

Medical Negligence: A Review of the Existing Legal System in Bangladesh

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Abstract

The issue of Medical negligence is extremely important factor for patient. Instances of negligence in the medical profession are not a new phenomenon. Medical Negligence is being committed in all over the world every day. The main purpose of this Study is to focus Medical Negligence Law in Bangladesh. The article also attempts to highlight and discuss the existing Law regards Medical Negligence. It is qualitative research. Primary and secondary resources are used in this paper. The information has been taken from many readings, articles, books, case law and status. The result is that Bangladesh is following Medical Negligence from long time ago. We have many problems to resolve this situation. The issue is more living in a society where the problem of medical Negligence is still considered to be the result misfortune, and people superstitiously believe that the affect of Medical Negligence is considered sometimes to be the result of sin on the part of the parents of the patient. It is expected that the present study assist to simplify improvement of the legal regime of the Medical Negligence and the enforcement of laws for the better future of the Medical Negligence of Bangladesh.

Keywords - Bangladesh, Medical Negligence, Medical Malpractice, Existing Legal Regime

I. INTRODUCTION

Medical Negligence is an issue of serious human rights concern that directly affects right to life and right to health care. The overwhelming number of incidents of medical negligence in Bangladesh mostly goes without any legal action, leading to a frustrating situation where public trust is completely lost on the medical service providers. Although the legal remedies available under the existing laws are limited or difficult to access, such efforts give a clear idea about the shortcoming of the existing law and the underlying difficulties in the judicial system. In order to ascertain the legal status of medical negligence the existing legal regime has been measured in this article. The Constitution of Bangladesh recognizes right to health care and guarantees right to life. Bangladesh is also a party to a number of international instruments, under which the Government has an obligation to protect and promote right to health. Medical services include a wide range of activities; from diagnosis to medicine, surgery and other forms of treatment. In this article, the legal system in Bangladesh relating to medical and health care services and operation of private clinics, laboratories etc. have been discussed and analyzed. This part starts with the assessment of constitutional safeguards; then it infers Bangladesh's obligation to ensure right to health care under the provisions of the international treaties. Upon a comprehensive evaluation of the policies and laws, this part then analyzes the gaps and inconsistencies of the existing laws and policies. Finally, it concludes with the proposal if need for a specific legislation afresh.

II. METHODOLOGY

This Article is mainly based on analysis of the existing laws and policies relating to medical services and medical malpractice. It relies on a number of previous reports, publications, laws and policies. It is qualitative research. Primary and secondary resources are used in this paper. The information has been taken from many readings, articles, books, case law and status.

III. AIMS AND OBJECTIVE OF THE STUDY

The present article aims at discovering the legal status of medical negligence on review of existing laws and policies of Bangladesh. This revision also aims to identify the gaps and inconsistencies in the existing laws and policies to protect the right to health care of the citizens. The jurisdiction of the study is limited to the

assessment of the relevant laws and policies of Bangladesh. It also relies on a number of previous works and publications.

IV. LITERATURE REVIEW

It is very difficult to define negligence; however, the concept has been accepted in jurisprudence. As per Salmond' negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.^[1] Negligence is the breach of a legal duty of care. A breach of this duty gives the patient a right to initiate action against negligence.^[2] All medical professionals, doctors, nurses, and other health care providers are responsible for the health and safety of their patients and are expected to provide a high level quality care. Unfortunately, medical professionals and health care providers can fail in this responsibility to their patients by not giving them proper care and attention, acting maliciously, or by providing substandard care, thus causing far-reaching complications like personal injuries, and even death.^[3]

Over the decade, the function of the hospital has slowly changed from 'a venue for treatment' to 'a provider of treatment.' Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of health care providers.⁴ This is known as an "implied undertaking" on the part of a medical professional.^[5]

In Jacob Mathew case, the Supreme Court of India has gone into details of what is the meaning of negligence by medical professionals. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence.^[6]

Insufficient skill, care, pace or attention can lead to negligence. Professionals providing psychological care to patients are equally responsible for providing due care to their patients. In case of any negligence on their part, they may be charged for medical negligence. Patients are authorized to receive good medical facilities during their course of treatment. Hence, any negligence in that can also be charged.^[7]

The medical professionals who have been charged under medical negligence are often compared to other medical professionals of their group for professionalism and competency before trying them in the court.

V. ANALYSIS OF EXISTING LAW AND POLICY

V.I Constitutional Defense.

