Medical Negligence Laws and Patient Safety in Bangladesh: An analysis

Sheikh Mohammad Towhidul Karim
Lecturer, Department of Law, International Islamic University Chittagong
E-mail: smtk_5@yahoo.com, Cell: 01815-677387

Mohammad Ridwan Goni (Corresponding Author)
Lecturer, Department of Law, International Islamic University Chittagong
E-mail: ridwan_justice@yahoo.com, Cell: 01819-612965

Mohammad Hasan Murad
Assistant Professor, Department of Law, International Islamic University Chittagong
E-mail: muradhs@yahoo.com, Cell: 01725-324834

Abstract:

This paper seeks to engage with the present legal scenario that exists in connection with the laws and regulations involving medical negligence in Bangladesh. Public and private health sector of Bangladesh virtually remained unregulated since the inception of this country. We have a very weak health system and very few rules and regulations are in existence to protect the rights of the patients and to provide remedy to them in case of breach of liability. The article begins by setting the scene in relation to the basic concepts of medical negligence. Some recent stories of medical negligence are discussed with legal analysis. The existing legal framework of medical negligence is then explored before the analysis progresses to the needs for regulatory reforms towards an effective legal regime of ensuring the prevention and redresses of medical negligence cases.

Keywords: Medical negligence, medical law, doctor’s duty, Bangladesh
1. Introduction

The Medical profession is one of the noblest professions in the world. Sometimes general people give the doctors the honour of God as they save the lives of people. So they believe that the place of this profession is after the place of God i.e., next to God. As such they are required to possess a particular level of learning, knowledge, expertise and skill and are to maintain a reasonable degree of "care and caution", while performing their duty. Patients are one of the most important classes of consumer. In Bangladesh patients belong to the most neglected sector of consumers. Patient’s rights have never been thought of or taken into account seriously. The role of health care professionals is seen as a money-making industry and patients are seen or treated as consumers of health services. The notion of the health care industry or health-providing mechanism has emerged due to “physicians as entrepreneurs or as workers in an entrepreneurial enterprise were enmeshed in mutual competition” (E.H. Loewy and Roberta Springer Loewy, 2004). However, Hospital malpractice causes thousands of injuries and deaths every year. Every day people suffer and sometimes die because of medical treatment in the Bangladesh.

2. Definition of Medical Negligence

Before going into the details of medical negligence, we have to understand the concept of negligence. We begin with the definition of negligence. Negligence means heedless or careless conduct. The term 'negligence' has been defined by Rattan Lal and Dhiraj Lal as the “breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do” (Ratanlal and Dhirajlal, 2002). Negligence, as per the law of Torts, is a breach of legal duty to take care resulting in damage to the person claiming it. Austin defines negligence thus – “In cases of negligence, the party performs not an act to which he is obliged; he breaks a positive duty”. In other words, negligence may exist in non-feasance or misfeasance...
Definition of medical negligence itself is open to wider interpretation. Now let us see what is Medical Negligence or medical Malpractice? Medical negligence can be defined as the treatment by a medical professional that does not meet the medically accepted standard of care. In other words, Medical negligence is professional negligence by act or omission by a health care provider in which care provided deviates from accepted standards of practice in the medical community and causes injury or death to the patient, with most cases involving medical error. It is a breach of duty by a doctor to perform his or her job as required by their duty. Inadequate skill, care, or speed can be cause for medical negligence claims. Any person, including doctors, nurses, or specialists, who assumes any part of the responsibility for a patient’s medical care can be held liable for medical negligence. Those professionals who provide psychological care are also responsible for the well-being of patients and could be charged with malpractice.

