32]"justice-denied-why-medical-negligence-goes-unpunished-india-what-can-be-done" 09.01.2020 available at *https://www.thenewsminute.com/article/* (last visited on 05th July,2021)

The Constitution of India and Access to Justice for Victims of Medical Negligence

India, being the largest democracy on Earth is also a plural society which adhere to the constitutional scheme of establishing a welfare State. The State is obligated to ensure and just and fair treatment is meted out in the society irrespective of economic and social disabilities present in our Legal system.[33] The idea behind "justice should not only be done but seem to be done" often calls for removing any kind of hurdle in the dispensation of justice to the aggrieved concerned. However, owing to several factors, this access to justice is not easy when the affected person is poor, illiterate and ignorant about his basic human and fundamental rights. The failure of the easy, timely and cost effective justice become a far-fetched dream for a certain section of class and shakes the trust of the justice delivery system of the State.

Before venturing into the components of Indian Constitution that talks about access to justice in India, there are certain question which comes before us when we compare the two way method of justice delivery to the victims of the crime. The punitive punishment is often seen as a method of restoring the sense of justice in people and there would not be a majoritarian demand for monetary compensation from the accused. The retributive goal of justice demands for stringent punitive punishment for the offence committed witnessing the revenge on the crime committed.[34] However, the Utilitarian focused justice focuses mainly on compensating the victims beside punishing the offender in order to give justice to victims and security to the Society at large.[35]

In India, the idea of equal justice for all is enshrined under the Preamble of the Constitution that holds for justice- social, economic and political elaborated in the Articles 14,21, 22(2), 32,39A, 38,41,46,142,226 and 282 of the Indian Constitution. Preamble of India provides for securing all citizens equality of status and opportunity along with justice-social, economic and political. Both the objectives have inter-connection. Equality promotes justice and justice

[33] Chaudhuri, Mohuya. "Families Demand Reform of India's Medical Negligence System." *BMJ: British Medical Journal*, vol. 348, 2014. *JSTOR*, www.jstor.org/stable/26513116. Accessed 7 July 2021.

[34] Gabrielle S. Adam & Elizabeth Mullen "Punishing the Perpetrator Decreases Compensation for Victims", Social Psychological Personality Science 2015, Vol. 6(1) 31-38, sagepub.co.uk/journalsPermissions.nav, last accessed on 05 July 2021

[35] David Mier, "Offender and state compensation for victims of crime: Two decades of development and change" *International Review of Victimology* 2014, Vol 20(1) 145–168, sagepub.co.uk/journals Permissions.nav Last accessed 05 July 2021

promotes equality. We cannot expect justice without the support of equality. Equality in a country like India ,where differences among people prevail because of Social, Economic and Political factors, could not be achieved without the support of provisions like legal aid. Legal aid brings less advantageous people at par with affluent counterpart so that they could get equal opportunity to seek justice.

The ideals of the Constitution enshrined in the Preamble can be achieved by advocating the fight for Fundamental rights in Part III of the Constitution. Article 14 provides for equality before law and equal protection of law which involves the element of fair hearing, the right of the parties to be heard before the Courts and justice served to all the section of people irrespective of their financial and social status. The victims of the crime stand at the same footing and has the fundamental right seeking justice by the fair trial and their active participation in the trial. Moreover, Article 21 of the Constitution strives for the procedure established by law should be just, fair and reasonable which effects life and personal liberty of the individual. This calls for free legal aid and access to justice to all who due to lack of awareness, illiteracy and poverty are not able to fight for their rights. The victims are represented by the State in the trial as the offence against the victim in heinous crimes is considered to be the crime against the society at large.

Furthermore, the Directive Principle of State Policies, which are the guiding principles for the legislature while making of the law, also seeks for a just society. Article 38 provides for the direction to the State, being the Social security provider, to minimise the income inequalities amongst individuals. Article 39A strives for implementing the concept of free legal aid via suitable legislative enactments in order to meet the idea of access to justice for every individual. Therefore, the establishment of Legal Services Authority Act,1987[36] is a result of discharge of legislative obligation under Article 39A. In view of victim sufferings, the Victim Compensation Schemes is administered by the Legal Services Authorities at the State Level wherein they help in providing the compensation to the victims of the crimes. Moreover, the 42nd Amendment Act, 1976 brought the subject of "administration of justice" under the

[36] The objective behind the enactment of Legal Services Authority Ac,1987 was to to encourage the settlement of disputes by way of Negotiation, Arbitration and Conciliation. To secure the legal rights of poor, down trodden and weaker section of the society. To ensure that the operation of the legal system promotes justice on a basis of equal opportunity.

