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Medical Negligence: an overview of the opinions and the controversies

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Abstract

It is becoming questionable nowadays as to whether doctors know what is in the patient's best interest when it comes to delivering health care. Changes in the English law in the recent past, where the well established Bolam test has come under scrutiny, reflect that expert witness testimony is being contested in terms of its defensibility as seen in the Bolitho case that questioned the authenticity of expert knowledge to the extent that the opinion amongst expert groups may not in fact be based on sound current knowledge. This changing scenario, is likely to have its implications on the outcome of future litigations of medical negligence because the expert opinions may well be open to scrutiny and logicality and the doctrine of 'doctor knows best' may no longer be recognized by the courts. However, there have been differences of opinions in various court verdicts from time to time. This article examines some important judgments in cases of alleged medical negligence.

Keywords

Malpractice, Medical Negligence; Occupational Negligence; Negligence; Doctrine of Res ipsa loquitur; No-fault compensation

Introduction

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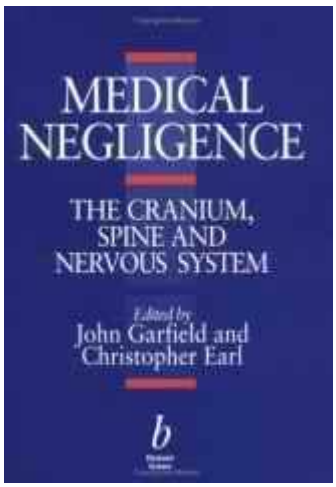

The Supreme Court of India hearing the appeal, in Dr Suresh Gupta Vs Govt. of Delhi[1] doubted the correctness of the view taken and expressed the opinion that the matter called for consideration by a Bench of three Judges. The referring Bench in its order dated 9.9.2004 assigned two reasons for their disagreement with the view taken in Dr Suresh Gupta's case: - 1) Negligence or recklessness being 'gross' is not a requirement of Section 304A of the Indian Penal Code (homicide by rash and negligent act) for fixing criminal liability on a doctor. Such an approach cannot be countenanced. 2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence is being done to the plain and unambiguous language of Section 304A IPC. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter, shall decide, placed at a different pedestal for finding out, whether rashness or negligence was involved. In the instant case, the cause of death was found to be "not introducing a cuffed endotracheal tube of proper size so as to prevent aspiration of blood from the wound in the respiratory passage." The Bench formed an opinion that this act, attributed to the doctor, could be described as an act of negligence as there was lack of due care and precaution.

The judgment may be interpreted as an indicator that 'gone are the days when doctors and nurses could base their practice on the principles of beneficence, non-maleficence and therapeutic privilege alone. They must now be able to defend their actions and have their reasons scrutinized and tested for logicality.' Earlier, the suggestion that the 'doctor knows best' led Lord Wolf to comment that the courts would no longer apply a deferential view to this doctrine, meaning that the medical fraternity should be more open to scrutiny with regards to their decision making.[2]

Furthermore, until now, the excessive deference towards health care professionals was on account of the presumption of beneficence, reluctance to find negligence against members of any profession and the difficulty for the plaintiff to find reputed experts prepared to argue evidence against

professional colleagues. However, nowadays the society is becoming primarily concerned about the rights of the individual rather than the duty individual owed to the society, and accordingly, the courts also have developed a more transparent approach to those in authority. Concurrently, in the aftermath of Bolitho case[3] the courts appear to be moving away from the Bolam approach towards insisting that the doctors give further consideration to the autonomy of the patient. Combined with the societal influence of the rights of the individual, ethical practice is beginning to play a part in raising particular questions such as the right to life, the right to terminate life,[4] patient's right to refuse treatment,[5] and the professional duty to treat.[6]

Canada and Australia have been rejecting the approach of English law in medical negligence cases. In Canada, the courts, although respectful of health professional opinions, also recognize that questions related to professional practice that naturally fall within the comprehension of a layman could arise, as is evident in Anderson Vs Chasney,[7] in which Bolam was rejected. The Canadian court, taking a different approach, opined that doctors are under a duty of care to ensure that their patients receive the information they need in order to give an informed consent to surgical and other health care decisions, and as such, the doctors must discuss the nature of illness and the recommended treatment; disclose the material risks involved and discuss any alternative as well as the result of doing nothing.[8]

