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ABSTRACT

In a landmark historical judgment the Hon’ble Supreme Court has ruled that doctors should not be held criminally responsible unless there is prima-facie evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine supporting the charges of a rash and negligent act. It is a laudable judgment in the light of criminal procedures filed against the medical professionals in trivial cases under Section 304-A and even 304 IPC where prima-facie there seems to be no neglect in these medical treatments.

Key Words: Negligence, damage, rashness, criminal law, mens rea, recklessness, res ipsa loquitur, Ex abundanti cautela, cognizance, harassment, Statuary, Bolam’s test, misadventure.

INTRODUCTION

On August 05, 2005 a Three Judge Bench of Supreme Court of India of Chief Justice R.C. Lahoti, Justice G.P. Mathur and Justice P.K. Balasubramanyam by order quashed prosecution of a medical professional under Section 304-A/34 IPC and disposed of all the interlocutory applications that doctors should not be held criminally responsible unless there is a prima-facie evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine supporting the charges of rash and negligent act. It was judiciary at its best. Taking upon themselves to define the borders of justice the learned judges applied healing touch to the healers [1]. The judgment with its salient features and opinion of medical professionals is being discussed [2] -

Conclusions of the judgment summed up:-

1. Negligence is the breach of a duty caused by omission to do some thing which reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and a reasonable man would not do. The definition of negligence as given in Law of Torts, Rattan Lal and Dhiraj Lal (editiede by Justice G.P. Singh), referred to herein above holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person, sued. The essential components of negligence are three: "duty", "breach" and "resulting damage"....

2. Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he can not 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; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. 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 of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the 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. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that can not be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

4. The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

5. The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in 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. For an act to amount to 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 high degree may provide a ground for action in civil law but can not form the basis for prosecution.

6. The word "gross" has not been used in Section 304-A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be "gross". The expression 'rash or negligent act' as occurring in Section 304-A of the IPC has to be read as qualified by the word "grossly".

7. 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 medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was likely imminent.

8. Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It can not be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

GUIDELINES

Re: Prosecuting medical professionals

As we have noticed hereinabove that the case of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometime such prosecutions are filed by private complaints and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complaint can not always supposed to have knowledge of medical science so as to determine whether the act of the medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of 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 he has suffered in his reputation cannot be compensated by any standards.

We may not understood as holding that the
doctor can never be prosecuted for an offence of which rashness or negligence is an essential component. 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 the doctors from frivolous or unjust prosecutions. Many a complaint prefers recourse to criminal process as a tool for pressuring the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against Statuary Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and / or State Governments in consultation with the Medical Council of India. So long as it is not done we propose to lay 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 accused doctor. The investigating officer, 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 (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collection 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.

Case at Hand

Reverting back to the facts of the case before us, we are satisfied that all the averments made in the complaint, even if held to be proved, donot make out a case of criminal rashness or negligence on the part of accused appellant. It is not the case of complainant that the accused appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a cause 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 can not be proceeded against under Section 304-A of IPC on the parameters of Bolam’s test.

RESULT

The appeals are allowed. The prosecution of the accused appellant under Section 304-A / 34 IPC is quashed.

All the interlocutory applications be treated as disposed of.

New Delhi: August 5, 2005.

DISCUSSION

Section 304-A IPC reads as "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 [3].

Negligence can not be described in a dictionary form. In a particular situation a particular act, which is short of being described as a reasonable act, in that particular circumstance may be called a negligent act (Bolam Test). Negligence is the genus of which rashness is the species. Medical negligence is a complicated subject and the liability of doctor will always depend upon the circumstances of the particular case. The injury to the reputation of a member of the medical or dental profession resulting from the finding of negligence can be very serious indeed and this is appreciated by the Courts [4]. In the case of Roe and Wooley v. The Ministry of Health and an anesthetist, which went to the Court of Appeal, it was held that neither the anesthetist nor any other member of the hospital staff had been guilty of negligence and when delivering his judgment Lord Justice Denning said “It is so easy to be wise after the event and to
condemn as negligence that which was only a misadventure. We ought always to be on our guard against it, especially in cases against hospitals and doctors. Medical Science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way [5]. In the case of Hunter v. Hanley, Lord President Clyde made the following observation: "The true test for establishing negligence in diagnosis or treatment on the part of the doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would have been guilty of, if acting with reasonable care" and this is concise and succinct definition of medical negligence [6]. In certain circumstances negligence may amount to a criminal offence and this goes beyond a mere matter of compensation. It involves an utter disregard to the life and safety of others and the conduct deserving of punishment; consequently, the degree of negligence is a material factor. The distinction between civil and criminal negligence was clearly drawn by Lord Hewart in the case of R.v. Bateman [7] The medical practice problem in America where the doctors are covered by commercial insurance, has become so acute that in 1970 the President of the United States set up a special commission to consider the problem in all its aspects. Although doctors in Britain are only seldom charged with criminal negligence, the number of civil actions against doctors based upon an allegation of negligence has increased considerably during the past three decades. Throughout the civilised world the public has become more and more compensation-minded and in recent years there has been a steady rise in the number of all classes of claims in which damages are sought for personal injuries whether they are sustained in road accidents, at work place or otherwise. The burden of proof in an action for negligence rests with the plaintiff and it follows thereafter that in medical practice it is for the patient or his relatives to establish his claim and not for the medical practitioner to prove that he acted with due skill and care. In certain types of cases the Court will accept that the nature of the occurrence complained of is such that as to relieve the plaintiff from establishing that the nature of the occurrence complained of is such that as to relieve the plaintiff from establishing that there was negligence and to place on the defendant the burden of proving the absence of negligence. In such cases the legal maxim res ipsa loquitur applies. The British Courts are, however, somewhat reluctant to apply this doctrine in cases of alleged negligence in medical cases.