Concurrent list for better dispensation of justice to all the affected parties. [37] Article 41 and Article 46[38] also provides for the obligation on the part of the State to remove any kind of inequalities amongst the individuals keeping in mind their economic and educational capacities.

Article 282[39] provides for making provisions for funding or grants to make the concept of free legal aid or compensating the victims of the crime under public interest by allotting certain section of the State budget for the funding the Compensation schemes.

However, though the Indian Constitution provides for the principles which enshrines the idea of access to justice for all; yet there are certain practical obstacles/challenges in accessing justice for all, which are as under:

1. India has always been seen through the eyes of India and Bharat, wherein Bharat comprises of the class in which caste and class divide plays an essential role. While people of India may have easy access to justice due to better literacy rate, economic condition and awareness; the settlers of Bharat are the worst sufferers of the crime since the social fabric of their surroundings does not make them aware of their fundamental rights.

2. The abuse of power element while committing the crime is something which had been rooted in India since time immemorial. The caste system and the feudal set of mind had caused a devasting effect on the rights of the marginalised section who due to caste and class divide had not been able to access the doors of justice enshrined in the Constitution.

3. Lack of education does result in the lack of awareness amongst the people for the fundamental rights and the laws which assist the victims of the foul acts committed

[37] 42nd Constitutional Amendment Act of 1976 is considered to be the Mini-Constitution as it brought several changes in the Constitution focusing on the federal structure of India. Several amends were made in the three lists provided under Article 245 of the Constitution.
[38] The Directive principle of State Policy under Part IV of the Constitution are the guiding lights for the established institutions to remove inequalities and promote the well-being and the right to work.
[39] Constitution of India, 1950,- "Expenditure defrayable by the Union or a State out of its revenues. The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be."

against them. Though, several Government since independence had tried to increase the primary education level and had also included Right to Education under Article 21A[40] as the fundamental right, however, there is a lot has to be done to connect education and the sense of awareness programmes at ground levels.

4. The Criminal Justice System in India is hugely accused centric driven which calls for the provisions for safeguarding the rights of the accused. However, the victim of the crime are the forgotten lot who only act as a witness to the crime during the trial. This biasness in the delivery of justice is the most questionable hurdle to the access of justice scheme for all. The Criminal procedural complexities and the lack of awareness about it, make the investigating and executing authorities exploit the victims of their ignorance of their legal rights.

5. The delay in delivering of judgments by the Courts counts for one of the essential reasons for difficulty in access to justice. The perception of the victims or complainants is of the delay in Court proceedings which could lead to years of trial cause hiccups in reporting of crimes to the Executive.

The points mentioned above are few key observation taken with respect to victim's perspective in accessing to justice under the legal system in India. Victims of Medical negligence, just like other crimes, are the sufferers of the deep rooted divide of society on the basis of economic and social reasons. The more educated, legal aware and financially sound victims can fight for their rights against the crime without any initial hesitation. However, most of the cases of Medical Negligence goes unreported or are not contested due to ignorance of the legal rights of the victims. The Private Healthcare Centres, had been taking undue advantage of such pitiable conditions of the poor classes who in the dire need to get medical treatment, approaches to these Centres. Even the negligence ,if adopted on the part of the doctors or hospital gets unquestioned or ignored due to lack of education or un awareness of such legal enactments and rights.

[40] This right was added under Part III of the Constitution by the 86th Constitutional Amendment Act,2002 after the Supreme Court recognized this right as a fundamental right under Article 21 of the Constitution in the case of Mohini Jain v. State of Karnataka(1992) SCC (3) 666.

Ways to overcome the challenge of non- access to justice by the Victims of Medical Negligence in India

The act of Medical Negligence cannot be equated objectively with other heinous crimes like murder or dacoity as the act committed here is done without any prior guilty mind by the skilled professional in the course of his profession and there is a relationship of trust between him and his patient unlike that in the case of murder or culpable homicide wherein the foremost intention is to kill the victim and no skill is required to do so. The accused in the case of Medical Negligence also hold a respectable position in the society which is her fundamental right to Reputation under Article 21 of the Constitution[41]. Having said that, the patients who had suffered the physical loss due to the reckless and gross negligent act of the doctor cannot be left to suffer and she also has the fundamental right to seek justice for the breach of duty towards the victim committed by the doctors. Thus, here the idea of justice requires a fair, reasonable and due procedure to be followed under the justice dispensation of India wherein the rights of both the concerned parties are respected and given due value keeping in mind the balancing of public and private rights of the society and the individuals effected respectively.