The Constitution of Bangladesh recognizes right to health and medical care as fundamental necessity of every citizen.^[8] According to article 18^[9] of the Constitution further provides that the State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties.^[10]

Thus, although the Constitution does not expressly recognize right to health and medical care as fundamental right, it is clear from the constitutional provisions as mentioned above, that the framers of the Constitution do intended for progressive realization of such rights.^[11] The constitutional sanction in favor of right to health and medical care can further be inferred from Article 32^[12] of the Constitution that guarantees right to life as a fundamental right. It has been observed in a number of Public Interest Litigation (PIL) cases that the right to life has already been construed in a wider sense to include right to safe environment^[13] and right to livelihood.^[14]

^[1] Blyth vs. Birmingham Waterworks Co. (1856) IIEEX 781

^[2] K K S R Murthy, Medical Negligence and the law, Indian Journal of medical ethics , Vol-3, No-4 (2007) p-116

^[3] Sweta S. Agarwal & Swapnil S. Agarwal, Medical negligence – Hospital's responsibility, Journal of Indian Academy of Forensic Medicine, Vol-31, No-2, April 2009, p-164

^[4] Ranchhoddas R, Thakore DK. Eds. Ratanlal and Dhirajlal's The Law of Torts. 26th ed. Lexis Nexis Butterworths Wadhwa Nagpur.2010. pp.474-620.

^[5] ibid

^[6] (2005) 6 SCC 1

^[7] P Rupasinghe, Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka, *Proceedings of 8th International Research Conference, KDU, Published November 2015*, www.kdu.ac.lk/proceedings/irc2015/2015/law-043.pdf

^[8] Article 15 of The Constitution of the People's Republic of Bangladesh, www.bdlaws.minlaw.gov.bd/pdf_part.php?id=367

^[9] The Constitution of the People's Republic of Bangladesh, www.bdlaws.minlaw.gov.bd/pdf_part.php?id=367

^[10] Report on *Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective*, Duration: March-April 2013, Prepared by Ain o Salish Kendra (ASK), <http://www.askbd.org/ask/2014/02/10/ask-study-medical-negligence-fraudulent-practice-private-clinics/> Time-11:14, Date-5/02/2016,

^[11] ibid

^[12] supra-9

^[13] *Dr. Mohiuddin Farooque Vs. Bangladesh and others*; 48 DLR, (1996) HCD 438

In a similar layer, the fundamental right to life can also be interpreted to include right to health and appropriate medical care.^[15] In addition, health and treatment are such basic needs of human life that they cannot be excluded from the essential preconditions of a secured human life and the State has some positive obligations to ensure those rights. Evermore, the Preamble to the Constitution offers a strong support for this argument. ^[16] Therefore, it is apparent that the entire scheme of the Constitution, to a considerable scope is in favor of right to health and medical care. However, while addressing medical negligence and fraudulent practices of private clinics and hospitals, some other provisions of the Constitution are also relevant. Apart from State's responsibility to protect and promote right to health and medical care, there is another aspect of the issue i.e. the responsibility of individuals and institutions delivering health care and medical services vis-avis the rights of the citizens who are the receiving end of the services.^[17]

V.II Penal Law in General: The Penal Code, 1860

Depending on the nature and culpability of the alleged act, medical negligence and fraudulent or ill practices involving medical profession or service can also come within the purview of general penal law. The offences under the Penal Code are tried in the criminal courts according to the provisions of the Code of Criminal Procedure, 1898. The Penal Code, however, does not contain any specific section to particularly address culpable negligence of a medical practitioner, except those relating to causing miscarriage etc.^[18] Nevertheless, the following sections 269 to 276, 304A, 312 to 316, 336 to 338, 415 to 418 of the Penal Code^[19] are of some relevance in cases of medical negligence, acts threatening public health, fraudulent conduct and so on.^[20] Sections – 415, 416 regarding Cheating or Cheating by personation etc. can be applied in cases of fraudulent private practice, private clinics, hospitals, laboratories and diagnostic centers.^[21] Prescribing patients for inappropriate and unnecessary medical tests can be brought under the mischief of Section 418.^[22]

V.III The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982

This Ordinance is intended to regulate medical practice and functioning of private clinics and laboratories. This is a vital law in dealing with private medical services as it provides for regulation of private practice, private clinics and laboratories. The Ordinance prohibits a registered medical practitioner in service of the Republic to carry on private medical practice during office hours.^[23] As per law, all medical practitioners are required to maintain hygienically sound chamber and room for the examination of patients.^[24] According to law, the conditions for licensing of private clinics have to ensure arrangement of requisite facilities.^[25]

