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Medical Negligence: Law and Interpretation

Anurag K. Agarwal¹

Abstract

Negligence by doctors has to be determined by judges who are not trained in medical science. They rely on experts' opinion and decide on the basis of basic principles of reasonableness and prudence. This brings into a lot of subjectivity into the decision and the effort is to reduce it and have certain objective criteria. This may sound simple but is tremendously difficult as medical profession evolves and experimentation helps in its evolution. Thus, there is a constant tussle between the established procedures and innovative methods. But, innovation simply for the sake of being different, without any reason is not acceptable. And, these issues make it extremely challenging to decide negligence by doctors. The paper examines the concept of negligence in medical profession in the light of interpretation of law by the Supreme Court of India and the idea of the 'reasonable man'.

Keywords: Courts, Doctors, Hospitals, Medical negligence, Law, Reasonable man

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Medical Negligence: Law and Interpretation

Introduction

For a patient, the doctor is like God. And, the God is infallible. But that is what the patient thinks. In reality, doctors are human beings. And, to err is human. Doctors may commit a mistake. Doctors may be negligent. The support staff may be careless. Two acts of negligence may give rise to a much bigger problem. It may be due to gross negligence. Anything is possible. In such a scenario, it is critical to determine who was negligent, and under what circumstances.

In a country committed to the rule of law, such matters are taken to the court and judges are supposed to decide. However, negligence by doctors is difficult to be determined by judges as they are not trained in medical science. Their decisions are based on experts' opinion. Judges apply the basic principles of law in conjunction with the law of the land to make a decision. Reasonableness and prudence are the guiding factors.

We would like to go through these principles in the light of some court judgments and try to understand as to what is expected from a doctor as a reasonable person. As these issues are at the core of medical profession and hospitals are directly affected by new interpretation of an existing law regarding medical professionals, it is pertinent to deal with them at the individual level of the doctor, and also at the employer's level i.e., hospital.

Negligence

It is very difficult to define negligence, however, the concept has been accepted in jurisprudence. The authoritative text on the subject in India is the 'Law of Torts' by Ratanlal and Dhirajlal.² Negligence has been discussed as:

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. Thus, the essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

² Law of Torts, Ratanlal & Dhirajlal, Twenty-fourth Edition 2002, edited by Justice G.P. Singh; pp.441-442

In the landmark Bolam case³, it was held that:

In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action.

Thus, the understanding of negligence hinges on the ‘reasonable man’. Let us try to understand who this ‘reasonable man’ is.

The ‘Reasonable Man’

It has been held by the courts that the test of reasonableness is that of the ‘ordinary man’ or also called as the ‘reasonable man’. In Bolam case, it was discussed that:

In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man.

Why the mention of ‘Clapham omnibus’? The Bolam judgment was pronounced in 1957 and Clapham, at that time, was a nondescript south London suburb. It represented “ordinary” London. Omnibus was used at that time for the public bus. Thus, “the man on the top of a Clapham omnibus” was a hypothetical person, who was reasonably educated and intelligent but was a non-specialist.

The courts used to judge the conduct of any defendant by comparing it with that of the hypothetical ordinary man.

Professional

According to the English language, a professional is a person doing or practising something as a full-time occupation or for payment or to make a living; and that person knows the special conventions, forms of politeness, etc. associated with a certain profession. Professional is contrasted with amateur – a person who does something for pleasure and not for payment.⁴

Negligence by professionals

The Supreme Court of India discussed the conduct of professionals and what may amount to negligence by professionals in Jacob Mathew’s case⁵:

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

³ Bolam v. Friern Hospital Management Committee, Queen’s Bench Division, 1957, Date of decision - 26 February 1957, Citation: [1957] 1 W.L.R. 582 = [1957] 2 All E.R. 118

⁴ Oxford Advanced Learner’s Dictionary of Current English, A. S. Hornby

⁵ Jacob Mathew vs. State of Punjab, Supreme Court of India, August 5, 2005, Citation: 2005 (6) SCC 1 = AIR 2005 SC 3180

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 and exercised with reasonable degree of care and caution....

He does not assure his client of the result...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...

...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 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.

The Bolam case very clearly distinguished between the negligence by an ordinary man and negligence by a professional in the following words:

But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

Negligence by Medical Professionals

In Jacob Mathew case, the Supreme Court of India has gone into details of what is the meaning of negligence by medical professionals.

Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply.

A case of *occupational* negligence is different from one of *professional* negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to

the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

In the Bolam case, the court held that:

... In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if he conforms with one of those proper standards, then he is not negligent.

