

# **Vicarious Liability In Medical Negligence**

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## **Abstract**

Vicarious liability in medical negligence is a growing concept in India and most of the jurisprudence for the same comes from either older United Kingdom cases or the cases of the different State Supreme Courts in the United States of America. As more cases of medical injuries come before the Indian courts, the judiciary is often helpless to tackle the same in the light of lack of proper legislations as well as jurisprudence in this regard. Through this paper, we will attempt to understand the basic and relevant terms such as medical negligence; vicarious liability; duty of care; et al. that will help us understand the nuances of this topic better. This research paper will analyse the meaning of medical negligence and vicarious liability independently in brief and focus on what vicarious liability means in terms of medical negligence. Furthermore, this paper will dwell into the various doctrines related to vicarious liability in medical negligence cases that have developed in courts in different jurisdictions over the years. For a better understanding of the topic, we will look at the position of vicarious liability in medical negligence in other jurisdictions, namely the United States of America and South Africa before we study the relevant case laws in India that have developed whatever little jurisprudence that exists in India.

**Keywords:** *Medical Negligence, Vicarious Liability, Jurisprudence, Legislation, Doctrines*

## **Introduction**

The field of medical science has grown many folds in the last many few decades, and in the process, the quantity of stakeholders involved has also rapidly increased. However, the one constant challenge has been the possibility of medical professionals being negligent in the treatment of their patients. Since the inception of medical science, the chances of medical injuries to patients have always existed, but as the law has developed in compliment to the societal growth, the impact of the same is visible on the field of medical science. Medical negligence has been a constantly developing field of jurisprudence in the 20<sup>th</sup> and 21<sup>st</sup> century, the aspect of vicarious liability is a relatively newer aspect of the same. As laws develop, so should the application of said laws in the complex technical fields as well. This paper dwells into the prominent legal theories of vicarious liability in cases of medical negligence cases that have developed in different jurisprudences and further analysis the position of the same in the Indian context through relevant case laws.

## **Research Methodology**

This paper is an analysis of the different theories and doctrines in the medical law jurisprudence to understand the position of vicarious liability in cases of medical negligence in India. The researcher has focused on secondary sources of data including but not limited to books, law journals and other research articles and research papers, online blogs, legislation enacted by the parliament and commentaries of such legislations and case laws.

## **Research Questions**

- What is vicarious liability in Medical Negligence?
- What are the different theories that exist in medical negligence jurisprudence relating to vicarious liability?
- What is the position of vicarious liability in medical negligence in India?

## **Medical Negligence And Vicarious Liability**

### **Negligence**

Negligence is a well-established wrong in many areas of law such as torts, criminal law under the Indian Penal Code, the Indian Contracts Act, et al. Negligence happens when the following three ingredients are satisfied:

- a. The defendant has a duty of care towards the plaintiff;
- b. There is a breach of said duty of care; and
- c. The breach causes damage to the plaintiff

When all three of the above are satisfied, negligence is established in law, and the plaintiff or victim may seek relief in terms of damages from the defendant.

### **Medical Negligence**

For many years the medical fraternity has played a crucial and irreplaceable role in the welfare of the society, and the same hardly be contradicted by anyone. The need for medical professions to treat acute as well as chronic diseases; perform small and big surgeries; et al. is a basic one. Doctors and medical professions play a huge role in our lives and they train extremely hard for many years to gain expertise in their field to serve us. However, it is a common understanding that even doctors and medical professions can make mistakes or be negligent in their conduct. Often that can result in extremely dangerous and harmful consequences for the patient and their families. Approximately 52 lakh cases of medical injuries are reported annually in India, out of which close to 1 lakh patients lose their lives because of medical negligence on part of the healthcare professional. (Asthana, 2009)

The Latin maxim of *ubi jus ibi remedium* which means that where there is a right there is a remedy, dictates that whenever a person has a legal right violated, they shall be compensated for the same. The right to healthcare is a well-established legal right in law, especially when you are paying a certain sum to avail the services of a professional, therefore doctors and other healthcare professionals shall also be held to a certain standard of conduct which they shall not violate. Violation of the same must result in punitive consequences for the professions. This in terms of medical services can be understood to be Medical Negligence. This term can at many times be used as Medical Malpractice as well. To find one single definition to explain medical negligence is difficult however it may be understood to be improper or unskilled treatment of a patient, which involves medical negligence on the part of the healthcare professional.

