

Law and Our Rights

Doctor's Negligence, Legal Rights

Law of Torts can give patients the right to compensation for injury caused by the negligent treatment of the medical practitioners, suggests Isaac Robinson

VERY often, we come to know that a patient suffered serious harm due to faulty diagnosis, surgery or prescriptions by a medical practitioner. It is common sense judgement that when doctors, nurses or the hospital authorities cause injury to the patient on account of their failure to take reasonable care and attention, they must incur some liability. What is the liability? What is the relief available to the injured person?

Even for the gross violation of professional duty we do not see that the injured person has received adequate relief. In a very limited cases criminal actions are brought, which too, is not adequate relief from the injured's point of view.

The most effective relief in such a case is available under the law of torts which we always overlook. It provides remedy against civil wrongs. Unlike Bangladesh, this law is very much familiar in all the major legal systems of the world.

Tortious liability lies with a person who causes injury against another in person, property or reputation. This liability arises from the breach of a duty primarily fixed by law towards persons generally.

Tort law applies in every sphere of life. A person has duties towards his neighbours; lawyers have duties towards the clients, doctors have duties towards the patients, government corporations have duties towards the general public and so on. Whenever there is any breach of the duty, an action for damage is maintainable by the person who suffered injury caused by the breach.

It is not infrequent in Bangladesh that duty of care fixed upon the medical practitioners are breached. This is called professional negli-

gence and for today's discussions we would be confined to the breach of professional duty by medical practitioners and the relief available to the injured. But before that, see the following events.

Event 1: Blinded by mistake

Abdul Hamid Patwari lost his left eye as doctors at the Islamia Eye Hospital took him to be Hamidullah and removed it. Both Patwari and Hamidullah had undergone cataract operations. Left eye of Hamidullah was to be removed on August 20, 1995 for fungal infection. But the authorities mistakenly removed the eye of Patwari.

Patwari was promised a corneal grafting free of cost but was discharged later without it.

Event 2: Post operation infection

Eyes of at least 12 patients at the Islamia Hospital were removed in ten days in September 1995 due to "faulty" cataract operation.

Event 3: Minor girl died for wrong treatment

An eight year old girl fell victim to "drug reaction" and died in Chittagong Medical College Hospital on August 6, 1995. Kulsoma Akhter Minar was admitted to the hospital with tonsillitis complain. She started groaning after an attending nurse pushed an anti-tetanus injection. She died after some time. Her death certificate shows that she died "possibly due to drug reaction."

Event 4: Woman died for injecting wrong blood group

Regia Begum (44) died on August 4 at the Dhaka Medi-

cal College Hospital for negligent treatment. Regia was admitted there on 21 July and a Tumor operation was carried on July 31. After operation her condition declined abruptly and she was given wrong blood group. She expired after some time.

In all the above cases, the hospital authorities can be made to pay damages for the breach of their professional duties. It is immaterial whether criminal actions lie against them or not. Even if criminal actions lie, civil actions for damages are not barred.

Doctors, nurses and the hospital authorities owe a duty towards the patients. This duty corresponds to the 'standard of care' which the society expect from the medical practitioners. They must maintain the standard of care for each and every patient. It is not a ground of defence that a particular thing was not done intentionally. It is enough if that was the result of negligence on the part of the doctor, nurse or the hospital authority.

The propensity of breach of obligations by the medical practitioners is higher in Bangladesh mainly either because they can't be held liable or because they are not generally held liable for the breach of their duty. When we say "they can't be held liable", we do not mean that they are immune from being held liable. Rather it is because of the intricacy of the procedural laws as well as the practice of the civil courts which make tort suit practically unworkable. On the other hand "they are not generally held liable" simply because of the narrow view of

our people towards such kind of remedy.

The rate of negligence is higher in government hospitals in proportion to private clinics. The reason is that government hospitals are subsidized by the government and there is nominal contribution from the patients. So the hospital authorities do not care much for the patients. Even some of the patients become satisfied with the contention that they are getting less care because they are not paying enough. This is a totally wrong conception.

Hospital authorities are bound to serve their best efforts to every patient. This is their professional duty. Any deviation from the minimum 'standard of care' will make them liable for professional negligence.

