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### **The Legal Framework on Duty Towards Emergency Patients: Analysis with Proposals for Reforms**

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#### **Abstract**

Duty towards patients in an emergency is a task of fundamental importance in any jurisdiction and therefore requires an appropriate legal framework. This legal framework should be directed towards protecting the interests of patients in an emergency while providing safeguards for the health professionals being parties involved in the matter. The present study is a descriptive analysis of duty towards emergency patients while proposing reforms. The results mandate protecting the rights of patients and health care for better outcomes concerning duty towards patients in emergency. Doctors should be protected from legal proceedings in case no gross negligence or dereliction of duty prima facie is made out. The study is general and does not distinguish different fields of medicine, like mental health, etc., for further analysis of their emergency patients. It looks at the duty towards patients in emergency cumulatively from all medical types, like cardiac and burns etc., in emergencies.

#### **Keywords**

emergency, patient, reforms, Malaysia, India, United Kingdom, Pakistan

## Introduction

The notion of duty of care is the fundamental component of negligence. There is no exclusion to medical negligence. The performance of duty with the proper standard of care is the obligation of doctors towards patients. The duty of care expected in a contract (in the private sector) or tort (in the public sector) is a duty to exercise reasonable care and skill.<sup>1</sup> Lord Atkin, in the seminal case of *Donoghue v Stevenson*<sup>2</sup> stated that each individual has to take acceptable care to prevent his or her actions in causing injuries to other individuals.<sup>3</sup> The Law Lords in *Donoghue Case* recognized that the manufacturer owed the customer a duty of care by failing to take reasonable care to ensure her safety was violated. The manufacturer was said to be negligent.<sup>4</sup>

The four criteria of negligence were laid down in *Lochgelly Iron Company v McMullan*.<sup>5</sup> as per Lord Wright: Firstly, the defendant owes the Claimant a duty of care. Secondly that the defendant fell below the standard of care expected by law. Thirdly, the defendant's conduct caused the claimant to suffer loss or injury. Finally, the harm or damage suffered by the claimant must be reasonably foreseeable by the defendant.<sup>6</sup> A doctor's legal duty of care as an undertaking towards the patient to exercise care and skill encompasses a wide coverage area. Duty of care occurs whereby foreseeable harm prevails where an acceptable individual foreseeing danger decides to take action to stop it.<sup>7</sup> The factors to be considered for the continuation of duty of care are the assessment of the public on guarding the claimant's interest, the foreseeability of injuries, and the blameworthiness of the defendant's conduct and the avoidance of harm in subsequent time.<sup>8</sup> This paper focuses on the duty to emergency patients and Good Samaritan laws in selected common law jurisdictions.

The general rule in negligence is that the doctor or physician does not have to provide medical assistance or treatment if there is no dependency between the doctor and the patient.<sup>9</sup> The liability occurs when the doctor has a duty arising from a contractual obligation whereby the doctor must administer treatment or care during on-call services to the hospital.<sup>10</sup> This can be illustrated whereby a patient suffers a cardiac arrest and is wheeled into the emergency room. The doctor in the emergency room will be required to treat and care for that patient.

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<sup>1</sup> L. Irvine, "The patient, the doctor, their lawyers and the judge: rights and duties," *Medical Law Review* 7, no. 3 (1999): 255, doi:10.1093/medlaw/7.3.255.

<sup>2</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>3</sup> *Ibid* 580.

<sup>4</sup> Walton, Thomas E., and James Palmer. "Maintenance of anaesthesia." *Anaesthesia & Intensive Care Medicine* 18, no. 3 (2017), 113-117. doi:10.1016/j.mpaic.2016.11.010.

<sup>5</sup> *Lochgelly Iron Company v McMullan* [1934] AC 1.

<sup>6</sup> Picard, Ellen. "Patients, doctors and the Supreme Court of Canada." *Oxford Journal of Legal Studies* 1, no. 3 (1981), 441-446. doi:10.1093/ojls/1.3.441. As stated in 'A doctor's duty to help in a medical emergency Medical Council of New Zealand.

<sup>7</sup> *Ibid* 1059.

<sup>8</sup> *Ibid*

<sup>9</sup> Jane Drummond, "Could Somebody Call a Doctor? On-Call Physicians and the Duty to Treat" *Missouri Law Review* 65, no.4 (2000) :1055. : <https://scholarship.law.missouri.edu/mlr/vol65/iss4/8>.

<sup>10</sup> Jane Drummond, "Could Somebody Call a Doctor?", 1062.

The New Zealand Medical Council approved the definition of a medical emergency given by S Milesi as:

"a sudden, unforeseen injury, illness or complication, demanding immediate or early professional care to save life or prevent gross disability, pain or distress. The immediate responsibility of the doctor faced with or called to an emergency is to apply his knowledge and skill to the saving of life and relief of suffering and to establish the most favourable conditions for his patient's ultimate recovery. This is the basic philosophy of medicine ..."<sup>11</sup>

Doctors must deliver emergency medical care due to the ethical codes mentioned in the Hippocratic Oath. In the oath, the medical professionals promise to 'act to preserve the finest traditions of my calling and experience the joy of healing those who seek my help.'<sup>12</sup> Despite that, doctors are afraid to provide medical treatment away from their hospitals or clinics due to the inadequacy of facilities and equipment that could jeopardise the patient. This could lead to a prolonged malpractice suit. In recent years, professional and societal attention has grown drastically to moral issues in health care. This increased interest in medical ethics results from multiple factors, including technological advances, the medicalization of societal ills, the growing sophistication of patients, efforts to protect disadvantaged groups, and the persistently rising healthcare costs.<sup>13</sup> The primary professional obligation of beneficent service to humanity is expressed in various doctors' and physicians' oaths and codes of ethics.

