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## Medical Negligence: An Analysis

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*No man is perfect. So, even highly skilled professionals like doctors are likely to be negligent. But this human tendency can be proved fatal in the sphere of medical negligence. In India, over 52 lakh medical injuries are reported each year, with 98,000 people dying as a result of medical malpractice each year. The fact that 10 people die every minute and more than 11 people die every hour in the country due to medical ineptitude is a major source of concern for the whole country. In order to extract the highest degree of care from doctors, it became imperative to deter them by deploying laws and punishments. With the same logic, laws relating to medical negligence came into existence to limit evil. The study seeks to explain medical negligence and the different types of laws that deal with it. The study moves on to analyze the Kafeel Khan case through the prism of medical negligence. Moreover, it briefly touches upon the critical appraisal of the topic. The study concludes by summarizing it all in a nutshell.*

**Keywords:** *medical negligence, vicarious liability, defense to medical negligence.*

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### INTRODUCTION

A doctor, being the noblest of the profession, is someone with which people repose their trust and secrets, a doctor is supposed to work with utmost diligence and respect for the profession. In India, doctors are revered with godlike veneration due to their life-saving work. But, like

other professions, doctors also have to follow some ethical and procedural guidelines to ensure that no mishaps occur. In 2020, the Medical Council of India (MCI) was superseded by the National Medical Commission (NMC)<sup>1</sup>. NMC came into force with the aims and objectives of:<sup>2</sup>

- Expand access to high-quality, low-cost medical education.
- Ensure that enough and high-quality medical personnel are available in all sections of the country.
- Encourage equitable and universal healthcare that promotes community health and makes medical professionals' services available to all residents.
- Encourages medical practitioners to incorporate the most up-to-date medical research into their practice and to participate in research.
- Evaluate medical institutions objectively and transparently on a regular basis;
- Maintain an Indian medical registration.
- Maintain strong ethical standards across all phases of medical care
- Have a well-functioning grievance resolution system.

The NMC is still following the rules of erstwhile MCI as the website says “Rules and Regulations are in the process of being framed till then the Rules and Regulations of IMC Act, 1956 will prevail as per Section 61(2) of the NMC Act, 2019.”<sup>3</sup> As of now, India is following the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002<sup>4</sup>, which provides for duties and responsibilities, maintenance of records, adherence to good medical practice and ethical conduct, and highest quality of care towards patients. There are several types of medical negligence acts; Wrong diagnosis, early/late diagnosis, incorrect surgeries, early/late surgeries, and prolonging treatment malignantly, malpractices being some commonly reported. There is no specific codified law for medical negligence per se, but the cases are covered under the ambit of the Indian Penal Code, 1860. Usually, section 304-A

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<sup>1</sup> National Medical Commission Act, 2019

<sup>2</sup> *Ibid*

<sup>3</sup> National Medical Commission Act, 2019, s 61(2)

<sup>4</sup> Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, s 4

(negligent act amounting to culpable homicide)<sup>5</sup>, section 337 (negligent acts threatening life and liberty)<sup>6</sup>, and section 338 (causing grievous hurt by the negligent act)<sup>7</sup> are attributed to medical negligence cases.

In the matter of *Laxman Balkrishna Joshi vs TrimbakBapu Godbole*<sup>8</sup>, the Supreme Court of India declared a person who sets himself forth ready to offer medical counsel and treatment implicitly brings forth that he is possessed of competence and knowledge for the Purpose. When consulted by a patient, such a person bears specific responsibilities, including a duty of care in determining whether to take the case, a duty of care in selecting what treatment to deliver, and a duty of care in administering such treatment. A violation of any of these responsibilities gives rise to a negligence claim against him. In *V. Kishan Rao vs Nikhil Super Speciality Hospital*<sup>9</sup>, the Supreme Court stated that it is evident that one of the obligations of the doctor towards his patient is a duty of care in selecting what therapy is to be offered, as well as a duty of care in the administration of the treatment. A violation of any of those responsibilities might result in the patient bringing a negligence claim. Hence, from the abovementioned cases and laws, it is settled that the doctors owe a duty of care towards their patients, which cannot be ignored or neglected, until and unless backed by genuine defences.