Professional negligence is not a phenomenon in government hospitals only, it is evident in private clinics too. Private clinics are well paid yet there are endless complaints of professional negligence.

An action under tort for damages would afford monetary relief to the injured person. Monetary relief is not available in a criminal case. So it would be proper for the injured person to pursue the law of tort, for remedy. Since the law of tort, is not familiar in Bangladesh, lawyers as well as the courts have the duty to familiarize the law to enable the general people to avail sufficient and speedy remedy for wrongs done to them.

There are, however, impediments which obstruct the development of tort law

in Bangladesh. Firstly, the ad valorem system appears to be the major impediment. The system requires the claimant of the damages to deposit to the court a percentage of the damage claimed. This amount is not refundable. Such a provision of law drives out substantial number of people from instituting tort suits. Apart from the cost of litigation, which under the present condition of the courts can run for several years, the claimant has to pay the ad valorem free in advance.

Secondly, the legal procedure in Bangladesh is very slow and lengthy. Very few people want to get implicated with the hazards of litigations unless they are forced to do so. However, it is not hard to remove this impediment. Since the court can earn money by way of court fees, ad valorem fees etc., expansion of the civil court coupled with necessary change in procedural laws can change the slow and lengthy character of the civil courts.

Thirdly, the compensation awarded to the claimant, after several years of litigation, is usually not adequate to redress the wrong done to him. There is not a single instance of tort suit in Bangladesh where the court awarded sufficient amount adequate to redress the wrong. Many people apprehend that the compensation awarded by the court might not even cover the court fees, and ad valorem fees and the lawyer's fees.

Finally, the narrow view of lawyers as well as the courts towards the law of tort is responsible for its failure in

Bangladesh. Courts are very conservative in granting reliefs in tort suits. In England tortious damages awarded to the claimant consists of 85 per cent of the total damages under the jurisdiction of civil courts.

We are hopeful that the present situation as regards to the implementation of tort laws in Bangladesh can be made favourable by a sincere effort from all corner. Tort is not a law to be used only against the doctors. It can be used against the police, lawyers, landlords, corporations like WASA, T & T and every other persons who have duties towards other person. Law of tort will thus play vital role towards the protection of citizens rights.

The cardinal purpose of tort law is to establish a 'standard of care' and 'standard of reason' that society expects from people, and to encourage more responsibility in them. To establish the 'standard of care' and 'standard of reason' in the society for every profession and every person in their respective fields, we must ensure the application of the law of torts.

Isaac Robinson - General Secretary, Law Review; member, Ain-O-Salish Kendra.

Lawscape

Arab world hit for HR abuses

The Arab Organization for Human Rights (AOHR) has expressed alarm over the state of human rights in the Arab world even as it noted some positive developments.

The report noted repeated complaints of torture and maltreatment in at least 13 Arab countries, including Egypt, Sudan, Libya, Tunisia, Algeria, Morocco, Syria, Jordan, Iraq, Bahrain and the self-rule areas of Palestine.

Torture resulted in deaths during detention in at least four countries and around 30 people were killed when Algerian authorities crushed a rebellion in one of its prisons. Another hundred were killed during the hunt for those who had escaped from the Azawalt prison in Algeria.

The report's findings were based on field work by AOHR fact-finding missions, its monitoring of events and trials, and complaints it received throughout 1994.

Political prisoners released in Philippines

President Fidel Ramos approved the release of 21 people serving prison terms for crimes related to political activities.

One person on trial also was ordered released in what was seen as a government response to calls for an end to the vestiges of the late President Ferdinand Marcos' strongman rule.

A popular revolt in February 1986 ended Marcos' 20 year rule. He was driven into exile in Hawaii, where he died in 1989.

The human rights group Karapatan welcomed the release but said 194 political prisoners remain in jail, including two men convicted during the Marcos administration.

The Ramos government maintains that it is holding no prisoners on purely political grounds.

Our readers, legal bodies and lawyers are invited to send us factual tidbits, information, and dates for any upcoming seminars, for publication in "Lawscape".