3. Nature of Medical Negligence

Most doctors, nurses and healthcare providers are highly skilled professionals who are committed to providing the finest medical care. But occasionally, tragic mistakes are made in a hospital, operating room or clinic. Medical mistakes in the diagnosis and treatment of hospital patients are unfortunately among the most common cases of hospital malpractice. As of complex nature of the practice of medicine, it is no surprise that even the smallest mistake by a doctor can have life-altering (even life-ending) effects on his or her patients. There are many different types of medical negligence are seen in medical science. Some of the more common categories of medical negligence are explained below:

3.1 Misdiagnosis

Diagnosis is the first test after the admission of a patient in a hospital, clinic, Medicare, dental care or any other kind of medical establishment. However, it is duty of doctor to supervise the test as if it is correctly and carefully completed.
Moreover, doctor makes diagnosis without due care and diligence. Besides, sometimes an error in diagnosis can occur in cases where symptoms may not be readily apparent or telling. Common types of misdiagnosis include (Types of Medical Negligence, 2012):

- Failure to Diagnose Cancer
- Misdiagnosis of Symptoms of Impending Heart Attack
- Misdiagnosis of Stroke
- Failure to Recognize DVT and Pulmonary Embolism
- Misdiagnosis of Diabetes
- Failure to Recognize Meningitis
- Failure to Diagnose Appendicitis

### 3.2 Delayed Diagnosis

A delayed diagnosis can be a form of medical negligence if another doctor would have reasonably diagnosed the same condition in a timely fashion. A delay in diagnosis can lead to an undue injury to the patient if the illness or injury is allowed to progress rather than being treated. Commonly, a diagnosis will not be made in a timely manner due to a doctor having a workload that diminishes his or her capacity to properly administer medical treatment. In these cases the hospital or clinic may even be held liable for any damages resulting from the delay in diagnosis and treatment. Some of the more serious examples of delayed diagnosis are:

- Untimely Diagnosis of Coronary Artery Disease
- Delay in Diagnosis of Heart Attack
- Delay in Diagnosis and Treatment of Stroke
- Delay in Cancer Diagnosis
- Failure to Timely Diagnose Appendicitis
- Delay in Diagnosing Internal Trauma Injury

Obviously, any delay in diagnosis and treatment of an illness or injury can reduce the likelihood of recovery for the patient.

### 3.3 Surgical Error

Medical negligence is often associated in operation theatre with complex surgeries, such as, heart, spine or brain
surgery which may cause serious damage or even death within minutes. However, surgical errors and medical negligence can occur during even the most common surgeries, including colon, vascular, gynecological, laser vision correction or sinus surgeries etc. It is a well known fact that doctors perform large number of surgeries that every day all across Bangladesh. Unfortunately, surgical accidents occur far more often than many people realize. Surgical medical procedures require an enormous level of skill, and even the slightest mistakes can have profound effects on the patient. There are various types of surgical errors may be made in medical sector, such as unnecessary surgery, wrong site surgery, errors in anesthesia etc. One of the most dangerous risks in any surgical procedure is that of cutting, lacerating or perforating an artery, organ or vessel. There are several ways a surgeon can make a potentially fatal mistake during an operation. It is a well known fact that doctors perform millions of surgeries that every day in Bangladesh. Unfortunately, surgical accidents occur far more often than many people realize.

3.3.1 Unnecessary Surgery

Now a day, most of doctors are running behind the money. They have lost the service mentality and forgotten the objectives of medical education. So they make unnecessary surgery for their own benefit, not the patient’s benefit. Besides, unnecessary surgery is often related to a misdiagnosis of patient symptoms or a medical decision without proper consideration of other options or risks.

Alternatively, sometimes surgery is chosen over more conventional treatments for their expediency and ease compared to other alternatives. Some of the most common unnecessary surgical procedures include:

- Pacemaker Implant
- Coronary Bypass Surgery
- Cesarean Section
- Hysterectomy
3.3.2 Errors in Anesthesia

Anesthesia is a very risky and sensitive part of any major medical operation. So it requires a specialist (anesthesiologist) to administer and monitor the effect on the patient and the anesthesiologist have to review the patient’s medical record, history, prior medications, allergies and time requirements of the operation to determine the best combination of drugs to use before making anesthesia. Anesthesia malpractice can happen either during the pre-operation medical review, or during the procedure itself.10

3.3.3 Negligent Anesthesia Preparation

Sometimes, anesthesiologist use anesthesia negligently and recklessly without reviewing patient’s medical record, history, prior medications, allergies and time requirements of the operation which causing damage the organ of the patient and even death instantly. Besides, unqualified anesthetist can also be liable for patient’s death. In the case of Rajmal vs. State of Rajasthan, (AIR 1996 Raj. 80) the petitioner's wife died. It was found that there was no negligence on the part of the doctor performing the surgery, nor his integrity or efforts could be doubted. The apparent cause of death of the patient was lack of adequate resuscitative facilities in the form of proper equipment, as well as trained and qualified anesthetist. Held, there was negligence on the part of the hospital and the State Government was liable to pay compensation.