Is humanitarianism vital for medical professionals? Must doctors play the role of "Good Samaritans" and lend a hand to those in need? It may be morally right to aid individuals who need treatment or care, although the legal responsibilities are complex.<sup>14</sup> A doctor's duty of care will only occur if the doctor accepts the victim as a patient. Windeyer J stated in the case of *Hargrave v Goldman*:<sup>15</sup>

"He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was, or ought to have been, in contemplation when something is done. The dictates of charity and compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him."<sup>16</sup>

Stuart Smith LJ restated in *Capital and Counties Plc v Hampshire County Council*.<sup>17</sup> That "mere physical proximity between a doctor and a sick person

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<sup>11</sup> 'A doctor's duty to help in a medical emergency Medical Council of New Zealand Miles S. In Duncan AS, Dunstan GR, Welbourn RB (eds). Dictionary of medical ethics. Second edition. Darton, Longman & Todd, London. 1981. 155-156.

<sup>12</sup>Hippocratic Oath, a modern version Available at: [http://www.pbs.org/wgbh/nova/doctors/oath\\_modern.html](http://www.pbs.org/wgbh/nova/doctors/oath_modern.html)> accessed 16 April 2008. As stated in 'Should Doctors Play the Role of Good Samaritans? (2008) 273 LR 1, 2

<sup>13</sup>"Code of Ethics for Emergency Physicians," *Annals of Emergency Medicine* 70, no. 1 (2017): 8, doi:10.1016/j.annemergmed.2017.04.029.

<sup>14</sup> Hippocratic Oath, a modern version <[http://www.pbs.org/wgbh/nova/doctors/oath\\_modern.html](http://www.pbs.org/wgbh/nova/doctors/oath_modern.html)>accessed 16 April 2008.

<sup>15</sup> *Hargrave v Goldman* (1963) 110 CLR 40.

<sup>16</sup> *Ibid*, 66.

<sup>17</sup>*Capital and Counties Plc v Hampshire County Council* [1997] QB 1004.

created no duty to treat ... a doctor who witnesses a road accident is not bound to stop and help, and if he does volunteer, his only duty is not to make the victim's condition worse."<sup>18</sup> Although Lord Atkin in *Donoghue v Stevenson* refers to 'acts or omissions' as forming the basis of the negligence action, English law has been reluctant to impose liability for omissions or failures to act.

### **Methodology**

The methodology employed for the writing of this paper is historical analysis, case law analysis and critical evaluation of laws in diverse jurisdictions. The research ponders upon statute law and cases for analysis of the issue and proposing reforms. The research issue is addressed with the material collected in analytical and qualitative research method.

### **Results**

The results call for revision of laws in relation to duty to emergency patients by providing for more effective measures as outlined in this paper. The reforms mulled mandate more informed choices to the emergency patients. Moreover, it is proposed that principles formulated by Muslim jurists in relation to medical negligence may be incorporated in the laws of modern democracies in the interest of general public. Developing countries needs to adopt appropriate laws for the enforcement of rights of patients in emergency wards. Vicarious liability also needs to be imposed on the administrative authority of hospitals for proper implementation of duty of care during treatment of patients. Moreover, medical legal reforms are required for the technological development. The technological development also require to trained the medical professional time to time for the purpose of getting awareness to use new technology.

### **Duty to Emergency Patients in Malaysia**

There is no domestic case concerning this scenario; therefore, the Malaysian courts would apply the position at common law. The common law does not impose a legal duty on "pure omission."<sup>19</sup> On the other hand, there are situations whereby omission may be triable if the essential element of proximity in the relationship between the parties is satisfied.<sup>20</sup> The factors that will be considered are reasonableness of conduct and societal expectations. This was laid down in the Federal Court in the case of *Foo Fio Na v Dr Soo Fook Mun & Anor*.<sup>21</sup>

The Federal Court adopted the judgment by Callaghan J in *Hajgato v*

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<sup>18</sup> Ibid, at 1035B.

<sup>19</sup> For instance, where there is a duty to act, where there is a special relationship between the parties: see *Stansbie v Troman* [1948] 1 All ER 599; where there is a special relationship between the defendant and the third party: see *Home Office v Dorset Yacht* [1970] AC 1004; where the defendant created a source of danger which was sparked off by a third party: *Haynes v Harwood* [1935] 1 KB 146.

<sup>20</sup> Ibid

<sup>21</sup> [2007] 1 AMR 621 at paras 77-80; [2007] 1 MLJ 593 at paras 66-69.