## **LAWS ON MEDICAL NEGLIGENCE IN INDIA**

Granting rights is not sufficient in itself. Rights must be backed by the legal system that assists an individual in enforcing them. Indian legal system has lived up to this expectation and has enacted various laws dealing with medical negligence. In India, the sphere of medical negligence is divided into three domains, namely: criminal negligence, civil negligence, and negligence under Consumer Protection Act. Each domain deals with a different set of cases and provides different remedies and compensation.

## **CRIMINAL NEGLIGENCE**

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<sup>5</sup> Indian Penal Code, 1860, s 304-A

<sup>6</sup> Indian Penal Code, 1860, s 337

<sup>7</sup> Indian Penal Code, 1860, s 338

<sup>8</sup> *Dr. Laxman Balkrishna Joshi v Dr. TrimbakBapu Godbole*, 1969 AIR 128 SCR 206

<sup>9</sup> *V. Kishan Rao v Nikhil Super Speciality Hospital*, 2010 SCC 513

The domain of criminal negligence comes into play if the components of motive or intention, the gravity of the crime, and the accused's character are proved.

**Section 304 A of IPC:** S. 304A<sup>10</sup> of the IPC states that whoever causes the death of another person by reckless or careless conduct that does not amount to culpable homicide shall be punished by imprisonment for up to two years, a fine, or both. It comes into the picture in cases where death is caused due to gross negligence by medical professionals. In this section presence of intention is immaterial.

**Section 337 of IPC:** According to section 337<sup>11</sup> of the Indian penal code, whoever causes harm to another person by acting rashly or recklessly in such a way as to jeopardise human life or the personal safety of others will be punished with imprisonment of either sort for a time up to six months, or a fine up to five hundred rupees, or both.

**Section 338 of IPC:** S. 338<sup>12</sup> of Indian Penal Code deals with “Causing grievous hurt by act endangering life or personal safety of others”. The section states that whoever causes serious harm to another person by acting rashly or recklessly in such a way as to risk human life or the personal safety of others is subject to imprisonment of either sort for a time up to two years, or a fine up to one thousand rupees, or both.

There are a few exceptions to the patient's rights outlined above. For doctors accused of criminal culpability, sections 80 and 88 of the Indian Penal Code provide defenses.

**Section 80 of IPC:** Under Section 80<sup>13</sup> nothing in the performance of a legitimate act in a lawful way by lawful methods and with adequate care and caution is an offence if it is done by accident or misfortune and without any criminal purpose or knowledge.

**Section 88 of IPC:** According to Section 88<sup>14</sup> a person cannot be charged with a crime if she or he acts in good faith for the benefit of another, does not want to injure the other even if there is a risk, and the patient has provided express or implicit permission.

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<sup>10</sup> Indian Penal Code, 1860, s. 304-A

<sup>11</sup> Indian Penal Code, 1860, s 337

<sup>12</sup> Indian Penal Code, 1860, s 338

<sup>13</sup> Indian Penal Code, 1860, s 80

<sup>14</sup> Indian Penal Code, 1860, s 88

## CIVIL NEGLIGENCE

If the intention is absent and the degree of negligence is not sufficiently gross, the case is dealt with under civil negligence. This domain is crucial as it embraces copious cases of the sphere of medical negligence. In most cases, civil culpability involves a demand for damages in the form of compensation. The domain further contains two stages of liability. First is the liability of the individual who has either committed an act which a reasonable man would omit in that situation or omitted an act which a person of reasonable mind would commit if placed in the same situation. The person is liable for the tort of negligence towards the patient. The second is the liability of the supervisor. If a violation of the duty of care occurs while operating on a patient or while the patient is under the supervision of the hospital or a medical practitioner, they are held vicariously accountable. And are obligated to pay restitution in the form of damages. Senior doctors are often held vicariously accountable for the mistakes made by junior doctors. If a hospital staff injures a patient by behaving incompetently, the hospital is liable. In other words, if staff is negligent (does not exercise reasonable caution when treating or interacting with a patient), the hospital is responsible for any damage the patient has as a result.

