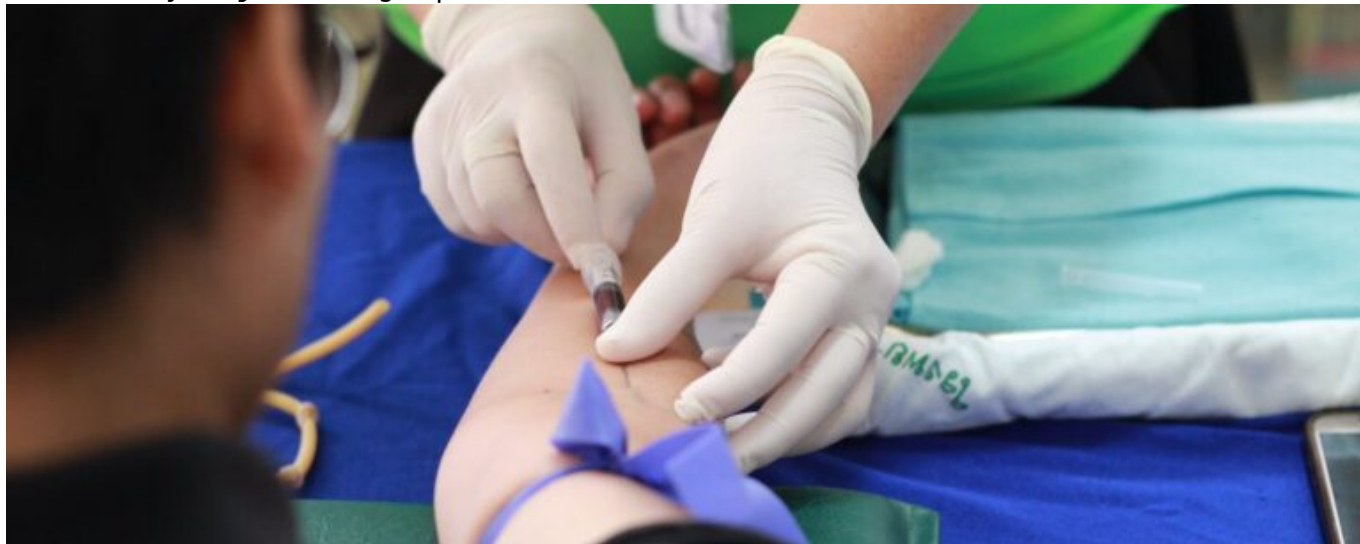


Medical Negligence During Pandemic

written by Rajdev Singh | June 3, 2021



A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. - Mc Nair, J[1]

Having lived with the pandemic for more than a year now, it is important to recognize that while it has been a disruptive and challenging time for us, we haven't faced the brunt of it the way the medical fraternity has. While the medical professionals and related staff have worked round-the-clock to manage the crisis, on the other hand there have been reports of mismanagement, patients being denied due care and medical assistance and in certain cases, non-observance of safety protocols; ultimately endangering the lives of both healthcare professionals and patients alike. These issues bring forth the topic of medical negligence during pandemic and the role played by law and judiciary to curb it.

This article discusses medical negligence during pandemic in the context of Indian legal system in the backdrop of the Covid-19 pandemic.

Understanding Medical Negligence During Pandemic

The Hon'ble Supreme Court in *Jacob Mathew vs. State of Punjab*[2] had observed that:

"Negligence is the breach of duty caused by the 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. Actionable negligence consists in the neglect of use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered to his person or property..."

In simpler terms, negligence is failure to exercise due care resulting in injury. However, in the case of medical negligence during pandemic, a higher degree of care is expected from the medical professional. Thus, the three-fold test to constitute medical negligence during pandemic is:

1. Existence of duty to care;
2. Breach or omission of such duty and
3. Suffering from injury consequent to such omission or breach.

Upon fulfilment of the three-fold test, civil or criminal liability (in some cases, both) can be fastened on the medical professional and the hospitals. This brings us to another important question: what standards apply to assess

the “duty of care” of the medical professionals?

Standard of Care and Bolam Test

A simple lack of care or error of judgement is not negligence on the part of any medical professional. So long as the doctor follows protocol amenable to the prevailing practice of the medical profession, he cannot be held liable for negligence merely because a better alternative course of treatment was available or because a more skilled doctor would not have resorted to that procedure.

The Hon’ble Supreme Court in *Dr Suresh Gupta vs. Govt. of NCT Delhi*[3] held that standard for fastening criminal liability and required medical negligence during pandemic to convict a doctor must be “a higher degree of morally blameworthy conduct.”

Mere lack of necessary care, attention or skill was observed to be insufficient to hold one *criminally* liable for negligence. However, it was observed that lack of a certain degree of care might create civil liability but will not be sufficient to attract criminal liability. In this case, a young man was stated to have died during the simple procedure for nasal deformity and the prosecution under Section 304A IPC was quashed by the Hon’ble Supreme Court, setting aside the order of the High Court. The view taken by the Apex Court was criticised on the grounds that different standards could not be applied to the conduct of negligence of doctors and others.

