Wording of Section 304-A: Analysing Medical Negligence

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ABSTRACT

With a growing number of cases related to medical negligence, there is hardly any definitive approach taken by Courts to apply criminal liability to such cases of negligence. The wording of Section 304-A is ambiguous to the extent that 'rash or negligent' is qualified and understood very differently in the Medical Negligence cases. This paper is based on the premise that there is a loss of trust between the patient and the doctor due to such ambiguity in laws and at a deeper level, how solving this ambiguity with the proposed change would bring about greater internalisation as well as better medical practices.

Firstly, the author has placed focus on what constitutes Medical Negligence before moving on to explain how it is different from other Negligence cases because Medicine is still an evolving science. Further, it explores when liability starts for a doctor which is supported by coverage of judgments on Medical Negligence. The final corollary to which is that criminal liability should not be associated with medical negligence at all; with growing consumer cases there are far better ways to improve medicine and deter future events of negligence.

Keywords: Criminal, Doctor, Liability, Medical, Negligence.

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THE NEED FOR REFORM: AN INTRODUCTION

For all the occasions the profession of medicine has been lauded for its expertise and far more criticised for not living up to the expectations of the needs of civil society, there has been surprisingly inadequate engagement with any sort of codification that would aid Courts in setting the Standard of Care that medical practitioners need to follow. With the privatisation of health care and with the increase of general legal awareness, there has been an unprecedented rise in the number of complaints levelled against the profession over the standards it adheres to. Critics have argued as well, that the Medical Council of India's failure to enforce and internalize such said (and demanded) standards has seen a backlash of sorts with society reacting with law suits[2]. This backlash has also been a product of the declining sanctity that once existed between a patient and a doctor, that is, the expectation is still there (what many refer to as the 'Next to God Status of a Doctor'[3]) but the chance to justify does not fall within the ambit of consideration of a plaintiff who is dealing with a loss of life; of course, with the Consumer Redressal Forums, the ease to file these complaints are visible leading to often speculative complaints that draw on for a long time for reparations[4].

The question that would be answered by this reform is whether medical negligence should come under criminal liability at all when society has evolved in such a way that it prefers a monetary compensation for the loss of a life. The reform should work in such a way that it sets standards of medical health-care whilst also ensuring that these standards are internalised by medical practitioners. For example, in the historic *Anuradha Saha*[5]case, the Supreme Court awarded a total compensation of INR 5.96 crore[6], the allocation of liability is to test if there is any unique benefit in adding criminal liability which would serve as deterrence vis-à-vis a monetary compensation.

A reformation is required to the extent where the thin line between civil reparation and criminal liability exists,while weighing up negligence in medical conduct. It is often misread and seeing as to how that invokes various sections of the Indian Penal Code, Judicial Precedent should account for various social factors like the urban-rural divide, the nature of medical science and the declining rate of specialised doctors before passing a verdict on criminal liability of the same. The wording of 304-A has a lack of clarity in showing exactly when there can be a chance of

[2]Joga Rao, SV. 'Medical Negligence Liability Under The Consumer Protection Act: A Review Of Judicial Perspective'. *Indian Journal of Urology* 25.3 (2009): 361. Web. 11 Sept. 2015.
[3] "The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals" – Para 35 of *Jacob Mathewv.State of Punjab and Anr.*
[4] Pandit, MS, and Shobha Pandit. 'Medical Negligence: Criminal Prosecution Of Medical Professionals, Importance Of Medical Evidence: Some Guidelines For Medical Practitioners'. *Indian Journal of Urology* 25.3 (2009): 379. Web. 11 Sept. 2015.
[5] (2014) 1 SCC 384
[6]The Hindu, 'Kolkata Hospital, 3 Doctors Told To Pay Rs. 5.96 Cr. For Negligence'. N.p., 2013. Web. 11 Sept. 2015.

having criminal liability because it uses '*rash or negligent,*' though the Supreme Court has, on more than one occasion, qualified this phrase with '*grossly*'. This begs the question of when a doctor can be held criminally liable under Codified Law.

