Misinterpretation of Section 304A IPC vis-a-vis 304IPC in medical Negligence cases – Deliberate or Inadvertent?

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Abstract

Negligence is specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. The degree of care required in a particular case depends upon the surrounding circumstances, and may vary according to the amount of risk to be encountered and to the magnitude of the prospective injury. A basic knowledge of how judicial forums deal with the cases relating to medical negligence is of absolute necessity for doctors. The need for such knowledge is more now than before. In light of higher premium being placed by the Indian Forums on the value of human life and suffering, but sometimes misinterpretations are done deliberately or inadvertently when the doctors are charged for culpable homicide not amounting to murder (304 IPC) instead of medical negligence (304 A IPC). A case of medical negligence is being discussed in which a gynaecologist has been charged for 304IPC instead of 304A IPC. The scenario was that, the patient died after readmission in private hospital, who had delivered a healthy baby, managed properly and discharged by the Gynaecologist and suffered undiagnosed complications after discharge at home. The charge was framed that the doctor was absent from the hospital and the case was handled by nurses on telephonic conversation with doctor. Earlier also the doctors had been prosecuted under 304IPC instead of 304A IPC in lower courts and even high courts (e.g. Jacob Mathews V. State of Punjab, Dr. Suresh Gupta V. Govt. of NCT Delhi). But in many cases, finally Supreme Court set aside the judgement of high court and held that the doctors could not be criminally prosecuted.

Key Words: Medical negligence, Culpable Homicide, Gynaecologist, Delivery, High Court, Supreme Court

Introduction

Negligence is specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. The degree of care required in a particular case depends upon the surrounding circumstances, and may vary according to the amount of risk to be encountered and to the magnitude of the prospective injury. A basic knowledge of how judicial forums deal with the cases relating to medical negligence is of absolute necessity for doctors. The need for such knowledge is more now than before. In light of higher premium being placed by the Indian Forums on the value of human life and suffering, but sometimes misinterpretations are done deliberately or inadvertently when the doctors are charged for culpable homicide not amounting to murder (304 IPC) instead of medical negligence (304 A IPC).(1) These misinterpretations of 304A IPC and 304 IPC by law enforcement agencies are not uncommon which further complicates the medical practice. Sometimes it happens
due to pleading by defence counsel in unprofessional manner also. The present case is also a classical example of the misinterpretation of law by law enforcement agencies.

This case report is based on the judgement of honourable high court of judicature at Bombay in Criminal anticipatory bail application no. 513 of 2018 dated 25.07.2018, in Dr. Deepa Sanjeev Pawaskar and Dr. Sanjeev Anant Pawaskar (The doctor couple) vs. the State of Maharashtra. The applicants had been filed for anticipatory bail apprehending their arrest in crime no. 71 of 2018 registered with Ratanagiri City police Station for offences punishable under section 304 IPC read with section 34 IPC. The main allegation under consideration was, “prescription without diagnosis and hence resulting into death of the patient amounts to criminal negligence on the part of the doctors”. The whole thrust of the bail petition was the act of the applicant would fall under section 304A of the Indian Penal Code not under section 304 of the Indian Penal Code and therefore the court was considering the issue. After considerations, the Honble High Court rejected the plea thus upheld the FIR. This case was widely circulated and published recently on social media and traditional media also claiming applicability of section 304 IPC in medical negligence cases.

**Case Report**

The scenario was that patient died after re admission in a private hospital, who had delivered a healthy baby, managed properly and discharged by the Gynaecologist and suffered undiagnosed complications after discharge at home. The patient was readmitted and died in the hospital. The charge was framed against doctor that prescription was done without diagnosis resulting into death of the patient amounts to criminal negligence on the part of the doctors. Pranav Pramod Polekar and his wife Dnyanada used to visit the hospital of Dr. Pawaskar for antenatal check up. Dnyanada was registered with Dr. Pawaskar hospital and visited the hospital regularly. She had taken the medicine prescribed by Dr. Pawaskar regularly and she was informed that the expected date of delivery was approx. 18/02/2018. On 05/02/2018 she started having labour pains and therefore she rushed to Dr. Pawaskar hospital. The doctor and his wife were present. She was admitted in the hospital. Initially, the family members were informed that she would have normal delivery. On 06/02/18, she was advised to undergo sonography test at GuruKrupa Sonography Centre. The sonologist diagnosed “umbilical artery showed reduced diastolic flow with increased S/D Ratio s/o fetoplacental insufficiency”. Upon seeing the Sonography report, doctors were of the opinion that she should undergo Caesarean Operation. On 06.02.2018, she underwent Caesarean Section. Dr. Ketkar was the anaesthetist. Dnyanada had given birth to a female child. The baby was admitted for routine child care.

