

## DOCTORS IN COURT- A BRIEF ANALYSIS OF MEDICAL NEGLIGENCE

Abhinav Mishra <sup>1</sup>

### Abstract

*“Negligence” is nothing but lack of care. The cases of medical negligence have not decreased even after the enactment of the Consumer Protection Act, 1986. This Act brought patients within the meaning of “consumer” as they avail the services of a doctor. Hence, a patient can file a suit for deficiency in services if a doctor acts negligently.*

*Medical negligence is not only punishable under the civil law but it is also punishable under the criminal law. Under civil law, negligence is punishable under law of torts or under Consumer Protection Act, 1986. Under the criminal law, it can be charged under section 304A of the Indian Penal Code, 1860 if death is caused by “gross negligence” of the doctor. The burden of proof generally lies on the complainant. In certain situations, the complainant can invoke the principle of “res ipsa loquitur” or “the things speaks for itself”.*

*The scope of this paper shall be limited to a brief study of the laws relating to medical negligence and various tests for medical negligence including Bolam’s test and Bolitho’s test. The object of this paper is to analyse case laws, legislations and tests and reach to a suitable conclusion as to what amounts to “medical negligence”.*

### Keywords

Bolam’s Test, Bolitho’s Test, Consumer Protection Act, 1986, Indian Penal Code, 1860 Medical Negligence, Res Ipsa Loquitor.

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<sup>1</sup> Damodaram Sanjivayya National Law University, Visakhapatnam, 530017.

## Introduction

It is hard to give an airtight definition of “negligence” as it is a subjective concept and it depends upon the facts and circumstances of the case as to what is negligent. However, under the ‘Law of Torts’, negligence is defined as:

Negligence is 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.<sup>2</sup>

Under the law of negligence, professionals such as lawyers, doctors and architects are included in the category of persons professing some special skill. A professional may be held liable for negligence on two grounds- i) he did not had required skills or; ii) he had the skills but he did not exercise those skills in a given case.

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<sup>2</sup> Law of Torts, Ratanlal & Dhirajlal, Twenty-fourth Edition 2002, edited by Justice G.P. Singh; pp.441-442

## **Elements of Medical Negligence**

1. The defendant owed the plaintiff a duty of reasonable care;
2. The defendant breached his duty;
3. The plaintiff incurred an injury, loss or harm due to defendant's acts or omissions.

### **1) The defendant owed the plaintiff a duty of reasonable care**

The general principle is that a person should not harm someone to whom he owes duty of care either by his acts or omissions. There is no dispute in this regard that doctors owe a duty of care to their patients. A surgeon is expected to show the care and skill not of an ordinary layman but in *Lievre v Gould*,<sup>3</sup> Lord Esher stated that “the question of liability for negligence cannot arise at all until it has been established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.”

Whether a person is a registered medical practitioner or not, he owes certain duties to his patient who consults him:-

- a) duty of care in deciding whether to undertake the case;
- b) duty of care in deciding what treatment to give;
- c) duty of care in his administration of that treatment; and
- d) Duty of care in answering a question put to him by a patient in circumstances in which he knows that the patient intends to rely on his answer.

A breach of any of these duties will support an action for negligence by the patient.<sup>4</sup>

### **2) There was a breach of duty**

Duty of reasonable care is breached if it is established that the standard of care provided by the medical practitioner falls below the general level of treatment.

Res ipsa loquitur doctrine- Res ipsa loquitur means that “facts or thing speaks for itself”. It signifies that further details are unnecessary; the facts of the case are self-evident. In cases of gross negligence, this doctrine can be applied. If a doctor negligently leaves scissors after surgery, gives medicine for allergy when a patient is suffering from fever, transfuses blood of wrong blood group or gives allopathic treatment when he has a homeopathic degree are a few

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<sup>3</sup> [1893] 1 Q.B.D. 491

<sup>4</sup> Halsbury's Laws of England, Vol. 30 Fourth Edition, p.31 para 34

circumstances in which the facts of the case are “self-evident” that the doctor was negligence and no further evidence is required.

In the case of Poonam Verma vs Ashwin Patel and Others<sup>5</sup>, a doctor of homeopathy gave allopathic treatment. Supreme Court held the doctor was negligent.

### 3) **The plaintiff incurred an injury, loss or harm due to defendants acts or omissions**

The plaintiff must incur injuries by the act of defendant only and not by other's act. It has been discussed in the case of Van Wyk v. Lewis. In this case, a doctor conducted an urgent operation in a hospital at night. After the operation, one of swabs was left in the plaintiff's body. Doctor relied upon the nurse to remove swabs and he took all possible measures in the operation. The doctor and nurse honestly believed that all the swabs were removed before the wound was sewn up. The court acquitted the doctor stating that the mere fact of swab remaining in patient's body is not sufficient to hold the doctor responsible. It is reasonable to leave the duty of checking swabs to the nurse. Hence, the doctor cannot be held liable even if the nurse is assumed to be negligent.

