

# Medical Negligence or Malpractice: Critical Review of Relevant Laws in Pakistan

**Arif Rasheed**

*Department of Forensic Medicine, Services Institute of Medical Sciences, Lahore*

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## Introduction

The terms 'medical negligence or medical malpractice' are often used synonymously, however, in stricto sensu 'medical negligence' include "criminal negligence" while 'medical malpractice' encompasses civil negligence including two other types, i.e., contributory and third party negligence. The word negligence is a noun meaning "not to give proper care or carelessness". Therefore, the medical negligence means medical treatment without proper care or is an act or omission by a medical practitioner therein he has deviated from accepted standards of practice in the medical fraternity and caused damage/injury or death to the patient. In case of damage/injury, it falls within the ambit of civil negligence and in case of death of patient; it falls within the purview of criminal negligence. Medical Negligence comes under the category of tort law. The scope of medical negligence is not limited to conduct of the medical practitioner alone. It extends to his staff working under his supervision (3rd party negligence) and in a hospital setting to the whole unit (captain of ship theory/master is responsible /vicarious liability) and in some cases role of patient also contribute in it (contributory negligence).

In all cases of medical negligence, burden of proof is on the patient (plaintiff) than on the medical practitioner (defendant). To prove negligence claim, the plaintiff is required to prove, first, that the doctor owed him a duty of care; second, the doctor breached that duty; and, third, that the breach resulted in damage/injury, however, there is a unique entity, **RES IPSA LOQUITRE**, (thing speaks for itself, e.g., leaving a swab or instrument in the body of the patient during surgery), where medical practitioner (defendant) has to prove that he was not negligent.

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In all cases of medical negligence, burden of proof is on the patient (plaintiff) than on the medical practitioner (defendant). To prove negligence claim, the plaintiff is required to prove, first, that the doctor owed him a duty of care; second, the doctor breached that duty; and, third, that the breach resulted in damage/injury, however, there is a unique entity, **RES IPSA LOQUITRE**, (thing speaks for itself, e.g., leaving a swab or instrument in the body of the patient during surgery), where medical practitioner (defendant) has to prove that he was not negligent.

## Relevant Laws in Pakistan

### Legal Position ( Common Law):

1. Law begins with the presumption:-
  - (a) that neither a doctor can be forced to start the treatment nor a patient can be forced to submit to treatment.
  - (b) When both agree, (i.e. patient consents to get treatment and medical practitioner promises to provide cure), they enter into an "implied contract", having their share of responsibilities.
2. Patients share of responsibility:-

- (a) Pay the mutually agreed fee.
- (b) Submit himself to the command of the doctor:- i- History ( all secrets ), ii- Exposure body parts for examination, iii-

Accept treatment advised.

### 3. Doctors share of responsibility:-

- a) Apply skill with competence proportionate to his own claim (general practitioner/expert etc.)
- b) During application of skill should exercise carefulness (reasonable).

### 4. The treatment must proceed without interruption till:-

- (a) Mutual agreement when the physician refers him to another physician and the patient accepts this advice.
- (b) Discharge of physician by the patient ( when the patient is not satisfied and decides unilaterally to go to some other medical practitioner) and
- (c) The death of either party.

**NOTE:** The position of the medical practitioner under employment with government or an organization is slightly different. He is under an obligation to provide medical treatment to any member of the public or organization who requires or requests it during the doctor's duty. Further the responsibility to provide treatment may shift to his successor, i.e., on change of duty or on transfer.

The Article 9 of **Constitution of Pakistan 1973** ensures a fundamental assurance that it is the duty of a welfare state to ensure the best enforcement of right of life; and as laid down by the Supreme Court that the word life covers all means of human existence, all such services and facilities that a person is entitled to enjoy legally and constitutionally. It includes medical care too as a right to have proper health care facilities and all goals and purposes of medical care are meant for the protection of life. It is also well established under the Constitution of Pakistan 1973 that no one, including doctors, enjoys complete immunity.

Laws have been enacted to regulate medical profession and to control the acts of medical practitioners, rules and regulations have also been

formulated to regulate the policies.

It is pertinent to mention that after 18th Amendment in the Constitution of Pakistan, the health and matters auxiliary to it including planning, financing, implementation, management, oversight, supervision, monitoring, regulation, medical education and training have become provincial subjects to legislate upon (Waraich, 2018).

Lawsuits can be brought against medical negligence under civil, criminal, tort and consumer law of the country such as:

- 1) Pakistan the Pakistan Medical & Dental Council (PM&DC) Act 2022.
- 2) Medical Tribunal Act 2020
- 3) Disciplinary Action under Health Care Commission Acts.
- 4) Laws entailing civil liabilities under law of Torts and Code of Civil procedure 1908 Section 19.
- 5) Consumer Protection Act 2005.
- 6) Criminal liability under Pakistan Penal Code 1860
- 7) Liability under code of Criminal Procedure of Pakistan 1898
- 8) Pakistan Medical and Dental Council (PMDC), authorized by its Constitution to initiate an inquiry under the jurisdiction of the Medical Tribunal as per Medical Tribunal Act 2020, if medical practitioners found guilty of negligence, their license to practice can be suspended, temporarily or permanently and revoked. In case of permanent suspension of license to practice, there is permanent erasure of name from registering register as per section 44 (Removal of names from the register)—that is called professional death.

