



EAST WEST UNIVERSITY
DEPARTMENT OF LAW

Dissertation on
Analyzing the Provisions Related to Medical Negligence in The
Draft of Health Services Act, 2017 of The Law Commission in the
Light of WHO Guidelines, Indian & Nepali Laws

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Consent Form

The dissertation titled Dissertation on Analyzing the Provisions Related to Medical Negligence in The Draft of Health Services Act, 2017 of The Law Commission in the Light of WHO Guidelines, Indian & Nepali Laws prepared by Jamima Jahan Jui, ID: 2016-3-66-028 submitted to Ali Mashraf, lecturer, Department of Law, for the fulfilment of the requirements of Course 406 (Supervised Dissertation) for LL.B. (Hons.) degree offered by the Department of Law, East West University is approved for submission.

.....

Signature of the Supervisor

Date:

Acknowledgment

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Declaration

I, Jamima Jahan Jui, ID: 2016-3-66-028 solemnly declare and affirm that this research paper is fully done by me and that it has not been plagiarized from anyplace. The goal of this research is to complete my undergraduate degree because it is for a course. A reference list is provided to keep the citation materials organized.

Jamima Jahan Jui
East West University
January, 2023

Abstract

Natural disaster places frequently in Bangladesh. During a natural calamity, there are several medical negligence incidents take places. Therefore, the existent study examined the nature of medical negligence committed against the individual person of our nation, as well as its causes. The investigation also found certain gaps in the country's enacted rules governing about the medical negligence. A number of difficulties have been identified that are arise in the application of this legislation in light of such a scenario. Additionally, the research article has made an effort to identify questions about medical negligence compensation that came up while the study was being conducted. The observation of this research paper based on some recent & past Incident history of medical negligence. While researching through this topic some Findings & recommendations have been found which states that the government should take more aggressive approach to dealing with medical negligence and make sure the protection & value of every citizen lives & rights.

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Chapter One

Introductory Statement:

In some parts of the universe, ignorance can result in greater losses. In Bangladesh and among its citizens, ignorance of tort law is one such example. Although there is hope for the day when tort law will be recognized as a legitimate area of the law, that day has not yet come.

Tort law works in the ground of civil wrong & its main focus is to make scope for the compensation of the victims for their harm caused by the negligence of others.

Unfortunately, the legal community in Bangladesh seems to denigrate the law, which seeks to alleviate human troubling by providing a solution. Although, it appears that things are now changing because new attorneys and academics appear to be interested in the applications and addition of tort law. Some of the frequent uses of tort law in Bangladesh include negligence and vicarious liability. The consumer may also utilize medical services. Medical negligence is described as a circumstance in which a medical professional fails to perform their duties, has any deficiencies in the services they are rendering, or has any flaws, imperfections, or inadequacies in the level of care they provide. Although this lack of medical professionals is widely observed and discussed in society but very little is being done to address it.

Literature Review:

Negligence is one of the most prevalent signs of civil wrong in our society and the medical field is one of them where it frequently manifests itself. Due to the lack of information in this particular area of tort law, many negligent damage victims continue to suffer without the legal remedies that are theirs.

Despite the fact that the government has put up a number of legislations, most of them do not adequately reflect the pains that the victims are experiencing.

When a patient seeks medical attention from a doctor in the hope that their pains may be alleviated, they also have expectations about the doctor's expertise, knowledge, and willingness to take action. The service supplier and service recipient have a sense of contract. Every Patients have a right to expect some certain things from their doctors, and if that obligation is broken, the doctor could be held liable for negligence & fir this one should be penalized.

Objectives

The main goal in writing this dissertation would be to apply tort law to medical negligence cases and look for ways to help those who were harmed as a result of medical professionals' or hospitals' improper actions. Questions about such cases and what the current laws offer citizens when they seek remedies will be explored. Because there are so many tort law aspects of medical negligence cases that are being overlooked every day. The major goal of this thesis is to demonstrate the logical need of a particular act or prohibition that will only be implemented in circumstances of medical negligence. Although there are existing Sections and Acts that address the subject of what obligations a service provider may have to the service recipient, they are not sufficiently detailed. There is no specific Act, Section, etc. that only addresses incidents of medical negligence, which may be why medical service providers don't feel responsible for their actions. Additionally, due to the respect that this profession enjoys in Bangladeshi society, such punishments may not terrify the majority of medical professionals, preventing any severe measures from being implemented. In order to find a remedy for these issues, extensive research will be done on the current state of medical negligence and the prior steps that were taken when similar situations first emerged.

Research Methodology:

The information from secondary sources has helped to the execution of this research paper. This paper's key sources included books, essays, and newspaper publications. Numerous references have been gathered from books and journals, but there have only been a few instances where information from newspapers has been used significantly. Also used are a few foreign Articles. "Qualitative Research Methodology" was the approach's driving principle. In OSCOLA's referencing style, the footnote and bibliography have been cited to complete this paper.

Limitations:

There is much here to learn more about. The more analysis, the better it will be for finding more flaws and fixing problems. Thus, gathering more information about this is delicate, and at the undergraduate level, it is challenging to finish research to a high degree. Due to a lack of resources, such as internal journals or blogs, the complete context of the situation was not accessible. Besides this the short duration of time frame is another major shortcoming of this study. Above everything else, I do my very best to conduct quality research.

