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**“MEDICAL NEGLIGENCE DURING COVID-19 ERA IN BANGLADESH: AN ANALYSIS OF LAW AND PRACTICE”**

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**ABSTRACT**

*Medical negligence is a major human rights concern that has a strong impact on the right to life and the right to healthcare services. Many of the significant amounts of medical negligent cases proceed without legal remedy that leads to a rigid situation in which public faith in medical care providers is lost. The Constitution of Bangladesh ensures the right to life and recognizes the right to health care. Bangladesh is already a party to a number of international treaties through which the government is supposed to maintain and support the rights. During Covid-19 pandemic era, medical negligence has recently become a well-liked subject of concern and debate in many developed states, and many of them have already enacted and created different health care laws to improve health care laws. However, in Bangladesh there is no specific and comprehensive legislation to prevent medical negligence though many legal provisions are there under different statutes, which are not precisely codified. The quality of care in medical negligence has traditionally been important for external professional decision assessment. This article provides a review of medical negligence by the USA and the United Kingdom. In addition to that, this paper explained the available remedy or legal actions under the present laws. Under the supervision of the civil society, a responsible medical*

*institutional framework supported by effective laws and regulations may create a fair and convenient health care system in Bangladesh.*

**Keyword:** Medical Negligence, Medical Protection, Healthcare Law, Bangladesh, Covid-19 Pandemic.

**I. INTRODUCTION**

Hippocrates, the great Greek physician who is known as the father of western medicine said, “Whenever a doctor cannot do well, he must be kept A from harming.”<sup>2453</sup> This means that doctors are only to do well and act like a protector that is why they are treated like saviours next to God. According to the World Medical Association Declaration of Geneva 1948, a member of the medical profession shall solemnly pledge to state that the health of the patient will be the doctor’s first consideration.<sup>2454</sup> In reality, doctors are human beings. They may also commit a mistake. Doctors may be negligent or the support staff may be careless. Two acts of negligence may give rise to a much bigger problem.<sup>2455</sup>

The Constitution of Bangladesh mentioned the right to life as a fundamental right of every citizen. At present, the right to life may be endangered by medical negligence. There is no definition of medical negligence in any Act of Bangladesh. Under tort law negligence it is more than mere carelessness.<sup>2456</sup> In addition, Longman Dictionary defined negligence as a breach of duty of care that causes damage to the claimant.<sup>2457</sup> Medical Negligence is the breach of the duty of care towards a patient by an act of commission or omission, resulting in damage, harm, or injury to a patient.

<sup>2453</sup> Khandakar Kohinur Akter, ‘A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices’, *The Northern University Journal of Law*, vol. 4, (2015) pp. 145-189

<sup>2454</sup> World Medical Association (WMA) Declaration of Geneva, adopted by the General Assembly of the World Medical Association at Geneva in 1948, Wikipedia, The Free Encyclopaedia.

<sup>2455</sup> Anurag K. Agarwal, ‘Medical Negligence: Law and Interpretation’, *Indian Institute of Management*, (2011) pp. 252-296

<sup>2456</sup> Benjamin C. Zipursky and John C.P. Goldberg, ‘The Fraud-on-the-Market Tort’ (2013) L Rev 1755 [https://ir.lawnet.fordham.edu/faculty\\_scholarship/644](https://ir.lawnet.fordham.edu/faculty_scholarship/644) > accessed on 15 August 2022.

<sup>2457</sup> Editor, ‘Negligence’ <https://www.ldoceonline.com/> accessed on 15 August 2022.

In a country of Bangladesh committed to the Rule of Law, such matters are taken to the court and judges are supposed to decide. However, negligence by doctors is difficult to be determined by judges, as they are not trained in medical science. Their decision are based on expert's opinions. Judges apply the basic principles of law in conjunction with law of the land to make a decision. Bangladesh has no complete and specific legal structure to administer medical negligence. Therefore, this existing negligence demands a thorough study from a legal perspective and this research paper will study the current laws on medical negligence in Bangladesh.

## II. RESEARCH OBJECTIVES

The main objective of this paper is to identify the adequacies of the existing laws to protect the patients from violation of their right to health, controlling medical negligence, and how they preserve health care laws. The other objectives are:

- To discuss medical negligence in the context of COVID-19 of Bangladesh healthcare system and its consequences
- To evaluate the legal remedies available to patients and the adequacy of the law regarding medical negligence in Bangladesh
- To analyze the legal limit to the existing laws, present for medical negligence in Bangladesh
- To recommend some potential suggestions to reduce medical negligence in the present context.

## III. METHODOLOGY

This research is based on the doctrinal and analytical study of the different statutes and policies relating to medical service and malpractices and some documents relating to medical negligence, medical treatment facilities which are stated in the fundamental state policy of the Constitution of Bangladesh.

The information has been taken from many readings, articles, books, case law and status. To understand the different varieties of medical negligence arising during the Covid-19 pandemic, newspaper articles were an important source for information due to the scarcity of scholarly published reports on this topic. Data's will be collected from secondary sources and experiences of victims of medical negligence gathered from media reports. Primary and secondary resources are used in this paper. The research is focused largely on the review of existing legislation and regulations relating to medical negligence and malpractice. This depends on past studies, documents, rules, and policies. I have tried my level best to complement this analysis paper by providing all the necessary information required for this study.

