

Legal Frameworks of Medical Negligence and Malpractice in Bangladesh and India

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Abstract: Medical negligence is an obvious infringement of the right to health, and it is committed by a professional organization that is intended to defend patients' rights to health in an emergency when their rights are at risk. In many developed states, the problem of medical negligence has recently been a prominent topic of attention and conversation. Several countries have adopted and formed distinct acts and courts to implement health care regulations. The statutes, and legal rules do not properly codify these provisions in Bangladesh, hence there is no particular and complete legislation in Bangladesh to prohibit medical negligence and malpractice. India, has a higher level of awareness about medical negligence, and as they have included a new facet into their law. Bangladesh can learn a lot from India to improve its their legal system. This article attempts to define medical negligence, major loopholes in Bangladeshi law comparing it with Indian laws, and finally, sharing recommendations to improve laws of patients' rights to health care in Bangladesh.

Keywords: medical negligence; fraudulent practice; human rights; professional

1. Introduction

In the context of healthcare, "medical negligence" means irresponsible actions of a medical practitioner that lead to the patient suffering injury. It encompasses various types of professional misconducts, such as fraudulent misrepresentation, unnecessary drug or test prescribing, and unfair treatment of patients. From a human rights perspective, it is crucial to analyze the entire spectrum of medical malpractice and misbehavior, including medical practitioners' professional negligence, as they all breach the right to health and access to medical treatment (Rahman 1994). In Bangladesh, fraudulent practices in hospitals and clinics have raised concerns for the government. Medical negligence has been a prominent issue in developed countries, leading to the adoption of specific laws and courts (Karim et al. 2013). However, there is no explicit law to prohibit medical negligence in Bangladesh. Since both India, and Bangladesh are common law countries sharing similar legal systems, it's a suitable comparison.

2. Methods

This article follows the qualitative research methodology to gather information from both primary and secondary sources for multi-dimensional information. Primary sources include Indian and Bangladeshi laws, case laws, national legislation and regulations. Secondary materials, such as textbooks, academic publications, legal journals, media and newspaper reports, conference papers, official documents, and internet sources were used in this research.

3. Medical Negligence

As a subset of professional negligence and a component of the legal concept of tort, medical negligence is a component of the law of torts (Mathiharan 1998). Claims regarding damages for injuries sustained by patients (and other individuals) by the physicians and other health care professionals fall in the domain of medical or clinical negligence. Compared to most other professions, the law of contracts doesn't affect the practice of medical law very much or at all (Bakshi 2011).

"Medical malpractice" refers to either the professional negligence in which the care provided to a patient deviate from the generally accepted standards of practice in the medical community

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leading to the patient's injury or death,¹ or the failure of physician or other medical personnel to meet the standards of duties related to the medical profession (Damayanti 2011). With the exception of situations in which the patient seeks treatment privately, patients do not enter into contracts with their doctors. These contracts determine what a reasonable person who has the necessary information and abilities would or would not do in a given situation.²

4. Existing Legal Framework in Bangladesh

4.1 Constitutional Rights of Health

Every Bangladeshi citizen has the basic right to health and access to sufficient medical care and treatment, as stipulated by the constitution of Bangladesh (Sultana 2018). A Fundamental Principle of State Policy is to "achieve, through planned economic growth, a continuous enhancement of productive forces and a consistent improvement in the material and cultural standards of living for the populace, with the objective of ensuring for its citizens" according to article 15 of the constitution. This principle is a fundamental principle of state policy."³

In accordance with the provisions of article 18 of the constitution,

- 1) The state is obligated to give the improvement of nutritional standards and the promotion of public health the highest priority as basic obligations.⁴

Therefore, even if the constitution does not expressly acknowledge the health and medical care as fundamental rights, these constitutional provisions indicate that the constitution want such rights to be progressively achieved. Article 32, also supports the right to health and medical treatment as it establishes the right to life as a basic right. Historically, in public interest litigation (PIL), the right to life is interpreted to encompass the right to a safe environment⁵ and the right to live.⁶ The right to health and medical care can be considered as fundamental right.⁷