... He is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. ... A man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying:

“I do not believe in anaesthetics. I do not believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century.”

That clearly would be wrong.

Degree of Negligence

The Delhi High Court laid down in 2005 that in civil law, there are three degrees of negligence⁶:

⁶ Smt. Madhubala vs. Government of NCT of Delhi; Delhi High Court, 8 April 2005, Citation: 2005 Indlaw DEL 209 = 2005 (118) DLT 515

- (i) *lata culpa*, gross neglect
- (ii) *levis culpa*, ordinary neglect, and
- (iii) *levissima culpa*, slight neglect.

Every act of negligence by the doctor shall not attract punishment. Slight neglect will surely not be punishable and ordinary neglect, as the name suggests, is also not to be punished. If we club these two, we get two categories: negligence for which the doctor shall be liable and that negligence for which the doctor shall not be liable. In most of the cases, the dividing line shall be quite clear, however, the problem is in those cases where the dividing line is thin. In all such cases we fall back upon the test laid down in Bolam case and which has been upheld in Jacob Mathew case.

Before we proceed further, let us have a look at the facts of the above mentioned two cases: Bolam and Jacob Mathew.

Bolam Case

John Hector Bolam suffered from depression and was treated at the Friern Hospital in 1954 by E.C.T. (electro-convulsive therapy). He was not given any relaxant drug, however, nurses were present on either side of the couch to prevent him from falling off. When he consented for the treatment, the hospital did not warn him of the risks, particularly that he would be given the treatment without relaxant drugs. He sustained fractures during the treatment and sued the hospital and claimed damages for negligence. Experts opined that there were two practices accepted by them: treatment with relaxant drugs and treatment without relaxant drugs. Regarding the warning also, there were two practices prevalent: to give the warning to the patients and also to give the warning only when the patients ask about the risks. The court concluded that the doctors and the hospital were not negligent.

Jacob Mathew Case

In this case a patient was admitted to CMC Hospital, Ludhiana. He felt difficulty in breathing. No doctor turned up for about 20-25 minutes. Later two doctors – Dr. Jacob Mathew and Dr. Allen Joseph – came and an oxygen cylinder was brought and connected to the mouth of the patient. Surprisingly, the breathing problem increased further. The patient tried to get up. The medical staff asked him to remain in bed. Unfortunately, the oxygen cylinder was found to be empty. Another cylinder was brought. However, by that time the patient had died. The matter against doctors, hospital staff and hospital went up to the Supreme Court of India. The court discussed the matter in great detail and analysed the aspect of negligence from different perspectives – civil, criminal, torts, by professionals, etc. It was held that there was no case of criminal rashness or negligence.

Civil or Criminal Liability

The liability of the doctor shall be civil or criminal or both. One of the essential elements in criminal law is *mens rea* – the guilty mind or an evil intention. The question arises as to whether in cases of medical negligence – whether slight, ordinary or gross – is there any criminal liability? As *mens rea* is essential, it is difficult to argue that the doctor had a guilty mind and was negligent intentionally. This has been the main argument in most of the cases in which the decision was to decide about the criminal liability. For instance, in

Jacob Mathew, neither the doctor nor any other hospital staff intentionally connected the empty cylinder. Similarly, in Bolam, the doctors or the hospital did not want to do something wrong intentionally. At no point of time, they had a guilty mind.

In Dr. Suresh Gupta's Case⁷ – Supreme Court of India, 2004 – the court held that the legal position was quite clear and well settled that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation. Only when the negligence was so gross and his act was so reckless as to endanger the life of the patient, criminal law for offence under section 304A of Indian Penal Code, 1860 will apply.

The section is as follows:

304A – 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 two years, or with fine, or with both.

Certain other sections which are relevant for this topic are as follows:

Section 80 - Accident in doing a lawful Act – 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.

Section 88 - Act not unintended to cause death, done by consent in good faith for person's benefit – 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 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.

Interestingly the illustration along with this section refers to an act of a surgeon. It is as follows:

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.

The court held that the negligence has to be “gross negligence” or “recklessness” for fixing criminal liability on a doctor. The standard of negligence is much higher as compared to what is relevant in civil liability cases. It is not simply lack of normal care. It has to be gross lack of competence or inaction and wanton indifference to the patient's safety. The court said “...where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.”

In Jacob Mathew, the court held that:

⁷ Dr. Suresh Gupta vs. Government of N.C.T. of Delhi, August 4, 2004, Supreme Court of India, AIR 2004 SC 4091

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 optimizing violations, may be motivated by thrill-seeking. These are clearly reckless.