## IV. CONCEPTUALIZING THE DOCTOR-PATIENT RELATIONSHIP

A **doctor-patient relationship (DPR)** is considered to be the core element in the ethical principles of medicine.<sup>2458</sup> DPR is usually developed when a doctor tends to a patient's medical needs via check-up, diagnosis, and treatment in an agreeable manner. Due to the relationship, the doctor owes a responsibility to the patient to proceed toward the ailment or conclude the relationship successfully. In particular, it is essential that primary care physicians develop a satisfactory DPR in order to deliver prime health care to patients.

The legal relationship between a patient and doctor is firstly a contractual relationship. The contract between the patient and doctor will be formed with the acceptance of the doctor on the issue of medical treatment in addition to the application of the patient to doctor. This contractual relationship will form the basis of patients' and doctors' rights, requests and obligations.<sup>2459</sup>

<sup>2458</sup> Yolanda Smith, 'Doctor-Patient Relationship' (*News Medical*, Jun 20, 2019) <https://www.news-medical.net/health/DoctorPatient-Relationship.aspx> accessed on 20 August, 2022.

<sup>2459</sup> *Bristol and West Building Society v Mothew* [1996] EWCA Civ 533.



DPR can come to an end through the doctor's discharge of patients when the treatment is complete. The relationship may also come to an end when: (1) the doctor concludes that the patient needs the care of different specialists; (2) successive missing of appointments by the patient;<sup>2460</sup>

## V. CONCEPT OF NEGLIGENCE

The word 'negligence' doesn't have a definitive feature rather have distinct meanings for different jurisdictions. **According to L.B. Curzon in the Longman Dictionary of Law "Negligence"** is defined as a breach of legal duty of care, breach of which caused damage to the claimant which was not even expected by the defendant<sup>2461</sup>. In 'tort' the key legal test is 'reasonable foreseeability' unlike criminal law which requires such wrongdoing to be intentional or the motive for the offence. In the case of **Glasgow Corporation v. Muir**<sup>2462</sup> Lord Macmillan explained the standard of foresight of a reasonable person. Operation on patient without consent is an instance of negligence even without obvious injuries. Dictionary meaning of term 'Negligence' is 'Lack of Proper Care'.<sup>2463</sup>

In the **UK case of Blyth Baron Anderson** an important step was taken to introduce the fair test of negligence. In this case, the term "negligence" was defined as "the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do"<sup>2464</sup>.

The successful claimant in a negligence action must prove three propositions: 1) that the defendant owed the claimant a duty of care; 2) that the defendant had breached the duty of

care; 3) that as a result of the breach, the claimant suffered damage of a kind that the law deems worthy of compensation<sup>2465</sup>.

## VI. LAWS RELATING TO MEDICAL NEGLIGENCE

### A. Constitution protection

While the right to health and medical care is not explicitly recognized in the Constitution as a fundamental right, it is clear from the constitutional provisions referred to in **Articles 15 and 18** that, the founding fathers of the constitution aim to attain these rights progressively.

Furthermore, a constitutional sanction for the right to health and medical care can be derived from **Article 32 of the Constitution**, which provides the universal right to life.<sup>2466</sup> In several Public Interest Litigation (PIL) cases, it has been recognized that the right to life has now been understood to include the right to a healthy environment<sup>2467</sup> and the right to livelihood<sup>2468</sup> in a broader context. Similarly, it is also possible to define the right to life to include the right to health and adequate medical treatment.

Article 32, "Right to life" express more than a mere animal existence.<sup>2469</sup> This research constitutes the right to live with human dignity and decency<sup>2470</sup> and everything that has meaning and relevance to man's life<sup>2471</sup> that includes culture tradition and lifestyle<sup>2472</sup>. Articles 15, 18 read with Articles 31, 32, 44 and 102 shall be treated as guardians of the rights of people towards health in the event of any harm.

In a similar layer, the fundamental right to life can also be interpreted to include right to

<sup>2460</sup> Supra note 2

<sup>2461</sup> Curzon, L.B. and Richards, P., 2007. The Longman Dictionary of Law. Pearson Education.

<sup>2462</sup> (1943) A.C. 448

<sup>2463</sup> 'Definition of Negligence Noun from the Oxford Advanced Learner's Dictionaries' (<https://www.oxfordlearnersdictionaries.com/us/definition/english/negligence?q=negligence> accessed on 21 August 2022.

<sup>2464</sup> Blyth vs. Birmingham Waterworks Co. (1856)11 EX.78.

<sup>2465</sup> Lunney, M. and Oliphant, K., 2008. Tort law: text and materials. Oxford University Press.

<sup>2466</sup> The Constitution of the People's Republic of Bangladesh, Article 32.

<sup>2467</sup> *Dr. Mohiuddin Farooque vs. Bangladesh and others* [1996] 48 DLR HCD 438.

<sup>2468</sup> *Ain o Salish Kendra vs. Government of Bangladesh* [1999] 19 BLD HCD 48.

<sup>2469</sup> *Munn vs. Illinois* [1876] 94 U.S. 113.

<sup>2470</sup> *Vikram Deo Singh Tomar Vs State Of Bihar* [1988] AIR 1782.

<sup>2471</sup> *State of Himachal Pradesh vs. Umed Ram Sharma* [1986] AIR 1986.