In *Mr. M Ramesh Reddy vs State of Andhra Pradesh*<sup>15</sup>, the court held the hospital officials negligent for failing to maintain the restroom clean, resulting in an obstetrics patient falling into the lavatory and dying there. The hospital was ordered to pay Rs. 1 lakh in compensation.

## NEGLIGENCE UNDER CONSUMER PROTECTION ACT

There has been much discussion and controversy since the 1990s about whether medical services are expressly or categorically included in the term "Services" as codified in Section 2(1)(o)<sup>16</sup> of the Consumer Protection Act (CPA). Section 2(1)(g)<sup>17</sup> of the act deals with deficiency of service. It states that "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

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<sup>15</sup> *Mr. M. Ramesh Reddy v State of Andhra Pradesh*, 1975 36 STC 439 AP

<sup>16</sup> Consumer Protection Act, 1986, s 2(1)(g)

<sup>17</sup> Consumer Protection Act, 1986, s 2(1)(o)

performed by a person in pursuance of a contract or otherwise about any service". In 1995, Hon'ble Supreme Court judgment in *Indian Medical Association vs VP Shantha*<sup>18</sup> brought the medical profession under the Consumer Protection Act of 1986's definition of "service." This formalized the relationship between consumers and medical professionals by allowing contractual patients to sue practitioners for compensation in 'procedure free' consumer protection tribunals if they were injured during treatment.

## CASE STUDY

### Kafeel Khan Case

In 2017, in the state-run Baba Raghav Das (BRD) Medical College in Gorakhpur, Uttar Pradesh, 63 children died due to leakage in the oxygen supply pipe.<sup>19</sup> It was later found out that, after several letters and requests, the hospital was not getting adequate funds to keep the hospital afloat, which led to one of the gravest child deaths incidents, attracting national attention. The Wire reported "over 30 letters written to the authorities at the BRD Medical College and the government of UP, alerting them to the fact that the budget had not been cleared for months and pending payments to the oxygen supplier had mounted to Rs 63 lakhs." The ruling Yogi Adityanath government termed the incident as 'Act of God', and despite terming it the act of God, 9 doctors and staff were arrested, one of them was Dr. Kafeel Khan.<sup>20</sup>

In September 2018, Dr, Kafeel Khan was arrested on a non-bailable warrant. He wrote a 10-page letter from jail, asserting his innocence. He writes, "The moment I got that WhatsApp message on that fateful August 10, 2017 night, I did everything a doctor, a father, a responsible CITIZEN OF INDIA would/should do. I tried to save each and every life that was in danger due to the sudden stoppage of liquid oxygen," "I yelled/screamed to everyone to focus on saving lives. I cried everyone in the team cried to see the havoc created by the administrative

<sup>18</sup> *Indian Medical Association v V.P. Shantha* AIR 1996, SC 550

<sup>19</sup> 'Post Mortem The UP government's farcical investigation into the Gorakhpur tragedy' (*The Carwan*, 01 June 2018) <<https://caravanmagazine.in/perspectives/up-government-farcical-investigation-gorakhpur-tragedy>> accessed 20 November 2021

<sup>20</sup> Anoo Bhuyan, 'Gorakhpur Deaths: Adityanath Government Ignored SOS on Oxygen Payments for Months' (*The Wire*, 9 Aug. 2018) <<https://thewire.in/health/gorakhpur-deaths-adityanath-government-ignored-sos-on-oxygen-payments-for-months>> accessed 20 November 2021

failure to pay the dues to the liquid oxygen suppliers – resulting in such a grave situation.” He concluded the letter by saying “I surrendered to save my family from the humiliation, misery, thinking that when I have not done anything wrong, I should get justice.”, and signs off as “A helpless, broken-hearted father/husband/brother son/friend, Dr. Kafeel Khan.”<sup>21</sup>