In Rogers Vs Whitaker,[9] the Australian High Court also rejected the English law approach in Sidaway Vs Bethlem Royal Hospital case[10] and chose to follow the Canadian example to the extent that the requirement of disclosure in Australia will now depend on the extent to which a reasonably prudent patient demonstrates an interest in being told. This allows the patient the freedom to exercise his/her autonomy.[11] Following this judgment, the New South Wales Court held that the Bolam test is not only the wrong test where disclosure of risk is concerned but is also the wrong test in relation to decision concerning treatment and diagnosis.[12]

Evolution of legal concept and controversies

Evolution of the legal concept of medical negligence is a surprisingly recent development. The tort of negligence was founded in the UK with the case of Donoghue Vs Stevenson in 1932, when commercial liability for defective produce was established. The key precedent in the establishment of medical negligence was provided by the Bolam proceedings of 1950. This case provided the so-called 'Bolam test', which has underpinned the UK's arrangements for more than half a century, and still provides the defense for medical professionals when they have 'acted in accordance with practice accepted as proper by a responsible body of medical opinion'. The Bolam test was amended by a judgment in the late 1990s to permit a judge to conclude that a medical decision that is not capable of withstanding logical analysis is unreasonable and the treatment therefore negligent.[13]

To deal with medical negligence in the National Health Service (NHS), the government created a centrally funded pool of resources to meet the costs of any claims brought against the NHS and the NHS Litigation Authority was set up in 1995 to contest law-suits on behalf of the Secretary of State. However, recognizing the growing financial burden imposed by clinical negligence claims filed against the NHS, and the increasingly complex and ambitious interventionist procedures, as well as seeking to rectify flaws in the existing system, the Department of Health conducted a review of arrangements in 2003 and published a consultation paper, 'Making Amends - Clinical Negligence Reform', that emphasized the importance of negligence prevention through reducing risks,

preventing harm and promoting best practice, rather than remedial cure through damages. The 2003 review has acknowledged that the long time taken to conclude the cases and the high expense has encouraged clinicians to practice 'defensive medicine' and avoid risky procedures.[13]

The situation has reached crisis proportions in the US (having a similar legal framework as the UK) where the escalating cost of settlements and the growing readiness of patients and lawyers to pursue claims have led to doctor's insurance premium becoming more expensive in the recent years. According to reports, the medical litigation is estimated to cost 0.2% of the entire US GDP as compared to 0.04% in the UK.[13]

Negligence as a tort

The jurisprudential concept of negligence defies any precise definition. The Indian law defines 'Negligence' as "the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence; 1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; 2) Breach of the said duty; and 3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."[14]

A definition of negligence in English law may be described as "any conduct that falls short of the standard expected of a person where a duty of care is owed and which causes foreseeable damage to another person." In order to establish negligence the plaintiff must prove that the defendant owed him a duty of care and the defendant breached this duty and failed to conform to the standard of care required and the plaintiff suffered injury or loss as a result of the defendant's actions, either directly or as part of this transaction.[2]

According to Charlesworth & Percy[15], negligence has three meanings: 1) a state of mind, in which it is opposed to intention; 2) careless conduct and 3) the breach of duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. The essential components of negligence, as recognized, are three: "duty", "breach" and "resulting damage", that is to say: - 1) The existence of a duty to take care, which is owed by the defendant to the complainant; 2) The failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and 3) Damage, suffered by the complainant, which is both causally connected with such breach and recognized by the law. If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence.

Generally speaking, it is the amount of damage incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damage but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil laws. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

In R. Vs Lawrence[16], Lord Diplock dealt with the concept of recklessness as constituting mens rea in criminal law. He said "Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so, that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it." The moral capability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences.

In Syed Akbar Vs State of Karnataka[17] their lordships 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 benefits of every reasonable doubt' but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

In Dr L B Joshi vs. Dr T B Godbole[18] the Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person, when consulted by a patient, owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. 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 high nor a very low degree of care and competence judge in the light of the particular circumstances of each case is what the law requires. Any task, required to be performed, with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. The only assurance which such a professional can give by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his-skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.