<sup>2472</sup> *Ramsbaran Autyanprasi & Anr vs Union of India & Ors* [1989] AIR 1989.

health and appropriate medical care.<sup>2473</sup> In addition, health and treatment are such basic needs of human life that they cannot be excluded from the essential preconditions of a secured human life and the State has some positive obligations to ensure those rights. Evermore, the Preamble to the Constitution offers a strong support for this argument.<sup>2474</sup> Therefore, it is apparent that the entire scheme of the Constitution, to a considerable scope is in favor of right to health and medical care. However, while addressing medical negligence and malpractice practices of private clinics and hospitals, some other provisions of the Constitution are also relevant. Apart from state's responsibility to protect and promote right to health and medical care, there is another aspect of the issue i.e. the responsibility of individuals and institutions delivering health care and medical services vis-avis the rights of the citizens who are the receiving end of the services.<sup>2475</sup>

### B. Consumer Rights Protection Act, 2009

Another tool for patients to combat medical negligence and also get remedies is the Consumer Rights Protection Act 2009<sup>2476</sup>. Section 2 (22) of the Consumer Rights Protection Act 2009 includes that "Service means any service of transport, telecommunication, water supply, sanitation, fuel, gas, electricity, construction, residential hotel and restaurants, and health, which are made available to the consumers in exchange of price but this will not include free of service."<sup>2477</sup> Within this Act, if required medical treatment is not given in return for payment or payments, a medical practitioner or hospital will be punished with imprisonment for a period not

exceeding one year or with a fine not exceeding 50,000 taka, or both. In addition, the offender may be punished with imprisonment for a period not exceeding three years or with a fine not exceeding 2, 00,000 taka or both for endangering life or security and causing damage to a consumer's money and health. But this law does not explicitly cover medical negligence in the transaction between doctor and patient.

### C. The Penal Code, 1860

Notwithstanding, The Penal Code doesn't have any express section to particularly address negligence of a medical practitioner except causing miscarriage. The following sections can be relevant in cases of medical negligence: Section 269-Negligent act likely to spread infection of disease dangerous to life<sup>2478</sup>; Section 270-Malignant act likely to spread infection of disease dangerous to life<sup>2479</sup>; Section 271- Disobedience to quarantine rule<sup>2480</sup>; Section 272- Adulteration of food or drink intended for sale<sup>2481</sup>; Section 274- Adulteration of drugs<sup>2482</sup>; Section 275- Sale of adulterated drugs<sup>2483</sup>; Section 276- Sale of drug as a different drug or preparation<sup>2484</sup>; Section 304A- Causing death by negligence<sup>2485</sup>; Section 312- Causing miscarriage<sup>2486</sup>; Section 313- Causing miscarriage without women's consent<sup>2487</sup>; Section 314- Death caused by act done with intent to cause miscarriage<sup>2488</sup>; Section 315- Act done with intent to prevent child being born alive or to cause it to die after birth<sup>2489</sup>; Section 316- Causing death of quick unborn child by act amounting culpable homicide<sup>2490</sup>; Section 336- Act endangering life or personal safety to others<sup>2491</sup>; Section 337- Causing hurt by act

<sup>2473</sup> Hoque, Dr. Ridwanul; *Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh*, Contemporary South Asia 15 (4), December, (2006) 405.

<sup>2474</sup> Report on *Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective*, Duration: March- April 2013, Prepared by Ain o Salish Kendra (ASK), <http://www.askbd.org/ask/2014/02/10/ask-study-medical-negligence-fraudulent-practice-private-clinics/> Time-11:14, Date-5/02/2016.

<sup>2475</sup> Ibid

<sup>2476</sup> Dr. Belal Hossain, 'Health care laws in Bangladesh' (2013) 1(1) <http://www.scribd.com/doc/6789243/Healthcare-in-bangladesh-Final> accessed on 23 August 2022.

<sup>2477</sup> Consumer Rights Protection Act 2009.

<sup>2478</sup> Section 269, Penal Code, 1860.

<sup>2479</sup> Section 270, Penal Code, 1860.

<sup>2480</sup> Section 271, Penal Code, 1860.

<sup>2481</sup> Section 272, Penal Code, 1860.

<sup>2482</sup> Section 274, Penal Code, 1860.

<sup>2483</sup> Section 275, Penal Code, 1860.

<sup>2484</sup> Section 276, Penal Code, 1860.

<sup>2485</sup> Section 304A, Penal Code, 1860.

<sup>2486</sup> Section 312, Penal Code, 1860.

<sup>2487</sup> Section 313, Penal Code, 1860.

<sup>2488</sup> Section 314, Penal Code, 1860.

<sup>2489</sup> Section 315, Penal Code, 1860.

<sup>2490</sup> Section 316, Penal Code, 1860.

<sup>2491</sup> Section 336, Penal Code, 1860.

endangering life or personal safety to others<sup>2492</sup>; Section 338- Causing grievous hurt by act endangering life or personal safety to others<sup>2493</sup>; Section 415- Cheating<sup>2494</sup>; Section 416- Cheating by personation<sup>2495</sup>; Section 418- Cheating with knowledge that wrongful loss may ensue to person whose interest the offender is bound to protect.<sup>2496</sup>

On the contrary, acts done in good faith can serve as a protection for the practitioners under Section 88. According to the Penal Code, 1860, anybody who caused the death of any person by performing any reckless act that does not lead to culpable homicide shall be punishable with imprisonment of either description for a period that may extend to 5 years or with a fine or both. The above discussion arises criminal liability for the medical practitioner.

#### **D. The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982**

This ordinance is of much importance as it deals with private medical practice, private clinics, and laboratories. Under section 4 of this ordinance, a registered medical practitioner during his/her office hours of the republic cannot carry practice in private medical.<sup>2497</sup> The Director-General of Health or any officer authorized by him has the authority under section 11 of this ordinance to visit any private medical, clinic, or laboratory. Many punishments are illustrated in the ordinance including canceling the license of the clinic and fine. Schedule A of this ordinance has given the maximum fees for many functions.

