**Medical Negligence: A Realm of Crime**

*Abstract*

Vipin Sharma & Akshay Anurag[[1]](#footnote-1)

*A doctor-patient relationship is based on blind trust. A patient places his faith and confidence in the hands of his doctor with an undoubted belief that he will take reasonable care and provide perfect and faultless medical assistance for his ailment. When this kind of profound belief is crushed, due to the negligent act of the doctor, it gives rise to litigation. The Criminal Law has invariably placed the medical professionals on a pedestal different from ordinary mortals. Negligence may be defined as breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent reasonable man would not do. To fasten liability in Criminal Law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in Civil Laws.*

**Introduction**

It is clear that one of the duties of the doctor towards his patient is a duty of care in deciding what treatment is to be given and also a duty to take care in the administration of the treatment. A breach of any of those duties may lead to an action for negligence by the patient.[[2]](#footnote-2) Other provisions in the Indian Penal Code which may be relevant are Section 312[[3]](#footnote-3), Section 313[[4]](#footnote-4), Section 314[[5]](#footnote-5), Section 315[[6]](#footnote-6), Section 316[[7]](#footnote-7), Section 336[[8]](#footnote-8), Section 337[[9]](#footnote-9), Section 338[[10]](#footnote-10), Section 269 and 270[[11]](#footnote-11) and Section 304A[[12]](#footnote-12).Criminal liability may also arise under a number of other statutes such as the Indian Medical Council Act, 1956, the Dentists Act, 1948, the Medical Termination of Pregnancy Act, 1971, the Preconception and Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the Transplantation of Human Organs Act, 1994 and other penal laws enacted by the Parliament and State legislatures from time to time.

A doctor enters the realm of crime if in the course his duty he is found guilty of assault, battery or manslaughter or in extreme cases, murder. The fact that he is a doctor does not absolve him from other forms of crime that the general population is exposed to or liable to be incriminated for. In order to prosecute a doctor for negligence under criminal law, it needs to be proven that the medical practitioner has done some act or omitted to do some act which in the prevailing circumstances no doctor in his ordinary sense and prudence would have done or failed to do which resulted in the irreparable damage to the patient. The act denotes single as well as the series of act, on the same footing omission also includes single as well as the series of omissions. Negligence becomes actionable on account of injury resulting from act or omission amounting to negligence to the person sued. The essential components of negligence are, *‘Duty’*, *‘Breach’* and *‘resulting damage’*.[[13]](#footnote-13) However, For every mishap or death during medical treatment, the medical men cannot be proceed against for punishment. In order to fasten criminal liability the act of the doctor has to be proven beyond reasonable doubt, unlike the civil law wherein the probabilities are balanced. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law.

Doctors are humans and definitely not infallible. Due to the fact that they see and handle the thin edge of life, they become more high strung and perhaps slightly more causal with death and dying. It is pertinent to note that the nobility and stature of doctor’s service are at stake as soon as criminal proceedings are started against him. Undoubtedly prosecution is quashed but the damage persists. Therefore, criminal law has placed the medical professionals on a different pedestal from ordinary individuals.

A careful reading of the aforesaid principles laid down by this Court in Indian Medical Association[[14]](#footnote-14) makes the following position clear:-

(a) There may be simple cases of medical negligence where expert evidence is not required.

(b) Those cases should be decided by the Fora under the said Act on the basis of the procedure which has been prescribed under the said Act.

(c) In complicated cases where expert evidence is required the parties have a right to go to the Civil Court.

(d) That right of the parties to go to Civil Court is preserved under [Section 3](https://indiankanoon.org/doc/1031309/) of the Act.