The apex court defined medical negligence in the case of Poonam Verma v. Ashwin Patel & Ors.<sup>1</sup> as *“Negligence has many manifestations -it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence per se.”*

### **Types Of Medical Negligence**

There is a set ‘standard of care’ which is established in the medical services industry. Any deviation from this set standard of care can be categorised as medical negligence. Below mentioned are the common categories of medical negligence:

- a. Wrong Diagnosis
- b. Delay in Diagnosis
- c. Error in Surgery
- d. Unnecessary Surgery
- e. Error in administration of Anaesthesia
- f. Malpractice related to Childbirth

### **Standard Of Care & Duty Of Care**

The tenets of standard of care have evolved over time in medical jurisprudence. It states that doctors or healthcare professionals have a certain standard of care that they must maintain while treating a patient. This should not be of the highest degree, nor the lowest degree. It should be in accordance with the level of care that any other doctor or healthcare professional, who has undergone similar training or possesses the equivalent proficiency, would ordinarily provide to the patient under similar circumstances. The apex court in the landmark case of Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr<sup>2</sup> held that a doctor or a healthcare professional has certain duties which breached shall make him liable for medical negligence. The standard of test here is a reasonable degree of care in regards to the profession.

The ‘duty of care’ creates an obligation on one the doctor or healthcare professional to take care to prevent any medical injury to their patient. Under this duty of care, the healthcare professional is required to fulfil certain requirements. They should be free to take up cases, but once they take a case they should offer proper care to the patient(s). the healthcare professional shall give a proper analysis of the patient’s condition without stretching or reducing the gravity of the same. The doctor must

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<sup>1</sup> Poonam Verma v. Ashwin Patel & Ors. 1996 4 SCC 332.

<sup>2</sup> Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr. AIR 1969 SC 128.

maintain the confidential information of the patient under the concept of Doctor-Patient confidentiality. Furthermore, they cannot refuse to treat patients in cases of emergency.

### **Vicarious Liability In Medical Negligence**

The concept of vicarious liability is also well established in cases of civil law and torts. Wherein for the acts of one person, the liability of another person arises, the concept of vicarious liability is applicable. The Latin maxim that gives this principle in law is *qui facit per se per alium facit per se* which means that 'he who does an act through another is deemed in law to do it himself'. Thus the employers become liable for the wrongful acts of the employees that are committed in the regular course of employment. (Singh, 2014)

The allocation of responsibility between the hospitals and their employees, be it doctors, anaesthetists or other nursing staff members has long been a topic for debate in medical jurisprudence. Vicarious liability in medical negligence cases is applicable when the doctors or healthcare professionals employed by a particular hospital are negligent in the treatment of the patient(s). (Correspondent, 1953)

## **Doctrines Of Vicarious Liability In Medical Negligence**

### **A. Captain of the Ship Doctrine**

This doctrine is largely rejected in contemporary times in most of the jurisdictions, however, it served many courts around the world for the longest time to decide cases of vicarious liability in medical negligence. This emerged in the late 1940s in the United Kingdom and was used to give relief to the patients who had suffered medical injuries during treatment or surgeries.

According to this doctrine, the mere presence of the doctor or head surgeon or physician in the operation room shall hold him or her liable for the negligence of everyone in that room. Hence the name captain of the ship doctrine, which stems from the fact that on an actual ship, the captain is held responsible for all the acts and omissions of his entire crew present on that ship.

### **B. Respondent Superior**

Under the doctrine of Respondent Superior, the basic rule of agency is looked at. In that sense, the court sees if the master is subject to liability for the wrongful acts or omissions of his or her servant(s) committed when acting within the scope of the employment. Courts also considers whether the master qualifies as a principal who hires or recruits another individual in the nature of employment to render his/her duties or service in the principal's matters and exudes control over the physical conduct of said

individual in the discharge of the service. (Coalter, 1995) This rule was laid down in the landmark case of *Jones v. Hart*<sup>3</sup> and was, for a long time the accepted standard and tool to judge matters of vicarious liability in medical negligence cases.

Under this doctrine when the principal or master is not in direct control of the physical conduct of the independent contractor, the principal shall not be held vicariously liable for the same. *Respondent superior* is applied to the health care industry so that a physician "is responsible for an injury done to the patient through the want of proper skill and care in his [or her] assistant, apprentice, agent, or employee." (Lisk, 1991)

The shortcoming of this doctrine is that it fails to give a clear answer as to the proper liability when more than one employer exists. This paved the way for the development of the Borrowed Servant Rule.

