Vicarious Liability of Hospitals for Medical Negligence of Medical Professionals

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Abstract

A medical professional is guilty of negligence when he or she ignores basic responsibilities and indirectly causes a victim to be injured or killed. A doctor is expected to bring to his task a *reasonable* degree of skill, knowledge, care and competence, failing which he may be held liable for negligence. The medical profession is prone to a plethora of complications, and it can sometimes be tricky to classify an act as an offence in cases of error of judgment or inevitable accident. Courts worldwide have many times taken an inclusive stance on such issues, keeping in mind the risks and complications that may arise, but dissenters still exist.

A hospital can now be held vicariously liable for the acts of medical professionals who are employees of the firm, in contrast with historical perception of the same question. However, the answer becomes more complicated in the case of professionals who are independent contractors. Although hospitals have typically not been held liable for the acts of independent contractors, many cases have ruled otherwise, citing various rationales.

A difference has also been found in the treatment of vicarious liability of a hospital for the criminal and civil negligence of doctors; doctors have been held personally liable for their criminal negligence, as opposed to vicarious liability of hospital in the case of civil negligence, in the case of *Indraprastha Medical Corp. Ltd. v. State NCT of Delhi.*

KEYWORDS:"vicarious liability", "medical negligence", "independent contractors", "professional limited liability company", "hospital management".

INTRODUCTION

Vicarious liability in the context of hospital authorities for tortious acts of its representatives has been a bone of contention in the legal fraternity for a very long time, with legal systems taking different, sometimes conflicting stands on who is to be held liable for the negligence of a doctor in the performance of his functions. As a result of this confusion, the wronged patient has suffered and been caught off guard by powerful corporations who slyly refuse liability. The answer to this question is by no means a straightforward one, and depends upon the nature of the negligent act, the professional relation of the doctor with the employer (hospital), etc.

This paper aims to critically look at this conundrum by first expanding upon the definition of professional deficiency, negligence and malpractice. The paper also examines the liability of a hospital authority for the acts of an employee and of an independent contractor, the disparities in the same, and analyses how the distinction is made between the two. The paper investigates how the nature of negligence of the doctor (criminal/civil) affects the liability of the doctor and the hospital. The paper also briefly looks into the applicability of Professional Limited Liability Companies in the field of medicine and hospitals, and cursorily examines its advantages.

WHAT WOULD CONSTITUTE A PROFESSIONAL DEFICIENCY?

Deficiency of service means "any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that 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."[1] Medical negligence is a common manifestation of professional deficiency in the medical field.

A medical professional is guilty of negligence when he or she ignores basic responsibilities and indirectly causes a victim to be injured or killed. In this case, the professional doesn't intend to cause the victim any harm but instead does so because of ignorance and/or a lack of action. Medical negligence cases often involve unintentional mistakes or oversights.

Medical negligence follows the same principles as negligence. The three ingredients of negligence are as follows –

1. The defendant owes a duty of care to the plaintiff.
2. The defendant has breached this duty of care.
3. The plaintiff has suffered an injury due to this breach.

The duty owed by a doctor towards his patient, in the words of the Supreme Court is to "bring to his task a reasonable degree of skill and knowledge" and to exercise "a reasonable degree of care".[2] The doctor, in other words, does not have to exercise the highest or fall to the lowest degree of care and competence in the given circumstances. He also does not have to ensure that every patient who comes to him is cured. He must only ensure that the patient receives a reasonable degree of care and competence from the doctor.

On these lines, it must also be ensured that the doctor is only prosecuted for the extent of knowledge about the patient's condition that he knew and could have reasonably been expected and assumed to know while treating the patient. For example, if a patient shows symptoms of the nascent stages of a rare disease which may not be clearly diagnosable at that stage and only shows more pronounced signs towards the later stages (and may be easily mistaken for another ailment) and the doctor works on this assumption, he cannot be held liable for the degree of knowledge he had at that point.

Negligence – a complicated term

There has been considerable discussion on what would qualify as negligence of the doctor, due to the various complications that arise in the field of medicine.

The question arises – what is the liability of a doctor for injuries or incidences caused by him/her, which were not in his hands, could not be prevented, were not intended or were the result of an error of judgment? Can they be grouped under negligence?

