

# Comparative Study on Medical Negligence

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## ABSTRACT

Medical profession is the one of the noblest profession among all other profession in India. For a patient, the doctor is like God. And, the God is infallible. But that is what the patient thinks. In reality, doctors are human beings. And, to err is human. Doctors may commit a mistake. Doctors may be negligent. The support staff may be careless. Two acts of negligence may give rise to a much bigger problem. It may be due to gross negligence. Anything is possible. In such a scenario, it is critical to determine who was negligent, and under what circumstances. In a country committed to the rule of law, such matters are taken to the court and judges are supposed to decide. However, negligence by doctors is difficult to be determined by judges as they are not trained in medical science. Their decisions are based on experts' opinion. Judges apply the basic principles of law in conjunction with the law of the land to make a decision. Reasonableness and prudence are the guiding factors. We would like to go through these principles in the light of some court judgments and try to understand as to what is expected from a doctor as a reasonable person. As these issues are at the core of medical profession and hospitals are directly affected by new interpretation of an existing law regarding medical professionals, it is pertinent to deal with them at the individual level of the doctor, and also at the employer's level i.e., hospital.

## 1. Introduction

It covers all aspects of professionals to follow codes of conduct when providing care or services in their field. In the event of the failure to adhere to the professional codes of ethics by the service provider a professional liability claim can be filed for.

### Negligence by Medical Professionals

Such a person, whether he is medical practitioner or not, who is consulted by a patient, owes him certain duties, namely a duty of care in deciding whether he undertakes the case; a duty of care in deciding what treatment to give and duty of care in his administration of that treatment. A breach of any these duties will support an action for negligence by patient. In Jacob Mathew 1 case, the Supreme Court of India has gone into details of what is the meaning of negligence by medical professionals. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course . Degree of Negligence The Delhi High Court laid down in 2005 that in civil law, there are three degrees of negligence:2

1. lata culpa, gross neglect
2. levis culpa, ordinary neglect
3. levis sima culpa, slight neglect

Every act of negligence by the doctor shall not attract punishment. Slight neglect will surely not be punishable and ordinary neglect, as the name suggests, is also not to be punished. If we club these two, we get two categories: negligence for which the doctor shall be liable and that negligence for which the doctor shall not be liable. In most of the cases, the dividing line shall be quite clear, however, the

problem is in those cases where the dividing line is thin. Bolam v. Friern Hospital Management Committee.<sup>3</sup>

No doctor turned up for about 20-25 minutes. Later two doctors – Dr. Jacob Mathew and Dr. Allen Joseph – came and an oxygen cylinder was brought and connected to the mouth of the patient. Surprisingly, the breathing problem increased further. The patient tried to get up. The medical staff asked him to remain in bed. Unfortunately, the oxygen cylinder was found to be empty. Another cylinder was brought. However, by that time the patient had died. The matter against doctors, hospital staff and hospital went up to the Supreme Court of India. The court discussed the matter in great detail and analyzed the aspect of negligence from different perspectives – civil, criminal, torts, by professionals, etc. It was held that there was no case of criminal rashness or negligence. The Supreme Court in Laxman v. Trimbak,<sup>5</sup> held: A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires." In Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia & Anr.,<sup>6</sup> the Apex Court has specifically laid down the following principles for holding doctors negligent: "Gross medical mistake will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of res ipsa loquitur can be applied. Even delegation In A.S. Mittal v. State of UP,<sup>7</sup> an irreparable damage was done to the eyes of some of the patients who were operated at an eye camp organized by the government of Uttar Pradesh.

Further, in State of Haryana v. Santra<sup>8</sup> However, the apex court has explained in State of Punjab v. Shiv Ram,<sup>9</sup> that "merely because a woman having undergone a sterilization

operation becoming pregnant and delivering a child thereafter, the operating surgeon or his employer cannot be held liable on account of the unwanted pregnancy or unwanted child. Failure due to natural causes, no method of sterilization being fool proof or guaranteeing 100% success, would not provide any ground for a claim of compensation. Poonam Verma v. Ashwin Patel, 10 reflects yet another reckless act on part of the doctor. In this case a doctor who was registered as a medical practitioner and was entitled to practice in homoeopathy was found to be guilty of negligence for prescribing allopathic medicines resulting in death.

## 2. Medical Negligence - A Civil Wrong or Criminal Offence:

The term negligence is used for the purpose of fastening the defendant with liability under civil law (the law of torts) and, at times, under the criminal law. But often it is alleged by the plaintiffs that negligence is negligence and that no distinction can be drawn between the two so far as it relates to breach of his duty and resultant damage. Explaining the difference between the two, Lord Atkin in his speech in *Andrews v. Director Public Prosecution*, stated: "... Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established."<sup>11</sup> The term negligence is used for the purpose of fastening the defendant with liability under civil law (the law of torts) and, at times, under the criminal law. But often it is alleged by the plaintiffs that negligence is negligence and that no distinction can be drawn between the two so far as it relates to breach of his duty and resultant damage. Explaining the difference between the two, Lord Atkin in his speech in *Andrews v. Director Public Prosecution*, stated: "... Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law there are degrees of negligence; and a very high degree of negligence is required to be proved before the felony is established."<sup>11</sup> Thus, for negligence to be an offence, the element of *mens rea* (guilty mind) must be shown to exist and the negligence should be gross or of very high degree.