On 08-02-2018 the baby was discharged and on 09-02-2018 at 5:00 PM Dnyanada was also discharged from Dr. Pawaskar hospital. Meanwhile, the doctor couple (applicant) had to go to Pune for some academic events therefor, they went to Pune on 08-02-2018 requesting Dr. Karmakar to attend the patient, if necessary in their absence. Applicants also informed the staff of their hospital, to call upon Dr. Girish Karmarkar in their Absence.

On 10-02-2018 patient started vomiting at home and her relative called upon Dr. Deepa Pawaskar (applicant) on telephone. The applicant asked them to call from any medicine shop and then she instructed to medicine shop owner to give some medicine which was said to be followed. On the same day, in the evening Dnyanada developed fever and continued vomiting and therefore, she was taken to the hospital of Dr. Deepa Pawaskar at 08:30 PM. The staffs have informed that the doctors are not available in the hospital. The staff nurse has called upon Dr. Deepa Pawaskar, who advised to admit the patient. The first informant has asked as to whether she should be taken to another hospital. However, he was informed that it was not necessary and the patient would be admitted for one day and on the next day, she would be discharged.

Dnyanada was being treated by two nurses, who were administering medicine on telephonic instructions of Dr. Deepa Pawaskar. The condition of the patient was deteriorating and the relatives, out of anxiety were informing the staff nurse. The relatives were insisting on shifting the patient to another hospital. However, he was informed that it was not necessary and the patient would be admitted for one day and on the next day, she would be discharged.
did not respond to the treatment, Dr. Karmakar visited the hospital at 10:30 PM and patiently heard about the complaints of the patient and thereafter prescribed the medicine. On 11-02-2018 at about 03:45 AM patient relatives realised that the tip of the nose and lips of Dnyanada had turned black and health of the patient deteriorated to large extent. The relatives had quarrel with the staff and thereafter at 04:00 AM the staff has called upon Dr. Pawaskar (Applicant) and upon the instruction of the applicant, Dr. Ketkar visited the hospital at 04:30 AM. By then patient was getting fits. Doctor Diagnosed poor prognosis and therefore, the patient needs to be shifted to Parker Hospital. The doctor was not able to state the current situation of the patient. No ambulance was available for transportation so she was transported by Dr. Ketkar’s car. She was admitted in ICU of Parker’s Hospital. She was kept on ventilator and at 07:00 AM the doctor informed that Dnyanada expired.

The investigating officer submitted the investigation report to the District civil surgeon for the opinion. The relevant part of the opinion of the civil surgeon was as follows:

On post-mortem examination following relevant findings have been noted:

- Pulmonary thromboembolism and bone marrow embolism in medium sized blood vessels.
- Intra-alveolar Haemorrhages and focal pulmonary edema.
- LSCS Suture site: acute non-specific inflammation
- Other organ congested
- Cause of death: pulmonary thromboembolism.

On perusal of other records the District civil surgeon opined as follows:

- Since the patient has undergone Caesarean operation and was readmitted on the very next day, it was incumbent upon the hospital to have examined the patient by the gynaecologist.
- The patient was admitted on telephone construction of Dr. Deepa Pawaskar.

The Dr Deepa Pawaskar is responsible for the health condition of the patient.

- Dr. Deepa Pawaskar should have referred the patient to a specialist immediately.
- The absence of Dr Deepa Pawaskar was preplanned and therefore the patient not to have been admitted in her absence except checking pulse and blood pressure and no other test were performed on the patient.