V.IV The National Health Policy

The National Health Policy (NHP), establish treatment as a right as per Constitution. The goals include improvement of quality of service by better management public health care centers and hospitals; to ensure supply of necessary equipments and resources therein, to ensure the quality of service in the private medical colleges, medical education and training institutions, hospitals, clinics and diagnostic centers, to keep the expenses of medical service and education within the reach of the people, to ensure people's right to information regarding health etc. ^[26] The policy adopted a number of principles to achieve the goals. These principles include -making aware of the citizens without discrimination of any kind to access their right to health, nutrition and medical care, decentralization of medical administration, human resource development, to ensure adequate supply of essential drugs everywhere. The Policy identified the overall challenges in providing medical services; which are poor management, limited resources and low quality of service.^[27]

^[14] *Ain o Salish Kendra Vs. Government of Bangladesh*; 19 BLD, (1999) HCD 489

^[15] Hoque, Dr. Ridwanul; *Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh*, Contemporary South Asia 15 (4), December, (2006) 405

^[16] Supra-10

^[17] ibid

^[18] ibid

^[19] The Penal Code 1960, http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=&id=11

^[20] Ratanlal Ranchhoddas, Dhirajlal Keshavlal Thakore, Y. V. Chandrachud, the Indian Penal Code (Act XLV of 1860, Publisher: Wadhwa and Co, New Dheli, India, Edition-28th, 1997, page-605

^[21] ibid, p-593, 603

^[22] ibid, p-605

^[23] Section-4 of The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982', http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=&id=620

^[24] Section 5, ibid

^[25] Section 9, ibid

^[26] The National Policy, 2011, The People's Republic of Bangladesh'

http://mohfw.gov.bd/index.php?option=com_content&view=article&id=74&Itemid=92&lang=en

^[27] ibid

V.V The Bangladesh Medical and Dental Council Act, 2010

This Act replaced the previous Medical and Dental Council Act of 1980. Section 4 of the Act provides for shape of the Council.^[28] Section 5 describes the powers and responsibilities of the Council.^[29] The powers and responsibilities are inter alia to grant accreditation to medical and dental education provided in medical and dental institutions in and outside Bangladesh; to set the policies and conditions for admission into medical and dental institutions; to administrate registration of recognized medical and dental professionals, and medical assistants; to prepare, publish and maintain such registers; to inspect medical and dental institutions, to take punitive measures against persons who are engaged in medical profession without registration under this Act; to take punitive measures against use of false title, degree, fraudulent misrepresentation etc; to adopt code of professional conduct and ethics for medical and dental professionals and such other or further acts as may be necessary for or incidental to fulfillment of other responsibilities.^[30]

V.VI Code of Medical Ethics

The Code of Medical Ethics adopted ^[31] by BMDC sets the normative guidelines of professional conduct to be followed by the registered physicians and dentists. Amongst other instructions and prohibitions, the guidelines prohibits issue of certificate containing false statements; attempt to make improper profit; abuse of professional knowledge, skill or privileges. ^[32] Under section-5. (a) of the code states that Gross negligence in respect of his professional duties to his patient may be regarded as misconduct sufficient to justify the suspension or removal of the name of a Medical/Dental Practitioner from the Register.^[33]

VI. GAP ANALYSIS AND FINDING

The Constitution of Bangladesh recognizes right to health and treatment. From the analysis of judicial review and Public interest Litigations (PIL) in Bangladesh, the constitutional jurisprudence developed so far has left the debate regarding fundamental ‘principles of State policy’^[34] more of an academic importance. However, it cannot be denied that an express recognition as ‘fundamental rights’ ^[35] could create a broader avenue to enforce those rights. Lack of resource has always been a common justification for not to make ensuring those rights binding upon the State. Keeping aside the merit of the question that how long this ‘crisis argument’ would continue to sustain in the constitutional cases yet after forty five years from independence. The constitutional safeguards attached with other fundamental rights and with the aid of judicial intervention including PIL, are quite capable of according protection against medical negligence and like vices, if not enforcing the right to health in its entirety.^[36]

The NHP of 2011 unequivocally emphasized on the need for quality control of the private medical services and private medical education institutions, which is a time worthy decision. In addition to this, it is more promising for the NHP to provide for necessary policies and laws to be framed in order to ensure accountability of all involved in providing health care services.^[37] The NHP also envisioned strengthening of Bangladesh Medical and Dental Council with a view to ensure proper monitoring of registration, professional quality and relevant aspects of ethical practice of medical practitioners. While, these are undoubtedly some plausible aspects of the NHP, the question follows is the more typical one as to how far these policies would be translated in implementation. The NHP itself, however, does not contain any time bound plan of action to achieve its goals.^[38]

The Bangladesh Medical and Dental Council Act have the power to take action against a registered physician or dentist if he is found guilty of any misconduct. But what constitutes misconduct, is not defined in the Act. The Act also fails to specifically address the issue of medical negligence and set the standard for duty of care that a medical practitioner owes to the patients.^[39]

^[28] The Bangladesh Medical and Dental Council Act, 2010’http://bdlaws.minlaw.gov.bd/bangla_pdf_part.php?act_name=&vol=&id=1065

^[29] *ibid*

^[30] *ibid*

^[31] This Code has been adopted by the BMDC in its meeting held on 24.03.1983 under the provisions of the Medical and Dental Council Act of 1980 which, now has been replaced with the Medical and Dental Council Act, 2010. Nevertheless, the Code remains in force as per savings clause (Section 38(3)(a)) of the Act of 2010, since no change, modification or replacement has been made so far under the new Act of 2010.

