LIABILITY OF A DOCTOR FOR CRIMINAL NEGLIGENCE: A CRITICAL ANALYSIS

Dr. Venugopal B.S.*

Medical Negligence which is the result of a reckless conduct amounts to criminal negligence[1]. In effect, it falls into the spectrum of administration of criminal justice to be dealt under criminal law as a crime for which a doctor invites criminal liability by way of punishment[2]. In this article an attempt is made to analyse critically the liability of a doctor for criminal negligence.

Meaning of criminal negligence: Criminal negligence means rash and reckless conduct of such an amount on the part of a person resulting in the death of another person amounting to manslaughter or culpable homicide not amounting to murder. Accordingly in the medical field it signifies rash or reckless conduct on the part of a doctor in administering treatment or performance of medical procedures resulting in the death of a patient. The term negligence is qualified by an adjective i.e., criminal. So it is an amalgam of the principles of negligence laid down under tort law and criminal law. Therefore it must be proved that (i) the doctor owed a duty towards the patient (ii) the doctor committed a breach of duty by his rash or reckless conduct (iii) it has resulted in the death of a patient not intended by the doctor.

Criminal Liability of Doctors : A Comparative Analysis.

English Law

Under English law criminal liability for negligence is exceedingly rare. The memorable case in which a doctor was charged for criminal negligence resulting in the death of a woman was R v.

* Associate Professor, School of Law, Christ University, Bangalore

1 Andrews v. Director of Public Prosecution, (1937) A.C.576

2 Glanwille Williams, 'A Text Book of Criminal Law', London, 2nd edition, (1983) p 27

Bateman[3]. In this case, in the course of labour of a woman, Dr. Bateman found it necessary to perform a version. After delivering a still born child he proceeded to remove the placentha manually. In the process of removing the placentha, he removed a portion of uterus. The woman died as a result of that.Dr. Bateman was charged for manslaughter. The Court of Criminal Appeal allowed the appeal and observed [4] that to establish criminal liability the facts must be such that in the opinion of the jury, the negligence of the accused went beyond a 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 of punishment.

It follows that examined as against an objective test of reasonable care there is no substantial difference between criminal and civil negligence. But the former is of such a high degree as to go beyond merely a matter of compensation between the parties. The difference between the civil and criminal negligence is not only a matter of degree but of kind too. The concept of criminal negligence assumes a greater dimension to move beyond a matter of mere compensation between the parties to bring into its fold such a repressive conduct on the part of a doctor which law seeks to check punitively. It implies a reckless conduct.

Reckless is a word of indignation[5]. It normally involves conscious and unreasonable risk taking by a doctor as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass[6] A reckless doctor deliberately takes a chance[7]. Recklessness is a less culpable state than intention but worse than inadvertent negligence[8] . It is nothing but unreasonable risk taking by a doctor[9]. The idea of recklessness as gross negligence is a manifestation of recklessness as an extreme departure from the standard of conduct of a prudent doctor[10] .In recklessness of this kind the state of mind of a doctor is not looked into. Accordingly in the course of treating a patient, if a doctor makes an extreme departure from the

[3] (1925)19 Cr. App R.8 as quoted in Peter Burns, An aspect of criminal negligence or How the Minotaur survived Thereus who became lost in labyrinth: Canadian Bar Review, (1970)58 at p.47

[4] Id at p.48

[5] See supra n. 2 at p.96

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid

standard of conduct expected of a prudent doctor resulting in death amounting to involuntary manslaughter, he will be held liable for criminal negligence[11] . But if he with an intention to kill a patient, administers a poisonous injection to the latter, he invites liability for murder.[12]

Criminal negligence involves wanton or reckless disregard for the lives or safety of others. **In R v. Adomako**[13] an anaesthetist failed to notice the disconnection of tube from the ventilator supplying oxygen to the patients mouth. It remained disconnected for six minutes. Later it was re-connected. But the patient had already suffered a cardiac arrest causing severe brain damage. Later he died of hypoxia. The House of Lords held that the anaesthelist was grossly negligent as any competent anaesthelist watching the patient should have soon realized the disconnection.

