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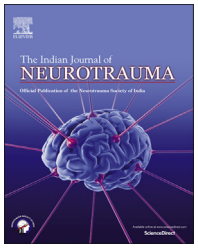

Review Article

Medical negligence: Indian scenario

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ARTICLE INFO

Article history:
Received 8 June 2014
Accepted 11 November 2014
Available online 6 December 2014

Keywords:
Medical negligence
Consumer protection act
Civil negligence
Criminal negligence

ABSTRACT

Medical profession differentiates itself from other professions, where apart from the knowledge and skill, touch of humanity is also required. Since the inclusion of medical profession under the ambit of Consumer Protection Act there has been a spurt in the number of cases against the doctors. Bolam's test is applied to assess medical negligence of doctor. Cases against the doctors can be brought in a civil or criminal court, and accordingly the negligence may be civil or criminal negligence. In deciding criminal negligence against doctors criminal intent need to be proved. The Medical Law and Ethical Code for medical professional in India are prescribed by Indian Medical Council, under the section 20-A of Indian Medical Council Act of 1956 and Amendment Act No. 24 of 1964.

Medical profession differentiates itself from other professions where apart from the knowledge and skill, touch of humanity is also required. In fact medical professional has always been given the highest degree of respect by the common man for the service they render towards the mankind. Even though the patient knows that he is suffering from an incurable disease, he derives solace under the care of the treating physician, whom they see as their saviour.

1. Medical knowledge: a dynamic concept

A medical professional applies his or her knowledge and skill in diagnosing and treating an ailment. However the degree of skill and knowledge may vary from person to person depending upon their experience and host of other factors. Newer methods of diagnosis, treatment comes up regularly and a medical professional is required to be updated on the current medical practices. Even none of the test is hundred percent sensitive and specific and no drug and procedures are totally safe and above all the interpretation of the test may require great degree of knowledge and understanding which vary among individuals.

2. Reasons for increased litigation against doctors

Doctor–patient relationship have always been of trust and doctors have enjoyed that trust in the past. But with increasing awareness among the patients, their expectations have also risen. This is evident from the fact that after the inclusion of medical profession under the ambit of Consumer Protection Act, we have seen a spurt in the number of cases

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http://dx.doi.org/10.1016/j.ijnt.2014.11.005

against the doctors. The reasons which can be enumerated for this fact are:

1. Lack of human feeling towards the patients
2. High expectation of the people
3. Commercialization of the medical services
4. Doctors criticize their own colleagues
5. Difficult patients: there are difficult patients to treat e.g. who conceal facts deliberately or by mistake, the history of their illness patients/don't follow the instructions/runs from doctor to doctors/and don't want to get cured because they receive benefit.

2.1. *Duties of a medical practitioner*

Every doctor, before he is awarded a Degree of Medicine is required to take oath known as Hippocratic Oath, which grossly defines the duties of the doctors. Following the gross violation of the medical code of conduct in the Second World War, the World Medical Association restated the Hippocratic Oath which is known as **Declaration of Geneva**. The Medical Law and Ethical Code for medical professional in India are prescribed by Indian Medical Council, under the section 20-A of Indian Medical Council Act of 1956 and Amendment Act No 24 of 1964.

2.2. *Duties of doctor towards the sick*

1. A doctor must always bear in mind the obligation of preserving the human life.
2. A doctor owes to his or her patient complete loyalty and the resources of his or her science. Whenever an examination or treatment is beyond his or her capacity he or she should summon other doctor who has the necessary ability.
3. A doctor shall preserve absolute secrecy every thing he or she knows about his/her patient because of the confidence entrusted in him.
4. A doctor must give emergency care as a humanitarian duty unless he or she is assured that others are willing and able to give such care.

2.3. *Duties with regards to attendance on a patient*

When a doctor agrees to treat a patient, he is obligated to attend the patient as long as he/she requires his attention. He cannot stop attending the patient unless in the following conditions:

1. After giving prior notice to the patient
2. Patient himself asked the doctor to withdraw
3. Medicines other than those prescribed by the practitioner is used by the patient
4. Patient doesn't follow the instructions given to the patient
5. Another practitioner is also attending the patient without his knowledge
6. The doctor himself is sick
7. When patient is malingering
8. Fees is not paid by the patient
9. Patient has recovered from the illness.

