MEDICAL NEGLIGENCE: CIVIL Vs CRIMINAL; ISSUE SETTLES

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Abstract

The public, patients, and the press including visual media have become aware of the Consumer Protection Act, 1986, with this came the issues of not only civil negligence but criminal negligence also. In one such case the first information report was lodged under S 304A of IPC against a doctor. The matter went to the two-judge Bench of the Supreme Court (SC) and the Court quashed the prosecution. Further the opinion was called for consideration by a Bench of three judges. In this relation are discussed the various issues of tort, crime, medical profession, guidelines in relation to negligence.

Key Words: Crime, Doctor, Negligence, Tort.

Introduction

Probably since the beginning of medical practice the society has taken the cognizance of medical negligence as well. In India, since the inception of the Consumer Protection Act, 1986 the question of medical negligence became very prominent. The public, patients, and the press including visual media became aware, with this, came the issues of not only civil negligence but criminal negligence also. In one such case the first information report was lodged under S 304A of IPC against Dr. Suresh Gupta. The matter went to the two-judge Bench of the Supreme Court (SC) and the Court quashed the prosecution of the Dr. Suresh Gupta. This Exemption of physician from criminal negligence caused furor and nation wide debate on the issue. Immediately after this case another case of Dr. Jacob Mathew came for hearing before the SC. The two-judge Bench that heard the case of Dr. Jacob Mathew doubted the correctness of the view taken in Dr. Suresh Gupta’s case and expressed the opinion that the matter may be called for consideration by a Bench of three judges. This is how the matter came up for hearing and the judgment thereof.

The referring Bench in its order dated 9-9-04 had assigned tow reasons for their disagreement with the views taken in Dr. Suresh Gupta’ case which were as under:

i) Negligence or recklessness being ‘gross’ is not a requirement of S 304 A of IPC and such an approach cannot be countenanced.

ii) Different standards cannot be applied to doctors and others.

The present Bench heard all concerned namely the State Govt. of Punjab and the Medical Council of India, a registered society “People for Better Treatment, Kolkata; Delhi Medical Council, Delhi Medical Association and Indian Medical Association. Mainly there were two issues-

1) Is there a difference in civil and criminal law on the concept of negligence? and
2) Whether a different standard is applicable for recording a finding of negligence when a professional, in particular a doctor is to be held guilty of negligence?

The Bench proposed to deal with the issues in the interests of settling the law.

Negligence as a tort

Though the jurisprudential concept of negligence defies any precise definition, Indian jurisprudential thought is well stated in the Law of Torts- Ratanlal and Dhirajlal- accordingly the definition involves three constituents of negligence 1) a legal duty to exercise due care, 2) breach of the said duty; and 3) consequential damage. The essential components of negligence, as recognized, are three: “duty”, “breach” and “resulting damage”, that is to say:

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

ii) The failure to attain that standard of care, prescribed by the law, thereby committing a breech of such duty; and

iii) Damage, which is both casually connected with such breech and recognized by the law, has been suffered by the complainant.

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

Negligence as a crime

It is claimed that negligence is negligence and jurisprudentially no distinction
can be drawn between negligence under civil law and negligence under criminal law. Generally speaking it the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount of degree of negligence that is determinative of liability. In practice it may happen that the patient suffers good damage but caused by small degree of negligence, which may not be sufficient for criminal prosecution of the physician. As against this the patient may suffer small damage but the negligence may be gross. In this situation as he has suffered less damage he may not like to go far criminal prosecution of the physician because the patient is more grieved by the damage he has suffered rather than the degree of care or lack of it the physician has exercised. Either way it is futile to charge the physician under criminal law. In criminal law the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

The Bench quoted the case of Andrews v Director of Public Prosecutions 1937 which stated, “simple lack of care which constitutes civil liability is not enough for the purposes of the criminal law. There are degrees of negligence and a very high degree of negligence is required to be proved before felony is established.”

The fore-quoted statement of law has been noted with approval in Syad Akbar v State of Karnataka (1980). In that case their Lordships have opined that there is a marked difference as to the effect of evidence, viz the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as the mind of Court, as a reasonable man, beyond all reasonable doubt.

The present Bench accepted this concept and said, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter the negligence has to be gross or of a very high degree. Criminal punishment carries substantial moral overtone. Some of the life’s misfortunes are accidents for which nobody is morally responsible. Others are wrong for which responsibility is diffuse. Yet others are instances of culpable conduct and constitute grounds for compensation and at times, punishment. Distinguishing between these various categories require careful, morally sensitive and scientifically informed analysis.\(^3\) There is another view to this criminal negligence that is based on ‘retribution’ that is ‘deserved punishment for the evil done’. In a crude way it is proverbial an eye for an eye.\(^4\)

**Negligence by Professionals**

Any reasonable man entering into a profession impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A physician would not assure the patient full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. What professional can say is that while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. The Bench cited multiple cases which are as under and accepted the contents their in-

- Michael Hyde and Associates v J.D. Williams & Co Ltd (2001)
- Bolam v Friern Hospital Management Committee (1957)
- Eckersley v Binnie (1988)
- Hucks v Cole (1968)
- Hunter v Henley (1955)
- Syad Akbar v State of Karnataka (1980)
- Krishanan and Anr v State of Kerala (1996)

  i) The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care.
  
  ii) A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field
  
  iii) Where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.
  
  iv) Res ipsa loquiter is a rule of evidence which in reality belongs to the law of torts. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. In our opinion, a case under section 304A IPC
cannot be decided solely by applying the rule of res ipsa loquiter.

