

## THE NEGLIGENCE PRINCIPLE OF BREACH

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### **ABSTRACT**

*This paper discusses the definition and meaning of the principle of breach specifically medical negligence and medical malpractice. It also studies the role of informed consent and standard of care & proof in the tort of negligence. In legal malpractice litigation, the doctrine of informed consent says that a lawyer has to disclose the material information about the risks and alternatives associated with a course of action to the client. Similarly in the tort of negligence regarding medical practice, the medical practitioner must disclose all the necessary information regarding the patient's medical condition and information regarding the entire process of treatment. In medical malpractice law, the doctrine of informed consent was recognized around 1960. This doctrine is rooted in the fundamental belief that "every human being of adult years and sound mind has a right to determine what shall be done with his (or her) own body." Apart from physicians and surgeons, medical services also include non-physician health professionals, such as nurses, ultrasound technicians, or respiratory therapists. Other medical service professionals provide elective treatments such as laser hair removal, box injections, massage therapy, and chiropractic care. The doctrine of informed consent and standard of care is also applied to these medical professionals. Negligence is an offense under tort, IPC, Indian Contracts Act, and Consumer Protection Act. When enough care is not provided by the medical practitioners to their patients, who are like their consumers, there is a breach of their duty and it leads to the patients suffering losses. In negligence by professionals, it is considered that the doctor has to attend to their patients with utmost care and their main goal should be to treat and heal the patients. One may find instances of medical negligence resulting in irreparable damage to the victim's patients or their relatives. These cases may have to be brought under the scanner of law. In the olden, these cases were treated as cases of tort and the victim was compensated. The Consumer Protection Act treats cases of medical negligence as civil. The law provides compensation to the victims.*

**Keywords:** Environment, Personality, Protection.

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## INTRODUCTION

Negligence means failure to exercise a duty of care towards a person or a property. If a person suffers from some other person's breach of duty of care can sue for damages to compensate for the harm. Loss may include physical injury, harm to property, mental or psychiatric illness and can also include financial loss.

### **The elements of Negligence include:**

- The legal duty of the defendant to exercise due care toward the plaintiff;
- Breach of the above-mentioned duty;
- Consequential Damages;
- The injury to the plaintiff is a reasonably foreseeable consequence of the defendant's act or omission.

In negligence, the principle of liability is that the party which is complained about should owe the party complaining a duty to take care and the party complaining should be able to prove he has suffered damage as a consequence of the breach of that duty. The duty of care refers to avoiding actions or omissions which are foreseeable or predictable and which can cause physical injury or harm. Breach of duty refers to the breaking of duty of care that the defendant had towards the plaintiff which involves not taking proper care by doing or omitting any action. For eg; If a man walks in a crowded place with tools in his hands must take special care that his tools do not hurt somebody, so it is the duty of care that he owes towards the passers-by such a person is bound to be more careful than the man who is not carrying anything in his hands.

Medical negligence or medical malpractice refers to the breach of duty of care by a professional or expert in a particular field, here it refers to trained medical practitioners which include surgeons, physicians, nurses, chemists, Physiotherapists, etc. The negligence may happen during diagnosis, treatment, medication or post-surgery care, or health management. In case of medical malpractice, The medical practitioners owe a duty of care to the patients, failing to do, they are liable to pay compensations under the Consumer Protection Act, 1986. The burden of proof shall lie on the complainant to prove a case of negligence. They have to first establish that there was a duty of care on part of the accused and that, there was a breach of such duty.

## **Negligence per se**

This doctrine is applied when the violation of the law causes harm because violating a law is considered a form of negligent behavior, it is considered that the defendant breached their responsibility that resulted in the violation of the law. To prove negligence per se, the plaintiff must prove that there already exists a law or a statute that mentions the standard of care or conduct which is necessary and also mentions that this breach has resulted in violating that law. Negligence means failure to exercise a duty of care towards a person or a property. If a person suffers from some other person's breach of duty of care can sue for damages to compensate for the harm. Loss may include physical injury, harm to property, mental or psychiatric illness and can also include financial loss.

