

MEDICAL NEGLIGENCE - WHEN DOES IT BECOME A CRIMINAL SUIT?

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INTRODUCTION

Millions of people all over the world avail of medical services every day. There are times when complications arise which can lead to a civil suit against a medical practitioner. However, clarity needs to be sought as to when a medical negligence turns into a criminal medical negligence. Medical malpractice is when due to the doctor's decision, a patient dies or the condition worsens which would result in "injury". According to Amy Cook, malpractice turns to manslaughter when there is a gross deviation from the standard of care.² In addition to that, one must also prove the practitioner's "culpable state of mind". This is not just restricted to doctors but it also involves nurses and assistants of nursing homes. A clinical negligence becomes a criminal medical negligence when there is a negligent state of mind. Criminal medical negligence is far more uncommon than civil medical negligence. In civil, strict liability is a rule. But in criminal medical negligence, the liability is placed on the mens rea.³ A man shall be punished in criminal medical negligence if he knew what he was doing and could have avoided injury by taking reasonable care. The simple difference between civil and criminal medical negligence is that the former is a public wrong and the latter is a private wrong. To bring a civil medical claim into question one needs to prove that there was a breach, damage, causation and a duty that was not fulfilled. Criminal negligence adds a fifth requirement which is the "state of mind".⁴ If it's shown that the negligence amounted to gross inattention, incompetency or indifference to the patient's wellbeing, criminal negligence would apply in the case. The following definition could be helpful in

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² Alan Fuchsberg, WHEN DO DOCTOR ERRORS BECOME CRIMINAL MEDICAL... JACOB FUCHSBERG LAW FIRM (2016), <https://www.fuchsberg.com/blog/medical-errors-become-criminal-negligence/> (last visited Sep 12, 2020).

³ When Should Medical Malpractice Be Criminally Culpable? | jhbl, SUFFOLK.EDU (2020), <https://sites.suffolk.edu/jhbl/2019/02/02/when-should-medical-malpractice-be-criminally-culpable/> (last visited Sep 11, 2020).

⁴ Lavlesh Kumar & Binaya Kumar Bastia, MEDICAL NEGLIGENCE-MEANING AND SCOPE IN INDIA RESEARCHGATE (2011), https://www.researchgate.net/publication/221833087_Medical_negligence-_Meaning_and_Scope_in_India (last visited Sep 12, 2020).

understanding criminal negligence, "That degree of negligence or carelessness which is denominated as gross, and which constitutes such a departure from what would be the conduct of an ordinarily careful and prudent man...as to furnish evidence of that indifference to consequences which in some offence takes the place of criminal intent."⁵

The reason why courts proceed and make this a criminal proceeding is because it is a crime that is beyond any damages or compensation. The essential element in medical negligence is a culpable mind. If the patient has not suffered at the hands of the doctor or if the health is intact, even if the doctor did not follow the standard medical care, then negligence would not amount to medical malpractice. Hence, it is a requirement that the patient's case be worsened for it to be considered a medical negligence case. If a medical negligence was not a foreseeable result of the patient's deteriorating health, it cannot be considered to be a criminal medical negligence.

HISTORY OF CASES

Long before medical malpractice became an actual phenomena, the famous case of State v Linda Burfield Hazzard gained limelight. In 1913, she was charged with first degree murder of a patient whom she tried to treat by intentional fasting. She claimed that this was a cure that allowed the digestive system to rest. She was licensed as a healing arts practitioner in the State of Washington. She had a valid license to practice her treatment, something which probably she wouldn't be allowed to do if she were living today. Her philosophy was that every illness is caused due to improper toxins in the blood. Her healing which was drugless healing was a form of alternative medicinal practice. It was based on a spiritual and cultural practice. Doctor Hazzard's medical practice came to an end after her abrupt arrest for first degree murder. She was charged for the offence of manslaughter of Claire Williamson. She defended herself by saying that she had cured a number of patients by this technique when they came to her voluntarily. However, Hazzard was sentenced for a term of 2 to 20 years.⁶

⁵ Edward Monico et al., *The Criminal Prosecution of Medical Negligence*, 5 THE INTERNET JOURNAL OF LAW, HEALTHCARE AND ETHICS (2013), <https://ispub.com/IJLHE/5/1/5237> (last visited Sep 12, 2020)

⁶ Murder by Medical Malpractice - Perey Law, PEREYLAW.COM (2012), <http://www.pereylaw.com/articles-videos/murder-by-medical-malpractice/> (last visited Sep 12, 2020).