* Requirement of Mens Rea

In law, no person is criminal unless he possesses a guilty mind. The criminal jurisprudence is based on the maxim, *actus non facitreum nisi mens sit rea* which means an act does not make a person guilty without a guilty mind. Similarly in the case of *MC Mehta* v. *Union of India[[15]](#footnote-15)*, the apex court has pronounced that the criminal liability of a doctor is subjected to the same Latin maxim of *actus non facitreum nisi mens sit rea.* If the mental element is proven to be absent, then the crime has not been committed. The state of mind is a pre-requisite.[[16]](#footnote-16)

Mens Rea is an essential ingredient to prove the liability of Medical Man under Indian Penal Code.[[17]](#footnote-17) The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.[[18]](#footnote-18) The Hon’ble Supreme Court of India has also stated that the act itself doesn’t make a man guilty unless his intention was so.[[19]](#footnote-19) The degree of negligence and misconduct must be higher to substantiate the Criminal Charges.[[20]](#footnote-20) There is a difference between “Simple lack of care” incurring civil liability and “Very high degree of negligence” which is sine qua non for establishing criminal liability.[[21]](#footnote-21) Justice Ravindra Nath Mishra of Allahabad High Court opined that, *‘A Doctor cannot be prosecuted for criminal offence of negligence for not delivering on the assurance that everything would be normal but patient died after the operation.’*[[22]](#footnote-22)

The standard to determine *mens rea* in criminal cases is the ‘*intention’* which is necessary to implicate a doctor.[[23]](#footnote-23) For fixing criminal liability the act and the intention of the doctor must concur. It can be concluded that, no act is per se criminal unless coupled with preceding intent and the consequent result thereof. The criminal intent of the doctor can be presumed in a case if:

1. The doctor does not have the requisite qualification to undertake the job he is dealing with.
2. The doctor has, in course of treatment, acted in a way in which no reasonable doctor would have acted.
3. The doctor has used a procedure in conducting the treatment which is not ordinarily compatible with current medical practice or standards.
4. Direct intention in which aim was to kill the patient or the doctor has realized that death or serious harm will result.

* Distinction between Criminal and Civil Liability

While deciding liability of a medical professional, Indian courts have made a distinction between Negligence and under civil law and criminal law. Between civil and criminal liability of a doctor causing death of his patient the court has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing, that is, a higher degree of morally blame worthy conduct.[[24]](#footnote-24)

* 1. ***Proximate and Efficient Cause***

To constitute criminal liability of a doctor there must be direct nexus between the death of the person and rash & negligent act of the accused, remote nexus is not enough.[[25]](#footnote-25) *“To impose criminal liability under*[*s. 304-A*](https://indiankanoon.org/doc/1371604/)*,*[*Indian Penal Code*](https://indiankanoon.org/doc/1569253/)*, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the cause causans; it is not enough that it may have been the cause sine qua non”*[[26]](#footnote-26)

Hon’ble High Court of Andhra Pradesh in the case of *Public Prosecutor* v. *E.O. Christian*[[27]](#footnote-27), held a doctor liable under Section 304-A of the Indian Penal Code for giving an injection of a poisonous drug, the color of which was quite different from that of the vaccine intended to be given.

* 1. ***Degree of Negligence required***

The question of degree of Negligence is most relevant to distinguish between negligence in civil law and negligence in criminal law. The doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not possess that knowledge in actual sense, he is prima facie acting with rashness or negligence.[[28]](#footnote-28) The criminality lies in running the risk of doing such an act with recklessness and indifference to the consequences. A doctor cannot be held criminally responsible for the patient’s death, unless his negligence or incompetence has manifested such disregard for life and safety as to amount to a crime against state.[[29]](#footnote-29) In criminal law it is not the amount of damages but the amount and degree of Negligence that is determinative of liability. To impose sanctions the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law.[[30]](#footnote-30)

* Act causing grievous hurt in good faith for the benefit of the patient
* the word “Gross” has to be read into Section 304-A IPC

The jurisprudential concept of negligence differs in civil and criminal law. The very act can be construed as negligent in civil law may not necessarily be negligence in criminal law. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e gross in nature.

*Defining the term Gross Negligence*

Gross Negligence has been defined as reckless behavior in the following manner:

1. Indifference to an obvious risk of Injury.
2. Having a foresight of the risk but still undertake it.
3. High degree of Negligence, having a full insight into the risk.
4. Inattention to avoid the risk as his duty demanded.