Chapter Two

Introduction

The medical profession is considered a noble profession because it helps in preserving life. We believe life is God given. Thus, a doctor figures in the scheme of God as he stands to carry out his command.¹ The father of western medicine the great Hippocrates said ` “Whenever a doctor cannot do well, he must be kept a form doing harm”.² Medical negligence is the inappropriate, reckless, or negligent treatment of a patient by a medical professional. This could entail the negligence of a nurse, doctor, surgeon, pharmacist, dentist, or another member of the medical staff. Medical negligence is the primary defense in most cases of medical malpractice where the victim claims they were injured during medical treatment.³ The World Medical Association Declaration of Geneva 1948 states that all medical professionals must affirm that the patient's health will always come first. People today deal with a variety of malpractices in their daily lives, and as a result, they also lose their lives.⁴ The term "medical negligence" encompasses a variety of actions beyond simple malpractice or professional misconduct, such as making false statements or exploiting legal loopholes. However, the right to life, which is the most important human right, is not widely known. In our country, patients have the ability to bring a lawsuit if they lose their health or are injured as a result of negligence or malpractice. One of the main reasons why medical professionals abuse their profession is the lack of competent and effective law.

Common Examples of medical Negligence’s

Medical staff can make mistakes at virtually any point in the process, including during diagnosis, treatment, reading X-rays or patient records. Here are just a few instances of how medical professionals can neglect their duty of care to patients. Despite the fact that they never

¹M. S. Pandit and Shobha Pandit, “Medical negligence: Coverage of the profession, duties, ethics, case law, and enlightened defense - A legal perspective” <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779963/>, 05 Dec 2022

² KhandakarKohinurAkter, ‘A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices’ (2013) 4 The Northern University Journal of Law 67

³Ty Mc Duffey, “What Is Medical Negligence” <https://www.legalmatch.com/law-library/article/what-is-medical-negligence>. 05 Dec 2022

⁴ Declaration Of Geneva The "Modern Hippocratic Oath" (World Medical Organization) <https://www.wma.net/what-we-do/medical-ethics/declaration-of-geneva> 05 Dec 2022

deliberately avoided their responsibilities, the patients may have suffered greatly as a result of their conduct.⁵ Such as-

Misdiagnosis:

Following the patient's admission, the doctor's initial course of action is to supervise the testing in order to identify the patient's primary issue and determine the best course of treatment.⁶

Time Consuming:

There is a common problem in our country about the time consuming in case of providing health services to the emergency or normal patients. The medicals often show the carelessness in case of providing services to their patients.

Wrong Or Improper Anesthesia:

Using the incorrect type or dosage of anesthetic during surgery could have serious consequences.⁷

Problem During Childbirth:

We are all aware that childbirth is not always easy. If an emergency C-section was required but not recognized, and the woman or infant suffered harm, there may be grounds for medical negligence claim.⁸ The ideal rate for cesarean sections, according to the WHO is between 10-15%, but as this article from the Atlantic points out, certain hospitals' C-section rates can reach as high as 70%. Negligent conduct can include misreading the circumstance when other doctors would have responded differently and minimized the harm.⁹

Providing Wrong Prescription:

We often see the news that doctors prescribed wrong medicines, treatments or suggestions to the patients which sometimes causes serious health issues or even death of the patients.

Post-Surgical Negligence:

Even if the procedure is done properly, what happens subsequently may give rise to medical malpractice claims. There may be a basis for negligence if the post-surgical treatment was sub-

⁵ Doug Mann, "7 Common Examples of Medical Negligence" <https://ohiotiger.com/blog/common-examples-of-medical-negligence/> IBID, accessed 29, Nov,2022

⁶ GayathriVaidyanathan, 'A Landmark Turn in India's Medical Negligence Law' (Ministry of External Affairs Government of India, 31 October 2013) <https://mea.gov.in/articles-in-foreign-media.htm?dtl/22423/A+Landmark+Turn+in+Indias+Medical+Negligence+Law>, accessed 29, Nov,2022

⁷ ibid

⁸ ibid

⁹ ibid

par and crucial measures were skipped, which resulted in a serious infection. Due to the possibility of other causes contributing to infections and other post-surgical complications, this case is typically challenging to prove.¹⁰

Responsibilities of Hospitals:

The need for health is one of our fundamental necessities. In addition to food, accommodation and other necessities, only healthy people can ensure the continuation of this planet. If one's health is compromised, it will have an impact on all aspects of life and interfere with the purpose of living. Because of this, we require medical professionals who can maintain patients' health.¹¹ To ensuring this basic & valuable fundamental need, hospitals are most important field. Peoples go to the hospitals to become healthy or removing the difficulties of their bodies. So, hospitals have some very important responsibility to deal with this. Because one's life depend on the responses & Proper services of the hospitals & its staffs. The doctors are considered as the second God to the people. So, the doctor's main goal should be serving their patient in the best way. Besides the doctors- the nurses, the staffs & the hospital managements also have some responsibilities to serve the patients. The main duties of the hospitals are- give each patient the same degree of care as well as respect. According to the National Health Policy 2011, there are three particular goals to guarantee of universal access on primary and emergency healthcare quality and promoting preventive services.¹² Ensuring the patient's details confidential. Patients should not be denied emergency medical care by doctors & by the Hospitals. To guarantee impartiality and accuracy of medical reports from the hospital authorities. They should more serious about any kind of surgery or on emergency situations. Doctors should be more concerned prescribing the right treatment & medicines while Checking patients' conditions. Any extra or unnecessary charges should not be added on the treatment of any patients. Hospitals should maintain the time chart of the routine of the staffs so that in every situation the service Providers present there to safe one's life. They should always maintain the storage of medicines & other essential equipment & also should monitor the expire date of those products. Overall, a hospital is a place where people go to safe their life or to become healthy. So, maintaining the proper