2.4. *Duties in case of surgical operations*

To carry out the necessary and relevant preoperative investigation in order to reach to the accurate diagnosis.

1. To explain to the patient and/or his relative regarding the exact nature of his illness, the line of treatment, expected outcome, possible complication of surgery and anaesthesia, and the possible alternative method of treatment and its accompanying risk.
2. To ensure that the operation theatre is adequately equipped with the necessary machine, and staff and the have facility to deal with the possible complication that may arise during surgery.
3. To ensure the adequate stock of emergency drugs, oxygen etc., in consultation with the anaesthetist and also to ensure that all the instruments are in proper working condition.
4. To follow the standard procedure of surgery.
5. Cautious to avoid making such mistakes of operating on wrong side or wrong limb.
6. He must not make experiment in operating.
7. He must not delegate his duty of operating on patient to his juniors, when he knows that the junior is incapable of performing the surgery.
8. With the help of the scrub nurse in counting the instruments and sponge before starting the operation and also at the end of surgery.
9. To maintain the complete record of the surgical procedure.
10. To provide adequate post-operative care and treatment and readiness to deal with the post-operative complication.
11. To give proper direction to the patient at the time of discharge from the hospital with clear instructions for the further treatment and follow-ups.

3. Consumer Protection Act

Consumer Protection Act was introduced in 1986. As per the Section 2(1) of the act, **consumer means any person who**—

1. Buys any good for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than person who buys such good for consideration paid or promised or party paid and partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include who obtain such good for resale or for and commercial purpose; or
2. Hires or avail any service for a consideration which has been paid or promised, partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than person who buys such good for consideration paid or promised or party paid and partly promised, or under any system of deferred payment when

such services are availed of with the approval of the first mentioned person.

4. Practice of medicine: profession or occupation?

Supreme Court in, **Indian Medical Association v. V.P. Shanta**[1], has discussed this question in detail, and held that medicine is a profession. Supreme Court has quoted, "***Scrutton L.J.***[2] *has said, 'Profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from a occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word profession used to be confined to three learned profession, the Church, Medicine and Law. It has now, I think, a wider meaning.*"

Supreme Court further added that in context of law relating to professional negligence, they have accorded professional status to following seven specific occupations i.e. Architect, Engineer, Surveyors, Accountants, Solicitor, Barrister, Medical Practitioner and Insurance Broker.

Importance of distinguishing occupation from the profession is that, in professional services the outcome cannot be achieved in all the cases, the failure may depend upon the factor beyond the control of the person.

5. Is patient a consumer?

In the past there had been different views whether the service rendered by the doctor, hospital or a nursing home can come under the ambit of "consumer", as given in the Consumer Protection Act. A division bench of **Andhra High Court in Dr A.S. Chandra v. Union of India**[3], held that the services provided by the doctor, hospital or nursing home in lieu of consideration are covered under CPA and thus patient be considered as the "consumer".

On the other hand, a Divisional Bench of Madras High Court **in Dr. C.S. Subramaniam v. Kumaraswamy**,[4] was of different opinion, and held that the services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment, both medical and surgical, would not come under the definition of 'Service' and a patient who undergoes treatment cannot be considered to be a consumer; only paramedical services provided by them would fall within the definition of 'service'.

However this decision of the Madras High Court was overruled by the Supreme Court of India in a landmark judgment dated November 16, 1995 in **Indian Medical Association v. V.P. Shanta**.[1] The salient features of this judgment were:

1. Medical service offered to patient by medical practitioner is a service, unless it is rendered free of cost to every patient under a contract of personal service.
2. Contract of personal service to be distinguished from a Contract for Personal Service. In the absence of a relationship of master and servant between patient and medical practitioner, the service rendered to the patient cannot be regarded as service rendered under a contract of personal service, therefore, not excluded from the definition of 'service' of the act (Section 2(1) of the act).
3. Where services rendered free of charge to all patients, such services is outside the definition off 'Service' under the act. A token amount paid for registration purpose would not alter the position.
4. Service rendered at a Government/Non-Governmental Hospital/nursing home where charges are required to be paid by person who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of expression 'Service' as defined in section 2(1)(0) of the act. Free service would also be service and recipient a consumer under the act.
5. Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care when under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of service.