Generally negligence is a matter of civil courts, but if the patient has died or suffered a severe damage then it attracts a criminal liability. The doctor must be proven to have such disregard for life as to amount to a crime against state. Doctors can be negligent and sued for manslaughter.[[31]](#footnote-31) Some of the instances wherein act of doctor was considered to be grossly negligent. Loss of eyesight of a person after the operation due to the infection contracted after the discharge from the hospital. The doctor was considered to be grossly negligent because the source of infection was the operating theatre.[[32]](#footnote-32)

*S304-A to qualify the test of ’Gross’ Negligence*

The recourse of Section 304A can be resorted wherein it can be established beyond reasonable doubt that the death was the direct result of the negligent act of the doctor, and the act must be proximate and efficient cause. However, the rashness and the negligence have to be distinguished in order to determine the nature of liability i.e a civil or a criminal liability. As quoted by the Justice Mirza Hameedullah Beg[[33]](#footnote-33), *‘There are degrees of negligence and rashness and one must find that the rashness has been of such degree as to amount to taking hazard knowingly that the hazard was of such a degree that injury was not most likely to be occasioned thereby. Culpable rashness is acting with consciousness that mischievous consequences are likely to follow.’* Mere carelessness is not criminal negligence for conviction under section 304A of the IPC.[[34]](#footnote-34)However, 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”.[[35]](#footnote-35)

As the court decided that in very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care caution.[[36]](#footnote-36) A Doctor owes a duty towards his patient and if not rendered appropriately it would amount to negligence.[[37]](#footnote-37) An Organization, wrote in a recent bulletin as below:-

*“If clinical trials become a commercial venture in which self-interest overrules public interest and desire overrules science, then the social contract which allows research on human subjects in return for medical advances is broken.”*[[38]](#footnote-38)Whether a person is licensed or unlicensed, if he displays gross ignorance, gross inattention or gross rashness in his treatment he, he is criminally responsible. The negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.

* Rule of *Res Ispa Loquitur*

The maxim *Res Ipsa Loquitur* means the thing speaks for itself. The maxim applies in actions for negligence where the circumstances of an accident are such that it is so improbable that it would have occurred without the negligence of the defendant, that it can be presumed that it was caused.[[39]](#footnote-39) The onus is on the defendant to disprove the presumed negligence.[[40]](#footnote-40) However this doctrine has a limited application in trial on charge of criminal negligence.[[41]](#footnote-41) This rule of evidence only operates in the domain of civil law in determining the onus of proof in actions relating to negligence. It cannot be used in determining the liability for negligence within the domain of criminal law.

* **Conclusion**

General Exceptions of Law-

Since the medical profession renders a noble service for the society. The medical professionals do not gain anything by acting with negligence or by omitting to do an act. Hence, the professionals must be shielded from frivolous or unjust prosecutions. With this proposition the Court went into the question as to what could be the actionable negligence in the case of professionals. The court opined that:

1. A simple lack of care, an error of judgment or an accident, even fatal, will not constitute culpable medical negligence. If the doctor had followed a practice acceptable to the medical profession at the relevant time, he or she cannot be held liable for negligence merely because a better alternative course or method of treatment was also available, or simply because a more skilled doctor would not have chosen to follow or resort to that practice.
2. Professionals may certainly be held liable for negligence if they were not possessed of the requisite skill which they claimed, or if they did not exercise, with reasonable competence, the skill which they did possess.
3. The word ‘gross’ has not been used in Section 304A of IPC. However, as far as professionals are concerned, it is to be read into it so as to insist on proof of gross negligence for a finding of guilty.
4. The maxim Res ipsa loquitur (Let the event speak for itself; no other evidence need be insisted) is only a rule of evidence. It might operate in the domain of civil law; but that by itself cannot be pressed into service for determining the liability for negligence within the domain of criminal law. It has only a limited application in trial on a charge of criminal negligence.
5. Statutory Rules or executive instructions incorporating definite guidelines governing the prosecution of doctors need to be framed and issued by the State and Central governments in consultation with the Medical Council of India (MCI). Until this is done, private complaints must be accompanied by the credible opinion of another competent doctor supporting the charge of rashness or negligence. In the case of police prosecutions, such an opinion should preferably from a doctor in government service.
6. The test of determining medical negligence as laid down in Bolam’s Case[[42]](#footnote-42) has good applicability in India and recourse can be taken from the same.
7. Doctors accused of rashness or negligence may not be arrested simply because charges have been levelled against them; this may be done only if it is necessary for furthering the investigation, or for collecting evidence, or if the investigating officer fears that the accused will abscond.

