

## ***PRIMUM NON NOCERE: MEDICAL MALPRACTICE AND THE INDIAN PENAL CODE***

*Written by Aditya Karekatte*

*4th year BA LLB (Hons.), National Law School of India University*

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### **ABSTRACT**

*The medical profession arguably one of the most stressful professions of all. With the intense pressure on doctors to perform, and a litigation-happy society, judgments like those of V. P. Shantha and Kunal Saha have not made things easier. This paper aims to analyze the medical profession in the context of the law, and liability of practitioners thereof. The author then aims to suggest possible solutions to the problems of administration of justice in a medico-legal context, given the obvious gap between the subject-knowledge required to determine administration of justice, and those who administer it, being untrained in medicine.*

### **INTRODUCTION**

In what I personally consider to be one of the most inspiring statements ever made in the jurisprudence of medical liability, the then Chief Justice of India R. C. Lahoti in the famous case of *Jacob Mathew v. State of Punjab*,<sup>1</sup> said:

*“If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason—whether attributable to himself or not, neither a surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last-ditch effort towards saving the subject and*

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<sup>1</sup> *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1.

*facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to the society.”*

Indeed, the medical profession has been long regarded as among the noblest of professions, and its practitioners respected worldwide. However, doctors are too only human, and therefore prone to error. While being perfect or flawless is not expected of any professional, the main question that arises is, “*what happens in cases where doctors are at fault?*”<sup>2</sup>

The judicial system has long since grappled with the question of discerning the fine line between genuine error and negligence or malpractice. Through the course of this essay, I shall attempt to scrutinize certain aspects of the medical profession alongside the Indian Penal Code (“IPC”), and see how the IPC has been interpreted, and then draw conclusions from the same as to the exposure, protection (if any), and nature of the profession. Lastly, I will also put forth my solutions to establish a balance in the dichotomy of medical knowledge or judicial expertise that are ostensibly mutually exclusive but are both necessary for deciding cases with respect to medical malpractice.

In this paper, I shall attempt to analyse Negligence, Fraud, and Informed Consent (vis-a-vis general defenses) with respect to the Indian Penal Code. I shall do this via an examination of important case laws on the subject, and attempt to trace the evolution of the stances adopted by the Courts.

## **NEGLIGENCE**

Black’s Law Dictionary defines Negligence as, “conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid Municipal ordinance *or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it* (emphasis supplied).”<sup>3</sup> Simply put, negligence is said to have occurred when a medical practitioner fails to exercise a reasonable degree of care in administering treatment to his patient.

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<sup>2</sup> David Sau-Yan Wong, LEGAL ISSUES FOR THE MEDICAL PRACTITIONER, p. 22 (Hong Kong University Press, 2010).

<sup>3</sup> Negligence, BLACK’S LAW DICTIONARY (2<sup>nd</sup> edn.).

However, this negligence is to be judged by a person having a qualifications in the medical profession, and not a man sitting on the metaphorical clapham omnibus.<sup>4</sup>

In India, there have been a number of standards that have been adopted to determine whether there has been negligence by a medical practitioner or not. One of the first medical negligence cases to come up before the court where a standard was set by it are the cases of *Dr. Laxman Balkrishna Joshi v. Dr. Trimbarak Babu Godbole*,<sup>5</sup> and *A. S. Mittal v. State of U.P.*<sup>6</sup> In these cases it was held that when a patient consults a doctor, the doctor is expected to perform certain duties, namely:

1. A duty of care in determining whether to undertake the case.<sup>7</sup>
2. A duty of care in determining the type and procedure of treatment to be administered.
3. A duty of care in ensuring the administration of that treatment, both by the doctor themselves, as well as those who work with them.<sup>8</sup>

A breach of any of the aforementioned duties may give rise for a cause of action on grounds of negligence. In cases where death occurs as a consequence of negligence, the doctor may be tried under section 304- A of the IPC.

In *Dr. Suresh Gupta v. Govt. of NCT Delhi*,<sup>9</sup> a patient who had had previously been termed as healthy, with no cardiac, stress- related, or other ailments, was being operated on in order to rectify a nasal deformity. However, due to an accidental incision made by the doctor and the wrong size of endotracheal tube to allow for aspiration of blood, the patient died of fluid asphyxiation. In this case, when Dr. Suresh Gupta was sought to be prosecuted under Section 304- A, the fault on his part was found to be failure to select the proper size of cuffed endotracheal tube. In the opinion of the Bench, the aforementioned act – even if true and

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<sup>4</sup> Charlesworth & Percy on *Negligence*, 9<sup>th</sup> edn., p. 16.

