ANIL AGGRAWAL'S
Internet Journal of Forensic Medicine and Toxicology
The world's first online journal devoted entirely to forensic medicine and toxicology · Published 1 January and 1 July

VOL. 14, NO. 2 · JULY – DECEMBER 2013
Downloaded from www.anilaggrawal.com · ISSN 0972-8074 (Online) · https://www.anilaggrawal.com/ij/vol_014_no_002/papers/paper011.html

Apologizing to the harmed patient

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CITE THIS ARTICLE

Vij K, Garg A, Sandhu SS, Khajuria R. Apologizing to the harmed patient. *Anil Aggrawal's Internet Journal of Forensic Medicine and Toxicology* [serial online], 2013; Vol. 14, No. 2 (July – December 2013): [about 6 p]. Available from: https://www.anilaggrawal.com/ij/vol_014_no_002/papers/paper011.html

ABSTRACT

Section 44 of IPC defines 'injury' in its broadest sense. However, a medical injury/harm carries some restrictive but intriguing concept. And, one of the most contentious and legally complex areas is the difficulty in differentiating between errors arising from exercise of clinical judgment and negligent behavior. Errors do occur. And, would occur as the adage "to err is human" can't be lost sight of. However, an equally reachable concept i.e. "to apologize is also human" invites due consideration since it may benefit both parties (spiritually, psychologically, and perhaps, legally).

Keywords: Apology, medical injury/harm, medical error/mistake, negligence, causation, informed consent, communicating skills

Introduction

Section 44 of Indian Penal Court (IPC) defines 'injury' as "any harm whatever illegally caused to any person in body, mind, reputation or property".[1] A medical injury/harm may be considered as : "any physical harm, bodily impairment, disfigurement, delay in recovery, or death which (i) is more probably associated in whole or in part with medical intervention rather than with the condition for which such intervention occurred, and is reasonably to be expected as a consequence of such intervention, or (ii) is consistent with failure to provide timely and appropriate intervention, or (iii) is the result of intervention to which the patient has not consented."[2] In view of such an intriguing

concept of medical injury and not losing sight of much preached adage “to err is human”, it is not unexpected that we can altogether escape committing errors and/or mistakes. Law Dictionary (Law Lexicon 2007) differentiates ‘error’ from ‘mistake’ thus: An ‘error’ is something incorrectly done through ignorance or inadvertence whereas a ‘mistake’ is caused by bad judgement or a disregard of rule or principle.[3]

Error in clinical judgement vis -a – vis negligent behavior

It is understandable that one of the most contentious and legally complex areas is the difficulty in differentiating between errors arising from exercise of clinical judgement and negligent behavior. Undoubtedly, the leading case in this direction was that of Whitehouse Vs Jordan and another (1981, 1ALLER 267) extending over the whole decade of the 1970s.[4]Herein, Mr. Jordan, an experienced obstetrician, was accused of causing cerebral palsy in an infant by pulling too hard during a forceps delivery of a high risk pregnancy. The trial court found him negligent and the plaintiff was awarded damages of 100000 £. However, the judgement was reversed at the Appellate Court (by a majority of two to one) on the grounds that the issue was a matter of clinical judgement not amounting to negligence. The plaintiff then appealed to the House of Lords in 1981 wherein the five Law Lords, though ultimately upheld the majority decision of the Court of Appeal; yet extended a dissenting note in respect of Lord Denning’s distinction between an error of judgement and negligence. It was observed : “ while some errors of clinical judgement were consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgement may be so glaringly below proper standards as to make a finding of negligence inevitable”.[4] The Supreme Court, too, elucidated this aspect vividly in Spring Meadows Hospital and another Vs Harjot Ahluwalia and another { 1998 (3) CPR I (SC), 1998 (1) CPJ I, and JT 1998 (2) SC 620} wherein the nurse gave an intravenous injection of chloroquine instead of chloramphenicol to a child for the treatment of enteric fever, leading to cardiac arrest and brain damage. The nurse plus the resident doctor were held negligent. And, the hospital vicariously liable. The observations of the Apex Court, in essence, were: “ Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bonafide mistake which under certain circumstances may be excusable, but a mistake tantamounting to negligence cannot be pardoned. In the former case, a court can accept that ordinary human fallibility precludes the liability while in the latter, the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor”[5]

Evaluating the concept of ‘apology’

