

# Criminal Prosecution of Doctors: Law and Case Study Analysis

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## **Abstract**

Speaking for Indian context, Criminal Prosecution of Doctors constitutes relatively a smaller volume of ever growing and multiplying medical litigation.

Medical negligence liability cases entail dominant percentage in medical litigation in addition to other violations like informed consent, breach of confidentiality and other statutory violations under applicable subject matter specific legislations. In the ambit of medical negligence, our contextual experience reveals prosecution of doctors under offences like Negligent Homicide (S. 304-A), Voluntarily Causing Hurt (S.337), Voluntarily Causing Grievous Hurt (S.338) of Indian Penal Code, 1860.

The crucial issue in this respect is, how and on what basis the Doctor can be subjected to criminal prosecution and whether there is any guidance for the Investigating Officer to comply with the same?

In view of umpteen instances of harassment meted out to various doctors in different parts of India, Hon'ble Supreme Court of India pronounced detailed guidelines with a view to protect the interests of the doctors and to render the process of prosecution of doctors more transparent and objective. This Article analyses the protocol in the light of select case studies and concludes with certain practical suggestions.

## **I. Introduction**

When it comes to professional service of any characters, autonomy and accountability go hand in hand. Particularly more so in medical profession. However, it is the bounden duty of all stakeholders including legislature, judiciary and enforcement authorities to ensure transparency and objectivity while extracting accountability. Whether doctor can be criminally prosecuted? Of course, yes! It all depends on the offence committed by the doctors and availability of pertinent evidence to be collected and furnished before the competent Court to enable such court to reach a rational conclusion. But in this Article, we are only concerned about the alleged offence committed by the doctor during the course of discharge of professional conduct. In other words, while exercising care and treatment whether the doctor was negligent, if so, such doctor can be subjected to criminal prosecution or not under S. 304-A (negligence homicide), or S.337 (voluntarily causing hurt), or S. 338 (voluntarily causing grievous hurt) of IPC 1860 in addition to others.

As per the current and applicable law, an aggrieved patient or family member is entitled to seek legal remedy by filing a complaint before a Consumer Commission or Civil Court –Civil Negligence or before a Criminal Court – Criminal negligence. The current issue is, whether law governing civil negligence is different from criminal negligence or not?

## II. Law relating to Civil Negligence and Criminal Negligence

### a. Supreme Court's Interpretation:

Hon'ble Supreme Court in Jacob Mathew's<sup>1</sup> case has affirmed and enunciated that the law governing civil negligence is distinctively different from law governing criminal negligence. Considering the nature of consequences that ensue from criminal prosecution, Supreme Court categorically opined that the negligence must be 'gross' negligence. At this juncture it is necessary to note and appreciate that S.304-A does not use the phrase 'gross' negligence, even then, Supreme Court felt the need for reading that requirement into the law. Therefore, it is necessary to understand that every instant of civil negligence cannot be given the colour of criminal negligence unless there is evidence to prove 'gross' negligence on the part of doctor.

In a decision reported in Jacob Mathew vs. State of Punjab and Others<sup>2</sup> the Hon'ble Supreme Court on referring to several decisions has summed up conclusions as under:

"49.

(1) Negligence is the breach of a duty caused by 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. The definition of negligence as given in Law of Torts, Ratanlal&Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) 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

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1 AIR 2005 SC 3180

2 AIR 2005 SC 3180.

generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the 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 possible for every professional to possess the highest level of expertise or skills 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.

(4) The test for determining medical negligence as laid down in Bolam's case<sup>3</sup> holds good in its applicability in India.

(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304k of IPO, yet it IS settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) 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.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence."

#### **b. Conceptual Foundations of Criminal Negligence:**

Hon'ble Supreme Court in Jacob Mathews case has referred to a scholarly contribution titled as "Errors, Medicine and the Law" with a view to highlight the author's enunciation focusing on the link between moral fault, blame and justice in reference to medical profession and negligence:

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity in principle from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. A society in which blame is overemphasized may become paralysed. This is not only because such a society will inevitably be backward- looking, but also because fear of blame inhibits the uncluttered exercise of judgment in relations between persons. If we

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3 (1957) 1 W.L.R. 582, 586

are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable. (ibid, pp. 242-243)

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable. (ibid, p. 245).