The Supreme Court in *Jacob Mathew* made it very clear as to when a medical professional can be prosecuted under criminal law for negligence. In the words of the court:

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.

Martin D'Souza's Case⁸

This is a case regarding kidney transplant and medicines being administered post-operation wherein there is a dispute about the medicine itself and the dosage. In 1991, the patient who was suffering from chronic renal failure went to Nanavati Hospital, Mumbai for kidney transplant. He was undergoing haemodialysis twice a week. Later he got his kidney transplant done at Prince Aly Khan Hospital. During his treatment at Nanavati Hospital he did not complain of deafness. At Nanavati Hospital he was prescribed Amikacin of 500 m.g. twice a day for 14 days. Much later, the patient filed a complaint at the National Consumer Dispute Redressal Commission, New Delhi and claimed compensation of Rs. 12 lakhs as his hearing had been affected. He complained that the dosage of Amikacin was excessive and caused hearing loss. The matter finally went to the Supreme Court. Almost all earlier cases pertaining to medical negligence have been discussed by the Supreme Court in the instant case and it was held that the doctor and the hospital were not negligent.

Interestingly, this case very strongly defended the position of doctors vis-à-vis the patients. The court has made an interesting observation:

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

Difficulties in application of Mathew guidelines

The Supreme Court observed that there were difficulties in the application of principles as laid down in *Jacob Mathew's* case. For instance:

⁸ Martin F. D'Souza vs. Mohd. Ishfaq, Supreme Court of India, 17 Feb 2009; Bench: Markandeya Katju and G. S. Singhvi, JJ.; the judgment was delivered by Katju J.; citation: AIR 2009 SC 2049

1. “The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires.” (*as per Jacob Mathew’s case*)

The court observed that it is a matter of individual understanding as to what is reasonable and what is unreasonable. Even experts may disagree on certain issues. They may also disagree on what is a high level of care and what is a low level of care.

2. The Jacob Mathew case said that “simple” negligence may result only in civil liability, but “gross” negligence or recklessness may result in criminal liability. Now, what is simple negligence and what is gross negligence may not be so easy to be determined. Experts may not agree on this because the dividing line between the two is quite thin.

Judges as lay men

Thus, Martin D’Souza’s judgment held that it was very difficult or rather impossible to understand, and therefore, define as to what is “reasonable” and what is “simple” and what is “gross”. At one place, the court observed:

Judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence.

In short, the Martin D’Souza judgment is like a confession by the judges that in cases of medical negligence, the judges are ill-equipped to make any decision and that too on the finer aspects of “simple” or “gross” negligence.

Police and Harassment of Doctors

An interesting order passed by the Supreme Court in this case was a warning given to police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew’s case. Even a threat was given to the policemen that if they did not follow these orders they themselves have to face legal action.

Consumer Courts

Another interesting order was to all the consumer forums – district, state and national – and the criminal courts, that before issuing notice to a doctor or a hospital, against whom the complaint was made, the consumer forum or the criminal court must first refer the matter to a committee of doctors and only when the committee reports of a *prima facie* case of medical negligence, the notice should be issued.

Critique

These two orders were rather surprising because this would have created hurdles in the working of the consumer courts, criminal courts as well as police. As per the law laid down in the Consumer Protection Act, there is no provision for a committee of doctors to first give

a *prima facie* report. It is agreed that in the last 10-15 years there has been a lot of harassment of doctors and hospitals, however it does not mean that the pendulum should swing to the other end. A balance has to be achieved and this is what precisely has been done by another bench of the Supreme Court in Kishan Rao's case in March 2010.

Kishan Rao's case⁹

Kishan Rao got his wife admitted to Nikhil Super Speciality Hospital in Hyderabad as she was suffering from fever and complaining of chill. She was not given any treatment for malaria. Instead she was being treated for typhoid. She did not respond to the treatment. In a very precarious condition, she was shifted to Yashoda hospital where she died due to cardio respiratory arrest and malaria. Kishan Rao filed a case in the District Forum and sought compensation for the negligence of the Nikhil hospital. The hospital delayed filing the case sheet. Finally, the District Forum decided in favour of Kishan Rao. Hospital appealed in the State Commission, which overturned the decision of the District forum on the ground that there was no expert opinion to the effect that the treatment given by the hospital was wrong or the hospital was negligent. National Commission upheld this decision.

Kishan Rao appealed in the Supreme Court, which observed that the case was not complicated which required expert opinion as evidence. It was a simple case of wrong treatment. The patient complained of intermittent fever and chill and was being treated for typhoid instead of malaria.