Medical aid is the fundamental necessity for human existence and cannot be omitted from the list of fundamental prerequisites to be fulfilled to secure a human life. Hence, the state has certain obligations in this respect as well. Strong support for this contention can be found in the preamble to the constitution, which states, "It shall be a fundamental aim of the state to realize through the democratic process a socialist society free from exploitation, in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic, and social will be secured for all citizens".⁸

Hence, it is clear that the overall framework of the Bangladeshi constitution is, to a significant degree, in favor of the right to health and medical treatment. For addressing issues of medical negligence and fraudulent acts of hospitals and clinics, other sections of the constitution are as important and should be considered. Besides the state responsibility to protect and promote the right to health and medical care, it is the responsibility of individuals and institutions delivering health care and medical services to care the rights of the patients (Badaruddin 2022). This aspect of the issue is known as the responsibility gap. According to article 21 of the constitution:

- 1) "It is the duty of every citizen to observe the constitution and the laws, to maintain discipline, to perform public duties and to protect public property."
- 2) Every person in the service of the republic has a duty to strive at all times to serve the people."⁹

Article 27 ensures equal treatment of all people before the law, while Article 28 prohibits discrimination. Article 40 grants citizens the right to engage in any lawful profession or occupation, as well as any lawful trade or business, so long as they possess any qualification, if any, that may be prescribed by law in relation to their profession, occupation, trade, or business. This right is, however, subject to any restrictions that may be imposed by law. Since, to establish accountability and provide adequate remedy to medical negligence should balance the patient rights and occupational freedom of medical professionals, these constitutional assurances are relevant in cases of medical negligence.

4.2 Bangladesh's Obligations as a Signatory to International Human Rights Treaties

The Universal Declaration of Human Rights (UDHR) 1948; the International Covenant on Economic, Social, and Cultural Rights (ICESCR) 1966; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979; and the Convention on the Rights of the Child 1989, are international human rights treaties to which Bangladesh is a party. Therefore, Bangladesh has to fulfill its commitment to protect the health rights of its citizens including the right to easy access to medical and health care facilities, appropriate and adequate treatment, and, an effective remedy if these rights are violated (Alam et al.2019).

The right to life, liberty, and the protection of person is described in Article 3 of the Declaration, whereas the idea of not discriminating against others is described in Article 2. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) placed a special emphasis on the right to health and medical treatment, as well as the states' responsibilities in ensuring

¹ *Pfizer Corp v. Ministry of Health*, 1965 AC 512.

² *Medical Negligence*, Wikipedia, https://en.wikipedia.org/wiki/Medical_negligence (last visited Dec. 10, 2024).

³ *Art. 15*, The Constitution of Bangladesh. <http://bdlaws.minlaw.gov.bd/act-367.html>

⁴ *Art. 18*, The Constitution of Bangladesh. <http://bdlaws.minlaw.gov.bd/act-367.html>

⁵ *Dr. Mohiuddin Farooque v. Bangladesh and others*, 48 DLR (1996) HCD 438.

⁶ *Ain o Salish Kendra v. Government of Bangladesh*, 19 BLD (1999) HCD 489.

⁷ For a detailed discussion on how ESC rights recognized as fundamental principles and typically understood as unenforceable rights made their way to judicial enforcement with the aid of progressive interpretation of the "right to life," see Dr. Ridwanul Hoque, *Taking Justice Seriously: Judicial Public Interest and Constitutional Activism in Bangladesh*, 15 CONTEMP. S. ASIA 405, 405 (2006).

⁸ *Ibid.*

⁹ *Art. 21*, The Constitution of Bangladesh. <http://bdlaws.minlaw.gov.bd/act-367.html>

these rights. The International Covenant on Economic, Social, and Cultural Rights (ICESCR) in Article 12 highlights the steps that must be taken to realize the right to health. These steps relate to “reduce infant mortality and ensure the healthy development of the child, improve environmental and industrial hygiene; prevent, treat, and control epidemics, endemics, occupational, and other diseases; and create conditions to ensure access to health care for all.”¹⁰

Compliance with the International Covenant on Economic, Social, and Cultural Rights is monitored by the United Nations Committee on Economic, Social, and Cultural Rights. A general comment on the right to health was approved by the Committee in year 2000 to provide clarification and operationalization of the principles mentioned above.¹¹