**OBSERVATION BY HON’BLE HIGH COURT**

The whole thrust of the applicants in the present case is that the act of the applicant would fall under section 304A of the Indian Penal Code and not under section 304 of Indian penal code and therefore this court is considering the issue. The Honourable Court considering the issue as “Prescription without diagnosis and hence resulting into death of the patient amounts to the criminal negligence”. This would be a case of culpable neglect which is defined as considerable on censurable or blameworthy neglect that is less than gross carelessness, but more than failure to use ordinary care (reference is given as Black law dictionary). An error in diagnosis could be negligence and covered under section 304A of IPC. But this is case of prescription without diagnosis and therefore culpable negligence. The word “gross” has not been used in section 304A of the Indian Penal Code, 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”. On this basis the Honourable High Court justified applicability of 304 IPC.

**OBSERVATION BY HON’BLE HIGH COURT NOT RELEVANT IN DECIDING THE CASE ON LAW POINTS**

Indian Medical Association, Ratnagiri branch wrote a letter to protest the DC and SP, threatening to go on strike for prosecuting doctor Pawaskar couple for offences punishable under section 304 of IPC. It is unfortunate that all private hospitals in Ratnagiri actually remain closed for 2 days and patients were forced to rush to Civil Hospitals. In whole judgement the matter of Strike by IMA is discussed at three places.
PLEADING OF DEFENCE COUNCIL

Applicant at the most be prosecuted under section 304A IPC not 304 IPC. Section 304A read thus.:-

- **Section 304 A 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 2 years or with fine or with both.

It is submitted that in no way, it can be said that this was a criminal negligence. The literature in respect of Pulmonary embolism may read as follows

- The patho-physiology of pulmonary embolism. Although the pulmonary embolism can arise from anywhere in the body most commonly it arises from calf veins.

- Unfortunately the diagnosis is often missed because the patient with pulmonary embolism presents with none specific signs and symptoms.

It is the case of civil law and the doctors could be made to pay compensation. At the most it is a negligence under section 304A and not criminal negligence. Besides these the defence counsel placed judgments of different case by the Supreme Court of India.\(^{(2)}\)

EXPLANATION OF RELEVANT LAWS RELATED TO THIS CASE

As this case has been registered under section 304 of IPC and main contention of the Counsel of the applicant (accused) was it could be a case of civil law or at the most it is a negligence under section 304 A IPC, it would be proper to have a look on following legal facts.

**INDIAN PENAL CODE**

- It deals with substantive criminal laws of India.
- It defines offences and prescribes punishment.

**SECTION 40 IPC Definition of Offence**

- The word “offence” denotes a thing made punishable by this code.

**Ethical Negligence:** It is a violation of code of medical ethics.

- If the complaint is made and the fact is proved, the name of the doctor may be erased from the medical register.

**ORDINARY NEGLIGENCE** (black’s law dictionary)

- Lack of ordinary diligence; the failure to use ordinary care (black’s law dictionary)

**CRIMINAL NEGLIGENCE** (black’s law dictionary)

- Gross negligence so extreme that it is punishable as a crime.

**GROSS NEGLIGENCE** (black’s law dictionary)

- A lack of even slight diligence or care.

**Medical Negligence**

- The term “medical negligence” is an omnibus one, which has come in vogue to refer to wrongful action or omissions of professionals in the field of medicine, in pursuit of their profession while dealing with the patients.

- There are four essential components of negligence

1. The existence of the **duty to care**, which is owed by the doctor to the complainant;
2. The failure to attain that standard of care prescribed by the law, thereby committing the breach of such Duty;

3. Direct causation;

4. Damage, which is both casually connected with such breach and recognised by the law has been suffered by the complainant.(4)

This is the ordinary Legal meaning of negligence. But for professionals such as Medical practitioners and additional prospective is added through a test known as BOLAM TEST which is the accepted test in India. In case of Bolam vs. Friern Hospital Management Committee,(5) the Queen’s bench division of the British Court held: “a doctor is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. It says that the standard of the ordinary skilled man exercising and professing to have that special skill” and not of the “highest expert skill”. This is applicable to both “diagnosis” and “treatment”. However, Supreme Court has now observed the need to reconsider the parameters set down in Bolam’s test that the errors of judgement do not necessary imply negligence.