Medical Profession in Criminal Law

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The IPC enacted as far back as in the year 1860 sets out a few vocal examples in S 88, 92 and 93 for all to see. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person’s benefit. Section 92 IPC provides for exemption for acts done in good faith for the benefit of a person without his consent thought the acts cause harm to a person and that person has not consented to suffer such harm. Section 93 IPC saves from criminally certain communication made in good faith.

The Bench also offered arguments in defence of the fore said Sections. It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it, would be in the highest degree barbarous and absurd. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow creature. The utmost that he can do is to abstain from every thing which is at all likely to cause death.

A doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against State.

To impose criminal liability under S 304 A IPC, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and the act must be the proximate and efficient cause without the intervention of another’s negligence. It must be causa causans; it is not enough that it may have been the causa sine qua non.

Profession v occupation

The Court dealt with how profession differs from an ‘occupation’ especially in the context of performances of duties and hence the occurrence of negligence. In the matter of professional liability professions differ from occupations fro the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man’s control. A case of occupational negligence is different from one of professional negligence.

And therefore the Bench agreed with the principles of law laid down in Dr. Suresh Gupta’s case and affirmed the same. However, there is no absolute immunity against criminal prosecution and therefore if need arises following guidelines are to be followed.

Guidelines

However the Bench felt the need of guidelines as regard to prosecution of medical professionals because the investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under section 304 A IPC. Till such guidelines are prepared by the Central Govt, State Govts. in consultation with Medical Council of India the Bench proposed the following guideline-

i) 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.

ii) 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 who can normally be expected to give an impartial and unbiased opinion applying Bolam’s test to the facts collected in the investigations.

iii) A doctor accused of rashness or negligence, may not be arrested in a routine manner.

In my opinion beyond this judgment also, it is better for patient himself if at all he has to sue the doctor he should choose civil suit rather than the criminal one. I put forth arguments in favour of my statement.

Some desperate authors want to say that India’s criminal justice system does not deliver justice at all. It has been repeatedly seen in India, from Bhopal gas tragedy to Uphar Cinema fire case or in cases of fire in school in Tamilnadu or fall of bridge in Daman that criminal law has failed to deliver justice. In these
cases the culprits were few and the victims were multiple; as against this in a case of patient - physician relationship commonly it one physician (culprit) one victim or in reverse more physicians (culprits) and one victim.

Physician takes up the patient and does his work in good faith and patient takes that inherent risk of something may go wrong. It is impossible to demarcate where a judgment error becomes gross negligence. It is difficult to hold a professional criminally liable for a judgment made in good faith. Say a lawyer does a bad job defending some accused of murder and the client hangs. No matter how bad is his defence, as long as he acted in good faith, can you hold him criminally liable? It’s the same with physicians. Still further the situation with physicians is unique. The truth is that the medical profession indeed requires a certain degree of guesswork. It is also this ability for guesswork that makes the physician invaluable. When it works the physician seems like a miracle man. When it doesn’t, it is hard for those affected to accept that it was possible to make a mistake. And if that mistake- inadvertent as it may be – leads to death, it becomes near impossible to come to terms with it.

Therefore to fix criminal liability on physician has multiple disadvantages:
The victim does not get any compensation.
Our legal system is multi tier. The process is time consuming. So much so that justice delayed is justice denied.
State contests the case. The sufferer cannot have his own lawyer (his lawyer can only assist to the Govt. pleader, the grieved family commonly does not have any say in his appointment).
 Practically in multiple cases of mass casualties as referred above, nobody has been held criminally liable and punished.

As against criminal liability now we try to see what, the advantages of civil liability against physician, are -
The burden of proof is lower. What we require under tort is ‘preponderance of evidence’. Compensation is awarded to victim. It is less time consuming. It is cheap.

The victim has a say in it. That is the victim can have his own lawyer or expert representing his case.
It makes the approach of restitution that is making good for loss of damage. This is the basis of tort also.

Conclusions
- The Bench dealt with the matter at length. It defines professional negligence.
- Negligence in the context of medical profession necessarily calls for a treatment with a difference.
- A case of occupational negligence is different from one of professional negligence.
- The parameters to prove civil negligence and criminal negligence are different.
- The jurisprudential concept of negligence differs in civil and criminal law. In criminal negligence mens rea must be shown to exist.
- There is no blanket immunity against criminal prosecution for medical professionals.
- The expression ‘rash or negligent act’ as occurring in S 304A of the IPC has to be read as qualified by the word ‘grossly’.
- The Indian Penal Code does put the medical professional on a pedestal different from ordinary mortals.
- Res ipsa loquiter is only a rule of evidence in the domain of civil law.
- The criminal law advocates an eye for eye-retribution.
- The criminal justice system in India has its limitation.
- It is advantageous for patient himself also to choose the line civil law as against criminal law. It a situation of restitution.

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