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Professional misconduct or criminal negligence: when does the balance tilt?

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On September 13, 2013, the Supreme Court absolved Dr Praful Desai, an oncologist, of conviction on the charge of criminal medical negligence in the treatment of one of his patients. This article examines the judgment of the Supreme Court in the light of medical negligence and criminal jurisprudence.

This case is about the selfless struggle of Mr Singhi, a man who spent more than 25 years seeking justice for his wife, on whom gross medical negligence was committed. The case concerned the liability of a medical practitioner in the matter of an alleged failure to carry out his duty to care for a woman in an advanced stage of cancer, and his failure to perform a surgery that he had advised, even though he knew of the complications of the case.

The facts are that Ms Leela Singhi had been suffering from cancer for several years and doctors in the USA had declared that she could not benefit from surgical treatment. Yet she was advised an "exploratory laparotomy" by Dr PB Desai, under whose care she was admitted into the Bombay Hospital. The surgery was performed on December 22, 1987, by a junior doctor of Dr Desai, who called upon Dr Desai during the operation and informed him that there was profuse oozing of ascitic fluids and plastering of intestines. Dr Desai did not examine her or even enter the operation theatre and simply asked his junior to close the abdomen as the operation could not be performed. The patient alleged that Dr Desai did not perform it himself, delegating it to his junior, and also failed in his duty to provide her with postoperative care. In his defence, Dr Desai contended that Mrs Singhi was not his patient and that only his opinion had been sought on her medical condition. As a result of the surgery, which was alleged to have been wrongly advised, the patient's health deteriorated and she developed intestinal fistula that never healed. This only added to her pain and suffering till the time she expired, on February 26, 1989.

Three cases were filed against Dr Desai. These were (i) a case before the Medical Council of India, (ii) a suit for breach of contract and damages for tortious medical negligence, and (iii) a case of criminal negligence. It was alleged that the doctor's acts of omission and commission constituted not only professional misconduct, but also criminal negligence, punishable under Section 338 of the Indian Penal Code (IPC). Since the surgery was performed by the junior doctor, charges of abetment were also brought against Dr Desai in the criminal case.

Professional misconduct – MMC

On January 13, 1991, the Maharashtra Medical Council (MMC) found Dr Desai guilty of professional misconduct and issued him a strict warning. Though it did not pass a detailed order, it found Dr Desai guilty of the allegations made against him. He had been charged not only with professional misconduct, ie neglecting his patient, but also cheating, forgery and criminal negligence (1) During the course of the inquiry, the MMC found that the operation theatre register produced by Dr Desai was not filled properly, was filled by only one person (and did not contain the signature of the sister in charge, whereas the photocopy of the register produced by the complainant had all the required details and signatures. Strangely, Bombay Hospital could not locate the original register, the photocopy of which had been produced by the complainant, and claimed that it was missing. However, all these details did not find a place in the order of the MMC, which merely issued a strict warning to Dr Desai. Dr Desai did not challenge the warning.

Breach of contract and negligence – Bombay High Court

On September 2, 2011, the Bombay High Court gave a reasoned and detailed order in the civil suit against Dr Desai, awarding

compensation to the patient's relatives in regard to the tort of medical negligence and breach of contract committed by the doctor. The compensation awarded was about Rs. 15 lakh with interest and costs incurred postoperatively by Mr Singhi till the death of the patient, and Rs 1 lakh as costs (1).

The High Court came to the conclusion that Dr Desai's argument that Mrs Singhi was not his patient ran counter to the documentary evidence, which clearly showed that there was a valid, binding and enforceable contract between the two, and his breach of this contract amounted to medical negligence. In fact, the High Court concluded that by not performing the surgery, Dr Desai caused much pain to Mrs Singhi.

It was also found that the documentary evidence went against the evidence led by some of the junior doctors, hospital staff and even trustees of Bombay Hospital who tried to shield Dr Desai, and their evidence was rejected by the court. In the court's view, Dr Desai's argument that his actions had been motivated by ethical considerations held no water because these actions had, in fact, been most unethical. The evidence showed that the patient was Dr Desai's patient and according to all mores of medical ethics, including the Hippocratic Oath, the ethical stand taken by Dr Desai that he could not interfere in another doctor's case (even if it was considered that the patient was his junior's patient) was incorrect.