The court held that it was not bound by the earlier decision of the same court in Martin D'Souza's case as that judgment was *per incuriam* regarding the directions for expert opinion is concerned. The court held that it was not necessary in all cases to seek expert opinion before proceeding with the matter. For simple and obvious cases, the consumer courts were free to proceed without seeking expert opinion and the instant case fell in such a category.

In Martin D'Souza the court did not follow the distinction, as laid down in Jacob Mathew case, regarding criminal prosecution and seeking compensation under Consumer Protection Act. Thus, the guidelines, as laid down in Martin D'Souza, regarding expert opinion before proceeding with any case do not hold good in consumer protection cases and that too which are quite obvious and straightforward. Moreover, the consumer protection law has been enacted to expedite the entire process and the idea of expert opinion at the outset shall defeat the very purpose of the law. Hence the guidelines, as far as expert opinion before issuing notice, are concerned need not be followed.

Finally, the Supreme Court allowed the appeal and ordered Nikhil hospital to pay the amount to Kishan Rao as ordered by the District Forum.

Critique

This is a very bold judgment in which a bench (equivalent size to the bench of Martin D'Souza's case – both two judges, and one judge common) held that the above mentioned observations of Martin D'Souza's case were *per incuriam*.

⁹ V. Kishan Rao vs. Nikhil Super Speciality Hospital, Supreme Court of India, 8 March 2010, Citation: 2010 (5) SCR 1

It was held in *A.R. Antulay v. R.S. Nayak*, reported in (1988) 2 SCC 602 that *per incuriam* are those decisions, which are made in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that count to be demonstrably wrong.

The court held that it was not bound by the directions given in *D'Souza's* case and expert evidence from a committee was not required.

This is really unfortunate that contradictory judgments are being pronounced by benches of equal size in the Supreme Court. Common man is unable to comprehend as to what is the interpretation of law. Which judgment should a person follow: the earlier judgment or the latter? In case he does not follow the earlier one, is he going to be punished for contempt of court and in case he follows the earlier judgment will it not be a mockery of the procedural and substantive law as laid down by the legislature. The matter should be decided by a larger bench of the Supreme Court so that there is certainty and the doctors as well as the patients are absolutely clear about the provisions of law.

Minor Marghesh Case¹⁰

Marghesh, a minor, was admitted in Dr. Mehta's hospital with the complaint of loose motions. He was injected glucose saline through his right shoulder and later through the left foot, which swelled and turned black upto the knee. He was taken to another hospital where the doctor amputated the left leg below the knee as he had developed gangrene. Marghesh, through his father, filed a complaint in the State Commission and claimed compensation for the negligence of Dr. Mehta. It was allowed. Dr. Mehta appealed in the National Commission, where it was allowed on the basis of expert opinion of another doctor that there could be ten other reasons for gangrene. Marghesh appealed in the Supreme Court, which took strong objection to the National Commission's decision based on the solitary ground of an expert opinion and did not pay any attention to Dr. Mehta's conduct during the proceedings. Dr. Mehta did not produce the case papers for six long years and did not produce a very important key doctor, who was involved in the treatment, as a witness. The Supreme Court allowed the appeal with the observation that the National Commission should have been much more diligent and cautious.

This judgment gives in a nutshell, most of the recent cases decided by the Supreme Court. It is more to do with the way the National Commission functions and also a missive as to how the consumer courts need to exercise discretion. The facts of the case very clearly tell us that the patient was not brought in a precarious condition to Dr. Mehta's hospital and the treatment given resulted in amputation of the left leg. There was no apparent reason for this to happen and hence, Dr. Mehta and his hospital are *prima facie* liable. However, the Supreme Court remanded the matter to the National Commission to be finally decided in a speedy manner.

¹⁰ *Minor Marghesh K. Parikh vs. Dr. Mayur H. Mehta*, Supreme Court of India, 26 October 2010, citation: AIR 2011 SC 249

Problems and Suggestions

Duty

The idea of negligence can be understood only when there is clarity about the duty of the doctor, assisting staff and the hospital as a whole. In several cases, there is a problem of overlapping duties and thus, it becomes difficult to draw a line between the duty of A and B. In any case, the doctor is under an obligation and is directly liable for the acts performed by him. For the assisting staff, it is the duty of the hospital and the person himself. Both have a joint and several liability. Thus, it is advisable to have clear-cut duties laid down for different persons. But, in practice, this is not so easy. It cannot be done perfectly. The choice is to try doing it in an imperfect manner or not doing it at all. Prudence says that there can be an endeavour to put in black and white the duties of different persons working in a hospital. It provides a basic framework, which helps in deciding matters in situations of confusion and failure.