English courts are very slow to indict a qualified doctor. Unqualified practitioners are dealt severely[14].But criminal negligence in case of doctors is restricted to instances resulting in death of a patient due to their act or omission, in either case amounting to recklessness in breach of duty of care[15].

The judicial tendency in England has been to extend the scope of the concept of recklessness. The decision in **Commissioner of Police of the Metropolis v. Caldwell**[16] makes it obvious that harmful consequences of one's act itself constitutes the necessary mensrea. Accordingly a doctor will be held liable for harmful consequences of his reckless act without any reference to his state of mind when he committed the act. It wiped out the difference between the subjective and objective recklessness. There is no need to examine the mental state of mind of an offender while committing the offence.

But criminal law makes an enquiry into the state of mind of a person. Recklessness as to the consequences of the act itself constitutes the sufficient means rea. The requirement of proving subjective negligence is more onerous than objective negligence. The latter calls for examination of departure from the conduct of a prudent doctor. If the departure is of an extreme

[11] Involuntory manslaughter means those killings where the accused does not possess the requisite mensrea for murder, see Peter Seago, "Criminal Law", 4th edition, London, at p.233 (1994)
[12] See supra n.2 at p.245
[13] (1994)3 All ER. 79 (H.L).
[14] R v. Crick (1859) IF & F, 519.
[15] See supra n 2 at p 259
[16] (1982) A. C 341 (HL). See for a critical analysis of Caldwell decision, Glanville Williams "Recklessness Redefined", Cambridge L.J. (1981) p.252.

degree, a doctor will invite criminal liability. This will be of great help to the patient that he needs to prove only the reckless conduct of a doctor. He need not prove intention on the part of a doctor which is indeed a cumbersome task. Examination of the conduct of a doctor places the patient in an advantageous position.

Amplifying the concept of objective recklessness in **R v. Lawrence Stephen**[17], the House of Lords, observed

"……. Recklessness on the part of the doer of an act does pre-suppose 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…… and 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 obvious from the above observation that an act of a doctor amounts to criminal negligence, if he fails to avoid the grave risk under circumstances which would have certainly drawn the attention of a reasonably prudent doctor as to the serious harmful consequences of an act.

A vast majority of the cases pertaining to criminal negligence of doctor are associated with drunkenness or impaired efficiency due to the use of drugs by doctors[18] . Self induced intoxication is not a defence for an offence involving recklessness[19] .There is no purposive element in recklessness[20]. Recklessness lies in the very act of getting drunken[21] It follows that a drunk doctor is always a reckless doctor and the converse is not true. If in a drunken state, he performs an operation and patient dies, the cause of the death will be attributed to the recklessness of the doctor eventhough otherwise also the patient would have died. A monumental relic of recklessness could be seen in the museum of forensic pathology in Edinburg which contains a specimen of 24(8 Ft.) small intestine removed by a drunken doctor in mistake for a umbilical cord[22] .Such cases deserve punishment. They cannot be defended as a doctor

[17] (1982) A.C. 510. (H.L.)
[18] J. K Mason, "Forensic Medicine for Lawyers' London ,2nd edition, (1983).p .337
[19] See supra n 14 at p.345.
[20] Ibid.
[21] Ibid.
[22] See supra n.18

should be more able to appreciate than anyone else the impairment of function due to alcoholism.[23]

The decisions of the English courts relating to medical negligence cases under civil law reflect a paternalistic attitude. It has also reflected in their attitude with respect to criminal liability of doctors for negligence, that it is exceedingly rare[24].

U.S.A.