Inflicting Primitive and Inhuman Mode of Punishments in Modern Era of Human Rights

Punishment or treatment to a person should be within the limits of civilized standards. Considering the basic human rights of a person Shahed Altaf Bijon finds danda beri to be cruel, inhuman and degrading

WHEN someone says "I know my rights" or "we're within our rights", they are claiming or recognising that in fairness and justice they are entitled to have or do certain things. It's our legal right. Countries like United States, Germany, Bangladesh have a written constitution, basic law or bill of rights describing what citizens have the right to do or expect. But that is not the whole story. People also base their claims to rights on 'general principles' of fairness and justice calling it 'moral rights'. It is helpful, perhaps, to think of legal rights as being concerned with fact and of moral rights as being 'aspirations' and 'ideals'. A moral right, however, may or may not be enforced and supported by the law but there is a further and higher category of moral rights and that is rights which apply to all people at all times in all situations. People possess such rights as they are human and are equally entitled to them regardless of their gender, race, colour, language, national origin, age, class, religion, or political creed.

A Case Study

Karim, a young boy aged 17 was arrested on the night of 27th June, 1995 from the 'gher' (paddy field) owned by his family. Later he was detained in Khulna district jail under an order of detention.

However, the arrest of June 27 was followed by two nights and one day lock-up in Khulna police station and while in custody he was severely beaten with lathis all over his body which later posed as a threat to his physical condition. Now he can not take any sort of food without considerable pain. Later on June 28 of 1995, he was taken from the First Class Magistrate (Khulna) to Khulna Central Jail and served with an order which directed to his detention of thirty days.

There may be questions as to what our basic human rights are. Among many other human rights the liberty oriented rights might be the most basic, that is, the right concerned with giving individuals freedom of action and choice, freedom to participate in the political life of one's community and society. It is therefore important to note that these rights provide defences for every individual against excessive state power by limiting what government and government bodies can do. So, the right to life, freedom from unfair imprisonment, the right to seek justice, the right to a fair public trial, the right to be considered innocent until proved guilty may be the most practical, logical and upto date examples of basic human rights.

The post Second World War movement of human rights has gained widespread consciousness and importance. It has been the most discussed issue in all corners of life in recent years. The Universal Declaration of Hu-

man Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture and other Cruel, Inhuman or Degrading Punishment or Treatment, Convention Relating to the Status of Refugees (1951) have therefore undoubtedly gained mass importance and acceptance in our global village.

The present situation prevailing in our country very disappointingly speaks of an alarming state of law and order. According to 'Amnesty International Report 1995' - over 40 people died in police and judicial custody allegedly as a result of torture. Torture consisting mostly of beatings by police, however, continues to be reported. Five men died in mental ward of Sylhet prison in February. Their bodies bore marks of injuries and at least two appeared to have been strangled. On 20 August some Abdul Khaleque died in Tejgaon police station in Dhaka on the day of his arrest.

Certainly it is not for us to decide whether Karim or Abdul Khaleque or any other person arrested and imprisoned is really a criminal or not. Law will certainly find its own way to judge that absolutely. But torturing is something that has to be made clear to the people. It just can not be an on going common phenomenon. We hope it's not lawlessness that we are suffering from but certainly it is unlawfulness that we are afraid of. In our combat towards a democratic society and state we should strictly and seriously demolish such unlawful, cruel, inhuman and degrading mode of punishment. When the whole world is marching towards a better society it is time for us to get rid of such primitiveness. After 25 years of independence we should overcome our struggle for justice and bring torture to an end and give some meaning to our rights. That's human right is all about.

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Torture: Violation of Human Rights

Torture is a serious violation of human right. To ensure adequate protection for all persons against any such

At the End of the Rainbow

Government should take steps to ensure that the food, shelter and wages of its workers abroad are guaranteed so that they are not forced to lead sub-human life in foreign soil, writes Saira Rahman

IN the last few years Bangladesh has seen a large exodus of manpower leave its soil for countries such as Malaysia, India, Singapore, Pakistan, Saudi Arabia, the Gulf etc. The root cause of this migration is poverty and the need to sustain oneself and ones family.

The government has its labour and Manpower Ministry and its own agents dealing with such export, but some choose a more private means and fall into the hands of extortionists in the guise of agents who, more often than not, supply forged documents for astronomical fees or introduce their clients to a new status called the 'illegal immigrant'.