Keeping in view the challenges in access to justice by balancing the rights of the society and the individuals affected by the crime; there are certain methods that can be adopted in overcoming the challenges to the victims of the medical negligence.

1. A recourse to the ancient culture of alternate dispute mechanism like Panchayat, Lok Adalats or gram Nyalayas[42] at the village level could be used in less complicated cases to streamline the cases of medical negligence wherein the (patients) victims or their family want to opt for Civil litigation against the doctors for negligent behaviour towards the treatment and seek compensation. The Supreme Court had also emphasised in a plethora of cases to eliminate dispute between the parties at inception so that the poor victims do not have to go through the ordeal of trial.

[41] Subramanium Swamy v. Union of India (2016) 7 SCC 221

[42] The concept of local self- government is not new to India. Even before the British raj over India, several local practices of justice dispensation were performed in order to fulfil the concept of "Nyaya". Gram Panchayat, Lok Adalat or Nyaya Panchayat are inspired form the local justice delivery mechanism of early India.

2. The enactment of Legal Services Authority Act,1987 at the national and state levels could play a major role in instrumentalising the justice concept to the victims of medical negligence by aiding the victims and their family members in streamlizing the process of compensation grant under the Victim Compensation Scheme at interim and final level.

3. The facility of online FIR after the Supreme Court judgment in the case of ***Lalita Kumari vs. Govt. of Uttar Pradesh***[43] has led to the free access to the complainants to report for cases of Medical Negligence without the callous attitude of the police authorities in filing of FIR against the doctors in such cases.

4. There should be a legislative enactment putting a cap on the compensatory amount in the cases of Medical Negligence wherein it will put an ethical and moral obligation on the doctors towards performance of their professional services in an independent manner without the fear of uncertain amount that could be charged from him in the event of negligence. At the same time, a decent amount of compensation keeping in view the amount of loss suffered by the patient shall curb the gross negligence and reckless attitude of the doctors and healthcare providers from treating the patients.

5. The element of restorative justice could be introduced in the case of Medical Negligence instead of penalising the doctor for their negligent behaviour since in such crimes the offender cannot be equated with the hard core criminal like that of murderer but a sense of realisation should be introduced before the accused doctors. Reparation of the loss to the family of the patient in the form of accepting the alleged act with the promise to transform and be vigilant in their actions towards the future patients could sometime meet the ends of justice.

6. The Court before deciding upon the liability against the doctors in the case of medical negligence keep in consideration the medical expert onions in holding the ordinary skill used by the accused doctor. Here in, the expert committee refer to different text or medical journals to reach on a specific conclusion. This leads to differential treatment in such cases as the ground or the basis on which the conclusion has been achieved is

[43] (2014) 2 SCC 1

not unitary and streamlined. Thus, there is a need to establish a common Clinical guidelines assist the parties concerned to decide upon their action. Thus, before applying the BOLAM test rule in such cases, the Court can refer to the Clinical guidelines by the legislature to resolve the conflict of ordinary standard of skill in dispute.[44]

COVID 19 and the emerging issue of Medical Negligence

Covid 19 has hit almost every nation around the world and with several mutants multiplying and effecting different nations now for almost 02 years now; we cannot ignore the quinssential need of good Medical infrastructure for every individuals. During this testing time of Covid19 widespread infection, it cannot be denied that the Doctors and other healthcare providers have been started to be treated next to God. The human life is closely dependent on the timely and effective treatment given by Doctors to the patients suffering from viral diseases like Covid19.

However, there has been rising issues of medical negligence been raised by several common men against the malpractices and mismanagement during Covid 19 treatment done by the doctors. The increasing trend of exploitative commercialization of healthcare infrastructure is a major concern wherein the law and Judiciary should play an active role to curb it.[45] It is expected from the Constitutional agencies like Legislature, Executive and Judiciary to defend the constitutional fabric of the society.