In the U.S.A. also the legal principles relating to liability of doctors for criminal negligence is not distinct from English law. The civil law principle pertaining to negligence based on failure to exercise reasonable care and skill is not sufficient to inflict criminal liability.[25]

In State v. Lester[26] a patient died because of overexposure to x-ray administered by the defendant who was indicted for manslaughter. Finding it for the defendant doctor, the court concisely laid down the principle of criminal liability of doctors for their negligence in the following terms.[27]

".....Not every careless act is criminal, only when a physician exhibits a gross lack of competency or inattention or wanton indifference to patients safety which may arise from gross ignorance or gross negligence, criminal liability attach. Where the patients death results from error of judgement or an accident, there is no criminal liability....."

Criminal negligence is a matter of degree. A doctor can be indicted only when his conduct results in the death of a patient. Intention to kill a patient is not taken into consideration[28]. The emphasis is on the conduct of a doctor. A doctor should not prescribe a treatment recklessly. If he does so and it results in the death of patient, he invites liability for manslaughter not amounting to murder[29]. A doctor cannot defend himself unless it is a well established course of treatment.

A doctor invites liability for involuntary manslaughter which includes criminally negligent homicides i.e., unintentional killings where he should have known that he was creating

[23] Ibid.
[24] [1981] 1 All E.R. p.545
[25] This is the same position under English Law.
[26] 149 N.W. 297 Minn 1914.
[27] Ibid.
[28] 138 Mass 165, 1885.
[29] Ibid.

substantial and unjustifiable risks of death by a conduct that grossly deviated from ordinary care.[30]

A doctor should not venture a surgery, if he is ignorant of the facts. If he does so, it is at his peril. The death of a patient consequent upon surgery exposes the doctor to criminal liability. In **Hampton v. State**[31], a physician in the course of an operation of a female made large rents in her uterus and pulled her intestines through them, as a result of which she died. He was charged with manslaughter for culpable negligence, gross ignorance and lack of ordinary knowledge. His conviction was upheld with a great deal of medical evidence in support of the prosecution. It was held that although a physician might use his best skill and judgement in an honest attempt to cure the patient, he might be so grossly ignorant of the facts of surgery as to render him criminally liable for the results of his ignorance. It follows that venturing a surgery in ignorance itself amounts to recklessness for which use of best skill and judgement cannot be pleaded as a defence.

It should be noted that in rarest of rare cases the appellate courts have convicted the physicians on the charge of criminal negligence. In those instances where juries have convicted the physicians, the appellate courts have declined to uphold the convictions[32] .

The plea of voluntary drunkness will not save a doctor from the clutches of criminal liability. If a doctor under the influence of any intoxicating liquour or narcotic drugs perform an operation whether emergency or non-emergency, resulting in the death of a patient, it will be suffice to indict him for criminal negligence.[33] The mere fact of drunkenness speaks for itself the reckless conduct of a doctor.

The persons who practice medicine inspite of the fact that they are not qualified to do so are considered as laymen. They are pseudo doctors. By playing doctors they place themselves in a precarious position, should a patient die because of the treatment. In such an eventuality they will be prosecuted for criminal negligence. In addition to that they are held guilty of practicing medicine without a licence. Most of these practitioners are indicted for manslaughter, not for homicide as the latter demands intention to kill.[34]

[30] Joel Samaha, "Criminal Law", 3rd edition, St. Paul Minn, p.334.
[31] 39 So 421 Fla 1905.
[32] Angela Roddey Holder, "Medical Malpractice Law" ,2nd edition . p.361
[33] Joel Samaha, op. cit. at p.242.
[34] See supra n.32 at p.363.

