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ORIGINAL ARTICLE

MEDICAL NEGLIGENCE: A LEGO-ECONOMIC ANALYSIS

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Abstract:

A doctor in the course of rendition of medical service to his patient shall comply with certain legal requirements. Accordingly he shall obtain the consent of a patient and the consent so obtained must be an informed one. He shall exercise reasonable care and skill in rendering his professional services. Any lapse on his part in this regard invites liability in the form of trespass for non-consensual treatment and tortious or contractual liability for medical negligence and failure to obtain an informed consent. In the above contemplated circumstances, a doctor attracts liability for deficiency in service under the Consumer Protection Act, subject to the conditions contemplated there in. A patient, if successful in proving medical negligence on the part of a doctor is entitled for compensation which has its own economic ramification both on the doctor as well as the patient. In this article, an attempt is made to critically analyse the concept of medical negligence from the legal and economic perspective.

The Economic Analysis of Medical Negligence Liability:

DOCTOR AND PATIENT RELATIONSHIP

Economists analyse the doctor-patient relationship in terms of an Agent and Principal relationship. The doctor is considered as an agent and the patient the Principal. It can be explained with the help of an analogy of a C.E.O employed by a company. A company employs him on the assumption that he has the required knowledge and prowess to achieve its economic goals. In turn, he expects the necessary incentives from the company. Likewise, a patient hires the service of a doctor for the reason that the latter has the required medical knowledge to cure his disease. In that sense, a patient is styled as principal and the doctor, the agent. Accordingly it is obligatory for the agent (doctor) to render quality medical service to the Principal (patient) for which the former seeks certain incentives pecuniary as well as non-pecuniary in the form of legal support and motivation.

Economists opine that a doctor (agent) undertakes to cure the patient (principal) without rendering any information to the latter as to what he does or proposes to do with his body.

Standard of Care expected of a doctor

Standard of care is the hub around which the whole negligence theory revolves. It is considered as the heart of the negligence based liability. According to this theory a physician is negligent, if the loss caused by the medical accident multiplied by the probability of medical accident occurring, exceeds the cost of preventing the medical accident. To put it otherwise where the cost of preventing the medical accident exceeds the loss resulting from it, a doctor cannot be held guilty of negligence.

Standard of care as contemplated in the fault system from an economic perspective has an impact on the conduct of the doctor, by way of motivating him to be cautious to avoid medical mishap. It aims to maintain stability in his competency and efficiency in his attempt to cure the patient. Its primary object is not to award compensation, which is only secondary. Patients remedy arises only when a medical error occurs due to the fault of his doctor. The standard of care should not be either too low or too high. If too low

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it is favourable to a doctor and too high it favours the patient. Therefore a balance has to be struck between the interest of a doctor and a patient.

COST/BENEFIT ANALYSIS

The medical negligence debate focuses on how the quality of medical care could be enhanced. The widely accepted response manifests that it can be attained by minimising the medical errors. The available economic literature shows finger towards the legal rules as a cogent instrument for promoting medical efficiency. The economists strongly advocate that legal rules must promote efficiency, which signifies maximisation of social welfare by minimizing the social cost of medical accidents. The economists use the tool of cost/benefit analysis to determine the standard of care which will lead to the aforesaid normative objective. This analysis aims at finding a level of care at which marginal cost of care taking equals the marginal benefit of accident reduction.

It can be substantiated with an illustration. For example a doctor can effectively and efficiently perform five operations a day. The sixth operation increases the additional cost which will be higher than the additional benefit of accident reduction. Therefore he may continue to perform the operations until the additional cost equals the additional benefit of accident reduction. To interpret on a general perspective a doctor should stop at a point where he feels physically strained that he is not in a position to discharge his duties efficiently no more.

TORT LAW AND MEDICAL NEGLIGENCE

Tort law is designed to motivate a doctor to internalize the external cost of his professional service to enable him to adopt an optimum level of precautions as the standard of care. Accordingly through tort liability a doctor should externalize the benefits of precaution to avoid the expected liability. The economists accord paramount importance to the deterrent function of the tort law. They believe that on the other hand lawyers seem to emphasize the compensatory function of tort law. In effect, it has resulted in perception difference between the economists and lawyers as to the function of tort law. Economists look at the medical negligence problem from an ex-ante perspective which signifies conferring incentives to the doctors to enable them prevent the damage. On the contrary lawyers view the problem from an ex-post perspective to think of the maximum extent of the indemnification of an injured patient. The dichotomy between ex-ante and ex-post has lead to have a perception of tort law as having two functions viz the deterrent and compensatory function.

