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ON
MEDICAL NEGLIGENCE; ERRORS AND INADEQUACIES IN
BANGLADESH'S LEGAL SYSTEM

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Declaration

I, Rafiul Hasan Suny, declared that I have completed this research work as a requirement of my bachelor of law degree at East West University. I state that I do this research work and it has not been published or submitted to be published previously in any journals in any form. I also declare that the information derived from any published and unpublished work of others has been appropriately acknowledge.

List of Abbreviation

ASK	Ain O Salish Kendro
BMDC Act, 2010	The Medical Practices, Private Clinics, and Laboratories (Control) Ordinance, 1982
MPPCL (Control) Ordinance, 1982	National Health Policy, 2011
NHP of 2011	The Consumer Protection Act, 2009
CP ACT, 2009	The Consumer Protection Act, 2009
PIL	Public Interest Litigation

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Abstract

Medical negligence is being practiced terribly in hospitals all over the world. It occurs on a daily basis, somewhere in the world. Medical negligence is not a recent phenomenon. Bangladesh is not also lagging behind in terms of medical negligence, but it is becoming increasingly prevalent. Which is a huge concern at present time? Even the slightest instances of medical negligence are severely punished around the world, yet in Bangladesh, the number of medical negligence s is staggering. Newspapers keep publishing and criticize, but negligence persists. A major reason for this is the country's weak legal framework, which helps the accused to readily escape responsibility from medical negligence. The primary objective of this study is to explore the legal structure that governs medical negligence, to shed light on the present difficulties of medical negligence in Bangladesh and to discuss the current provisions and errors in laws relating to medical negligence. The results show that no separate law has been enacted in Bangladesh on medical negligence. Moreover, much of what is said in various laws concerning medical negligence is flawed, vague, which discourages a victim from seeking justice. The study further said that medical negligence could be reduced if proper effective legislation was enacted and errors in existing laws were corrected and clarified, as well as strict monitoring of hospitals in the country.

Chapter One

Introduction

1.1 Introduction:

Medical negligence arises when a doctor or nurse, through their acts or omissions, fails to meet established medical standards of care. A breach of this standard of care might lead to the failure of a critical diagnostic test, the prescribing of the wrong medication, or even a serious surgical error. Our society is familiar with the term “medical Negligence”. News of medical negligence is being published regularly in newspapers. Although only a handful of incidents were reported, most of them were suppressed. Despite the application of innovative and sophisticated technology in several healthcare facilities in our country, it is widely believed that a significant portion of the population of Bangladesh does not depend on national healthcare providers for treatment. Because of this, the Medical professionals have been regularly treating patients with inappropriate treatment for a long time by their dominating nature which affected the patient bitterly.

One of the major reasons for this is, victims have received few legal remedies as no effective medical negligence legislation has been enacted, and as a result, medical negligence occurs often in hospitals. As either a consequence, medical negligence is widespread in Bangladeshi hospitals, with one of the major reasons being the country's weak legal structure, which includes errors in the law, ambiguity, a lengthy procedure system, a lack of knowledge about where to sue, and high court fees, all of which discourage patients from suing and allow the accused to easily avoid their liability, in terms of which the medical professionals in Bangladesh use their professional incompetence to the maximum advantage, believe that they are not subject to the law. As well as the higher authorities join hands with the wrongdoer out of greed, not even taking any appropriate action against the accused. As a result, the situation is worsening as they spend more time in their private clinics or chambers to earn more money and have less time to treat patients, which is now a major concern for Bangladesh. Furthermore, In Bangladesh, medical negligence has persisted for a long time. In contrast, owing to a lack of law enforcement, the country's healthcare system is poorly organized and many patients are harmed.

1.2 Thesis Question:

The main thesis question is, whether the existence laws of Bangladesh dealing with Medical Negligence is sufficient or not?

1.3 Objectives of the Thesis:

Objectives of the thesis are,

- 1) To study the current scenario of medical negligence that affects the health care system of Bangladesh.
- 2) To study current existing laws and regulations relating to medical negligence.
- 3) To find out errors in existing laws on medical negligence in Bangladesh.

1.4 Literature Review:

There is a lot of research about medical negligence. But no significant research has been done on the loopholes in the law on medical negligence. However, the goal of the study is to evaluate no enacted law has been made. Even no such study has been done. Due to time and scope, only a few papers and journals are reviewed. However, just a few relevant talks can be reviewed. Khandakar Kohinur Akter in her paper, “A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practices” addressed the effectiveness of medical negligence in law and its loopholes that affect the health care system of Bangladesh . Md. Rafiqul Islam Hossaini in his paper name,'Medical Negligence and its Constitutional Protections in Bangladesh' Discusses the constitutional right to medical negligence and the limitations of judicial review (PIL).

1.5 Methodology:

This study is mainly based on qualitative analysis that has been conducted with assistance from the data from both primary and secondary sources. Some legal provisions are used as primary sources, books, articles, newspaper writings were the secondary sources of this paper. Although substantial use has been made of the information from journals and websites, the quantity of references gathered from newspapers and books registered.

1.6 Limitations:

Different books, papers, etc. are being studied here, but the resources are not enough and very important research is available here. Web documents in the field of research are also limited; they are too many to download or read subscriptions. Therefore, the lack of access to relevant materials was a constraint on this work.

Chapter Two

A Comprehensive Discussion of Medical Negligence

Medical negligence occurs without adequate care by a physician and even patients are injured due to negligence of their duties, which is currently increasing at a massive rate and patients suffering from lack of proper knowledge in this regard are being deprived of proper justice. This chapter will discuss the theoretical aspects of negligence and medical negligence as well as the history of medical negligence.

2.1 Definition of Negligence

In a general sense, the simplest definition of negligence is that it is a precaution, a failure to act reasonably and that this failure has caused some damage¹. The conduct of negligence may consist with act or omissions, reasonably dangerous actions, or omission of precautions against danger². Furthermore, the word "Negligence" may be defined as a careless act done by person that occurred civil liability in Law of tort³. Moreover, the term "negligence" is defined as refraining from doing something that a reasonable person would be directed to by considering that which normally controls the behavior of human beings, or doing something that a prudent and reasonable person would not do⁴. **L.B Curzon** addressed negligence as a breach of a legal duty, breach of right which caused damage to the claimant⁵. In a narrow sense, negligence is conduct carelessness but in strict legal analysis, negligence means more than carelessness, be it exclusion or commission: it refers to the complex concept of proper responsibility, breach, and loss resulting from the person to whom the responsibility was due⁶. Now the point is how does negligence work? The action will be considered as negligence, if the plaintiff had suffered a 'foreseeable' injury due to the failure of the reasonably careful person to provide reasonable care.