### **The elements of Negligence include:**

The legal duty of the defendant to exercise due care toward the plaintiff breach of the above-mentioned duty

### **Consequential Damages:**

Due to the defendant's act or omission, the injury caused to the plaintiff must be foreseeable. In negligence, the principle of liability is that the party which is complained about should owe the party complaining a duty to take care and the party complaining should be able to prove he has suffered damage as a consequence of the breach of that duty. The duty of care refers to avoiding actions or omissions which are foreseeable or predictable and which can cause physical injury or harm. Breach of duty refers to the breaking of duty of care that the defendant had towards the plaintiff which involves not taking proper care by doing or omitting any action. For eg; If a man walks in a crowded place with tools in his hands must take special care that his tools do not hurt somebody, so it is the duty of care that he owes towards the passers-by such a person is bound to be more careful than the man who is not carrying anything in his hands.

Medical negligence or medical malpractice refers to the breach of duty of care by a professional. In most cases, negligence per se is used in a motor vehicle or automobile accident. If the plaintiff proves that the driver violated a traffic law and it led to the accident, negligence will be assumed despite the degree of the violation of the law. However, where

there is a necessity to violate the law under certain circumstances, the doctrine of negligence per se may not apply. For eg: The pedestrians are supposed to walk on the footpath or the sidewalk but if the footpath is covered with ice or blocked due to many reasons like construction work, then not walking on it may not be considered negligence per se even though the law is violated.

### **Res Ipsa Loquitur in medical negligence**

Res Ipsa Loquitur is the maxim which means 'the thing speaks for itself in Latin. In this doctrine, the plaintiff does not need to prove that injury has happened, the facts and circumstances surrounding it are enough to presume by the court that negligence has occurred. Since the defendant's negligence is presumed, therefore it is not necessary to prove it.

### **The elements of res ipsa loquitur include:**

The defendant should be in control of the situation or the instrument which caused injury, and that control should be exclusive. The injury usually would not happen in ordinary situations if the defendant took proper care. There is no contribution of the plaintiff that led to the injury. This doctrine arises in those cases where the negligent act seems very obvious, so there is no need for evidence. In the law of torts, generally, the burden of proof lies on the plaintiff. It becomes difficult for the plaintiff

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For eg: In the *Byrne v. Boadle*<sup>1</sup> case, the defendant was walking on a pavement that was outside a flour mill warehouse and a barrel from the warehouse window fell on his head. This was an unforeseeable event as the defendant did not see how and when the barrels fell on him and it was the consequence of the negligence of the people running that warehouse. But in ordinary circumstances, the barrel does not fall unless there is any carelessness. In this case, the plaintiff's action did not contribute to his injury but rather the control was in the workers of the warehouse. This doctrine is also applied in medical malpractice cases when some kind of harm happens during surgeries or diagnosis, etc.

### **Duty of the practitioner to obtain informed consent:**

<sup>1</sup> *Byrne v. Boadle* (2 Hurl & Colt. 722, 159 Eng. Rep. 299, 1863) - In this case, the defendant was walking on a sidewalk which was near the flour mill warehouse. One of the barrels from the warehouse fell on the defendant as a consequence of the carelessness of the workers in the warehouse as in ordinary situations, the barrel can not fall from the warehouse. The plaintiff was liable for negligence.

Under article 21 of the Indian constitution, a patient has a legal right to refuse any treatment except in emergencies where the doctor need not get any consent from the patient. The consent obtained should be legally valid. A medical practitioner who tries to treat without valid consent will be liable under the tort and criminal laws. The law presumes the doctor to be in a dominating position, hence the consent should be obtained after providing all the necessary information.<sup>2</sup> Consent includes various elements to be considered as free consent:

1. The consent should be expressed in the form of oral or written form.
2. It can also be implied by gestures or actions.
3. The consent should be only taken when the patient is completely informed about the medical procedure like surgery, diagnosis, and their consequences.
4. The doctors also must explain the medical history of their patients before taking consent.
5. The consent should not be forced, coerced, or taken in any illegal form, should not be done under the pressure of undue influence, and should be done without fraud or misrepresentation.

