

## Relationship between a doctor and a patient under the realm of Medical Negligence: One Holistic View.

*By: Urmil Bhavesh Shah*  
*From: Auro University*

### ABSTRACT

Medical Negligence has been a central point of debate since quite a while for now. Negligence on the part of the physician, even be it involuntary is unacceptable as Hippocrates rightly said, “Wherever the art of medicine is loved, there is also a love for humanity”.

The relationship between a doctor and a patient is a key to prosperity in this world. A physician has certain kinds of relations with his patients mainly fiduciary and contractual. Reasonable duty to care is also an important element of the relation between a doctor and a patient. Medical negligence indeed has some liabilities under Criminal Law, Tort Law and Consumer Protection. Basically, the paper will cover the relation of a doctor and a patient from the viewpoint of medical negligence comprising the holistic view of the aspects related to torts.

### HYPOTHESIS

The project relies on the premise that the words ‘doctor’ and ‘physician’ and ‘medical negligence’ and ‘medical malpractice’ are interchangeably used and liabilities under medical negligence also exists in form of Criminal Law, Tort Law and Consumer Protection. The project also depends on the

assumption that a doctor certainly has two kinds of relation with his patient namely fiduciary and contractual.

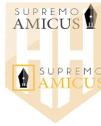
### INTRODUCTION

The relationship between a physician and a patient is a key aspect to prosperity in this world. Both the parties require each other and cannot sustain without each others mutual trust. Trust is the most important element of any relationship, but specifically in a physician-patient relationship, it’s the core on which the relationship is developed and sustained. Without both of them trusting each other there can be no solution to any medical emergency or medical problem in this world.

Hippocrates, possibly was the first person to deduce this relation between a doctor and a patient. He is also referred to as the ‘father of early medicine’ for his contributions to the field of medicine. Also he was the first person to deduce that disease can be caused by nature or human kind and not because of gods or superstition, as mentioned by him in his work, ‘On the Sacred Disease’, “It is thus with regard divine nor more sacred than other diseases, but has a natural cause from the originates like other affections. Men regard its nature and cause as divine from ignorance and wonder.”<sup>1</sup>

It is not necessary that the relation be only of a trust based nature or rather fiduciary in nature, the relation can also be contractual in nature. There can be a contract between a physician and a patient.

<sup>1</sup> Hippocrates, ‘On the Sacred Disease’.



Ever since ages, a relation between a doctor and a patient has been considered sacred and if either of the parties tries to distort this sacred relation then there exists sanctions and liabilities under Tort laws, Criminal Laws and Consumer Protection Laws.

### **THE SACRED RELATION**

The most important elements of a relation between a physician and a patient, as discussed earlier is 'trust' and 'care'. Trust and care are the sole pillars on which a physician-patient relationship sustains and prospers. A physician basically has a fiduciary relation (trust based) and a duty of care towards his patients. But this duty of care should not be confused with absolute duty of care. The duty of care in such a relation depends on the reasonability or what we call in lawmen terms, 'reasonable duty of care'.

The significance of a relation between a physician and a patient dates long back to some 400BC, where Hippocrates, a Greek physician was the first one who identified such a relation and since then it is subject to a lot of scrutiny. *'The relationship between doctors and their patients has received philosophical, sociological, and literary attention since Hippocrates, and is the subject of some 8,000 articles, monographs, chapters, and books in the modern medical literature.'*<sup>2</sup> Hippocrates did consider trust

<sup>2</sup> The Doctor-Patient Relationship-Challenges, Opportunities, Strategies. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1496871>.

and care as the basis of such a relationship and relied more on the fact that a physician must act in the best interest of his patients as mentioned by him in his Oath, *'The Hippocratic Oath'*, *'The Hippocratic oath expresses the essence of the fiduciary relationship between a physician and each of his patients. The physician has a duty to act in the patient's best interest and to refrain from exploiting the patient. Respecting the fiduciary relationship and the trust of the patient is a cornerstone of the ethical physician's practice.'*<sup>3</sup>

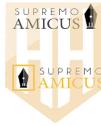
### **TRUST AND REASONABLE DUTY TO CARE**

Healthcare is considered of a crucial nature in the US and they also regard trust as an essential element to a physician-patient relationship. *'providing health care, and being a doctor, is a moral enterprise. An incompetent doctor is judged not merely to be a poor businessperson, but also morally blameworthy, as having not lived up to the expectations of patients, and having not violated the trust that is an essential and moral feature of the doctor-patient relationship'*.<sup>4</sup> Trust and duty to care plays a significant role in a fiduciary relationship (FR), which will be discussed in the next part. The important thing to be noted is that, the duty to care of patient is reasonable in nature and not absolute, which means a

<sup>3</sup> Claire Zilber, Ethics and the Doctor-Patient Relationship.