Section 52 of IPC- Where a person, uneducated in matters of surgery

The illustrations are set out below:-

7 "Where a patient sustained a burn from a high frequency electrical current used for "electric coagulation" of the blood [See Clarke v. Warboys, The Times, March 18, 1952, CA];

7 Where gangrene developed in the claimant's arm following an intramuscular injection [See Cavan v. Wilcox (1973) 44 D.L.R. (3d) 42]; 7 When a patient underwent a radical mastoidectomy and suffered partial facial paralysis [See Eady v. Tenderenda (1974) 51 D.L.R. (3d) 79, SCC];

7 Where the defendant failed to diagnose a known complication of surgery on the patient's hand for Paget's disease[See Rietz v. Bruser (No.2) (1979) 1 W.W.R. 31, Man QB.];

7 Where there was a delay of 50 minutes in obtaining expert obstetric assistance at the birth of twins when the medical evidence was that at the most no more than 20 minutes should elapse between the birth of the first and the second twin [See Bull v. Devon Area Health Authority (1989), (1993) 4 Med. L.R. 117 at 131.];

7 Where, following an operation under general anaesthetic, a patient in the recovery ward sustained brain damage caused by bypoxia for a period of four to five minutes [See Coyne v. Wigan Health Authority {1991) 2 Med. L.R. 301, QBD];

7 Where, following a routine appendisectomy under general anaesthetic, an otherwise fit and healthy girl suffered a fit and went into a permanent coma [See Lindsey v. Mid-Western Health Board (1993) 2 I.R. 147 at 181]; 7 When a needle broke in the patient's buttock while he was being given an injection [See Brazier v. Ministry of Defence (1965) 1 Ll. Law Rep. 26 at 30];

7 Where a spinal anaesthetic became contaminated with disinfectant as a result of the manner in which it was stored causing paralysis to the patient [See Roe v. Minister of Health (1954) 2 Q.B. 66. See also Brown v. Merton, Sutton and Wandsworth Area Health Authority (1982) 1 All E.R. 650];

7 Where an infection following surgery in a "well-staffed and modern hospital" remained undiagnosed until the patient sustained crippling injury [See Hajgato v. London Health Association (1982) 36 O.R. (2d) 669 at 682]; and 7 Where an explosion occurred during the course of administering anaesthetic to the patient when the technique had frequently been used without any mishap [Crits v. Sylvester (1956) 1 D.L.R. (2d) 502]."