Another extremely famous case is that of Michael Jackson's doctor, California v Murray. Dr Conrad Murray was Michael Jackson's doctor and was accused of unlawfully and without malice killing his patient by acting without due caution. Murray gave Jackson a powerful aesthetic to help him sleep some hours before his death. This dose was so powerful that it was not advisable to prescribe/give outside hospital premises. The case against him was registered as one without malice as his intention was not to harm his patient but his negligence rose to the standard of criminal negligence. The doctor was found guilty of involuntary manslaughter after two and a half years later of Michael Jackson's death. The trial was only focused on proving whether or how Dr Murray had acted in a reckless manner which directly caused his patient's death. Testimony has indicated that the drug that was administered to Michael Jackson by the doctor, Propofol, had played a very significant part in the singer's death.⁷

In 2010, Michael Darnley suffered a personal injury when he was assaulted by a stranger. On reaching A&E Department, he informed the receptionist of his headache. He was informed of a waiting time period and decided to leave the hospital but he returned when his condition worsened during the day. Due to the delay it was revealed that he had extensive brain injuries and he suffered from a permanent brain damage.⁸ During his trial it was revealed that had Mr Michael stayed at the hospital, he could have been treated and the injuries could have been prevented. However, he argued that due to the misleading information by the receptionist, he decided to leave the hospital. The High Court held that it would be unfair to impose liability due to the failure of the receptionist to give Mr Darnley an exact waiting time. However, on further appeal, the Supreme Court acknowledged that even though a receptionist working in such a busy environment cannot be expected to give an exact time, however, a reasonable standard of care can most certainly be expected.

⁷ Daniel B Wood, CASE AGAINST MICHAEL JACKSON'S DOCTOR CENTERS ON GROSS NEGLIGENCE THE CHRISTIAN SCIENCE MONITOR (2010), <https://www.csmonitor.com/USA/Society/2010/0208/Case-against-Michael-Jackson-s-doctor-centers-on-gross-negligence> (last visited Sep 12, 2020).

⁸ Michael Darnley v Croydon Health Services NHS Trust, STEWARTS (2019), <https://www.stewartslaw.com/news/michael-darnley-v-croydon-health-services-nhs-trust-ae-receptionist-found-negligent-for-giving-misleading-waiting-times/> (last visited Sep 12, 2020).

In Dallas, 2017, a former doctor was sentenced to a term of 20 years for his involvement in the overdose death of his patient. He was booked under negligent homicide. The prosecution argued that he distributed drugs outside the course of his professional practice and without a medical reason. He prescribed the drugs without looking at the history of any of his patient that led to the death of some of them.

ONGOING DEBATE

There are several theories which have been formulated in relation to prosecution of medical practitioners. While some feel that medical negligence should be considered to be a white collar crime, many others believe that the regulatory authorities are not doing enough to monitor the medical field. Utilitarians are of the view that all individuals must monitor themselves and their actions but at the same time threat of punishment could make the medical practitioners hesitant which would in turn affect their work. Retributive justice on the other hand believes in punishment of the guilty. They believe that a medical practitioner's fault must be punished. The medical community at large believe that criminal prosecution would serve as a dangerous precedent. It will stop the professionals from experimenting and trying out new treatments for their patients.

Criminal prosecution was very rare in the United State. Between 1809 and 1981, there were only 15 cases of medical malpractice. Currently, the American Medical Association is of the opinion that the matter of negligence should be civil matter and not a criminal one. It however acknowledges that recklessness from the standard care should be criminally culpable but it holds strong views against criminal prosecution of medical negligence.⁹

⁹ When Should Medical Malpractice Be Criminally Culpable? | jhbl, SUFFOLK.EDU (2020), <https://sites.suffolk.edu/jhbl/2019/02/02/when-should-medical-malpractice-be-criminally-culpable/> (last visited Sep 12, 2020).

INDIA'S PERSPECTIVE ON CRIMINAL NEGLIGENCE

India has adopted the Bolam Test from the United Kingdom, a test that was established after the landmark case of *Bolam v Friern Barnet HMC*.¹⁰ In the said case the court decided that a doctor may be able to avoid a claim of negligence if he provides sufficient proof that any other doctor in his case would have done the same thing as him. In the Bolam case, the plaintiff was a patient in a mental health hospital. The plaintiff contended that the hospital had been negligent in not giving him any drugs during his electro-convulsive treatment. He also pleaded negligence on grounds that the doctors had not warned him of the possible risks. While reaching the decision, there was a consensus amongst medical professionals that the use of drugs and restraints would cause more harm than not. Also, it is a common practice to not warn the patient of risks unless the risk is high or the patient asks for details.¹¹

In India, a medical practitioner is usually booked under Section 304 of the IPC for alleged negligence. This section deals with punishment for reckless and negligent behaviour that may have caused harm to another. The Supreme court of India has spoken about negligence of professionals in the case of *Jacob Matthew v State of Punjab*. In the said case, Dr Jacob and Dr Joseph connected an oxygen cylinder to the mouth of the patient as he had difficulty in breathing. However, it was found that the cylinder was empty and the patient's breathing problem had increased. By the time another cylinder was brought, the patient had died. In the said case, the Supreme Court gave out its verdict that there was no case of negligence against the doctors. The Supreme Court stated that for a medical practitioner to be booked for negligence under criminal law it must be proven that an accused did something or failed to do something that some other practitioner would not have done or not have failed to do in an ordinary circumstance.¹²

¹⁰ The Bolam Test in Clinical Negligence, LAWTEACHER.NET (2019), <https://www.lawteacher.net/free-law-essays/medical-law/bolam-test-clinical-negligence.php> (last visited Sep 12, 2020).

