

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Writ Jurisdiction Case No.930 of 2017

Arising Out of PS. Case No.-3229 Year-2016 Thana- PATNA COMPLAINT CASE District- Patna

Dr. Prabha Sinha wife of Dr. Pranay Kumar Sinha, Resident of Manas Nursing Home, Opposite Kankarbag Police Station, P.S.- Kankarbag, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through Senior Superintendent of Police, Patna
2. The Senior Superintendent of Police, Patna.
3. Prabhat Kumar Singh, Son of Late Pramod Prasad Singh, resident of Lakhanchand Kothi, Rajendra Path, P.S.- Kadamkuan, District- Patna.

... .. Respondent/s

with

Criminal Writ Jurisdiction Case No. 1585 of 2017

Arising Out of PS. Case No.-3229 Year-2016 Thana- PATNA COMPLAINT CASE District- Patna

1. Dr. Mrs. Aditi Raj, Daughter of Dr. Pranay Kumar Sinha and Wife of Shri Pankaj Kumar, Resident of DS-33 Manas Nursing Home, Opposite Kankarbagh Police Station, P.S.- Kankarbagh, District- Patna.
2. Dr. Pranay Kumar Sinha, Son of Late Parmeshwar Sinha, Resident of DS-33 Manas Nursing Home, Opposite Kankarbagh Police Station, P.S.- Kankarbagh, District- Patna.

... .. Petitioner/s

Versus

1. The State of Bihar through Senior Superintendent of Police, Patna
2. The Senior Superintendent of Police, Patna.
3. Prabhat Kumar Singh, son of Late Pramod Prasad Singh, Resident of Lakhanchand Kothi, Rajendra Path, P.S.- Kadamkuan, District- Patna.

... .. Respondent/s

Appearance :

(In Criminal Writ Jurisdiction Case No. 930 of 2017)

For the Petitioner/s : Mr. P.K. Sahi, Sr. Advocate

For the State : Mr. Saroj Kumar Sharma, AC to AAG-7

For the private respondent: Mr. Sandip Sahi

(In Criminal Writ Jurisdiction Case No. 1585 of 2017)

For the Petitioner/s : Mr. Vikas Kumar

For the Respondent/s : Mr. Lalit Kishore, AG



CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
CAV JUDGMENT
Date: 14-08-2020

The aforesaid batch of cases arise out of the same impugned order dated 24.12.2016 passed by the learned Additional Chief Judicial Magistrate (A.C.J.M.), Patna in Complaint Case No. 3229 (C) of 2016, hence both the cases have been taken up for hearing together, with the consent of the parties and are being disposed of by this common Judgment.

The aforesaid batch of cases have been filed against the order dated 24.12.2016 passed by the learned A.C.J.M., Patna in Complaint Case No. 3229(C) of 2016, whereby and whereunder cognizance has been taken against the aforesaid petitioners under Sections 304, 316/34 of the Indian Penal Code.

The case of the prosecution in brief as per the complaint filed by the complainant namely Prabhat Kumar Singh bearing Complaint Case No. 3229(C) of 2016, pending before the learned Court of Chief Judicial Magistrate, Patna dated 06.10.2016 is that the daughter of the complainant was married five years back with one Lokesh Kumar and subsequently she became pregnant whereupon she came under the treatment of Dr. Mrs. Prabha Sinha i.e. the petitioner of the first case (Cr.W.J.C. No. 930 of 2017). The deceased daughter of the



complainant is stated to have gone to the hospital of the petitioner of the first case on 21.02.2016 where she was treated and certain medicines were prescribed apart from being advised to get certain tests conducted at Manas Lab situated in the said hospital namely, Manas Nursing Home whereupon all the pathological tests of the daughter of the complainant was done at the Manas Lab. On 13.09.2016, the daughter of the complainant had rushed to the doctor i.e. the petitioner of the first case on account of some problem in pregnancy, whereafter the petitioner of the first case had given some medicines as also had prescribed certain tests. Again the tests were conducted at Manas Lab after taking the blood sample of the deceased daughter of the complainant. Since the doctor had prescribed *Dengue* test, the complainant was quite perplexed and had visited the aforesaid lab in the evening whereupon he was told that there was nothing in the report and *Dengue* test had turned out to be negative, however, no report was given to the complainant and when the complainant had again requested the doctor sitting in the lab to repeat the *Dengue* test, since his daughter was pregnant since last seven months and was suffering from fever, the doctor sitting in the lab became angry and had abused the complainant, whereafter the complainant