Though we have been striving to reduce the rate of errors through system - based practices and improvement in human skills, yet there is little doubt that the person – based approach continues to hold sway and that the temptation to blame a particular individual is hardly resisted by institutes / authorities. Admittedly, little attention has been paid to the equally reachable concept i.e. “to apologize is also human”.[6]Putting it in some practical terms, one may advocate that how can we characterize and address the human complexities of unpleasant situations so that patients , families , and the doctors may reach some degree of understanding and move towards forgiveness?.[6]Healthcare providers are often reluctant for assuming personal responsibility and believe that they must “invent words with due care and caution” or display a positive “spin”. Approximately 30 States in America have adopted “I am sorry” laws, which to varying degrees extend shelter to doctors and render the comments communicated to the harmed / injured patient inadmissible as evidence for proving liability.[6] Depending upon the wording , the legal effect/ affect

of an apology can fall on a continuum ranging from innocent expressions of sympathy to overt, supportive evidence of wrongdoing. In Phinney Vs Vinson (605 A. 2d 849), the plaintiff argued that the apology expressed by the defendant in itself was sufficient evidence of liability. But, the Supreme Court of Vermont concluded that, probative though it is, an apology is not the automatic equivalent of legal liability for wrongdoing.[6] However, a contrary result was reached in Greenwood Vs Harris {(1961, Okla.) 362 P. 2d 85} wherein the court held that it was not possible to interpret the defendant's statements other than an admission of the defendant's failure to use and apply the customary degree of skill exercised by physicians in the community.[6]

As obvious, examples are available to show that the courts have gone both ways on this subject and have progressively been conveying that error , mistake , and a bad result are predominantly medical concepts requiring evidence – based judgements,; whereas fault , negligence, and culpability are legal concepts approached through legal standards which necessitate taking into account other elements such as scope, standard of care in a given scenario , and causation (showing a reasonably close and "causal connection" between the negligent act or omission and a resulting injury/harm i.e. the so called legal or proximate cause).And, therefore, efforts need be concentrated to find a balancing point between two compelling impulses i.e. the compelling urge to say "I am sorry" on the one hand pitted against the creeping danger of legal liability on the other since one never knows that how far a "sorry" will be stretched . And, interpreted as legal weakness transforming an indecisive plaintiff into an aggressive opponent who senses an easy victory.[6]This is especially so in the prevailing societal shake-up wherein factors like right to information, quality assurance and accountability, close involvement of patients in understanding their illnesses and making decisions to accept or refuse treatment, etc; are increasingly heaping up.[7]

Conclusion

Medical science is not a precise science, but rather a scientific humanism. It may be advocated that 'the apology' should be a safe-worded work of art commensurating with the situation. Errors do occur (and, probably, would occur).However, during these days of commercialism, often the public has been raptorial for new sources of pecuniary advantage. And ungrateful patients, at times, look - upon the field of medical negligence as a Land of Ophir[8]. Self – policing combined with timely expression of sympathy and benevolence can go a long way in unfolding pleasant results for both parties, spiritually as well as psychologically. And, perhaps, legally too[8]. The attending doctor must convey his genuine concern about the unfortunate event and express the same in comprehensible non-medical –terms preferably in the local language. Doctors who are open-minded and communicative are much less likely to be complained against as patients / attendants are often forgiving of errors committed by a friendly and concerned medical professional. It has been forwarded that a high proportion of complaints are precipitated or escalated into legal action by a progressive breakdown of the doctor-patient communication.[9] An illuminating example in this context may be cited through the case entitled Nizam Institute of Medical Sciences Vs Prasanth S Dhananka & Others decided by the Supreme Court on 14th May 2009 wherein the award of Rs . 15 Lac granted by the National Commission, surprisingly enough, was enhanced to Rs. 1 crore by the SC . Herein, the complainant (a student of IT engineering) was operated- upon for 'neurofibroma' (a benign encapsulated tumor resulting from proliferation of Schwann cells….. a kind of nerves cells named after the German histologist) by a cardio-thoracic surgeon at National Institute of Medical Sciences (NIMS). However, the complainant developed paraplegia with complete loss of control over the lower limbs and some other related complications rendering him incapable of all normal

chores of life. The complainant and his parents approached the National Commission alleging utter negligence on the part of the doctors and making NIMS vicariously liable and the State of Andhra Pradesh statutorily liable. And, ultimately succeeded in having such an exemplary amount of compensation primarily on two accounts : (i) Not associating a neurosurgeon during the operation since the nature of the tumor fell under that field and (ii) apathetic attitude of the attending doctors, especially the concerned surgeon (Not to talk of discussing the things, they never heeded to repeated requests of complainant's father for supplying a detailed report as to the prognosis of his son's condition so that he could discuss the same with experts from some developed countries and adopt timely measures for better quality of life of his son)[10]. Another related illustration may be sought in the case entitled Samira Kohli Vs Dr. Prabha Manchanda and another (SC judgement dated 16.01.2008) wherein it was categorically conveyed that "the 'informed consent' is a process extending over time encompassing exchange of information, not a form once filled and got signed. The most significant aspect is the necessity to convey to the patient doctor's readiness to share the information and be available to discuss anything the patient may fear as a risk, a side-effect, or a concern about the proposed treatment"[11]. Medical profession can afford some eagerness in expecting the proffered benefits of the solacing approach, though some disillusioned segment may by nature be so timorous as to apprehend every path beset with lions.

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