However, from the perusal of the aforementioned PM&DC ACT, one thing is obvious that primarily it is to manage the affairs of medical education as well as recognition of medical and dental qualifications (Waraich, 2018). The objective pertaining to determination of the rights and liabilities and the modus operandi to confer liability on the doctors, paramedical staff and medical & dental institutions on the account of their negligence and medical

malpractices, has not been comprehensively addressed in it.

In Punjab, the Punjab Healthcare Commission Act 2010 and in Sindh, the Sindh Healthcare Commission Act 2013 has been promulgated to deal with cases of medical negligence in their respective provinces. The practical part associated with medical negligence or malpractice in these ACTS has been reproduced herein as under:

- Section 4 of the Punjab Healthcare Commission Act 2010 empowers the Commission that on application of any aggrieved person to hold enquiry and investigate into malpractice services by any healthcare provider and issue resulting orders and while doing so can exercise the powers of a civil court for the execution of its orders. Pakistan Social Sciences Review (PSSR) March, 2021 Volume 5, Issue I475
- Section 19 of the same Act defines medical negligence as a healthcare service provider may be held guilty of medical negligence when a healthcare provider does not exercise with due care and caution with rational proficiency the expertise which he or his employee did possess.
- Section 23 of the Act prescribes the procedure of the investigation to be followed by the commission and details the process required to be followed for filing a complaint.
- Section 26 of both the enactments (Punjab and Sindh) Healthcare Commission Acts 2010 and 2013 respectively provides that where the conditions of a case permit action under any other law can also be taken, the Act empowers the Commission to refer any case to the executive authorities or law enforcing agencies for appropriate action under relevant laws. Meaning thereby that once an inquiry is completed by the Commission and the commission is of the view that it is proved by cogent evidence that charges levied against accused healthcare provider hold water then it may refer the case accordingly.
- Section 28 confers jurisdiction on the Commission to adjudicate and impose fine up-to five hundred thousand rupees, keeping in view gravity of offence, but only after affording an adequate

opportunity of hearing to a person to be fined. And in case the complaint is proved false, it could impose fine up-to two hundred thousand rupees upon the complainant.

- Under section 35, all administrative authorities of the Government have been directed to act in support of the Commission for executing the mandate given to it by Law. Where it appears to the Commission that the circumstances of a case warrant action under any other law, the Commission may refer such cases to the concerned governmental authorities or law enforcement agencies for appropriate action under relevant laws.

The Health care Commissions Acts were enforced in the province of Punjab, Sindh, KPK after the accruals of the enormous cases of medical malpractices across the country. From perusal of all these supra mentioned HCC ACTS, it is obvious that although there are sufficient provisions in the statutes governing the conduct of medical practitioners, however, owing to poor understanding of the procedure, lack of proper mechanisms for implementation, these remedies against negligence and medical malpractice are not implemented in true letter and spirit. This area has been so badly neglected at the platform of technicalities and stereotyped red-tapism inbuilt in the system. The fundamental purpose of these laws to ensure the application of the generally acknowledged principles of wellbeing of patient has been vanished.

Another significant aspect is to determine the question of jurisdiction as far as the medical malpractice and negligence of medical practitioner are concerned. Wariarch in 2018 has asserted that Consumer courts of Pakistan has jurisdiction over the matters regarding malpractice and negligence of the healthcare provider; however, this is an outdated idea now particularly after the promulgation of special laws on the subject, the jurisdiction of the general law (Consumer Protection Act 2005) is redundant. The same has been stated by honourable Lahore High Court judge, Justice Farrukh Irfan that Section 29 of the HCC Act barred proceedings under any other law which included the Punjab Consumer Protection Act, 2005. These bottlenecks can be removed through a

ved through a revised and meticulous enactment exclusively dealing with conduct of healthcare provider including misfeasance, malfeasance, and negligence (Khowaja, K. 2009). It is stated in PLD 2019 Lah 429 that in the matters of medical malpractice and negligence the exclusive jurisdiction is of Punjab Healthcare Commission in Punjab (Pakistan Social Sciences Review (PSSR) March, 2021 Volume 5, Issue I 477) to investigate and impose penalty. It is further stated in 2011 CLC 463 that once it is decided by the Healthcare Commissions that doctor was guilty of malpractice and misconduct, criminal as well as civil law could be agitated against this felony.