Several chiropractors have been convicted of manslaughter in practice of medicine for causing the death of a paralysed patient by advising him to fast for 35 days, taking a diabetic patient off insulin culminating in his death etc.[35] In one case a chiropractor performed a surgery resulting in the death of a patient. Convicting him for manslaughter the court said that he acted with a shocking degree of unskillfulness, manifesting virtually an incredible amount of ignorance in surgery and anatomy and utterly wanting in skill.[36]

INDIA

The Indian law on liability for Criminal Negligence is laid down in Sec.304A of IPC which reads as follows :

"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 both"

It follows that a doctor will be held liable only for his rash or reckless conduct resulting in the death of patient not amounting to culpable homicide. If it amounts to culpable homicide, it does not fall into the purview of Sec.304A, as it implies an intention to cause death or knowledge that the act done in all probability would cause death.[37] Hence it is obvious that criminal negligence will be attributed only when there is no intention to cause death or no knowledge that the act done in all probability would cause death. Accordingly a doctor if intentionally kills a patient in the guise of treatment, cannot swim into the harbour of the above section to undergo a diminished punishment.

It is not sufficient to say that a physician was rash or negligent in his act. A great deal of care shall be taken before saddling a doctor with criminal liability. It must be based on sound legal principles[38].

In **Juggan Khan v. State of Madhyapradesh**[39] a homeopath was convicted for criminal negligence under Sec.304A of IPC. In this case a patient was suffering from guinea worm. The

[35] Chiropractor means a person who treats pain by manual adjustment of the spinal column etc. so as to release pressure on the nerves. See Chambers 21st Century Dictionary, New Delhi, 9th edition, p.243(1996).
[36] Angela Roddey Holder op. cit at p.364
[37] It invites liability under Sec.302 of IPC Culpable homicide amounting to murder and not amounting to murder are dealt under Sec.299 & 300 of IPC.
[38] (1940) P.C. .72.
[39] AIR 1965 S.C. 831.

homeopath without studying the effects of datura leaf administered 24 drops of stramonium along with a leaf of datura. She died. Datura is not a medicine which falls within the ambit of homeopathy system of medicine. Perhaps it is administered by ayurvedic doctors. The Madhya Pradesh High Court convicted the doctor for murder. On appeal the Supreme Court convicted him for criminal negligence and observed[40].

" It is a rash and negligent act to prescribe poisonous medicines without studying their probable effect".

It follows from the decision that the court took a serious note of a person not experienced in a particular system of medicine administering it without the knowledge of it's consequences. To sustain conviction under the section a proximate and direct connection between the administration of medicine and death must be proved. This issue was not examined in the above case for the reason that the offender was not a qualified practioner.

Sec.304A falls heavily on the quacks to protect the patient from their clutches. In Dr. **Kushaldas Pammandas v. State of Madhyapradesh**[41], a Hakim gave a pencillin injection to a patient. After the administration of the injection, the patient profusely perspired, vomited and died. The Madhyapradesh High Court confirming his conviction by the lower court observed,

"The fact that a person totally ignorant of the science of medicine or practice of surgery undertakes a treatment or performs an operation is very material in showing his gross ignorance from which an inference about his gross rashness and negligence in undertaking the treatment can be inferred".

It follows that the court has introduced the concept of criminal negligence per se which dispenses the requirement of burden of proof, where quacks venture to administer medicine or perform surgical procedure. The policy of law is to save the patients from persons who play doctors.

The courts are slow to invoke Sec.304A against qualified doctors, unless there is a direct nexus between the death of a person and their rash or negligent act. In **Ganashyamdas v. State of Madhyapradesh**[42] a patient was suffering from chronic asthama for 25 years. The doctor was a vaidhyaraj, holding a degree of AVMS from the Board of Indian Medicines. He administered a coramine injection to the patient as there was heavy coughing and difficulty in breathing. The

[40] Id at p.834.
[41] A.I.R. 1960 (M.P.) 50.
[42] (1977) Cri L.J. 1373.

patient died. According to the post-mortem report the cause of death was due to obstruction of bronchia in both the lungs by tenacious sputum which led to suffocation and respiratory failure. It was not stated in the report that the coramine injection had the effect of accelerating the death. Relying on the opinion of civil surgeon that coramine[43] was not given for asthma, the vaidhyaraj was booked under Sec.304A for causing the death of the patient due to rash and negligent act. The High Court setting aside the conviction held that there was no direct nexus between the administration of coramine injection and death of the patient and as the patient being an old man suffering from chronic asthma the natural death could not be ruled out.