In Criminal law, negligence or recklessness must be of such a high degree as to be held gross. The apex court in *Jacob Mathew v. State of Punjab*, has explained that; "the expression, rash and negligent act "occurring in section 304-A of the I.P.C should be qualified by the word, grossly." 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 has resulted was most likely imminent. From the above it may be inferred that the distinction between civil and criminal liability in medical negligence lies in the conduct of the doctor which should be of gross or reckless or of a very high degree.

## 3. Medical negligence and hospitals

Hospitals in India may be held liable for their services individually or vicariously. They can be charged with negligence and sued either in criminal/ civil courts or Consumer Courts. As litigations usually take a long time to reach their logical end in civil courts, medical services have been brought

under the purview of Consumer Protection Act, 1986 wherein the complainant can be granted compensation for deficiency in services within a stipulated time of 90 -150 days. Cases, (e.g., cases where treatment is routinely provided free of cost at non-government or government hospitals, health centers, etc provider can be charged under Section 304-A IPC for causing damages amounting to rash and negligent act or in Civil Courts where compensation is sought in lieu of the damage suffered, as the case may be.

### **Liability of hospitals in cases of negligence**

Hospitals liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to the deficiency of the hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of an employer for the negligent act of its employees. An employer is responsible not only for his own acts of commission and omission but also for the negligence of its employees, so long as the act occurs within the course and scope of their employment. This liability is according to the principle of "respondeat superior" meaning, let the master answer. Employers are also liable.

### **Direct liability**

A hospital can be held directly liable for negligence on many grounds. Failure to maintain equipments in proper working condition constitutes negligence. In case of damage occurring to a patient due to absence/ non-working equipment e.g. oxygen cylinder, suction machine, insulator, ventilator etc. the hospital can be held liable.

In *Mr. M Ramesh Reddy v. State of Andhra Pradesh*<sup>12</sup> the hospital] were held to be negligent, inter alia, for not keeping the bathroom clean [in this case the bathroom was covered with fungus and was slippery], which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1 Lac was awarded against the hospital. A curious issue is that of liability in cases of polyclinics. Polyclinic means a place where doctors of different specialties practice with common staff and other facilities. Since every doctor is practicing individually, he would be responsible for his own negligence and not for others. But a particular doctor may also be vicariously liable for negligence of staff of the polyclinic, if the negligence occurs during the care of his particular patient in addition to the polyclinic being held liable for the negligence of its staff. The other doctors may get involved as partners of the polyclinic depending upon the agreement between them. With life-saving equipment and such equipment is either absent or non-functioning, it is liable for negligence in case of a mishap. In the United Kingdom, even delay in arrival of ambulance has been held negligent on the part of hospital as even a common man knows the importance of properly equipped ambulance arriving on time in saving a life [Kent vs Griffiths, (2002) 2 All ER474].

### **Vicarious liability**

A hospital can be held vicariously liable on numerous grounds on different occasions. Several High Court Judgments have held hospitals vicariously liable for damages caused to the patients by negligent act of their staff. In one judgment of the Kerala High Court in *Joseph @ Pappachan v. Dr. George Moonjerly*, in support of the following effect stated that „person

run for treatment, they must use reasonable care and skill to ease him of his ailment. The hospital authorities cannot, of course, do it by themselves; they have no ears to listen to the stethoscope, and no hands to hold the surgeon's scalpel.

#### 4. Medical Profession – Whether Under Consumer Protection Act

In *Indian Medical Association v. V.P. Shantha and Ors.*, the apex court has put an end to this controversy and has held that patients aggrieved by any deficiency in treatment, from both private clinics and Government hospitals, are entitled to seek damages under the Consumer Protection Act, 1986. A few important principles laid down in this case include: 1. Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service" as defined in section 2(1) (o) of the C.P. Act. 2. The fact that medical practitioners belong to medical profession and are subject to disciplinary control of the Medical Council of India and, or the State Medical Councils would not exclude the service rendered by them from the ambit of C.P. Act. 3. The service rendered by a doctor was under a contract for personal service rather than a contract of personal service and was not covered by the exclusionary clause of the definition of service contained in the C.P. Act. 4. A service rendered free of charge to everybody would not be service as defined in the Act. The hospitals and

doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service.

#### 5. Conclusion

Thus, after critically analyzing the present paper I came up to following conclusion. There are two possibilities in cases of negligence – either it is negligence of the doctor or it is negligence of the staff. There may be a possibility of negligence, both of the doctor and the staff. In most of the cases, it will be a case of joint and several liability, and both the doctor and the hospital will be liable. The division of liability between the two of them will be decided according to the understanding between the two. The level of subjectivity in such decisions is quite high and the purpose of law to be certain and specific is defeated to a large extent. Recent decisions are a good step in the direction of making this murky a bit tidy, however, a lot needs to be done by the courts in the shape of clearer judgments so that the layman can benefit. As of now, the judgments leave a lot of room for discretion, which at times may be exercised by different persons, including doctors and judicial officers, in an undesirable manner. The law on the subject needs to be more precise and certain. That will surely give a better understanding about the "reasonable man". Thus it is submitted that as the law on medical negligence appears to have been settled by the Hon'ble apex court, there is a need to have a settled legal position in other sectors as well so far as it relates to the consumer protection in India.

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