The court stated that breach of contract of a personal nature, more so by a professional, involved the violation of human rights, and this violation was acute and profound in the case of doctors. Breach by non-performance of the contract by doctors could also result in fatality and considerable mental distress. The court, therefore, awarded the complainant compensation by way of damages.

Criminal negligence – magistrate's court

On July 5, 2011, Dr Desai was convicted by the magistrate's court of the criminal charges against him under Section 338 (causing grievous hurt by committing an act so rashly or negligently as to endanger human life or the personal safety of others), read with Section 109 (abetment) of the IPC. The punishment was negligible. Dr Desai was sentenced to simple imprisonment till the rising of the court and was ordered to pay Rs. 50,000 by way of compensation, and in default to suffer simple imprisonment for three months.

This was the first time in a criminal trial in India that the evidence of a doctor from New York was led through video conferencing. An appeal was made to the Supreme Court on the validity of allowing evidence through video conferencing. The apex court, vide its order dated April 1, 2003, allowed the evidence to be led in this manner (1).

As stated in the High Court decision (4), the magistrate found that Leela Singhi was Dr Desai's patient. The evidence given by the doctor from New York showed that a gynaecologist's opinion had been taken to decide whether a hysterectomy was advisable. The doctors in New York were of the opinion that Leela Singhi's condition was inoperable because she already had metastatic disease in the pleura and had undergone radiation therapy which had resulted in the hardening and scarring of the pelvic tissues. Under these circumstances, there was a serious risk of the development of complications if the patient was operated upon. It was found that the exploratory surgery that was later undertaken should not have been performed on the basis of a CT scan which was not decisive. In the court's opinion, "When there was already a previous examination and consultation with a gynecologist, the surgery could have created risk of complications for the patient, the surgeon should have obtained best consultation or additional opinion before proceeding with an operation associated with such a risk." The court held that even if it was granted that Dr Desai's decision to operate could not be considered an error in judgment, his conduct throughout warranted condemnation, being as it was, associated with negligence and reflective of total apathy towards the patient (4).

The court held that the element of *mens rea* (guilty mind) was of no significance considering the facts of the case. It held that Dr Desai had a responsibility towards his patient and it was not permissible for him to fail to operate on her personally and take care of her. It also held that his multiple operation schedules, due to which he had not operated on the patient and not attended to her during operation and postoperatively, had caused the patient suffering. The anguish faced by the patient and her relatives was unparalleled. According to the court, "The criminality lies in running the risk of decision of operating, then perpetuated by recklessness or indifference as to consequences…. The violent indifference, deliberate omission, associated ego demonstrated by Dr Desai has put the life of the patient in a miserable situation. Patient ultimately succumbed due to abcess and operational hazard" (1).

The sentence passed by the magistrate was upheld in appeal by the sessions court and High Court (4), but was overturned by the Supreme Court on September 13, 2013 (5). The Supreme Court held that the negligent omission committed by Dr Desai was not criminal in nature. This case highlights the predicament of patients and their relatives and it could now become tougher to prove criminal medical negligence.

Breach of duty to care amounting to negligence – Supreme Court

The apex court confirmed the finding of the magistrate's court that Leela Singhi was Dr Desai's patient, even though he refused to accept this fact. Therefore, it was his responsibility to take care of the patient. According to the facts, it was clear that Dr Desai had neglected his patient and by omitting to do his duty, had caused harm to Mrs Singhi.

It is well established in law that the primary duty of healthcare providers is the duty to care for and treat patients. It is their duty to prevent not just physical harm, but also psychological injury. The apex court held that once the doctor–patient relationship has been established, the doctor has a "duty to treat" and a corresponding "duty to care". The patient should not be neglected.

Negligence is the breach of a duty caused by omission to commit an act which a reasonable man, guided by those considerations that ordinarily regulate the conduct of human affairs, would commit, or caused by the commission of an act which a prudent and reasonable man would not commit. Negligence becomes actionable on account of the injury resulting from the act or omission to commit the act amounting to negligence attributable to the person sued. The essential components of negligence are: "duty", "breach" and "resulting damage" (6).