How many migrant workers has the Government of Bangladesh sent abroad so far? We have recently learnt that it has proposed to send one thousand domestic workers to Singapore. Does the Government know what happens to its citizens once they become migrant workers? Their living conditions? Wages? Health and hygiene? Security? Do workers them-

selves have the slightest inkling of the kind of country they are going to? Its customs and laws? Its language?

They leave with enthusiasm to hunt out that pot of gold, only to find themselves face to face with the Tower of Babel. However, communication isn't the only problem. Whereas the basics of the language and culture problem can be overcome within a few months, the health, wages, food and lodging of foreign migrant workers in some countries remain deplorable. Unfortunately, once our Government sends hordes of eager men - and some women - abroad to earn foreign exchange, via lack of proper foresight, there is no means by which all the above are monitored or regulated. Once abroad, the citizens of Bangladesh become faceless nonentities, occasionally

reminding us of their existence by newspaper headlines where caught with illegal papers, jailed or murdered. The Bangladesh High Commission in receiving states should wake up to the fact that there are migrant workers being paid less than minimum wage in a foreign country, that some are living in hovels without proper hygiene, that some are being physically and mentally abused by their employees and that some are languishing in cramped, overcrowded detention centres. For example, the Malaysia Government gives Bangladesh workers a 2-year jobs permit. However, the meagre wages they earn goes towards paying their debts to the agent. They are unable to save money during their 2-year tenure and this induces them to stay on illegally. There are many

Bangladeshi migrant workers in detention centres in Malaysia - categorized as "undocumented" migrant workers. The Malaysia Government is willing to release them, on condition that their families take the responsibility of their return to Bangladesh. The families, of course, cannot afford to do so, therefore the detainees remain imprisoned for overstaying their visas. There are also reports that detention centres in Malaysia are in appalling condition. They are overcrowded, there are no beds and toilet facilities are hazardous to health and hygiene. There is a shortage of food and detainees suffer from dehydration and malnutrition and diseases due to lack of medical attention.

As has been mentioned before, once these starry-eyed, eager workers plant their feet on foreign soil, they no longer exist as citizens of Bangladesh, but are reduced to foreign exchange carrying statistics. Our Government should take urgent steps to ensure that the food, shelter and wages of its workers abroad are guaranteed and substantial, and that its consulates abroad are equipped with the means to monitor overall working conditions and with the

means of dispensing advice to and redressing wrongs perpetuated against its citizens working abroad. At home, the government agencies must take up the responsibility of conducting orientation programmes in aid of those preparing to work in a country whose laws, traditions, language, customs geography and food are alien to Bangladesh. They should also be frankly told what to expect once they arrive including the working condition and accommodation. This matter could, of course, also be taken up by the Bangladesh High Commission in the receiving countries. Bangladesh, however, is not the only negligent sending state. Thai workers sent to Hong Kong also fall the same dilemma. However, there are NGOs based there which specialise in orientation sessions for their bemused citizens and who monitor the quality of treatment meted out to them, and who dispense shelter, para legal aid, counselling education and training to abused immigrant workers.

The Constitution of the Peoples' Republic of Bangladesh states in Article 20 (1) that "work is a right, a duty and a matter of honour for every citizen who is capable of working..." However when the Government sends its people abroad, it seems to forget that some of the working conditions they have to face may not be 'honourable'.

Thus, it is imperative that the Government of Bangladesh help its desperate citizens seek out a pot of gold abroad in order to aid both their own families and the country under the safest circumstances possible. In order to do so, the following are necessary:

1. Examining standards for migrant worker contracts, and formulating a universal contract applicable between all sending and receiving countries either rigorously or inter relational, so that we can guarantee our worker a better deal abroad.
2. Orientation or education of the migrant workers either at home before they leave, or at the High Commission in the receiving country, before they join work.
3. Concrete bilateral agreements between receiving and sending states with the inclusion of wages, tenure, checks and balances.
4. Periodic monitoring of the condition of Bangladesh workers in different sectors of the receiving states by the Bangladesh consulates or specialised governmental authorities abroad.

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Legal Opinion

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