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Medical Negligence and Liabilities of Doctors to Society

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Abstract

The medical professional enjoys high regards due to their noble profession. The doctors require highest degree of care and caution in their profession because even a minor negligence can cause death of a patient. A doctor may be prosecuted for his gross negligence during medical treatment or surgery causing death of a patient. But if a doctor has taken reasonable care and caution while providing medical treatment or surgery, then he cannot be made liable for his act. Now abortion or miscarriage is permissible in certain circumstance after enactment of Medical Termination of Pregnancy Act, 1971. Mere deviation from normal professional practise cannot necessarily involve medical negligence amounting to criminal offence. For launching a criminal prosecution against doctors, the prosecution has to come with a high degree of negligence on the part of the medical professional. The Hon'ble Apex Court is of consistent views that criminal prosecution of doctors without another medical opinion on the point of their guilt is not permissible in law.

Keywords: Doctors, Medical Negligence, Indian Penal Code.

1. Introduction

Doctors enjoy highest regards in society as they protect human lives. They are regarded often as 'second god' for their noble services to human being. Although doctors also charge fees and other charges from, their patients like other professionals, yet their profession is known as 'noble profession' out of respect and reverence. The doctors require highest degree of care and caution in their profession because even a minor negligence can cause death of his patient and it may ruin the whole world of a happy family. A doctor, therefore, is expected to render his services with reasonably skilful behaviour adopting the ordinary skills and practices of the profession with 'ordinary case' [1].

The word "negligence" means the "failure to exercise a standard of care that a reasonable person would have taken in a similar situation." An estimated 98000 people die every year due medical negligence of medical professionals and the number of such deaths in India is rather highest among the world. The laws in India take a very lenient view on medical negligence and do not intend to prosecute and punish lightly to the medical professions. Doctors as per law cannot be punished unless there is an act or omission by medical professional which may really called as a "gross negligence". The so called terms like 'ordinary', "reasonable" and "gross negligence" are a matter of judicial interpretations.

If a doctor has taken a reasonable care and caution while rendering his medical treatment or surgery, he cannot be held liable for his act. A mere difference of opinion or error in diagnosis is not a ground for fastening the liability of a medical practioner [2].

Mere deviation from professional practice cannot necessarily involve the act of criminal negligence and in fact an act to amount to criminal negligence, degree of negligence should of much higher [3].

The Hon'ble Apex Court has ruled in 'Jacob Methew -V- State of Punjab and others' [4], that mere derivation from normal professional practice is not necessarily evidence of negligence nor error of judgement on the part of professional is *per se* negligence and the medical practioner cannot be held negligent because we choose to one procedure and not the other and the result was a failure. Apex Court made it clear that to persecute 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 circumstance no medical profession in his ordinary senses and prudence would have done or failed to do.

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In another case the Hon'ble Apex Court in *'Dr. Suresh Gupta –V- Govt. of NCT of Delhi'* [5], held that for launching prosecution against a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. In the case before Hon'ble Supreme Court, the opinion of medical experts was that there was negligence on the part of the accused in "not putting a cuffed endotracheal tube of proper size" and in a manner so as to prevent aspiration of blood blocking respiratory passage, such act of doctor was held to be negligent act but not so reckless or grossly negligent so as to make him criminally liable.

The concept of negligence differs in civil and criminal law what may be negligence 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 [6]. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very higher degree. 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.

2. Provision of Penal Code

Ordinarily the prosecution against doctors are launched under section 304A of Indian Penal Code. (Causing death by rash or negligent act) Another prosecutions are lodged under Section 314 (death caused by an act done with intent to cause miscarriage), 315 (Act done with intent to prevent child being born alive or to cause it to die after birth) and Section 316 (causing death of quick unborn child by act amounting to culpable homicides)

After the enactment of the *Medical Termination of Pregnancy Act, 1971*, the provisions of Indian Penal Code relating to miscarriage have been subservient to it because of the *non obstante clause* in section 3 of the Act which permits abortion/ miscarriage by a registered practitioners under certain circumstance, such as:

- i. **Health** – when there is danger to the life or risk to the physical or mental health of women;
- ii. **Humanitarian** – Such as when pregnancy was caused due to sex crime like rape or intercourse with a lunatic women; and
- iii. **Eugenic** – Where there is substantial risk that the child, if born, would suffer from deformities and diseases; [7]

When a quack performing surgical operation of a pregnant women daringly, crudely and criminally resulting in her death, he was found guilty under Sec. 314 IPC and thereby convicted and sentenced [8].