The Two Judges High Court Bench decision in Dr. Suresh Gupta Vs. Govt. of NCT of Delhi and Anr.(2004)6 scale 432 in Paragraph 12 & 19 reads as follows- the legal decision is almost firmly established that where a patient dies due to negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and the same time, if the degree of negligence so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable to offence under Section 304-A IPC. "Thus a doctor can not be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State".

In the case of Dr. Jacob Mathew Vs. State of Punjab & Anr. The Hon'ble Court in Punjab opined against the judgment in Dr. Suresh Gupta Vs. Govt. of NCT of Delhi. Their contention was different. They questioned the adjective "gross" and opined that negligence is negligence and the doctor should not be treated on a different pedestal. All negligent acts causing death should be treated are par.

Section 304-A IPC was a sword hanging on the doctors working both in Govt. Hospital as well as private sector. Since long, this has been made a malady and the doctors were practicing defensive medicine so much so that even proper treatment / surgical procedures were being held back with the fear of untoward results because of which doctors could be sued for no fault of theirs. The Supreme Court of India has given a historic judgment describing the concept of negligence, in particular professional negligence and as to when and how it can call for an action under the criminal law. In the case of Dr. Suresh Gupta, the Hon'ble Judges had clarified that for ordinary negligence the doctors could not be held criminally responsible deserving criminal prosecution. It was only gross negligence
and recklessness where the doctors could be criminally held responsible. In this context, it is to be understood that Section 304-A IPC does not refer to the adjective "gross" in connection with negligence. This is why the Punjab High Court, in the case of Dr. Jacob Mathew Vs. State of Punjab & Anr. argued that the doctors could not be considered on different pedestal as far as 304-A is concerned. It is Punjab High Court which wanted a clarification on the word "negligence" in the case of doctors. This is how a Three Judge Bench in the Supreme Court was constituted and it deliberated on the issue for three days. This historic judgment has clearly defined the role of professionals, namely doctors and their involvement and liability towards Section 304-A IPC. In nutshell, the principle in Dr. Gupta's case was affirmed by the Supreme Court. This judgment practically absolves the medical professionals of the liability of Section 304-A. In case of Dr. Suresh Gupta, the court categorically held—"for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill can not be described to be so RECKLESS OR GROSSLY NEGLIGENT as to make him criminally negligent"

Now from the above statement of the Hon'ble Judges, this is amply clear that Section 304-A IPC both can be made applicable to the doctors theoretically but the doctors can feel secure in doing usual medical practice without any fear or apprehension of being victimized on trivial grounds. The Supreme Court had gone through the details of the problems of the medical professionals due to the application of this Section on them. This historic decision will no longer distort the Doctor-Patient relationship and will benefit the patients in the long run. This will also free the doctors from undue anxiety in the conduct of their profession. While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of the complex tasks. In medical science the results are not constant and are subject to variation. Sometimes when the outcome is negative the doctors are blamed for no fault of theirs. The level of competence of the doctors should be maintained by continuous medical education. Incompetence, whether due to lack of knowledge or due to quackery should be actively discouraged by the regulating bodies, government and the medical associations. The decision will not only provide relief to the doctors, who had been considered as soft targets by the law enforcing agencies and stop their harassment by unsatisfied patients but would also increase the quality of service in emergency cases, which the doctors were fearing to attend because of the prevailing atmosphere of being charged by the relatives of the patient or mob and further by the police under section 304 and 304-A IPC. The centre and state governments while framing necessary guidelines for proving negligence against a doctor on a complaint, should include at least three government doctors in the board of doctors with two members of the board of same specialty i.e. of the doctor against whom the complaint has been lodged and one specialist of forensic medicine keeping in view the legal implications of the complaint.

Contrary to the appreciation of the judgment by representatives of various bodies of medical professionals, some organizations working for consumers' rights have expressed their views the other way on the judgment. According to Pushpa Girimaji, consumer rights activist, getting other doctors to come forward against peers won't be easy. This may make the process long-drawn and thus discourage even people with genuine grievances from coming forward. Another consumer activist, Joseph Pookkat commented that from the point of view of the consumers, this entire charade of getting another doctor to support the charges of negligence, does not work out. This peer adjudication never comes out strongly. And Dr. Kunal Saha President, People for Better Treatment said that the judgment has laid down the guidelines in order to, deal with negligent and delinquent doctors. Doctors are misinterpreting it and there is no reason for them to be so happy about.[8]

**SUMMARY AND CONCLUSIONS**

1. Concept of negligence is different in civil and criminal law.
2. Doctors and medical practice have to be treated differently.
3. The alleged negligence should be of gross nature to attract criminal liability.
4. Many a complaint prefer recourse to criminal
process as a tool for pressuring doctor for extracting unjust compensation.

5. A private complaint may not be entertained unless the complainant produces prima facie evidence.

6. The service done by doctor is the noblest of all. They have to be protected.

7. The loss of reputation suffered by a doctor cannot be compensated by any standards.

8. A doctor should not be arrested in a routine manner.

9. Guidelines have been prescribed by apex court.

10. Statutory rules need to be framed by the Government of India and State governments in consultation with Medical Council of India.

References


6. Hunter v. Hanley


8. Times of India, August 7, 2005: Doctors welcome SC verdict.