In **Rukmini v. State**[44] the deceased was a pregnant lady. She was taken to the petitioner doctor for consultation and pre-natal treatment. The doctor assured that she would have a normal confinement. But she had a damaged heart condition called as ventricular septal defect. Eventhough the Doctor was aware of it but he did not disclose it. On developing labour she was admitted in a nursing home. Then she gave birth to a cyanosed baby. Soon after delivery she and the child died. A case was registered against the doctor on a F.I.R. the investigation of which was duly closed. A second FIR was filed on the basis of a petition filed by her husband. Challenging the validity of the 2nd FIR the petitioner moved the High Court. Dismissing the petition, the High Court said[45]

"We are not able to agree that those averments do not disclose commission of an offence under Sec.304A of the IPC."

It is obvious from the facts of the case that there was a reckless omission on the part of the doctor in not disclosing the actual condition of the patient. Like a reckless act if there is a reckless omission resulting in the death of a patient a doctor invites liability.

Negligence to be labelled as criminal, it should be gross. In Dr. Suresh Gupta v. Govt. of N.C.T. of Delhi,[46] a young boy was subjected to an operation for nasal deformity. He did not have any past history of heart ailments. Neither it was a complicated nor a serious operation. There was an omission on the part of the doctor in not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage. The

[43] Coramine is prescribed for bronchitis, microcardial suffering, respiratory depression, in bronchial asthma coramine ephedrine is prescribed.
[44] (1987) Cri L.J. p.200.

[45] Id at p 209. But the High Court declined to intervene as the case was registered in the appropriate court.
[46] A.I.R. 2004 S.C. 4091

patient died as a result of this. The doctor was charged under Sec.304A. It was held that though the act attributed to the doctor could be described as negligent, it could not be termed as criminal. According to the court a doctor could be considered as committing an act of criminal negligence, when he exhibited a gross lack of competence or inaction and wanton indifference to his patients safety and which was found to have arisen from gross negligence or gross ignorance. It follows that wherever death occurs in the course of treatment ipso fact it does not suggest an instance of criminal negligence, unless a very high degree of negligence is proved.[47] The rule of res ipsa locquitor being a mere rule of evidence has no application in criminal proceedings and operates only in the domain of civil law.[48]

The Supreme Court once again reiterated its view point in **Jacbo Mathew v. State of Punjab**.[49] In this case the deceased was suffering from cancer in its advanced stage. He died due to non availability of gas cylinder in the room. The doctor was prosecuted under Sec.304A for causing the death of the deceased. It was held the hospital could be held liable for non availability of oxygen cylinder under civil law and the doctor could not be prosecuted under Sec.304A, unless his conduct was grossly rash or negligent. It was further held that a doctor could not be held liable for error of judgment or an accident. The Supreme Court further gave its approval to the principles laid down in **R v. Lawrence[50] and R v. Caldwell**.[51]

Medical Science is shrouded with uncertainties. In the face of these uncertainties a doctor has to render his service. The fear of criminal liability would aggravate the situation. It may deter a doctor from making a last minute effort to save the life of a patient because of the timidity forced on him by the apprehension of criminal prosecution. If it happens it will be a greatest disservice to the community. For every doctor professional reputation is as dear as his life. No doctor generally will intentionally kill a patient nor show apathy towards the safety and life of the patient. The moment a death occurs in the course of treatment some unscrupulous police officers may take advantage of the situation to expose a doctor to undue hardship to make a windfall gain out of it. Unwarranted arrest of a doctor in this regard will be suicidal. Doctor must be guarded against this. Criminal process once set in motion will have its own grave consequences resulting in the arrest of a doctor who will leave no stone unturned to avoid the

[47] State v. Devakki Amma, 1970 Ker. L.T.958
[48] Syad Akbar v. State of Karnataka, (1980)1 S.C.C.30.
[49] (2005)3 C.P.J.9 (S.C.).
[50] See supra n.17.
[51] See supra n 16

possible arrest. Eventually where a case is registered and if the court exonerates him from liability, in no monetary terms the loss of his professional reputation can be compensated. Taking stock of this situation, the Supreme Court in Jacob Mathew observed[52]

"The investigating officer should before proceeding against the doctor accused of a 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 be normally expected to give an impartial and unbiased opinion applying Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled 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 may be withheld".