was forcibly ousted from the said premises. On the evening of the same day i.e. on 13.09.2016 the complainant had gone to meet the petitioner of the first case and had shown all the reports whereupon he was told that everything was fine, however, the complainant had requested the doctor to again get the *Dengue* test of his daughter conducted since she was suffering from fever since a long time, to which the petitioner of the first case had threatened the complainant and had called her staff who had then snatched the lab report from the hands of the complainant and had thrown him out of the clinic. It is the case of the complainant that the accused persons had always been negligent in treating his daughter and ultimately, when the daughter of the complainant was being treated in the aforesaid hospital by the petitioner of the first case, she became very serious on 16.09.2016 and at about 2:00 A.M. the nurse and staff of the petitioner of the first case informed the complainant that the baby had died in the abdomen of his daughter and she is very serious, hence the staff ousted the complainant along with her daughter from the nursing home at 2:15 A.M. on 16.09.2016 without being provided any prescription as also after having fleeced the complainant of a sum of Rs. two lacs within four days. It is the case of the complainant that having left with no



option he had taken his daughter to Kurji Holy Family Hospital, had admitted her there and subsequently he was told that his daughter was suffering from Dengue, which had been diagnosed on the basis of pathological test conducted there on 17.09.2016. The complainant was further informed by the hospital authorities that the baby had already died in the abdomen of his daughter, on account of negligence of the doctor treating her and her condition was serious. Ultimately, on 18.09.2016 at about 12:15 A.M., the daughter of the complainant died and the death certificate issued by Kujri Holy Family Hospital clearly states that the daughter of the complainant was suffering from *Dengue*. It is thus the allegation of the complainant that the only daughter of the complainant has been virtually killed by the petitioner of the first case and the doctor sitting in the laboratory inasmuch as the petitioner of the first case has treated the daughter of the complainant negligently and the doctor sitting in the laboratory had failed to conduct further pathological test.

The learned Court of Additional Chief Judicial Magistrate, Patna by the impugned order dated 24.12.2016 passed in Complaint Case No. 3229 (C) of 2016, on the basis of the materials available on record, averments made in the complaint petition and considering the evidence on record has



prima facie come to a finding that on account of negligence on the part of the accused doctor Prabha Sinha, the daughter of the complainant and the child in her foetus have died as also the proprietor of Manas Lab and doctor of the lab are also having complicity inasmuch as a wrong report pertaining to the daughter of the complainant has been furnished, accordingly cognizance has been taken against the aforesaid petitioners under Sections 304 and 316/34 of the Indian Penal Code.

As far as the first case i.e. Cr.W.J.C. No. 930 of 2017 is concerned, the Learned Senior Counsel for the petitioner has submitted that the allegations made in the complaint petition are false and concocted and the order taking cognizance is bad in law in view of the settled proposition of law as propounded by the Hon'ble Apex Court and this Hon'ble Court in a catena of cases. It is submitted that the petitioner is a reputed lady doctor of Patna and is well qualified inasmuch as she possesses the following educational qualifications:- (i) M.B.B.S. degree from Patna University, (ii) Diploma in Gynae and Obs. (DGO) and (iii) M.S. in Obstetrics and Gynecology. The petitioner of the first case is stated to have joined Bihar State Health Services in the year 1991 and ultimately she had taken voluntary retirement with effect from the month of August, 2011, whereafter she has