1- **Civil Courts**, The cases of civil negligence like extraction of healthy tooth instead of diseased one, administration of wrong injections, use of expired drugs, wrong diagnosis and wrong treatment/medicine which leads to damage can be dealt in the civil courts for the claim of damages proportionate to the damage caused (Magistrate courts).

Clinical negligence can be remedied under civil liability, criminal prosecution and disciplinary action by the regulatory body, which today is the Pakistan Medical Commission (PMC), or the provincial healthcare commissions established after the 18th amendment.

A civil action can be initiated at a consumer court or a high court to claim damages for the losses suffered owing to negligent healthcare services. To prove one's negligence claim, the victim is required to prove, first, that the doctor owed him a duty of care; second, the doctor breached that duty; and, third, that the breach resulted in damage/injury.

It is easy to prove the first of this three-stage liability test. However, the second and third stages are where most negligence claims fail and doctors escape liability. It is practically impossible for a layman to prove with scientific evidence as to what the expected standards of care are, how a doctor deviated from that expected standard, and how it caused harm.

In civil litigation, a litigant has the right to acquire all information from the opponent. However, most patients are not given sufficient information by the doctors or hospitals after a case goes wrong. Patients

in routine medical practice are never told about the medical condition they were in, what possible options or treatments they had, whether the healthcare service providers had the required equipment and expertise, and what drugs were administered and why.

2- **Criminal Courts**, Where there is death of the patient due to reckless action of the doctor, the said cases falling within the purview of criminal negligence can be dealt in the criminal courts (district & session Judge).

### **Relevant Statutory Sections In This Regard Are Mentioned Infra:**

i- Section 318 of the Pakistan Penal Code 1860 which states the following:

“Whoever, without any intention to cause the death of or cause harm to a person causes the death of such person, either by mistake of act or by mistake of fact, is said to have committed qatl-i-khata.”

ii- Section 321 states the following:

“Whoever, without any intention to cause the death of, or cause harm to, any person, does any unlawful act which becomes a cause for the death of another person, is said to have committed qatl-bis-sabab.”

iii- Section 304(A) of the PPC 1860 specifically provides the following:

“Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

There is a general principle of criminal law that “every sane is presumed to intend the natural consequences of his act”. Doctors who have attained their MBBS degrees and have had practical experience in their field are also presumed to have the knowledge of what the consequences/side-effects of their prescribed medicine may be. Therefore, doctors cannot pin liability solely on the hospital, as the primary responsibility is with the doctors themselves while hospitals may be held liable under the principle of vicarious liability in this regard.

## Conclusion

There is need of hour to look into the healthcare system of Pakistan. The ambiguities, confusions and bottle necks within and among the various legal frameworks are existed. There is no close monitoring on conduct (professionalism, i.e., cognitive, psychomotor domains and attitude) of medical practitioners. The medical institutes and hospitals have no uniform criteria, policy, framework and body to deal with cases of medical negligence and malpractice.

## Recommendations and Suggestions

The intra and inter ambiguities within various legal framework must be removed.

It should be made mandatory to conduct close monitoring of medical training, regulation of duty hours and work commitment by medical professionals, legal protection for patients and doctors, adequate salaries for doctors, and assessment of professional competence at regular intervals. These measures will hopefully help control medical malpractice at a larger scale. PMDC and other regulatory bodies should also pledge to preclude cases of medical negligence and grasp doctors liable through criminal or civil penalties, depending upon nature & magnitude of medical negligence or malpractice.

The universally accepted norms of medical practice must be introduced and implemented within the framework of our health system (Jalal & Haq, 2014). All medical practitioners must be given proper training and equip with skills to meet the standard of care expected from them. It has always been a highly privileged, respectful, and highly rewarding profession. A very high level of implied trust, empathy, care, kindness, morality, and professional proficiency is expected from a doctor. Exclusive law must be made which clearly defines the provisions regarding medical negligence and medical malpractice and the liabilities in case of breach of such obligations. The measure to award monetary compensation must be clearly stated. There should be an accountability mechanism of regulatory bodies as

well. The bureaucratic hurdles should be removed, and this area must be effectively separated from the bureaucratic shackles and control. The law must ensure the enforcement of the rights of patient as well as healthcare provider. A doctor cannot overlook nor disregard the celestial role he is expected to have in the discharge of his duties and the standards a doctor must adhere to or is morally connected with regardless of any law watching over their deeds (Sher, 2006). The oath 'the undertaking' which a doctor swears on the very first day of his medical profession casts a heavy responsibility on his shoulder to uphold all the virtues associated with this profession the oath states will use those regimens which will benefit my patients according to my greatest ability and judgment, and I will do no harm or injustice to them (Shah & Sheahan, 2016). These aspirations when truly translated by the State legislature through efficacious enactments, by executive through viable policies and with opulent implementation by the judiciary, the entire healthcare regime can be progressed and revamped for addressing the concerns, for serving the mandate of laws and for enforcing the fundamental rights guaranteed by the Constitution.

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