### **C. Borrowed Servant Rule**

According to this rule, the servant directed or permitted by her/his master to render services for another person, may become the servant of such other person for whom they are performing the act. The general principle dictates in this regard, that unless legitimate evidence is present to show the contrary, the servant shall be considered to be in service of the person who has borrowed said servant.

The courts tend to focus on finding out which particular master was being served when the alleged negligent act or omission took place. Accordingly, the master being servant when the alleged negligent act or omission took place is held liable for the acts or omissions, and the other master is declared free from any liability in the matter.

The critical point to be accessed is that the exact point at which the servant stopped being the servant of one master and became the servant of the other master is relevant. To access this the courts have majorly laid down two tests, namely the "scope of the employment" test and the "whose business" test. To better sort out any confusion, the courts use the "administrative vs professional acts" test as well. According to this test, a non-employer physician is liable only for the "professional" acts of other doctors, physician, or health care professionals and holds the general employer only liable for their "administrative" acts. (Lisk, 1991)

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<sup>3</sup> *Jones v. Hart* 90 Eng. Rep. 1255 (1698).

## **Position In Different Jurisdictions**

### **The United States of America**

In the United States, there has been a lot of development in medical jurisprudence especially with regard to the concept of vicarious liability in medical negligence.

In *Harris v. Miller*<sup>4</sup> the Supreme Court of North Carolina laid down the standard that must be observed while deciding whether a doctor or healthcare professional is liable under the principle of vicarious liability in medical negligence cases. The Court observed that the physician shall be held vicariously liable if it is established that the physician possessed the 'right to control' the other medical professionals at the time of the negligent act or omission. For this conclusion, the courts emphasised on their analysis and interpretation of the 'borrowed servant rule' thus overruling the landmark cases of *Jackson v. Joyner*<sup>5</sup> which had for years been the precedent establishing the use of the 'captain of the ship' doctrine. The court also overturned the case of *Starnes v. Charlotte – Macklenburg Hospital Authority*<sup>6</sup> under which the established principle was that during an operation the physician or head surgeon has no control over a skilled specialist like an anaesthetist. (Coalter, 1995)

### **South Africa**

There has been a constant evolution of medical negligence in South Africa with regard to the concept of medical negligence and vicarious liability, however, the issues invariably are left upon for the courts to interpret the same in the best good faith application of the law for the case at hand. The courts tend to follow the principle of 'reasonable duty of care showed by a reasonable doctor'.

In this regard, the courts from time to time tend to look at the reasonable duty of care that a reasonable doctor with the same qualifications, training and experience would show in a similar situation and applying that as a standard of care, judges the matter at hand to assess whether there is negligence or not. Many can argue that in this regard the standard is truly being set by the doctors and not by the courts. However, the court has argued that in the final stage it is the court that is the arbitrator and not the doctors.

The courts in South Africa accept the doctrine of vicarious liability in medical negligence cases. They rely on the principle that there has to be an established position of authority vis-à-vis the employee in terms of which the former is legally capable of exercising control over the actions of the latter. (Dokkum, 1997) The concept of who has 'control' is of great significance in South African courts with

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<sup>4</sup> *Harris v. Miller* 335 N.C. 379, 438 S. E. 2d 731 (1994).

<sup>5</sup> *Jackson v. Joyner* 236 N.C. 259, 72 S.E.2d 589 (1952).

<sup>6</sup> *Starnes v. Charlotte – Macklenburg Hospital Authority* 28 N.C. App. 418, 221 S.E.2d 733 (1976).

regard to cases of vicarious liability in medical negligence. The well-established doctrine of ‘Captain of the ship’ is also accepted in appropriate cases in South Africa. However, the primary focus is on the doctrine of ‘*Respondent Superior*’ wherein, the doctor is held responsible for the wrongful acts and omissions of her or his medical staff. (Dokkum, 1997) According to this theory when the doctor delegates their staff to perform a particular task, then the doctor is liable for his or her own wrongful acts and omissions and also responsible for the wrongful acts or omissions of her or his staff who is carrying out the assigned tasks. However, the physician is not held directly responsible for the wrongful acts or omissions of the anaesthetist as the physician has neither employed the anaesthetist nor are they in direct control of his/her tasks.