¹⁰ ibid

¹¹ R T De George," The moral responsibility of the hospital" <https://pubmed.ncbi.nlm.nih.gov/7086317/>, 29 Nov, 2022

¹² Health Policy 2011

responsibility of the hospital & its staffs are really important & necessary one.

Right to Health:

People have some rights from birth. A state must uphold citizens' rights as a fundamental principle. Currently, there is a global increase in public health knowledge and rights.

Democracies prioritize improving citizens' health, and they recognize it as a state right. This is reflected in their constitutions. In accordance with their constitutions, some non-democratic nations have also guaranteed their citizens' right to health and placed a strong focus on it.¹³ Citizens have a right for their state to provide health services. Both a person's physical and mental health are factors in their overall health status. The Constitution of Bangladesh places a high value on the right to health and medical care as a basic necessity. The rights are expressly listed in the articles of the Bangladeshi Constitution, as may be seen by reading them. Although it is not immediately apparent, it can be considered a part of the Right to Life, which is a basic right under Article 32 of the Bangladeshi Constitution.¹⁴ Definition of "Life" is defined in Article 31 of the Constitution of Peoples Republic of Bangladesh.¹⁵ From this we can say that, if the right to health is not protected than the fundamentals rights of the peoples are not protected too. "A socialist society free from exploitation, one in which the rule of law, basic human rights and freedoms, equality, and justice—political, economic, and social—will be guaranteed for all citizens, shall be realized through the democratic process. It is obvious that medical negligence is a clear violation of fundamental rights because multiple sections and the preamble themselves guarantee equality, justice, and fundamental human rights. The right to public health has been acknowledged by the government and is referred to as a citizen's right in Article 18(1).¹⁶ Being a citizen of the country everyone has the right to get every kind of fundamental rights from the state.

¹³ Oxford Advanced Learner's Dictionary with Worksheets (5th Edition) 551

¹⁴ Article 32 of the Constitution of Republic of Bangladesh

¹⁵ Article 31 of the constitution of People's Republic of Bangladesh

¹⁶ Article 18(1) of the constitution of People's Republic of Bangladesh

Chapter Three

Codified Laws in Bangladesh:

There are many codified laws in Bangladesh which are deal with the area of medical negligence and other medical Related issues. Like-

The Penal Code, 1860

The Constitution of Bangladesh,1972

The Code of Criminal Procedure, 1898

The Code of Civil Procedure, 1908

The Code of Medical Ethics

The Bangladesh Medical and Dental Council Act,2010

The Consumer Rights Protection Act, 2009

The Medical Practice and Private Clinic and Laboratories (Regulation) Ordinance, 1982

The Constitution of Bangladesh, 1972:

The Constitution of Bangladesh focuses about the right to health to ensure proper & necessary health care to the peoples of our country. Right to health becomes the fundamental right under article 15,18,31,32,44. In Article 15 medical care is mentioned as the basic necessity of life & state is liable to attain this fundamental responsibility. In Article 18, public health & morality is mentioned as the fundamental principles of state policy.¹⁷ Article 31 is also related to the fundamental rights and Article 32 talks about right to life.¹⁸ Article 44 stands about the enforcement of fundamental rights.¹⁹ If the government of the state somehow fails to fulfill the obligations of the people, one can file a suit (writ petition) under Article 102 of the constitution of Bangladesh.²⁰ In the case of Kudrat-e-Elahi Panir VS Bangladesh²¹ and in the case of Dr. Mohiuddin Farooque v. Bangladesh,²² we can see the implementation of the Article 44 and Article 102.