2.1.1 Elements to prove Negligence

As we have known about the actual concept of negligence but to prove negligence there must be contained with these four elements. 1. Duty of Care 2. Breach of that Care 3. Legal Causation 4.

¹ The Basic Definition of negligence, Grabb, and Durando, May 31, 2020
<<https://grabbanom/blog/the-legal-definition-of-negligence>> Accessed on 20 march, 2022.

² Henry T. Terry, 'Negligence; Harvard Law Review' (Nov 1915)29, PP 40

³ MD, Rafiqul Islam, 'Medical Negligence and its constitutional protections in Bangladesh', Bangladesh Law Digest, October 26, 2016, <<https://bdlawdigest.org/constitutional-protection-and-claims-for-medical-negligence-in-bangladesh.html>> Accessed on March 17, 2022.

⁴ Blyth vs. Birmingham Waterworks Co. (1856)11 EX.78.

⁵ Curzon, L.B. and Richards, P., 2007. The Longman Dictionary of Law. Pearson Education

⁶ Lochgelly Iron and Coal Co v McMullan (1934) AC 1 at 25.

Damages. All these things must be satisfied. Even if one is not satisfied then the applicant cannot establish that the respondent was negligent⁷. These four elements are described below:-

Duty of Care: Is a legal obligation of a person to refrain from doing any act which caused damage or injury to another even if obligation has not taken⁸. In general sense a person's duty of care is to not harm others through negligence. For instance, a driver has an obligation to other road users not to cause an accident. They have such a duty of care to other road users. Moreover, That the person have an "reasonable care" which addressed as the level of caution and concern for one's own safety and the safety of others will generally be used by the prudent and rational person in the same situation⁹That means reasonable care refers to the level of "as" care that a person would reasonably use with caution in similar or similar situations¹⁰. Furthermore Failure to exercise such care which causes injury to others can result in liability.

Breach of that Duty: Failure to comply with the obligation to act in a certain way in a peculiar situation¹¹. To determine a breach there must be reasonable care. Failure of such a care is known to be a breach of that duty¹². Furthermore, such failure of act shall be addressed as a foreseeable. That means, if something is foreseeable, it is possible and predictable consequence of the negligence or inaction of the accused¹³. Furthermore, an injury is foreseeable "if a reasonably careful person, in the same or similar circumstances, assumes that a person's injury in the plaintiff's situation may be the result of the defendant's conduct.

Legal Causation: The breach of duty must be the actual cause and the proximal cause of the harm to a person. That means failure to use reasonable care to avoid foreseeable harm to an individual or his property¹⁴.

Damages: The law provides a way to seek compensation or compensation for injuries and damaging effects when someone is injured by another¹⁵.

After the conclusion to prove negligent act, the reasonable person must breach of such standard of care which he owed to foreseeable harm to a person.

⁷ Ibid.

⁸ Ibid.

⁹ Defining Reasonable care and negligence, Lauenstein Law Firm, (June 19, 2017)
< <https://www.lauensteinlaw.com/news/2017/06/19/defining-reasonable-care-and-negligence/> > Accessed on March 24, 2022.

¹⁰ Four elements of negligence Claim and more, Griffiths Law,
< <https://www.griffithslawpc.com/resources/elements-negligence-claim/> >, Accessed on March 22, 2022.

¹¹ Negligence, Legal services commission south Australia,
< <https://lawhandbook.sa.gov.au/ch01s05.php> > Accessed on 22 March, 2022.

¹² Ibid

¹³ David Berg, Foreseeability in a personal injury case, Lawyears.com, (March 1, 2022).
< https://www.lawyers.com/legal-info/personal-injury/personal-injury-basics/what-is-foreseeability-in-a-personal-injury-case.html?_cf_chl_tk=GTQQEeZmpAuvcMMcbkVozCDZjK1SpKyAryfk2qTrQ9M-1648681442-0-gaNycGzNCKU > Accessed on March 22, 2022.

¹⁴ Enjuris Editors, Causation in negligence cases, Enjuris,
< <https://www.enjuris.com/personal-injury-law/causation.html> > Accessed on 20 March, 2022.

¹⁵ Ibid

2.2 Definition of Medical Negligence

The word “Medical negligence “ defined as a neglect of a professional responsibilities or failure to practice a general degree of professional competence or to provide professional services to an individual (such as a physician) results in injury, loss or damage¹⁶. Medical negligence is a failure of an act or omission by a medical professional that deviates from recognized medical standards of care. Medical negligence occurs when a medical professional fails to meet the standard of care that seriously injured a patient. Breach of such standard of care may fail a required diagnostic test, prescribing the wrong medication or making a serious mistake during surgery that could result in serious injury to the patient by a physician¹⁷. The law acknowledges that certain medical standards are recognized by the profession, such as, or in similar circumstances, acceptable treatment by reasonably qualified healthcare professionals. If the physician failed to meet such care then negligence may be established.

2.2.1 Standard of Care

The legal definition of the term "standard of care" is often misunderstood. The concept is often discussed among physicians¹⁸. The standards of care prescribing, a duty to care with appropriate treatment to their patients by a medical professional¹⁹. That means it is a level of care that should exercise by a professional²⁰. A decision has given, Bolam v Friern Hospital has taken, for a long time professional negligence has stood as a recognized standard of care because it is 'reasonable skill and care'²¹.

2.2.2 Res Ipsa Loquitur

Res ipsa loquitur is a Latin term meaning "thing speaks for itself"²². In the case of medical negligence, this means that the consequences would not have happened if no one had been negligent²³. The following things are needed to prove the components of res ipsa loquitur:

¹⁶ Malpractice, Merriam Webster

< <https://www.merriam-webster.com/dictionary/malpractice> > Accessed on March 23, 2022.