1. B.A.LLB. (Hons), 4th Year students of National University of Study and Research in Law, Ranchi) [↑](#footnote-ref-1)
2. [*Indian Medical Association* v. *V.P. Shantha & others*](https://indiankanoon.org/doc/723973/) - (1995) 6 SCC. [↑](#footnote-ref-2)
3. (causing miscarriage) [↑](#footnote-ref-3)
4. (causing miscarriage without woman‘s consent) [↑](#footnote-ref-4)
5. (deaths caused by act done with intent to cause miscarriage) [↑](#footnote-ref-5)
6. (act done with the intent to prevent the child being born alive or to cause it to die after birth) [↑](#footnote-ref-6)
7. (causing death of quick unborn child by act amounting to culpable homicide) [↑](#footnote-ref-7)
8. Act endangering the personal safety of others. [↑](#footnote-ref-8)
9. Causing hurt by an act endangering life or personal safety of others. [↑](#footnote-ref-9)
10. Causing Grievous hurt by an act endangering life or personal safety of others. [↑](#footnote-ref-10)
11. A Negligent act by a doctor causing disease by infection and endangering life. [↑](#footnote-ref-11)
12. Death resulting from medical negligence. [↑](#footnote-ref-12)
13. *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1. [↑](#footnote-ref-13)
14. *Supra.* [↑](#footnote-ref-14)
15. AIR 1987 SC 1086. [↑](#footnote-ref-15)
16. 2007 Cr Lj 154. [↑](#footnote-ref-16)
17. *R.* v. *Awrence*, (1981) 1 ALL ER 974 (HL). [↑](#footnote-ref-17)
18. Ibid. (R v. Awwerence.) [↑](#footnote-ref-18)
19. *M.C. Mehta* v. *Union of India*, 1987 (1) SCC 395. [↑](#footnote-ref-19)
20. *Jacob Mathew* v. *State of Punjab and Others*, 2005 (6) SCC 1. [↑](#footnote-ref-20)
21. *Suresh Gupta (Dr)* v. *Government of NCT of Delhi*, 2004 (6) SCC 422. [↑](#footnote-ref-21)
22. *Dr. Meera Malik* v. *State of U.P.*, U/S 482/378/407 No. - 4194 of 2015. [↑](#footnote-ref-22)
23. N. Panduranga Rao v. State of Andhra Pradesh, 1975 (2) APLJ 277. [↑](#footnote-ref-23)
24. *Suresh Gupta* v. *Government of NCT Delhi and Anr*., AIR 2004 SC 4091. [↑](#footnote-ref-24)
25. *Ambalal D. Bhatt* v. *State of Gujarat*, 1972 (3) SCC 525. [↑](#footnote-ref-25)
26. *Kurban Hussein Mohammedali* v. *State Of Maharashtra*, 1965 AIR 1616, 1965 SCR (2) 622.  [↑](#footnote-ref-26)
27. 1971 ACJ 20 (APHC). [↑](#footnote-ref-27)
28. *Jaggankhan* v. *State of Madhya Pradesh*, (1965) 1 SCR 14. [↑](#footnote-ref-28)
29. *Laxmaanan Prakash* v. *State*, 2001 ACJ 1204(Mad HC) [↑](#footnote-ref-29)
30. *Jacaob Mathew* v. *State of Punjab*, AIR 2005 SC 3180. [↑](#footnote-ref-30)
31. R. Ferner & McDowell, ‘Doctors charged with manslaughter in the courts:... for gross medical negligence. Mansaughter, Discretion and the Crown prosecution Service (2006) 33: Journal of Law and Society 421. [↑](#footnote-ref-31)
32. Haripada saha v. State of Tripura, 2002, ACJ 1877. [↑](#footnote-ref-32)
33. *Siva Ram* v. *State*, AIR 165 All 196. [↑](#footnote-ref-33)
34. *Dr. Ved Khulle* v. *State*, 1998 (1) ACJ 328.[J&K State]. [↑](#footnote-ref-34)
35. ***Jagdish Chander* v. *State*,**(1974) 1 SCR 204. [↑](#footnote-ref-35)
36. *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996) 2 SCC 634. [↑](#footnote-ref-36)
37. *Kusum Sharma and Others* v. *Batra Hospital and Medical Research Centre and Others*, (2010) 3 SCC 480. [↑](#footnote-ref-37)
38. Possible conflict of interest within medical profession. HealthDayNews. August 15, 2003. [↑](#footnote-ref-38)
39. *Syad Akbar* v. *State of Karnataka*, 1980 SCR (1) 25. [↑](#footnote-ref-39)
40. Ratanlal & Dhirajlal *“The Indian Penal Code”* 22th Edition, 2010. Page number- 1705. [↑](#footnote-ref-40)
41. *Suresh Gupta (Dr)* v. *Government of NCT of Delhi*, 2004 (6) SCC 422, ¶48. [↑](#footnote-ref-41)
42. [1957] 1 WLR 582 [↑](#footnote-ref-42)