[http://www.brown.edu/Courses/BI\\_278/Other/Clerkship/Didactics/Readings/ETHICS%20AND%20THE%20DOCTOR.pdf](http://www.brown.edu/Courses/BI_278/Other/Clerkship/Didactics/Readings/ETHICS%20AND%20THE%20DOCTOR.pdf).

<sup>4</sup> Arnold R, Forrow L, Barker LR, Medical Ethics and doctor-patient communication, NY Springer-Verlag, 1995, pp.345-67.



physician can only be held liable if he doesn't perform his duty to care in reasonably foreseeable manner.

Duty to care in a FR, means *'the fiduciary owes a duty of care toward the principal. This means they are legally required to be educated and informed about the laws and issues regarding the procedures, conditions, and surgeries they are administering. If they are not adequately informed, they may not be legally liable if they did not have enough time to obtain the relevant information.'*<sup>5</sup>

Thus, *'Trust is most realistic when a relationship has a history of reliability, advocacy, beneficence, and good will.'*

### **FIDUCIARY RELATIONSHIP**

A fiduciary relationship (FR) basically means a relationship based on trust and mutual care. A physician-patient relationship is mostly based on mutual trust and duty to care on the part of the physician. *'United States law considers the relationship fiduciary; i.e., physicians are expected and required to act in their patient's interests, even when those interests may conflict with their own.'*<sup>7</sup> A fiduciary relationship generally works on the principal-agent relation, *'the beneficiary delegates discretionary powers to the fiduciary, eg principal-agent, who is then held to strict fiduciary standards of*

*conduct'*<sup>8</sup>. The term fiduciary is very important as a physician can be held for non-performance of the obligation. *'Once an FR is established, fiduciary obligations are due, and fidelity or loyalty is universally considered the most fundamental obligation.'*<sup>9</sup> A fiduciary owes certain set of duties towards his agent, *'a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient.'*<sup>10</sup>

### **CONTRACTUAL RELATIONSHIP**

There can also be a contractual form of relationship between the patient and the physician. *'The contract between the patient and physician will be formed with the acceptance of the physician on the issue of medical treatment in addition to the application of the patient to physician. This contractual relationship will form the basis of patients' and physicians' rights, requests and obligations. Because of the service contract the performance of the patient will be to pay the wage which was fixed with the contract. The patient has an obligation to comply with physician's recommendations and treatments; moreover the patient has also an obligation not to have any objections. Otherwise the physician will not be liable.'*<sup>11</sup>

<sup>5</sup><https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1496871/>

<sup>6</sup> Supra Note 2.

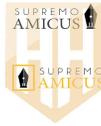
<sup>7</sup> Rodwin M, *Medicine Money and Morals: Physician's Conflict of Interest*, Oxford University Press; 1993.

<sup>8</sup> EC Hui, *Doctors as fiduciaries: a legal construct of the patient physician relationship*.

<sup>9</sup> Ibid

<sup>10</sup> Dr. Laxman Balkrishna Joshi vs. Dr. Trimbak Babu Godbole and Anr, 1969 (1) SCR 206.

<sup>11</sup> Tugce Oral, *The Definition of Legal Relation between a patient and a physician*.



It's because of all these reasons that a physician-patient relationship (be it fiduciary or contractual) remains a cornerstone to care.

### **MEDICAL NEGLIGENCE**

Medical Negligence, also known as Medical Malpractice is a tort (civil wrong) under professional negligence wherein there is an omission of act by medical practitioner or health service provider in which the treatment provided to the person lacks uniform and accepted standards in the medical field.

The important thing to note is that the proof to establish that whether there is a medical malpractice on the part of the physician is on the victim or patient in a Court of Law and not on the physician or the medical body itself.

### **LIABILITIES UNDER MEDICAL NEGLIGENCE**

There are broadly three kinds of liabilities under the tort of medical negligence or medical malpractice under the various heads:-

1. Under Consumer Protection Act.
2. Under Tort Law.
3. And, under Criminal Law.

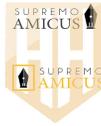
The various liabilities and their effects on both the patient and the physician is discussed below.

#### **I. Consumer Protection Act:-** The victim (patient) can approach the

Consumer Court as its first approach to seek remedy for the loss done to him by a negligent physician. The act or relation between a patient and physician in here is to be treated as a 'service'. That means the relation between a patient and physician will be of a consumer-buyer nature. This kind of relationship also states that if there is no 'consideration' involved in transaction of the service, then the patient cannot be deemed as a consumer of the medical service. The Supreme Court case of '*Kishore Lal vs. Chairman, Employees State Insurance Corporation*' is a landmark case in this kind of relationship as it defined the nature of such relationship, '*The Court held that the relationship between a medical practitioner and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the service rendered by the medical practitioners can be regarded as a service of personal nature, but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service and it is a contract for service and the service rendered by the medical practitioner to his patient under such contract is not covered by the exclusionary part of the definition of service*'.<sup>12</sup>

<http://www.ankarabarusu.org.tr/siteler/AnkaraBarReview/tekmakale/2011-1/2.pdf>

<sup>12</sup> Kishore Lal vs. Chairman, Employees State Insurance Corporation, AIR 2007 SC (1819).



