

LIABILITY OF MEDICAL PROFESSIONALS UNDER THE CRIMINAL LAW : RECENT JUDICIAL TRENDS

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The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit¹. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to a person and that person has not consented to suffer such harm². Section 93 saves from criminality certain communications made in good faith³.

It would be in order to preface this discussion with the law laid down by the Privy Council in *John Oni Akerele v. The King*⁴. A duly qualified medical practitioner gave to his patient the injection of Sobita which consisted of sodium bismuth tartrate as given in the British Pharmacopoea. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act.

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¹ The Indian Penal Code, 1860

Section 88. 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.

² The Indian Penal Code, 1860 Section 92. 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.

³ The Indian Penal Code, 1860

Section 93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

⁴ AIR 1943 PC 72.

He was convicted. Their Lordships quashed the conviction. On a review of judicial opinion and an illuminating discussion on the points which are relevant here, what their Lordships have held can be summed up as under:

- (i) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.
- (ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. ... There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.
- (iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinion.

The most favourable view of the conduct of an accused medical man has to be taken, for *it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.* (Emphasis supplied)

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a mixture was dispensed once and a number of persons were made gravely ill, a criminal degree of negligence was proved.

The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra*⁵,

⁵ (1965) 2 SCR 622.

while dealing with Section 304A of IPC⁶, the following statement of law by Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap*⁷, was cited with approval:

To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*; it is not enough that it may have been the *causa sine qua non*.

K.N. Wanchoo, J., speaking for the Court, observed that the above said view of the law has been generally followed by High Courts in India and was the correct view to take of the meaning of Section 304A. The same view has been reiterated in *Kishan Chand & Anr. v. State of Haryana*⁸.

In *Juggankhan v. State of Madhya Pradesh*⁹, the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of Dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of Dhatura, were not satisfactorily established by the prosecution. The Supreme Court exonerated the accused of the charge under Section 302, IPC. However, on a finding that stramonium and Dhatura leaves are poisonous and in no system of medicine, except perhaps Ayurvedic system, the Dhatura leaf is given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being

⁶ The Indian Penal Code, 1860 Section 304A. 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.

⁷ 4 Bom LR 679.

⁸ (1970) 3 SCC 904.

⁹ (1965) 1 SCR 14.

administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. The principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is *prima facie* acting with rashness or negligence.

*Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Babu Godbole & Anr.*¹⁰, was a case under the Fatal Accidents Act, 1855. It does not make a reference to any other decided case. The duties which a doctor owes to his patients came up for consideration. The Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, *viz.*,

- (a) a duty of care in deciding whether to undertake the case,
- (b) a duty of care in deciding what treatment to be given and
- (c) a duty of care in the administration of that treatment

A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task 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. The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor *without taking the elementary caution of giving anaesthesia to the patient*. The doctor was held guilty of negligence and liable for damages in civil law.

In the year 1996, there are three reported decisions available. *Indian Medical Association v. V.P. Shantha & Ors.*¹¹, is a three-Judge Bench decision. The principal issue which arose for decision by the Court was

¹⁰ (1969) 1 SCR 206.

¹¹ (1995) 6 SCC 651.

whether a medical practitioner renders 'service' and can be proceeded against for 'deficiency in service' before a Forum under the Consumer Protection Act, 1986. The Court dealt with how a 'profession' differs from an 'occupation' especially in the context of performance of duties and hence the occurrence of negligence. The Court noticed that medical professionals do not enjoy any immunity from being sued in contract or tort (i.e., in civil jurisdiction) on the ground of negligence. However, in the observation made in the context of determining professional liability as distinguished from occupational liability, the Court has referred to authorities, in particular, *Jackson & Powell* and have so stated the principles, partly quoted from the authorities:

In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control.

In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (See: *Jackson & Powell on Professional Negligence*, 3rd Edn., paras 1-04, 1-05, and 1-56).¹²

In *Poonam Verma v. Ashwin Patel & Ors.*¹³, a doctor registered as medical practitioner and entitled to practise in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practise in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a

¹² *Ibid.*

¹³ (1996) 4 SCC 332.

prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence *per se* actionable in civil law. *Dr. Laxman Balkirshna Joshi's* case¹⁴ was followed. Vide para 16, the test for determining whether there was negligence on the part of a medical practitioner as laid down in *Bolam's*¹⁵ case was cited and approved.

In *Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors.*¹⁶, the Court noticed that in the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. 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. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the abdomen of the lady. The doctrine of *res ipsa loquitur* was held applicable 'in a case like this'.