ERROR OF JUDGEMENT(4)

· A doctor is not liable for an error of judgement or of diagnosis, if he has secured all necessary data on which to base a sound judgement.

SECTION 299 IPC- Definition of culpable homicide

· Whoever causes death by doing an act with the intention of causing death, or with intention of causes such bodily injury as it is likely to cause death, or with the knowledge that he is likely by such an act to cause death, commits the offence of culpable homicide.

SECTION 300 IPC - Definition of murder

- Except in case hereinafter excepted, culpable homicide is murder.

- Distinction between culpable homicide and murder, “culpable homicide” is a genus and “murder” is its species and all “murders” are culpable homicide but all “culpable homicide” are not “murder”.(6)

· Section 300 IPC definition of culpable homicide not amounting to murder (exception to the murder)

1. Exception I - Culpable homicide is not murder if the offender, whilst deprived of the power of self control by Grave and sudden provocation causes the death of the person who gave the sudden provocation or causes the death of any other person by mistake or accident.

2. Exception II - Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of a person or property exceeds the power given to him by law and cause death by doing an act.

3. Exception III - Culpable homicide is not murder if the offender, being a public servant or adding a public servant acting for the advancement of the public justice exceeds the power given to him by law and cause death by doing an act.

4. Exception IV - Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel.

5. Exception V - Culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or taken risk of death with his own consent.

SECTION 304 IPC - punishment for culpable homicide not amounting to murder

- It has two parts: section 304 I.P.C part I, section 304 IPC part II.

- Section 304 IPC Part I: The first part applies where the accused causes bodily injury to the victim with intention to cause death; or with intention to cause bodily injury as is likely to cause death.

- Section 304 IPC part II: comes into play when death is caused by doing an act with knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as it is likely to cause death.
SCOPE—Before an accused is held guilty and punished under first part or second part of 304,a death must have been caused by the assailant under any of the circumstances mentioned in the five exceptions to Section 300 IPC.\(^{(7)}\)

Therefore it is very clear that instant case cannot be placed under any of the five exceptions of section 300 IPC hence the doctors cannot be prosecuted under 304 IPC.

SECTION 304 A IPC CAUSING DEATH BY NEGLIGENCE

Whoever causes the death of any person by doing any rash and negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or with both.

RELEVANT JUDGEMENTS OF DIFFERENT COURTS INCLUDING APEX COURT

Honourable Supreme Court in Jacob Mathew versus State of Punjab and others reported in (2005) 6 SCC

Indiscriminate prosecution of medical professionals for criminal negligence is counterproductive and does no service or good to the society. To prosecute a medical professional for negligence under criminal law, the hazards taken by the accused doctor should be of such the nature that the injury which resulted was most likely imminent.\(^{(1)}\)

Hon’ble Supreme Court in Emperor versus Omkar Ram Pratap (1902) 4 Bombay LR 679

An error of judgement on the part of a professional is not negligence Per Se. Higher the acuteness in emergency, the higher the complications more are the chances of error of the judgement.\(^{(8)}\)

Hon’ble Supreme Court in ASV Narayan Rao versus Ratnamala and anr. reported (2013) 10 SCC 741

For an act to amount to criminal negligence, the degree of negligence should be much higher that is gross or of very high degree.\(^{(9)}\)

Hon’ble Supreme Court in Dr Suresh Gupta vs government of NCT of Delhi and another AIR 2004 SC 4091

The prosecution will have to prove a case of high degree of negligence on the part of the doctor for sustaining of prosecution under section 304A IPC.\(^{(8)}\)

Hon’ble Supreme Court in Mahadev Prasad Kaushik vs State of Uttar Pradesh and another (2008) 14 SCC 479

Honourable Supreme Court found that the offensive reveal is one punishable under section 304-A IPC and summons out to have be issued under section 304-A IPC.\(^{(10)}\)

Hon’ble Supreme Court in Crl.R.P number 296 of 2014 has cautioned many times that prosecution under section 304 IPC is not possible in any circumstances against doctor. Even prosecution under section 304A IPC can be sustained only if definite material showing high degree of negligence is there with the prosecution.\(^{(11)}\)

Deficiency in prosecution arguments, defence arguments, judicial observations and judgements

1. Hon’ble High Court defined the culpable negligence as less than gross negligence and more than failure to use ordinary care and quoted reference of black’s law dictionary. If it is a fact then culpable negligence shall be of lesser degree than criminal negligence, as according to black law dictionary, Criminal negligence is synonym to gross negligence.