Indian Medical Association (IMA) secretary came out in defence of Dr. Kafeel Khan and alleged that the disaster took place due to the negligence of the state in supplying oxygen, and not medical negligence of Dr. Kafeel Khan and other staff. He also pointed the lack of accountability, opaqueness, and corruption within the government quarters in framing Dr, Kafeel Khan in the conspiracy.<sup>22</sup> RTI activist Sanjay Sharma filed an RTI application asking for details of the disaster, BRD hospital responded that the disaster took place due to lack of oxygen, and also told that, out of 6 arranged oxygen cylinders, Dr.Kafeel Khan arranged 4 of them himself.<sup>23</sup>

After enough furor, Dr. Kafeel Khan was given bail after 9 months of imprisonment as the prosecution was not able to prove prima-facie charges of medical negligence. Justice Yashwant Verma of Allahabad High Court, in his detailed order, noted that “The applicant has admittedly been in custody for the last 7 months. Learned AGA states that no aspect of the investigation remains outstanding. This clearly obviates the need for the continued custody of the applicant. The State in its affidavit also does not refer to any evidence which may establish or even tend to indicate that the applicant has tried to influence witnesses or to tamper with the evidence. The applicant admittedly is a medical practitioner, a government employee with no prior criminal history. The Court also takes note of his medical condition as brought on record by way of affidavit.”<sup>24</sup> Arrest and Bail of Dr. Kafeel Khan point towards a wider bureaucratic failure, and even medical failure on the part of the state, leading to the loss of life

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<sup>21</sup> ‘Kafeel Khan, Prime Accused in Gorakhpur Tragedy, Asserts Innocence in Letter’ (*The Wire*, 21 Apr. 2018) <<https://thewire.in/health/kafeel-khan-prime-accused-in-gorakhpur-tragedy-asserts-innocence-in-letter>> accessed 20 November 2021

<sup>22</sup> Outlook Web Bureau, ‘IMA Comes Out in Defence of Dr Kafeel Khan Arrested in Gorakhpur Hospital Tragedy Case, Calls It Conspiracy’ (*Outlook India*, 10 April 2018,) <[www.outlookindia.com/website/story/ima-comes-out-in-defence-of-dr-kafeel-khan-arrested-in-gorakhpur-hospital-tragedy/310831](http://www.outlookindia.com/website/story/ima-comes-out-in-defence-of-dr-kafeel-khan-arrested-in-gorakhpur-hospital-tragedy/310831)> accessed 20 November 2021

<sup>23</sup> Qazi Faraz Ahmad, ‘RTI Response Reveals Gorakhpur’s BRD Hospital Was Short of Oxygen, Dr Kafeel Helped With Cylinders’ (*News18*, 14 August 2018) <[www.news18.com/news/india/rti-response-reveals-gorakhpurs-brd-hospital-was-short-of-oxygen-dr-kafeel-helped-with-cylinders-1843613.html](http://www.news18.com/news/india/rti-response-reveals-gorakhpurs-brd-hospital-was-short-of-oxygen-dr-kafeel-helped-with-cylinders-1843613.html)> accessed 20 November 2021

<sup>24</sup> *Dr. Kafeel Ahmad Khan v State of U.P.* 2018 SCC 512

of children. This also created a vacuum between Dr. Kafeel Khan and the Uttar Pradesh government, as evident by his subsequent arrests and bail under the National Security Act, 1980 for sloganeering and instigating students in Aligarh Muslim University (AMU) in the anti-CAA protests. But again, Allahabad HC quashed his detention as there was no evidence of the said allegations, and there was no need for detention.<sup>25</sup>

It can be deduced that “For any case of medical negligence or error in a private hospital, the first liability vests with the hospital management, which charges the patient.”<sup>26</sup> In this instant case, it was the hospital authorities and the state government which should’ve been charged with negligence, if not medical negligence. This case also points towards the difficulties which arise while proving medical negligence charges. Judges in the case of, while quoting Lord Scarman to show the difficulties which arise while framing medical negligence charges, said: “a doctor who professes to exercise a special skill must exercise the ordinary skill of his specialty. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom anyone answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence.”<sup>27</sup> In the abovementioned case, judges while differentiating between accident and negligence, said: “Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means any unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.”<sup>28</sup>