#### **E. National Health Policy, 2011**

The new policy of 2011 signifies many principles to achieve its goals. These principles involve making people conscious of their right to health, nutrition, and medical care without discrimination of any form, decentralization of

medical service, improvement of human resources, and ensuring a sufficient supply of quality drugs everywhere. The Policy acknowledges that the regulatory authorities in the healthcare sector are not adequately successful due to the lack of human resources, finance, and legal assistance. It also suggested that current policies been reviewed and amended in this respect. Bangladesh Medical and Dental Council and Bangladesh Nursing Council will also be strengthened and restructured under the strategies of this policy.<sup>2498</sup>

#### **F. The Drugs Act, 1940**

**Section 6** <sup>2499</sup>of this Act provides for the establishment of a central drug laboratory and the Directorate General of Drug Administration was created. **Section 10** <sup>2500</sup>bars from importing certain drugs such as misbranded drugs or not standard quality. **Section 22** <sup>2501</sup>illustrates the power of the inspector that includes a lock or seal any factory, laboratory shop, and building. **Section 26** <sup>2502</sup>gives a person the capacity to submit for tests and to receive a report of the said test.

The framework of healthcare legislation also includes The Bangladesh Nursing Council Ordinance, 1983, The Bangladesh Homoeopathic Practitioners Ordinance, 1983, The Bangladesh Unani and Ayurvedic Practitioners Ordinance, 1983, The Pharmacy Ordinance, 1976, The Bangladesh Drug Control Ordinance, 1982, and many more.

#### **G. Specific Relief Act, 1877**

As per civil law, doctors in Bangladesh may be found liable personally or vicariously for their work, and medical practitioners may be responsible for or pay compensation for medical negligence. It specifies that the aggrieved parties are qualified, if there is a violation of a contract, to claim one or more recourse against the opposing party under the

<sup>2492</sup> Section 337, Penal Code, 1860.

<sup>2493</sup> Section 338, Penal Code, 1860.

<sup>2494</sup> Section 415, Penal Code, 1860.

<sup>2495</sup> Section 416, Penal Code, 1860.

<sup>2496</sup> Section 418, Penal Code, 1860.

<sup>2497</sup> The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance 1982.

<sup>2498</sup> Section 26, National Health Policy, 2011.

<sup>2499</sup> Section 6, the Drugs Act, 1940.

<sup>2500</sup> Section 10, the Drugs Act, 1940.

<sup>2501</sup> Section 22, the Drugs Act, 1940.

<sup>2502</sup> Section 26, the Drugs Act, 1940.

Contract Act, 1872, where the following remedies are proposed: 1- Rescission of the contract, 2- Suit for damages, 3- Suit upon quantum meruit.<sup>2503</sup> An aggrieved patient under the Special Relief Act, 1877 can request a temporary and permanent injunction against medical practitioners who breach contracting and service conditions.

## VII. OBLIGATION UNDER INTERNATIONAL TREATIES

The obligation of Bangladesh as a state party to different International Human Rights Treaties:

Bangladesh is a party to many international human rights treaties; such as the Universal Declaration of Human Rights (UDHR), 1948; International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966; Convention on Elimination of All Forms of Discrimination against Women (CEDAW), 1979; Convention on the Rights of the Child (CRC), 1989. These international instruments created some obligation in both moral and legal and Bangladesh as a state party is obliged to fulfill its responsibility to protect and promote the welfare of the health sector, access to medical resources, adequate treatment, and essential remedy if rights are violated.

**Article 25 of the UDHR** specifies that every person has the right to a standard of living that is adequate for health.<sup>2504</sup> Motherhood and childhood care are also mentioned in **Article 25**.<sup>2505</sup> Notably, the **ICESCR** stressed the right to health and medical care and the responsibility of member states in gradually ensuring that those rights are completely realized. Reducing infant mortality rate, improving environmental hygiene, protecting and controlling diseases, and ensuring access to health care are stated in **Article 12 of ICESCR**.<sup>2506</sup> The UN Committee on

Economic, Social and Cultural Rights in its General Comment in 2000 states that the right to health includes access to safe water, adequate sanitation, adequate supply of food, and access to health-related education and information.<sup>2507</sup>

**CEDAW** stressed the equal treatment of women in health care services. **Article 12** of the Convention mandates States Parties to take all necessary steps to eradicate discrimination against women in the healthcare sector.<sup>2508</sup>

**Article 2** also highlights the healthcare of women during pregnancy and motherhood.<sup>2509</sup>

**Article 14** further states to remove discrimination against women in rural areas for proper health care facilities.<sup>2510</sup>

**Article 24** of CRC mentions child health care to the highest standard and requires state parties to provide every child access to such health care services.<sup>2511</sup> Abolishing traditional practices prejudicial to the health of the children and international cooperation is emphasized to achieve the goals of this research.

Bangladesh is a state party to all the above-mentioned international instruments. As a state party, Bangladesh is under obligation to follow the principles, rules, foundation of the treaties. It is submitted that Bangladesh being a dualist country needs to incorporate these rules and principles in its national law to give effect.

3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> accessed on 23 August 2022.

<sup>2507</sup> Tapos Bandhu Das, "A study on Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective" (2014) 1(1) ASK <http://www.askbd.org/ask/wp-content/uploads/2014/02/Report-Medical-Negligence.pdf> accessed on 23 August 2022.

<sup>2508</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.refworld.org/docid/3ae6b3970.html> accessed on 23 August 2022.

<sup>2509</sup> Ibid

<sup>2510</sup> Ibid

<sup>2511</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> accessed on 23 August 2022.