¹¹ Legal Service India, SUPREME COURT AND MEDICAL NEGLIGENCE NECESSARY PROTECTION LEGALSERVICEINDIA.COM (2017), <http://www.legalserviceindia.com/article/1178-Medical-Negligence.html> (last visited Sep 11, 2020).

¹² ANURAG AGARWAL, MEDICAL NEGLIGENCE: LAW AND INTERPRETATION INDIAN INSTITUTE OF MANAGEMENT AHMEDABAD-380 015 INDIA (2011), <http://pbtindia.com/wp-content/uploads/2011/10/Medical-Negligence-Law-and-Interpretation.pdf> (last visited Sep 12, 2020).

A qualified doctor may commit an error even after taking all the necessary precautions. In a judgement passed in 2005, the Supreme Court ruled that doctors cannot be held criminally responsible unless there is prima facie evidence of rash or negligent behaviour on part of the doctor. The liability of doctors depends on a case to case basis. Lord Justice Denning was of the opinion, in the landmark case of *Roe and Wooby v Ministry of health*¹³ that we need to keep our guard up against negligence, especially in cases against the medical community. Medical science is growing every single day but it comes with certain risks that need to be taken account for. In the case of Dr. Suresh Gupta, the full bench of the supreme court declared that it is of utmost importance to take care and caution while initiating a criminal proceeding against a medical practitioner. In the order, it was stated that medical practitioners must not be put through undue stress for simply doing their jobs. If the doctors had to think before taking any step, they would not be able to do their jobs well. Lack of care or an error of judgement was held to not be proof enough of medical negligence. However, where the patient has not been informed or where there has been a serious breach of duty, accountability for the same needs to be taken.¹⁴ An interesting case that is to be mentioned whenever we talk about criminal medical negligence is that of *Martin D'Souza*. This case is of utmost importance as it goes to show that one cannot define and use the same guidelines in every given case. Every case is different and must be looked at considering the facts of the case. The principles of the landmark *Jacob Matthew* case could not be applied in this case because there could have been many contradictions between experts as to the definition of terms. Experts could have had difficulties in agreeing on what is low level of care, high level of care, what is gross negligence and how that is distinguished from simple negligence. The judges passed an order that police officers were not to arrest medical practitioners unless the facts of the case fall within the ambit of the *Jacob Matthew* guidelines. Also, before any notice is issued to the doctor, the matter must first be referred to a committee of doctors.¹⁵

¹³ *Roe v Minister of Health* (1954) EWCA Civ 9 (08 April 1954)

¹⁴ MS Pandit & Shobha Pandit, *Medical negligence: Criminal prosecution of medical professionals, importance of medical evidence: Some guidelines for medical practitioners*, 25 INDIAN JOURNAL OF UROLOGY 379 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779964/> (last visited Sep 12, 2020).

¹⁵ Amartya Bag, *IMPORTANT MEDICAL NEGLIGENCE CASES IN INDIA - IPLEADERS IPLEADERS* (2014), <https://blog.ipleaders.in/important-medical-negligence-cases-india/> (last visited Sep 12, 2020).

ANALYSIS AND CONCLUSION

A doctor is liable for the acts performed by him/her as the job that is performed concerns someone's life. In the medical profession, standard of care must be higher, but at the same time, greater risks need to be factored in while initiating proceedings against doctors. Initiating criminal cases against practitioners for cases might grow in the future as people might opt for it after every bad experience which could simply be a result of misfortune. It is imperative to note that mistakes happen given the complexity of the work and the work environment where everyone needs to be treated to. Criminal sanctions must be sought only after every other action is exhausted. There is no denying that speculative claims damage the reputation of the doctor and the hospital. Hence, the medical profession should not be harassed unnecessarily. Fear should not be created amongst the fraternity. Certain liberties must be given and negligence must be guided upon by reasonableness. Having said that, a medical practitioner must be extremely cautious of not acting in a rash manner. A medical practitioner must keep handy the declaration of the Code of Medical Ethics provided by the Indian Medical Council. Drawing a distinction between misfortune and actual negligence can be tough to do but simply criminalising doctors for cases that can be dealt as a civil suit may not be the most appropriate approach for the society at large.