In *Dr. Gupta vs. Govt of NCT Delhi*[3], the learned court held that "simple lack of care, error of judgment, or an accident is not proof of negligence on the part of a medical professional and that failure to use special or extraordinary precautions that might have prevented a particular incidence cannot be the standard for judging alleged medical negligence."[4]

In *Mrs. Shantaben Muljibhai Patel and Ors. vs. Breach Candy Hospital and Research Centre and Ors*[5], the plaintiffs sought compensation for death arising out of complications in surgery to the patient. This complication was considered a possibility, immediately noticed on occurrence, and acted upon with timely and great effort. The hospital was equipped with the necessary equipment and the doctors performed their duties to the best of their ability with due care and caution. The concerned case carried a high risk of failure and contingency, and such accidental eventuality could not be controlled. The National Commission in reaching its judgment, said –

"*Every surgical operation is attended by risk. If something goes wrong, conclusion of deficiency in service cannot be drawn. Reasonable care was exercised by the nursing staff. There was no negligence or deficiency in the service provided."*

While delivering its judgment, the National Commission referred to the observations of Lord Denning in *Roe andWoolley vs. The Ministry of Health and An Anaesthetist*[6]:

"*Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way."*

It can be inferred from these cases that even though there might exist better/different ways to treat the same problem around the world, the doctor treating the patient will only be expected to adhere to the procedures that any reasonable doctor would follow in general and will not be expected to do any better. Such a defence is important to ensure that doctors do not start fearing the consequences of every one of their actions so much that they are held back from treatment and progress.

Sections 80 and 88 of the Indian Penal Code approach this problem in a similar way –

> *Sec. 80* – Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.
>
> *Sec. 88* - Nothing which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith,

> and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

However, the defence of error of judgment has not been well-received throughout the legal fraternity. In the case of *Pringle v. Rapaport*[7], the court on appeal explained that giving the defence the opportunity to take the defence of error of judgment *"suggests to the jury that a physician is not culpable for negligent exercise of judgment and injects a subjective element into the objective test of standard of care."* Scholars and commentators argue that giving the system an opportunity to decide whether an error or mistake was acceptable would invite considerable confusion and ambiguity, as these words mean different things to different people – *"there are plenty of "errors" that doctors can make within the standard of care, and then there are plenty of "errors" that are indisputably negligence"*.That is why the law does not use terms like "error" or "mistake".

Guidelines for standards of care

Many medical systems have attempted to make guidelines for maintaining a standard of care in hospital operations, for ailment-specific treatment, and for the general maintenance and governance of the hospital. The National Institute of Health and Care Excellence (NICE), an executive non-departmental public body of the Department of Health in the United Kingdom, has developed such a "Guideline and Advice List"[9] (ANNEXURE – 1) that provides guidelines for different ailments (like Oesophago-gastric cancer or cystic fibrosis) or situations (like "Emergency and acute medical care in over 16s"). In India, under the National (Rural) Health Mission, the Ministry of Health and Family Welfare has set out various guidelines for maternal healthcare among others.[10]

LIABILITY OF HOSPITAL FOR NEGLIGENCE OF EMPLOYEE (STAFF) PHYSICIAN

Most cases of physician negligence fall into one of the following categories:

1. misdiagnosis
2. negligence affecting pregnancy and childbirth
3. mistakes in prescribing or administering medication
4. surgical errors
5. If a physician who worked for the hospital was negligent in any of these tasks (or in any other task), the hospital would be liable along with the physician.[11] This is important because it ensures that there will be a financially responsible party to compensate an injured plaintiff.

According to Ratanlal & Dhirajlal's *"The Law of Torts"* –

"….. *with the change in the legal position that the control test is not decisive in all cases and breaks down when applied to skilled and professional work, a hospital has been held liable for the negligence of its professional staff and the distinction earlier drawn between professional duties and ministerial or administrative duties has been disapproved."*[12]

In *Darling v. Charleston Community Memorial Hospital*[13], thecourt noted that the traditional notion that a hospital is not responsible under the doctrine of respondeat

superior for the acts of its employed health care providers no longer reflected the realities of practice at modern day hospitals. This fact formed the basis for its holding that the defendant hospital owed a duty to supervise the care and treatment rendered to the plaintiff not only by its nurses, but also by the physician.

In *Cassidy v. Ministry of Health*[14], Lord Denning observed that –

"*The hospital authority is liable for the negligence of professional men employed by the authority under a contract of service as well as a contract for services…. The authority owes a duty to give proper treatment, and though it may delegate the performance of that duty to those who are not its servants, it remains liable if the duty be inadequately performed by its delegates."*

Lord Denning clearly states that hospitals may be held vicariously liable for negligence of doctors under contract of service, i.e. employee physicians.

The aforementioned cases and writings reflect that there has been a change in the perception of vicarious liability of hospitals towards employees over time. It was previously thought that according to the control test, a hospital would not be held liable since the "master" (hospital) could not control the method of work. However, the control test has been held inadequate in cases of professional or skilled work for various reasons. As enumerated in *Cassidy*, the hospital owes a duty to the patient to give them proper treatment, as the patient contracts not with the doctor but the hospital itself. The doctor is not the face of the hospital, and thus the patient places their trust in the hospital authorities. It is this trust that places the liability on the hospital to ensure the well-being of the patient.