### **IMPORTANCE OF INFORMED CONSENT**

Consent refers to an agreement, compliance, or permission given voluntarily without any compulsion. All medical procedures which include examinations, diagnostic procedures, and medical research on patients in the absence of consent constitute assault (IPC 351) for which he is liable in damages.<sup>3</sup> This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.<sup>4</sup> Informed consent is the process of giving relevant and important information to the patient, in the case of a minor or an insane person, the parent or the legal guardian of the minor regarding the process of diagnosis or treatment. It is necessary for the practitioner to disclose the benefits and the side effects of the treatment, precautions the patient needs to take, and the purpose

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<sup>2</sup> Consent and medical treatment: The legal Paradigm of India is available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779959/> last accessed on 4.12.2021

<sup>3</sup> The importance of Informed Consent in Medicine available at <http://saspublisher.com/wp-content/uploads/2013/10/SJAMS15455-463.pdf> last accessed at 4.12.21

<sup>4</sup> Indian contract act, act number 9, 1872.

of the diagnosis or the treatment. It is also essential that the patient should be allowed to ask questions or doubts about their medical condition, treatment, or surgery. Informed consent is important as it helps the patient to make decisions and reduces the liability of the medical practitioners if proper measures of care are taken.

### **THE CONSUMER PROTECTION ACT, 2019**

The Consumer Protection Act, 2019<sup>5</sup> also known as COPRA, came into force on 20th July 2020. It aims to empower consumers and protect their rights and interests of the consumers. This act defines a consumer as someone who buys or avails goods and services in exchange for consideration. The consumer has the will and the power to buy goods or avail of services. The COPRA 2019 further repealed the Consumer Protection Act, of 1986. According to this new act, the medical practitioners come under the umbrella of product service providers who are skilled and trained in their respective fields. The service providers or medical practitioners will be held liable if

- the services provided by them were faulty or not up to the mark
- There was negligence in conducting the act or not sharing any important information with the patient which may have caused harm.
- The medical practitioner failed to give adequate instructions to the patient or the guardian.
- In the case of medical malpractice, the doctor did not obtain informed consent.

Under the consumer forum, the victim can seek remedy by approaching the consumer court by filing a case against the health professionals. In the case of medical malpractice, the victim can claim damages against a medical practitioner or health professional for negligence. Section 69(1) of the Consumer Protection Act, 2019 specifies that the time limit for filing a complaint against the accused must be 2 years from the date of injury.<sup>6</sup> For criminal liability, the existence of men's rea or malice intention must be proven.

### **PRINCIPLE BREACH OF DUTY**

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<sup>5</sup> The Consumer Protection Act, 2019 Act No. 35 of 2019 An act - available at <https://egazette.nic.in/WriteReadData/2019/210422.pdf> last accessed at 6.12.21

<sup>6</sup> India: Consumer Protection Act, 2019 available at <https://www.mondaq.com> last accessed at 8.12.21

The principle of duty of care evolved from *Donoghue V. Stevenson*<sup>7</sup> in 1932. In this case, the defendant ordered a ginger beer in a restaurant and there was a snail in the beer bottle, as a result, the woman fell ill and sued the manufacturer. It was concluded that the manufacturing company was negligent as it failed to ensure the safety of its consumers. The court established that there is a general duty of care of manufacturers towards their consumers. The breach of duty results in negligence. The duty is a legal duty rather than a moral or a social duty. If the plaintiff proves that the defendant had a certain legal duty towards them and there has been a breach of this duty then the defendant may be held liable for the tort of negligence. In this case, Lord Atkin concluded that a person must take reasonable care to avoid actions or omissions which are foreseeable and would likely cause harm to your neighbor. Then he explained the term neighbor which refers to any person who is likely to be affected by the negligent acts of another person. For eg: For a food company its consumers are its neighbors and the company has a duty of care toward its consumers to ensure safety and avoid any foreseeable mistakes like using low-quality raw materials, adulteration, using harmful chemicals in food items, negligent packaging of food items which may affect the quality of the product, etc.

### **STANDARD OF CARE**

The law defines that the medical practitioners or skilled and trained professionals must follow a certain code of conduct or maintain a standard of care towards their consumers or patients. Medical standard of care: It refers to a process or certain guidelines which specify the rules which hospitals or clinics should follow during diagnosis or treatment. In the case of negligence, the plaintiff must establish that there has been a breach of the standard of care. It is the idea that the doctor possesses knowledge and skills and owes his patient the best possible care and treatment they could provide. Medical malpractice is a form of negligence. Some of the Standard of care mistakes include:

- Mistakes in diagnosis or delay in a diagnosis.
- Errors during surgeries, medications, and anesthesia.
- The injury happened during childbirth to the mother or the fetus.