*M/s. Spring Meadows Hospital & Anr. v. Harjot Ahluwalia through K.S. Ahluwalia & Anr.*¹⁷, is again a case of liability for negligence by a medical professional in civil law. It was held that an error of judgment is not necessarily negligence. The Court referred to the decision in *Whitehouse v. Jordan*¹⁸, and cited with approval the following statement of law contained in the opinion of Lord Fraser determining when an error of judgment can be termed as negligence:

The true position is that an error of judgment may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill

¹⁴ *Supra* n.10.

¹⁵ [1957] 1 WLR 582.

¹⁶ (1996) 2 SCC 634.

¹⁷ (1998) 4 SCC 39.

¹⁸ [1981] 1 All ER 267.

that the defendant holds himself out as having and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.¹⁹

It is pertinent here to quote some of the conclusions arrived at by the authors of *Errors, Medicine and the law*²⁰ highlighting the link between moral fault, blame and justice with reference to medical profession and negligence. The same are quoted below :

- (i) The social efficacy of blame and related sanctions in particular cases of deliberate wrong-doings may be a matter of dispute, but their necessity in principle from a moral point of view, has been accepted. Distasteful as punishment may be, the social and possibly moral, need to punish people for wrong-doing, occasionally in a severe fashion, cannot be escaped. A society in which blame is over-emphasized may become paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable.²¹
- (ii) Culpability may attach to the consequence of an error in circumstances where sub-standard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable.²²
- (iii) Before the Court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the

¹⁹ *Ibid.*

²⁰ Alan Merry & Alexander McCall Smith, *ERRORS, MEDICINE AND THE LAW* at 241-48.

²¹ *Id.* at 242-243.

²² *Id.* at 245.

interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. 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 complex tasks.²³

- (iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high, a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.²⁴
- (v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between, (a) *accidents* which are life's misfortune for which nobody is morally responsible, (b) *wrongs* amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e., wrongs) calling for punishment on account of being *gross* or of a *very high degree* requires

²³ *Id.* at 246-247.

²⁴ *Id.* at 248.

and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.²⁵

Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.²⁶

In *Dr. Suresh Gupta v. Govt. of NCT of Delhi & Anr.*²⁷, the patient was operated by a plastic surgeon for removing his nasal deformity. While conducting the operation the surgeon gave incision at wrong part due to which blood seeped into the respiratory passage and the patient expired. The post-mortem report was that the cause of death was asphyxia resulting from blockage of respiratory passage by aspirated blood consequent upon surgically inside margin of nasal septum. The surgeon was prosecuted under Section 304A of the IPC. On approaching the High Court, it refused to quash the criminal proceedings. The doctor approached the Supreme Court submitting that even if the entire case of the prosecution was accepted, there was no case for convicting him. Allowing the appeal, the Supreme Court held :

For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as “gross negligence” or “recklessness”. It is not merely lack of necessary care, attention and skill. The decision of the House of Lords in *R v Adomako* relied upon on behalf of the doctor elucidates the said legal position and contains following observations :

Thus a doctor cannot 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.

²⁵ *Ibid.*

²⁶ *Jacob Mathew v. State of Punjab & Anr.*, AIR 2005 SC 3180.

²⁷ (2004) 6 SCC 422.

Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as 'criminal'. It can be termed 'criminal' only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient's safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. This approach of the courts in the matter of fixing criminal liability on the doctors, in the course of medical treatment given by them to their patients, is necessary so that the hazards of medical men in medical profession being exposed to civil liability, may not unreasonably extend to criminal liability and expose them to risk of landing themselves in prison for alleged criminal negligence. For every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecutions of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety than giving all best treatment to their patients. This would lead to shaking the mutual confidence between the doctor and patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence. No doubt in *Suresh Gupta's case*, the patient was a young man with no history of any heart ailment. The operation to be performed for nasal deformity was not so complicated or serious. He was not accompanied even by his own wife during the operation. From the medical opinions produced by the prosecution, the cause of death is stated to be not introducing a cuffed endo-tracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage. This act attributed to the doctor, even if accepted to be true, can be described as negligent act as there was lack of due care and precaution. For this act of negligence he may be liable in tort but his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligence as to make him criminally liable. Between civil and criminal liability of a doctor causing death of his patient the court

has a difficult task of weighing the degree of carelessness and negligence alleged on the part of the doctor. For conviction of a doctor for alleged criminal offence, the standard should be proof of recklessness and deliberate wrong doing, i.e., a higher degree of morally blameworthy conduct. To convict, therefore, a doctor, the prosecution has to come out with a case of high degree of negligence on the part of the doctor. Mere lack of proper care, precaution and attention or inadvertence might create civil liability but not a criminal one. The courts have, therefore, always insisted in the case of alleged criminal offence against doctor causing death of his patient during treatment, that the act complained against the doctor must show negligence or rashness of such a higher degree as to indicate a mental state which can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. The following concluding observations of the learned authors in their book on medical negligence²⁸ are apt on the subject and a useful guide to the courts in dealing with the doctors guilty of negligence leading to death of their patients :

Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high – a standard traditionally described as gross negligence. Further, it held that blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use, however, distorts tolerant and constructive relations between people. 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

²⁸ *Supra* n. 20 at 247-48.

grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis.