*London Health Association*.<sup>22</sup> Callaghan J emphasized that the court is allowed to quash shoddy accepted methods. All professions must obey the law; therefore, the courts are responsible for regulating and making amendments to professional standards.<sup>23</sup> Although common law does not force doctors to treat patients,<sup>24</sup> However, hospitals are needed to provide treatment and care in emergencies. The treatment will be carried out so long as the claimant can show that he or she has come to the hospital without the legitimate assurance that the hospital will provide emergency care.<sup>25</sup> The drawback of this is that the hospital will be exposed to negligence liability when a staff physician exercises his or her right to refuse to engage in treatment.<sup>26</sup> The standard of care for persons who choose to aid an injured party may vary by jurisdiction (i.e., gross negligence, willful and wanton conduct). While there is some variation by jurisdiction, the standard of care is arguably lenient per the philanthropic purpose of Good Samaritan laws. The "gratuitous" requirement may be modified and/or interpreted differently in statutes that apply to medical personnel performing their duties.<sup>27</sup>

### **Duty to Emergency Patients in the United Kingdom**

The Court of Appeal in the United Kingdom had to deal with the issue of whether the ambulance service has a responsibility or duty to aid a casualty in society. This can be seen in the case of *Kent v Griffiths*.<sup>28</sup> Mrs Kent was a pregnant woman who suffered a severe asthma attack. She was attended by a general practitioner (GP). The GP made an emergency call to get the patient to the hospital as quickly as possible. The ambulance failed to arrive, although calls were made, and support was given that the ambulance was on its way. The ambulance arrived 40 minutes later, and by that time, Mrs Kent had endured respiratory arrest, which caused miscarriage and brain damage.

Due to the delay in treatment, Mrs Kent brought an action under negligence against the ambulance service. The London Ambulance Services ("LAS") stated that they were under no duty to react based on the decision in *Capital & Counties Plc v Hampshire County Council*.<sup>29</sup> In this case, it was said that fire brigades have no duty under common law to answer calls to fires or to take

<sup>22</sup> Kevin Williams, "Are Doctors Good Samaritans?," *Medico-Legal Journal* 71, no. 4 (2003): 165, doi:10.1258/rsmlj.71.4.165.

<sup>23</sup> [2007] 1 AMR 621 at para 78; [2007] 1 MLJ 593 at para 67.

<sup>24</sup> See *Hurley v. Eddingfield*, 59 N.E. 1058 (mId. 1901). As stated in Jane Drummond, 'Could Somebody Call a Doctor? On-Call Physicians and the Duty to Treat' (2000) 65 Missouri Law Review 1055, 1069.

<sup>25</sup> See *Wilmington Gen. Hosp. v. Manlove*, 174 A.2d 135 (Del. 1961). "[W]e are of the opinion that liability on the part of a hospital may be predicated on the refusal of service to a patient in case of an unmistakable emergency, if the patient has relied upon a well-established custom of the hospital to render aid in such a case." *Id.* at 14. This ruling is a statement of the undertaking and reliance theory embodied in RESTATEMENT (SECOND) OF TORTS § 323 (1965). See also *Standurfv. Sipes*, 447 S.W.2d 558 (Mo. 1969) (evidence of the plaintiff's undertaking and reliance per the rule outlined in *Manlove* is sufficient to bar summary judgment for the hospital. Common law has been somewhat eclipsed in this area by enacting the Emergency Medical Treatment and Active Labor Act ("EMTALA"), which imposes specific care requirements on Medicare-participating hospitals in emergencies. See 42 U.S.C. § 1395dd (1994) (enacted to combat "patient dumping" of uninsured patients presenting for emergency care). As stated in Jane Drummond, 'Could Somebody Call a Doctor? On-Call Physicians and the Duty to Treat' (2000) 65 Missouri Law Review 1055, 1069

<sup>26</sup> *Ibid*

<sup>27</sup> Nils Pelzer, "Victims of Victims: Will Good Samaritan Laws Put Things Right?," *SSRN Electronic Journal*, 2014, 446, doi:10.2139/ssrn.2497446

<sup>28</sup> *Kent v Griffiths* [2000] 2 WLR 1158.

<sup>29</sup> *Capital & Counties Plc v Hampshire County Council* [1997] QB 1004.

reasonable care to do so. The Court of Appeal took a different approach in *Kent v Griffiths*, whereby the court stated that London Ambulance Services were liable for the injuries sustained by Mrs Kent. A timely arrival could have prevented the injuries.<sup>30</sup>

Lord Woolf MR was not ready to agree that ambulance crews are like firefighters, police officers or coastguards.<sup>31</sup> Lord Woolf reiterated that ambulance crews must be treated as equivalent to hospital staff such as doctors and nurses since their responsibilities and duties are owed to the public.<sup>32</sup> The view on ambulance crews has changed from merely transporting casualties to hospitals to having one minimum of well-trained paramedics on board. This has become a vital part of emergency clinical care. This is a significant responsibility of ambulance crews as they must ensure adequate treatment is given to people as soon as possible.<sup>33</sup>

On the facts of *Kent*, as soon as the London Ambulance Service (LAS) acknowledged the 999 calls, the duty to attend existed. The assumption that duty of care only occurs when there is a pre-existing doctor-patient relationship may need to be revised.<sup>34</sup> There was acceptable proximity between Mrs Kent and the London Ambulance Service. For example, there was a final call for assistance and reliance upon the LAS to avoid the anticipated risk of personal injuries. Based on the above discussion, it was fair, just and reasonable to impose a duty of care.<sup>35</sup> This is suitable to be categorized under a duty of appropriate medical care. The decision in *Kent* is in line with the public outlook and moral inclination. Another English case that reaffirmed the duty of an emergency ward to accept a patient in need of emergency treatment based on sufficient proximity of relationship between the doctor, hospital and patient is *Barnett v. Chelsea and Kensington Hospital Management Committee*.<sup>36</sup> Moreover, the standard of care required is the same when doctors act voluntarily as it is during their ordinary course of work. Another case that features the doctor's duty to act is seen in the case of *F v West Berkshire Health Authority*.<sup>37</sup> Lord Goff stated that the doctor who assists an individual in public has no outstanding duty than what is already implemented in the Hippocratic Oath. The doctor's duty is not to make the patient's condition terrible.