<sup>2503</sup> SMT Karim, MR Goni and MH Murad, 'Medical Negligence Laws and Patient Safety in Bangladesh' (2013) 5(2) JAPSS 424-442.

<sup>2504</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (II), available at: <https://www.refworld.org/docid/3ae6b3712c.html> accessed on 23 August 2022.

<sup>2505</sup> Ibid

<sup>2506</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p.



## VIII. CAUSES BEHIND THE INFLATED NUMBER OF MEDICAL NEGLIGENCE CASES IN BANGLADESH

### A. Constitutional Requirement for the Right to Health

Guaranteeing the right to health by a democratic provision could place a burden on the state to ensure the right to health, and incentives to fix the obligation of medical professionals against their patients. The 49% of citizens agree that it really is time to enforce the right to health in Bangladesh across constitutional safeguards, which could increase pressure on the state to enact specific legislation to discourage medical neglect in Bangladesh and to improve medical services and facilities.<sup>2512</sup> The PIL, a statutory solution, has its importance for the security of fundamental rights in Bangladesh, but does have some drawbacks, as health and medical care are not fundamental rights in Bangladesh. Adversely, this statutory solution can be used to save lives with adequate medication and carefree treatment, but it is an expensive way - ingesting and, ultimately, unknown to the wider public in Bangladesh.<sup>2513</sup>

### B. Lack of Specific Legislations

In Bangladesh, yet, there is no systematic legislation on medical profession and neglect. Commonly, citizens feel that this is a constitutional inadequacy major explanation for the rise in medical negligence. Relevant regulations on the prevention of medical negligence and the control of medical negligence can alter the current state of affairs.<sup>2514</sup>

There are clauses of various laws, but these are not standardized and promulgated in such a manner that victims are misled in their judgment as to which court they can go or even under which law they may bring an action against medical malefactors. As an example,

felony charges are often taken into the Criminal Code, which is not favorable, since the accusations do not imply that the doctors are responsible, so it would be a concern for the doctors if criminal cases were brought against them. However, at the other hand, the civil courts cannot convict the defendants; they simply have the power to assess the sum of the claims for loss and damage.<sup>2515</sup> Under the very Consumer Protection Act, a lawsuit can be brought for medical negligence. It should be noted here that the Law Commission of Bangladesh made a recent effort; a proposal has been made to lay down laws on the subject in trying to address pervasive complaints of medical neglect in the region.<sup>2516</sup>

### C. Present legislation is not clearly established to resolve the medical malpractice correctly

Tort law itself has not been implemented in our country, although certain elements of Tort law have been included in both the Code of Civil Procedure and the Code of Criminal Procedure of our country. Time has come to focus on this dimension. If this kind of medical malpractice cannot be confined through a well-defined boundary of the statute, so any day in the future the demon will increase in strength and overtake all the good accomplishments of our wellbeing and care of the service. It is not that the paradigm of the US system of law, as I have outlined above, should be applied in to, but we should create a system that is fitting and adapted to our own needs.<sup>2517</sup> In the current cases, if the wounded party goes to court for taking an action for medical neglect, it must pay additional court costs, which can be reduced. Besides this, it is impossible for him to make his case since the medical institutions are not able to supply the requisite evidence. In this situation, The Right to Information Act, 2009 can be a legislative mechanism to guarantee access to information on medical problems.

<sup>2512</sup> Mohiuddin Farooque v. Bangladesh & Others Writ Petition No. 1783/1994 (Doctor's Strike Case).

<sup>2513</sup> Ibid

<sup>2514</sup> Tasnim Eshita. Clinical Negligence, Forum-A monthly publication of the Daily Star, Volume 06, Issue 08, Dhaka. (2012).

<sup>2515</sup> Ibid

<sup>2516</sup> Tasnim Eshita, Clinical Negligence, Forum-A monthly publication of the Daily Star, 06(08), (2012).

<sup>2517</sup> S. Damayanti, What is medical negligence? What are the standard of care principles, 15 July 2011.

The government should then take the requisite steps to eliminate such uncertainty and to render the way for redress easy and comfortable for the group that has suffered.<sup>2518</sup> Financial reimbursement is the standard cure for medical malpractice. This form of liability is attributable to a mere lack of treatment and is of a civil nature, as opposed to criminal negligence in situations where men have to be mens rea.<sup>2519</sup> In Bangladesh, this criminal responsibility cannot be punished under Section 304A of the Criminal Code of 1860. People may therefore demand a legal redress for neglect of care and for violation of contract where there is a contractual relationship here between patient and medical practitioners or service providers. Pursuant to Contract Act 1872<sup>2520</sup> for violation of contract or operation, where the patient is allowed to claim compensation for any harm or injury rendered to him or her by the infringer of the contract. Such liability shall not be provided for any distant and indirect injury or harm suffered as a result of the infringement.<sup>2521</sup> The Specific Relief Act 1877 could also place provisional and permanent injunctions on medical practitioners or officials for due to contractual obligations. In addition, under the rule of wrongdoing, incompetence as tortuous or civil responsibility, medical practitioners or authorities can be responsible for damages.<sup>2522</sup> Moreover, if the person dies in the Operating Theater (OT) due to incompetence on the part of medical professionals, none of us can accuse or show civil or criminal wrongdoing on the part of the individual liable. These protocols have been planned by the responsible authority for its own safety just not for the provision of quality care. In emergency care (24 hours open to emergency patients) and emergency services, only registration records are maintained for the maintenance of patient records.

