

## VIEW POINT

# MEDICAL MALPRACTICE: IN QUEST OF AN EFFECTIVE LEGAL PROTECTION IN BANGLADESH

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### Abstract:

*To check negligence or malpractice in health-care service, or to check the deviation from the general accepted standard of the health-care service providers in Bangladesh proper legal protection against it is the demand of the time. The remedy against such medical malpractice has well been developed in United States (US) Law system. However, we are lagging far behind. This article has made an attempt to define "medical malpractice" and has rendered a bird's eye view on United States (US) law as a model study and has talked about it in Bangladesh perspective.*

### Introduction:

Sometimes we see that some quarter of the people do not rely on the treatment of the health-care providers of this country, even though sophisticated and state-of-the-art technologies in the medical sector have already been introduced in our country. These people usually point to the negligence of our health-care service providers and feel easy to rush, every now and then in any sort of illness however meagre it will be, to the overseas health-care service providers such as India, Singapore, Thailand etc. Sometimes news of injury of the people due to negligence of the health-care providers publish in the news papers, or telecast in the cable-media. Actually, those instances of negligence are mostly occurred by some kinds of so-called health-care service providers who are not in fact properly educated on professional education, and who do not use sophisticated and befitting tools during operation or treatment. Whereas, by such activities, they tarnish the positive image or overall general accepted standard of providing services of our health-care providers. This and all other kinds of negligence by our health-care providers can be termed as "medical malpractice".

**Definition of "medical malpractice" and its legal aspect:** "Medical malpractice is an act or omission by a health care provider which deviates from accepted standards of practice in the medical community and which causes injury to the patient. Simply put, medical malpractice is professional negligence (by a healthcare provider) that causes injury."<sup>1</sup>

In the common law system, such 'medical malpractice' is a specific kind of negligence which duly falls within

the purview of Tort Law. To put it simply, Tort Law means the law related to private or civil wrong which usually deals with the wrongs like assault, battery, trespass, defamation, malicious prosecution, fraud, public nuisance, negligence etc.

**Medical malpractice in United States (US) law system:** Before delving into the US law system we ought to keep in view that, though in Bangladesh we operate our own unique legal system, some countries like USA have more than one system operating within the same national borders. So, this instant write-up has to be gone through on the backdrop of that consideration.

In the cases of medical malpractice claims, the defendant is the health care provider. In a recent case of 2003, the term 'health care provider' has been defined. Although a 'healthcare provider' usually refers to a physician, the term includes any medical care provider, including dentists, nurses, and therapists.<sup>1</sup> That is to say, the law may not protect nurses and other non-physicians from liability when committing negligent acts. Relying on vicarious liability or direct corporate negligence, claims may also be brought against hospitals, clinics, managed care organizations or medical corporations for the mistakes of their employees. 'Vicarious liability' simply means the liability of one person on behalf of another person/s, i.e. his agent/subordinate. According to the US law system, an aggrieved party i.e. the plaintiff must establish four elements of the tort of negligence for a successful medical malpractice claim.<sup>2</sup>

1. A duty was owed- a legal duty exists whenever a hospital or healthcare provider undertakes care or treatment of a patient.

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2. A duty was breached- the provider failed to confirm to the relevant standard of care. The standard of care is proved by expert testimony or by obvious errors. (the doctrine of *res ipsa loquitur* or ‘the thing speaks for itself’).
3. The breach caused an injury- the breach of duty was a proximate cause of the injury.
4. Damages- without damages (losses which may be pecuniary or emotional), there is no basis for a claim, regardless of whether the medical provider was negligent.

The aforementioned four points are elaborated below-

**The pre-trial and trial stage:** Firstly, the plaintiff has to file a lawsuit under the Tort Law in a Court with appropriate jurisdiction. Then comes the ‘discovery’ stage i.e. sharing of information between the two litigant parties. Such information includes interrogatories, requests for documents, and depositions. If both parties agree, the case may be settled early on negotiated terms. If the parties cannot agree, the case will proceed to trial.

Secondly, the burden of proving the case lies totally upon the shoulder of the plaintiff i.e. he has to prove all the aforementioned four elements by a preponderance (50%) of evidence. During the trial, both the parties will usually present experts to testify as to the standard of care required, and other technical issues during trial. The fact finder (judge or jury) must then weigh all the evidence and determine which is the most credible.

Thirdly, the fact finder (judge or jury) will render a verdict for the prevailing party, and assesses the compensatory and punitive damages, within the parameters of the judge’s instruction. The verdict is then reduced to the judgment of the Court. The losing party may move for a new trial. In a few jurisdiction, a plaintiff who is dissatisfied by a small judgment, may move for *additur*. In most jurisdictions, a defendant who is dissatisfied with a large judgment, may move for *remittitur*. Either side may take an appeal from the judgment.

**Expert testimony:** Expert witnesses must be qualified by the Court, based on the prospective experts qualifications and the standards set from legal precedent. To be qualified as an expert in a medical malpractice case, a person must have a sufficient knowledge, education, training or experience regarding

the specific issue before the Court to qualify the expert to give a reliable opinion on a relevant issue. The qualifications of the experts are not the deciding factors as to whether the individual will be qualified, although they are certainly important considerations. Expert testimony is not qualified “just because somebody with a diploma says it is so.”<sup>1</sup> In addition to appropriate qualifications of the expert, the proposed testimony must meet certain criteria for reliability. In the United States, two models are evaluating the proposed testimony are used:

- 1) The ‘gate keeper’ model: The more common (and some believe more reliable) approach used by all federal Courts and most state Courts.
- 2) The ‘Frye test’ model: Some state Courts still use this model that relates on scientific consensus to assess the admissibility of novel scientific evidence.<sup>3</sup>

Elaboration of these two models is not necessary for serving the purpose of this article.

**Damages:** The plaintiff’s damages may include compensatory and punitive damages. Compensatory damages are both economic and non-economic. Economic damages include financial losses such as lost wages (sometimes called lost earning capacity), medical expenses and life care expenses. These damages may be assessed for past and future losses. Non-economic damages are assessed for the injury itself; physical and psychological harm, such as loss of vision, loss of limbs or organs, the reduced enjoyment of life due to a disability or loss of a loved one, severe pain and emotional distress. Punitive damages are only awarded in the event of wanton and reckless conduct.<sup>4</sup>

**Bangladesh perspective:** Existing law is not well-defined to address the remedy against medical malpractice properly. Tort law as a whole has not been introduced in our country, though some provisions of Tort Law have been embodied both in the Civil Procedure Code and Criminal Procedure Code of our Country. Time has come to ponder over this aspect. If such sort of medical malpractice cannot be bound within the well-defined boundary of law then some day in future the demon will increase in size and will swallow all the positive achievements of our health care service. It is not that the model of the US law system as I have elaborated above can be followed in toto, but we can evolve a system suitable and cut out for our own requirement.

**Conclusion:**

People of our country are getting conscious day by day regarding the damage caused by medical malpractice. The dedicated medical practitioners should come forward in no time to fight against medical malpractice and thereby to ensure one of the five fundamental rights of human being i.e. the right of getting the proper treatment. Civil society of our country also has a greater role to play in this perspective.

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