## **India**

Actions against Indian hospitals often lie on the grounds of the services rendered by them rather than the lack of services- individually or vicariously. They can be sued for negligence either in Criminal Courts, Civil Courts or Consumer Forums. The Supreme Court has held that every doctor “has a duty to act with a reasonable degree of care and skill” in the case of *State of Haryana v. Smt. Santra*<sup>7</sup>.

The position of vicarious liability in India has been uncertain for a long time now. Therefore, given the ambiguity in this regard, courts have, in the past, taken up matters on a case to case basis, often applying foreign theories without a set standard.

However, what must be noted is that the legal concept of medical negligence is not just limited to the conduct of doctors but applies to nurses, pharmaceutical companies, healthcare facilities and other health care providers too. Thus, those offering medical advice and treatment need to state implicitly that they have the necessary skill and knowledge to be undertaking such activities and also that they have the required skill to decide whether or not to take up a case and to decide what kind of treatment is to be administered. This is known as an “implied undertaking” on behalf of the medical practitioner.

And as litigations usually take too long to reach their logical end via civil courts, medical services have now been brought within the ambit of the Consumer Protection Act, 1986, where the complainant is entitled to compensation for deficiency in services within the stipulated period.

Cases that do not fall within the purview of the Consumer Protection Act, for example, where services have been provided free of cost at a government hospital—can be taken up in criminal courts where the medical practitioner can be sued under Section 304-A of the Indian Penal Code that deals with deaths caused by negligence. It states that whoever causes the death of any person by doing any rash or

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<sup>7</sup> *State of Haryana v. Smt. Santra*. AIR 2000 SC 3335.



negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with a fine, or with both.

## **Cases**

The hospital is not only responsible for the staff it provides but also for independent contractors such as anaesthetists/surgeons or doctors in some cases—who admit or operate a particular case. This was held in the case of *Smt. Rekha Gupta v. Bombay Hospital Trust and Anr.*<sup>8</sup> by the National Consumer Disputes Redressal Commission.

In *Joseph Alias Pappachan v. Dr. George Moonjerly*<sup>9</sup>, it was held that “*persons who run hospitals are in law under the same duty as the humblest doctor: whenever they accept a patient for treatment, they must use reasonable care and skill to ease him of his ailment. The hospital authorities cannot, of course, do it by themselves; they have no ears to listen to the stethoscope, and no hands to hold the surgeon’s scalpel. They must do it by the staff which they employ; and if their staff are negligent in giving treatment, they are just as liable for that negligence as anyone else who employs others to do his duties for him.*”

The apex court in the case of *Achutrao Khodwa v. State of Maharashtra*<sup>10</sup> observed that “*The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient.*” Further, the court said that the principle of *res ipsa loquitur* shall be applicable in appropriate cases of medical negligence. One party to the current case was a government hospital, and the Court held the government vicariously liable for the negligence of the government employees in the hospital. The terms of employment of a doctor or a surgeon with a hospital are a matter of their negotiation and understanding, however, this does not afford the hospitals a free pass from the liability that may arise from third parties. Hospitals are expected to facilitate medical services and they fall short or if there occurs a deficiency of service or in cases, where the operation has been done negligently without bestowing normal care and caution, the hospital also must be held liable and it cannot be allowed to escape from the liability by stating that there is no master-servant relationship between the hospital and the surgeon who performed the operation. The hospital is liable in case of established negligence and it is no more a valid defence to say that the surgeon is not a servant employed by the hospital, etc.

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<sup>8</sup> *Smt. Rekha Gupta v. Bombay Hospital Trust and Anr* 2003 (2) CPJ 160 (NCDRC).

<sup>9</sup> *Joseph Alias Pappachan v. Dr. George Moonjerly* 1994 (1) KLJ 782.

<sup>10</sup> *Achutrao Khodwa v. State of Maharashtra* 1996 SCC (2) 634.

In the case of *R.P. Sharma v. State of Rajasthan*<sup>11</sup> the hospital staff was found negligent in obtaining the correct blood group bottle of blood from the blood bank causing the death of the patient. The apex court held the government vicariously liable for the negligent actions of its employees and the plaintiff's family was given compensation.