Sedley L.J in Michael Hyde and Associates Vs J.D. Williams & Co. Ltd[19], said that 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. In the opinion of Mc Nair J,[20] "Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art". A professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession and must bring to any professional task he undertakes no less expertise, skill and care than other ordinary competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average.[21]

Deviation from normal practice

A mere deviation from normal professional practice is not necessarily evidence of negligence nor a mere accident is evidence of negligence. So also an error of judgment on the part of a professional is not negligence per se. To establish liability on this basis it must be shown: 1) that there is a usual and normal practice; 2) that the defendant has not adopted it; and 3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. In the opinion of Lord Denning,[22] a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care".[23] Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

In A H Khodwa Vs State of Maharashtra,[24] the Court noticed that in the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

It may be stressed here, that virtually anything done in medical practice can go wrong because of a wide range of variability and uncertainty inherent in the biological processes. A doctor has a right to deviate from the ordinary process and exercise his knowledge and skill in adopting any one amongst the acceptable therapeutic approaches. If it were not so, all inducement to progress in the medical science would have been jeopardized. All that the law requires of a medical man is the adoption of a reasonable approach because to label the charge of negligence, extent of deviation

from normal course is not the test, but the kind of deviation, which no professional man of ordinary skill and knowledge would have adopted under similar circumstances. In the words of Lord Nathan, 'the standard of care that the law requires is not an insurance against accidental slips but a degree of care as a normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case in question'.[25] Law requires taking two points into consideration: 1) the importance of the object to be attained by drawing a balance between the importance and usefulness of an act and the risk created thereby and 2) the magnitude of the risk that will determine the precautions to be taken.

Doctrine of res ipsa loquitur

The doctrine of res ipsa loquitur is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence in general and that of the doctors in particular. Else it would be counter productive. Simply because a patient has not favorably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable, per se, by applying the doctrine. Res ipsa loquitur is a rule of evidence, which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant.

Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. Accordingly, it may be interpreted that a case under Section 304AIPC cannot be decided solely by applying the rule of res ipsa loquitur. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless.

Professional liability in alleged negligence

In order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment". Whether he be licensed or unlicensed, if he displays gross ignorance, or gross inattention, or gross rashness, in his treatment, he is criminally responsible. However, a favorable view of the conduct of an accused medical man has to be taken, "for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck. To impose criminal liability under Section 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 that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sina qua non."[26]

In Indian Medical Association Vs V.P. Shantha,[27] determining professional liability as distinguished from occupational liability, the Court has referred to authorities, in particular, Jackson & Powell and have so stated the principles, partly quoted from the authorities: - "In the matter of professional liability professions differ from occupations for 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.

M/s Spring Meadows Hospital Vs Harjot Ahluwalia[28] is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in Whitehouse & Jorden,[29] and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence, "The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

In State of Haryana Vs Santra[30] also, Bolam's test was approved. This case too refers to liability for compensation under civil law for failure of sterilization operation performed by a surgeon and opines that:

a). Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not the make them, people can choose not to commit violations. A violation is culpable.

b). An inappropriate raising of the standard of care threatens this balance. A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled.

c). Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability.

d). Indiscriminate prosecution of medical professionals for criminal negligence is counterproductive and does no service or good to the society.

Concept of 'no-fault' compensation

In majority of mishaps, the line between an error of clinical judgment and negligence is too blurred for a decision to be reached and as the onus of proof is upon the plaintiff, the action fails. Yet the physical harm suffered by the patient remains the same, as does the need for financial restitution. To avoid this, countries like New Zealand and Sweden have adopted a 'no-fault' system, the principle of which is that irrespective of the doctor's negligence, the victim is compensated according to his needs in terms of medical and social support, the money coming from the funds set up by the government, employees and the employers. However, the system is not problem-free, firstly, the compensation awarded is substantially less than that obtained by civil litigation, due to limited funds available, and secondly, in the absence of a separate system of medical accountability there is no censure upon the offending doctors.[31]

Risk management

Until recently, relatively little attention had been given in any country to trying to identify the sources of risk in health care and to find ways to reduce it in a planned and organized way. A much higher level of error has been tolerated in health care than has been acceptable in other sectors. There is a need to give high priority to enhancing patient safety by systematically learning from what goes wrong, on the pattern of recent NHS recommendations.[13] In addition to the risk management and the avoidance of clinical error, under-funding, staff shortage, overwork and conflicting priorities need to be taken care of.

Conclusions

1). Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do and becomes actionable on account of injury resulting from the act or omission. Three essential components of negligence being 'duty', 'breach' and 'resulting damage'.

2). A case of occupational negligence is different from one of professional negligence and negligence in the context of medical profession necessarily calls for a treatment with a difference. Additional considerations should apply to infer rashness or negligence on the part of a professional, in particular a doctor. 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 or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

4) 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 mens 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. 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.

5) Learning from the past, there is a need to identify the sources of risk in health care and to find ways to reduce the same by the medical fraternity.

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