<sup>5</sup> *Dr. Laxman Balkrishna Joshi vs. Dr. Trimbarak Babu Godbole and Anr.*, AIR 1969 SC 128.

<sup>6</sup> *A. S. Mittal v. State of U.P.* AIR 1989 SC 1570.

<sup>7</sup> This is also mentioned in the Hippocratic Oath, which is to be sworn by all new doctors before they can practice. (“*I will not be ashamed to say ‘I know not’, nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery*”)

<sup>8</sup> See generally *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1.

<sup>9</sup> *Dr. Suresh Gupta v. Govt. of NCT Delhi* 2004 Cri L. J. 3870.

accepted by the Court to be relevant, could only give rise to civil liability, and not criminal liability.<sup>10</sup>

This reading in of “gross negligence” in criminal negligence of the medical profession is not a new practice by any means, however. It has been accepted and even encouraged by the Courts from even pre-independence times, as can be seen in the case of *John Oni Akerele v. The King*,<sup>11</sup> a duly qualified medical practitioner injected his patient with Sobita (Sodium Bismuth Tartarate) as was prescribed in the British Pharmacopea (an accepted authority on medical treatments). Unfortunately, the patient died. The physician was subsequently tried and convicted under Section 304- A IPC. However, in an appeal, the House of Lords refused to uphold this conviction, saying instead:

*“... 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 ... 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.**”<sup>12</sup>*

However recently, most notably in the case of *Jacob Mathew v. State of Punjab*,<sup>13</sup> this view has been challenged. In this case, a patient who was already terminally ill died as a result of negligently being connected to an empty oxygen cylinder instead of a full one. In the proceedings under Section 304-A against the treating doctors, the doctors were convicted by

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<sup>10</sup> Per Y. K. Sabharwal J., “for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill cannot be described to be so **reckless or grossly** (emphasis supplied) negligent as to make him criminally liable”, *Dr. Suresh Gupta v. Govt. of NCT Delhi* 2004 Cri L. J. 3870.

<sup>11</sup> *John Oni Akerele v. The King* AIR 1943 PC 72.

<sup>12</sup> *Id.*, This view has also been upheld in several other cases, wherein the Courts have said that the viewpoint that is the most favorable to the doctors must be adopted, because “it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck”, see also *Kurban Hussein Mohamedalli Rangawalla v. State of Maharashtra* [1965] 2 SCR 622, *Emperor v. Omkar Rampratap* 4 Bom LR 679, *Kishan Chand and Anr. v. The State of Haryana* MANU/SC/0141/1970, *Paramanand Katara v. Union of India* 1989 SCR (3) 1997.

<sup>13</sup> *Supra* note 1.

the lower Court. However, the lower Court in its open disagreement with the verdict in *Dr. Suresh Gupta's* case said that the Court had in the aforementioned case brought in an unintentional meaning to the section insofar as interpretation of Section 304-A is concerned. They also went on to say that differential standards could not be applied to doctors, and such reading in of "gross negligence" was unwarranted and such *cassus omissus* should be reversed.<sup>14</sup> However, the Supreme Court (thankfully) did not accept this distinction, and went on to voice its disagreement and uphold the principle used in the said case *ex abundanti cautela* (as a measure of abundant caution). Nonetheless, a similar principle has also been reiterated recently in *Kunal Saha v. Sukumar Mukherjee and Ors.*<sup>15</sup>

Personally, I find myself agreeing with the stance that has been upheld repeatedly by the Court. A profession as important as the medical one cannot be taken lightly, and its practitioners should in my opinion be accorded the benefit of the doubt. I vehemently disagree with the stance taken by the lower Court in *Jacob Mathew's* case, because I believe that separate parameters can indeed be applied to different professions, if there exists a reasonable difference between them.<sup>16</sup> In the case of the medical profession, that distinguishing factor would be the external considerations that must be factored into the circumstances under which a medical practitioner practices his or her art.<sup>17</sup> That being said, my stance should not be misinterpreted to be a vocation of absolute protectionism for medical personnel. Rather, it is only meant to safeguard genuine practitioners who make genuine mistakes that are not deserving of a criminal sentence.<sup>18</sup>

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<sup>14</sup> "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. ... But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved."

<sup>15</sup> *Kunal Saha v. Dr. Sukumar Mukherjee and Ors.* (2014) 1 SCC 384.