Criminal responsibility is also used as a solution. The First Penal Code 1860, has put significant pressure for medical negligence in so many sections. The Penal Code of 1860, which is based on the concept of good faith, restricts the range of criminal action towards medical negligence in Bangladesh. The test to show the fraudulent intent of the person involved is very complicated because, once it is proven, the punishment is much less than the harm or cost. Medical profession and Medical Clinics and Labs (Regulation) 1982, arrangements were made for the regulation of general practice and the licensing of private clinics. That being said, this Act has hardly been used to prosecute many of Bangladesh's private hospital physicians or government physicians for their care reasons for that. In 2017, the Ministry of Health and Family Welfare disqualified the four interns from the Shaheed Zia Medical College in Bogra on the advice of a report examining the suspected incidents, which culminated in the country-wide boycott of junior doctors before the penalty was lifted. This risk of strike made it very difficult to enforce the penalty clauses laid down in this Act. Consequently, the statutory provisions are insufficient to solve the existing health issues Bangladesh Industries<sup>2523</sup>

#### **D. Complexity with respect to evidence of negligence**

The burden of proof of negligence is on the shoulder of the victim because, if he fails to provide key facts in the court that indicates inappropriate care on the part of a standard practitioner, there will be no civil redress available. So, it becomes impossible regardless, because of the technical nature of the medical conditions, the doctor is obligated to demonstrate the incompetence of another doctor with whom the misconduct charges have been brought.<sup>2524</sup> In particular, though, a doctor is not able to supply details against another doctor since they adhere to the same

<sup>2518</sup> Ibid

<sup>2519</sup> Gandhi, B.M. Law of Torts: With Law of Statutory Compensation and Consumer Protection. Lucknow: Eastern Book Company 2006. 230.

<sup>2520</sup> Section 73 of the Contract Act 1872.

<sup>2521</sup> Ibid

<sup>2522</sup> Section 53 of the Specific Relief Act 1877.

<sup>2523</sup> Countrywide Intern Doctors Strike, Dhaka Tribune <http://www.dhakatribune.com/bangladesh/2017/03/05/countrywide-intern-doctors-strike-continues>.

<sup>2524</sup> S.M. Masum Billah, Law Commission's proposal of making medical negligence law, The Daily Star, April 20, 2013.

discipline. The medical institutions, too, are refusing to give the requisite papers to patients. Correspondingly, in the lack of the requisite documentation and facts, it is very hard to ascertain a case of neglect. Most cases in Bangladesh the healthcare facilities involved refuse to supply them until the court directs them to do so.<sup>2525</sup>

### **E. Intricacy of conduct under the Consumer Protection Act**

While redress under the Consumer Protection Act, 2009 is found for medical neglect, the mechanism for bringing a claim is very complicated. For eg, if a customer decides to lodge a lawsuit for that reason, he or she must first lodge a formal complaint with the Director General or with the approved individual of the department within 30 days of the case being brought.<sup>2526</sup> The magistrate shall not accept any offence, until the criminal complaint is forwarded to him by the Director General or the designated person of the department within 90 days of the issuance of the case. This ensures that even though the customer causes any loss, he cannot file a complaint immediately with the magistrate.<sup>2527</sup> As a consequence, the user sometimes does not express his concern, as this process takes a long time.<sup>2528</sup> In another hand, in the case of the private sector, the Director-General has the ability to diagnose flaws and lacks the oversight of health-care insurers, but will not take any protective measures; he will warn the Commission only Secretary, Minister of Health and Director General of the Health Directorate. It is also a huge barrier to prosecuting medical practitioners working in the private sector, which is why the rate of clinical incompetence in private clinics is growing day by day.<sup>2529</sup>

### **F. Lack of Judicial Intervention**

Within Bangladesh, judges are qualified only to deal with conventional cases and medical

negligence issues are of a specific type requiring specialist skills. Owing to the professional nature of medical problems, judges can also not be deemed to be knowledgeable individuals and can determine what is fair and which is not, in specific, the case. A possible solution to this dilemma may be to fix it.<sup>2530</sup>

### **G. Implementation of a specific special statute on medical negligence**

In Bangladesh, it is high time that a specific law was adopted to resolve the problem of medical negligence, which specifies the proper meaning of the term 'medical negligence' with its essence and uniqueness. This arena has remained ignored for a long period of time, though distinct and successful regulations have been integrated into the judicial process of certain developing countries and are making good use of them. In addition, the Bangladesh Law Commission has recently clarified why separate regulation is unavoidable, when the current criminal law is either insignificant or prejudicial. In addition, the law of wrongdoing, which is a consequence of statutory law, swims in the gray region of Bangladesh, as a result of which, in the lack of direct laws, strong case law has not really been shaped.<sup>2531</sup> In this context, it should be recognized that the State is under an international duty to take effective constitutional, financial, fiscal, legal, advertising and other steps to fully enforce the right to health, including adequate medical facilities and resources. In addition, claimants stripped of their right to health should be eligible to sufficient compensation, which can take the form of redress, reward, relief or assurances of pro-repetition.<sup>2532</sup>

## **IX. PROBLEMS IN EXISTING LAWS IN BANGLADESH**

### **A. Legal Challenge**

<sup>2525</sup> Ibid

<sup>2526</sup> Section- 60 of the Consumer Protection Act, 2009.

<sup>2527</sup> Section- 61 of the Consumer Protection Act, 2009.

<sup>2528</sup> Section-73 of the Consumer Protection Act, 2009.

<sup>2529</sup> Ibid

<sup>2530</sup> Sultana Nishat, "Medical Negligence in Bangladesh; An Introduction", Law Vision, Issue: 9 Department of Law, University of Chittagong, (2004-2005), 52.

