MEDICAL NEGLIGENCE AND CRIMINAL LIABILITY : A CRITICAL STUDY

By

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The medical profession is one of the noblest professions in the world. However, corporatisation and commercialization of medical profession has made it like any other business and the medical profession is increasingly being guided by the profit motive rather than that of service. Such a situation gave rise to unethical practices and negligence. Today it is seen that many doctors do not take the life of a patient under their seriously. Today like every thing in the society Hippocrates noble profession has become commercialized and people are not only suspicious but downright sceptical of their practice. Therefore, if there is a rashness or negligence on the part of the doctor while treating a patient he is being made liable under the Consumer Protection Act and as well under other penal laws like Indian Penal Code. However, it is pertinent to note that there are divergent opinions in judgments of Supreme Court in deciding the negligence of a doctor while treating a patient. The issue of what amounts to medical negligence and when can a doctor be said to be negligent and the standard of care that a doctor is expected to meet in his practice has been the topic of a number of landmark judgments of the Judiciary. Hence there is much need for the deliberations on the accountability of the doctors for their professional negligence.

What is Negligence?

Negligence connotes careless state of mind which may amount to recklessness or indifference. Negligence can also be defined as a careless conduct or breach of a legal duty to take care. *Charles Worth* and *Percy* defined negligence as, "negligence is a tort which involves a person's breach of duty that is imposed upon him to take care, resulting in damage to the complainant"[1]. Thus the essential elements of tort of negligence are:

(i) The existence of a *duty to take care*, which is owed by the defendant to the complainant.

(ii) The *breach of such duty* by the defendant and failure to attain the standard of care prescribed by the law.

(iii) As a consequence of such breach, complainant should have been suffered *damage*

Thus the complainant should establish that the injury would not have occurred, but for the negligence of the defendant. Whether the defendant owes a duty to the plaintiff or not depends on reasonable foreseeablity of the injury to the plaintiff. If at the time of act or omission, the defendant could reasonably foresee injury to the plaintiff, he owes a duty to prevent the injury and failure to do that makes him liable.

Medical Negligence

The issues relating to civil liability of the doctors assume special significance in the present context, due to commercialization of medical profession. The action against personal injury caused to the complainant at the hands of doctors requires the proof of legal duty to take care, breach of such duty and consequential damage suffered by the complainant. The Supreme Court in *A.S. Mittal v. State of U.P.*[2], held that "a mistake

1. *Charlesworth* and *Percy*, on Negligence, 9th Edn.
2. 1989 AIR

by a medical practitioner which no reasonably competent and careful practitioner would have committed is negligent one". A medical practitioner can be said to be reasonably competent and careful when he adopts the ordinary skills and normal practices of the profession. Law does not expect very high or very low standard from a person who renders professional services. In *Dr. L.B. Joshi v. T.B. Golbole*,[3] the Court held that, "the duties which a doctor owes to his patients are:

(i) A duty of care in deciding whether to undertake the case

(ii) A duty of care in deciding what treatment to give

(iii) A duty of care in administration of that treatment

A breach of any of these duties gives a right of action for negligence to the patient".

Criminal Negligence and Liability

The extent of criminal liability depends on the amount and degree of negligence. According to Dr. *Chulani* criminal negligence is the "gross and culpable neglect to exercise that reasonable and proper care and precaution to guard against injury incumbent upon the professional to have adopted and which under the circumstances it was his duty to adopt". Criminal rashness on the part of the doctor also plays an important role in deciding criminal negligence. Criminal rashness is hazarding a dangerous or wanton act with knowledge that it is so and that it may cause injury, but without intention to cause injury or knowledge that it will probably cause injury. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Hence, the criminal liability arises in medical negligence when there is a gross deviation from set standards.

3. 1969 AIR

Misjudgment on the part of the Doctor

What would be the position, if the patient suffers injury as result of misjudgment or miscalculation of the doctor? As per the legal position and judicial pronouncements a doctor is not liable for an error of judgment, if he has taken all precautions. In *A.S. Mittal v. State of U.P.*,[4] Supreme Court held that "law recognizes the dangers which are inherent in surgical operations. Mistakes will occur on occasions despite the exercise of reasonable care and skill". Thus for a treatment the doctor may adopt a method which in his judgment will be more appropriate and effective. In such cases, the doctor is not liable for an injury resulting from an error on his judgment. In *Philips India Ltd. v. Kunju Punnu*,[5] the Court held that "the standard of care which the law requires is not an insurance against accidental slips. It is such degree of care as a normally skilful member of the profession may reasonably be expected to exercise in actual circumstances of the case in question. It is not every slip or mistake which imports negligence.

Consent of the Patient

Consent of the patient to undergo a particular treatment or surgery is very important. "Consent to treatment could be expressed or implied by the patients conduct. Once a patient has come to the doctor for treatment and paid the professional fee, he is said to have impliedly consented to the treatment, such a consent being valid only for examination and not for the performance of any procedure"[6]. The Indian Medical Council regulations also require the consent of the patient or guardians in case of minor patients while performing an operation[7].