The apex court held that since there was a decision shift to operate on Mrs Singhi despite advice from the USA doctors to the contrary, Dr Desai was required to give personal attention to the patient during the operation, and he was contractually bound to do so too. The court ruled that the negligence committed by Dr Desai was a tortious civil wrong and not a criminal act.

Unfortunately, the Supreme Court paid insufficient attention to the principle of duty to care in determining the impact of the illegal omission.

It is interesting to note that the apex court did not view the decision to operate on someone who had been declared inoperable as a rash or reckless act, or as an act which amounted to taking an unnecessary risk. In fact, it held that the decision to operate was unanimous and was seen as a bold step, since taking a risk was thought to be worthwhile in the light of the patient's deplorable condition. Unfortunately, the apex court was of the opinion that it did not matter whether the woman's abdomen was opened by the junior doctor or the senior doctor. The Court concluded that it was due to the deplorable condition of the woman that the operation could not be completed, and not due to the omission by Dr Desai.

Even though the causal relation was established between Mrs Singhi and Dr Desai, and he was held to be negligent beyond a doubt, the point that led the judges to view the negligent omission by him as being outside the sphere of criminality was the severity of the woman's condition. They did not consider that the permanent harm faced by Mrs Singhi was in fact due to the negligent omission.

Unfortunately, in many cases of medical negligence, key aspects of the harm caused are not evaluated or brought before the courts. The apex court did not consider and evaluate whether the procedure was worthwhile and whether the benefits were proportionate to the burden. It did not consider that though exploratory laparotomy is sometimes beneficial, a hasty exploration ought to have been avoided, especially when the CT scan was not decisive and a doctor had given the opinion that surgery could result in further complications. Strangely, the judges did not view these aspects of prognosis and treatment as essential factors in the determination of whether the advice to get the surgery performed and subsequent act of omission were tantamount to gross negligence of a criminal nature.

The apex court also failed to consider the factor of causation of personal injury to the woman, beyond what she was already suffering. A mere "possibility" of providing relief to a patient in distress (in this case by conducting an exploratory procedure on her), did not provide the evidence as to what was factually caused to the patient nor did it establish any assessment as to the degree of contribution of that procedure to the increased or decreased pain or increased risk. The lower courts, both in the criminal and civil proceedings, came to the conclusion that the omission by Dr Desai caused additional pain and suffering to the woman. Mere possibility of giving relief is not sufficient to establish factual causation. The apex court did not consider whether the negligence caused the harm and increased the risk that forced the patient to remain in hospital for a further three months, during one of which she was in immense pain as a direct consequence of the operation. Unfortunately, the judges lauded the operation as a bold step (though it was a mere possibility of providing relief). The apex court also did not consider the fact that the doctor failed to warn the patient of the risks and that he did not take the opinion of a gynaecologist before the surgery.

The facts before the courts established that Dr Desai was guilty of negligence. However, the apex court failed to appreciate that the acts of omission by Dr Desai materially increased the risk of injury that in fact eventuated. The Court did not consider that Dr Desai's negligent omission was a necessary condition of the harm that ensued, as was found by the Maharashtra Medical Council, as being guilty of professional misconduct and as held by the lower courts that ruled he was guilty of criminal negligence under Section 338 of the IPC.

Shift from criminal to civil liability – Supreme Court

The line between civil and criminal negligence is thin. The courts have held that in criminal law, it is not the damage done, but the degree of negligence that determines liability. The apex court relied on Jacob's case (6), in which it was held that the degree of liability for negligence in criminal law has to be higher than that in civil law. The essential ingredient of *mens rea* cannot be excluded from consideration when there is a charge of criminal liability. The element of criminality is introduced when the accused commits the act with recklessness, rashness or criminal negligence, knowing that the degree of hazard may cause injury, and with indifference as to the consequences. Civil liability accrues irrespective of moral blameworthiness. However, for criminal liability, the only state of mind that deserves punishment is that which demonstrates an intention to cause harm to others, or that which is associated with a deliberate willingness to subject others to the risk of harm.