2. The observation that the error in diagnosis is covered under section 304 A IPC is wrong. In fact error in diagnosis is not negligence at all (usually).

3. Hon’ble Court has mentioned three times regarding strike of IMA and on reading judgement it appears that the presiding judge was unhappy with the strike by IMA. Such things should not be considered in discussing law points. Even the protest of the members of IMA against the lodging of FIR under section 304 was genuine.

4. The defence lawyer has argued wrongly that it cannot be considered under section 304 IPC and atmost the case can be considered under section 304A IPC and
not in criminal negligence. Actually section 304 IPC can never be imposed against any doctor for professional negligence. Section 304 A and criminal negligence is the same and the defence lawyer should have argued for Civil negligence.

5. However the duty of Defence counsel is to protect any way to his client therefore it would have been proper that the Counsel would have place the scope of 304 IPC and would have pleaded that the complaint is not tenable under section 304 IPC and should be quashed. But defence counsel not pleaded like defence counsel but as judge.

**Discussion**

The term medical negligence is not defined or referred to anywhere in any of the enacted Indian law. Therefore it is interpreted by the Indian judiciary by referring general laws tending to give sufficient leeway to the doctors and expressly recognize the complexity of the human body, inexactness of the medical sciences, the inherent subjectivity of the process, genuine scope of the error of judgement and the importance of autonomy of the doctors. On persual of entire facts it is very clear the different types of negligence can be understood as follows:-

- Error of judgement- Not negligence usually.
- Ethical Negligence – it is the violation of code of medical ethics which is tried in the court of State Medical Council.
- Ordinary negligence or Civil Negligence - Failure to use ordinary care, or absence of reasonable degree of skill and care. It has to be tried in Civil Court like consumer forum.
- Criminal negligence - Gross negligence or extreme that is punishable as a crime. Gross negligence as a lack of even slight diligence or care. The omissions of even such diligence as habitually careless and inattentive people actually do exercise in avoiding danger to their own person or property. In such cases the offender can be prosecuted under 304A IPC and the case can be tried in Criminal Court.

Section 304 IPC is meant to deal with general offences and includes act of commission only that to in regards to general crime. The scope of culpable homicide not amounting to murder is limited to the five exceptions of definition of Murder. Professional negligence especially related to medical profession cannot be the example of these five exceptions thus cannot be brought under ambit of section 304 IPC. No judgement of Apex Court justified the prosecution of doctor under section 304 IPC. The apex court even cautioned all courts of India regarding prosecution of doctor even under section 304A IPC except in case of extreme recklessness.

Therefore it is very clear from the above discussion that in the judgement of instant case –

- That in incorrect manner the criminal negligence has been considered under section 304 IPC. The Civil negligence, error of judgement, ethical negligence etc. in 304A IPC. There is no discussion on therapeutic misadventure.
- Some unwanted facts like strike by IMA which is likely to affect human psyche in judging a case was included in the judgement.
- Pleading by Defence Council was not proper.

**Conclusion**

Although the legislature have not guide the Judiciary clearly and finer details encompassing all the types of situation relating to medical negligence but Hon’ble Supreme Court of India through its various judgements have clarified many things to some extent. But vagueness still prevails and need to be addressed. It cannot be done by single agency but in policy making, various stakeholder like legislatures, Judiciary, medical jurist, Healthcare providers, law enforcement Agencies, medical and legal fraternity to avoid such situations. A comprehensive manual of the medical jurisprudence has to be framed and legalised by parliament of India for the guidance of law enforcement agencies, medical and legal fraternity in dealing with such cases.

**Conflict of Interest:** None

**Source of Funding:** Not required

**Ethical Clearance:** Not required
References