Expressing its concern over the matter the Supreme Court further in Martin F. D'Souza v. Mohammad Isfaq observed[53]

"…. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in **Jacob Mathews case**, otherwise the policemen themselves have to face legal action".

The above discussion reveals that one should adopt a very cautious approach in indicting the doctors for criminal negligence because of its irreversible ill consequences. But the courts have not hesitated to punish the erring doctors. In **P.M. De'Souza v. Emperor**,[54] a doctor incharge of a dispensary carelessly mixed up bottles of poisonous drugs and administered them without reading the labels. In effect several patients died. He was held guilty of criminal negligence .

The Indian Penal Code has laid down certain exceptions to criminal liability. Accordingly a doctor cannot be held liable for acts not intended to cause death done in good faith for patient's benefit.[55] For example, a surgeon, knowing that a particular operation is likely to cause the death of a patient, who suffers under a painful complaint, but not intending to cause

[52] See supra n.49 at pp. 29-30
[53] (2009) I C. P.J. 32 at p 52 (S.C.).
[54] A.I.R.1920 All. 32.
[55] Sec. 88 of I.P.C.

patients death and intending in good faith for the benefit of the patient performs an operation on him with his consent, in case if the patient dies, commits no offence.[56]

Where there is a reckless act, it negates good faith, as they cannot go hand in hand. An unqualified practitioner who ventures an operation cannot plead the defence of act done in good faith, as playing doctor itself a reckless act. In **Sukaroo Kabiraj v. Empress**[57], an unqualified practitioner operated a patient for internal piles by cutting them out with an ordinary knife. The patient died of bleeding. The practitioner contended that earlier he had successfully conducted such operations that he was entitled to claim the plea of act done in good faith for the benefit of the patient. Rejecting the contention the court held the practitioner criminally negligent as he was not educated in surgery.

A doctor can claim exemption from criminal liability for certain communications made in good faith. For example a doctor in good faith communicates to a patient that he cannot live and the patient dies as a result of shock. The doctor commits no offence[58].

It is obvious that in the case of a qualified practitioner, if a reckless act on his part resulting in the death of a patient, the plea of act done in good faith is of no avail.A doctor who causes hurt[59] or grevious hurt[60] to any patient by doing any act so rashly or negligently as to endanger his life or personal safety, invites liability.

An unreported case decided by a civil court discussed below is a classic example of reckless act of a qualified doctor which without any iota of doubt fits into 338 and 304A of I.P.C.[61] In this case a woman was admitted in a nursing home in Mangalore. The Surgeon decided to perform an operation. An anaesthetist who was fully intoxicated, administered overdosage of anaesthecia, as a result of which she fell in comma. She expired after four years of vegetative state. The Principal Civil Judge, Mangalore, awarded damages amounting to Rs.1,50,000/-.

[56] *Ibid.*
[57] (1887) ILR 14 Cal 566
[58] Sec. 93 of I.P.C.

[59] Sec. 337 of I.P.C. - He will be imprisoned for a term which may extend to 6 months or with fine which may extend to Rs.500 or both.
[60] Sec. 338 of I.P.C. – He will be imprisoned for a term which may extend to 2 years or with fine which may extend to Rs.1000 or both.
[61] For the report of the case, see The Week, Jan 8-14 (1989).

It is evident that it was the reckless act of the anaesthetist which eventually resulted in the death of patient which certainly deserves infliction of criminal liability.