The apex court did not find the acts and wilful omissions by Dr Desai sufficiently reckless and reflective of indifference to the consequences as to invoke criminal liability. While holding that act and omission are inextricably linked, the Court made a distinction between the two, being of the view that for an omission to qualify as a liability, it should be exceptional and needs to be adequately justified in each instance. The Court went on to state that when an omission is viewed

as invoking criminal liability, it should be justified by clear statutory language, and that the maximum penalty for an active wrongdoing should not be automatically transferred to the corresponding omission. Even though the Court opined that an omission by a medical professional may constitute an offence under Section 338, it held that in the case of a breach of the duty to care, a case may be filed before the disciplinary committee for professional misconduct. Clearly, the judgment has tilted the balance in favour of doctors.

Therefore, to prosecute a medical professional for negligence under criminal law, it must be established that he/she did something or failed to do something which, given the facts and circumstances, no medical professional in his right senses would have done or failed to do. The risk taken by the doctor should have been of such a nature that the resulting injury was most likely imminent (7). The higher standards for criminal medical negligence have to be met and the intent to harm has to be established.

In the light of the Supreme Court's judgment, it appears that to attract criminal liability, a patient must establish that the negligence of the doctor was of a gross kind and there was intent to cause harm. This could impose an intolerable burden on aggrieved persons, who would find it difficult to gather proof. It could frustrate the intent of the law on criminal negligence. Statutory provisions barely touch upon the harm caused to complainants in cases of medical negligence. It is difficult to prove the existence of intent to harm. The lower court held that mens rea was not of much consequence; the act or omission itself was enough to invoke criminal liability. However, the apex court took a different view of the matter.

The law on negligence has developed in a manner that favours professionals, especially medical professionals. In another judgment, the Supreme Court had stated that there can be no duality of opinion that medical practitioners intend to cure their patients (8). This makes the task of proving criminal liability more difficult. Judges are often reluctant to hold medical professionals accountable for negligence, recklessness or deviation from normal practice. The Supreme Court has stated in a number of its judgments that medical professionals are harassed or humiliated unnecessarily, and that malicious cases are filed against them to extract compensation. There have been very few cases of medical negligence in which compensation has been awarded to the complainant. Two examples of these are seen in (i) the civil case against Dr Desai and (ii) in *Dr Balram Prasad vs Dr Kunal Saha & others*, in which about Rs 6 crore was awarded as damages for tortious medical negligence (9).

The bias in favour of doctors stems from the fact that the standards laid down for deciding whether their actions or omissions constitute criminal negligence are higher than those for others. The courts are of the view that when a patient agrees to seek medical treatment or undergo an operation, every careless act of the medical professional cannot be termed "criminal" (10). However, the Supreme Court has failed to recognise that when a patient agrees to seek medical treatment or undergo a surgery, especially in an extremely complicated case such as that of Leela Singhi, and when the doctor takes the patient's consent to perform such a complicated surgery, it is his duty to conduct the operation himself rather than delegate it to his junior, and then to care for the patient. If a doctor fails in this duty, is it not tantamount to criminal negligence? Judges cannot ignore the ethical nature of medical law by retreating into the fortress of the legal protection afforded to the medical profession since time immemorial. The ethical issues raised by a failure to assist a person in need arise from positive duties (11). A breach of these duties could fall within the realm of criminal law of negligence.

While medical professionals have been put on a pedestal, mere mortals, especially disadvantaged patients and their families, suffer because of their lack of knowledge of the subject, as well as their inability to produce complete and appropriate evidence. It is only a few people like Mr Singhi who can carry on the relentless battle for justice in the courts. Mr Singhi battled for 25 years, against all odds and adverse circumstances.

The judgment of the lower court, subsequently confirmed by the High Court, had given out a clear message that doctors cannot just abandon their patients and leave them to their juniors. Unfortunately, the Supreme Court ruled that Dr Desai's actions did not amount to criminal misconduct or criminal negligence, thereby giving medical professionals yet another reason to believe that they can tilt the balance in their favour.

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