been running her own nursing home namely Manas Nursing Home. It is submitted that the petitioner of the first case is a competent and well qualified doctor, who has treated several pregnancy cases and there has been no complaint whatsoever much less any complaint of negligence in respect of treatment and conducting operations. It is further submitted that as far as the present case is concerned, there is no fault on the part of the petitioner and the fact is that the daughter of the complainant was under the treatment of the petitioner of the first case since February, 2016 since she was pregnant and on 13.09.2016 she had come to the nursing home of the petitioner of the first case for regular check up and was having fever since one day, thus on the very same day blood test and other tests were conducted and probably on account of incubation period, the *Dengue* test, conducted at Manas lab had turned out to be negative, whereafter the petitioner had advised the requisite treatment to be followed and then the complainant and his daughter had left the clinic. In the late evening of 16.09.2016, the complainant and his daughter had again come up for check up at the clinic of the petitioner of the first case and the daughter of the complainant had made a complaint that there was no movement of the child in the abdomen whereupon ultra sound was



conducted at Maurya X-ray at about 11:00 P.M., which is not in any manner connected with the clinic of the petitioner of the first case, and it was detected that the fetus was dead, hence the petitioner had advised for induction of labour pain and upon the complainant and his daughter having agreed for the same, the process was started and saline water was administered for safe delivery of the dead foetus, however, in the meantime, dark brown mixed blood started oozing out from the mouth and nose of the daughter of the complainant, hence in the night of 16.09.2016, complainant was advised to take the patient to the medical emergency department of PMCH, Patna since she required immediate medical treatment for vomiting and ICU facility was not available at the nursing home of the petitioner. Thereafter, a detailed slip was given to the complainant for reference regarding the problem of the daughter of the complainant so that appropriate treatment could be administered at PMCH, however, the complainant, at his own risk, got his daughter admitted in Kurji Holy Family Hospital in the early morning of 17.09.2017 whereupon several pathological tests appear to have been conducted and it was detected that the daughter of the complainant was suffering from *Dengue*. It is submitted that the complaint case has been filed only on the



presumption that wrong treatment was administered to the daughter of the complainant without there being any expert opinion of a competent doctor regarding the treatment administered by the petitioner of the first case.

As far as second case is concerned, it is the case of the petitioner no. 1 of the second case that she is the daughter of the petitioner of the first case as well as that of the petitioner no. 2 of the second case. The petitioner no. 1 of the second case is stated to be possessing MBBS degree, diploma in clinical pathology and MD (Pathology) degree. It is submitted that the petitioner is having a reasonable work experience and had joined Manas Lab as a pathologist on 01.09.2015, whereafter she had worked there till 10.11.2016. It is further submitted that the petitioner no. 1 of the second case is a competent Pathologist and has a wide experience. The learned senior counsel for the petitioner no. 1 of the second case has submitted that there is no fault on the part of the petitioners of the second case and similar facts have been stated, as has been canvassed herein above in the case of the petitioner of the first case. It is thus submitted that when the daughter of the complainant had come for check up on 13.09.2016, she was having fever since one day and probably on account of incubation period (early stage of



infection), when the *Dengue* test was conducted at Manas Lab, the daughter of the complainant tested negative as far as *Dengu* is concerned. In this regard, the learned senior counsel has referred to the expert opinion as published in Davidson's Principles & Practice of Medicine, 22nd Edition which clearly mentions regarding clinical feature of *Dengue* fever as also stipulates the incubation period to be 2-7 days. It is thus submitted that even considering the allegations leveled in the complaint petition, the second test has been stated to have been conducted after 4-5 days at Kurji Holy Family Hospital on 17.09.2016, wherein the daughter of the complainant had tested positive for *Dengue*, hence it is submitted that no negligence or fault can be attributed to the petitioner no. 1 of the second case on account of the incubation period of 2-7 days resulting in the *Dengu* test having turned out to be negative qua the daughter of the complainant on 13.09.2016. The said extract from Davidson's Principles and Practice can be found at Annexure-7 to the writ petition of the second case. As far as the petitioner no. 2 of the second case is concerned, he is merely the husband of the petitioner of the first case and is also a well qualified doctor possessing MBBS degree, MD in General Medicine and FICP degree. The petitioner no. 2 of the second case is stated to



be a Professor of Medicine in Patna Medical College and Hospital, Patna, who has already retired on 30th June, 2015 and is stated to be one of the Partner of Manas Nursing Home, Patna. However, no allegation has been leveled in the complaint petition as far as the petitioner no. 2 of the second case is concerned.