6. Contract between Doctor and Patient: 'a contract of service' or 'contract for service'

In the same case of **Indian Medical Association v. V.P. Shanta**,[1] Supreme Court has distinguished between the two. In 'contract for service' professional uses his knowledge and skill without detailed direction from the opposite party whereas in contract of service relationship of master and servant exists. Contract between doctor and patient is 'contact for service' not 'contract of service' and no relationship of master and servant between doctor and patient.

7. Is medical service a personal service?

In the same case Supreme Court observed that there is no doubt true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between doctor and patient, service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in section 2(1)(0) of the act".

8. What is negligence?

As per the law dictionary, negligence may be defined as:

"Conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm. A person has acted negligently if he or

she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances". Supreme Court in **Poonam Verma v. Ashwin Patel and Ors.**,[5] has defined *"negligence as tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do."*

The definition involves three constituents of negligence:

(1) A legal duty to exercise the due care;
(2) Breach of the said duty;
(3) Consequential damage.

9. Legal duty to exercise due care

First and foremost question is whether a doctor has legal duty to exercise due care in treating the patient i.e. whether a doctor–patient relationship exists. As soon as a patient approaches the doctor and the doctor agrees to treat the patient, doctor–patient relationship is established, and the same moment the duty of the doctor toward the patient starts. Doctor–patient relationship may be in the form of an implied contract or it may exist without a contract.

10. Relationship in contract

Relationship is contractual when a patient goes to a private practitioner. When a doctor accepts the patient, he has certain duties and responsibilities towards the patient. Doctor impliedly promises to diagnose and try to cure the patient of his ailment, and patient impliedly promises the doctor to follow his instruction regarding the treatment and to pay his/her fees. In case where there is a team of doctors, the contract of the patient or his guardian is with main doctor, the other doctor being the agent of main contracting doctor. In such case the other doctors may not have contractual relationship, but the liability of such doctor is no less towards the patient.

However a doctor may refuse to treat the patient without any rhyme or reason and no doctor can be compelled to treat a patient.

In **Lanphier and wife v. Phipos**,[6] it was held that doctor cannot be held if he or she sees a person lying injured on the street who is in danger of dying of haemorrhage and simply passes by, he or she is not guilty of negligence because there is no doctor patient relationship exists. However if the doctor goes to the aid of the dying person, a professional relationship is at once established and the doctor is required to exercise reasonable care and diligence. In an emergency situation he has a legal obligation to render help to save the life of an injured person if he happens to be approached on the spot.

11. Relationship beyond contract

In hospitals or healthcare institutions run by the Government body, Municipal Corporation, or any other similar institution or charitable institution, where all patients are treated free of cost, the direct contact between doctor and patient may not exist. However a doctor–patient relationship does exist. As soon as the doctor accepts the patient for treatment, relationship starts and doctor is supposed to apply all the reasonable skill and care in treating the patient. In such institutions patient may not approach Consumer Forum, because Consumer Protection Act does not apply in such cases. However patient may file a suit in tort, in Civil Court.

Situation when doctor patient relationship is not established:

1. The doctor performs an examination for life insurance purposes.
2. He is appointed by the trial court to examine the accused for any reasons.
3. He makes a pre-employment medical examination for a prospective employer.
4. Assessment of injuries in case of assault.
5. Assessing drunkenness in prohibition and vehicular accident cases.
6. Evaluation of disabilities for purpose like compensation, retirement benefit etc.

The patient whose ailment is beyond the competence of the doctor should be referred to a more skilful doctor or a hospital equipped with competent doctor, or act under the specific instruction of some qualified doctor, competent to treat the patient.

12. Breach of the duty

Once a doctor has accepted the patient for the treatment, or doctor–patient relationship is established, he is expected to apply a reasonable degree of care in treating his patient. But how to decide whether he has erred in performing duty?