<sup>2531</sup> S.M. Masum Billah, Law Commission's proposal of making medical negligence law, The Daily Star, April 20, 2013.

<sup>2532</sup> Ibid

Usually, mens-rea and actus rea needed to prove an act of the accused. However, the **Penal Code** gives more significance to mens rea. As good faith is a part of medical negligence, it is very difficult to prove a mens rea in the given circumstances. The profession of the medical practitioner involves taking risk thus only knowledge of the probable injury or loss may not be enough.

### 1. Absence of a codification of Medical Negligence Legislation

There are many rules of numerous laws, but they are not a single Act so that the patients get lost in choosing which court they will go to or under which statute they can bring a case against medical case offender.

As an example, criminal charges are often filed under **Penal Code**, which is not accurate. Since accusations do not mean that the doctors are guilty, it will be a problem for the doctors. On the other hand, the suspects will not be punished in civilian courts.

They just have the right to assess the amount of compensation. Even under the Consumer Protection Act, a medical negligence suit can be initiated. Therefore, it can cause several suits. It must be referred here that The Law Commission of Bangladesh has made an effort to provide a new law.<sup>2533</sup>

### 2. Excessive Court Fees

Generally, it takes a significant amount of money to file a suit in a court that is not reasonable for the vulnerable defendant in Bangladesh. That is why the victim sometimes would not pursue legal proceeding for relief. However, no court costs are needed in our neighboring state **India** to institute a complaint of medical negligence under the **Consumer Protection Act**.<sup>2534</sup>

<sup>2533</sup> S.M. Masum Billah, 'Law Commission's proposal of making medical negligence law' The Daily Star (Dhaka, 20 April, 2013).

<sup>2534</sup> KK Akter, 'A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices' (2013) 1 NUJL [https://www.researchgate.net/publication/287122153\\_A\\_Contextual\\_Analy](https://www.researchgate.net/publication/287122153_A_Contextual_Analy)

### 3. Proof of Negligence

The onus of proof over the question of negligence goes on the plaintiff's side and if he fails to provide material facts before the court then no valid relief will be possible. The scope of medical issues makes it difficult for a doctor to prove the misconduct of some other doctor against whom an incompetence accusation has been raised. Being in the same profession makes it even harder. Consequently, the lack of required records and facts, an allegation of negligence becomes very difficult to prove.<sup>2535</sup> In certain cases, the medical institutions perform poorly to supply them unless directed by the judicial court to do so.

### 4. Incompetent Regulatory Bodies

**Bangladesh Medical and Dental Council (BDMC)** is allowed to respond appropriately and, to revoke or remove approval of any institute if found inadequate.<sup>2536</sup> It is the supreme authority to monitor and oversee the ethical behavior of the doctor and to take disciplinary action. However, very the Council approves few.<sup>2537</sup> BDMC has its limitations too. Many actions are limited with only one **Director-General of Health Ministry** and that is not practical at all.

### B. Practical Challenges

Usually, the police carry the investigation and they do not have proper information and resource to investigate medical negligence cases. Since evidence is an important element of an investigation and in the case of medical negligence, the evidence must be preserved with special care; the existing court system does not have such capacity to do so. The lengthy process of the court proceedings, not able to appoint their own lawyer, and refusing

[is of the Medical Negligence in Bangladesh Laws and Practices](#) accessed on 26 September 2022.

<sup>2535</sup> S. Damayanti, 'What is medical negligence? What are the standard of care principles' (2011) NUJL <http://pharmacyzoneustc.blogspot.com/2011/07/part-vi-implementation-of-existinglaws.html> accessed on 26 September 2022.

<sup>2536</sup> Nimal Kasturiaratchi, Reidar Lie and Jens Seeberg, 'Health ethics in six SEAR countries' (1991) [https://www.who.int/ethics/regions/en/searo\\_ethics.pdf](https://www.who.int/ethics/regions/en/searo_ethics.pdf) accessed on 26 September 2022.

<sup>2537</sup> Ibid



to pay speed money to prevent everyone to continue the suit.

### I. Public Awareness

21% of the people in Bangladesh believe that the public uninformed about health rights and medical negligence, while 42% wish for education on legal protection against medical negligence.<sup>2538</sup> Passing a specific law or code related to the legal remedies of medical negligence that is propexcrly explained to the public may encourage them to use this method more often. However, the media plays very vital role in increasing the awareness of this issue in Bangladesh such as with issues related to women and children. On behalf of the Ministry of Health and Family Welfare in Bangladesh, the media has successfully aired many programs meant to build awareness in the public about health-related issues and this strategy could also work to educate the public on the legal remedies as well.

### II. Lack of Legal Knowledge

Many healthcare professionals have some or no knowledge about the legal penalty for their negligence. Certain times they may have followed negligence as a tradition and don't have the concern about negligence. A complied knowledge about the whole negligence may create a sense of responsibility in both the patients and medical professionals.

### III. Privatization of Healthcare

In recent times more and more private hospitals and clinics are created around the country. The biggest benefit of this spread is many people can now have physical access to the hospital. Although, the sick competition among these private hospitals created various standards of medical services based on payment. However, due to more private healthcare, the standard of services is getting lower to getting the access of mass people. Lack of proper equipment and

huge pressure of patients are the main reasons for their lower standard of services.