<sup>16</sup> Kenneth McKnorrie, *Medical Negligence: Who Sets The Standard?*, JOURNAL OF MEDICAL ETHICS, Vol. 11, No. 3, p. 135 (September 1985), available at <http://www.jstor.org/stable/27716387> (Last visited on 9<sup>th</sup> April 2016).

<sup>17</sup> *V. Kishan Rao v. Nikhil Super Specialty Hospital*, (2010) 5 SCC 513, *Bolam vs. Friern Hospital Management Committee*. (1957) 2 All ER 118, *Spring Meadows Hospital v. Harjol Ahluwalia* (1998) 4 SCC 39.

<sup>18</sup> It is to be noted, however, that criminal liability and civil liability are two very different things, and my views on the one are not to be confused with the other, civil liability being outside the scope of this paper.

## FRAUD

While it is true that there have not been many cases with respect to fraud in the medical profession, this in fact highlights a lapse, the very point of which I shall seek to highlight with the following case example.

In the case of *Poonam Verma v. Ashwin Patel*,<sup>19</sup> a doctor who was qualified to practice homeopathy by his own judgment (sans the request of the patient) decided to administer allopathic medications to the patient, as a result of which the patient died.<sup>20</sup> The patient's wife filed a suit against the doctor, and the court held that the doctor had been guilty of negligence, and he was held civilly liable. With the exception of having to pay Rs. 3,30,000 and being reported to the Medical Council of India, the doctor, Ashwin Patel, faced no other sanction. This naturally begs the question: "why were criminal charges not brought against the doctor?" Under Section 415 of the Indian Penal Code, "*whoever, by deceiving any person, ... intentionally induces the person so deceived to do ... anything which he would not do ... if he were not so deceived, and which act or omission causes ... damage or harm to that person in body ... is said to 'cheat'.*"<sup>21</sup>

In this case, the Court clearly held that "*a person who does not have knowledge of a particular System of Medicine but practices in that System is a Quack and a mere pretender to medical knowledge or skill ...*".<sup>22</sup> By necessary implication, therefore, Dr. Ashwin Patel has – with the full knowledge that he was not qualified to do so – treated a patient using allopathic medication, ergo, should be held liable under Section 415 of the Indian Penal Code. Further, this case and its facts also clearly fall under the purview of Section 304-A of the Indian Penal Code, as even upon mere application of the principle of *Res Ipsa Loquitur* the act committed by Dr. Ashwin is clearly negligent and has caused the death of Mr. Pramod Verma.

I find myself shocked that the State did not succeed in bringing criminal charges against Dr. Ashwin Patel, especially on grounds on *inter alia* Sections 304-A, and 415. It is appalling that such a blatant violation was allowed to go unpunished, while cases of genuine error by

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<sup>19</sup> *Poonam Verma v. Ashwin Patel* 1996 SCC (4) 332.

<sup>20</sup> *Id.* at para. 9.

<sup>21</sup> Section 415, Indian Penal Code, 1860.

<sup>22</sup> *Id.*

qualified, well-meaning doctors are tried for years on end.<sup>23</sup> An example must be set in order to prevent future violations, and a fine of Rs. 3 lakh is not going to have much effect.

## INFORMED CONSENT (VÍS-A-VÍS GENERAL DEFENSES)

One of the most important cases when it comes to the issue of consent is that of *Samira Kohli v. Prabha Manchanda*.<sup>24</sup> In this case, a woman (Samira Kohli) was admitted to the hospital for treatment of prolonged menstrual bleeding. However, during the course of the operation to diagnose the condition she was afflicted with, the doctor Prabha Manchanda noticed a condition that necessitated the removal of Samira Kohli's reproductive organs. Because the patient was under anaesthesia, she went outside the theatre, and took the consent of the patient's mother, and proceeded to perform the procedures of removal of ovaries and uterus.

When the patient filed suit for damages, the Court held that her claim could be allowed in part (on the tort of assault and battery) and directed the doctor to refund the fees charged by her with interest, and pay compensation of Rs 25,000.

Apart from raising several issues of informed consent,<sup>25</sup> and contrasting the Prudent Doctor principle of the UK with the Prudent Patient principle of the USA, this case would also raise an interesting question with relation to the interpretation of Sections 350 and 322 of the Indian Penal Code, and the General Defenses envisioned within the same legislation.