¹⁷ Article 18 of the constitution of People's Republic of Bangladesh

¹⁸ Article 31 of the constitution of People's Republic of Bangladesh

¹⁹ Article 44 of the constitution of People's Republic of Bangladesh

²⁰ Article 102 of the constitution of People's Republic Of Bangladesh

²¹ Kudrat-e-Elahi Panir V. Bangladesh, 44 DLR

²² Dr. Mohiuddin Farooque v. Bangladesh, 48 DLR 438

The Consumer Rights Protection Act,2009

All patients are regarded as consumers under this Act, whereas medical institutions, including doctors, dentists, and medical assistants, are regarded as service providers. They are bound to provide services to anyone who might seek help care from them. If they failed to provide good & enough health services than it's under the area of medical negligence.²³ Following this there are three parts that discuss negligence. The first one is section 45, which deals with the punishment for failing to sell or deliver the promised good or service and provides imprisonment for a term not exceeding three years, a fine not exceeding two million takas, or both.²⁴ The second one is section 52, which deals with the punishment for failing to sell or deliver the promised good or service and provides imprisonment for a term not exceeding one year, a fine not exceeding fifty thousand takas, or both.²⁵ The final portion, Section 53, outlines the penalties for service providers that negligently harm a customer's property, health, or life and subject them to 3 years in prison, a fine of no more than Tk 2 lakhs, or both.²⁶ A person must wait an extremely long time to file a lawsuit or receive any relief. For instance, if a person or consumer wants to file a lawsuit under this ordinance, he must file a complaint before the director general or another authorized department official within 30 days of the cause of action under section 60.²⁷ Additionally, he cannot file a complaint directly to the magistrate if a charge sheet has not been presented to him by the DG or another authorized official under section 61 of The Consumer Rights Protection Act, 2009.²⁸ Therefore, it implies that it will also take a very long period. So, this is an insufficient solution.

Penal Code:

There are no particular statutes regarding medical negligence, nor is it specifically included in the current legal system. The Penal Code of 1860 does offer a good number of remedies, and the Code of Criminal Procedure of 1898 governs these. The punishments for medical negligence in Bangladesh are outlined in some parts of the Penal Code 1860. The adulteration of drugs is a

²³ The Consumer Rights Protection Act, 2009

²⁴ The Consumer Rights Protection Act, 2009, s 45

²⁵ The Consumer Rights Protection Act, 2009, s 52

²⁶ The Consumer Rights Protection Act, 2009, s 53

²⁷ The Consumer Rights Protection Act, 2009, s 60

²⁸ The Consumer Rights Protection Act, 2009, s 61

crime, according to Section 274 of the Penal Code of 1860.²⁹ The sale of pharmaceuticals under the name of another drug or preparation is discussed in Section 276.³⁰ According to Section 304A, anyone who kills someone by acting carelessly or rashly faces a sentence of up to five years in prison, a fine, or both.³¹ According to Section 314, any act that results in the death of such pregnant women or a woman's miscarriage is punishable by up to 10 years in prison and a fine.³²

Any conduct that recklessly or negligently endangers a person's life or personal safety is punishable under Section 336 with three years in jail, a fine, or both.³³ According to sections 337 and 338 of both laws, inflicting minor harm while endangering the lives or personal safety of others is punishable by up to six months in jail or a fine, or by both, and inflicting severe harm while endangering the lives or personal safety of others is punishable by up to two years in imprisonment or a fine, or by both.³⁴ The major goals of the aforementioned parts of Bangladesh's Penal Code are to protect individuals from suffering and to provide a modicum of protection against any harm committed by the offender, if we are to follow those goals. As a result, the Penal Code offers protection against the harms. The fine is quite inexpensive, though, so the offender is not afraid of the punishment or the fine. Therefore, the question of whether medical carelessness is a criminal or just a persistent problem arises.

The Code of Criminal Procedure, 1898:

It follows a process. If any offenses are committed, they must be tried by a session court and any judicial magistrate in accordance with schedule II of the code of criminal procedure, as per sections 336, 338, and 304A of the penal code of 1860.³⁵ A violation of Section 336 may result in an arrest without a warrant and a five-year prison sentence, a fine, or both.

The Code of Civil Procedure, 1908:

Although section 9 of the Code of Civil Procedure from 1908 allows persons to initiate a lawsuit

²⁹ The Penal Code, 1860, s 274

³⁰ *ibid*, s 276

³¹ *ibid*, s 304A

³² *Ibid*, s 314

³³ *ibid*, s 336

³⁴ *ibid*, s 337, s 338

³⁵ The Penal Code, 1860 s 336, 337, 338

and seek damages for malpractice, this Act does not explicitly include any remedies for medical negligence.³⁶ People can simply file claims for remedies under this Act, although no specific remedies or compensation amounts are listed in this document. There are certain obstacles that deter civil lawsuit for compensation, such as lengthy court proceedings, a lack of technical knowledge and expertise among attorneys and judges, the need to pay a court filing fee, etc.

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

Only private clinics or private medical services are covered by this Act. Penalties or remedies are only addressed in one area of the medical practice and private clinics and laboratories, section 13.³⁷ Any registered physician or owner of a private laboratory who violates any provision of this ordinance is subject to punishment by a fine that may not exceed 5,000 Taka, according to Section 13(1).³⁸ On the other hand, Section 13(2) states that any owner of a private clinic who violates any provision of this ordinance is subject to imprisonment for a term that may not exceed six months or a fine that may not exceed 5,000 Taka.³⁹ According to this regulation, the director general will primarily be held accountable for negligence; section 13 (1,2) also mentions compensation of 5,000 Taka, or around six months in jail, which is not a sufficient remedy for a person's death.⁴⁰ Additionally, this law's implementation is not user-friendly or simple.

The above-mentioned laws are the codified laws of Bangladesh where some of the laws are effective for the remedies of medical negligence.