In nutshell, the Ld. Senior Counsel for the petitioners has submitted that no *mens rea* is present as far as the aforesaid petitioners are concerned and moreover, no case is made out against the petitioners herein under Sections 304, 316/34 of the Indian Penal Code, by any stretch of imagination, which is apparent from a bare perusal of the materials on record, the averments made in the complaint petition and the evidence on record. The Ld. senior counsel for the petitioners has referred to and relied upon various judgments rendered by the Hon'ble Apex Court and this Court, which are being detailed, along with their relevant extracts, herein below:-

(i) (2005) 6 SCC 1 (Jacob Mathew vs. State of Punjab & Ors.);

Paragraph nos. 10 to 18, 28, 29, 32, 34, 38, 40, 47 and 48 whereof are reproduced herein below:-

“Negligence as a tort

10. The jurisprudential concept of negligence defies any precise definition. Eminent jurists and



leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in the Law of Torts, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh). It is stated (at pp. 441-42):

“Negligence is 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. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. ... the definition involves three constituents of negligence: (1) A legal duty to exercise 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; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.”

II. *According to Charlesworth & Percy on Negligence (10th Edn., 2001), in current forensic speech, negligence has three meanings. They are: (i) a state of mind, in which it is opposed to intention; (ii) careless conduct; and (iii) the breach of a duty to take care that is imposed by either common or statute law. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings. (para 1.01) The essential components of negligence, as recognised, are three: “duty”, “breach” and “resulting damage”, that is to say:*

(1) the existence of a duty to take care, which is owed by the defendant to the



complainant;

(2) the failure to attain that standard of care, prescribed by the law, thereby committing a breach of such duty; and

(3) damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant. (para 1.23)

If the claimant satisfies the court on the evidence that these three ingredients are made out, the defendant should be held liable in negligence. (para 1.24)

Negligence — as a tort and as a crime

12. The term “negligence” is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The essential ingredient of mens rea cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.

In R. v. Lawrence [(1981) 1 All ER 974 : 1982 AC 510 : (1981) 2 WLR 524 (HL)] Lord Diplock spoke in a Bench of five and the other Law Lords agreed



with him. He reiterated his opinion in R. v. Caldwell [(1981) 1 All ER 961 : 1982 AC 341 : (1981) 2 WLR 509 (HL)] and dealt with the concept of recklessness as constituting mens rea in criminal law. His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being “subjective” or “objective”, and said: (All ER p. 982e-f)

“Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting ‘recklessly’ if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.”

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. There is, in other words, a disregard for the possible consequences. The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be



found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent. The element of criminality is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions [1937 AC 576 : (1937) 2 All ER 552 (HL)] stated: (All ER p. 556 C)

“Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.”

Thus, a clear distinction exists between “simple lack of care” incurring civil liability and “very high degree of negligence” which is required in criminal cases. In Riddell v. Reid [(1942) 2 All ER 161 : 1943 AC 1 (HL)] (AC at p. 31) Lord Porter said in his speech —

“A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.” (Charlesworth & Percy, ibid., para 1.13)

15. *The fore-quoted statement of law in Andrews [1937 AC 576 : (1937) 2 All ER 552 (HL)] has been noted with approval by this Court in Syad Akbar v. State of Karnataka [(1980) 1 SCC 30 : 1980 SCC (Cri) 59] . The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit*



of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

16. Law laid down by Straight, J. in the case of Empress of India v. Idu Beg [ILR (1881) 3 All 776 : (1881) 1 AWN 132] has been held good in cases and noticed in Bhalchandra Waman Pathe v. State of Maharashtra [1968 Mah LJ 423 (SC) : 1968 ACJ 38 : 1968 MPLJ 371 (SC)] a three-Judge Bench decision of this Court. It has been held that while negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

17. In our opinion, the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in tort and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree.