¹⁷ Exercise the standard of care resulting in medical malpractice in Maryland, Gilman and Bedigian

< <https://www.gilmanbedigian.com/what-does-it-mean-to-fail-to-exercise-the-standard-of-care/#:~:text=Medical%20malpractice%20occurs%20when%20a,mistake%20during%20a%20surgical%20procedure> < Accessed on March 22, 2022.

¹⁸ Ibid.

¹⁹ Yvette Brazier, what is medical malpractice, Medical news today, April 5 2017,

< <https://www.medicalnewstoday.com/articles/248175> > Accessed on March 23, 2022.

²⁰ Ibid.

²¹ *Bolam v Friern Hospital* [1957] 1 WLR 582.

²² Res Ipsa Loquitur and Evidence Law, FindLaw, (November 29, 2018)

< <https://www.findlaw.com/injury/accident-injury-law/res-ipsa-loquitur.html#:~:text=Res%20ipsa%20loquitur%20is%20a,defendant%20through%20the%20use%20of> > Accessed on March 23, 2022.

²³ Raynes and Lawn, In medical malpractice what are the key facts required to prove medical malpractice, Raynes and Lawn, (August 12, 2020)

- If there was no injury, there would be no negligence²⁴.
- The injured person is not responsible for his or her own injuries²⁵.
- Exclusive control goes to the defendant who caused the injury²⁶.
- The injury could not have been caused by anything other than the apparatus under the regulator of the accused²⁷.

2.2.3 Essential Elements to Prove Medical Negligence

Some Legislation has been enacted to prove medical negligence²⁸. If the party wants to prove medical negligence, they have to prove some reasons at the same time. The following elements need to be established to prove medical negligence:

- The physician fails to provide a reasonable standard of care or otherwise neglects the patient's treatment²⁹.
- Lack or negligence of physician care directly contributes to the injury or harm of the patient³⁰.
- The patient has suffered injuries or other injuries that are directly related to the treatment received from the physician³¹.

2.3 History of Medical Negligence

The history of medical negligence dates back numerous centuries. Indeed, the first identifiable phenomenon of medical practice was found in 1374. It was stimulated by a surgeon who tried to repair his patient's broken arm. However, even after the treatment, the patient's hand became malformed³². But unfortunately, that case has been terminated because of a procedural mistake. The Hammurabi Code is one of the oldest long texts in the world which first introduces medical negligence as an offense in law. The Babylonian Code consists of 1794 BC and 282 laws. According to one section, the doctor should be punished if the patient is harmed³³. In 1794, the United States witnessed its first medical error³⁴. Plaintiffs claim that a doctor promised to operate efficiently, but did the

< <https://rayneslaw.com/what-are-the-key-facts-required-to-prove-medical-malpractice/> > Accessed on 22 March, 2022.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Albert Hirst, Essential Elements needed to prove medical malpractice in the state of California, Albert E. Hirst, (Feb 2, 2020).

< <https://www.socialworkerscompensation.com/essential-elements-needed-to-prove-medical-malpractice-in-the-state-of-california/> > Accessed on March 23, 2022

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Naomi Anderson, Physicians News Digest

< <https://physiciansnews.com/2017/05/10/brief-history-medical-malpractice/> > Accessed on March 25, 2022

³⁴ Ibid.

opposite. The plaintiff's wife died as a result of the operation. Plaintiff won the case³⁵. In the earliest Indian medical literature, the term "mithya" has been used to describe careless, misleading, erroneous and inappropriate treatment. It has been said that doctors who misbehave or treat are responsible for the punishment and the amount of punishment varies according to the condition of the victims i.e. 500 pana³⁶.

2.4 Concluding Remarks:

Therefore, according to the Law of Torts, "negligence" refers to an act of carelessness that resulted in civil liability. Legal standards of negligence go beyond simple carelessness in the course of daily activities and extend to a wide range of wrongdoing. Due to its complexity, it alludes to the concept of adequate duty and its subsequent breach and loss. Medical malpractice occurs when a doctor or nurse fails to follow accepted medical standards of care, either via their acts or their failure to act. A lapse in this standard of care could result in the failure of a vital diagnostic test, the prescription of the incorrect medication, or even a severe surgical error. So it can be said that medical negligence has been going on in this world since ancient times and it is still continuing. Its prevalence in Bangladesh has been going on for ages and its victims have received very few legal remedies due to no proper law on medical negligence has been enacted and in view of this, medical negligence is constantly occurring in the hospitals.

³⁵ Ibid.

³⁶ Khandakar Kohinur Akter, 'A contextual Analysis Of The Medical Negligence In Bangladesh:Laws and practices',(2013)6.pp 67

Chapter Three

Current Scenario of Medical Negligence in Bangladesh

A wide range of indiscretions and irregularities in Bangladesh's healthcare system are frequently highlighted by patients who use the system to get services. At the same time, due to weak legal framework, medical professionals are extremely misusing this sector, which is now a major concern for Bangladesh. In this chapter, we will look at the structure of medical negligence in Bangladesh, the most common sector where it occurs, patient abuse by medical professionals in public and private hospitals and what is happening now.

3.1 Contemporary Situation of Medical Negligence in Bangladesh's Hospitals

Medical negligence in Bangladesh is conducted in a heinous manner that is affecting different sectors of the society, especially those who have been subjected to inadequate medical treatment by medical professionals which have now become a hot topic in Bangladesh. Despite the application of innovative and sophisticated technology in several healthcare facilities in our country, it is widely believed that a significant portion of the population of Bangladesh does not depend on national healthcare providers for treatment.

Moreover, thousands of people in the country go to the hospital every day for better treatment of their ailments so that they can cure themselves quickly. Simply put, every professional in the hospital works as a patient caregiver. But the question arises as to how caregivers later became predators in this sector. However, the government of the country and every professional person engaged in that work will be obliged to give proper treatment to every person of the country according to the constitutional safeguards of Bangladesh. As most of the people in Bangladesh are financially lower middle class and lower class, a large part of them have to rely on government hospitals for treatment as most of them cannot afford the cost of treatment in private hospitals. It is unfortunate, however, that many of the patients and their families who seek medical attention at the country's government-run hospitals are ignored by the medical staff, including doctors and nurses. Even Patients are not considered to be human by the doctors at the government hospital. They never pay attention to the patient. Furthermore, every day patients in the hospitals of Bangladesh are admitting a lot of medical negligence whereas in the public hospitals such negligence is taking place in a horrible manner. A report was published in The Daily Inquilab on 6 May 2022, which showed that thirteen patients have died in the last two months without treatment at Rangpur Medical College Hospital. The highest number of patients died in the medicine ward³⁷. Not only that, some of these incidents are seen to be published in newspapers.