³⁶ The Code of Civil Procedure, 1908, s 9

³⁷ The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, s 13

³⁸ *ibid*, s 13(1)

³⁹ *ibid*, s 13(2)

⁴⁰ *ibid*

Principle of Inclusion in the Proposed Legislation

Now, we will discuss the factual analysis of the Recommendations of the Law Commission to solve the problem of improving the quality of medical care including medical negligence:

This legislation suggests some principles. Those are:

- Describe, clarify, and analyses the types, traits, and nature of medical malpractice and negligence. ⁴¹
- Establishing a committee or commission made up of knowledgeable doctor representatives to decide on the aforementioned issues, including negligence;
- Examine the diagnostic and pathology centers' quality control, as well as their interactions and communications with doctors, and take effective action to stop it if there is proof that doctors are receiving payments from these facilities.
- If public and private hospitals can be confirmed to have proper management, cleanliness, treatment facilities, and overall quality control, the likelihood of medical negligence can also be decreased.
- Ensuring that physicians and medical assistants attend government hospitals on a regular basis;
- Medical guidelines (medical guidelines) Formulations that must be followed
- Establishing special civil courts with more room for compensation and court-ordered mediation to address medical negligence. In consultation with the aforementioned group, the court will manage the proceedings. In many nations, particularly in the United States, mediation of medical malpractice claims or litigation has shown to be more effective than other disagreements. However, using the Penal Code will not prevent you from compensating the victim of your gross carelessness for the loss they experienced. ⁴²
- Before going to court, one option for resolving grievances is to go to the BMDC, which is comparable to the Prem Council. If justice is not served, one may then consider going to court. The BMDC's membership and scope of authority can then be altered. ⁴³

⁴¹ Recommendations of the Law Commission to solve the problem of improving the quality of medical care including medical negligence [2013]

⁴² ibid

⁴³ ibid

- The hospital or medical facility in question is also vicariously liable for the doctor's or medical assistant's negligence.
- The government's responsibilities for the proper management of hospitals, the provision of medical tools, the hiring of the necessary number of physicians, and the development of a welcoming environment for physicians and medical assistants. ⁴⁴
- Occasionally, while several other patients are present in his chamber, the doctor will listen to a medical candidate and offer recommendations or prescriptions. In order to preserve the medical candidate's privacy, this kind of practice should be avoided. ⁴⁵
- Medical schools' curricula should place a strong emphasis on medical ethics, special counselling, or the development of patient service attitudes. When crafting the statute, the aforementioned concerns as well as additional technical ones were taken into account. It is crucial to enlist the aid of a committee made up of medical professionals, attorneys, and specialists in relevant fields. ⁴⁶

After analyzing this principle, we can say that this legislation was prescribed to reduce the amount of medical negligence from our country and ensuring the proper health care facilities.

Subjects of the Proposed Health Care Act, 2017

In before going to briefly discussion of this Act, first of all we should discuss about the terms of Medical Negligence defined here so,

According to the section 27(1) of this proposed Act Medical negligence includes the following facts from the Physician or Doctor-

- Mistreatment
- Misdiagnosis
- Providing the wrong medication
- Removal of wrong organs
- Providing false or exaggerated reports

⁴⁴ibid

⁴⁵ ibid

⁴⁶ ibid

- Examining multiple patients simultaneously
- providing treatment for drug addiction or derangement
- Unnecessary delay in providing medical treatment in case of emergency
- giving unnecessary pathological and diagnostic tests
- Administering medicine repeatedly
- Unnecessarily outside of own field or jurisdiction
- Arriving late at work and workplace before completion of working hours
- Leaving or being absent without permission
- Not following prescribed treatment protocol etc. ⁴⁷

Section 27(2) talks about the negligence of Supportive Staffs. Those are-

- Unnecessary delay in patient admission:
- Non-routine care of the patients
- Arriving late at work and leaving work before completion of work hours or being absent without permission;
- Behaving Discourteous or stormy with the patient or his relatives
- Section 27(3) of this Act talks about the medical negligence committed by the Institution. Negligence of medical institutions are-
- Failure to regularly supervise all matters related to patient treatment;
- Not keeping adequate medical equipment:
- Failure to perform calibration within the prescribed period:
- Not hiring trained and experienced nurses, support staff To do and not to store details of their work skills:
- Physician's opinion regarding patient's treatment, prescriptions and not saving all information related to comments:
- Regarding patient diagnostic tests and imaging not saving all information:
- Not keeping all types of emergency medicine:
- Not keeping surgical equipment including Autoclave;

⁴⁷ Health Care Act [2017], s 27(1)

- Failure to provide safe water and healthy food:
- Failure to prescribe duties and responsibilities for doctors, nurses and support staff:
- Not having its own ambulance for transporting patients
- And not having separate vehicles for transporting dead bodies etc. ⁴⁸