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<sup>7</sup> *Donoghue V. Stevenson* [1932] A.C. 562 (26 May 1932)- In this case, the defendant ordered a ginger beer in the plaintiff's restaurant and there was a snail in the beer bottle, as a result, the woman fell ill and sued the manufacturer. It was concluded that the manufacturing company was negligent as it failed to ensure safe and should have a duty of care towards the people who are likely to be affected by their actions, also called neighbors.



The practitioners are assumed to have the same level of knowledge as experts in that field as they have gone through the same training as them. Some specialists include Neurologists, radiologists, cardiologists, etc. But simply a mistake does not contribute to medical malpractice, if the health care professionals provide sub-standard facilities or care to the patient, then it contributes to medical malpractice.

## CASE LAW

Some of the landmark judgments in India which shaped the law of medical negligence or malpractice over the years:

**Kunal Saha v. AMRI (Advanced Medical Research Institute)**<sup>8</sup>- In this case the defendant, Anuradha was a child psychologist and suffered from a skin disease as she came to Kolkata for her vacation. She went to consult a doctor named Sukumar Mukherjee who did not prescribe her medicine and instead advised her to take a rest. After this, her rashes increased rapidly and the doctor prescribed her injections, but soon after the administration of the injection, her condition worsened and was admitted to AMRI hospital under the observation of the same doctor. On 28th May 1988, the defendant died due to Toxic Epidermal Necrolysis. In November 1988, Kunal Saha the husband of Anuradha Saha filed a complaint in the national disputes and redressal commission. Later the supreme court rejected the criminal appeal but accepted the civil appeal and ordered the hospital for compensating the victim's family. But later in 2013, the supreme court found that the hospital and the doctor were negligent in the treatment of the patient and asked for compensation of around 60 million.

**Indian Medical Association v. V.P. Santha & Ors**<sup>9</sup>- There were many cases of medical negligence seeking compensation under the Consumer Protection Act, 1986, when the Supreme court decided to deliver a landmark decision in 1995. The case of the Indian Medical Association v VP Shantha brought the medical profession under the ambit of services. It is defined in section 2(1)(o) of the Consumer Protection Act, 1986. Earlier it was unclear whether a medical practitioner, doctor, health professional, chemist, or physiotherapist came under the COPRA 1986. There were many complaints and opposition regarding this judgment but the supreme court said that the medical practitioner should be

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<sup>8</sup> Kunal Saha V. AMRI CAL 692,2866, 731, 858 of 2012, SSC 384 (2014)

<sup>9</sup> Indian Medical Association vs V.P. Shantha & Ors 1996 AIR 550, 1995 SCC (6) 651



held liable for negligence and section 14(1)(d) includes that they should be compensated based on the degree of damage caused by the negligent party. The National Consumer Redressal Commission held the doctor-patient relationship as an individual contract rather than a master-servant relationship, so the practitioner must be liable for their negligent acts. This landmark case brought various interpretations of medical negligence liability and the Supreme court included all the private medical hospitals and practitioners except for free service providers under the categories of medical practitioners who can be made liable.

## CONCLUSION

The person who enters a learned profession is expected to have certain levels of a reasonable and fair degree of skills and they owe a duty of care to their patients. This does not mean that they are liable for all the mistakes instead they are liable for only those actions which are performed with low or sub-standard quality of care. The professionals who fall under this category are lawyers, doctors, professors, engineers, etc. The most important elements of medical malpractice include breach of the standard of care and informed consent. The liability of medical negligence could be both civil as well as criminal. Sometimes medical negligence is also a result of improper administration of the hospitals or pharmacy shops. If a patient calls a doctor and shares her symptoms and then the doctor provides her information about methods of treatment, the doctor-patient relationship has been established. As the legal jurisprudence is constantly evolving the courts and consumer tribunals are more focused on protecting the interests and rights of the consumers. It must be also kept in mind that sometimes, despite all the efforts and care, there may be some instances where the patient could not be saved. The Directive Principles of State Policy focus on the health of the public at large and their well-being and the government must formulate policies for improving public health. There has been a need for a balanced view for both medical professionals as well as those who avail of these services which can only be achieved by understanding the reasoning behind laws made for the consumers and the service providers.