4.3 National Health Policy, 2011

Through National Health Policy, 2011 (NHP), the government has shown its dedication to medical treatment as a constitutional and international right. This policy aims at enhancing service quality by improved management of public healthcare facilities and hospitals; ensuring the provision of essential equipment and resources; preserving service quality in hospitals and medical colleges; and supervising medical education and training institutions; hospitals, clinics, and diagnosis centers. It also aims to ensure that the costs of medical services and education are affordable for the general population; and protect the right of the public to access essential information. The policy sought its goals using multiple ideas (Bakshi 1980). These ideas call for decentralizing medical administration; guaranteeing that everyone has access to health, nutrition, and medical care without prejudice; and building human resources to assure a sufficient supply of essential drugs. The policy acknowledges insufficient human resources, ineffective service providers, and dearth of pharmaceuticals and tools. Through improved government control, the strategy underlined the quality monitoring of hospitals, medical services, and institutes of medical education. The policy recognizes that medical regulatory bodies are ineffective without human resources, money, or legal support.

The policy's provision for appropriate procedures and legislation to guarantee accountability of all health care providers is reasonable. The measures include enhancing the Bangladesh Medical and Dental Council mandate to oversee registration, professional standards, and ethical medical conduct. The Bangladesh Medical Council will be reorganized (Rabiul et al. 2015). Enhancing management within medical colleges and hospitals to guarantee adequate healthcare services; granting medical colleges and hospitals increased financial and administrative authority to fulfil their comprehensive roles; ensuring the quality of patient treatment in public hospitals and healthcare centers; and formulating a manual on service quality along with overseeing methodologies are some additional measures in this regard.¹²

4.4 National Children Policy, 1994

National Children Policy, 1994 (NCP) in general, addresses issues pertaining to children. Concerns about the Bangladeshi children regarding their health and diet were especially addressed in the policy (Akter 2013). NCP did not pay particular attention to the issue of children's rights to get appropriate medical facility. It primarily emphasized the dietary considerations and several other areas of health. This policy accepted the notion of doing what is in the "best interest of the kid," and may be a very helpful legal guide.¹³

4.5 Medical Practice and Hospitals and Clinics and Laboratories (Regulation) Ordinance, 1982

This ordinance regulates medical practice, hospitals, clinics, and labs. Section 4 of the Ordinance bans a government-employed doctor from practicing during office hours. Section 5 requires all doctors to keep sanitary rooms and chambers. Section 9 regulates hospital and clinic licensure. Accordingly, all hospitals and clinics have to provide the following:

- a) lodging that is suitable and equipped with sanitary conditions;
- b) an operation theatre with air conditioning;
- c) the required tools as stated in Schedule B of the Ordinance; and
- d) a certified medical practitioner working full-time.¹⁴

Section 11 permits inspections. Any official assigned by the Director General of Health (DG) may check labs, medical chambers, hospitals, and clinics. Should a chamber, clinic, or laboratory fail any criteria laid down by ordinance, the DG may advise the government that the medical practitioner should be denied access to hospitals and practice, and the license of the clinic should be withdrawn, or that the laboratory should cease. Violation by a hospital or medical clinic owner is punishable by imprisonment for up to six months or a fine of up to 5,000 Taka. Under both conditions the court can mandate that all or any of a hospital's, clinic's, or laboratory's transportable property be turned over to the government. The Ordinance's Schedule A states the highest rate a doctor can charge for a consultation, operation, delivery, electrocardiogram (ECG), and lab test.¹⁵

4.6 Ordinance of 2008 Concerning the Protection of Consumer Rights

In accordance with the provisions of Article 76 of this law, the Department DG has the authority to go to any hospital or health care institution to determine whether a regulatory breach has taken place. Should he find any deviation or non-compliance, he is required to alert the Director General of Health or the Secretary of the Ministry of Health; although he is not authorized to act

¹⁰ Art. 12, International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

¹¹ General Comment 14, UN Committee on Economic, Social and Cultural Rights.

¹² The National Health Policy, 2011.