Another SC case of ‘*Indian Medical Association vs. VP Shantha*’ was also a landmark judgment as medical profession was brought under Sec. 2 (1) (o) of Consumer Protection Act, 1986 in this case.

to the physicians who act in good faith.

**II. Tort Law:-** When the Consumer Protection Act, ends the Tort Law takes over the charge of protecting the interest of people even in the case when the service is provided free of cost to the consumer (which the major shortcoming of the Consumer Protection Act). The Tort Law can help the victims to claim for compensation for the loss suffered to them but however, ‘*the onus is on the victim to prove the negligence on the part of the physician*’.<sup>13</sup> This is a major shortcoming of the tort law (which we will try to solve further ahead in the paper).

**AREA OF PROBLEM**

The sole and major area of concern here in this structure of remedy against the medical inefficiencies and lacunas is that ‘*the onus to prove the charge or allegation is on the victim or the consumer*’. This kind of system in turn, attracts social evils like corruption as medical service providers are generally backed by bureaucratic powers and more often than not ‘*genuine*’ cases of medical malpractice either die down (because of bribing the jurists) or are settled out of the court and thus as a result there is not efficient precedent set in the Indian Judiciary as to how to mitigate this problem as physicians often get away with the notion of ‘*reasonable duty to care*’.

**III. Criminal Law:-** In some cases of negligence, the omission or commission of act on the part of the physician is so ‘*blatant*’, ‘*reckless*’ or ‘*gross*’ that it can attract criminal liability. However, ‘*every civil negligence is not criminal negligence*’.<sup>14</sup> A negligent physician can be punished under Sec. 304(a) of the Indian Penal Code. However, Sec. 88, 89 and 92 provide immunity

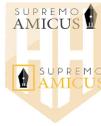
**SOLUTION**

The Indian Judicial System did foresee this issue and as a result has carried out certain acts and amendments like the introduction of the Consumer Protection Act in the field of medicine liability (as discussed earlier in the case of IMA vs. VP Shantha). But none of these amendments have been able to succeed to mitigate the loss of the victims as ‘*lives lost as a result of medical malpractice cannot be regained back*’.

But one of the efficient solutions to this problem can be the changing of the archaic rule by transferring the onus of proof of medical malpractice over the medical service providers. This significant change cannot only help to reduce corruption in such field, as the medical service providers

<sup>13</sup> Philips India Ltd. v. Kunju Pannu, AIR 1975 Bom.306.

<sup>14</sup> Talha Abdul Rahman, Medical Negligence and Doctor’s Liability, Indian Journal of Medical and Ethics.



will have to prove the burden rather than hiding it from the suffering party, but also to the increase efficiency as some of these decisions can be set as precedent to work benefits for the greater good of the victimized people at large. This solution in fact sees to it that doctors (negligent) get away with their act by the very notion of 'reasonable duty to care'. Such an efficient solution will help to improve the relationship between a physician and a doctor.

*humans and mistakes are bound to happen in such a dynamic field, but the burden upon doctor's is profound as somebody's life and health is on stake*'.<sup>15</sup> It is not always that medical professionals are always wrong or negligent 'but a willingness to admit one's shortcomings, is I believe crucial in a doctor-patient relationship.'<sup>16</sup> It is because of this reason why Hippocrates rightly quoted 'Whenever a doctor cannot do good, he must be kept from doing harm'.<sup>17</sup>

\*\*\*\*\*

'The Bolam Case' and 'Jacob Matthew vs. State of Punjab' are some of the cases where this solution could have been worked out and would not have left the victims stranded in these cases.

Though there will increase in number of unwanted and fake complaints regarding medical malpractices by the victims but then the solution will itself help to identify the 'genuine' complaints and reduce corruption, as we must look at the 'greater picture'. This solution, however doesn't mean that there should be an imposition of absolute duty to care over the patients as that would be unfair to doctors who 'act in good faith' of the person.

## CONCLUSION

This project work shows the relationship between a physician and a patient and how can it be improved by working out the inefficiencies related to the tort of 'medical negligence' and its liabilities. 'Medical profession is touted to be a noble profession, a profession wherein doctors heroically saves the lives of others and make the world a happy place to live, but doctors are also

<sup>15</sup> Almas Shaikh, Doctor-Patient Relationships: The distinction between contractual and tortious liability. <https://www.lawctopus.com/academike/doctor-patient-relationships-the-distinction-between-contractual-and-tortious-liability/>

<sup>16</sup> Dhruv Khullar, The Doctor-Patient Relationship (When You're Neither), Vol.42, No.6, pp. 7-9.

<sup>17</sup> WH Auden, Louis Kroneberger, Viking Book of Aphorisms: A Personal Selection (1988), pp. 213.