METHODOLOGY

I. LIMITATION: 304A IN RELATION TO OTHER ACTS

304A in relation to acts of rash or negligent driving may still hold water because there are hardly any judicial pronouncements that have tackled the distinction between say for instance, driving and a negligent act in general. The fact that we can extrapolate the wording to have improper meaning for medical liability is because the Courts have made the distinction. The need of the hour is to be able to formulate a change, either as an explanation or as illustration, under this very Section. This, in turn, would give Courts faster reference (which is codified) and give doctors and patients the chance to internalize procedures so criminal complaints become less which would restore the doctor-patient sanctity that has lost some of its value

II. SOURCES

In writing this paper, the author has used Criminal Law principles and argumentation which came from secondary sources like other journal articles which discuss similar concepts but not the specific research question that the author seeks to answer. In addition to this, there is an extensive comparative analysis of judgements which deal with medical negligence. The examples of medicine, in particular have come from empirical data.

CORE CHAPTERS

1. WHAT CONSTITUTES MEDICAL NEGLIGENCE?

Negligence occurs when there is no exercise of due care. If one were to look at the three ingredients then they would be as follows[7]:

a. There is an existence of duty of care from one party to the other,
b. The party has breached the duty of care,
c. As a result of thus breach, the other party has suffered legal injury.

This sort of negligence would constitute a tortious liability; The Supreme Court has held that for criminal negligence to be established there must be a *grossly culpable* state of mind[8]. To simplify the phrase, negligence would constitute an inadvertent state of mind when the doctor is supposed to know the consequences of his act and the standard of care to be observed by the doctor should be of a higher degree than the ordinary standard of care.

1.1WHAT IS THE DUTY THAT IS OWED?

In *Laxman* vs. *Trimback*[9], the Court held that a "reasonable degree of skill and knowledge" is imperative for a doctor. As Professor Joga Rao correctly points out, this is only a spectrum where a doctor need not be at an extreme to establish liability -the test is only to see if a reasonable degree of care and competence is afforded to the patient[10].

Courts have drawn the distinction between standard of care and degree of care. For example, a specialist would have a higher degree of care for his speciality and not for cases related to another speciality. All doctors are to adhere to the same standard of care, whether one is a general practitioner or a specialist but the degree of care would vary depending on what would amount to 'reasonable' at a given point of time in light of the circumstance. If we were to consider a hypothetical, a vascular surgeon would be expected by law to exercise ordinary skill of dealing with veins and arteries while a Neuro-surgeon would be expected by law to do the same in relation to the nervous system; both have the same standard of care (or duty which has been established) but what would be reasonable would be only be clear depending upon various other circumstantial factors.

This distinction begs two questions:

a. What is this the degree of knowledge required by the doctor?

[7] Supra n. 1
[8] Supra n. 1
[9] AIR 1969 SC 128
[10] Supra n. 1

b. What is the inherent value of consent which is taken by the doctor before the patient undergoes a medical procedure?

Both these questions have a common premise: medicine is an inexact science. This adage has been approved by courts as well as by scholars. Medicine is an ever-evolving discipline with new medicines and greater diagnostic techniques which come out every day. For example, Endo-vascular laser ablation is a technique that has recently been developed in India for a physical anomaly that has plaguing human race for quite some time i.e. the varicose vein.

The corollary to this evolution that has happened in medical science is that 'reasonableness' will also vary with time[11], which means that as a doctor, one cannot be aloof from the developments, for example, Sumo Tablets were scientifically proved to have been with incorrect doses to cure fever. If a doctor were to prescribe the same after a year of this incident, then that would constitute negligence though the author will answer at the end of this paper why criminal negligence should not be read into it.