Answer to this question was given in a landmark judgment of **Bolam *v. Friern Hospital Management Committee case*[7] *also (popularly known as Bolam's Test)***. Plaintiff sustained acetabular fracture while undergoing Electroconvulsive therapy. Plaintiff sued the doctor for negligence. In this judgment *Judge Mc Nair J. has stated the test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art.* The standard of care are thus set out as per this decision, which popularly known as **Bolam's Test**.

This decision has since been approved by the House of Lords in other cases like **Whitehouse v. Jordan**[8]**; Maynard v. West Midlands Regional Health Authority (1985)**[9]**; Sidaway v. Gethlem Royal Hospital**[10]**; Chin Keow v. Govt. of Malaysia.**[11]In India too Bolam's test is widely applied and quoted while deciding the cases of medical negligence. Supreme Court in Poonam **Verma vs. Ashwin Patel &. Ors**[5] **Laxman Balkrishna Joshi vs Trimbak Bapu Godbole**[12] *also uphold the principles laid in Bolam's test.*

Eckersley v. Binnie[13]**, summarized the Bolam test in the following words** *... a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in*

knowledge of new advances, discoveries and developments in his field.

13. What is reasonable degree of Care?

The word reasonable is very vague and is not defined precisely. It may depend upon the situation for that act. In a particular situation any act which is short of being described as reasonable comes under the category of negligent act. It also depends upon the qualification and experience of the doctor and the given set of circumstances. A general practitioner cannot be expected to possess the skill and knowledge off a specialist. The degree of skill and knowledge of a surgeon practicing in remote area cannot be equated with the surgeon in teaching Medical College Hospital. The injury to the reputation of a professional resulting from the finding of the negligence can be very serious and this is appreciated by the courts.

In a land mark case **Roe and Wooby v. Ministry of health,**[14] Lord Justice Danning was of the opinion that "*it is easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought always to be on our guard against it especially in cases against hospitals and medical profession.*" *Medical science has conferred great benefits but these benefits are attended by unavoidable risks.*

In the case of **Hunter v. Henley**[15], Lord President Clyde observed "*the true test for establishing negligence in diagnosis or treatment on the part of the doctors is whether he has been proved to be guilty of such failure as no doctor possessing ordinary skill and exercising reasonable care would have been guilty of.*"

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown:

(1) That there is a usual and normal practice
(2) That the person has not adopted it; and
(3) That the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.

However approval of treatment by the professional body may not be enough proof of correctness of treatment. In **Samira Kohli v. Dr Prabha Manchanda**,[16] Supreme Court quoted ***Vinitha Ashok vs. Lakshmi Hospital***[17], ***Bolam7, Sidaway***[10], *and clarified that though the opinion of professional body favours the accused medical practitioner but this opinion should also be capable of withstanding the logical analysis and if it is not than the court is entitled to hold the body of opinion is not reasonable or responsible.*

14. Is doctor liable for every negative outcome of the patient?

No; **said the Supreme Court in A.S. Mittal & Ors vs State of U.P. & Ors.**[18] Things that should be considered in deciding these cases is the circumstances in which they were working at the time of mistake and whether such mistake was negligent.

Law recognizes the dangers which are inherent in surgical operation. **Mistakes will occur on occasions despite the exercise of reasonable skill and care.** Jackson and Powell on Professional Negligence, 1982 Edn. Said that necessity of the highest standards of aseptic sterile conditions at places where ophthalmic surgery-or any surgery–is conducted cannot be over-emphasized. It is not merely on the formulation of the theoretical standards but the professional commitments with which the prescriptions are implemented that the ultimate result rests.

Lord Justice Denning in Roe v. Minister of Health[14] said that "we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong but we must insist on due care for the patient at every point and must not condemn as negligence that which is only a misadventure".

In Patch v. Board of Governors united Bristol Hospital,[19] the judge observed that, "**The liability of doctors is not unlimited**; the standard of care required of them is not that standard shown by exceptional practitioners. Surgeons, doctors, and nurses are not insurers. They are not guarantors of absolute safety. They are not liable in law merely because a thing goes wrong … the law requires them to exercise professionally that skill and knowledge that belongs to ordinary practitioner".