¹³ The National Children Policy, 1994

¹⁴ Section 9, The Medical Practice and Hospitals and Clinics and Laboratories (Regulation) Ordinance, 1982. <http://bdlaws.minlaw.gov.bd/act-620.html>

¹⁵ The Medical Practice and Hospitals and Clinics and Laboratories (Regulation) Ordinance, 1982.

directly in this regard. Penalties for unlawful activity endangering consumer life or personal safety are described in Section 52. Penalties for circumstances wherein the service provider's negligence, irresponsibility, or carelessness causes the customer to lose money, health, or life are described in Section 53. Depending on the particular case, both offences carry either a fine not to exceed two thousand takas or jail for a term not to be more than three years (Rahman 1994). Apart from any possible criminal process, Section 69 offers a civil remedy for monetary reparations. Section 70 allows the civil courts to award up to five times more money than the actual harm done in addition to other remedies for compensation of negligence.¹⁶

4.7 Bangladesh Medical and Dental Council Act, 2010

Section 17 of this act removes a medical institution's accreditation if its curriculum, exams, or students' competency do not fulfill standards. Sections 18 and 19 deal with registering doctors and dentists, whereas Section 20 registers medical assistants. Section 21 states that registers made, published, and kept under sections 18, 19, and 20 are public records under the Evidence Act, 1872.¹⁷ Section 22 forbids allopathic medicine or identifying as a doctor or dentist without registration. This clause allows punishment up to 3 years in jail, 1 lakh taka fine, or both. Section 24 allows a cancellation appeal. Section 27 allows inspections of medical and dental institutions to review curricula, exams, training, and other activities. Section 28 punishes any dishonest claim to be a certified physician or dentist with three years in jail or a one lakh Taka fine, or both. Section 29 punishes fake titles, whereas section 30 punishes dispensing prohibited drugs.¹⁸

4.8 Medical Ethics Code of Conduct

It is the responsibility of the BMDC to provide dentists and doctors with an explanation of the standards of professional behavior that are outlined in the Code of Medical Ethics. Exploiting professional knowledge, skills, or privileges, abusing patient relationships, canvassing, advertising, and using false titles are all prohibited by the standards. Fake certifications, generating improper profits, abusing professional knowledge, skills, or privileges are all outlawed. These guidelines deal with the neglect of patients and state:

- (a) If he willfully disregards his professional responsibility to his patient, this might be regarded a kind of misconduct serious enough to justify suspension or removal from the register.
- (b) When a registered practitioner provides assistance to an unregistered individual in the practice of medicine, dentistry, or other professions, or when the practitioner maintains a professional contact with such an individual, the registered practitioner is subject to disciplinary action.¹⁹

The code does not, however, precisely state any benchmark for the degree of care a dental or medical practitioner owes the patient. Rather, it focusses only on problems involving illegal professional association and severe carelessness.²⁰

4.9 The Penal Code, 1860²¹

The criminal law includes penalties for imprisonment and fines,²² and these provisions apply equally to physicians and patients (complainants). If a medical professional like a doctor or nurse may be fined for their carelessness, then a complainant should face the same fate if his or her grievance is groundless or malicious. These regulations are meant to stop complaints or actions initiated with shady motivations for illegal gains or revenues that have not been earned. Death by negligence is a criminal offense punishable under section 304A; causing miscarriage without women's consent is covered by section 313; death caused by an act done with the intent to cause miscarriage if done without a woman's consent is covered by section 314; an act done to prevent a child from being born alive or to kill them is covered by section 315; and an act to prevent a child from being born alive is covered by section 3. Section 88 is important for medical wrongdoing for actions that are not meant to cause death but were done in good faith and with the person's consent to help them.

"There is a concern among physicians and other medical professionals that they may be harassed by police or by the law courts, especially in medico-legal matters, and this dread stems from the fact that the phrase "there is a fear" was used. Hence, they are hampered in their ability to handle such circumstances. So, unless it is absolutely necessary, the court system and the police should try to avoid using subpoenas to question medical experts".²³

There are numerous judicial cases concerning medical negligence in Bangladesh, despite the rigorous legal procedures and the reluctance of individuals to pursue legal action. In the *Mazkura Ayub vs. United Hospital (2018)* case, the complainant suffered a serious health complication due to negligent treatment at United Hospital in Dhaka. The HCD initiated the investigation, and upon obtaining evidence, the court imposed a six-month suspension on the doctor's registration and mandated compensation from the hospital. In 2024, Justice Jahangir Hossain in the case of *Sunita Chakrabarti vs. Lab-aid Hospital Ltd.* directed the hospital to pay the compensation to her because her husband, Mridul Chakrabarti, died due to negligence and delayed treatment of the hospital. In another case named *Ayaan's (2019)*, the court issued a rule on why the hospitals should not be obligated to compensate the victim's family because Ayaan died due to the negligence of the hospital and doctors.