Secondly, doctors are told to always take the consent of the patient before a surgical procedure. In obtaining the consent, there must also be a duty of care. This duty of care is to tell the patient all material facts and risks of the procedure that would enable him to make the decision. The reasonableness (degree) does not extend to disclosing all technical information that a layman would not be able to decipher nor does it involve re-iterating risks that any general medical procedure would entail. Hence, once again, in this spectrum, the reasonableness would vary and only if there is a disparity between what is expected and what happens in reality, the courts will intervene. To show an example, we could examine *Dr. Shyam Kumar* vs. *Rameshbhai Harmanbhai Kachhiya*[12],in whichthe bench held that the eyesight was lost in order to operate on glaucoma and cataract. There was no consent taken and when inquired, not even medical records were produced, thus allowing compensation.

2. ASCERTAINING LIABILITY: WHEN DOES IT START?

The liability arises when there is an injury to the patient as a result of the doctor's failure to meet his expected degree of care. Thus in 1956, in the celebrated case *R v Jordan*[13], a man was stabbed and brought to the hospital wherein he was given greater than the prescribed amounts of intravenous fluids and died of pneumonia in the following week. The Bench held that the cause of death was from the conduct of the treatment received and not from the initial stab. Of course, our concern is not with the principle of *novus actus interveniens* (intervening act), but the fact that causation stems from the specific breach of duty. To prove for the patient that there has been negligence then he has to show that the legal injury has been caused by the breach of duty which the doctor owed him. Of course, this standard is slightly lowered when it comes to non-criminal negligence where probable cause has to be shown. For example, if the doctor's act could be one of the probable causes, then the burden is on the plaintiff to show that it is the most probable cause which led to the injury.

[11] Supra n.1
[12] (2006) CPJ 16 (NC)
[13] (1956) 40 Cr App R 152

Another method to ascertain liability is by the principle of *Res Ipsa Loquitor* (for example,when a hand is not put into a cast and instead is amputatedor when, while delivering a baby, a swab is left behind). These instances do not need the plaintiff to show anything beyond the existence of duty of care. For this two things need to be checked[14]:

a. That whole control is with the doctor,
b. In all other circumstances, this accident would never have happened without negligence.

This principle too, however, is a tortious principle and not a criminal one. In *Calcutta Medical Research Institute v Bimalesh Chatterjee*[15], it was decided that the onus of proof is on the plaintiff and there is a presumption of innocence that is afforded to the doctor till such contrary is proved. *Kanhaiya Kumar Singh v Park Medicare & Research Centre*[16] re-affirmed this by saying negligence can never be presumed in these cases.

3. OBSERVATION: ANALYSING CRIMINAL LIABILITY IN MEDICAL NEGLIGENCE

Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.

The Supreme Court has delved a lot on this section in specific relation to doctors. In the *Santra* case, the distinction in considerations for Civil and Criminal Liability was made. The Supreme Court said that the consideration for the former is amount of damages incurred which would be the amount to be given for compensation. In Criminal Law, the degree of negligence is not the definitive factor in determining liability, but other considerations (which are made in any criminal case), like motive, magnitude of offence and the character of the perpetrator[17].

In *R vs Adomako*[18], the House of Lords settled on a principle of Criminal Liability for doctors where it was held that the burden is on the plaintiff to show that the doctor was incompetent to the extent that he had absolute disregard for the life of his patient which amounted to an offence against the State.

[14] Supra n. 1
[15] I (1999) CPJ 13 (NC)
[16] III (1999) CPJ 9 (NC)
[17] Ijme.in. 'Medical Negligence And The Law | Murthy | Indian Journal Of Medical Ethics'. N.p., 2007. Web. 11 Sept. 2015.
[18] (1994) 3 All ER 79

The former was in 1994 but in India, 1996, the principle against having Criminal Liability in Medical Negligence was strongly affirmed in *Poonam Verma v Ashwin Patel*[19]where the Apex Court drew out the distinctions for what exactly would constitute negligence, recklnessness and rashness.

a. A rash person knows consequences but is under a wrongful assumption that they will not occur as a result of his actions.
b. A reckless person knows the consequences of his act but does not care whether they will occur as a result of his actions.

They held that any conduct in this regard which does not meet the standard of recklessness and deliberate wrongs (where intention is read in i.e. desire and foresight are both present) should not have criminal liability put on them. With this as precedent, the discussion on *Suresh Gupta*[20]would become easier in due course of the paper.