General Practitioner vs. Specialist

A number of problems arise when a general practitioner tries to treat a patient who requires services of a specialist or a super-specialist. On the other hand, there may be problems also in situation when the general practitioner could have treated a patient, however, forms an opinion that he cannot do anything and the patient must be taken to a specialist. In such cases, time may be a crucial factor and by the time the patient is taken to a specialist, it may be too late. In both the abovementioned situations, it is to be seen that the general practitioner has a very critical role to play in the treatment of a patient. Agreed that the general practitioner is not supposed to know everything, however, it is expected that he must guide the patient properly to the best of his ability. He has to exercise his discretion so that the patient gets the best, at that place and at that time, taking into account the distance of the nearest specialist, his availability and the condition of the patient. Thus, a lot depends on the first doctor to whom the patient is taken for treatment. There can be no hard and fast rules to be followed, however, the doctor must make a decision in the context of the facts and circumstances. Common sense of a trained medical expert – not of a layman – is the guiding factor.

Risk and adventure

A problem often seen is the experimentation mode of some doctors. As they might have been practising as a doctor for a very long time, they have experience and on the basis of that experience they would like to deviate from the standard set practice and procedure followed by others. There is nothing wrong *per se*. The only problem is when it becomes an unnecessary experimentation. Risk taking just for adventure is not acceptable. Thus, if a doctor can perform a difficult surgery in candle light – because there is no electricity connection – it does not make sense that he insists performing surgery in candle light when there is power available. Thus, the level of expertise expected is that of the ‘person having ordinary skills in the art’ and the conduct expected is that of a reasonable and prudent person.

Protocol

Proper guidelines, methods, procedures and protocol must be laid down for things which are routine or are well-known and established by experts. Such guidelines help others in treating

the patients with the well-settled methods. Assumptions taken while giving such a treatment should also be documented. Also, the practicing doctor need not follow it blindly. Commonsense of an expert – trained medical practitioner – must be exercised. In case there is a failure to exercise commonsense, it is a case of negligence. As a layman, let us take an example. A standard procedure discusses about a treatment for certain disease prevalent in a very cold place. Now, before administering that treatment to a patient with that disease who recently travelled from a very cold place to a hot place, the doctor has to take into account that the place where is treatment currently will be given is a hot place. As common sense – of a layman – tells us, the patient cannot, of course, be expected to cover himself with blankets and drink lot of warm fluids. The common sense of an expert has to add on to the common sense of a layman. Thus, the guidelines provide a certain direction and guidance to achieve and end. In no case the guidelines should become an end in themselves.

Paper work

Law requires evidence and documentary evidence in the form of case papers has to be meticulously prepared. The duty of the doctor is to treat the patient, however, it is also important to document the treatment given and at times the reason why such treatment has been given. The matters reach a court after several months and years and by that time the only thing on which the parties can rely in the court is the case file. The oral evidence of doctors and other staff also adds to the evidence, however, the documentary evidence always gets precedence, until and unless proved to be forged. It is also important to have transparency in the system and give a copy of all the papers, reports, films, etc. to the patient. In such a case the confidence of a patient in the hospital and its system increases. There are, however, some doctors and hospitals who try to keep the patient in the dark. The oft-repeated phrase is, “do you have trust in me?” The patient is almost at the mercy of the doctor.

Electronic Records

An important improvement in the paper work has been in the shape of electronic records, which allow easy storage and retrieval. At the same time, several copies can easily be made. There is also minimal chance of errors creeping in as most of the items are to be selected from a drop-box. The issue of bad handwriting, very common complaint with doctors, is also easily taken care of. All new hospitals work with local network of computers and do not transfer papers from one place to another. There is also no chance of losing a paper.

Conclusion

There are two possibilities in cases of negligence – either it is negligence of the doctor or it is negligence of the staff. There may be a possibility of negligence, both of the doctor and the staff. In most of the cases, it will be a case of joint and several liability, and both the doctor and the hospital will be liable. The division of liability between the two of them will be decided according to the understanding between the two. As far as determining negligence is considered, courts have to depend on the advice of experts, except in cases of blatant violation of protocol and doing things which are considered to be unreasonable and imprudent. The level of subjectivity in such decisions is quite high and the purpose of law to be certain and specific is defeated to a large extent. Recent decisions are a good step in the direction of making this murky area a bit tidy, however, a lot needs to be done by the courts in the shape of clearer judgments so that the layman can benefit. As of now, the judgments

leave a lot of room for discretion, which at times may be exercised by different persons, including doctors and judicial officers, in an undesirable manner. The law on the subject needs to be more precise and certain. That will surely give a better understanding about the “reasonable man”.