A patient when sustains an injury, as a result of medical negligence bears a welfare loss. There will be a welfare imbalance in him which can be deciphered from a comparison of his ante-mishap position with the post-mishap position. The compensation theory which is restitutionery in nature aims at correcting the patient's welfare imbalance by restoring the patient to the position in which he was before the medical mishap.

The economists have laid down the proposition that the primary goal of tort based liability is to provide incentives and motivation to doctors to take optimal care through the deterrent effect stemming from the liability. These incentives have great influence on the quality of health care that the doctors need to conform to a standard of care which ensures this quality care. It is obvious from the above discussions that for economist incentives and compensation act as preventive measures against the negligent doctors. In effect, compensation is seen as incentive to a doctor that the fear of compensation makes him alert as to not to be negligent. On the contrary, lawyers see compensation as a restitutionery tool performing the function of restoring patient's health.

An act of medical negligence by a doctor resulting in injury to a patient gives rise to an externality arising from human (doctor) action. Legal rules which aim at internalizing these externalities can provide sufficient incentives to a doctor to prevent the injury. They provide a mechanism to correct these externalities. From economic perspective, they can be looked as a price mechanism which informs both the doctor and patient the division of risk, to motivate them to take due care. Accidents in various areas including medical practice have assumed a menacing proportion, which ignited the economic scholars to develop major tools. They pointed out the efficiency of tort law in correcting externalities arising through the use of liability rules.

CONTRACT LAW AND MEDICAL NEGLIGENCE

Epstein, on the contrary points out the superiority of contract law over tort law. The justification is that the doctor and patient can directly enter into a contract regarding the ensuing liability rather than

relying on tort law. According to him these contracts result in optimal solution as the different parties can contract in their own interest.

Feldman profounded an expected utility model of patient decision making, for which he made use of an econometric model of medical malpractice incidents. He showed inter-alia that higher the income, higher submission to surgical operations and favourable legal system encourage incidents.

MOTIVATION FOR INSTITUTING MEDICAL NEGLIGENCE CASES

Mueller, puts across the proposition that per capita depend upon average awards, exposure to injury, propensity to litigate and legal rules favouring the patient. Mueller, puts across the proposition that per capita depends upon average awards, which signifies the compensation amount divided by the total number of patients. Exposure to injury propensity to litigate, reasonable per capita compensation, legal rules favouring the patient would boost medical negligence litigation.

LEGAL ANALYSIS OF MEDICAL NEGLIGENCE

Medical Negligence: In common parlance it signifies the lack of care and skill. Applied in the sphere of medical field, it connotes failure to exercise such care and skill in diagnosis, medical advice, administration of treatment, performance of medical procedures and surgery, which is reasonably expected from a person who holds himself out as a doctor, resulting in a injury to a patient.

It implies breach of duty to take care on the part of a doctor what he owes to a patient, resulting in damage to the latter, undesired by the former. Doing an act what a reasonable doctor placed in a similar circumstance would not have done or omitting to do an act, what a reasonable doctor would have done amounts to medical negligence.

Negligence of a doctor is determined on the basis of the principle laid in Bolam. v Hospital Management Committee, which is popularly known as the Bolam principle. Accordingly a doctor is not held guilty of negligence, if he has acted in accordance with a practice, which is accepted as proper by a responsible and respectable body of medical opinion. Inherent in this principle is the principle of respectable minority rule under which a doctor cannot be held liable for taking recourse to a medical practice, which has the backing of a respectable minority medical opinion. But a doctor stubbornly cannot take recourse to a practice which is totally unknown to the informed medical opinion.

The conduct of a doctor amounts to negligence, if it falls short of the standard set in the locality where he practices. A doctor has to exercise his best judgement and deviate from the accepted practice, when the latter is injurious in an individual case, which is known to the doctor. Any lapse in this regard exposes a doctor to liability for negligence.

Failure to obtain informed consent of a patient for any medical treatment results in medical negligence. Accordingly a doctor will be held liable if he has obtained the consent of a patient for a medical treatment without divulging, the material risks associated with it, or alternative methods of treatment with their relative merits and risks, should the risk associated with it occurs. The rationale behind this proposition is that the disclosure of the risks will enable him to arrive at a rational conclusion as to whether, opt out from the medical treatment or not.