³⁷ The Daily Inquilab ,(Dhaka,8 May, 2022)

< <https://www.dailyinquilab.com/article/482902/%E0%A6%B0%E0%A6%AE%E0%A7%87%E0%A6%95-%E0%A6%B9%E0%A6%BE%E0%A6%B8%E0%A6%AA%E0%A6%BE%E0%A6%A4%E0%A6%BE%E0%A6%B2%E0%A7%87-%E0%A6%9A%E0%A6%BF%E0%A6%95%E0%A6%BF%E0%A7%8E%E0%A6%B8%E0%A6%95%E0%A6%A6%E0%A7%87%E0%A6%B0-%E0%A6%85%E0%A6%AC%E0%A6%B9%E0%A7%87%E0%A6%B2%E0%A6%BE%E0%A7%9F->

Again, most of the incidents are covered up. Due to which many people do not know how horrible medical negligence is being practiced in government hospitals.

Even the private hospitals are also not lagging behind in this competition, where many people go in the hope of receiving good treatment. And, taking advantage of this opportunity, private hospitals are springing up all over the country like a frog's umbrella. Whereas many hospitals have no valid license, the condition of private hospitals is also deteriorating. At the same time, patients are mistreated, extra fees are charged, unnecessary medical tests are performed, healthy patients are hospitalized for embezzlement in the name of long-term treatment, staff is mistreated, and patients are served by incompetent doctor. On August 16, 2014, a woman named Raushan Jahan died due to wrong treatment by a doctor at the National Hospital in the city³⁸. Furthermore, a case has been filed under section 304 of The Penal Code 1860, against eight people including the owner, doctors and nurses of a private hospital named Mecca-Medina in the capital's Mohammadpur for the death of a child aged 7 due to medical negligence³⁹. On June 3 of the same year, two-year-old Mehraj Hossain was admitted to a private clinic in Chittagong city for an operation. The child cries incessantly after the operation, a doctor on duty gives her an injection. Later, her condition worsened and she was transferred to the ICU, where she died⁴⁰. Therefore, these are only a few incidents that have been mentioned above but such incidents happen regularly in Bangladesh hospitals. Moreover these are not only a few instances of medical negligence that are happening in government and private hospitals. Thousands more incidents exist that demonstrate medical negligence on the part of medical professionals.

The Ain O Shalis Kendro (ASK) ,published a report in 2008 that identified 504 incidences of medical negligence that occurred between June 1995 and September 2008⁴¹. Furthermore, they also published a report in a newspaper from 2006 to 2016, where it can be seen 276 persons died as a result of 311 incidents of improper treatment. According to published sources, 466 people died in the eight years between 2008 and 2016, with 377 doctors being involved. Another report of the national daily newspaper has revealed at least 20 cases of serious medical negligence between 2018 and 2019, in

<https://www.samakal.com/todays-print-edition/tp-mohanagar/article/18065441/%E0%A6%85%E0%A6%AD%E0%A6%BF%E0%A6%AF%E0%A7%8B%E0%A6%97> > Accessed on May 18,2022.

³⁸ Sarowar Sumon and SaibalAsayarja, 'Obohela;vul chikitsay eker por ek mrittu',Doinik somokal,(Chattagram,1 july,2018)

< <https://www.samakal.com/todays-print-edition/tp-mohanagar/article/18065441/%E0%A6%85%E0%A6%AC%E0%A6%B9%E0%A7%87%E0%A6%B2%E0%A6%BE-%E0%A6%AD%E0%A7%81%E0%A6%B2-%E0%A6%9A%E0%A6%BF%E0%A6%95%E0%A6%BF%E0%A7%8E%E0%A6%B8%E0%A6%BE%E0%A7%9F-%E0%A6%8F%E0%A6%95%E0%A7%87%E0%A6%B0-%E0%A6%AA%E0%A6%B0-%E0%A6%8F%E0%A6%95-%E0%A6%AE%E0%A7%83%E0%A6%A4%E0%A7%8D%E0%A6%AF%E0%A7%81> > Accessed on April 20,2022

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Eshita Tasnim,'The Daily Star Archive', (Dhaka,August 2012)

<<https://www.thedailystar.net/archives>> Accessed on April 7,2022

Chittagong alone out of 64 districts of Bangladesh. Of these, 13 have died⁴². Furthermore, it was held that the proportion of patients and their companions who have been victims of hospital negligence. It demonstrates that the vast majority of respondents (93.50 percent) claim to have experienced negligent in hospitals when seeking medical care⁴³. Of course, these statistics do not reflect the actual number of cases of negligence, as many such cases go unreported and involve complex medical questions, which in most cases go unnoticed.

But the results of these reports highlight the current context of the country and the extent to which people are being neglected in hospitals. According to the report, medical negligence in Bangladesh is often defined as active misconduct of doctors, nurses or other staff, such as giving the wrong amount of medicine during an emergency procedure; the rest are considered subconscious errors, including such poor maintenance operations or configurations, or poor structured healthcare delivery, such as failure to properly follow a patient with diabetes or hypertension⁴⁴. Therefore, in conclusion, it can be said that medical negligence has been prevailing in Bangladesh for a long time. Whereas at the same time, due to the absence of proper legislation enforcement, the country's medical system is not appropriately organized and many patients are being harmed.

3.2 The modes of Medical Negligence that is prevalent in Bangladesh

Hospitals in Bangladesh have long been plagued by medical negligence in various sectors, most of which remain undisclosed, and the country's weak legal framework has led the accused to take this negligence to the highest levels in those sectors, such as:

3.2.1 Abused by Medical Professionals: Patients frequently accuse doctors and other healthcare professionals of abuse. Many doctors charge more for individual consultations. Moreover, some doctors fail to disclose confidential information and frequently recommend unnecessary clinical tests and surgeries that benefit them financially. A doctor's primary responsibility is to fully explain to a patient the benefits and risks of taking medications, as well as the proper medication and timing for doing so. It is really upsetting that physicians get agitated when they're asked about the prescribed medicines in great detail. It is an obligation on the part of medical practitioner to provide care for as long as the patient needs it if he or she accepts to be treated⁴⁵.