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<sup>30</sup> *Alexandrou v Oxford* [1993] 4 All ER 328 ; *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 ; *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 .

<sup>31</sup> The police and fire services' primary obligation is to the public. In protecting a particular victim of crime, the police are performing their general role of maintaining public order and reducing crime. In the case of fire, the fire service will typically be concerned with protecting a particular property where a fire breaks out and preventing the fire from spreading. In the case of both services, there is generally a concern to protect the public: [2000] 2 All ER 474 at para 4. As stated in 'Should Doctors Play the Role of Good Samaritans?' (2008) LR 1, 4

<sup>32</sup> *Ibid*

<sup>33</sup> K. Williams, "Litigation against English NH's Ambulance Services and The Rule in *Kent V. Griffiths*," *Medical Law Review* 15, no. 2 (2007): 153.

<sup>34</sup> *Ibid*

<sup>35</sup> Once the decision has been made to provide an ambulance in response to a situation of a medical emergency (not restricted solely to "999" calls), an explanation is required to justify a failure to attend within a reasonable time. If there is no good reason for the delay and an absence of any other circumstances which make it unfair or unreasonable or unjust to impose liability, a free-standing duty of care may exist as envisaged in *Capitol Industries plc v Dickman* [1990] 1 All ER 568; [1990] 2 AC 605 .

<sup>36</sup> *Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428.

<sup>37</sup> *F v West Berkshire Health Authority* [1990] 2 AC 1.

A critical case in this area is the case of *Montgomery v NHS Lanarkshire*, which affirmed that clinicians should adequately advise about the pros and cons of treatment or, indeed, not treat a patient so that patients can make informed choices.<sup>38</sup> A claimant can successfully bring a claim if there is an omission by a clinician to properly advise of the pros and cons in this way, and the patient would have made a different choice leading to a different outcome if they had been so advised. There are several recent cases where *Montgomery* has been affirmed, i.e. in the case of *Webster v Burton Hospitals NHS Foundation Trust*.<sup>39</sup> There is likely to be much debate on what issues clinicians should raise with patients.

## India

The entire gamut of laws on consent turns into complex propositions if an emergency medical situation arises. In a few milestone decisions, the apex court ruled that a medical practitioner has to treat a patient in an emergency. Emphasizing the paramount duty of any "welfare state", the Supreme Court stated that Art. 21 imposes an obligation on the State to safeguard the right to life of every person.<sup>40</sup> A writ petition was filed under Article 32 of the Indian Constitution to the Supreme Court by a voluntary organization named Paschim Banga Khet Majoor Samiti (West Bengal Farm Labourers' Association). Article 32 of the Indian Constitution gives the right to individuals to move to the Supreme Court to seek justice when they feel that their rights have been 'unduly deprived'.<sup>41</sup> The claim was because Article 21 of the Indian Constitution was not adhered to by the government of West Bengal, as Haikm Seikh was refused admission in the general hospitals.

Article 21 states that 'no person shall be deprived of his or personal liberty except according to a procedure established by law'.<sup>42</sup> Article 21 secures two rights which are the right to life as well as the right to personal liberty.<sup>43</sup> The right to life considers the right to healthcare, the right to live with human dignity, the right to livelihood, the right to pollution-free air, etc. Preservation of human life is the main priority.<sup>44</sup>

The West Bengal Farm Labourers' Association cited the initial Supreme Court decision in *Pt Paramanand Katara v Union of India and Ors*.<sup>45</sup> In this case, the Supreme Court highlighted that prompt medical assistance must be given to injured persons to safeguard life. This responsibility extends to the state and

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<sup>38</sup> *Montgomery v NHS Lanarkshire* [2015] UKSC 11.

<sup>39</sup> *Webster v Burton Hospitals NHS Foundation Trust* [2017] EWCA Civ 62.

<sup>40</sup> Omprakash V Nandimath, "Consent and medical treatment: The legal paradigm in India," *Indian Journal of Urology* 25, no. 3 (2009): 345, doi:10.4103/0970-1591.56202.

<sup>41</sup> Sujit Das, "Right to Emergency Medicare-A Landmark Judgment :," *Economic and Political Weekly*, last modified October 26, 1996, 2851. <https://www.epw.in/journal/1996/43/commentary/right-emergency-medicare-landmark-judgment.html>.

<sup>42</sup> *Ibid* 2852.

<sup>44</sup> Murray Rachel, "Right to Liberty and Security of the Person," *The African Charter on Human and Peoples' Rights*, 2019, xx, doi:10.1093/law/9780198810582.003.0007.

<sup>45</sup> *Pt Paramanand Katara v Union of India and Ors*.1989(4) SCC 286

doctors too. The Indian Supreme Court finally decided on the 6<sup>th</sup> of May 1996. The Supreme Court held that the government's responsibility is to protect the welfare of the people. This responsibility includes appropriate medical treatment, and facilities must be provided for the people by the healthcare centres as well as hospitals.<sup>46</sup> The medical professionals hired by the state to work in government hospitals are duty-bound to continue providing medical assistance to preserve human lives. Articles 32 and 226 of the Constitution allow the court to provide appropriate compensation through redress in proceedings due to the deprivation of constitutional rights reaffirmed under Part III of the constitution.<sup>47</sup> Hakim Sheikh was compensated for the failure of the government hospital to render appropriate medical treatment which was a violation of his fundamental right ascertained under Article 21 of the Indian Constitution.<sup>48</sup>

The court emphasized further that every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or state action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation of a doctor is total, absolute, and paramount. Laws of procedure, whether in statutes or otherwise, that would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.<sup>49</sup>

### **Canada**

There has only been one Canadian case that discussed the issue of the duty of a physician to treat an emergency patient. *Egedebo v. Windermere District Hospital Association*<sup>50</sup> was decided by the British Columbia Court of Appeal in 1993. In this case, a doctor was on the job but not on call in the emergency department when a patient needed emergency care.