DOCTOR-PATIENT RELATIONSHIP

A doctor undertakes a learned profession. There exists a contractual relation between a doctor and patient. The contract is not a contract of service, but a contract for service. Knowledge of medicine falls within the domain of a doctor. A patient being a layman cannot understand the intricacies of medicine that he cannot control and supervise the work of a doctor. In effect his remedy for any medical negligence lies in invoking the jurisdiction a civil court under tort law or contract law, or alternatively the consumer forae under the consumer Protection Act provided he has hired the service of a doctor for consideration.

STANDARD OF CARE

Anyone who practices a profession undertakes to bring to the exercise of it a reasonable degree of care and skill. The test is not that of a man on the top of a Clapham omnibus, but that of an ordinarily skilled doctor practicing a particular sphere of medicine. Therefore the degree of care and skill that is expected is the reasonable care and skill, what an ordinarily skilled doctor would have shown. A doctor cannot be held guilty of negligence on the ground that some other doctor with higher educational qualification and experience would have diagnosed it otherwise. It is neither the highest nor the lowest degree of care. As

medical profession is stratified one, the standard of care that is expected of a doctor, is that of a doctor with the same specialization and experience, placed in the similar situation. Therefore a beginner in medical profession cannot be compared with an experienced doctor. His conduct in a given situation is compared with a comparative beginner. The question of negligence, every time it is a question of fact that it cannot be put into a straight jacket. It is a fluid concept. In effect, a doctor who practices medicine in a remote village cannot be compared to a doctor who practices medicine in a sophisticated hospital with access to better facilities. The negligence of a doctor must be determined with reference to the state of medical knowledge that prevailed at the time of commission of alleged negligent act and not with reference to any subsequent advancement in the sphere of medicine. But there is an obligation on the part of a doctor to be aware of development in the medical knowledge relating to his sphere of practice.

LIABILITY FOR NEGLIGENCE

Liability for medical negligence is not strict. A doctor invites liability only when he has failed to exercise reasonable care and skill resulting in injury to the patient. But the liability is concurrent. It arises under contract law as well as tort law independent of a contract. The option is given to a patient to pursue the remedy either under tort or contract law or under the Consumer Protection Act, by invoking the jurisdiction of either the civil courts or consumer forae.

BURDEN OF PROOF

Burden of proving negligence on the part of a doctor falls on a patient. It has two prongs viz causation and forceability. Accordingly, a patient has to prove that the proximate cause of his injury is the negligent conduct of a doctor and the doctor was in a position to foresee the injury at the time when the contract was made, if remedy is sought under contract law, or it could be foreseen at the time of commission of the alleged negligent act, if remedy is pursued under tort law. But in spite of negligence of a doctor, if the injury is inevitable, no recovery is allowed. If a patient can successfully prove both causation and foreseability, he is entitled to claim damages from the negligent doctor.

DAMAGES FOR NEGLIGENT MEDICAL SERVICES

The remedy of an injured patient lies in legal action for damages. The quantification of damages is a very tedious task as it involves value judgements. The courts take into consideration certain factors like the age of the injured, nature of injury, life expectancy in case of death, earning capacity before and after the medical mishap, deprivation of employment prospects, deprivation of marriage prospects, sexual malfunction, anxiety, suffering, mental agony, loss suffered, expenses incurred etc.

EXCEPTION FOR LIABILITY

Negligence based liability is not absolute. Law has recognised the following exceptions (a) emergency (b) error of judgement(c) volenti non-fit injuria (injury suffered with consent), inevitable accident (d) involuntary act, and contributory negligence. In addition to that unlike a commercial contract, the contractual relation between a doctor and patient is modified to accommodate the uncertainties with which the medical profession is shrouded. Moreover law does not compel a doctor to guarantee the success of treatment. Even the doctrine of informed consent is not a rigid one. Law has recognised certain exceptions like therapeutic privilege, emergency and waiver on the part of the patient.

CONCLUSION

It is evident from the above discussion that the economists have ventured to analyse the concept of liability for medical negligence in terms of economic concepts. They look at it as a price mechanism as offering incentives to both doctor and patient to internalise the externalities. Accordingly a doctor will be cautious in discharging the duties that he does not want to be negligent and thereby he wants to avoid payment of compensation. On the other hand a patient also does not want to be negligent, so as not to lose the full award of compensation, which will be scaled down to the extent of his negligence.