The conditions for the fulfillment of Sections 350 and 322 and therefore sentencing under Sections 352 and 325 are clearly met in this case, and while it may not have been morally justified in this case, it would be interesting to see how the Courts establish a position of law with regard to the issues of criminal liability for lack of informed consent (especially in cases of doctors conducting procedures out of selfish motivation) vís-a-vís the general defenses.<sup>26</sup>

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<sup>23</sup> See Sanjay Mandal, *Triumph Tinged with Sadness*, THE TELEGRAPH (October 25, 2013), available at [http://www.telegraphindia.com/1131025/jsp/calcutta/story\\_17491879.jsp#.U9vpAfmSySo](http://www.telegraphindia.com/1131025/jsp/calcutta/story_17491879.jsp#.U9vpAfmSySo) (Last visited on 10<sup>th</sup> April, 2016); PBT, AMRI, *Dr S Mukherjee, Dr B Halder, Dr B Prasad Pay Rs 1.2 Crore in a Case of Medical Negligence*, INDIA MEDICAL TIMES (May 16, 2012), available at <http://www.indiamedicaltimes.com/2012/05/16/amri-hospital-dr-s-mukherjee-dr-b-halder-dr-b-prasad-pay-rs-1-2-crore-in-a-case-of-medical-negligence/> (Last visited on 10<sup>th</sup> April, 2016).

<sup>24</sup> *Samira Kohli v. Prabha Manchanda Appeal (Civil) 1949 of 2004*.

<sup>25</sup> *Per Cardozo J., "Every human being of adult years and sound mind has a right to determine what should be done with his body; and a surgeon who performs the operation without his patient's consent, commits an assault for which he is liable in damages"*, *Schoendorff vs. Society of New York Hospital* (1914) 211 NY 125.

<sup>26</sup> In any case, the facts of this case clearly fall under the "good faith" exception provided in sections 87 to 92.

Under the general defenses prescribed under the Indian Penal Code, those under Sections 80, 87, 88, 89, 90, and 92 (*inter alia*), the particular circumstances of the cases would have to be considered in deciding whether a doctor can be held criminally liable. However, by and large, these provide that an act done in good faith, for the benefit of the person (with or without their consent) cannot be held against them to establish criminal liability.

## **POSSIBLE SOLUTIONS TO THE PROBLEM OF ADMINISTRATION OF CRIMINAL JUSTICE**

To quote Justice Markandey Katju in *Martin F. D'Souza v. Mohd Ishfaq*, “if punished, no doctor can practice his vocation with equanimity ... it is true that medical profession has to an extent become commercialized.”<sup>27</sup>

I have been an advocate of protection of the medical profession for a long time,<sup>28</sup> and as I have read more about the profession, the tolls it takes on its practitioners and patients, and the major difficulties that arise with regard to implementation of both criminal and civil justice in the medical field, I have come to realize that the main problem is that we seem to have reached an impasse insofar as adjudication of disputes is concerned. On the one hand, we have ‘experienced’ judges,<sup>29</sup> practiced in the law and its interpretation, and on the other, we have a nuanced, complicated profession that requires over a decade of dedicated study in an entirely different field before one can even profess to be remotely qualified to practice the same. In such a scenario, how are we to reconcile the in-depth knowledge of both the law as well as life sciences that is an essential prerequisite to bringing even a semblance of the “justice, equity, and good conscience” that we as a society cherish so much into dispersion of justice in the medical profession?<sup>30</sup>

At this point, I would like to offer two solutions. The *first* of these has been proposed by Judge Douglas McKeon of the Supreme Court of New York. It is popularly labeled ‘Judge- Directed

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<sup>27</sup> *Martin F D’Souza v. Mohd. Ishfaq* (2009) 3 SCC 1.

<sup>28</sup> Aditya Karekatte, *Will The Decision in Kunal Saha v. Balram Prasad Dissuade Students From Entering the Medical Profession?*, submitted to the National Law School of India University (July 2014).

<sup>29</sup> I will not venture to comment on what I perceive to be the rationality (or lack thereof) in the decisions and verdicts of many judges.

<sup>30</sup> *Per* Katju J., “Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence”, *Martin F D’Souza v. Mohd. Ishfaq* (2009) 3 SCC 1.