The doctor said the patient should wait to be attended to by the on-call physician, although he knew the physician was busy. The patient experienced perpetual injuries. The court held that although the doctor was not on duty, there was still a proximity of relationship between the patient and the doctor. It was reasonably foreseeable that the doctor's acts or omissions would affect the patient. The doctor breached the duty of care because any reasonable physician would have known that his failure to provide treatment and that no other physician was free at that time would jeopardise the patient's health. The court went on to state that the physician has the duty to provide aid, treatment and

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<sup>46</sup> Sujit Das, "Right to Emergency Medicare-A Landmark Judgment", 2851.

<sup>47</sup> Rudal Sah v State of Bihar, 1983 (3) SCR 508; Nilabati Behara v State of Orissa, 1993 (2) SCC 746; Consumer Education and Research Centre v Union of India, 1995 (3) SCC 42]. As stated in Sujit Das, 'Right to Emergency Medicare A Landmark Judgment' (1996) 31 Economic and Political Weekly 2851

<sup>48</sup> Sujit Das, "Right to Emergency Medicare A Landmark Judgment" 2852.

<sup>49</sup> Pt. Parmanand Katara v Union of India. AIR 1989 SC 2039.

<sup>50</sup> Egedebo v. Windermere District Hospital Association, [1991] BCWLD 1992, BCI no 2381 (QL) (BC SC), aff'd (1993), 78 BCLR (2d) 63, 22 BCAC 314, 38 WAC 314 (BC CA), leave to appeal to SCC refused 80 BCLR (2d) xxvi (note), 157 NR 319 (note), 32 BCAC 240 (note), 53 WAC 240 (note) (SCC).



care.<sup>51</sup>

Section 9 of the Canadian Medical Association's Code of Ethics<sup>52</sup> stated that physicians must give practical support to any individual in urgent need of medical care.<sup>53</sup> The courts have taken ethical considerations in establishing a duty of care to emergency patients.

The Ontario Court of Justice (General Division) in the case of *Baynham v. Robertson*<sup>54</sup> proved that if a hospital decided to stop its emergency services, then it must take reasonable measures to notify the public. This decision was influenced by public policy and the reliance principle.<sup>55</sup>

The court cited the decision of the Ontario Court of Appeal in *Yepremian v. Scarborough General Hospital*<sup>56</sup> which stated that hospitals have a direct duty to serve non-negligent medical treatment, as this echoes the relationship between hospitals and the public in society. Moreover, hospitals primarily hold out to the public that they provide treatment and care services.

## Pakistan

There are several laws on the rights of patients in medical treatment at the federal and provincial levels. After the 18<sup>th</sup> amendment, provinces have laws regulating medical cases. The National Health Care Bill, 2017, was introduced in National Assembly for approval which deals with patients' rights in emergency medical treatment. Section 3 of The National Health Care Bill, 2017 provides patients with the right to medical care and humane treatment. Similarly, section 4 deals with the patient's right to consent, and doctors are bound to disclose all the risks clearly and the side effects of treatment to the patient and all the treatment procedures and their purpose. However, there are some exceptions in emergency cases, in which exigency treatment is necessary for safeguarding the life without disclosure of means of treatment. In other words, if the treatment by law is compulsory and the public interest is involved, consent can also be ignored for the public interest. There are also charitable organizations in Pakistan that provide services for emergency medical situations, e.g. blood banks and ambulance services. These organizations provide support to the government to deliver healthcare Services.<sup>57</sup> Currently, some provisions of the Pakistan Penal code 1860 are also applicable to medical negligence cases in general and do not specifically deal with patients' rights in the emergency room. The Mental Health

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<sup>51</sup>Marésa Cronjé-Retief, "Chapter 3 Hospitals The Hospital in Perspective," Brill, last modified January 1, 2002, [https://doi.org/10.1163/9789004478152\\_006](https://doi.org/10.1163/9789004478152_006).

<sup>52</sup> Code of ethics of the Canadian Medical Association. Ottawa: Canadian Medical Association; 1996. <[http://www.cma.ca/cma/common/displayPage.do?pageId=/staticContent/HTML/N0/I2/where\\_we\\_stand/1996/10-15.html](http://www.cma.ca/cma/common/displayPage.do?pageId=/staticContent/HTML/N0/I2/where_we_stand/1996/10-15.html)> accessed 14 January 2002. As stated in Anne F. Walker, The legal duty of physicians and hospitals to provide emergency care (2002) 19 JAMC 19 FÉVR. 166 (4) 467.

<sup>53</sup> Ibid,468.

<sup>54</sup> Baynham v. Robertson (1993), 18 CCLT (2d) 15 (Ont Gen Div). As stated in Anne F. Walker, The legal duty of physicians and hospitals to provide emergency care JAMC 19 FÉVR. 2002; 166 (4) 467

<sup>55</sup> Ibid

<sup>56</sup>Yepremian et al. v. Scarborough General Hospital et al. 20 O.R. (2d) 510, 1980.