Now we are going to discuss about this Act shortly –

- According to the section 1 of the Act, this Act will be named as ‘Health Care Act, 2017’ & it will be applicable for the whole Bangladesh. ⁴⁹
- Section 4 of this Act talks about the -Health Care Recipient Rights and Responsibilities. ⁵⁰
- Section 5(1) of this act talks about the health services providing by the government hospitals including (a) Free medical prescription from a doctor,(b) Free medical treatment as mentioned in the policy, subject to availability, (c) Beds in cabins or associated wards free of charge or, as the case may be, at such rent as may be fixed by the Government, subject to availability and in the nature of the disease, in case of need for hospitalization, (d) free or subsidized quality food and nutrition in the case of admitted patients; (e)Surgical, pathological, radiological, imaging and other necessary tests, if necessary,(f) Follow up treatments in case of outpatients and(g) Primary care, examination, treatment in emergency department or ward, transfer to Intensive Care Unit (ICU) or Cardiac Care Unit (CCU) or related departments if necessary and other for advanced treatment if necessary. Arrangement of transfer to any specialized hospital or institution etc. On the other hand, Section 5(2) of this act suggested the responsibilities of private hospitals as well. Section 6 of this Act strictly advised not to do any discrimination in the basis of any sex, caste, language, Status, professional etc.⁵¹
- Section 8 of this Act suggested about the compensation of the patients or his/her family in case of negligence committed by the hospitals. ⁵²
- Section 9 of this Act stands with the duties of the patients & their families to continue

⁴⁸ Health Care Act [2017],s 27(2)

⁴⁹ Health Care Act [2017],s 1

⁵⁰ *ibid*, s 4

⁵¹ *ibid*, s 5(1),5(2), s 6

⁵² *ibid*, s 8

friendly & helpful behavior with the hospital's staffs.

- Section 12 of this act talks about the duties of the doctor.
- Section 13 & Section 14 briefly suggested the duties of the nurses, other Staffs & authorities' duties of the hospital.⁵³ Section 15(1) talks about -If any damage is caused to the medical service provider or the institution by the patient receiving the service or his guardian and representative, they shall be entitled to compensation and other remedies & sub-section 2 states that - The remedy referred to in sub-section (1) shall be prayed to the 'Healthcare Disputes Settlement Tribunal'.⁵⁴
- Section 16 talks about the duty to protect the Rights of The Patients by the hospital management. Section 20 of the Health Care Act,2017 talks about the privacy of patient which should be maintained by the hospital management & doctors.⁵⁵
- Section 22 of this Act suggests the duties of Bangladesh Medical & Dental Councils.⁵⁶
- Section 23 of this Act suggests the duty & responsibility of the Medicine Making Companies & strictly suggests not to making low categories medicines. If they do not follow the right making process of the manufacture or substandard medicine that shall be considered as a criminal offence; And the Commission may receive a complaint in this regard and conduct a preliminary investigation and refer the matter to the concerned criminal court for initiation of trial, including taking cognizance of the offence; or Complaints relating to compensation to the Healthcare Dispute Resolution Tribunal will be sent.⁵⁷
- Section 24 of this act talks about the duties & responsibilities of the Government in case of taking concern regarding the health care.
- Section 29 of this act suggests to- (1) establish National Health Commission within 6 months after promulgation of this Act; (2) the Commission shall be a statutory independent body and shall have permanent continuity and the provisions of this Act shall Subject to this, it shall have power to acquire, hold and transfer property, both

⁵³ *ibid*, s 13,14

⁵⁴ *ibid*, s 15(1),15(2)

⁵⁵*ibid*, s 16, s20

⁵⁶ *ibid*, s 22

⁵⁷ *ibid*, s 23

immovable and immovable, and may institute proceedings against it & (3) The Commission shall be a quasi-judicial body.⁵⁸

- Section 41 of this Act suggests to carry out the purpose of this Act, the Government shall constitute one or more tribunals in the capital called “Healthcare Dispute Resolution Tribunals”. And according to section 43, 44, 45, 46, 47,48,49 of this Act, the Tribunal have the right to solve the of civil & criminal cases.⁵⁹

Rest of the sections of this Act suggests to take initiative action & giving punishment according to the related conventional Law of our country in case of any negligence committed by the hospitals or from the patients.

⁵⁸ Health Care Act [2017], s 29

⁵⁹ Ibid, s 41, 42, 43,44, 45, 46, 47, 48, 49

Chapter Four

Comparison With Other Countries

India

In India, there are around 52 lakh medical wounds or injuries that remain chronically untreated, and 98,000 people die in the country each year as a result of medical malpractice.⁶⁰ The fact that 10 people die every day as a result of medical malpractice and that over 11 people pass away every hour as a result it is a serious concern for the entire nation. ⁶¹Mainly, there are two laws in India that provide remedies for medical negligence. One is The Consumer Rights Protection Act (CPA), 2019 and another one is the Indian Penal Code (IPC), 1860. In case of medical negligence there is a minimum amount of fees required to file a lawsuit under The Consumer Rights Protection Act of 2019. ⁶²On the other hand, Sections 374 and 385 of the IPC, which deal with causing harm and serious harm are covered by Section 304A of the IPC, which addresses the death of a person by carelessness. ⁶³Section 337 of IPC states that- Anyone who injures another person by acting in penalized with either physical or mental imprisonment for a time that may reach six months, a fine that may reach 500 rupees, or both.⁶⁴ Causing grievous damage by act threatening life or personal safety of others is under Section 338 is of IPC, 1860.It says that- It is punishable by imprisonment of either kind for a term that may extend to two years, a fine that may reach to one thousand rupees, or by both for anyone who causes great harm to anyone by acting in a way that endangers human life or the personal safety of others.⁶⁵ These are the legal responsibilities of India. Both financial liability and disciplinary sanctions are possible. People may bring lawsuits under civil law for monetary liabilities, but they may also do so under the Consumer Protection Act of 2019 for disciplinary actions.