3.3.4 Failure to Monitor Anesthetic Performance

Even if the pre-op work is done correctly, there is potential for negligence should the anesthesiologist not monitor the patient and reacts in time to and changes in vital signs. It is even possible for the anesthesiologist to run into logistical problems, such as a lack of available oxygen. If these types of situations are not anticipated during the operation, the patient may lose their life due to medical negligence (Types of Medical Negligence, 2012).
3.4 Wrong Site Surgery

Wrong site surgery is another type of surgical error, usually involving a mis-communication or error in hospital records which leads to a surgeon operating on the wrong organ or external appendage (Types of Medical Negligence, 2012).

4. Childbirth Trauma and Labor Malpractice

Childbirth can be an especially difficult event for the newborn child, and even worse if not handled appropriately by the doctor and nurses. Instances of medical negligence during childbirth can take place in several ways, including failure to perform a c-section, mishandling of a difficult birth, complications with induced labor, misdiagnosis of newborn medical condition or failure to monitor fetal vital signs (Types of Medical Negligence, 2012).

4.1 Medical Negligence and C-Sections

A cesarean section (c-section) is often a requirement to preserve the health of the baby in cases of fetal distress. Commonly the baby will show signs of fetal distress, such as a lack of oxygen to the brain and reduced heart beat, and a c-section must be administered immediately to prevent injury to the fetal brain. If the medical staff fails to perform the c-section in time, delaying the procedure in hopes of delivering the baby normally, that decision may lead to permanent brain damage to the baby.

4.2 Mistreatment of Difficult Birth

During difficult births, the medical staff may have to use methods for forcing the extraction of the child. Usually a combination of forceps and suction will be used to force the child out of it’s mother. One of the risks associated with forced extraction is that any improper, or negligent handling of the process can cause permanent injuries to the baby, especially nerve damage such as brachial plexus injury.
4.3 Complications with Induced Labor

Many times, doctors and medical staff will attempt to speed up a delivery, or avoid a c-section by inducing labor. Oxytocin (common brand used is called Pitocin) is administered to expedite the delivery of the child, but this drug may have side-effects if not monitored carefully. In cases where fetal distress is detected, such as a prolapsed umbilical cord, it is critical that the administration of pitocin be ceased immediately, and a c-section be considered. In these cases, the doctor has precious few minutes to judge the situation and decide on the best course of action to prevent serious permanent injury to the newborn baby.

5. Negligent Long-Term Treatment

Medical negligence can also occur in subtle ways over the course of a long treatment period. Generally, the negligence will take the form of a failure to follow up with treatment, or a doctor’s failure to monitor the effect of the treatment properly.

When the doctor fails to monitor the progress of the patient properly, this negligent medical treatment can lead to further injury to the patient. Sometimes a nurse is appointed by doctor for the treatment of patient. But they fail to make decisions regarding continuation, cessation or adjustment of the treatment plan of doctor due to lack of proper knowledge in medical science.

6. Negligence in Treatment: Actual Incidences in Bangladesh

In 2012, High Court of Bangladesh summoned a number of doctors for alleged negligence in treatment. There was a serious allegation of negligence against Labaid Cardiac Hospital causing the death of Dhaka University teacher Dr. Mridul Kanti Chakrobarty on August 15, 2011. He had admitted in Labaid with diarrhea related dehydration and his treatment started around an hour after had been taken to the hospital. High Court Division passed a verdict of Tk 50
lakh compensation against Labaid Cardiac Hospital after having found the Hospital’s negligence which caused the death of Dr. Mridul Kanti Chakrobarty (Daily star, August 18, 2011). Earlier, on July 4, 2011 Professor Abu Nasser M Saleh, a professor of Physiology Department of Rajshahi University died at Rajshahi Medical College Hospital almost without treatment in the hospital. Saleh was ‘wrongly diagnosed’ at the emergency department of the hospital where he was taken with chest pain and referred him to the respiratory unit instead of cardiology department. Both the incidents drew media attention (Daily star July 6, 2011).