## **Standard of Care**

Professionals are required to exhibit a higher degree of care than an ordinary layman. Specialist doctors are required to exhibit higher degree of care than physicians. However, the standard of care depends upon the facts and circumstances of the case. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

### 1) **Bolam's Test- Accepted Practice**

Bolam v. Friern Hospital Management Committee<sup>6</sup> laid down Bolam's test which continued to be used for several years. Under this test, the jury was of the opinion that if a responsible body of similar profession support the treatment that caused the injury, even if the treatment given was not a standard practice. This means that if a few doctors support the treatment given by the defendant, he shall not be held negligent. This test was criticised for its

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<sup>5</sup> 1996 SCC (4) 332

<sup>6</sup> [1957] 1 WLR 582

overreliance on medical testimony. It was too easy to invoke Bolam's test on the basis of a single expert's opinion and too difficult for the plaintiff to prove that no other doctor would have acted similarly.

Bolam's test gives more weightage to what medical practice 'is' rather than what the practice 'should be'. Bolam's test has not been overruled in India and is still followed by the Indian Courts. In 2010, Supreme Court reiterated this principle and held that, "where the procedure adopted by the doctor performing surgery is supported by expert opinion, no negligence could be attributed to the doctor."<sup>7</sup>

## 2) **Bolitho's Test- Expected Practice**

In *Bolitho v. City and Hackney Health Authority*<sup>8</sup>, another test was laid which came to be known as Bolitho's test. It overruled Bolam's test. Under this test, a doctor can be held negligent even if a few doctors support his treatment unless the treatment given by him was logically defensible and justified. Lord Wilkinson circumscribed Bolam's test by stating that, "The existence of the practice is not of itself determinative of the issue of breach of duty. The court has to subject the expert medical evidence to scrutiny and to decide whether the practice is reasonable or not. The issue of reasonableness is for the court and not for the medical profession." He further stated that, "The court should not accept a defence argument being 'reasonable', 'respectable' and 'responsible' without first assessing whether such opinion is susceptible to logical analysis".

## **Degree of Negligence**

Every act of negligence shall not be punished. Therefore, it is necessary to determine what degree of negligence is punishable under the law. In the case of *Smt. Madhubala vs. Government of NCT of Delhi*<sup>9</sup>, Delhi High Court laid down three degrees of negligence:

- 1) *lata culpa*, gross neglect;
- 2) *levis culpa*, ordinary neglect, and
- 3) *levissima culpa*, slight neglect.

Slight neglect will surely not be punishable and ordinary neglect, as the name suggests, is also not to be punished. If these two categories are clubbed, there are two degrees of

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<sup>7</sup> *Kusum Sharma v. Batra Hospital and Medical Research Centre*, AIR 2010 SC 1050

<sup>8</sup> [1997] 4 All ER 771

<sup>9</sup> 2005 Indlaw DEL 209 = 2005 (118) DLT 515

negligence- i) negligence for which the doctor shall be liable and ii) 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.<sup>10</sup> In those cases, courts rely upon Bolam's test and Bolitho's test.

### **Medical Negligence under Consumer Protection Act, 1986**

According to Consumer Protection Act, a consumer is a person who "buys any goods for a consideration" or "hires or avails any services for a consideration."<sup>11</sup> In the case of Indian Medical Association v. V.P. Shantha and others,<sup>12</sup> Supreme Court held that the patients aggrieved by the deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act. The Supreme Court held that under COPRA, Section 2 (1)(o):

- Service rendered to a patient by a doctor (except free service) by way of consultation, diagnosis and treatment, would fall within the ambit of 'service'.
- The fact that doctors belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils under the Indian Medical Council Act would not exclude the services rendered by them from the ambit of COPRA.
- Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service'.
- Service rendered by a doctor or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care, where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in above Section.
- Similarly, where, as part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the

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<sup>10</sup> Anurag K. Agarwal, Medical Negligence: Law and Interpretation, W.P. No. 2011-03-03 March 2011, Indian Institute of Management, Ahmedabad.

<sup>11</sup> Sec 2(d), Consumer Protection Act, 1986

<sup>12</sup> III (1995) C.P.J. 1 (S.C.); A.I.R. 1996 S.C. 550

service rendered to such an employee and his family members by a doctor or a hospital/nursing home would not be free of charge and would constitute 'service'.