15. Does error of judgment is equal to negligence?

A doctor cannot be held liable for negligence merely because he made an error or judgment. The Supreme Court, in case of Spring **Meadows Hospital & Anr. vs. Harjot Ahluwalia,**[20] has cited **Lord Fraser**, who pointed out thus: "***True position is that an error of judgment may, or may not, be negligent; it depends on the nature of error***. *If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.*"

16. Does mistaken diagnosis amounts to negligent diagnosis

Merely a mistaken diagnosis does not amount to negligence. A practitioner can only be held responsible if in reaching to his diagnosis he failed to apply reasonable skill and care on his part. *In* ***Wood v. Thurston***[21]*a drunken man was brought to the casualty ward of a hospital with history of run by lorry. Surgeon did not examined him as closely as the case required and had even failed to use his stethoscope which could have enabled him to discover the patient's true condition. The patient had fractured ribs, broken collar bone and badly congested lungs. Patient was even sent home and he died few hours after. The doctor was held negligent because of his lack of commitment in examining the patient.*

17. Damage to patient as a result of breach of duty

A doctor is negligent only when the damage is done to a patient as a result of breach of duty. There must be direct relation

between breach of duty and the damage to the patient. If a patient suffers from a complication when he is under the care of the doctor, and if it can be proved that the complication is not due to the breach of duty by the medical practitioner, he cannot be held for negligence. If complication develops despite reasonable care by the doctor, he cannot be held liable.

18. Consent in medical practice

Consent is fundamental and established principle in the Indian law. Every person has the right to determine what shall be done to his body. Self-defence of body (IPC sections 96–102, 104, 106) provides right to the protection of bodily integrity against invasion by other. All medical procedures, including examinations, diagnostic procedures and medical research on patients potentially acts of bodily trespass or assault in the absence of consent or statutory section (IPC 351). Treatment and diagnosis cannot be forced upon anyone who does not wish to receive them except in statutory situation.

Likewise declaration of Helsinki in 1964 also made it compulsory to take free consent for any medical research too.

The legal implication of consent first came to vogue in United States in 1914 **Schloendorff v. Society of New York Hospital case**,[22] when a patient was operated upon for tumor without his wish, **Justice Benjamin Cardoza** wrote in his opinion *"Every human being of adult years and sound mind has a right to determine what shall be done with his own body and the surgeon who performs operation without his (patient's) consent commits assault for which he is liable in damages."*[1] This landmark opinion established the concept of consent as an integral part of the most fundamental precept for respect of a person's bodily integrity. The actual phrase "**informed consent**" entered American jurisprudence in 1957 in a California medical malpractice case.

In **Salgo v. Leland Stanfordetc .Bd. Trustee,154,cal.App 2d560**[23] patient's legs were paralyzed when his physician performed aortography to locate an obstruction in his abdominal aorta. Apparently, the treating physician had not informed the patient about the risk in the procedure. In its decision, the court held that *"a physician violates his duty to his patient and subjects himself to liability if he holds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment."*

19. Types of consent

Consent is of two types.

1. Implied
2. Express which may be verbal or written.

19.1. *Component of consent*

A valid consent can be divided in to three basic parts.

1 **Voluntariness:** consent should be without any coercion, undue influence, fraud or misinterpretation.
2 **Competent:** person should be above 18 yrs of age and of sound mind.
3 **Knowledge:** patient should be explained in detail about the nature of treatment, complication and alternative to given treatment.

19.2. *Why should consent is necessary?*

The English law on this aspect is summarized thus **in Principles of Medical Law (published by Oxford University Press – Second Edition, edited by Andrew Grubb, Para 3.04, Page 133)**[24]:

"Any intentional touching of a person is unlawful and amounts to the tort of battery unless it is justified by consent or other lawful authority. In medical law, this means that a doctor may only carry out a medical treatment or procedure which involves contact with a patient if there exists a valid consent by the patient (or another person authorized by law to consent on his behalf) or if the touching is permitted notwithstanding the absence of consent."