After examining all the medical papers accompanying the complaint, the Court found no case of recklessness or gross negligence made out against the doctor to compel him to face the trial for offence under Section 304A of the IPC. As a result the Supreme Court allowed the appeal and set aside the impugned orders of the Magistrate and of the High Court and quashed the criminal proceedings pending against the doctor.

In *Jacob Mathew's*²⁹ case, one Jiwan Lal Sharma suffering from cancer was admitted in a private ward of CMC Hospital, Ludhiana on 15-02-1995. On 22-02-1995 at about 11pm he felt difficulty in breathing. His brother contacted duty nurse who in turn called some doctor to attend to the patient but no doctor turned up for about 20 to 25 minutes. Then, Dr. Jacob Mathew and Dr. Ellen Joseph arranged an oxygen cylinder and connected it to the mouth of the patient but the breathing problem increased further. The cylinder was found to be empty. No other gas cylinder was available in the room. Patient's brother brought one cylinder from adjoining room but there was no arrangement to make the gas cylinder functional. In-between, 5 to 7 minutes were wasted. By this time another doctor came and declared the patient dead. On a report by the deceased's son, a case was registered under Section 304A IPC. The magistrate framed charges against the two doctors. Sessions' Court dismissed the revision petition. Then the doctors approached High Court for quashing FIR and all subsequent proceedings.

It was submitted before the High Court that there was no specific allegation of any act of omission or commission against the accused persons in the entire plethora of documents comprising the challan papers filed by the police against them. The learned single judge who heard the petition formed an opinion that the plea raised by the appellant was available to be urged in defence at the trial and, therefore, a case for quashing the charge was not made out. An application for recalling the above said order was moved which too was dismissed. Feeling aggrieved by these two orders, the appellant filed appeal by special leave before the Supreme Court.

²⁹ *Supra* n. 26.

The matter came up for hearing before a Bench of two learned judges of the Court. Reliance was placed by the appellant on two judges Bench decision of the Supreme Court in *Dr. Suresh Gupta's case*³⁰. The Bench hearing the appeal doubted the correctness of the view taken in *Dr. Suresh Gupta's case* and expressed an opinion that the matter called for consideration by a Bench of three Judges.

The referring Bench in its order dated 09.09.2004 has assigned two reasons for their disagreement with the view taken in *Dr. Suresh Gupta's case* which are as under :

- (1) Negligence or recklessness being 'gross' is not a requirement of Section 304A, of IPC and if the view taken in *Dr. Suresh Gupta's case* is to be followed then the word 'gross' shall have to be read into Section 304A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.
- (2) Different standards cannot be applied to doctors and others. In all cases it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness or negligence, violence would be done to the plain and unambiguous language of Section 304A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved.

The order of reference has enabled the Supreme Court to examine in depth the concept of 'negligence', in particular 'professional negligence' and as to when and how it does give rise to an action under the criminal law. Accordingly, the Supreme Court in *Jacob Mathew's case*³¹ after discussing the issues summed up the conclusions 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.

³⁰ *Supra* n. 27.

³¹ *Supra* n. 26.

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 a 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 a medical professional. 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; 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 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 practises. A highly skilled professional may be

possessed of better qualities, but that cannot 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*³² 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 higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
- (6) The word 'gross' has not been used in Section 304A 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 304A of 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 most 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 cannot 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.

Thus the Supreme Court agreed with the principles laid down in *Dr. Suresh Gupta's case*³³ and reaffirmed the same. The Supreme Court further

³² (1957) 1 WLR 582 at 586.

laid down the Guidelines for Prosecuting Medical Professionals as follows :

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 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 rash or negligent act within the domain of criminal law under Section 304A 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 which he has suffered in his reputation cannot be compensated by any standards.³⁴

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 prefer 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.³⁵

And lastly, the Court held that 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, the court proposed to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal

³³ *Supra* n. 27.

³⁴ *Supra* n. 26.

³⁵ *Ibid.*

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 (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.³⁶

Thus, the Supreme Court has been pragmatic and considerate in dealing with the criminal liability of the medical practitioners for medical negligence, but not in the least lenient as some of the medical practitioners might like to believe. The judgment erects safeguards against indiscriminate prosecution, but it does not shield them from criminal liability if any of them is negligent.

³⁶ *Ibid.*