⁶⁰ Richa Singh,” Medical Negligence in India “<https://blog.iplayers.in/medical-negligence-india/>, 25 Dec 2022.

⁶¹ Ibid

⁶² The Consumer Rights Protection Act,2019

⁶³ The Consumer Rights Protection Act,2019

⁶⁴ Ibid, s 337

⁶⁵ Ibid, s 338

Nepal

In Nepal there are very random cases on medical negligence like our country. In their nation, holding out past the point of competence is the root cause of around 14.28% of medical negligence cases.⁶⁶ Almost 70 complaints were filed at the Nepal Medical Council (MNC) between October 2018 to October 2019 against the doctors regarding their negligence to the patient. Right against medical negligence is a part of right to dignified life guaranteed under Article 12(1) of the Interim Constitution of Nepal, 2007.⁶⁷ In Nepal, there are various way which one can be pursued the claim of medical negligence. In case of the negligence of a doctor, one can filed FIR to the police station. There are different types of code of Medical Ethics are available in Nepal. Section 17(b) of the Nepal Medical Council Act,1964 states that, the registration number of the doctor would be removed from the list if the medical council agreed that the doctor was liable for any kind if misconduct with the patient.⁶⁸ Nepal Medical Council Rules, 1968 and The Consumer Rights Protection Act,1998 also deals with the medical negligence.⁶⁹ There is various famous case in Nepal in the ground of Medical Negligence. Anisha MC Thapa case is one of the recent famous cases in Nepal, where Thapa was declared dead due to the negligence of the Hospitals & its doctors & nurses. But instate of taking legal actions, Thapa's family took compensation of Rs 500,000 in the name of the new born baby of Thapa.⁷⁰ In this incident we can see the dark side if medical negligence where the victim's family greediness & thus the system never changes.

Compensation on Medical Negligence in Bangladesh

We can see that the pecuniary remedy or compensation for medical malpractice is still not at a sufficient level. This is because we have been dealing with various problems and challenges for a while now. The first reason behind this is we are not even sure which legislation is appropriate

⁶⁶ Shalini Jhunjhunwala," Medical Negligence and Its Legal Aspect in Nepal" 01 Jan 2023
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243682

⁶⁷ Interim Constitution of Nepal [2007], Article 12(1)

⁶⁸ Nepal Medical Council Act [1964], sec 17(b)

⁶⁹ Nepal Medical Council Rule,1968 & The Consumer Rights Protection Act, 1998

⁷⁰ <https://english.onlinekhabar.com/weak-and-complicated-law-forces-nepals-medical-negligence-victims-to-rely-on-the-mob-for-justice.html>

for demonstrating restitution for the kind of wrongdoing that can quickly steal our lives. Even while we have the option to initiate a case for carelessness, injury, or serious injury under the Penal Code, it's interesting to note that these actions also fall under the definition of a civil wrong. Because a victim cannot seek compensation under the Penal Code, which is necessary for a victim as well, bringing a medical negligence action under the Penal Code will not be sufficient for the victim. However, bringing a criminal action for medical malpractice can also damage a doctor's reputation, which is potentially insufficient compensation for the victim. Therefore, it is imperative for citizens of this nation to comprehend the nature of the wrongdoing and the corrective procedure; otherwise, people will continue to be perplexed and will never receive the proper cures.

Secondly, this wrongful act is civil suit in nature but there is no particular law yet regarding this ground. Now if anyone talks about the Acts of The Medical Ethics, The Medical Practice and Private Clinics and Laboratories, CRP Act etc., but these are only for who are related with medical professions & the remedies are not still satisfying.

After that if we talk about The Consumer Rights Protection Act,2009 than we can see that the process is so lengthy & the amount is very sufficient. Like if a doctor does any harmful negligence Which can be a question of life-or-death situation than how can be only 2,00,000 Taka enough as a compensation?

There is another way of getting compensation in this matter. The Public Interest Litigation (PIL) ground. According to the Article 102 of the Constitution of Bangladesh, one can claim compensation for this particular right violation through PIL.⁷¹ Article 32 of the Constitution of Bangladesh talks about right to life but right to health & proper medical care doesn't directly include here as a fundamental right.⁷² Though from the PIL one can receive huge amount of compensation but the procedure isn't easy & applicable for all kinds of People. Another option for obtaining compensation is through a straightforward civil wrong suit using the 1908 Code of Civil Procedure's Section 9 procedure.⁷³ This section offers a very broad scope for someone to seek compensation in a civil lawsuit but it depends on the circumstances & evidences.

