COMMENTS

Medical negligence: need for balanced approach

NR MADHAVA MENON

Founder-Director of the National Law School of India, Bangalore, and Member of the Central Ethics Committee of Indian Council of Medical Research. Address: Devi Priya, Sairam Rd., Poojapura, Thiruvananthapuram 695 012 INDIA email: profmenon.milat@gmail.com

A well researched and authoritative judgment of the Supreme Court delivered on February 10, 2010 (1) attempted to circumscribe the scope of criminal liability for negligence by doctors and hospitals. The law of professional negligence, especially in the case of doctors, has been formulated in such a way as to eliminate fear and anxiety about legal consequences while making professional judgements during diagnosis and treatment. The decision reiterated the principles laid down in an earlier judgment (2) and restrained the tendency to criminally prosecute doctors for a simple lack of care or an error of judgment or an accident which, the Court declared, 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 or she 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 doctor followed. 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 a professional proceeded against on indictment of negligence, said the Court.

The standard of care in criminal negligence was formulated in the following terms:

> 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.

There is reason for the medical world to be happy with this judgment as they sometimes feel threatened by police and prosecution in the course of discharging their professional functions.

The case under review involved an operation done in a private hospital in Delhi on a man diagnosed as having a malignant abdominal tumour. During the surgery, his pancreas was injured and a second surgery was done to control the flow of fluids. He was discharged carrying two bags on his body, with advice to change the dressing periodically. The patient suffered severe pain and agony and was treated at the All India Institute of Medical Sciences for a pancreatic fistula. He was readmitted, to another hospital, where he was diagnosed as having post operative complications of adrenoloctomy and gluteal abscess. The patient vomited while convalescing and was taken to hospital where he died on account of pyogenic meningitis.

When the complaint in the National Consumer Commission failed, the wife of the deceased approached the Supreme Court alleging criminal negligence on the part of the doctors (and the hospital) who performed the operation, stating that they injured the pancreas, leading to the complication resulting in death. The charge was of negligent murder under section 304-A of the Indian Penal Code. The appellants contended that the doctors lacked the kind of skill required to undertake such a complicated operation. They said the "anterior approach" adopted to remove the left adrenal tumour was not the standard one and the "posterior approach" should have been adopted.

The respondents in their submission to the Court argued that the anterior approach was preferred over the posterior one in cases of suspected cancer. This submission was supported by an expert witness as well. The respondents argued that merely because a complication had ensued, it did not mean that the doctors or the hospital was guilty of negligence. The law of negligence has to be applied according to the facts of each case and not by any general rule for all occasions.

The Court in its judgment examined the law of negligence as applied to professionals, distinguished the nature of proof required for civil and criminal negligence and evolved certain tests to decide the liability or otherwise of doctors in an action for negligence.

Negligence: civil and criminal

Negligence is the breach of a general duty of care which one owes to another in one's interaction with others. In civilised societies, human conduct is regulated by ordinary prudence expected of reasonable human beings. The duty of care is that of reasonable men in society. Doing something or refraining from doing something is part of that duty of care which varies from situation to situation and from time to time. The standard of reasonableness depends on the facts and circumstances of each case. Hence the law is not codified and is left to be evolved by judicial interpretation and common practice.

Apart from negligence per se, negligence can manifest itself by way of active and passive negligence, concurrent and continuing negligence, civil and criminal negligence, etc. Gross negligence, which is rash, reckless and hazardous in nature, often invites criminal liability as there is an element of *mens rea* or wilfulness involved in such acts. Such grossly negligent conduct resulting in death is what is made punishable as negligent homicide under section 304-A of the Indian Penal Code. Even when reckless conduct resulting in death is made a criminal offence, the penal code has provided exceptions to liability whenever the act is not intended to cause death and is done with consent in good faith for the person's benefit. Similarly, an act done in good faith for the benefit of a person even without his or her consent is protected by the penal code (sections 88 and 92 IPC). Thus perceived, criminal negligence is supposed to apply in extreme cases of rash and reckless conduct which no person with reasonable prudence would have hazarded in the circumstances.

Another point of distinction between civil and criminal negligence is on the point of evidence, the burden of proof and the application of the benefit of doubt. In civil proceedings all that is required to prove negligence is a preponderance of probabilities without the defendant being necessarily entitled to the benefit of doubt whereas, in criminal proceedings for negligence, the persuasion of guilt must be near conclusive beyond all reasonable doubt, the benefit of doubt being given to the accused.

Standard of proof in medical negligence

In the law on negligence, professionals are included in the category of persons professing some special knowledge and skills. A person who holds himself out as a medical practitioner and gives medical advice or treatment implicitly undertakes that he is possessed of the knowledge and skills necessary for the purpose. A breach of that duty of care in deciding what treatment to give and how, resulting in injury or harm, will entail an action for negligence. The standard of care expected of medical personnel is that prescribed by the profession or that accepted by a reasonable body of medical men skilled in that particular art. Of course, a physician does not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery will invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of the profession which he is practising and while undertaking the task entrusted to him he would be exercising his skill with reasonable competence.

Applying the above test, a professional may be held liable for negligence on one of two findings: either he did not possess 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 is that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch in which he practises. The competence of the defendant for fixing liability is to be judged by the lowest standard that would be regarded as acceptable by the profession. In the realm of diagnosis and treatment there is scope for genuine difference of opinion. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

A case of occupational negligence is different from one of professional negligence. A simple lack of care or an error of judgment is not proof of negligence on the part of a medical professional. 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. The medical professional is often called upon to adopt a procedure which involves a higher element of risk, but which he honestly believes will provide greater chances of success for the patient than a procedure involving less risk but with higher chances of failure. Just because a professional looking to the gravity of illness has taken a higher element of risk to redeem the patient from his suffering but did not yield the desired result may not amount to negligence.

In short, 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. By such a categorical articulation of the law of criminal negligence, the Supreme Court has provided the desired protection to medical practitioners to practise their profession without fear of harassment or humiliation while ensuring the legitimate interests of patients. The Court added:

> ...it is the bounden duty of the civil society to ensure that the medical professionals are not unnecessarily harassed by complainants who use the criminal process as a tool for pressurizing the medical professionals and hospitals for extracting uncalled for compensation. It would not be conducive to the efficiency of the medical profession, if a doctor is to administer medicine with a halter around his neck.

This is a bold statement from the apex court which is bound to raise the comfort level of medical practitioners particularly against criminal prosecutions.

References

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