When the doctor in another case concerned was not competent to terminate the pregnancy of the deceased girl, or his clinic had no approval of the Government and even the basis facilities for abortion were not available to the clinic. The victim girl was taken by the other accused to another clinic with the intent to cause miscarriage and then her death was caused by the doctor while causing abortion both accused were convicted under Sec. 314/34 IPC [9]. But if a pregnancy is terminated by qualified doctor in accordance with the procedure of Medical Termination of Pregnancy Act, such doctor can not to be treated as guilty under section 314 IPC [10].

According to the law, every failure or misfortune in the hospital or in a clinic of a doctor cannot be termed as an act of the negligence so as to try him of an offence under section 304A, IPC. In absence to show that accused doctor was lacking skill in profession he was practising or he was ill

equipped or has shown apparent gross negligence, the prosecution against doctors cannot lightly be permitted.

3. Judicial Safeguards to Doctors

No FIR can be lodged against doctors for alleged medical negligence and as such without preliminary enquiry in view of law laid down by Full Bench of Apex Court in *Lalita Kumari –V- Govt. of U.P. case* [11].

The Hon'ble Patna High Court held in *'Lalan Kumar –V- State of Bihar'* [12] has ruled that criminal liability on doctors can be fastened only if he commits gross negligence in discharge of his duty and mere lack of care or error of judgement does not constitute any criminal liability. The Hon'ble High court held, "*the prosecution of doctors for death*" of a patient in course of treatment is a serious matter. It does not affect the doctor alone but society as whole. It must be born in mind that the duty of doctor is only to treat the patient; it is for the god to cure. Nobody has control over the wishes of god. However, it does not mean that doctor has licence to be negligent. A doctor can be fastened with criminal liability if he commits gross negligence in discharge of his duty. However, mere lack of care or error of judgement does not constitute any criminal offence. There also must be nexus between the cause of death and nature of negligence on the part of doctor. [See: 1982 SCC 30; *Syed Kabir –V- State of Karnataka and 2005 PLJR (Supra)*]"

In another case, the Hon'ble Patna High Court held in *'Dr. Narendra Prasad –V- State of Bihar'* [13], that before summoning a doctor for offences of medical negligence under Sec 304 A IPC, the Court concerned must obtain a report from a competent doctor or medical board regarding negligence and the criminal proceeding cannot be sustained in absence of such report.

Highlighting the importance of another medical opinion, the Hon'ble Supreme Court in *'Mahabir Prasad Kausik –V- State of U.P.'* [14], held; "*criminal prosecution of doctors without adequate medical opinion pointing to their guilt would be doing disservice to the community at large. If the courts were to impose criminal liability on Hospital and doctor for everything that goes wrong, the doctors would be more worried about his own safety than giving all best treatment to their patients. It would also lead breach of mutual confidence between the doctor and patient*".

The Hon'ble Apex Court in a significant judgement in *'Martin F.D. Souza –V- Mohd. Ishaq'* [15], laid down a law for the protection of doctor against frivolous prosecutions and held, "*whenever a complaint is received against a doctor or hospital by the Consumer Forum or by the criminal court then, before issuing notice to the concerned doctor or hospital, they should refer the matter to a competent doctor or a committee of doctors, specialized in the field relating to which the medical negligence is attributed. Only after the report of such doctor or committee confirms that there is a prima facie case of medical negligence, only then notice shall be issued to the doctors.*"

Where there are more than one recognized school of established medical practise, it is not negligence for the doctor if he followed any one of those practices in preference to other. The doctors must take consent of the patient before commencing treatment but such patient should have the capacity and competence to give consent. The consent of mother, for example, for surgery cannot be treated as valid consent for surgery unless there is emergency in case of removal of reproductive organ of women and such operation

without consent of the women would amount to a tortious act of assault and battery and also amounts to deficiency in services.

4. Conclusion

The doctor enjoys great respect in society on account of their noble profession. Their profession in fact is in the nature of social services. Doctors should take all possible precautions while providing medical treatment to the needy persons. Unfortunately, a large number of medical professionals do not care about their social and moral responsibility and are engaged in making money by resorting to unhealthy practices. The Government now should set up 'vigilance cells' at district level to check such mal practices.

5. End Notes

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