### X. FINDINGS

Medical negligence in Bangladesh is a day-to-day example that is ongoing caused by a lack of accountability. It is a strong view that, under moral responsibility and oath, physicians or medical practitioners are responsible to serve their best in order to protect our life and welfare. It is established that the state has a constitutional duty to preserve and enforce people's right and to meet their basic needs, including health care. There are some loopholes which are follows: accountability of the healthcare professionals, there is no lack no complied Act, no powerful regulatory body are some of the big points question regarding the medical negligence. It is submitted that proper detailed legislation on medical legislation may create a convenient and favorable healthcare system. However, it may be the question whether enacting a new law always be beneficial? Even if such question is not within the scope of this research.

Some medical practitioners are commonly found to be irresponsible regarding their execution because they choose their benefit, unlawful purposes, overloaded burden, weak management structure, lack of information regarding scientific innovation, gaps in the current legal system, people's inability to bring legal proceedings against medical professionals, and for some other difficulties. Citizens in our country are more conscious are want to bring legal proceedings for cases of medical negligence that lead patients to die or harm.

As the supreme law of the land, the Constitution of Bangladesh has guaranteed its citizen's right to health. Supreme Court of Bangladesh is still able to serve its statutory obligation and to establish remedies for claims of medical neglect under constitutional law.

In addition, medical practitioners are required to be aware of the legal implications of their

<sup>2538</sup> Zelina Sultana, 'Medical Negligence in Bangladesh: An Argument for Strong Legal Protection' (2019) 12(2) APJHLE <https://heinonline.org/HOL/LandingPage?handle=hein.journals/aspihle12&div=11&cid=&page=> accessed on 26 September 2022.

medical negligence and should restrain from entering into such questionable cases and lawsuits. The key concept in the framework of medical negligence has never been tested in the law. It is also submitted that no such cases have been recorded yet to consider the above test mentioned in the framework. In the big picture, there is no such implementation of the laws regarding medical negligence. Many existing problems have already been discussed and another solution is provided in this chapter.

## XI. RECOMMENDATION

From above mentioned discussion, the recommendation are following:

### A. Enacting new Law

In order to address medical negligence problems without further delay, the government should enact new, strict laws and effective regulations. The statute shall determine and adequately provide the method of operation, penalty of malpractice, responsibilities, and liability of all providers of medical services. Victim's interests and remedies must be explicitly and separately noted in the statute. The work mechanisms and principles of private practice should be clarified in the legislation. The government shall set the number of medical practitioners' fees from time to time. Under this proposed special Act, the Government shall print gazette notice about the rates of all forms of medical tests. However, is enacting a new law is always good? This question is beyond the scope of this research paper.

### B. Establishing Independent Healthcare Tribunal

A separate health tribunal or judicial structure that would decide in cases of medical negligence following the enactment of special laws in medical negligence should be created. The courts will be employed with judges specially qualified in medical science. There could be a Medical Negligence Commission to offer expert assistance and support to the courts in order to get a more fast and successful solution. Under the new Act, there will

be a dedicated investigation division with a qualified perception of health problems.

### C. Holding for Accountability

To discover the complaint of the patient the management of public and private medical institutions must regulate the evaluation of the service; for example, the recommendation box, patient satisfaction surveys, etc. In addition, the patient should be informed on the diagnosis, course of treatment, and the discussion with the patient should be recorded. Later this can be used as proof. The monitory body Bangladesh Medical and Dental Council with the Ministry of Health will monitor the complaint mechanism to establish accountability.

### D. Awareness Building

The Ministry of Health and Social Welfare should provide adequate publication of these guidelines so that patients are aware of the medical practitioner's rights and roles and obligations under the Code of Medical Ethics. In addition, an awareness-raising and training initiative should be organized for the people about the rights of the patients. Ethical issues in medical as well as a medical practice should be prioritized by health planners, decision-makers and policymakers. Information campaigns may be promoted to increase awareness among the general population through newspapers and numerous cable channels.

## XII. CONCLUSION

"Where there is a right, there is a remedy" is a tremendous view of jurisprudence. Patients are the overall sufferers of medical negligence, and they lose their precious lives from such negligence. It is important to note that the only solution is not to enact new legislation, but the laws must be properly and truly enforced. It would be nothing but a wild goose chase if the legislation remains impossible to implement. Impartial and rapid inquiry in cases of medical negligence, remedies must be ensured to inspire patients to seek relief. It was also proposed in the recommendation to establish a specialist and competent board to support both

the court and litigants in the case of specific health research complications. A complaint mechanism is an outstanding facility for the patient. Institutional judicial proceedings and high lawyer fees must be avoided and every medical professional must be held accountable for their conduct. Additionally, In order to learn about medical ethics and standards, public awareness is necessary. As the world's holiest occupation, a medical practitioner is deeply obliged not to handle a customer as a business center.

Laws and regulations on medical neglect are aimed at saving people from abusing their right to health and maintaining medical service laws. Moreover, the law will aim to punish medical practitioners who knowingly breach duties. An effort has been made in this paper to discuss the current legal standards for medical negligence in Bangladesh. It also discusses the important shortcomings of those clauses. It must be acknowledged that the laws are not sufficient and effective to solve this issue.

In order to organize information for doctors, nurses, and patients on the effects and remedy of medical negligence in Bangladesh, it is also proposed to establish an effective complaint mechanism, mass training and awareness-raising program at the same time. The suggestions include the introduction of a detailed medical malpractice prosecution statute and the creation of a health court. The purpose of the new legislation should be to establish a positive atmosphere between patients and doctors. Eventually, it is expected that the proposed formulated legal frameworks and medical negligence guidelines will be able to set a full norm in place to stop medical malpractice in Bangladesh.

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