Negligence by professionals

18. In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a



special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would 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 profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practises. In Michael Hyde and Associates v. J.D. Williams & Co. Ltd. [2001 PNL 233 (CA)] Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. (Charlesworth & Percy, ibid., para



8.03.)

28. A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

29. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason — whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

32. At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are: (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds; (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the “smoking gun”.



Medical professionals in criminal law

34. The criminal law has invariably placed medical professionals on a pedestal different from ordinary mortals. The Penal Code, 1860 enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General Exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person's benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause harm to the person and that person has not consented to suffer such harm. There are four exceptions listed in the section which are not necessary in this context to deal with. Section 93 saves from criminality certain communications made in good faith. To these provisions are appended the following illustrations:

Section 88

“A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.”

Section 92

“(a) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(c) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is no time to apply to the child's



guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence."

Section 93

"A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death."

38. *The question of degree has always been considered as relevant to a distinction between negligence in civil law and negligence in criminal law. In Kurban Hussein Mohammedali Rangwalla v. State of Maharashtra [(1965) 2 SCR 622 : (1965) 2 Cri LJ 550] while dealing with Section 304-A IPC, the following statement of law by Sir Lawrence Jenkins in Emperor v. Omkar Rampratap [(1902) 4 Bom LR 679] was cited with approval: (SCR p. 626 D-E)*

"To impose criminal liability under Section 304-A, Penal Code, 1860, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."

40. *In Juggankhan v. State of M.P. [(1965) 1 SCR 14 : (1965) 1 Cri LJ 763] the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of dhatura were not satisfactorily established by the prosecution. This Court exonerated the accused of the charge under Section 302 IPC. However, on a*



finding that stramonium and dhatura leaves are poisonous and in no system of medicine, except perhaps the Ayurvedic system, is the dhatura leaf given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be a rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient. The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of a rash and negligent act was drawn against him. In our opinion, the principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is prima facie acting with rashness or negligence.

47. Before we embark upon summing up our conclusions on the several issues of law which we have dealt with hereinabove, we are inclined to quote some of the conclusions arrived at by the learned authors [[Ed.: Alan Merry and Alexander McCall Smith.]] of Errors, Medicine and the Law (pp. 241-48), (recorded at the end of the book in the Chapter titled “Conclusion”) highlighting the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. Hence we quote:

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity — in principle — from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasised may become



paralysed. This is not only because such a society will inevitably be backward-looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (ibid., pp. 242-43)

(ii) Culpability may attach to the consequence of an error in circumstances where sub-standard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid., p. 245)

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake: the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid., p. 246) A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient



relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid., p. 247) While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid., p. 247)

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high — a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (ibid., p. 248)

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the



larger interest of the society. (ibid., p. 248)

(emphasis supplied)

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

Conclusions summed up

48. *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 the 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



case [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] , WLR at p. 586 [[Ed.: Also at All ER p. 121 D-F and set out in para 19, p. 19 herein.]] 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 304-A 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 304-A 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.”

(ii) **(2009) 3 SCC 1 (Martin F. D'Souza v. Mohd. Ishfaq);**

Paragraph nos. 42, 43 & 47 whereof are reproduced herein below:-

“42. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalised for losing a case provided he appeared in it and made his submissions.

43. To fasten liability in criminal proceedings e.g. under Section 304-A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.

Protection to doctors in criminal cases

47. In para 52 of Jacob Mathew case [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] the Supreme Court realising that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection: (SCC p. 35)

(i) *A private complaint should 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.

(ii) 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 opinion applying the Bolam [(1957) 1 WLR 582 : (1957) 2 All ER 118] test.

(iii) A doctor accused of negligence should 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 investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.”

(iii) (2010) 3 SCC 480 (Kusum Sharma v. Batra Hospital);

Paragraph nos. 43, 72, 73, 84, 87 & 89 whereof are reproduced herein below:-

“43. It is also denied that Dr. Kapil Kumar lacks experience. On the contrary, Dr. Kapil Kumar has impressive credentials and he had undertaken training in the well known Tata Cancer Hospital at Mumbai and he had adequate experience in handling such operations.

