

Medical Negligence As Crime

By

Sh. B.R. Gupta, Advocate
Former Director, Prosecution, J&K

Introduction

Right to life includes right to health and health care under Article 21 of the Constitution of India. Thus when ever there is breach of this right and medical practitioner acts negligently, he becomes liable for medical negligence as a civil wrong. This issue has been the core of many a legal debate in the light of the inclusion of the medical profession in the list of services under the Consumer Protection Act. Now the patients have become the consumers and they can sue the doctors for their negligence.

Medical negligence also creates a criminal liability on the medical practitioners and this is due to various provisions as contained in the Penal Code and other statues.

What is negligence ?

From a layman's point of view, the first thing that comes to our mind is that it connotes some sort of careless or rash act, which results in breach of legal duty. Negligence is thus simply neglect of some care, which we are bound to exercise towards some body. This may be taken to be as a rash act as well which may be defined as an over hasty act. In cases of negligence, the party performs not an act to which he is obliged. He breaks a positive duty i.e. he adverts not to the act which is his duty to do. Thus we can say that subjective theory relates to negligence to the state of mind and says that it is a mental condition and on the other hand, the objective theory says that Negligence is the omission to do some thing which a reasonable man would do or doing something which a reasonable man would not do.

What is Criminal Negligence ?

Negligence is a breach of civil wrongs but it may also lead to a criminal liability on a negligent person. Criminal negligence is the 'gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. For example a medical practitioner under takes

termination of pregnancy in its sixth week but uses unsterilized instrument. In this case the medical practitioner has deviated from a standard training he was bound to apply viz. adequate training before undertaking the procedure or doing the procedure according to the standard used by the profession. Thus he will be liable for criminal negligence.

The other concept here is that of criminal rashness. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. For example - a medical practitioner undertakes termination of pregnancy in its sixth month, Here is a rash act where the medical practitioner is aware, or should be that the act is dangerous and could result in death but yet under takes the termination with indifference to its likely consequences. Thus we can see that a criminal liability is created in negligence only when there is a gross deviation from set standards.

What is Medical Negligence ?

Let us see as to how scholars and Courts in India have defined it. In *A.S. Mittal v. State of UP*, AIR 1989 SC 1570 at page 1574, the Supreme Court of India held that "a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed is a negligent one." This definition poses some questions in front of us so as to 'who a reasonably competent doctor is' can a miscalculation or misjudgment on part of the doctor be taken as negligence and what happens when the negligence is very clear one. For clarity, let us see these in separate heads.

Who is a reasonably skilful doctor ?

Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. Thus we can safely say here that the common law does not expect very high or very low standard from a professional. But, the doctor is a professional man and thus he is expected to have some standard of care towards his profession. It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill. The duties, which a doctor owes to patients, are clear, viz. a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or 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 patients.

Can a misjudgment on part of the doctor be taken as negligence ?

This is one of the important issues as in various cases where the miscalculation of the doctors often results in harm to patients. As the law stands today in India, doctor is not liable for an error of judgement or of diagnosis. If he has secured all necessary data on which to base a sound judgement. For a treatment of a disease or injury, the doctor may adopt a method, which in his judgement, will be more effective and appropriate. In such a case, the doctor is not liable for an injury resulting from an error in his judgement. This has been accepted by the Supreme Court of India in case of A.S. Mittal v. State of U.P. where it was held that 'law recognizes the dangers which are inherent in surgical operations. Mistakes will occur on occasions despite the exercise of reasonable skill and care.

It is settled principle that it is not expected of a doctor to have guaranteed a cure and is never presumed to be infallible. He is also not obliged to achieve success in every clinical case he treats. If an ill person goes to a hospital for treatment, there is always some risk, no matter what care is used.

Medical negligence as Crime

The Criminal Medical negligence may arise when:

1. A Doctor shows gross absence of skill or care during treatment of a patient resulting in injury or death.
2. A Doctor performs a illegal act.
3. A Doctor assaults a person and the person dies.

Thus it is clear that the negligence on the part of the Doctor must be amounting to total lack of attention, in difference to the patient safety and gross in attention to prove criminal negligence on his part. Criminal liability in cases of medical negligence is created in India by various sections of Penal Code, namely sections 304A, 336, 337 and 338. Section 304A deals with Criminal negligence and provides that whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide. It is important to note that where a person practicing medicine or surgery is guilty of gross negligence in course of his employment which result in death it amounts to mans slaughter and can be charged u/s 304A. The most important case to mention here is of *Juggan Khan v. State of Madhya Pardesh*, AIR 1965 SC 831. Another case is that of *Dr. Khusal Das Pamman Das v. State* AIR 1960 MP 50 where it was held that where a person is totally ignorant of the science of medicine or practice of surgery

undertakes treatment is guilty of criminal negligence. The duty of a Medical Practitioner who undertakes the treatment of a patient is to use fair and reasonable standard of care and competence. Before he can be held responsible for death of his patient the prosecution must prove all letters necessary to establish civil liability except pecuniary loss and in addition must prove negligence or incompetence on his part.

Liability of Medical Establishment

The liability of the medical establishment may come up in various ways. The most common of these is vicarious liability when the hospital can be held negligent for the negligent behavior of its employee. It is restricted to civil litigations as this doctrine is based on the principle of respondent superior. A hospital as an employer is responsible for the negligence of the employees acting under its supervision and control except where it is shown that the managers of the hospital exercised due care and skill in selecting properly qualified and experienced staff.

The hospital or medical establishment may be held liable when they are devoid of basic facilities for which they are obliged. It may be seen in case of *State of M.P. v. Dr. Bharti Patidar* 1995 Cr. L.R 243 where patient was given spinal anesthesia which caused trouble. The nursing home devoid of basic facilities to tackle the problem and thus held liable to be tried for negligence.

Conclusion

It has been found that negligence as a concept has various complexities and that negligence safely divide into breach of positive duty and breach of negative duty and it can further be explained on the basis of mens rea i.e. using the objective and subjective theories. The intention of the Legislature seems to be in favour of objective theory of negligence. It was further established that criminal negligence is the gross and culpable neglect or failure to do some act and it is invoked only when there is gross deviation from set standards. The criminality also lies in hazarding a dangerous or a wanton act with the knowledge that is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused.