WHAT IS MEDICAL NEGLIGENCE?

Before discussing medical negligence, it would be in order to understand the concept of negligence as such.

Negligence may be defined as the "breach of a 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". A shorter definition is that "negligence as a tort is the breach of legal duty to take care which results in damage, undesired by the defendant to the plaintiff". The definition involves three constituents of negligence: (1) A legal duty to exercise the due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) Breach of the said duty; (3) consequential damage.

As regards **medical negligence**, the legal position has been described in several leading judgments. Some of these are given below.

1—In the leading case *Bolam v. Friern Hospital Management Committee* *[(1957) 2 All ER,* wherein judge Mc Nair J. has stated as follows:

"…….. where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."

2-- The Supreme Court in *Laxman v. Trimbak AIR 1969 SC 128,* held:

"The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a

reasonable degree of care. Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires."

3—In *Achutrao Haribhau Khodwa v. State of Maharashtra [AIR 1996 SC 2377],* the Supreme Court said--

"The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence."

4—In Spring Meadows Hospital & Anr. Vs. Harjol Ahluwalia & Anr., (1998) 4 SCC 39 at 47, the Apex Court has specifically laid down the following principles for holding doctors negligent:

> "Gross **medical mistake** will always result in a finding of negligence. Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing of his duties properly. We are indicating these principles since in the case in hand certain arguments had been advanced in this regard, which will be dealt with while answering the questions posed by us."

5— In Poonam Verma Vs Ashwin Patel and Others, decided on 10.05.1996, the Supreme Court observed as follows:

"13. Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. (See : Blyth v. Birmingham Waterworks Co., (1856) 11 Exch 781 : Bridges v. Directors etc. of N. L. Ry. (1873-74) HL 213 : Governor-General in Council v.

Mt. Saliman, (1949) ILR 27 Pat 207 : (AIR 1949 Patna 388); Winfield and Jolowicz on Tort).

14. The definition involves the following constituents :-

(1) a legal duty to exercise due care;

(2) breach of the duty; and

(3) consequently damages.

15. The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances would do, or, by doing some act which a reasonable prudent man would not do.

16. So far as persons engaged in Medical Profession are concerned, it may be stated that every person who enters into the profession, undertakes to bring to the exercise of it, a reasonable degree of care and skill. It is true that a Doctor or a Surgeon does not undertake that he will positively cure a patient nor does he undertake to use the highest possible degree or skill, as there may be person more learned and skilled than himself, but he definitely undertakes to use a fair, reasonable and competent degree of skill. This implied undertaking constitutes the real test, which will also be clear from a study and analysis of the judgment in Bolam v. Friern Hospital Management Committee (1957) 2 All ER 118, in which, McNair, J., while addressing the jury summed up the law as under :

> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. 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. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent".

17. This decision has since been approved by the House of Lords in Whitehouse v. Jordan, (1981) 1 All ER 267 (HL); Maynard v. West Midlands Regional Health Authority, (1985) 1 All ER 635 (HL); Sidaway v. Gethlem Royal Hospital, (1985) 1 All ER 643 (HL); Chin Keow v. Govt. of Malaysia, (1967) 1 WLR 813 (PC).

18. The test pointed out by McNair, J. covers the liability of a Doctor in respect of his diagnosis, his liability to warn the patients of the risk inherent in the treatment and his liability in respect of the treatment.

19. This Court in Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128, laid down that a Doctor when consulted by a patient owes him certain

duties, namely, (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of these duties gives a cause of action for negligence to the patient.

20. The principles were reiterated in A.S. Mittal v. State of U.P., AIR 1989 SC 1570, in which wide extracts from that judgment were made and approved".

40. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or negligence per se, which is defined in Black's Law Dictionary as under :

> Negligence per se: 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 a 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. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes".

6-- In *Jacob Mathew Vs. State of Punjab (2005)6 SCC 1,* while dealing with the tests to be kept in mind by the courts in dealing with cases of medical negligence, the Hon'ble Supreme Court observed as follows:

- "*…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."*

- Indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

Conclusions summed up

We sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by 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. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, 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 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 followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of 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 for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. 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.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) 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.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or

could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

- Guidelines re: prosecuting medical professionals

As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain

an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

7—In Dr.Kunal Saha v. Dr. Sukumar Mukherjee and Ors., decided on 1st June, 2006, the National Consumer Commission summarised the medical negligence law as follows:

Real test for determining deficiency in service

Well laid down tests for determining deficiency in service are - whether there is failure to act in accordance with standard of a reasonable competent medical practitioner?

(i). Whether there was exercise of reasonable degree of care?

(ii). The degree of standard or reasonable care varies in each case depending upon expertise of medical man and the circumstances of each case. On this aspect, it would be worthwhile to refer to the enunciation from Halsbury's Laws of England.

"With regard to degree of skill and care required by the doctors, it has been stated as under in (pr.36, p.36, Vol.30, Halsbury's Laws of England, 4th Edn.)

> "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. Neither the very highest nor a very low degree of care and

competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also exists among medical men; nor is a practitioner necessarily negligent if he has acted in accordance with one responsible body of medical opinion in preference to another in relation to the diagnosis and treatment of a certain condition, provided that the practice of that body of medical opinion is reasonable."

The Apex Court aptly stated the said principles further in Dr.Laxman Balakrishna Joshi Vs. Dr.Trimbak Bapu Godbole, AIR 1969 SC 128, which reads as under:

"The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires: (cf. Halsbury's Laws of England, 3rd ed. Vol. 26 p.17). The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

Similarly in Poonam Verma Vs. Ashwin Patel (1996) 4 SCC 332, dealing with medical negligence, the Court observed that:

"14. Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.

15. The definition involves the following constituents:

(1) a legal duty to exercise due care;

(2) breach of the duty; and

(3) consequential damages.

16. The breach of duty may be occasioned either by not doing something which a reasonable man, under a given set of circumstances would do, or, by doing some act which a reasonable prudent man would not do.

17. So far as persons engaged in the medical profession are concerned, it may be stated that every person who enters into the profession, undertakes to bring to the exercise of it, a reasonable degree of care and skill. It is true that a doctor or a surgeon does not undertake that he will positively cure a patient nor does he undertake to use the highest possible degree of skill, as there may be persons more learned and skilled than himself, but he definitely undertakes to use a fair, reasonable and competent degree of skill. This implied undertaking constitutes the real test, which will also be clear from a study and analysis of the judgment in *Bolam* v. *Friern Hospital Management Committee*[5] in which, McNair, J., while addressing the jury summed up the law as under:

> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of

> an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent."
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> **18.** This decision has since been approved by the House of Lords in *Whitehouse* v. *Jordan*; *Maynard* v. *West Midlands Regional Health Authority*; *Sidaway* v. *Bethlem Royal Hospital*; *Chin Keow* v. *Govt. of Malaysia*.
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> **19.** The test pointed out by McNair, J. covers the liability of a doctor in respect of his diagnosis, his liability to warn the patients of the risk inherent in the treatment and his liability in respect of the treatment."

If there are alternative procedures of treatment and if a Doctor adopts one of them and conducts the same with due care and caution then no negligence can be attributed towards him.

In substance, for establishing negligence or deficiency in service there must be sufficient evidence that a Doctor or a hospital has not taken reasonable care while treating the patient. Reasonable care in discharge of duties by the hospital and Doctors varies from case to case and expertise expected on the subject which a Doctor of

a hospital has undertaken. Courts would be slow in attributing negligence on the part of the Doctor if he has performed his duties to the best of his ability with due care and caution.

It has been held in Dr. Anita Prashar Vs. Preeti Kochar and Anr. III (2005) CPJ 638, and also in Hon'ble Supreme Court case in the case of Achutrao (1996) 2 SCC 634 that there are various mode and course of treatment and if a Doctor adopts one of them with due care and caution the Court could indeed be slow in attributing negligence on the part of a Doctor if he has performed his duties to the best of his ability and with due care and caution.

Same view is expressed in Achutrao Haribhau Khodwa and Ors. Vs. State of Maharashtra & Ors. – (1996) 2 SCC 634, wherein the Court observed:

> **"**14. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence".

……
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As per the settled law discussed above, deficiency in medical negligence is to be judged on the following principles:

(i). It is to be remembered that a Doctor or a Surgeon does not undertake that he will positively cure a patient nor does he undertake to use the highest possible degree of skill, as there may be persons more learned and skilled than himself, but he definitely undertakes to use a fair, reasonable and competent degree of skill.

(ii). It is to be stated that if there are several modes of treatment and if a Doctor adopts one of them and conducts the same with due care and caution then no negligence can be attributed towards him;

(iii). Secondly, in the case of medical man, negligence means, failure to act in accordance with the standards of reasonably competent medical men at the time.

(iv). A medical practitioner is expected to exercise a reasonable degree of care and exercise skill and knowledge which he possess;

(v). No doubt, failure to use due skill in diagnosis with the result that wrong treatment is given is negligence;

(vi). Medical opinion may differ with regard to diagnosis or treatment, but in a complicated case if they occur and Court will be slow in attributing negligence on the part of the Doctor if he has performed his duties to the best of his ability and with due care and caution.

8--In --Kalyani Dutta v. Tirath Ram hosp., decided 3-3-08, the Delhi State Consumer Commission held as follows:

"7. However, the definition of deficiency provided by Sec. 2(1)(g) of the Consumer Protection Act, 1986 is so wide that it also takes in its fold the administrative deficiencies of the hospital. For instance, not providing blood to a patient who could die if blood transfusion is delayed for some time or not providing oxygen cylinder for want of which the patient is likely to suffer, some time fatal, or admitting the patient in the Nursing Home or hospital knowing it well that the doctors who are specialized and skilled for treating the patient are not available for some reason or the other. Sometimes, sanitary conditions of the hospital are so bad that it contributes to the worsening condition of the patient. Sometimes, the wherewithal and paraphernalia of the hospital who have very high reputation and claims themselves to be a five star or seven star hospital are not adequate.

8. Similarly any negligence in not attending to the patients in ICU who are ordinarily not allowed any attendant amounts to negligence. Utmost care and round the clock attendance is required for the patients in ICU. Nomenclature ICU itself suggests that core should be of intensive nature. Any shortcoming, imperfection or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

9. In such like cases we have taken a view that the hospital alone can be held guilty for deficiency in service in not taking proper care of the patient and once a patient is admitted in the in the hospital/ICU it becomes their first and foremost duty to provide each and every help to the patient depending upon the nature of disease and give proper attendance for preventing any fall from the bed as has happened in the instant case or any other eventuality causing any physical damage to the patient etc. Recently we have come across and decided few cases of patients having fallen from the bed in ICU suffering fractures particularly old and heart patients and even resulting in death.

10. However, in this case the OP had taken the plea that patient was suffering from such disease that developed psychosis and broke the fence of the barrier attached to the bed and had a fall. This itself shows that there was no person to attend to the patient and that too in the ICU and this amounts to administrative deficiency".

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