72. The ratio of Bolam case [(1957) 1 WLR 582 : (1957) 2 All ER 118] is that it is enough for the



defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that the respondent charged with negligence acted in accordance with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when 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. Secondly, 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 point of time on which it is suggested as should have been used.

73. A mere deviation from normal professional practice is not necessarily evidence of negligence.

84. In Achutrao Haribhau Khodwa v. State of Maharashtra [(1996) 2 SCC 634] this Court noticed that:

“44. ... in the very nature of medical profession, skills differ from doctor to doctor and more than one alternative course of treatment is available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.” [Ed.: As observed in Jacob Mathew v. State of Punjab, (2005) 6 SCC 1, p. 30, para 44.]

87. 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.

89. *On scrutiny of the leading cases of medical negligence both in our country and other countries specially the United Kingdom, some basic principles emerge in dealing with the cases of medical negligence. While deciding whether the medical professional is guilty of medical negligence following well-known principles must be kept in view:*

I. Negligence is the breach of a duty exercised 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.

II. Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment.

III. The medical professional is expected to bring 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.

IV. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.

V. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other



professional doctor.

VI. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

VII. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

VIII. It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

IX. It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.

X. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurising the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.



XI. The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.”

(iv) (2017) 14 SCC 571(Jayshree Ujwal Ingole v. State of Maharashtra);

Paragraph No. 7 whereof is reproduced herein below:-

“7. We have heard the learned counsel for the parties. The learned counsel for the appellant has placed reliance on the judgment of this Court in Jacob Mathew v. State of Punjab [Jacob Mathew v. State of Punjab, (2005) 6 SCC 1 : 2005 SCC (Cri) 1369] , wherein this Court held that the court should be circumspect before instituting criminal proceedings against a medical professional. This Court has held that negligence comprises of: (i) a legal duty to exercise due care on the part of the party complained of; (ii) breach of the said duty; and (iii) consequential damage. It was held that in cases where negligence is alleged against professionals like doctors the court should be careful before instituting criminal proceedings. It is not possible for any doctor to assure or guarantee that the result of treatment would invariably be positive. The only assurance which a professional can give is that he is professionally competent, has requisite skill and has undertaken the task entrusted to him with reasonable care.”

(v) 2006(2) PLJR 159 (Dr. Hemendra Nath Thakur vs. State of Bihar);

Paragraph nos. 9 and 10 whereof are reproduced herein below:-

“9. It may further be noted that in this case the complainant or the boy’s guardian did not insist for a post mortem and, therefore, the cause of death of



the boy remains unknown and on the basis of the kind of allegations made in the complaint it would be well nigh impossible to attribute the death of the boy to any negligence, carelessness of the doctor or an error or mistake by the two compounders.

10. On hearing counsel for the parties, I am satisfied that the institution and continuance of this case amounts to an abuse of the process of the court. The order taking cognizance is accordingly set aside.”

The learned senior counsel for the petitioners has thus submitted that the petitioners are well qualified doctors, they possess the requisite skill for treating the patients and there is no allegation in the complaint petition that the petitioners herein have done 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, hence it is submitted that there is no material on record so as to warrant prosecution of the petitioners for criminal negligence, thus the impugned order dated 24.12.2016 passed by the learned Additional Chief Judicial Magistrate, Patna in Complaint Case No. 3229 (C) of 2016 is fit to be set aside.