Ain O Salish Kendro (ASK), leading human rights NGO in Bangladesh, had discovered 504 specific medical negligence cases that happened in between June 1995 to September 2008, most of the narratives are sadly disappointing and sketch the terrible picture of our state and standard of medicare (Daily star, April 17 2010). However, cinema celebrity Manna died by heart attack on February 17, 2008 at United Hospital, Dhaka. His wife said there was no specialist doctor in the hospital to treat after he was rushed there with chest pains on February 17, 2008. So, he died prematurely because of the negligence of doctors (BD News 24 Online, February 17, 2008). Some newspaper headlines are tabled below that reflect horrible faces of medical negligence in Bangladesh–
Law on Medical Negligence

In Bangladesh there is no particular law on medical negligence except some scattered references on several medical code, ethics, civil and criminal statutes and some constitutional articles. This area directly falls within tortuous liability which is not usually welcomed by our courts or the lawyers feel reluctant to resort to courts for various reasons.

7.1 Constitutional safeguard

Actually, the Constitution of Bangladesh does not provide any special rights to the patient. In fact the patient’s rights are basically indirect rights (Nayak, 2004). Bangladesh Constitution has declared "right to life"(Article 32) as a fundamental right. Indeed, in its Fundamental Principles of State Policy, the State has been obligated to ensure the "basic necessities of life, including food, clothing, shelter, education and medical care and to 'raising of the level of nutrition and the improvement of public health'. Thus we have constitutional remedies where health is in jeopardy under Articles 15, 18 read with Articles 31, 32, 44 (Constitutional Provisions relating to fundamental rights)
and 102 (Writs) as guards of citizen’s health right. In Doctor’s Strike Case (Dr. Mohiuddin Farooque vs. Bangladesh & others), the petitioner challenged the continuance of strike by government doctors wherein the court treated it (strike) as ‘failure to perform their statutory and Constitutional duties to ensure health services and medical care to the general public, arising out of the abstention from duties by the striking doctors. It was emphasized that the willful absence of the doctors of BCS (Health Cadre) as members of the Association from their statutory and public duties caused threat to life and body of the public is of no legal effect. The all-encompassing phenomenon of right to life has received recognition from Bangladesh apex court. Pending hearing of the Rule, the Respondents were directed by way of mandatory injunction to call off the strike of the doctors BCS (Health Cadre) of all the Government Medical Hospitals, Complexes and Centres immediately with effect within 24 hours from the date of service of notice and to join their offices respectively.

7.2 The Medical and Dental Council Act 1980

Patients pay good amount of fees to the doctors but they are not getting proper services from them. In that case the Council (Section 3 of the Act 1980) may remove any medical professional as per law. When any medical practitioner or dentist is found guilty of misconduct in respect of his profession, the Council may refuse to permit registration of that person (Section of 28i). The Council may also direct the removal of the name of any registered medical practitioner or dentist from the Registration, altogether or for a specified period, on account of professional misconduct(Section of 28ii). Section 5(a) of the Code of Medical Ethics provides that gross negligence of medical and dental practitioners in their duties to their patient may be regarded as misconduct sufficient to justify the suspension or the removal of their names from the Registrar.

7.3 The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982
Doctors, both private clinics and government hospitals owe duty of care to the patients. During office hours private medical practice is completely prohibited (Section 4) In private clinics and diagnostic centres, patients pay money for their treatment. Therefore, patients become consumers there and are entitled to get proper services. Conditions precedent for establishing a private clinic are, proper accommodation with hygienic environment for the patients, at least eighty square feet of floor space for each patient, air conditioned operation theatre, availability of all the essential equipments, adequate supply of life saving and essential medicines, required number of full-time registered medical practitioners, nurses and other staff and specialists for the operation, treatment and supervision of patients (section 9). This Act also has given supervisory powers to the Director General of Health. The Director General of Health or any other officer authorized by him shall have the authority to inspect any chamber of registered medical practitioner, private clinic, private hospital or pathological laboratory whether they have contravened or failed to comply with any provision of this Ordinance (Section 11). In case the Director General finds that they have contravened any provision of this Ordinance, he may recommend the government in case of medical practitioner to debar him from carrying on medical private practice, in case of private clinic or private hospital to cancel the licence in respect thereof and in case of pathological laboratory to close it down. In this Ordinance, it is very unfortunate that no punitive action can be taken except imposing fine (Ahmuduzzaman and Syeda Shamsia Husain, 2009).