CONCLUSION: WHY SHOULD MEDICAL NEGLIGENCE NEVER BE ASSOCIATED WITH CRIMINAL LIABILITY?

The possibility of something going wrong (or, as one terms it, an 'eventuality') is very high in the medical realm. Even after taking all precautions and following all procedural aspects by the book, an otherwise highly qualified doctor maybe the subject of a scrutiny if a life is lost because of this eventuality. The Supreme Court has held that medical deficiency would not accrue to negligence if all procedures are adhered to (usually in accordance with Medical Council of India rules) and the result of such deficiency is absolutely discounted. The likelihood is always there for something wrong to occur[21]. Having said that, the author would like to talk about why the reformation should occur on a two prong basis:

A. Metric of Beyond Reasonable Doubt is violated.
B. Monetary reparations will have a better deterrent value than criminal sanctions.

To discuss the first argument, we must again re-invoke the principles of medicine not being an exact science and as a causation of that; it is the author's firm belief that there can be no uniform standard if a decision is given where even with a grossly culpable state of mind, the Courts, even with all their resources, cannot explain a certain phenomenon to its fullest extent. In this discussion, *Suresh Gupta v Govt. of Delhi, NCT*[22]would be helpful. In that case, a nose repair failed leading to a wrong incision which further led to lung collapsing and finally, death. The defendant was accused of criminal liability under 304-A but was acquitted; the Supreme Court's reasoning on this account will expound on how important it is to have an extremely high standard for Criminal Medical negligence.

[19] (1996) 4 SCC 332
[20] AIR 2004 SC 4091
[21] Supra n. 16
[22] AIR 2004 SC 4091

"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 men 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."[23]

The explanation for this is fairly straightforward. It makes a distinction as to what incompetence is (which has been established as negligence) and what gross negligence is. This means that the standard to criminally incriminate someone for medical negligence is really high but going by the wording of the IPC which uses an 'or' to distinguish between rash and negligence it is difficult for any other reading (even though *Suresh Gupta* accounts for this in the judgement). The phrase that the Supreme Court uses is that of "*recklessness and deliberate wrong doing i.e. a higher degree of morally blameworthy conduct"*[24]. The justification for the same comes in the judgement when they refer to "Error, Medicine and the Law"[25] (Alan Merry and Alexander McCall Smith at 247-248); the attachment of liability which leads to punishment has moral overtones and these moral overtones do not accrue till the acts themselves are blameworthy. The only acts which can be blameworthy in this situation are those of recklessness and deliberate wrongs.

This was further re-affirmed in the *Jacob Mathew*[26]case wherein, the Supreme Court (in Para 49) said that the words '*rash and negligent*' need to be qualified by grossly; this was also preceded by how 304A has to be read differently in cases of medical negligence.Thus, it strengthens the claim that the Section is wrongly worded for medical negligence cases and in so far as judicial precedent has allowed for a distinction between medicine as a profession and other professions.

Secondly, on the question of reparations that are paid as civil liability serving as better deterrent compared to criminal liability, the general understanding is that doctors, if hit by civil liability, have to pay a lot of money. With *Anuradha Sen* setting the precedent for high valuation, doctors are far more prone to taking extra care for all procedures and prescriptions. A criminal sanction would hurt them to the extent that doctors will never want to take a tough call because there of the fear of being jailed. Critics argue that if there is a terminally ill patient, and then he would be left without any attempt to rescue his life (irrespective of how slim his chances of survival are), because the doctor will not be ready to make a call that would lead to his death. This sort of timidity[27] among doctors, who need to take tough decisions with time constraints, would end up hurting society far more.

[23] *Ibid.*
[24] *Ibid.*
[25] AIR 2004 SC 4091
[26] AIR 2005 SC 3180
[27] Supra n.4

SECTION WITH RECOMMENDED CHANGES

304A. **Causing death by negligence:-** *Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

Explanation: The standard for medical negligence cases would need an act of gross negligence which is recklessness or deliberate wrong.

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