¹⁶ The Consumer Rights Protection Ordinance, 2008.

¹⁷ Evidence Act, 1872 <http://bdlaws.minlaw.gov.bd/act-24.html>

¹⁸ The Bangladesh Medical and Dental Council Act, 2010.

¹⁹ Sec. 5, The Code of Medical Ethics.

²⁰ *Ibid.*

²¹ The Penal Code, 1860 <https://bdlaws.minlaw.gov.bd/act-11.html>

²² Prof. S.K. Verma, *Legal Framework for Health Care in India*, 165 (2002).

²³ Code of Criminal Procedure, 1898.

5. Existing Legal Framework in India

Both the Constitution of India and Indian tort law detail the procedures in the event of medical negligence or malpractice.²⁴

5.1 Indian Penal Code, 1860

The *Indian Penal Code* (IPC) Section 304A addresses medical staff member acts. This section states that those who are liable to cause death of a person by negligence and which does not amount to culpable murder—may be prosecuted and adequately punished with two years or a fine, or both (Ranchhodas et al.2010). The following codes encompass acts of medical malpractice: 52, 80, 81, 83, 88, 90, 91, 92, 304A, and 337 and 339.²⁵

Some of the sections that are often used in medical negligence cases are listed below:

- Section 304-A of the IPC defines a person who performs a reckless or careless conduct amounting to culpable murder as punishable with either imprisonment of any kind for up to two years, a fine, or both. The offence has a two-year maximum penalty for incarceration.²⁶
- Section 337 states that a person who commits a rash or negligent act threatening human life or the personal safety of others will be punished with either imprisonment of for a term of six months, or with a fine that may extend to five hundred rupees, or both.²⁷
- A person who acts rashly or carelessly endangering the human life or personal safety of others shall be either imprisoned for a time of up to 2 years, or with a fine of up to one thousand rupees under Section 338.²⁸

5.2 Consumers Protection Act, 1986²⁹

All medical services are protected by the Consumer Protection Act of 1986. Consumers have safeguards in place to protect them from poor service. A "deficiency of service" is defined by the Consumer Protection Act, section 2(1), as any flaw, imperfection, shortcoming, or deficiency in the quality, character, or method of performance required by or under any legislation now in effect or has been undertaken to be done by a person in accordance of a contract or otherwise (Yadav et al.2007). This definition encompasses a wide range of issues, including but not limited to the following: a failure in the quality of performance in the case of *Indrani Bhattacharjee v. Chief Medical Officer and Others*,³⁰ the patient's ECG was abnormal, but the doctor gave him stomach medication instead of advising him to see a cardiologist and quit smoking and drinking, constituting a defect in service. The patient filed a lawsuit against the Chief Medical Officer and others (Biswas 2012).

It is not possible to hold doctors responsible if they provide their services for free. According to subsection (1) of section 2 of the Consumer Protection Act of 1986, receiving free medical care in a hospital, health care facility, dispensary, or nursing home does not qualify as a service. This is true regardless of whether the facility is run by the government or a private organization. Service contracts are excluded from the purview of the Consumer Protection Act. Patients who get free treatment or pay a nominal registration fee are not eligible for assistance under the Act. Patients have the right to file a claim under the Consumer Protection Act if their fees are waived because of their incapacity to pay (Jhabala,2021).

In the *Indian Medical Association v. P. Santha*,³¹ it was determined that the personal services that doctors provide to patients cannot be interpreted as being contracts of personal service. The Consumer Protection Courts have the authority to file lawsuits against doctors for breach of service contracts (Verma 2002).

