Criminality in Medical Negligence

2020 – the year where all medical practitioners are hailed as Corona Warriors. It is only them, who have the power to help us get through this pandemic. But as the famous saying goes, with great power comes great responsibility. And as the law upholds, with great responsibility comes duty that fastens liability.

Professionals in the medical field include doctors, nurses, etc., who are responsible for the health and well-being of their patients. Due to the very nature of the medical profession, the degree of responsibility on the practitioner is higher than that of any other service provider. The concept of a doctor-patient relationship forms the foundation of legal obligations between the doctor and the patient. It is the responsibilities and duties that emerge from the doctor-patient relationship that forms the cornerstone of the legal implications emerging from medical practice.

Breach of duty by a professional would be termed as professional misconduct; which for medical practitioners is governed by the Indian Medical Council (Professional Conduct, Etiquette, and Ethics) Regulations, 2002, made under Indian Medical Council Act, 1956. The Medical Council of India and the appropriate State Medical Councils are empowered to take disciplinary action whereby the name of the practitioner could be removed forever or be suspended. Section 20A of the Indian Medical Council Act, 1956, reads as follows:

> "*Professional Conduct. 1. The Council may prescribe standards of professional conduct and etiquette and a code of ethics for medical practitioners. 2. Regulations made by the Council under subsection (1) may specify which violations thereof shall constitute infamous conduct in any professional respect, that is to say, professional misconduct and such provisions shall have effect notwithstanding anything contained in any law for the time being in force.*"

With respect to the duties and obligation of dentists towards patients and the public, dentists are governed by the Code of Ethics prescribed by the Dental Council of India in exercise of the powers conferred by Section 17A of the Dentists Act, 1948.

When considering and interpreting the legal implications in a Court of law, it is the amount of damages incurred which is determinative of the extent of liability in tort. However, in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. There is no straight jacket formula to calculate the degree of negligence and it is most likely to vary from one case to another, from one circumstance to another. The

element of criminality will be assessed in the conduct of the accused, if he or she has undertaken the risk of doing an act with recklessness and indifference to the consequences. It is not merely a lack of necessary care, attention and skill. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him or her criminally liable.

In the case of a criminal prosecution, a medical practitioner may be charged under Section 304A of Indian Penal Code, 1860 in case of death and under Sections 336, 337 or 338 of the Indian Penal Code, 1860 in case of serious injury.

- **Section 304A:** 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.
- **Section 336:** Act endangering life or personal safety of others.—Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to two hundred and fifty rupees, or with both.
- **Section 337:** Causing hurt by act endangering life or personal safety of others.—Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.
- **Section 338:** Causing grievous hurt by act endangering life or personal safety of others.—Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender. What is common in the above Sections is rashness and negligence. Negligence, simply put, is a breach of duty of care resulting in injury or damage. 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 as to amount to taking a risk knowing that the risk 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.

To prevent emotional, frivolous and malicious prosecutions, the Supreme Court in *Jacob Mathew Vs. State of Punjab, AIR 2005 SC 3180* laid down certain guidelines that should govern the prosecution against doctors for offences involving criminal rashness or criminal negligence-

> "(1) 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.
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> (2) 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 investigation.
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> (3) A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

Negligence could be an action or omission. *Bolam's* test in simple words can be put forth as a test where one judges if a certain act is negligent by comparing the purported act to that of the standard of an ordinary or average medical practitioner and not to that of the highest skilled member in the said profession. Therefore, to prosecute 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 circumstances no average member of the profession in his or her ordinary senses and prudence would have done or failed to do.

Sections provided for in the Indian Penal Code, 1860 that come to the rescue of medical practitioners are as under:

- **Section 52:** Good faith — Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.
- **Section 80:** Accident in doing a lawful act — Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.
- **Section 81:** Act likely to cause harm, but done without criminal intent, and to prevent other harm — Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.
- **Section 83:** Act of a child above seven and under twelve of immature understanding — Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.
- **Section 88:** Act not intended to cause death, done by consent in good faith for person's benefit — Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.
- **Section 89:** Act done in good faith for benefit of child or insane person, by or by consent of guardian — Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person.
- **Section 92:** Act done in good faith for benefit of a person without consent — Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

For example, if a medical practitioner has the knowledge and follows a practice in good faith which is 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.

On the other hand, when a medical practitioner administers a medicine known to or used in a particular branch of medical profession, he impliedly declares that he has knowledge of that branch of science. However, if he had no knowledge as to the side effects of such medicine and yet he administered it, he is prima facie acting with negligence.

With respect to medical negligence, the Hon'ble Supreme Court has held that as far as the sphere of criminal liability is concerned, as mens rea is not abandoned, the subjective state of mind of the accused lingers a critical consideration. In the context of criminal law, the basic question is quite different. Here the question is: Does the accused deserve to be punished for the outcome caused by his negligence? This is a very different question from the civil context and must be answered in terms of mens rea. Only if a person has acted in a morally culpable fashion can this question be answered positively, at least as far as non-strict liability offenses are concerned.

A befitting conclusion to this article would be reiterating what the Hon'ble Supreme Court has observed, which is:

> "*We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.*"

To err is human and an error of judgement taken in good faith in the best interest of the patient may not make a medical practitioner criminally liable. A medical practitioner may be liable for a civil case for negligence but mere carelessness or want of due attention and skill in all cases cannot be described as so reckless or grossly negligent so to make a medical practitioner criminally liable.

-Authored by **Lakshmi Raman**