In the case of *M Ramesh Reddy v. State of Andhra Pradesh*<sup>12</sup>, the plaintiff slipped and fell in the hospital bathroom as it was wet. The court recognised negligence on part of the hospital employee responsible for cleaning the bathroom and held the hospital liable vicariously.

From the above two cases, we can understand that the courts are open to the idea of vicarious liability in medical negligence cases. However the same is mostly restricted to the cases where the defendant is the government owing to the greater duty of care for government enterprises.

## **Findings & Conclusion**

It is well established that medical negligence cannot be understood to be a simple tort. Over years the accountability of medical professionals, doctors, physicians, and other healthcare professionals has increased greatly, and with this, a new form of jurisprudence has developed. The concept of vicarious liability developed in the United Kingdom and has spread to almost all jurisdictions in contemporary times. The concept being simple, *qui facit per se per alium facit per se* which means that "he who does an act through another is deemed in law to do it himself".

There are a few different theories that dictate the jurisprudence for the concept of vicarious liability in medical negligence. While most of the States in the United States of America have developed standardised jurisprudence for the same, other jurisdictions are oscillating between different theories on a case to case basis. With the relevant data and research being available, India should be one of the countries to go ahead and draft a proper legislation in this regard. India boasts of its development in medical science, and credit where it is due, India has made great leaps in this regard.

For many years now, India has in a way 'looked west' for jurisprudence in many fields, one prominent example in the early days was the law of contracts. However, the concept of vicarious liability in particular cases of medical negligence is not as developed in the west as the law of contracts was, and India is not far behind in terms of the capacity to legislate on this issue.

With the cases of civil claims for medical negligence in India have grown swiftly in the last few years, the legislation has not kept pace. Currently, the only resolve is under the Consumer Protection Act,

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<sup>11</sup> *R.P. Sharma v. State of Rajasthan* AIR 2002 Raj 104.

<sup>12</sup> *M Ramesh Reddy v. State of Andhra Pradesh* 2003 (1) CLD 81 (AP SCDRC).

1986 or a civil suit under Tort. However, there is a dire need for dedicated legislation and not just MCI guidelines to not only monitor medical services but also to create a resolution mechanism to grant appropriate relief to victims of medical injuries due to negligence. It is a matter of responsibility as well as necessity that the legislature keep up with these developments and ensure proper regulation of the same. This will not only be in the best interests of the patients who receive medical treatments of different sorts, but it will also benefit the medical industry in the longer run.

## References

1. Asthana, S (2009). Medical Negligence in India [online] iPleaders. Available at [https://blog.ipleaders.in/medical-negligence-india/#Medical\\_negligence\\_definition](https://blog.ipleaders.in/medical-negligence-india/#Medical_negligence_definition) [Accessed 8 Apr. 2021].
2. Coalter, J. S. (1995) The Vicarious Liability of a Physician for the Negligence of Other Medical Professionals - North Carolina Charts a Middle Course - The Effect of Harris v. Miller. *Campbell Law Review*, Vol. 17, No. 2, pp.1-20.
3. Dokkum, N. V. (1997). The Evolution of Medical Malpractice in South Africa. *Journal of African Law*, Vol. 42, No. 2, pp175-191.
4. Kini, A (2017). Hospital Vicariously Liable For Medical Negligence Committed By Its Doctors [online] Live Law. Available at: <https://www.livelaw.in/top-stories/hospital-vicariously-liable-for-medical-negligence-committed-by-its-doctors-sc-read-judgment-150893> [Accessed 15 Apr. 2021].
5. Lisk, L. D. (1991) A Physician's Respondeat Superior Liability For the Negligent Acts of Other Medical Professionals: When the Captain Goes Down Without the Ship. *University of Arkansas at Little Rock Law Review*, Vol. 13, No. 2, pp.183-207.
6. Medical Legal Correspondent. (1953) Vicarious Liability. *British Medical Journal*, Vol. 3, No. 1, pp.1338-1339.
7. Singh, K (2017). Legal Liabilities and Duties of a Doctor: Part 1. [online] Delhi Journal of Ophthalmology. Available at: <https://www.djo.org.in/articles/28/1/legal-liabilities.html> [Accessed 12 Apr. 2021].
8. Singh, P (2014). Vicarious Liability in India. [online] Legal Services India. Available at: <http://www.legalservicesindia.com/article/1634/Vicarious-Liability-in-India.html> [Accessed 7 Apr. 2020].