Economic analysis attempts to explain the standard of care expected of a doctor in terms of marginal cost and marginal benefit. This approach points out a stage where a doctor can not treat a patient efficiently i.e. where the marginal cost of care taking exceeds the marginal benefit of accident reduction. Logically it implies he can go on treating patient when marginal benefit of accident reduction exceeds the

marginal cost of caretaking. The other way how the economists examine the standard of care is in terms of loss caused by medical negligence and cost of preventing it. Accordingly where the loss caused by negligence is more than the cost of preventing it, a doctor is held guilty of negligence. If such loss equals the cost of prevention, or loss is less than the cost of prevention, doctor cannot be held guilty of negligence, as he is said to have exercised the reasonable care as contemplated by law. A doctor is not under an obligation to incur a higher cost than the loss that may arise as a result of medical negligence. Proposition converges with the legal concept of inevitable accident which signifies that a doctor is under no legal obligation to exercise a care beyond the standard of care prescribed by law.

Economists are of the opinion that they look at tort problem as ex-ante and lawyers as ex-post. That is they focus on the deterrence function of tort law to see that negligence does not occur. If occurs, he is made to pay compensation which is a drain on his income that to that extent he becomes poor. It may have an impact on the economic condition of his family as well as on his profession that patients are not ready to go to a negligent doctor for treatment. The object of law is also to prevent occurrence of medical mishap, which it seeks to achieve by imposing liability. Therefore it is obvious that economist view coincides with the legal view. Law does not intend that doctors should commit negligent acts, that the patients should get an opportunity to claim compensation. The problem of law is what if doctors are negligent and patients are exposed to the injury. The harm done to the patient's health cannot be put into oblivion. Hence, arises the need for legal rules imposing liability on such doctors. Lawyers come into scene only after the commission of a tort to defend their clients which may be a doctor or patient. When they argue the case for a patient, they need to stress the compensatory aspect of law to do justice to the latter. If they argue the case for a doctor, they try to defend their client by trying to establish that the latter has exercised reasonable care or that the case is one which falls within the legally recognised exceptions. It needs to be accepted that the source of income of lawyers lies in the wrongful acts committed by the people. But to generalize that lawyers intend the people to commit wrongs to earn their income is a misconceived notion.

Some economists claim the superiority of contract law over tort law in this regard. Generally in a contract the terms and conditions are mutually agreed. But in case of a doctor and patient it is not so. A doctor will not accept the terms and conditions proposed by the patient with regard to the administration of treatment and performance of medical procedures. A doctor and patient may enter into a contract incorporating a clause prescribing the maximum amount of compensation that can be claimed. But it is always subject to the scanner of courts, which will decide whether the terms and conditions are reasonable. One merit of the contract based remedy is that there is always an implied obligation on the part of a doctor that he shall exercise reasonable care and skill, which is once against decided based on negligence law.

Economists opine that there is a change in the position and attitude of a patient that now they are considered as consumers of service. But they are not considered in the medical treatment decision making process. Law has taken cognizance of this factor. Accordingly, in many jurisdictions including India, doctrine of informed consent which imposes an obligation on a doctor to render certain information, regarding the medical treatment and procedure to a patent, is invoked by the courts to protect the interest of the latter.

Economic perspective looks at the utilisation of the medical resources in such a way that quality service is made available to the consumers at a reasonable cost. If the medical negligence compensation is very high, doctors take recourse to defensive medicine, a trend which has already commenced in India after the inclusion of medical profession within the preview of the Consumer Protection Act or compulsory insurance. Both escalate the cost of medical services that a common man cannot afford it.

Economists view legal rules as incentives for doctors which enable them to be efficient to prevent the occurrence of medical error. Even though law impose liability for negligence, certain exceptions are recognised. These exceptions provide the necessary incentives and discretion to the doctors, which motivate them to enter and continue in a profession which is beset with many uncertainties. These incentives protect the interest of the doctors. Law protect the interest of the patients by awarding compensation in appropriate cases, where medical negligence is proved. The burden of proof to prove negligence falls on a patient. This is a great incentive to a doctor. Moreover law does not expect a doctor to cure a patient but insists only to exercise a reasonable care and skill in his attempt to cure a patient.

The above discussion leads to an inference that law is full of incentives to the doctor. In spite of sufficient incentives being given to the doctors if they tread the path of negligence, law invariably keeps moving from its deterrent to compensatory function.

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