3.2.2 Anesthesia Surgery and Procedures: Doctors frequently make major errors in minor surgeries. Some examples are stitching after surgery and leaving surgical instruments in the body. An anesthesiologist may not need to administer anesthesia depending on the patient's medical history. But doctors in our country frequently make mistakes that cause long-term

⁴² Hossain Mohammad Reza, 'Mediation of Health Disputes to Optimise Patient Safety in Bangladesh', *Australian Journal of Asian Law*, (2021)21 No 2, Art8, pp 119-136.

⁴³ Md, Rabiul Islam and Shekh Farid, 'Negligence in government hospital of Bangladesh: A Dangerous Trend', *International Research Journal of Social Science* (May, 2015)4(5), 12-18

⁴⁴ Ibid

⁴⁵ Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr., AIR 1969 SC 128.

problems. Due to many loopholes in the legal framework of the country, the doctor gets away with it easily after committing such an offense.

3.2.3 Failing Medical Examination and Misdiagnosis: Unnecessary pathological examination and diagnosis in our country has taken a new dimension to the erroneous and fraudulent medical system of treatment⁴⁶. Such tests and diagnoses are not always done in an appropriate manner; As a result, patients experience serious illnesses such as diabetes, heart attack, trauma injury or cancer, which is now a cause for concern, so cautionary thinking is essential.

3.2.4 Negligence during Childbirth: Maternity and cesarean sections often have complaints of medical negligence during delivery. For example, making a quick decision just before the birth of a baby or having it delivered by an incompetent doctor. Whenever complications arise during delivery and the life of both mother and child may be at risk, a cesarean operation must always be performed under strict monitoring and treatment to ensure both are saved.⁴⁷. Therefore, every hospital in the country should have a cesarean section which will be run by a skilled medical professional but in the current context of Bangladesh this department is not run by a skilled professional in most of the hospitals.

Therefore, medical negligence occurs not only in the above sectors but also in many other cases such as incompetent doctors treating patients, denial of proper treatment in hospitals, especially government hospitals, and private hospitals charging patients excessive fees that are difficult to bear by patients and their families.

3.3 Concluding Remark:

Therefore, at the end, the medical negligence is going on in the hospitals of Bangladesh in a very heinous manner, one of the major reasons being the weak legal structure of the country. Since there is no codification in this regard in the law of the land, the protection of the law has been mentioned against the medical professionals accused under different sections of various Acts and Ordinances which consist with error, ambiguity in the law. And by using these loopholes, they can easily avoid their liability. And patients are being mistreated by medical professionals and are being mistreated, which is a major concern for the country.

⁴⁶ Aktarul Alam Chowdhury, 'Md. Hasnath Kabir Fahim, Medical Negligence and Deceptive Medical Practices in Bangladesh Health Segment: an Appraisal', Vol. III, Issue III.

⁴⁷ Ibid

Chapter Four

Medical Negligence: A Comprehensive Analysis of Legal Remedies and Errors

Bangladesh has a bunch of existing laws for medical problems, but for adequate use, they rarely help. There are also several provisions for both civil and criminal remedies. But they are mentioned in different acts and ordinances of the law. Again, the existence of many of their provisions is often seen as ambiguous, vague, and undefined. If we look at civil remedies, there are 45 permanent laws for the entire health care system. Some sections of the law specify what remedies can be taken against medical negligence again Some of these have errors and ambiguities that call into question the provisions of the law. The following are some of the notable provisions of the law:

4.1 Constitutional Protection

Constitutional protections for health and medical treatment, among other things, are a significant part of our legal framework. Though The right to health and medical treatment is not expressly recognized as a fundamental right of a citizen in Bangladesh's Constitution, but it can be seen as a branch of the right to life, which is protected as a fundamental right of a citizen under Article 32⁴⁸. When a doctor fails to perform his or her duties, it is a grave infringement of the right to life protected under Article 32 of Bangladesh's Constitution⁴⁹. Furthermore, according to articles 15(a) and 18(1) of Part II of our Constitution, which deals with the Fundamental Principles of State Policy, the state is committed to ensuring the necessities of life, including medical treatment⁵⁰ and improving public health⁵¹. In a case law it addressed that, medical negligence is a serious violation of the basic human rights to life and health, which are essential for survival⁵². Furthermore, in medical negligence litigation, judicial review can be regarded as an appropriate remedy. In accordance with Article 102 of the Constitution of the People's Republic of Bangladesh, the Supreme Court of Bangladesh's High Court Division has been granted the power of judicial review⁵³. For example, a court may intervene if the government does not fulfill its legal and constitutional requirements

⁴⁸ Md. Rafiqul Islam Hossaini, 'Medical Negligence and its Constitutional Protections in Bangladesh' (Bangladesh Law Digest,(October 26, 2016) < <https://bdlawdigest.org/constitutional-protection-and-claims-for-medical-negligence-inbangladesh.html>> Accessed on April 20, 2022.

⁴⁹ People's Republic Of Constitution, art 32.

⁵⁰ Ibid, art 15(a)

⁵¹ Ibid, art 18(1)

⁵² Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC)

⁵³ People's Republic Of Constitution, art 102

relating to the right to health care and medical care, so long as it does so in accordance with its legal and constitutional obligations. In a number of public interest litigation (PIL) cases, it has been observed that the right to life has previously been construed in a broader meaning to encompass the right to a safe environment⁵⁴ and the right to livelihood⁵⁵.

But according to the Judicial Review and Public Interest Case (PIL) study in Bangladesh, the constitutional interpretation that has been developed so far has left the basic "state policy" conflict unresolved. It cannot be denied that the explicit recognition of "fundamental rights" is of much greater scholarly significance⁵⁶. It cannot be denied that the explicit recognition of "fundamental rights" is of much greater scholarly significance⁵⁷.

However, the following problems still remain in the judicial review of medical negligence cases: no one can file a judicial review before the High Court Division without the Locus Standi⁵⁸. In cases against the state, there is often a lack of cooperation from the government. Therefore, the courts cannot always force the government to respond quickly⁵⁹.