The primary issue is that most citizens of our nation are unaware of this compensation method and instead choose to file a lawsuit in accordance with PILs or special laws. People are rarely

⁷¹ The Constitution of Peoples Republic Bangladesh, Art 102

⁷² Ibid, Art 32

⁷³ The Code of Civil Procedure [1908], s 32

aware of this method for bringing a claim for compensation for medical malpractice

WHO Guidelines on Medical Negligence

Negligence has to be confined to two specific meanings: the use of outdated knowledge & skills; and not taking the safety measures that are known to be necessary. The sub-branch of WHO is the WHF (World Health Forum) suggests some ideas about reducing medical negligence. There idea about reducing medical negligence is highly different from general perspectives. The guidelines are-

Educating the Public

People should be made aware of their rights and responsibilities in relation to the healthcare system and their own options for maintaining their health in order to enable them to make informed decisions ⁷⁴

Education in Medical Ethics for Health Care Professionals:

Health care workers need to be adequately educated on patients' rights and the obligations that society places on them in this regard, in accordance with the generally accepted standards of autonomy and justice. A shift in mindset among healthcare practitioners could result from further ethical education and a review of past actions. It is true that some people will never gain anything from such efforts, but there is little doubt that the majority of people can enhance their relationships with patients and with society at large by giving ethical issues a higher priority in their daily lives ⁷⁵

Continuing Education & Monitoring of Specialists:

The knowledge and abilities of health care professionals must be continuously updated, and they must also get regular monitoring. ⁷⁶

Social Changing:

If society's views are to change and those of health care professionals are to change, then both must change. Attitudes are greatly impacted by the media. When the media publicizes what may be an improper medical action for example, it might put experts on the defensive due to the

⁷⁴ Povl Riss, 'Medical negligence' 1996(1) World Health Forum <WHF_1996_17(3)_p213-239> 3rd Jan,2023

⁷⁵ ibid

⁷⁶ ibid

pressure of public opinion, which is frequently generated by and even influenced by the media. Professionals may reject high risk patients because of the possibility of negative publicity.⁷⁷

Legal and Administrative change:

Some changes must have to bring on legal & administrative sectors after examining the loopholes of the reasons of medical negligence.

•Modifying the traditional medical contract:

The contract between the physician and the patient ought to more evenly distribute each party's rights and responsibilities while also taking societal requirements into account. This should be understood as a "three-party agreement" that upholds the ideals of beneficence, autonomy, and justice. The entire freedom of the individual to make decisions must always be respected while making every attempt to make clear all the components required for informed consent.⁷⁸

⁷⁷ *ibid*

⁷⁸ *ibid*

Chapter Five

Findings

Compensation as a legal remedy in cases of medical malpractice in our nation is not sufficiently recognized by our special or codified laws. There are various laws that address medical malpractice, but no victim will be adequately compensated under them. It was also discovered that there is an additional method of pursuing compensation for malpractice under Article 102 of the Bangladeshi Constitution, although unlike other civil procedures, this method is neither convenient nor straightforward for the victim. The entire process of asking for assistance is a trial process. Despite the fact that more people are seeking compensation for medical negligence every day, the court hardly ever gets complaints for negligence compensation since, in our nation, victims can only submit complaints when a situation becomes serious. On the other hand, the government does not provide any social services to identify the crime and raise awareness.

Moreover, there is no process for providing any kind of long-term support system.

This thesis also points out that there is a knowledge gap, as thousands of cases of medical negligence go unreported due to ignorance of the law or failure to file a lawsuit in accordance with the right procedure or venue. Most people in Bangladesh have a widespread misconception about medical malpractice.

This dissertation also revealed that Section 9 of the Code of Civil Procedure (1908) is not adequately recognized as a means of getting relief through compensation by legal minds like lawyers and judicial bodies like lower courts. As a result, implementation is lacking.

Another gap to step ahead is not to the promulgation of Health Care Act, 2017. This can be like the milestone on the ground of medical negligence prevention. If we compare with our neighbor country India than we can see that they established they are making & trying to give an effort and has also given a sizable award in terms of medical negligence compensation

Recommendations

This thesis predicted a relatively bleak conclusion for medical negligence & its compensation in Bangladesh overall, which was proven to be accurate after extensive investigation. The overall views & knowledge about the medical negligence in public is not sufficient & the laws are not enough standards to set a good compensation. There is some advice given below may be useful for obtaining a suitable compensation scheme for medical negligence-

Instead of revoking licenses under certain codified Acts that are related to medical carelessness, our legislative body should place more emphasis on the compensation amount sector.

The recommend Health Care Act,2017 should be come into force to reduce this kind of negligence & everyone should have the knowledge about the Act.

Even though filing a PIL is not always a wise course of action and also takes some time to result in compensation, we must concentrate on a quick trial procedure.

People should be inspired and informed that they have the right, as citizens of this nation, to seek redress for any violation of their rights, including medical negligence.

The government ministry should be in charge of monitoring the hospitals to ensure they are providing patients with the care they need. If a patient is not receiving the required assistance after being admitted to the hospital or during their stay, the hospital will be put on trial.

The healthcare organizations should create a culture of safety that focuses on the system's progress as a whole and considers the difficulties and errors.

Conclusion

The system of our country is not sufficient in maintaining proper health care of the individuals & protect of the fundamental rights of the People of our country. AS a developing country government should give more focus on the health sector because a healthy population can give a wealthy nation. For this the authorities should be monitoring this field with honesty & without illegal motive. The public also should be more aware about their right & laws of the country. And for this the media & other social organizations should raise their voice. With the positive efforts of everyone's Bangladesh can be a happy country where no one will be suffered for the intentionally or carelessly actions of the related persons of medical service providers.

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