7.4 The Consumer Rights Protection Act, 2009

There are many services are prevailing throughout the country and medical service or treatment is one of them. The definition of service provides in the Consumer Rights Protection Act, 2009. Under this Act, "Service" means service of any service of transport, telecommunication, water supply, sanitation, fuel, gas, electricity, construction, residential hotels and restaurants, and health, which are made available to the consumers in exchange of price but this will not include free service (Section 2.22). Patients are receiving
services from doctors or hospitals; so they are consumers as they consume medical services.

Punishment is provided in the Act for failure to provide promised service. If doctors or hospitals do not provide promised service in lieu of payment, the offender will be punished with imprisonment for a term not exceeding one year or with fine not exceeding 50,000 taka or both (Section 45). However, it is very difficult to prove that doctors or hospitals did not provide intended services as the services involve such minute or numerous details, or which is so dependent on the personal qualifications or volition of the doctors that violation cannot be ascertained. The Act also provides that whoever does any act which can endanger life or security of consumer will be punished for imprisonment for a term not exceeding three years or with fine not exceeding 200,000 taka or with both (Section 52). Medical service providers can be prosecuted if there is negligence or intentional act or omission leading to endangering life and security of the patients. According to section 53 medical professionals may also be held liable if their negligence cause damage to money, health or life of service receivers.

7.5 The Penal Code, 1860

The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec. 304A or Sections 336 or 337 or 338 of the Penal Code, 1860 alleging rashness or negligence on the part of the doctors resulting in loss of life or injury of varying degree to the patient (Prakash, 2007). Sections 80 and 88 of the Penal Code contain defenses for doctors accused of criminal liability.

7.6 Civil Liability

Doctors in Bangladesh may be held liable for their services individually or vicariously as per civil law and the medical professionals can be liable or provide compensation for medical negligence. It means that whenever there is breach of a contract, the aggrieved parties are entitled to claim one or more remedies against the opposite party as per
the Contract Act, 1872 where following remedies are suggested:

- Rescission of the contract.
- Suit for damages.
- Suit upon *quantum meruit* (means in proportion to the work done).

An aggrieved patient may also seek temporary and permanent injunction under the Specific Relief Act, 1877 as against health professionals violating contractual and service terms.

### 8. What has to prove for medical negligence?

A patient must establish and prove four fundamental elements for a successful medical malpractice claim which are given below:

#### 8.1 Duty

Duty is a legal element that establishes a requirement between a doctor, nurse or other medical professional and their patient to treat said patient to the accepted medical standard of care. A legal duty exists whenever a hospital or health care provider undertakes care or treatment of a patient. In such a situation, patient has to prove that the doctor or hospital failed to conform to the relevant standard care.

#### 8.2 Negligence

Doctors or health care providers must provide its patient the standard of care during the time of treatment. In order for negligence to be proven a claimant (usually the patient himself) must show that the doctor owed a duty of care to the patient, that the doctor was negligent in his management, and also that the patient suffered harm as a result. Also, a patient might introduce expert witnesses, evidence of a customary practice, or circumstantial evidence.
8.3 Causation

The second important element is causation. Causation means that the health care professional’s breach of the standard of care caused or contributed to causing some harm to the patient. In other words, we can say, causation is that harm has resulted which would not otherwise have occurred. There is a causal link between the negligence and the harm, i.e., that the injury, damage and loss suffered is a direct consequence of the medical negligence.

8.4 Damages

The third element is damages, i.e. the amount of compensation. Without damages, there is no basis for a claim. Financial loss can include the future costs of caring for the patient. It can also include the patient’s future lost or income where, as a result of the negligence, the patient is no longer able to work or to earn as much as he or she would otherwise.