4.2 The Penal Code of 1860

There is no specific criminal statute that addresses medical negligence in Bangladesh⁶⁰. However, certain careless acts are punishable under the Penal Code of 1860, depending on the circumstances. It gives legal remedy for a negligent act that may transmit an infection, adulterated pharmaceuticals, abortion without a woman's consent, injury or significant injury, or a reckless or careless act that endangers another's life or safety or causes death. These offenses can result in criminal charges and/or fines.

According to section 269 of the PC 1860, willingly engaging in any illegal or negligent act that could spread a life-threatening infection to another person shall be punished with a specific term of imprisonment. The sentence shall be extended to six months' or a fine, or both⁶¹. Furthermore, fortification of a medication for the purpose of decreasing its effectiveness, altering its effectiveness, or making it harmful is punishable by up to six months of imprisonment, a penalty of up to TK 1,000,

⁵⁴ Dr. Mohiuddin Farooque v. Bangladesh, (1996) 48 DLR 438

⁵⁵ Ain o Salish Kendra Vs. Government of Bangladesh; 19 BLD, (1999) HCD 489

⁵⁶ Kazi Latifur Reza, Medical Negligence: A Review of the Existing Legal System in Bangladesh, IOSR Journal of Humanities And Social Science, (October.2016)21, Issue 10, Ver. 7 ,PP 01-06

⁵⁷ Ibid

⁵⁸ Md. Rafiqul Islam Hossaini, 'Medical Negligence and its Constitutional Protections in Bangladesh', Bangladesh Law Digest, (October 26, 2016) < <https://bdlawdigest.org/constitutional-protection-and-claims-for-medical-negligence-inbangladesh.html>>Accessed on April 26, 2022

⁵⁹ Ibid

⁶⁰ Hossain Mohammad Reza, Mediation of Health Disputes to Optimise Patient Safety in Bangladesh, Australian Journal of Asian Law, (2021)21 No 2, Art 8: 119-136 .

⁶¹ Penal Code 1860, s 269.

or both under Section 274⁶². Similarly, a physician may be sentenced to up to three years in prison, or both, if he or she willfully aborts a pregnant woman or her child, as stated in Section 312 of the Penal Code⁶³. If this is done without the woman's consent, the accused faces the prospect of a life sentence or a fine and imprisonment of up to ten years, which is addressed in section 313 of the penal code 1860⁶⁴. Moreover, reckless or negligent acts that risk someone else's life or well-being may also be covered under section 336 of the Penal Code, 1860⁶⁵. According to section 337, inflicting a common injury on another person negligently is punishable by six months' imprisonment, a fine, or both⁶⁶. Consequently, causing serious harm negligently is punishable by up to two years in prison, a fine, or both under section 338 of the penal code,1860⁶⁷.

Furthermore, causing death by a person's negligent act is subject to years' imprisonment, a fine, or both under Section 304A of the Penal Code⁶⁸. In De Souza's case, to manufacture a fever mixture, the compounder grabbed a bottle from a non-poisonous medication cupboard and added its entire contents to a mixture given to eight people, seven of whom died. The poison bottle contained strychnine hydrochloride, not quinine hydrochloride as expected. The compounder was found guilty under Section 304A of the Penal Code,1860⁶⁹.

Sadly, sections 88⁷⁰ and 92⁷¹ The Penal Code shields medical professionals from legal action if they cause injury to others in certain instances. Moreover, Section 304 A is the most appropriate section of the penal code to punish the death of a person who was negligent in their actions. Under this provision, a victim must have died as a result of the negligent actions of the convict, but what happens to those who have been harmed but haven't yet died? This remains a question. Although suspicious terms such as "hurt" and "painful" have been defined, the parties' neglect of freedom of interpretation endangers human life. There is no explanation for the work of professional organizations like doctors or nurses or others. Section 323 further adds ambiguity, protecting the accused on the basis of honest belief⁷². This is a crucial defense in all cases of medical negligence. In truth, the Penal Code was not designed with medical negligence in consideration.

4.3 The Bangladesh Medical and Dental Act, 2010.

The Medical and Dental Council regulates doctors and other health professionals in Bangladesh. The Medical and Dental Council Act 2010 allows the council to refuse registration to a doctor or dentist

⁶² Ibid, s 274.

⁶³ Ibid, s 312.

⁶⁴ Ibid, s 313.

⁶⁵ Ibid, s 336.

⁶⁶ Ibid, s 337.

⁶⁷ Ibid, s 338.

⁶⁸ Penal Code 1860, s 304A.

⁶⁹ De Souza, 42 All 272. (1920).

⁷⁰ Penal Code 1860, s 88.

⁷¹ Ibid, s 92.

⁷² Ibid,s 323.

who has been found guilty of professional misconduct. According to Section 23 of the BDMC 2010, Professional misconduct may also result in the suspension of a registered medical practitioner or dentist's name from the register⁷³. In Raifa's case⁷⁴. The doctors on duty failed to provide sufficient medical care for the girl named Raifa, according to the committee found the doctors guilty of negligence and recommended that they undergo disciplinary actions as well as that the overall defective administration of Max Hospital be rectified in order to maintain patient safety at the hospital.

The formalized phrase practice of allopathic medicine and the introduction of oneself as a physician or a dentist are prohibited under Section 22 of the Act without registration⁷⁵. According to Section 28, making a false claim to be a registered physician or dentist, or making a false misrepresentation to that effect, is punishable by three years in prison or a Tk 1,000 fine, or both⁷⁶. The use of a fraudulent title is punishable under Section 29⁷⁷. As we know, if a registered doctor or dentist is found guilty of any misconduct, the BDMC, 2010 has the authority to take action against them. However, the Act does not define what constitutes misconduct. The law fails to address medical negligence and define the quality of a physician's obligation to patients.

4.4 The Medical Practices, Private Clinics, and Laboratories (Control) Ordinance, 1982.

The objective of this ordinance is to govern medical practices as well as private clinics and laboratories. It is a significant piece of legislation for dealing with private medical services because it regulates private practice, clinics, and laboratories. Section 4 of this ordinance prohibits a licensed physician working for the Republic from practicing his personal medicine while on duty⁷⁸. The ordinances, section 5, further mandates that all medical practitioners have to perform patient examinations in hygienically sound rooms and spaces⁷⁹. According to Section 9 of this ordinance, there must be enough infrastructures for private clinics to be licensed⁸⁰.