4. 1989 AIR

5. 1974 AIR

6. *Sidharth Luthra* and *Madhav Khurana*, 'Medico Legal Aspects of Consumer Law Concerning Medical Negligence', Halsbury's Law Monthly, March, 2009, P.16.

7. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

In *Samira Kohli v. Dr. Prabha Manchanda*,[8] the Supreme Court held that, "for the consent to be valid in law, it must be an **'informed consent'.** The patient must consent to the treatment after understanding the nature of the treatment". But in cases of emergency the consent of patient is not necessary. The Supreme Court in a landmark judgment in *Parmanand Katara v. Union of India*,[9] held that, "there is no legal impediment for a medical professional when he is called upon or required to attend to an injured person needing his medical assistance immediately.." and ruled that right to health is a fundamental right.

Medical Negligence: The Bolam Rule

In UK, the issue of medical negligence was considered in great detail in the case of *Bolam v. Friern Hospital Management Committee*[10]. This case is seminal authority for determining the standard of care required from medical professionals. In this case Court held that, "in the case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at that time and that there may be one or more perfectly proper standards and if the medical man conforms with one of those proper standards he is not negligent". Hence, the Courts there opined that a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men. Court will take into consideration what other medical professionals do in similar situation while deciding medical negligence. Hence *Bolam* case laid down a modest and "ordinary skilled professional standard of care" for determining the liability of the doctors.

In a landmark judgment very recently in *Martin F. D'Souza v. Mohd. Ishaq*,[11] Supreme Court has approving the Bolam Rule held that, "Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence… While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminative proceedings and decisions against doctors are counter productive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation". And the Supreme Court has further directed that, "whenever a complaint received against a doctor or hospital by the consumer fora or by the criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the consumer fora or criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is *prima facie* case of medical negligence should notice be then issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent".

Medical Negligence as a Crime

The Indian Penal Code contains provisions for the protection of patients against negligence committed by a doctor. If there is a delinquency, culpability, rashness or grievous negligence on the part of a doctor while treating a patent he is liable under IPC. Sections 304-A, 336 and 336 of IPC mainly deal with the criminal liability of a doctor apart from other sections. Section 304-A says 'whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either

8. (2008) 2 SCC
9. (1989) 4 SCC
10. (1957) 1 WLR
11. (2009) 3 SCC

description for a term which may extend to two years or with fine or with both'. In *Juggankhan v State of Madhya Pradesh*[12], Supreme Court awarded two years imprisonment U/S 304-A to a homoeopathic doctor who negligently caused the death of a patient. Many cases can be cited with regard to criminal liability of doctors for their medical negligence.

But in recent days Supreme Court is taking liberal view in deciding criminal liability for medical negligence. In *Jacob Mathew v. State of Punjab*[13], Supreme Court held that "the jurisprudential concept of negligence differs in Civil and Criminal Law. What may be negligence in Civil Law may not necessarily be negligence in Criminal Law. For negligence to amount to an offence, the element of *means rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher *i.e.* gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in Civil Law but cannot form the basis for prosecution". The Court further observed that, "the word 'gross' has not been used in Section 304-A 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 304-A IPC has to be read as qualified by the word 'grossly'.

Conclusion

The cordial relationship between doctor and patient has undergone drastic changes due to corporatisation of medical profession, resulting in commercialization of the noble profession, much against the letter and the spirit of the Hippocratic oath. Though rapid advancements in medical science and technology have proved to be efficacious tools for the doctors in the better diagnosis and treatment of the patients, they have equally become a tools for the commercial exploitation of the patients.

The development of law pertaining to professional misconduct and negligence is far from satisfactory. The legislations are not adequate and do not cover the entire field of medical negligence. In a situation where medical services are commercialized applying the rule of "ordinary skilled professional standard of care" laid down in *Bolam* case in establishing the medical negligence may not do the proper justice to the injured patients. There is a need of a special legal code, to deal firmly with the cases of medical negligence in India, considering the vulnerable position of patient, who is a consumer paying his hard earnings for the medical services.

Finally it is submitted that the Judiciary while deciding medical negligence cases, more incline may be showed towards injured patients ensuring them higher medical skills at the hand of doctors rather applying "ordinary skilled" rule. To conclude it is useful to cite an observation of former Chief Justice *K.G. Balakrishnan* in his address at national seminar on the 'Human Right to Health'[14], that, "the right to health cannot be conceived of as a traditional right enforceable against the State. Instead, it has to be formulated and acknowledged as a positive right at a global level one which all of us have an interest in protecting and advancing".

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12. 1965 AIR SC
13. (2005) 6 SCC
14. (2009) 1 SCC