<sup>57</sup> Muhammad Hanif Shiwani, Amin A. Muhammad Gadit, "Medical negligence: A growing problem in Pakistan", *Journal of the Pakistan Medical Association* 61 no. 1 (2011), 611. <https://pubmed.ncbi.nlm.nih.gov/22204225/>

Ordinance of 2001 and many other laws deal with doctors' medical duties and liabilities. However, despite all these initiatives, Pakistan still needs vital medical emergency care because of the number of deaths due to the negligence of doctors in the emergency room.<sup>58</sup>

In Pakistan, a myriad number of medical negligence cases can be found. *Mrs. Parveen Azad Vs. The Administrator/ Chairman of the National Medical Centre* is one of the medical negligence cases, but unfortunately, the suit was barred due to limitation law. In this case suit for compensation is filed by the deceased wife after three years.<sup>59</sup> Plaintiff's husband's death occurred due to the doctor's negligence in the emergency room. As the patient was suffering from a temperature of 126 F, the doctor started treating him for malaria and typhoid before the test result was reported. There is a general Principle of Criminal Law that; "every sane is presumed to intend the natural consequences of his act". Doctors who attained the degree and license of medical practice are presumed to foresee the consequences of their actions and are solely responsible for their acts.<sup>60</sup> The Lahore High Court noted that; Medical matters require checking on doctors who may mishandle patients during treatment.<sup>61</sup> In *Muhammad Aslam versus Dr. Imtiaz Ali Mughal*<sup>62</sup> the court held that the negligence of a doctor is a criminal offence. On the other hand, the child, 14 years of age name Salman Muhammad Afzal died in District Head Quarter Hospital Khaniwal due to the negligence of doctor Dr Zeshan Haider. The doctor did not examine the child and disappeared after signing the duty roster. This matter was referred to the Inquiry Committee of the District Health Officer of Khanewal. The committee decided the case in favour of the plaintiff, held Dr Zeshan Haider liable for his act and dismissed him from the job.<sup>63</sup> Medical treatment with proper care is also a constitutional right in Pakistan. Art.9 of the 1973's constitution of Pakistan provides the right to life.<sup>64</sup> It is a fundamental right that imposes a duty on the state to ensure citizens' right to life properly. Supreme Court of Pakistan held that Art. 9, Right to life, covers all aspects of life including medical care for purpose of protection of life.<sup>65</sup> As we know, human life is the most precious, so there is a need to adopt proper standards of care for patients. The duty of proper care is the right of patients and the obligation of doctors. Doctors who have attained their MBBS degrees and have had practical experience in their field are also presumed to know what the consequences/side effects of their prescribed medicines may be. Therefore, doctors cannot pin liability solely on the hospital, as

<sup>58</sup> Syed Saleem et al., "Bridging the Gap in Emergency Medicine in Pakistan," *West JEM* 21.2 March 21, no. 2 (2020): 234, doi:10.5811/westjem.2019.10.44502.

<sup>59</sup> *Mrs. Parveen Azad Vs. The Administrator/ Chairman of the National Medical Centre*, Suit No. 866 of 2013.

<sup>60</sup> Amna Iqbal, Medical Malpractice: An Alarming Situation in Pakistan, October 4 (2019) *Courting the Law*, <https://courtingthelaw.com/2019/10/04/commentary/medical-malpractice-an-alarming-situation-in-pakistan/>, n.d

<sup>61</sup> *Dr. Naik Parveen vs. DCO Multan*, 2017 CLC 1150.

<sup>62</sup> *Muhammad Aslam vs Dr Imtiaz Ali Mughal*, PLD 2010 Karachi 134.

<sup>63</sup> "Probe body finds doctor guilty of negligence," *Tribune News*, August 24, 2022, accessed December 13, 2022, <https://tribune.com.pk/story/2372764/probe-body-finds-doctor-guilty-of-negligence>.

<sup>64</sup> Article 9, The Constitution of Pakistan, 1973.

<sup>65</sup> Zarfishan Qaisar, "Critical Analysis of Medical Malpractice Laws in Pakistan: An Expedition from Enactment to Opulent Enforcement," *Pakistan Social Sciences Review* 5, no. 1 (2021): 36, doi:10.35484/pssr. 2021.

the primary responsibility is on the doctors. In contrast, hospitals may be held liable under the principle of vicarious liability in this regard. There is an intense need to implement health care standards in Pakistan. There is a need for medical training sessions for medical professionals from time to time for the legal protection and care of patients. For proper medical care of patients, a training programme is started in different Hospitals in the country to take the initiative of adequately trained staff to deal with emergency cases. However, there is still a need for well-trained doctors from time to time because of technological development. The assessment of professional competency is also needed at regular intervals. There is also a need for compliance with strict laws, and medical negligence cases should be adopted, holding doctors liable by criminal penalties.