The issues of non-adhere of clinical protocols, safety measurement, timely treatment of the patients, denying the medical beds, oxygen beds and an exorbitant medical bills has been causing a major haul amongst the citizen of India.[46] In 1978, India had signed the Alma Ata Declaration at the World Health Assembly which promised for "Health for All" by 2020[47] whereby Indian Governments through various Schemes like National Health Mission in 2013,

---

[44] Ministry of Health and Family Welfare (2018): "Standard Treatment Guidelines (Speciality/ Super Speciality-wise)," Ministry of Health and Family Welfare, Government of India, New Delhi, http://clinicalestablishments.gov.in/En/1068- standard-treatment-guidelines.aspx. (last accessed on 2nd July 2021)

[45] Ibid

[46] Gillon, R "An Introduction to Philosophical Medical Ethics: The Arthur Case," *British Medical Journal,* Vol 290, No 6475 (1985), pp 1117–19.

[47] Available at https://www.business-standard.com/article/current-affairs/40-years-of-alma-ata-steps-india-can-take-to-achieve-health-for-all-118090200095_1.html(last accessed on 3rd July 2021)

Ayushman Bharat Pradhan Mantri Jan Arogya Yojana in 2018 had been introduced to improve the health infrastructure of the country. The Clinical Establishments(Registration and Regulation) Act, 2010 was enacted to regulate the clinical practice of the private healthcare infrastructure, however, many States have not ratified it till date which makes it problematic for the regulating the private medical sector under the realm of law.

The Supreme Court in the Jacob Mathew case(supra) has laid down guidelines to determine the standard of skilled to be proved in the case of Medical Negligence. However, Covid 19 is an exceptional phenomenon that calls for an reviewing the normal practice of establishing liability. Till now, there is no one particular method to treat Covid 19 patients and different methods from Blood plasma infusion, to viral medication and drugs had been used by several doctors to treat Covid 19. Moreover, the exponential surge in the number of Covid positive rates in India had led to collapsing of medical infrastructure in India. The punishment for poor health facilities could not be attributed to the doctors whose numbers are significantly less as compared to the number of patients. The Government during this course of pandemic via several guidelines had issued suggestions for home isolation and home quarantine to leave bed spaces for more critical Covid patients. Thus, the inclination of the doctors accordingly shifts form less critical patients to the ones whose lives are endangered.

The Supreme Court in the recent case of ***Malay Kumar Ganguly v. Sukumar Mukherjee*** had rightly held as under:

"*Failure to act in accordance with the standard, reasonable, competent medical means at the time would not constitute a negligence. However, a medical practitioner must exercise the reasonable degree of care and skill and knowledge which he possesses.* ***Failure to use due skill in diagnosis with the result wrong treatment is given would be medical negligence.***
…….The law on medical negligence has to keep up with the advances in the medical science as to treatment as also to diagnostic...Duty of the doctor is to prevent further spread of infection...Blood tests and cultures should be regularly performed to see if the infection is coming down.".[48]

[48] CRIMINAL APPEAL NOS. 1191-1194 OF 2005 (2009)

Conclusion

The act of Medical Negligence has been much talked about issue across the globe owing to the increasing demand of better and efficient Medical infrastructure in every State across the globe. Countries like India, which, due to vast population and limited Medical infrastructure at dispensation, is striving to provide for better facilities to its people. However, situations like pandemic should not wreak the legal system of a country which protects its citizens from the encroachment of their basic human rights. Accordingly, medical negligence, as a tort and crime, is recognised under the law to safeguard the rights of the patients(victims).

The time of Covid 19 pandemic calls for an extraordinary times, however the liability and the duty of care towards the patients cannot be absolutely absolved as the patients(victims) would be severely affected by the injustice caused and it would also hamper their fundamental right to seek justice. Therefore, what is needed from the Executive is to come up with certain delegated legislation to lay down certain guidelines for the minimum standard of care for patients during pandemic era. [49] Moreover, the element of capped compensatory justice should be advocated and not the punitive punishment to the negligent doctors. The lower Judiciary must keep in mind the exceptional circumstances of Covid 19 while determining the issue of medical negligence before it. Speedy and effective dispensation of cases would contribute to better justice served to the concerning parties. Furthermore, strict laws are needed to be enforced by State Governments regulating the private health care providers and doctors.

[49] Suveer Gaur, "Covid 19 and the Medical Negligence: need for comprehensive guidelines" 26th June 2020 available at https://www.barandbench.com/columns/covid-19-and-medical-negligence (last accessed on 03rd July 2021)