VICARIOUS LIABILITY OF ORGANIZATION FOR ACTS OF INDEPENDENT CONTRACTOR

Many hospitals have increased the use of "independent contractors" to provide hospital care over time. This has been true for many years for Emergency Room physicians, who are often employed by an ER group which then signs a contract with the hospital to provide emergency room care. Although the liability of a hospital in the case of acts of an employee is rather straightforward, the situation gets murkier in the case of an independent contractor.

An organization cannot generally be held liable for the actions of an independent contractor, and the same can be said of a medical organization like a hospital. However, there are exceptions to this general rule.

In *Collins v. Herts C.C.*[15], Hilbery J., found that the vicarious liability of a hospital no longer depended on whether the officer in question had performed his duty under a contract of service or contract for service, but on whether the officer was employed to perform some of the obligations of providing nursing, accommodation and treatment which the authority owed to its patients. The county council was also held liable for Miss K.'snegligence because one of the amenities offered by the hospital to its patients was the presence of a resident house surgeon at all times.

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Lord Denning specifically implicates a hospital authority as liable for actions of a person under a contract for services (in other words, an independent contractor) too.

It may also be noted that independent contractors of hospitals perform functions that are *delegated* to them by the hospitals, and thus Lord Denning's judgment holds true in the case of independent contractors.

The court in the case of *Cox v. Ministry of Justice*[17]observed that –

"*A relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the defendant's business and for its benefit and where the commission of the wrongful act is a risk created by the defendant by assigning those activities to that individual.***"**

Although the facts of this case do not correlate to the medical profession, this observation can be successfully applied to the present scenario. A doctor of a hospital, whether an employee or an independent contractor, "*carries on activities as an integral part of the organization* (here the hospital) *and for its benefit*". Also, "*the commission of the wrongful act is a risk created by the defendant by assigning those activities to that individual"*, where thedefendant here is the hospital authority, the individual the doctor, and the activity assigned to him the treatment of the patient. This case thus drives another strong argument in favour of the vicarious liability of the hospital for the acts of independent contractors.

The Doctrine of Ostensible Agency

The doctrine of ostensible agency as a principle drives a strong case for vicarious liability of the hospital for acts of independent contractors in a hospital.

When the hospital leads a patient to believe that the hospital employs the physician and the patient relies on that belief, the ostensible agency doctrine may allow the patient to recover malpractice damages from the hospital.[18]

In *Vivone v. Broadlawns Medical Centre*[19], thecourt found that ostensible agency would allow the patient to recover from the hospital for the negligence of an independent physician who worked in the hospital's clinic. A similar judgment was reached in *Roessler v. Novak*[20], by the application of the theory of "*agency by estoppel"*, a theory acknowledged by Maryland (United States) courts to be essentially the same. The similar theory of apparent agency has also been used to reach a similar judgment in the case of *Malcolm v. Mount Vernon Hospital*[21].Importantly, in *Ginsberg v. Northwest Medical Center*[22], the court found that a surgical consent form stating that the surgeon was an independent contractor and not an employee of the hospital did not prevent the patient from recovering from the hospital.

However, this doctrine has not been universally accepted in all cases. In contrast with *Ginsberg*,in *Fletcher v. South Peninsula Hospital*[23], it was decidedthat the patient could not sue the hospital for the acts of the independent contractor because he had signed an agreement that expressly stated that he was an independent contractor, before the operation.

This doctrine is a sensible defence from the perspective of a patient, as a patient cannot be expected to know whether the doctor treating them is an employee of the hospital or an independent contractor. Ostensible agency also has important consequences for lawsuits. Attorneys of plaintiffs view hospitals as those with deep pockets, and thus plaintiffs make every effort to include them in lawsuits.

The doctrine of indoor management

Another approach to this problem is the application of the doctrine of indoor management to such cases.

The doctrine of indoor management protects outsiders against the actions of a company. It states that any person wishing to enter into a transaction with the company only needs to satisfy that his proposed transaction is not inconsistent with the articles and memorandum of the company. He is not bound to inspect the internal irregularities of the company. If there are any internal irregularities, the company will be liable, as the person has acted in good faith and he did not know about the internal arrangement of the company. Hence an outsider "is presumed to know the constitution of a company, but what may or may not have taken place within the doors that are closed to him."[24]

This doctrine was established in the case of *Royal British Bank v. Turquand*[25] -

The directors of a company borrowed some money from the plaintiff. The Articles of the company provided for the borrowing of money on bonds, but there was a necessary condition that a resolution should be passed on the same in a general meeting held by the shareholders. In this case, the shareholders claimed that as no such resolution was passed in a general meeting, the company was not bound to repay the money.