CONCLUSION

The above discussion reveals that there is a marked difference between negligence under civil and criminal law. Civil negligence is a matter of a matter of mere compensation between the doctor and patient, for the injury what the latter has sustained. Negligence under civil law does not amount to negligence under criminal law. But negligence under criminal law involves negligence under civil law. It is the highest degree of negligence which amounts to negligence under criminal law as laid in **Andrew**[62]which received the approval of Supreme Court in **Jacob Mathew**[63] It is a reckless act or gross negligence on the part of a doctor causing the death of patient which gives rise to criminal liability making it to extend beyond the spectrum of civil law. It ceases to be a mere matter of settlement between the doctor and patient. The State intervenes in the public interest to punish erring doctor for his reckless act, which not only implies failure to exercise the care that is expected of a reasonably competent doctor, but also an indifferent and callous attitude towards the safety or life of others, conscious of the risk ahead.

In all the jurisdictions to ascertain negligence of a criminal type the same principles are applied. In India the Supreme Court has given approval to the principles laid down by the English Courts in Lawrence and Caldwell. These cases extended the ambit of recklessness. Accordingly it signifies objective recklessness which dispenses with the need of proof of the state of mind of a doctor. The underlying idea is that the recklessness itself indicates the required mens rea which does not amount to intention to indict a doctor. If the act is an intentional act, the doctor invites punishment for murder.

Infliction of criminal liability results in the punishment of a doctor by way of his imprisonment. It attaches stigma to a doctor. It mars the reputation of a doctor. Doctors render noble service to the society. The imagination of a world without doctors cannot be conceived of. Therefore, criminal liability be imposed on doctors sparingly. Every instance of a death of patient in course of treatment, does not signify reckless conduct of a doctor. Death may occur

[62] See. supra n.1
[63] See. supra n.49

due to various other reasons. Some time it may be an inherent material risk of a procedure. If death occurs as a result of the inherent risk, a doctor cannot be held liable if he obtained the consent after the disclosure of risk. Hence under those circumstances a doctor should not be looked as a criminal. It is laudable that in all jurisdictions, including India, courts have taken stock of this situation and are slow to indict the doctors for criminal negligence. But in the rarest of rare cases which constitutes only a fraction courts have indicted the doctors for criminal negligence. This indicates a justifiable medical paternalism. Otherwise the very idea of criminal liability may deter a person from entering into medical profession or he has to operate a patient in the backdrop of the terror so created which will be fatal to the public interest.

It is very unfortunate that some unscrupulous police officers, whenever a death occurs in the course of treatment, grab this circumstance to extort the doctor and arrest him. Arrest of a doctor will cause irreparable damage to his status and professional reputation. In this regard the Supreme Court has made it mandatory to comply with the directions laid down in **Jacob Mathews** , in the absence of statutory guidelines. Therefore, it is submitted that at the earliest the government in consultation with the Medical Council of India, should promulgate the statutory guidelines to curb the unscrupulous police officers.

There is a need to check quackery and playing doctors. In all the jurisdictions courts have come heavily on unqualified practitioners or quacks taking to medicine or surgery, resulting in the death of patients, to indict them for involuntary manslaughter. The courts have justifiably laid down the concept of criminal negligence per se. Wherever actions are initiated in civil courts and consumer courts, such unqualified practitioners are held liable on the basis of negligence per se or deficiency in service per se to pay exemplary damages to the patient which involves a punitive element.[64]

To conclude criminal liability should be inflicted on a doctor sparingly only in such cases, where otherwise it would result in blatant injustice to the patient. It is submitted that where criminal liability is imposed, in addition to the punishment of an erring doctor damages also must be awarded, deviating from the traditional corridors of criminal law, in which lies the real remedy of the patient.

[64] Sri. Mayappa v. Dr.A. Narasimha Swamy, J.M.C. Vol.5, Jan-March 2009, p.12; M.Jeeva v. Smt. Lalitha, (1994) 2 C.P.J. 73 (N.C.); Poonam Verma v. Dr. Ashwin Patel (1996)4 S.C.C. 332