

## Recent legal aspects of medical negligence

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### Abstract

In spite of following one of the best management strategies, by the competent doctors with best available infrastructures in patient care, undesired results harming the patient cannot be avoided. Does it mean all these undesired results causing damage to the patient are as a result of medical negligence? Nowadays, patients are more aware of their rights on account of increased literacy level, role of print, electronic and social media and above all enactment of new law i.e. Consumer Protection Act 1986. Though the question of medical negligence is decided by Courts, but Courts on their own are not trained in medical science. Their decision is based on expert's opinion. Judges apply the basic principle of law in conjunction with the law of land to make a decision. Reasonableness and prudence are the guiding factors. This paper deals with the legal aspects of medical negligence i.e. what is negligence and its type and various judgements especially the Jacob Mathew vs. State of Punjab 2005 and Anr, Martin F.D'Souza vs. Mohd. Ishfaq 2009, V. Kishan Rao vs. Nikhil Super Specialty Hospital 2010 delivered by the Apex Court to make the law of negligence more rational and directions given to subordinate Courts, various Consumer Fora, State and investigating agencies regarding procedures to be followed before filing a complaint or registering a case of criminal negligence against the doctor.

**Key words:** Medical negligence, doctor, patient, court judgement, laws

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### Introduction

The role of technology since the last fifty years is steadily increasing in the health care sector in India. So the clinician are relying more on technology in the field of diagnosis, management of the ailments and postoperative care. Moreover the patients are nowadays more demanding on account of more awareness of their rights. With the enactment of Consumer Bill doctors are now more cautious regarding the treatment of their patients thereby leading to the birth of defensive medicine and increasing the cost of treatment

which taxes the patients/relatives. Nowadays, if a patient is admitted in the hospital or visits the doctor for treatment of an ailment and due to treatment if any damage occurs to the patients, then the patients may go to police with the request for registering FIR under relevant section of IPC or file a complaint in the Court or Consumer Forum regarding inappropriate facilities, standard of professional competence and the appropriateness of therapeutic and diagnostic methods. Before the landmark judgement of Supreme Court of India in Jacob Mathew case, the cases of medical negligence were filed in the Courts/Consumer Fora without any subject

expert's opinion. But recently, this landmark judgement and the other judgements delivered by the Apex Court have made the law of medical negligence more rational to curb the filing of vexatious and frivolous complaints against the doctors

### **Negligence**

To define negligence is not easy. But in a simple terminology it can be said that it is breach of a legal duty to care. This failure of duty may be caused by the omission to do something which a reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs should have done. It may also be doing something which a prudent and reasonable person would not have done. Basically, there are three constituents of negligence;

1) Legal duty to exercise due care on the part of party complained of towards the party complaining the former's conduct within the scope of duty.

2) Breach of the said duty and

3) Consequential damage

Cause of action for negligence arises when damage occurs, for, damage is a necessary ingredient of this tort. Thus the essential components of negligence are three 'duty', 'breach' and 'resulting damage' (1).

### **Civil negligence**

Persons who offer medical advice and treatment implicitly state that they have the requisite skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer the treatment. This is known as an "Implied undertaking" on the part of medical professional. In the case of *State vs. Smt. Santra* the Supreme Court held that every doctors "has a duty to act with reasonable degree of care and skill" (2). Doctors in India may be held liable for their services individually or vicariously unless they come within the the exceptions specified in the *Indian medical Association vs. V P Santha* i.e. if they do not charge fees (3). In a key decision in the case of *Dr Laxman Balkrishna Joshi vs. Dr Trimbak Bapu Godbole*, the Supreme Court held that if a doctor has adopted a practice that is considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong.(*Bolam Test*).The law expects an ordinary degree of skill from doctor (4). Doctor cannot give warranty of the perfection of their skill or guarantee of cure. If the right course of treatment has been adopted by doctor and is skilled and has worked with a method or

manner best suited to the patient, then he/she cannot be blamed for negligence even if the patient is not totally cured (5),(6),(7).

Certain conditions must be satisfied before liability can be considered. The person who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty; and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting expert opinion (8).

In some situations the complainant can invoke the principle of *Res Ipsa Loquitur* or "the thing speaks for itself". In certain circumstances no proof of negligence is required beyond the accident itself. The maxim *Res Ipsa Loquitur* 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 criminal negligence within the domain of criminal law. It has only a limited application in trial on a charge of criminal negligence

### **Criminal Negligence**

One of the essential elements in criminal is *mens rea*- the guilty mind or an evil intention. The question arises as to whether in cases of medical negligence- whether slight, ordinary or gross – is there any criminal liability. As *mens rea* is essential, it is difficult to argue that the doctor had a guilty mind and was negligent intentionally, this has been the main argument in most of the cases in which the decision was to regarding criminal liability.