- In the absence of a relationship of master and servant between the patient and doctor, the service rendered by a doctor to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a 'contract for personal services' and is not covered by definition of 'service'.
- The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service'.
- Service rendered free of charge by a doctor attached to a hospital/nursing home or a doctor employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be 'service'. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
- Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service – is outside the purview of the expression 'service'.
- Service rendered at a government hospital/health centre/ dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service – is outside the purview of the expression 'service'. The payment of a token amount for registration etc; would not alter the position.

The services rendered free of charge in a government hospital are out of the purview of Consumer Protection Act, 1986. For example, in a case, a patient was treated for tubectomy in a Government hospital under a planning scheme. She was treated free of charge. Later on, a child was born to her and she filed a complaint against the State claiming damages. Her claim was rejected as she not a consumer under the Consumer Protection Act, 1986 because the services rendered to her were free of charge.<sup>13</sup> However, when a free treatment is given to everybody, a person may not be entitled to approach Consumer Court but he can approach District Court by filing suit for damages.<sup>14</sup>

When a doctor or a hospital charges excessive fees, a consumer court does not has the jurisdiction to go into the propriety of fees charged. Amount to be charged by a doctor is the choice of the medical practitioner.<sup>15</sup>

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<sup>13</sup> Paramjit Kaur v. State of Punjab, II (1997) CPJ 394 (Punjab SCDRC)

<sup>14</sup> S. Mittal vs. State of U.P., (1989) 3 SCC 223

<sup>15</sup> B.S. Hegde vs. Dr. Sudhanshu Bhattacharya, II (1992) CPJ 449

However, revealing that patient is HIV-positive for the benefit of his wife does not amount to deficiency in services nor does it violate the rule of confidentiality<sup>16</sup>.

## **Criminal Negligence under Indian Penal Code, 1860**

If death is caused due to negligence of a doctor, he can be charged under sec 304A of the Indian Penal Code<sup>17</sup>. For a doctor to be charged under this section, patient's death must be caused due to doctor's negligence or incompetency, with such disregard for the life and safety of his patient so as to constitute an offence against the society. A doctor can also be prosecuted under section 336, 337 and 338 of the Indian Penal Code.<sup>18</sup>

It has been held that the mere fact that a life has been lost or that some person has sustained an injury should not lead to a presumption of a rash or negligent act.<sup>19</sup> A doctor can be held criminally liable only in cases of gross negligence. Simple lack of care should give rise to civil liability only.

Criminal intention is an important feature to make a person criminally liable and there is no mens rea except in certain exceptional cases. Under the criminal law, mens rea is considered as 'guilty intention' and unless it is found that the accused had a guilty intention to commit the 'crime', he cannot be guilty of committing the crime.<sup>20</sup> Further, negligence is something which lacks intention and therefore, courts have been careful in holding medical practitioners criminally responsible. The reason cited by the courts is that a doctor under the fear of litigation cannot treat his patient appropriately. Considering that the medical profession renders noble service to the society, it has been protected from unjust and frivolous prosecutions. Further, it has also been stated that a doctor cannot perform surgery with shaking hands under the fear of litigation and prosecution and therefore, courts have been very careful in making a criminally liable.

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<sup>16</sup> Mr. X v. Hospital Z [1998(2) CCC 117(NS)]

<sup>17</sup> Sec. 304A of the Indian Penal Code- Causing death by negligence- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

<sup>18</sup> Sec 336- rash or negligent act endangering human life; Sec 337-causing hurt to any person by doing any rash or negligent act as would endanger human life; 338-causing grievous hurt to any person by doing any rash or negligent act so as to endanger human life

<sup>19</sup> Banavarlal v. State (1961) 2 Cri. L J 561 Raj.

<sup>20</sup> Director of Enforcement v MIs. M.C.T.M. Corporation Pvt. Ltd., AIR 1996 SC 1100: p.1103.

## Conclusion

The no. cases of medical negligence filed against doctors have increased drastically after the Consumer Protection Act, 1986 came into force. This act is being used as a powerful tool by the patients and Courts have successfully enforced patient's right and penalised doctors for medical negligence. However they have also been careful to avoid frivolous complaints against doctors and dragging them unnecessarily into litigation. The situation may seem to be balanced but it is actually a bit tilted towards doctors. This is evident from the Jacob Mathew's case in which the apex court acquitted the doctor even after patient's death. Further, the needle of balance is already tilted towards the doctor as the burden of proof is on the patient. Another problem is that Bolam's test has yet not been overruled in India. Due to this, doctors get acquitted even if they bring a single doctor to testify their treatment. Thus, the cases of medical negligence continue to increase and the justice continues to be denied.

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In addition to the above sources, a number of articles and journals have been referred which have cited throughout the paper.