Subsequently, the matter was referred to a larger bench in *Jacob Mathew vs. State of Punjab*[4], which endorsed the approach adopted in *Dr Suresh Gupta*[5] that a high degree of negligence is the prerequisite for fastening criminal liability, and it was further observed that:

“[i]n order to hold the existence of criminal rashness or criminal negligence, it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent.”

The facts of the case were that the oxygen cylinder connected to the mouth of a patient being treated for terminal cancer was found to be empty. The patient succumbed before the replacement could be arranged. The Hon’ble Apex Court set aside the judgment of the High Court and held that the doctors could not be criminally prosecuted.

In the absence of comprehensive guidelines concerning adjudication of medical negligence cases, it is no surprise that the Hon’ble Supreme Court may pass a contrary judgment in the current scenario.

Furthermore, Indian Courts have consistently, in the past, cited the Bolam test as a point of reference to decide medical negligence disputes.

The Bolam test was first recognized in an English law case *Bolam vs. Friern Hospital Management Committee*[6]. In this case, the patient/claimant was not administered a relaxant drug to avoid risking death. However, the claimant suffered a serious fracture as a consequence. The claimant argued that the doctor breached the duty of care by not using the relaxant drugs. However, it was held that the doctor did not breach the duty of care.

The Court held that the medical professional is not negligent if he acted in accordance with the protocol accepted as proper by skilled men exercising and professing to have that special skill, merely because another doctor would have taken a contrary view.

Lately, there has been a shift in the position of the Indian Courts which

have highlighted the deficiencies[7] of the Bolam Test and observed to revise the factors[8] set out in the Bolam Test.

Medical Negligence During Pandemic

Our legal system has to propound a middle ground between the independence of doctors in taking decisions as per the changing conditions of the patient and the rights of the patient to be treated fairly. It is an unfortunate fact that Indian medical infrastructure is one of the poorest and the most overstressed in the world[9], especially during the outbreak of the Covid-19 pandemic. Additionally, present circumstances are quite different from that of the ideal scenario.

There have been suggestions that medical practitioners should be temporarily completely absolved from medical negligence during pandemic in view of the demanding conditions under which the doctors are operating. However, experts are divided over granting complete immunity to medical institutions as several cases have been reported apart from negligence consisting of mismanagement to unethical practice of overcharging the patients.

It is argued that entangling medical professionals in litigation at a time when they are under immense pressure may lead to demotivation of the community. Thus, relaxing provisions holding them criminally liable may grant them much needed breathing space. Another interesting perspective is to explore alternative mechanisms to settle disputes in which the patient can be compensated monetarily to the extent possible.

The challenge is to strike a delicate balance by ensuring the independence of medical professionals, operating under severe resource crunch, in the pandemic stays intact while ensuring the safeguard of a patient's rights and access to best possible treatment.

The Way Ahead

Medical negligence litigation is among those grey areas of law that has strong and ardent proponents on both sides. Instead of providing complete legal immunity, a more pragmatic approach of allowing civil liability claims against the negligent doctor must be adopted where they may not be held liable for criminal negligence. Moreover, swift and transparent mechanism must be devised by Central and State Governments to decide those civil liability claims. Importantly, comprehensive guidelines laid down by the Hon'ble Supreme Court in consultation with all the stakeholders should be issued for adjudication of the medical negligence cases.

There are no two thoughts about the fact that our medical professionals are giving their all despite facing a serious dearth of vital resources such as medicinal oxygen, life-saving medicines, etc, and in some unfortunate instances have had to face violence.[10] The death of a doctor, during this pandemic, is no less than a soldier being martyred on a battlefield and for their supreme sacrifice, India shall always remain indebted to them.

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- [1] J Mc Nair, J in Bolam vs. Friern Hospital 1957 1 WLR 582
 - [2] Criminal Appeal Nos. 144-145 of 2004
 - [3] Criminal Appeal No. 778 of 2004
 - [4] Criminal Appeal Nos. 144-145 of 2004
 - [5] Supra
 - [6] 1957 1 WLR 582
 - [7] V Kishan Rao vs. Nikhil Super Speciality Hospital, Civil Appeal No.2641 of 2010
 - [8] Arun Kumar Manglik vs. Chirayu Health & Medicare Private Ltd. & Anr.,

Civil Appeal Nos. 227-228 of 2019

- [9]
<https://medicaldialogues.in/india-slips-to-150th-rank-in-healthcare-world-economic-forum>
- [10] One of the incidents can be read here:
<https://www.indiatoday.in/cities/delhi/story/doctors-attacked-in-delhi-hospital-by-family-of-covid-patient-1795567-2021-04-27>
- [11] Medical negligence during pandemic
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