^[32] Code of Medical Ethics, <http://bmdc.org.bd/code-of-medical-ethics/>

^[33] *ibid*

^[34] Part-2 of Bangladesh Constitution, *supra*-9

^[35] Part-2 of Bangladesh Constitution, *ibid*

^[36] *supra*-10

^[37] The National Health Policy (NHP), Strategy-14

^[38] *supra*-9

^[39] *supra*-28

The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982 provide that The Director General of Health is mainly responsible for the monitoring. The provisions of the ordinance appear to be sound. But the problem remains with application. So, the question that is important to consider at this stage is whether there is anything missing in the law which can ensure proper application. It seems that whereas the Director General of Health is empowered to take necessary actions for monitoring etc., there is nothing in the Ordinance to ensure his accountability. This aspect needs to be taken into consideration in order to establish accountability of the monitoring mechanism in the first place.^[40]

The provisions of the Penal Code, 1860, Sections 304A and Sections 312-316 can be directly invoked in cases of medical negligence. But still, the immunity granted by Sections 88 and 92 are the main hurdle to prove a case of medical negligence.^[41] It is all the more difficult because of the fact that in any case of medical negligence, it is very hard to establish the requisite *mens rea*. As a result, even the cases of gross negligence do not appropriately fit to the scope of those sections.

VII. RECOMMENDATION

From the above analysis it is apparent that the legal regime in Bangladesh lacks specific legislation on medical negligence. At present there is no law that specifically defines medical negligence. Doctor's negligence being a matter of a specialized discipline, cannot be generally construed as in other cases by the courts or lawyers. Therefore, a specific legislation defining what medical negligence is, and also setting the parameters of medical negligence is essential. The NHP, 2011 itself provided for necessary changes in the laws and regulations to ensure accountability in medical sector. Bangladesh Law Commission has also made a set of proposals. The Commission's suggestion and the assessment of this article come to the concurrent conclusion regarding necessity of a fresh and specific law on medical negligence and formation of health tribunal. I think so, if we forming strong complaint mechanism, mass training and awareness rising program are also proposed with a view to marshalling information to doctors, nurses, and patients on the effects and compensation of medical negligence in Bangladesh. These, recommendations can render better result if implemented in time bound logical framework.

VIII. CONCLUSION

Medical negligence and lack of accountability in the entire health care administration have led to an unbearable condition. Limited resources, shortage of necessary equipment's and medicines and an abnormally disproportionate ratio of doctors and nurses against patients- all these are reality in the context of medical services in Bangladesh. On the other hand, the state is under constitutional obligation to preserve and enforce the rights of the public health and health care, in addition to protect the patients from violation of their right. However, with utmost respect to the support of the medical professionals who are carrying services in such a hostile situation, it must be explained that such a truth or insufficiency cannot be accepted as a justification for negligence, misconduct or unscrupulous activities. It is all the more important to state that all these vices are ultimately found to be interconnected. For that reason, accountability is a last point to improve the situation of medical service in Bangladesh. A greater sense of accountability will encourage public trust upon medical profession. To established an effective accountability system, state can revise the existing Law and policy, and improvement to the patients in health care delivery system addressing common good of the public health. In this article, an experiment has been ready to discourse the current existing legal system on medical negligence in Bangladesh. The aforementioned also finds the major shortfalls of such provisions. Nevertheless, it important is unveiled that the laws are not proper and suitable to respond this problem. The proposal embraces representation of an inclusive law on accusing medical negligence and formation of health tribunal. Concurrently creating active complaint mechanism, mass training and consciousness rising program are also proposed with a view to marshalling information to doctors, nurses, and patients on the effects and redress of medical malpractice in Bangladesh. Lastly, people have got an effective remedy in case of Medical Negligence and Fraudulent Practices.

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[⁴⁰]The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982', http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=&id=620

[⁴¹] supra-19

- [3] Report on *Medical Negligence* and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective, Duration: March-April 2013, Prepared by Ain o Salish Kendra (ASK).
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