Following are the locations where complaints may be made in accordance with the Consumer Protection Act:

- 1) If the value of the services and compensation that is being claimed is less than twenty lakh rupees, the District Forum will take further action.
- 2) If the value of the products or services and the compensation that is being sought is less than one crore rupees, then the case must be brought before the State Commission.
- 3) If the total worth of the products or services and the compensation is more than one crore rupees, the National Commission takes action. When a complaint is filed with the District Consumer Redressal Forums, a nominal charge needs to be paid.

5.3 Medical Negligence and Indian Constitution

There are just a few sections in the Indian Constitution that have an effect on the practice of medicine (Agarwal 2011). The constitutional provision that prohibits the practice of medical negligence or malpractice and safeguards the patients' interests are ³²

- No individual shall be deprived of the right to life and personal liberty unless in accordance with the process that is established by law, as stated in article 21 of the Indian constitution.

²⁴ Express Healthcare, <http://www.expresshealthcaregmt.com/20021231/focus4.shtml> (last visited Dec. 10, 2024).

²⁵ Express Healthcare, <http://www.expresshealthcaregmt.com/20021231/focus4.shtml> (last visited Dec. 10, 2022).

²⁶ Section 304, The Indian Penal Code (IPC).

²⁷ Section 337, The Indian Penal Code (IPC).

²⁸ Section 338, The Indian Penal Code (IPC).

²⁹ https://www.indiacode.nic.in/bitstream/123456789/6922/1/consumer_protection_act_1986.pdf

³⁰ II CPJ 342 UP S.C.D.R.C., 1998.

³¹ 1996 AIR 550, 1995 SCC (6) 651.

³² <https://blog.iplayers.in/medical-negligence-2/>.

- The right to constitutional remedies is discussed in Article 32 of the Indian constitution. The highest court is known as the custodian and guarantee of fundamental rights, and it has been granted the jurisdiction to issue directives, orders, and writs.
- In accordance with article 42 of the Directive Principles of State Policy, the state has the authority to enact laws that ensure workers are treated fairly and that they have access to maternity leave.
- Article 47 of the Directive Principles of State Policy indicates that the state may consider increasing the level of nutrition and the quality of life of its people and the enhancement of public health. Apart from when they are used for medical reasons, the state might aim to prohibit the use of intoxicating beverages and of medications that harm health.

6. Challenges of Bangladeshi and Recommendations

Bangladesh lacks a stand-alone statute for medical negligence. Instead, victims must consult sections 337 and 338 of the Penal Code for appropriate action. Existing laws are not properly codified, leading to confusion and multiple legal actions. The Law Commission of Bangladesh is working on legislation to address medical negligence, to improve healthcare quality without jeopardizing medical professionals' interests. High court fees and difficulty in establishing liability in cases of negligence are key challenges. The complainant bears the burden of proof, and medical institutions often refuse to provide necessary records and evidence. The Law Commission's proposal aims to improve healthcare quality without jeopardizing medical professionals' interests.

Establishment of a health court in Bangladesh is a recent idea to address medical malpractice claims. Health courts are specialized courts with trained adjudicators, independent expert witnesses, and predetermined award amounts. They are faster, more accurate, and more effective than traditional courts. They can provide written judgments on care requirements and establish precedents for patients and medical professionals. To ensure accountability in medical administration, the management of public and private medical facilities should supervise patient complaints and establish an effective complaint mechanism. The Penal Code should be expanded to address medical negligence, specifying its definition, severity, and consequences. The police force should be trained to investigate cases of medical malpractice, and the Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982, should be amended to include inspection provisions. Private clinics should have suitable facilities, proper equipment, and seating arrangements for patients. Fees for surgical procedures, medical exams, and services should be established.

7. Conclusions

Despite medical malpractice in Bangladesh, the legal system does not appropriately handle its consequences. The lack of proper regulation in Bangladesh, causes medical practitioners to often take advantage of professional indemnity coverage without being aware of the legal duties that they have. Hence, patients have less time and fewer opportunities to receive healthcare services. India, has made substantial advances in its legislative system, which can be replicated in Bangladesh to strengthen legal system. The government should raise awareness of patient rights, establish a central information repository, upgrade the Upazila Health Complex, provide training programs for nurses and ward boys, and reduce political interference. The Bangladesh Medical and Dental Council should establish itself as an independent organization, implement a reassessment procedure, design hospitals for patient-intensive atmospheres, and hold hospital administration accountable.

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