# THE SUPREME COURT'S ON MEDICAL NEGLIGENCE.

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The Supreme Court of India under Art. 141 of the Constitution of Indian lays down law of the land. In recent times, it has given certain land mark judgments in respect of medical negligence cases. A medical negligence case can give rise to two types of legal action.

i) Criminal case u/s 304 (A) of Indian Penal Code[1] and
ii) A consumer complaint or a civil case under law of torts for recovery of compensation.

It is well settled from the judgment of the Supreme Court of India in the case of Indian Medical Association Vs V.P. Shantha and others (AIR 1996 SC 550) that Consumer Protection Act is applicable to all professions including medical profession. In recent times the Supreme Court of India has given the following three land mark judgments in medical negligence cases :-

**I] Jacob Mathew Vs State of Punjab**

2005 (6) SCC 1 ( Larger Bench )
G.P. Mathur J, P.K. Balasubramanyan J , R.C. Lahoti J.
This judgment lays down guidelines and general principles relating to medical negligence cases, as under :-

(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. The essential components of negligence are three : "duty", "breach" and "resulting damage".

(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. 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. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge
available at the time of the incident, and not at the date

[1] [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.]

of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the time equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(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. 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.

(4) What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high 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.

(5) The expression "rash or negligent act" as occurring in Section 304-A IPC has to be read as qualified by the word "grossly".

(6) The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(7) As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes, such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed. to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to a rash or negligent act within the domain of criminal law under Section 304-A IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

Ed. : The following is the said extract from Merry and McCall Smith : Errors, Medicine and the Law.

"Some of life's misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis".

8. Such malicious proceedings have to be guarded against.

9. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and / or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient.
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. 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 the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unles his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

(10) It is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law (or may not be - we express no opinion thereon) but the accused - appellant cannot be proceeded against under Section 304-A IPC on the parameters of the Bolam test.

Again in the said judgment the Supreme Court directed :-

"Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. 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. 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. A doctor accused of rashness or negligence, may not be arrested in a routine manner

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**II] Martin F. D`Souza Vs Mohd. Ishfaq**
2009(3) Bom.C.R. 202
Katju Markandey & Lodha R.M., JJ.
This case applied the general principles of guidelines mentioned in Jacob Mathew to consumer cases.

**III] In V. Kishan Rao Vs Nikhil Super Speciality Hospital & anr.**
2010 (6) BCR 155 SC
Singhvi G.S. & Ganguly Asok Kumar, JJ.
The Court overruled Martin D'Souza to the extent it applied the guidelines/ directions in Jacob Mathew to cousumer cases. Para 29 is as under :-

"We are of the view that aforesaid directions are not consistent with the law laid down by the larger Bench in Mathew (supra). In Mathew (supra), the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in Mathew (supra) did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. This has been elaborately discussed in Mathew (supra). This distinction has been accepted in the judgment of this Court in Malay Kumar Ganguly (supra) See paras 133 and 180 at pages 274 and 284 of the report".

**IV] Lastly, the Supreme Court has in recent judgment reported in 2010(2) BCR 599 Kusum Sharma and ors Vs Batra Hospital and Medical Research Centre laid down guidelines as under :-**

I. Negligence is the breach of a duty exercised 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.

II. 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.

III. The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. 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.

VIII. It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.

XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

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