The MPPCL (Control) Ordinance, 1982, assigns primary duty to the Director General of Health. Even the ordinance's provisions seem appropriate. But the issue is with the application. So, at this point, the question is whether the law is missing anything that could ensure proper enforcement. Although the Director General of Health is entitled to take appropriate actions for monitoring, etc., nothing in

⁷³ The Medical and Dental Council Act ,2010, s 23.

⁷⁴ Mohammad Rubel Khan v Dr Bidhan Roy Chowdhury and others. Case No 08 (07) 2018 .

⁷⁵ The Medical and Dental Council Act 2010, s 22.

⁷⁶ Ibid, s 28.

⁷⁷ Ibid, s 29.

⁷⁸ the Medical Practices, Private Clinics, and Laboratories (Control) Ordinance, 1982., s 4.

⁷⁹ Ibid, s 5.

⁸⁰ Ibid, s 9.

this law holds him accountable. This issue must be studied initially to build surveillance system accountability.

4.5 National Health Policy, 2011.

The 2011 National Health Policy superseded the 2000 policy⁸¹. According to the Constitution and various international instruments, treatment is a right, which the new policy reaffirms. The main objectives of this policy are to improve public health care facilities and hospital standards; necessary facilities and supply arrangements; quality management in private medical colleges and training institutions; and ensure the affordability of medical services and education for the people. And to achieve that goal, the policy adopted some policies, such as ensuring an adequate supply of important medicines everywhere⁸².

This policy focuses on one of the most significant issues facing Bangladesh's health care providers: a lack of sufficient resources and an absence of sufficient service quality. The high cost of healthcare facilities in urban areas is also cited as a major obstacle in the policy, which has led to the ordinance emphasizing increasing access to healthcare services at the upazila and district level⁸³. The quality control of private medical services and private medical education institutions was strongly emphasized by the NHP of 2011, a time-worthy decision.

Moreover, it is more hopeful for the NHP to formulate essential regulations and laws to assure accountability of all parties involved in providing health care services. For proper registration, professional quality, and pertinent aspects of ethical practice, the NHP envisaged strengthening the Bangladesh Medical and Dental Council⁸⁴. While reasonable components of NHP exist, the following is a more common concern about the extent to which these policies will be put into practice: It is true that the NHP itself does not have an action plan to meet its objectives in a timely manner.

4.6 The Consumer Rights Protection Act, 2009.

Protection and enforcement of patient rights are equally important when it comes to medical negligence, particularly in light of the Consumer Rights Protection Act of 2009. Section 2 (22) of the Act defines "service" to include, among other things, health services that are offered to customers

⁸¹ Tapos Bandhu Das, 'Medical Negligence and Fraudulent Practice in Private Clinics: Legal Status and Bangladesh Perspective', (March-April 2013), <<https://www.askbd.org/ask/wp-content/uploads/2014/02/Report-Medical-Negligence.pdf>> Accessed on April 26, 2022.

⁸² Ibid.

⁸³ Kazi Latifur Reza, Medical Negligence: A Review of the Existing Legal System in Bangladesh, IOSR Journal of Humanities And Social Science, Volume 21, Issue 10, Ver. 7 (October.2016) PP 01-06 < www.iosrjournals.org > Accessed on April 27,2022.

⁸⁴ Ibid .

for a payment, although this does not include free services⁸⁵. Furthermore, Section 53 of the Act can be directly linked to medical negligence, which states that if a service provider causes damage to the money, health, or life of a service receiver through negligence, irresponsibility, or carelessness, he will be penalized with imprisonment for a term not exceeding three years, or a fine not exceeding Tk 2,00,000, or both.

However, the fines are not always proportional to the loss or injury caused by the service providers⁸⁶. To file a complaint under Section 60 of the CP Act 2009, a consumer must first file a complaint with the director general or a person authorized by the administration within 30 days of the cause of action accruing⁸⁷. Under Section 61 of CP Act 2009, no offense is cognizable unless a charge sheet is filed within ninety days of the complaint. Even if a customer loses money, he or she cannot complain immediately to the magistrate until the approved person sends the charge sheet within 90 days⁸⁸. Because this technique is complex and inconvenient, consumers feel frustrated or lose interest.

In the private sector, the director general can inspect the healthcare coverage but cannot undertake any precautionary measures. Only the health secretary and the director general of health services will be notified. Disciplining medical workers in the private sector is difficult, which is why professional negligence in private clinics is increasing. The phrase "medical profession" is not expressly incorporated in Section 2 of the CP Act, 2009, but it was added in 1995 under Section 2 (1) (o) of the Consumer Protection Act, 1986⁸⁹. In *Indian Medical Association v VP Shantha* (3 CPR (1995) 412), the Supreme Court decided that the health profession should be included under the Consumer Protection Act. Indeed, this terminology should be added to our statute so that it is clear that victims of medical negligence need to go to the consumer court and seek due justice⁹⁰.

4.7 Code of Medical Ethics.

The BMDC, 2010 adopted a Code of Medical Ethics that sets normative criteria for registered doctors and dentists. According to Section 5 (a) of the Code of Medical Ethics, gross negligence by medical or dental practitioners in their duty to patients is sufficient misconduct to suspend or remove their names from the register⁹¹. But this code merely addresses gross negligence in a vague manner. It fails to clearly define a physician's obligations and responsibilities in several aspects of his practice. Frustratingly, the Code doesn't try to figure out who is responsible for different types of negligence.

⁸⁵ The Consumer Rights Protection Act 2009, s 2(22).

⁸⁶ *Ibid*, s 53.

⁸⁷ *Ibid*, s 60.

⁸⁸ *Ibid*, s 61.

⁸⁹ The consumer Protection Act,1986 (repealed), s 2(1).

⁹⁰ *Indian Medical Association v VP Shantha* (3 CPR (1995) 412).

⁹¹ Code of Medical Ethics, s 5(a).

4.8 Tort Statute Provision.

Tort actions have just lately been introduced in Bangladesh, but they are not yet well-established in our legal system. Medical negligence is normally dealt with under tort law. Despite the fact that tort laws concepts are distributed across several laws in a disjointed manner, victims of negligence rarely employ such provisions, presumably because such claims have been unsuccessful for the last 40 years⁹². This is due to the fact that tort law is not codified, and those who have been harmed are discouraged from pursuing damages through a tort claim⁹³.