### Islamic Law

The profession of Medical is most important for society because it is a profession of humanity. After all, it benefits the citizens as it is a profession of humanity, so it imposes a standard of proper care on medical practitioners.<sup>66</sup> Allah imposes a duty of care in Surah Al Maida: "And if anyone saved a life, it would be as if he saved the life of the whole people".<sup>67</sup> It is a general rule that Doctors must perform the duty of care while treating their patients.<sup>68</sup> If a person treats another person without knowing that specific field, he will be held liable for that act under strict liability. In this situation, the patient needs not to prove actual damage against the person who offers the treatment. The principle of strict liability is based on the Hadith: "Whosoever treats people without knowledge of medicine before that becomes liable".<sup>69</sup> On the other hand, if a person has knowledge of a specific field or profession and he inflicts harm, then He will be accountable for his actions according to the rules and regulations implied on him.<sup>70</sup> According to Imaam Shafi, "A doctor is liable to pay compensation if he is negligent."<sup>71</sup>

According to Imam AI-Nawawi, a Shafi follower states; "A surgeon who bleeds a patient or applies leeches to him does not incur any responsibility, even though the sick man succumbs, provided that the operator does not overstep the limits imposed by science in operations of that nature."<sup>72</sup>

Ibn Qudamah expresses his statement for the medical negligence; "A surgeon who, on proper authorisation, bleeds anyone or applies leeches to him, is in no way responsible for the consequences and an executioner who carries out a sentence of death or of flogging upon the authorisation of the Sovereign is merely

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<sup>66</sup> Puteri N. Kassim, "Medical Negligence in Islamic Law," *Arab Law Quarterly* 20, no. 4 (2006): 405, doi:10.1163/026805506779147274.

<sup>67</sup> The Holy Quran 5: 32.

<sup>68</sup> Liaquat Ali Niazi Khan, *Islamic Law of Tort* (Lahore: Dayal Singh Trust Library, 1988), 179.

<sup>69</sup> Aba Dawrd, *Attah ad-Thyat*, Cairo: Matba'ah Mustaf., n.d., Vol. 18, at p. 108.

<sup>70</sup> Dr Puteri Nemie Jahn Kassim, *Medical Negligence In Islamic Law*, 401.

<sup>71</sup> Imam al-Shafi'!, *KItab al-Umm*, 6th Ed., Cairo: Matba'ah al-Kubra, 1325H, at p. 175.

<sup>72</sup> AI-Nawaws, Muhiudin 'Aba Zakaria Yahya bin Sharif, *Minhaj-et-Talibiw A Manual of Muhammadan*, (Lahore: Law Publishing Company, 1977), 454.

the latter's instrument, unless he knows that the order is from a tyrant, or given in error. In these two cases, he would be liable under the law of talion, unless acting under violent compulsion." <sup>73</sup>

According to A1-Marghinani, the author of al-Hidyyah: "If a surgeon operates phlebotomy in any customary part of the body, he is not responsible in case of the person dying in consequence of the such operation." This is the view taken by Al-Mabsot... "The ground on which the law proceeds in this particular area is that the operators cannot guard against consequences, as those must depend upon the strength or weakness of the constitution in bearing any disorder or pain, and as this is unknown, it is therefore impossible to restrict the work to the condition of safety." <sup>74</sup>

There are three requirements for patient treatments in Islam. One is the patient's consent; the second is the permissibility by the authority, which means the doctor must be qualified to conduction of the treatment of the patient and the third one is the necessity to follow the code of conduct for the treatment of patients. The doctor is bound to follow the code of practice allowed by the law while practising the medical profession, e.g. medical license is compulsory for the doctor and without obtaining a license, he cannot practice the medical profession. Statement of Holy Prophet Muhammad, peace be upon him, narrated by Abdullah bin Amr bin Al-Aas that; "Whoever practices medicine, without being qualified, he will be held liable." <sup>75</sup> This Hadith shows that medical qualification is compulsory for medical practitioners, without medical knowledge, they cannot treat patients.

### **Reforms and Recommendations**

(i). Good Samaritan laws protect persons who assist injured others. Such laws have historically been intended to reduce bystanders' hesitation to assist an injured party, for fear of being sued or prosecuted for unintentional injury or wrongful death. In India, road accident deaths and disabilities resulting from accidents could be drastically reduced if proper care is provided to the victim at the critical "Golden Hour", during which there is the highest likelihood that prompt medical treatment will prevent death. Bystanders and Good Samaritans are therefore vitally important in preventing disability and death. In this regard, protocols for bystanders need to be disseminated publicly while protecting laws.

(ii). The Supreme Court in India approved the suggestions by an enquiry committee appointed by the state government in the case of *Paschim Banga Khet Majoor Samiti (West Bengal Farm Labourers' Association)*. The enquiry committee announced several directions to the government that will be implemented in the government hospitals to deal with emergency patients. Firstly, appropriate facilities are available at the primary health centres whereby patients can be

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<sup>73</sup> Ibn Qudamah, *Mu'jam al-Fiqh al-Hanbali, Mustakhlis Min Kitab al-Mughm*, (Kuwat: Al-Matba'a al-asariyya, 1973) 804.

<sup>74</sup> Hamilton, C., *Hedaya* (Lahore: Premier Book House, 1975), 504-505.

<sup>75</sup> Nasiruddin al-Khattab, English Translation of Sunan Abu Dawud, op.cit., Hadith no. 4586, Vol.5, 149.

provided with primary treatment to stabilize their condition.<sup>76</sup> Emergency preparedness of hospitals needs to be gauged by courts on the principle of the right to life so that there is no dereliction by governments in this regard. Chief Justice Saqib Nisar set one such precedent in Pakistan under his suo-moto jurisdiction by visiting hospitals. Emergency preparedness at hospitals should receive fundamental importance from governments, being a fundamental right.

(iii.). District and sub-divisional hospitals should be enhanced to treat severe cases. Lastly, specialist treatment needs to be upgraded due to increased demand.<sup>77</sup> All these measures could improve doctors' duty to emergency patients in India.