Per contra, the learned counsel appearing for the complainant namely Shri Sandeep Shahi, Advocate has though not controverted the aforesaid principles laid down by the Hon'ble Apex Court in a catena of decisions, however, has



submitted that paragraph no. 11 of the complaint petition would show that the complainant was abused and thrown out of the clinic by the staff of the Hospital when he had prayed for conduct of repeat test for *Dengue* disease and moreover paragraph no. 16 of the complaint petition would also show that the staff of the petitioner of the first case had informed the complainant that the baby had died in the abdomen of the daughter of the complainant and his daughter was also serious, hence had forcibly ousted the complainant and her daughter from the nursing home in the night of 16.09.2016 at about 2:15 A.M. It is thus submitted that the said averments itself are sufficient to show the gross negligence on the part of the petitioners, hence the learned Additional Chief Judicial Magistrate, Patna by the impugned order dated 24.12.2016 passed in Complaint Case No. 3229 (C) of 2016 has rightly taken cognizance of the offence under Sections 304, 316/34 of the Indian Penal Code against the petitioners herein. It is submitted that in any view of the matter the complainant is a poor person who has lost his only daughter and there are ample evidence and material on record to prima facie make out a case against the petitioners herein under Sections 304, 316/34 of the Indian Penal Code, thus the present petitions are fit to be



dismissed.

I have heard the learned counsel for the parties and perused the materials on record as also gone through the catena of judgments referred to by the learned senior counsel for the petitioners. A bare perusal of the materials on record would show that the petitioners are well qualified doctors and they possess the requisite skills which they profess to possess and the said fact is not disputed by the complainant as well. It is a well settled law that criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. For negligence to amount to a criminal negligence, the element of *mens rea* must be shown to exist and it is recklessness that constitutes *mens rea* in criminal law as far as negligence is concerned and there should be reckless state of mind and intention to cause harm and only then the same would amount to criminal negligence. Thus, from the evidence on record and the averments made in the complaint petition, it is apparent that requisite treatment was administered by the petitioner of the



first case, whereafter a test for *Dengue* was also conducted on 13.09.2016, however, the daughter of the complainant had tested negative, which might be on account of incubation period, as discussed herein above in the preceding paragraphs, inasmuch as the daughter of the complaint was having fever only since past one day. Therefore, it cannot be said that the petitioners have not followed the practice acceptable to the medical profession, which is apparent from the prescriptions and test reports annexed to the writ petitions.

This Court further finds that neither there is any evidence nor averment in the complaint petition to show that the petitioners herein had engaged in very high degree of negligence so as to constitute the ingredients warranting prosecution of the petitioners for criminal negligence or to show that the petitioners 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 resulting in a rash and negligent act. Thus, in absence of any evidence or material on record to show that the death of the daughter of the complainant is the direct result of rash and negligent act of the petitioners herein and such act is the proximate and efficient cause for the death as also in



absence of materials to show presence of reckless state of mind qua the petitioners herein with an intention to cause harm apart from there being no credible opinion of another competent doctor on record to support the charge of rashness or negligence on the part of the petitioners herein as also in absence of any post mortem report showing the cause of death of the deceased, this Court finds that no case of having committed criminal rashness and negligence is made out qua the petitioners herein (of both the cases), under Sections 304, 316/34 of the Indian Penal Code, hence the impugned order dated 24.12.2016 passed by the Additional Chief Judicial Magistrate, Patna in Complaint Case No. 3229 (C) of 2016 is liable to be set aside, especially since no criminal liability appears to be made out against the accused-petitioners, in view of the material placed before this Court. This Court further finds that in the recent past there has been a spurt in the cases to implicate the doctors after demise of the patient, some on account of extortion of illegal money from the doctors and some due to other reasons, only to harass the doctors, out of frustration and because of these factors, guidelines have been laid down by Hon'ble Apex Court in the case of Jacob Mathew (Supra) and in the case of Kusum Sharma (supra), which have been detailed herein above in the preceding



paragraphs.

Having regard to the facts and circumstances of the case and for the reasons mentioned herein above as also applying the well settled principles of law enumerated in the preceding paragraphs, this Court finds that even if all the averments made in the complaint are taken to be true on their face value, no case of criminal rashness or negligence is made out as against the accused-petitioners herein under Sections 304, 316/34 of the Indian Penal Code, hence the impugned order dated 24.12.2016 passed by the Additional Chief Judicial Magistrate, Patna in Complaint Case No. 3229 (C) of 2016 is unsustainable in the eyes of law, thus is quashed.

Both the aforesaid writ petitions are allowed.

(Mohit Kumar Shah, J)

S.Sb/-

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