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<sup>25</sup> Buzz Staff, ‘Dr Kafeel Khan Walks Out of Jail. Why Was He Detained for Speech That Allahabad HC Found Promoting Unity?’ (*News18*, 2 September 2020) <[www.news18.com/news/buzz/why-was-dr-kafeel-khan-in-jail-for-9-months-for-a-speech-that-allahabad-hc-found-promoting-unity-2838637.html](http://www.news18.com/news/buzz/why-was-dr-kafeel-khan-in-jail-for-9-months-for-a-speech-that-allahabad-hc-found-promoting-unity-2838637.html)> accessed 20 November 2021

<sup>26</sup> Asthana, N., ‘The Curious Case of Dr Kafeel Khan’ (*The Quint*, 15 November 2021) <[www.thequint.com/news/india/the-negligence-of-government-institutions-and-the-persecution-of-dr-kafeel-khan#read-more](http://www.thequint.com/news/india/the-negligence-of-government-institutions-and-the-persecution-of-dr-kafeel-khan#read-more)> accessed 20 November 2021

<sup>27</sup> *Jacob Mathew v State of Punjab* 2005 SCC 1

<sup>28</sup> *Jacob Mathew v State of Punjab* 2005 SCC 1



## CRITICAL APPRAISAL

Medical negligence is not an isolated crime, as per expert reports, nearly 5,00,000 citizens die due to negligence<sup>29</sup>, but the same is denied by the government. The panel formed by the government to study the medical negligence cases found that only 15% of medical negligence cases are genuine, and there was no negligence on the part of the doctors or the medical system in the remaining cases.<sup>30</sup> This can be attributed to the lack of dedicated codified legislation for medical negligence cases, as of now, acts like the Consumer protection act, India medical association act, and the Indian penal code deal with medical negligence arising in various forms and situations, but no dedicated law is there. Several cases point towards ambivalent attitudes and reactions that medical negligence cases invite, this can be solved if courts can refer to specific legislation while conducting such trials. It can be opinionated that, having a special committee/tribunal dedicated to handling such cases in furtherance of the specific legislation can reduce the caseload on the judiciary, freeing the precious time of the court, and at the same time giving a worthy opportunity to the parties to present their cases in an equitable manner, without being worried of long proceedings and huge fees.

## CONCLUSION

*“No doctor knows everything. There’s a reason why it’s called “practicing” medicine.”*

It is not said that practitioners are negligent or irresponsible, but many practitioners fail or breach their responsibilities to the patient while executing a duty that demands a great deal of patience and care. Medicine, being one of the noblest professions, needs the establishment of a website that may assist sick people. Many doctors, particularly experts, are prone to overlooking trivial information when practicing medicine, causing injury to patients that may have been avoided, or even death. To quote Mahatma Gandhi, “It is health that is a person’s real wealth and not pieces of gold and silver”. As a moral duty, all responsible authorities,

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<sup>29</sup> Press Trust of India, ‘India’s Medical Error Deaths, Nearly 5 Mn a Year, Can Be cut by 50%: Expert’ (*Business Standard*, 28 October 2018) < [www.business-standard.com/article/current-affairs/india-s-medical-error-deaths-nearly-5-mn-a-year-can-be-cut-by-50-expert-118102800193\\_1.html](http://www.business-standard.com/article/current-affairs/india-s-medical-error-deaths-nearly-5-mn-a-year-can-be-cut-by-50-expert-118102800193_1.html) > accessed 20 November 2021

<sup>30</sup> Chetna Chaudhary, ‘Only 15% Medical Negligence Cases Genuine’ (*The Times of India*, 18 January 2019) < <https://timesofindia.indiatimes.com/city/gurgaon/only-15-medical-negligence-cases-genuine/articleshow/67579198.cms> > accessed 20 November 2021

whether the hospital, the government, the Medical Council, or any other entity striving to improve healthcare facilities, should collaborate and take action to Quality health care, adequate health care, and fundamental health care accessibility.