Concerning Malaysia's state of the law on doctors' duty to emergency patients, the Federation of Private Medical Practitioners' Association of Malaysia ("FPMPAM")<sup>78</sup> has recommended the implementation of the "Good Samaritan Clause" in relevant legislation, in particular, the Private Healthcare Facilities and Services Act 1998 and its Regulations,<sup>79</sup> which essentially should state that "short of gross negligence or professional incompetence, doctors providing free and voluntary emergency care for such patients that are brought to the clinics, should be protected from liability."<sup>80</sup>

This will be considered fair since the law safeguards those who need help and those who lend assistance. Due to this, most American states enforced "Good Samaritan statutes."<sup>81</sup> to protect the "Good Samaritan" from legal liability. This can be illustrated whereby the law specifically states that "whoever in good faith provides emergency (and sometimes non-emergency) medical services shall not be civilly liable unless their acts constitute wanton misconduct".<sup>82</sup> The reasoning behind the Good Samaritan legislation is to get the better of the stringent rules of the common law which does not favour a general duty to rescue. The legislation encourages healthcare professionals to provide emergency treatment despite no duty. This will ensure that healthcare professionals will not be responsible for disastrous consequences if they have acted reasonably in that circumstance.<sup>83</sup>

The Good Samaritan doctrine is defined in Black's Law 7th edition as 'The principle that a person who is injured while attempting to aid another in imminent danger and who then sues the one whose negligence created the danger, will not

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<sup>76</sup> Sujit Das, "Right to Emergency Medicare-A Landmark Judgment .," *Economic and Political Weekly*, last modified October 26, 1996, <https://www.epw.in/journal/1996/43/commentary/right-emergency-medicare-landmark-judgment.html>.

<sup>77</sup> Ibid

<sup>78</sup> Chang, Keng Wee, Dr, the honorary secretary of FPMPAM, mentioned this point in his article "The PHFS Act (1998) and Regulations (2006) an Update" *New Straits Times*, (Kuala Lumpur, 17 September 2006).

<sup>79</sup> Private Healthcare Facilities and Services Regulations 2006.

<sup>80</sup> Chang, Keng Wee, Dr, "The PHFS Act (1998) and Regulations (2006) an Update" *New Straits Times*, (Kuala Lumpur, 17 September 2006).

<sup>81</sup> California passed the first state statute pertaining to Good Samaritan law in 1959, and the rest of the states eventually followed. Some of Canada's provinces have also passed "Good Samaritan" laws such as Good Samaritan Act 2001 (Ontario), Emergency Medical Aid Act 2000 (Alberta), Good Samaritan Act 2001 (British Columbia), Volunteer Services Act 1989 (Nova Scotia).

<sup>82</sup> K. Williams, "Are Doctors Good Samaritans?" *Medico-Legal Journal* 71, no. 4 (2003):165, doi:10.1258/spmlj.71.4.165.

<sup>83</sup> However, circumstances that dictate a pre-existing duty to act preclude protection under Good Samaritan laws. For example, healthcare professionals acting as hospital employees are ordinarily responsible for rendering emergency care to patients. Their general duty precedes the emergency, so protection cannot be invoked. As stated in 'Should, Doctors Play the Role of Good Samaritans?' (2008) LR 1, 5

be charged with contributory negligence unless the rescue attempt is an unreasonable one or the rescuer acts unreasonably in performing the attempted rescue.

(iv). It is also proposed that extreme emergency treatment at every hospital regardless of status (public or private) should be obligatory upon hospitals and reimbursement for private hospitals delineated through appropriate government incentives. This is so because doctors are under oath to protect patients, and any delay can result in a mishap. The provision of extreme emergency treatment can be created by governments for a person in need at a private hospital by creating a situation of contract towards the public of private health professionals and hospitals.

(v). The patients should be informed as far as possible of the choices available to them, particularly in the cases of mental health where there is most likely to be a breach of informed consent.

(vi). From the above analysis of different jurisdictions, it also emerges that the law does not bind health professionals to protocols in cases of emergency, which then may be assessed in court proceedings for gauging misconduct. It is suggested that the law should bind health professionals in emergency cases to specific duty protocols.

(vii). Islamic law has provided detailed guidelines in case of medical negligence. It is suggested that same may be incorporated into laws in the interest of the masses. Islamic law provides unqualified damages if a person without knowledge gives treatment.<sup>84</sup> Similarly, informed consent and the duty to follow a code of practice are mandatory.<sup>85</sup> Further civil liability for breaches involving medical negligence is prescribed in Islamic law.

(viii). Where health professionals can show that there was prima facie no misconduct, the burden of proof should always be shifted to the plaintiff. Moreover, there should be no criminal liability, and only civil liability should be the appropriate mode of prosecution in cases of gross negligence in medical.

## **Conclusion**

Based on the discussion, serving patients effectively requires both scientific and technical competence, knowledge of what can be done, and moral competence, knowledge of what should be done. The common law has been striving to achieve consistency concerning moral obligations along with presumptions of society for some time now. This can be seen via the initiation of the Good Samaritan legislation to overcome the rigidity of the common law. Moreover, the courts consider policy considerations as well as the reasonableness of conduct in constructing the law. This has indirectly paved the way for a more conscious and protective society. This has strengthened altruistic behaviour in

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<sup>84</sup> Pateri Nemise John Kassim, "Medical Negligence in Islamic Law", 400.

<sup>85</sup> *Ibid*, 401.

society. In conclusion, an appropriate regulatory or governing framework must be in order to cultivate humanitarianism and prevent possible rescuers from liability. Islamic law legal framework can be of assistance in this regard too.

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