In the *Santra* case, the Supreme Court has pointed out that liability in civil law is based upon the amount of damages occurred; in criminal law the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of offence, the magnitude of offence and the character of the offender. In *Poonam Verma vs. Ashwin Patel* the Supreme Court distinguished between negligence, rashness and recklessness. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that that they will not occur as a result of his/her act. A reckless person knows the consequences but does not care whether or not they result from his/her act. Any conduct falling short of recklessness and

deliberate wrongdoing should not be the subject of criminal liability (9).

Thus a doctor cannot be held criminally responsible for a patient's death unless it is shown that she /he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State (10). The doctors may be prosecuted under various sections of IPC i.e .section 336, 337, 338, 304 A IPC. But the doctors are mostly prosecuted under section 304 A IPC. Defences for doctors accused of criminal liability rare imbibed in the section 80 and 88 of the Indian Penal code. In Kanhaiya Kumar Singh vs. Park Medicare and Research Centre, it was held that negligence has to be established by complainant and cannot be presumed (11). In Suresh Gupta's case in August 2004 the standard of negligence that had to be proved to fix a doctor's or surgeon's criminal liability was set at 'gross negligence or 'recklessness". In this case the Supreme Court distinguished between an error of judgement and culpable negligence. It held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do a great disservice to the community. A doctor cannot be tried for culpable or criminal negligence in all cases of medical mishaps or misfortunes.

Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. The Court observed that allegations of rashness or negligence are often raised against doctor by persons without adequate knowledge, to extract unjust compensation. This results in serious embarrassment to doctors who are forced to seek bail to escape arrest. If bail is not granted then they face incarceration. Though they may be exonerated of the charges at the end; but in the meantime they would have suffered a loss of reputation; often irreversible. The tendency to initiate such cases has therefore to be curbed.

Since the medical profession renders a noble service, it must be shielded from frivolous complaints or unjust prosecution. With this perspective in mind the Court went into the question as to what actionable negligence in the case of professional. The law now laid down is as follows:

A simple lack of care, an error of judgement or an accident, even fatal will not amount to 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 available, or simply because a more skilled doctor would not have chosen to follow or resort to that practice.

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.

The word 'gross' has not been used in section 304A 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 guilt (12).

In the case of Jacob Mathew vs. State of Punjab and Anr the issue of gross negligence was decided by Supreme Court (13).

The court directed the central government to frame guidelines to save doctors from unnecessary harassment and undue pressure in performing their duties. It ruled that until the government framed such guidelines, the following guidelines would prevail: A private complaint of rashness or negligence against a doctor may not be entertained without prima facie evidence in the form of a credible opinion of another competent doctor supporting the charge. In addition, the investigating officer should give an independent opinion, preferably of a government doctor. Finally, a doctor may be arrested only if the investigating officer believes that she/ he would not be available for prosecution unless arrested.

The Supreme Court in Martin F.D'Souza vs. Mohd. Ishfaq 2009 has delivered a judgement that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) 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/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. The Apex Court has further warn the police official not to arrest or harass doctors unless the facts clearly come within

the parameters laid down in Jacob Mathew's case (vide supra), otherwise the police man will themselves have to face legal action (14).

In V. Kishan Rao vs. Nikhil Super Specialty Hospital 2010, the Hon'ble Supreme Court had upheld the findings and decisions of District consumer forum on the basis of the lack of independent expert opinion (in the favour of complainant) relying on the principle of "Res Ipsa Loquitur" (meaning thereby the thing speaks for itself i.e. there is no need of expert opinion in every case of negligence) (15).

Medical council of India in compliance of the Supreme Court Judgement in the case of Criminal Appeal No. 144-145 of 2004 of Jacob Mathew vs. State of Punjab and Another has formulated guidelines for prosecution of medical professional under criminal law for their medical negligence (16).

### Conclusion

Though the above cited judgements are rational and will remove the unfounded fear of medical negligence from the mind of honest and sincere professionals as the courts considers that medical profession renders a noble service to the society and it should be shielded from unjust prosecution. But the law does not give any immunity to the wrong doers. Either there may be negligence of the doctor, of hospital staff or of both. In most of the cases, it will be a case of joint and several liabilities. The division of liability between the two of them will be decided according to the understanding between two. As far as determining of negligence is considered, the courts may seek the opinion of subject experts alongwith the examination of the hospital /treatment record of the patient except in cases where things speaks for itself (Res Ipsa Loquitur).

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