Adjudication', and involves a Court-appointed judge who mediates disputes between parties in disputes.<sup>31</sup> This is, naturally, valid only for civil cases. As far as deciding criminal cases is concerned, my *second* solution is the setting up of a separate body altogether. In much the same way as we have Industrial and Green Tribunals, I propose the setting up of a quasi-judicial body - a Medical Tribunal, to be comprised of a joint panel of judges and medically trained personnel. However, in order for a judge to be eligible to serve on the Medical Tribunal, he or she must hold a B. Sc. Degree in any branch of science. The Intellectual Property Bar already mandates the same, and to expect the same of judges serving on a Medical Tribunal is not, in my opinion, too much to ask. The advantage of such a composition is that any possible bias in the minds of the medical personnel on the board would be countered by the judges, while at the same time enabling both to contribute effectively to the dispensing of justice.

The functions of this tribunal would tentatively be to have exclusive jurisdiction over all cases related to medical malpractice and negligence. As an additional measure, the medical profession should be removed from the purview of the Consumer Protection Act, because as there has been sharp increase in baseless medical claims ever since the profession was declared a service, by *Indian Medical Association v. V. P. Shantha*,<sup>32</sup> as was pointed out by Justices B. N. Agrawal, H. S. Bedi and G. S. Singhvi when they said, "*frivolous complaints against doctors have increased by leaps and bounds.*"<sup>33</sup>

All medical cases would be filtered through this Tribunal, whether Civil (only after the Judge-Appointed Arbitration had failed), or Criminal. Appeal could lie to the High Court or the Supreme Court subject to leave to appeal, if it is felt that sufficient cause exists for the same. It is my belief that establishing an alternate path for the medical profession would be a boon for all parties involved – not only would it contribute to securing of justice for both patients and doctors by virtue of more qualified judges, but also because it would lighten the already vast load of cases pending before our Courts.

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<sup>31</sup> Michelle Andrews, *Judge Devises Model For Resolving Medical Malpractice Cases More Quickly*, THE WASHINGTON POST (21<sup>st</sup> November 2011), available at [https://www.washingtonpost.com/national/health-science/judge-devises-model-for-resolving-medical-malpractice-cases-more-quickly/2011/11/16/gIQAT0EthN\\_story.html](https://www.washingtonpost.com/national/health-science/judge-devises-model-for-resolving-medical-malpractice-cases-more-quickly/2011/11/16/gIQAT0EthN_story.html) (Last visited on 10th April 2016.)

<sup>32</sup> *Indian Medical Association v. V. P. Shantha* 1995 SCC (6) 651.

<sup>33</sup> *Nizam Institute of Medical Sciences v. Prasanth S. Dhananka and Ors.* (2009) 6 SCC 1.

The Hippocratic Oath as is currently sworn by new doctors before they are allowed to practice was written in 1964 by Dr. Louis Lasagna, and is considerably different from the original one that had been envisaged by Hippocrates many millennia ago. It is meant to be a solemn oath. However, violation thereof prescribes no lasting penalty upon practitioners. If stringent penalties could be introduced for violation of the provisions of the Hippocratic Oath – which includes but is not limited to consent, doctor-patient confidentiality, negligence, malpractice, and reasonable duty of care – such as temporarily or permanently barring the doctor from practice – if found guilty by the aforementioned Tribunal – then it would be sure to have a deterrent effect.

## CONCLUSION

Through the course of this paper, we have examined the Indian Penal Code provisions with respect to certain aspects of the medical practice, and seen the attitude of the Courts towards the specific areas of negligence, fraud, and informed consent. I have also given a brief outline of a proposed mechanism that I believe will not only help reduce the burden of cases before our judiciary, but will also help in dispensing more thorough justice to all the parties involved. Having seen the stances as elaborated above, I cannot help but feel that the focus of the State has been unnecessarily on prosecuting doctors that may not be at fault,<sup>34</sup> while ignoring those who actually may be, as was given in the example of Dr. Ashwin Patel above. That being said, I hope that we as a society begin to realize that the medical profession is no ordinary profession, and therefore should not be governed by ordinary rules. With the protection of the State, and with concrete legal positions – so that medical personnel may be aware of where to draw the line – it is my belief that the profession can prosper even more than it is now. India is already a medical tourism hub, but with the right legal aid from the Government, it can become even more well-developed.

The medical profession is a praiseworthy, respectable profession. However, it should not be held to be free from liability for the wrongdoings of its practitioners. While it is true that the benefit of the doubt should be accorded to doctors in judging, this should not be extended to

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<sup>34</sup> This is in no way intended to be an approval of their actions or a statement that they should be granted immunity. My intention is merely to say that at many times it appears as if frivolous prosecutions are being undertaken.

the point of immunity. Indeed, criminal punishments are an important whip. But a whip is an exercise in futility if the horse knows it will not be used.