19.3. *Consent in emergency*

Any hospital and doctor is expected to provide the treatment to a patient in case of emergency. **Kerala High Court in Dr Thomas v. Elisa AIR 1987**[25] has said **"***When a surgeon or medical man advances a plea that the patient did not give his consent for the surgery or the course of treatment advised by him, the burden is on him to prove that the non-performance of the surgery or the non-administration of the treatment was on account of the refusal of the patient to give consent thereto". 'In most instances, the consent of a patient is implied* **(Mayne's "Criminal Law of India" by S. Swaminathan 4th Edn. – at page 198)**[26]*. A surgeon who failed to perform an emergency operation must prove with satisfactory evidence that the patient refused to undergo the operation, not only at the initial stage, but even after the patient was informed about the dangerous consequences of not undergoing the operation.*

20. Liability of doctor in medical negligence

Cases against the doctors can be brought in a civil or criminal court, and accordingly the negligence may be civil or criminal negligence.

20.1. *Civil negligence*

This is the usual form of negligence seen in clinical practice where the patient or their legal heir bring against the medical practitioner for committing the breach in duty, when it is his legal duty to take care of the patient. Patient can bring the case of alleged negligence against the doctor in Consumer Forum. If the person is able to establish that there was negligence on the part of doctor and then he can get compensation for the alleged suffering. Person can file the complaint in Civil Court or Consumer Court for compensation, but not in both of them. Since the judgment in Consumer Forum is fast and inexpensive, people generally prefer going to Consumer Forums.

20.2. *Criminal negligence*

This type of negligence is more severe than the civil negligence. When a medical practitioner commits an extremely gross negligent or grossly rash act, he may be sued for criminal negligence under section 304-A, which is culpable homicide not amounting to murder, and can invite punishment up to the two years, or with a fine or both. To establish a criminal liability against the medical professional it should be established that:

1. Death is due to the direct result of rash and negligent act of the accused
2. Act must be proficient and approximate cause
3. It was without the intervention of another's negligence

20.3. *What degree of negligence is criminal negligence?*

In **Dr Suresh Gupta v. Govt of NCT Delhi,**[27] Supreme Court bench has said that for fixing criminal liability on a doctor or surgeon, the standard of negligence required should be so high to describe it as "gross negligence" or recklessness. It is not merely lack of care of necessary care, attention and skill. "*Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State*".

Every careless act of medical man cannot be termed as 'Crimina'l. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable Another Landmark judgment regarding fixing criminal liability on medical profession was of **Jacob Mathew v. State of Punjab**[28]. This case was referred to three judge bench by another bench of Supreme court and expressed reason for disagreement with the judgment in Dr Suresh gupta v. Govt of NCT Delhi[27] for the following two reasons:

1. First that Section 304-A, does not distinguish between negligent and grossly negligent act. And the word 'gross' is not the requirement of Section 304-A.
2. Different standards cannot be applied to doctors and others. In all cases, it is seen that the act was rash or negligent.

Thereafter three judge bench of Supreme Court gave its ruling in this case and underlined the important point, which has widespread implication.

"*In order to hold the criminal negligence, the element of* ***mens rea*** *(means criminal intention) must be shown to exist. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.*

The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'. Doctrine of ***Res ipsa liquitor****, if at all, has limited role in trial in cases of criminal negligence.*

Supreme Court further placed some guidelines

1. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.
2. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice.
3. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

21. Laws protecting medical practitioner

The following provision of Indian Penal code provides protection from liability for unfortunate consequences, when medical man has exercised utmost care and diligence and acted with best intention.

Section 80, I.P.C: Accident in doing a lawful act. Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Section 87, I.P.C: A person who is above 18 yrs of age can give valid consent to suffer any harm, which may result from an act which is not intended or known to cause grievous hurt or death.

Section 88, I.P.C: Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Section 89,I.P.C: Act done in good faith for benefit of child or insane person, by consent of guardian. – Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person: Provided-

Section 92, I.P.C: Act done in good faith for benefit of a person without consent. – Nothing is an offence by reason of any harm which it may causes to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving

consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

Section 93, I.P.C: No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Conflicts of interest

All authors have none to declare.

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