4.9 Problems dealing with the Legal System of Bangladesh

Since the law on medical negligence in Bangladesh is not established in such a way, At the same time, the victims face a legal hurdle in filing their complaint.

4.9.1 Legislation that has not been enacted: There exist provisions for medical negligence, but they are neither appropriate nor codified, leaving victims confused⁹⁴. The allegation does not mean the doctors are guilty, so filing a criminal case against them will be an issue. Furthermore, civil courts, on the other hand, cannot convict defendants, which is one of the major concerns in dealing with medical negligence.

4.9.2 Absence of Health Court: In Bangladesh, there is no health court, which makes it difficult for medical negligence victims to file a claim. Medical negligence victims are unable to choose which court to go to for redress because the remedy is laid forth in different laws and statutes.

4.9.3 Obstacles to proving Negligence: The complainant bears the burden of proof in cases of negligence, but if he fails to produce evidence in court showing unlawful treatment, no legal remedy is available. And, because of the complexities of medical issues, the complainant must demonstrate the negligence of a doctor against whom they are charged with negligence⁹⁵.

There are also some other problems dealing with the existing laws that were mentioned during the analysis of the law section of this chapter.

⁹² Hossain Mohammad Reza, Mediation of Health Disputes to Optimize Patient Safety in Bangladesh, Australian Journal of Asian Law, (2021), 21 No 2, Art 8: 119-136.

⁹³ Ibid.

⁹⁴ Khandakar Kohinur Akter, A Contextual Analysis of the Medical Negligence in Bangladesh: Laws and Practice, The Northern University Journal of Law, (2013) IV <<https://www.banglajol.info/index.php/NUJL/article/view/25942> > Accessed on April 28,2022

⁹⁵ Ibid.

4.10 Concluding remarks:

Medical negligence is a regular occurrence in Bangladesh, but the law enforcement in this regard is very meager. One of the major reasons for this is that errors in the law, ambiguity, a long-term procedure system, a lack of knowledge about where to sue, and extra court fees discourage patients from suing and allow the accused to easily avoid liability. If we compare it with other countries like India and Pakistan, they have made many contemporary changes in the legal system, which are very important to bring in our country as well.

Chapter Five

Findings, Recommendations and Conclusion

5.1 Findings

While doing the research, I found that laws in Bangladesh do not adequately address medical negligence. However some provisions of law that specifically handles medical negligence in an indirect manner, which is ambiguous, defective and undefined, making it difficult for victims to make claims. Moreover, many provisions of the aforesaid laws and regulations are often not taken as a direct remedy for medical negligence. The victim is further discouraged from suing because of the high court expenses and its lengthy legal process.

5.2 Recommendations

Due to the lack of clear concept of law on medical negligence in Bangladesh and inability to enforce it, the accused persons involved in the medical profession are avoiding their liability by taking advantage of the loopholes in these laws. Therefore, the following measures can be taken to prevent these abuses: -

- A separate health care law should be enacted to address the issue of remedies to ensure all medical services, the governing body and the procedures to be followed if someone admits to medical negligence so that the victim can easily seek redress under that law.
- Medical negligence may be included under some sub-sections of the Penal Code, 1860 section 337,338, 304A . In addition, the definition, categories, and scope of medical negligence must be explicitly stated with these additions. Furthermore, every procedural obstacle has to be removed even if there is medical negligence involved.
- Private clinics and hospitals must be run by the proper authority, have necessary healthcare facilities, appropriate medical equipment, a disciplined and clean environment, and sufficient seating arrangements for patient visitors.
- Tort law should be well established in our legal system as medical negligence normally dealt with under tort law. It should be codified.
- The code of medical ethics should address different types of negligence.
- The phrase "medical profession" should be expressly addressed in section 2(1) of new Consumers protection act 2009, to avoid conflict of filing suit under medical negligence under this Act.
- In order to ensure the inspectors' accountability, the MPPL (Regulation) Ordinance, 1982 must be amended.
- Recommendations to ensure transparency in the governing body of the medical profession, the BMDC Act, 2010.
- The government can be approached to execute the NHP of 2011 with a strategy plan.
- Create a strategy for health policy campaigning; The right to healthcare is protected by specific policy standards that must be identified and prioritized.

- To introduce public awareness campaigns to inform people about their entitlement to good health and care.
- The Health Court may be established so that the aggrieved person may seek redressed in that court in case of medical negligence.
- Court fees should not be excessive so that people are able to bear the cost of filing a medical negligence case.
- Arrange for the publication and distribution of favorable court decisions and judgments obtained in PILs involving the right to health care, medical negligence, and/or professional misconduct.

5.3 Conclusion

Generally negligence is a failure to duty of care that harms others which falls under tort liability. Medical negligence is part of the negligence that a physician fails to treat his patients properly. Hospitals in Bangladesh, it is a regular reflection where most of the legislation of the country fails to cure the patients suffering from medical negligence. The public and private health care sectors in Bangladesh have been brought to their knees by medical negligence and a lack of accountability within the health care system as a whole. All of these are true in Bangladesh's medical services context, with limited resources, a lack of critical equipment and medications, and an unreasonably unbalanced ratio of nurses and doctors to patients. Moreover, there is no well-established separate law on medical negligence in the country. What is there is mostly vague, ambiguous and not structural. As a result, the people involved in the medical profession are moving away from their standard of care that many patients are being neglected in the treatment. Where legal action against the accused is taken nominally and later they can come out with any loopholes of the law. At the same time, one of the reasons why patients are discouraged from filing lawsuits is the lack of foresight about which legislation to sue, the long-term procedural system and the extra court fees.

To reduce medical negligence, the recommendations include enacting a comprehensive medical negligence law and creating a health court. Establishing an effective complaint procedure, public training, and awareness building programs are also proposed to enlighten physicians, nurses, and patients about the repercussions and redress of medical negligence in the country. Ideally, this research paper takes account of the healthcare legislation and remedies and loopholes available in Bangladesh. There was a brief discussion about available remedies and loopholes on the constitution's health and consumer rights clauses, doctors' criminal and civil liability, and present health policy. Members of technocrats, bureaucrats, civil society, and professional groups must effectively participate in updating health policy. At the same time, practically all outdated .

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