It was thus held that the company could be sued by the plaintiff on the strength of the bond, and that the company was liable to repay the loan as the plaintiff was entitled to assume that the necessary resolution had been passed. Lord Hatherly observed –

"*Outsiders are bound to know the external position of the company but are not bound to know its indoor management.*"

Applied to the context, it can be argued that the question of whether a person is an independent contractor or an employee of a hospital is a matter of the internal agreements and arrangements of the hospital, and contracting patients are not bound to make efforts to identify the legal position of the doctor treating him/her with respect to the hospital. In such a case, it is only fair that a hospital must be held liable for the acts of even its independent contractors.

What is the stage of control at which one becomes liable?

The liability of an organization for the acts of an independent contractor and an employee differs to a large extent. It is therefore imperative to distinguish between the two and identify a person correctly as either one or the other.

The 20-factor test expounded by the IRS of the United States[26] (ANNEXURE-2) is a good measure of whether the person is an independent contractor or an employee. This test is highly comprehensive and lists such factors as instructions, training, integration, etc. The interpretation and analysis of the results of this test are left to the discretion of the one analysing it, to classify whether the person in question is one or the other, based on the weight given to the individual factors in that particular scenario.

However, three general yardsticks can be taken for prima facie determination –

1. **Behavioural:**Does the company control or have the right to control what the worker does and how the worker does his or her job?
2. **Financial:** Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
3. **Type of Relationship:**Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?[27]

CAN A HOSPITAL BE HELD VICARIOUSLY LIABLE FOR THE CRIMINAL NEGLIGENCE OF THE DOCTOR?

There seems to be a marked difference between the treatment of vicarious liability of hospital in cases of civil and criminal negligence of the doctor.

In the case of *Indraprastha Medical Corp. Ltd. Vs. State NCT of Delhi & Ors*[28], it was discussed that -

"*The offence of criminal negligence* ***requires a specific state of mind*** *in respect of the person committing the offence.* ***The offence of medical criminal negligence cannot be fastened on the companysince thecompany can neither treat nor operate a patient of its own****. It is the Doctor working in the company who treats & performs operations. It is the Doctor who examines the patients and prescribes medicines. If there is a deliberate or negligent act of the Doctor working in the Corporation/Hospital,* ***it is the liability of the Doctor and not of the Corporation for criminal negligence*** *despite the fact that due to the act of the Doctor of treating patients the Corporation was getting some revenue."*

Clearly, it has been stated by the court in this case that, as an organization does not have the capability to have a mens rea (guilty mind), or even a mind for that matter, and therefore is incapable of committing a crime.

It is important at this juncture to distinguish between civil and criminal negligence.

Distinguishing between civil and criminal negligence

In medical negligence, the degree of negligence suffered is determinative of the extent of criminal liability. In criminal law, the degree of negligence must be higher than that of the 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.[29]

In *Andrews v. Director of Public Prosecutions*[30], Lord Atkins observed –

"*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****. Probably of all the epithets that can be applied 'reckless' most nearly covers the case."*

In *Rex v. Bateman*[31], a case in which a doctor was convicted of manslaughter arising out of his treatment of a woman in childbirth, the question initially arose of whether he had committed an offence of civil or criminal negligence. Lord Hewart, C.J. stated –

"*….. in order to establish criminal liability the facts must be such that, in the opinion of the jury,* ***thenegligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment****."*

From this, it can be understood that a doctor can not be held criminally responsible for the death of a patient unless his negligence or incompetence in the matter went to such a level as to transcend matters of mere compensation and to show such disregard for human life and safety of others as to amount to a crime against State. To impose criminal liability under S.304A of the Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and the act must be the proximate and efficient cause without the intervention of another's negligence.

THE APPLICABILITY OF PROFESSIONAL LIMITED LIABILITY COMPANIES IN THE HEALTHCARE SCENARIO – A SHORT ANALYSIS

(This section is not meant to be an exhaustive analysis of this topic and should not be taken as such. It is merely meant to serve as an introduction to the topic and to its impact on the main topic.)

A professional limited liability company ("PLLC") is a business entity designed for licensed professionals, such as lawyers, doctors, architects, engineers, accountants, and chiropractors.[32] A salient feature of a PLLC – one that makes it lucrative for professionals – is that while each member of a PLLC remains personally liable for his or her own malpractice, they collectively are not liable for each other's malpractice. A PLLC offers the same liability protection for members as an LLC, but it does not shield individual members from malpractice claims against them.

In the context of a hospital, PLLCs have some tangible advantages for the members of the PLLC. In a typical case of medical negligence, if one physician is sued, the other physicians are not sued too, since they are separating their individual liability and their liability as members of the business. If a group of medical professionals who are otherwise unacquainted with each other come together and decide to form a PLLC, the individual members need not be held back by the possibility of moral or legal turpitude of fellow members who they possibly know only professionally and its affect on their career, as they will not be held liable or dragged to court for the offence of another. This could considerably boost the healthcare scenario in India, and lead to higher competition, compared to the current scenario in which only a few big market players with huge financial resources control the industry.

FOOTNOTES

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