9. Problems to Prove Medical Negligence Cases

Medical negligence is a common incident in Bangladesh. Everyday and even every minute a lot of patients are becoming victims of medical negligence. However, what are the reasons behind this? Definitely, we believe, there is no comprehensive law relating to medical malpractice which can easily enforce the rights of the victim patient. In addition, cases of medical negligence often involve complex issues regarding emergency room care, surgery, intensive care treatment, delivery and medication errors. These cases require extensive medical research, investigation and analysis i.e. the investigation officer or any other person in this connection, judges and especially the lawyer must have proper medical knowledge. Negligence by doctors has to be determined by judges who are not trained in medical science. They rely on experts’ opinion and decide on the basis of basic principles of reasonableness and prudence. But most of the lawyers, investigation officers, judges have no experience and knowledge in medical science to evaluate the
case and give real legal advice, real report and comprehensive judgment. Besides, lacking of evidence of patient is another loophole for not proving the medical negligence lawsuits.

10. Reform Proposals

10.1 Enactment of New Law

The government should enact a new law, which can be called, the Patient’s Rights Protection Act. All medical professionals are bound to follow with obligations the provisions of that comprehensive Act. This Act should impose legal obligations upon medical practitioners, dentists, private clinics, private hospitals, pathological laboratories and also upon government hospitals for their medical malpractice. This Act also emphasis on medical ethics so that the ‘medicare’ can be effectively ‘judicially’ scrutinized. In addition, the Act will cover the following provisions –

- Complete separate Medical Malpractice Court System or Tribunal.
- Organize necessary campaigns, seminars and workshops regarding medical ethics for creating awareness among citizens and medical professionals.
- Favourable budget for healthcare service.
- Checking up the activities of medical practitioners, dentists, private clinics, private hospitals, pathological laboratories and government hospitals as well.
- All records and documents of hospitals, clinics, diagnostics etc. must be kept in prescribed computer software.

10.2 Setting up a Medical Review Bureau

There is a need to establish Medical Review Bureau to co-exist with the courts, which can set a proper balance between doctor and patient. The Medical Review Bureau
would be the starting point of entry to provide a forum outside the courtroom in which the problem may be solved without the expense, publicity and the difficulty of court proceedings. This Bureau should aim at providing a framework to resolve disputes by offering an independent, accessible and impartial alternative to the courts (Kassim et al, 2002). Its principal role would be to scrutinize the medical conduct referred to it. If any expert opinion is needed for complaint, the Bureau can appoint an expert in this regard. When a patient wishes to bring an action against the doctor, he submits a written request to the Bureau to consider the claim. The Medical Review Bureau shall direct the doctor to submit a written objection within 10 days of institution of a written request. But the Bureau may extend time if think fit. After hearing of both parties, a decision of a Bureau shall be delivered within 60 days following the institution of written request unless the parties to the dispute give their consent in writing to extent the time limit.

11. Conclusion

The doctor-patient relationship is one of the most unique and privileged relation based on mutual trust and faith. It is believed that health care professionals should treat patients as their friends, and not as consumers of services (Loewy, 1994). But presently there is a great decline in this relationship which might be due to communication gap between them, commercialization of health services, increased consumer awareness and finally non existence of particular law on medical negligence in our country except some scattered civil and criminal laws. However, mistakes of medical professional which may result in death of a person or cause permanent impairment can be particularly costly and cannot be overlooked. The law does not aim to punish doctors for all their mistakes, but only to those which are committed out of negligence. Mistakes occur but which occurs from carelessness and negligence cannot be let off. The development of law on negligence pertaining to professionals' liability in Bangladesh is not well decorated. So, in order to avoid future death related to medical negligence, policy and practices need to be strengthened. As the Bangladesh Medical and Dental Council (BMDC) look
after public interest so the role of BMDC is very important for ensuring the patient's rights. Eventually, we hope and believe that the new proposed enactment relating to medical negligence and our reform proposals and social movement can diminish the medical negligence in Bangladesh.

References

Books and articles


Other sources

Rajmal vs. State of Rajsthan, AIR 1996 Raj. 80

Dr. Mohiuddin Farooque vs. Bangladesh & others (Writ Petition no. 1783/1994)


The Daily star, Bangladesh,

The BD News 24 Online, Bangladesh

The Constitution of the People’s Republic of Bangladesh.1972

The Medical and Dental Council Act, 1980