(iii) Before the court faced with deciding the cases of professional negligence there are two sets of interests which are at stake : the interests of the plaintiff and the interests of the defendant. A correct balance of these two sets of interests should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. (ibid, p.246). A consequence of encouraging litigation for loss is to persuade the public that all loss encountered in a medical context is the result of the failure of somebody in the system to provide the level of care to which the patient is entitled. The effect of this on the doctor-patient relationship is distorting and will not be to the benefit of the patient in the long run. It is also unjustified to impose on those engaged in medical treatment an undue degree of additional stress and anxiety in the conduct of their profession. Equally, it would be wrong to impose such stress and anxiety on any other person performing a demanding function in society. (ibid, p.247). While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks. (ibid, p. 247).

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing, are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness. (ibid, p.248).

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) those (i.e. wrongs) calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society. (ibid, p. 248).

In conclusion, the authors reasoned that indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society.

### **c. Why law relating to Criminal Negligence warrants clear enunciation?**

It is necessary to know that the offence envisaged u/s 304-A, IPC 1860 is a cognizable and bailable offence. To understand the nuances of the process relating to criminal prosecution, the above characteristic features of the offence must be understood clearly.

(i) Cognizable offence means the Investigating Officer can arrest the doctor without a warrant;

- (ii) Because it is a cognizable offence, either an FIR can be registered or a Complaint can be filed before the Investigating Officer;
  - (iii) As it is a bailable offence, bail from the concerned Police Station can be obtained. However, to be endorsed and confirmed by the concerned Criminal Court;
  - (iv) If so, the doctor concerned can be arrested and the arrested doctor is entitled to obtain bail. However, in the process, the doctor is subjected to worst form of humiliation, reputation loss, particularly under the garb of sensational savvy media;
  - (v) Post filing of charge sheet, criminal trial takes place and on every date of hearing the doctor must be present before the Criminal Court. In the event if the doctor is not present, warrant will be issued to secure his presence on the next date of hearing, if exemption is not applied for and granted by the concerned Court;
  - (vi) Subject to city-wise variable conditions, in all probability, the trial may entail 2-3 years to complete;
  - (vii) If the Court is convinced about furnished evidence, may record conviction – punishment could be imprisonment upto 2 years or fine or both;
  - (viii) By and large, during the period of trial the patient's family may put pressure on the doctor to settle criminal case by paying monetary compensation;
  - (ix) Throughout the process from the beginning till the criminal court commences proceedings nobody knows about the basis of such alleged criminal negligence;
  - (x) May not be in every case, but in most of the cases, the underlying complex issues which delve into the interface of law and medicine are difficult to comprehend.
- These are the precise reasons why the Supreme Court felt the need for clear enunciation of protocol to be complied by the investigating Police Officer before formally initiating his criminal prosecution against the doctors.

### **III. Mandated Protocol to be observed by Investigating Officer:**

#### **(a) Supreme Court's decision in Jacob Mathew's<sup>4</sup> case**

The Court laid down guidelines to be followed by the authorities, whenever a criminal complaint against a medical professional is filed. It stated,

“A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.”<sup>5</sup>

The investigating officer should, before proceeding against the doctor accused of 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 normally be expected to give an impartial and unbiased opinion applying Bolam's 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 levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.”<sup>6</sup>

4 AIR 2005 SC 3180.

5 The above mandate of credible expert opinion has been followed in several cases subsequently.

6 Jacob Mathew v. State of Punjab & another, AIR 2005 SC 3180:(2005) 6 SCC 1, Para 53

**(b) Other decisions where Jacob Mathew's ration was followed:****(a) A.S.V. Narayanan Rao v. Ratnamala<sup>7</sup>****Facts:**

The appellant is a cardiologist. The husband of the first respondent (one Divakar) approached the appellant herein, complaining of a pain in the chest on 22.04.2002. Divakar was admitted in the hospital where the appellant was working and kept in the Intensive Care Unit (ICU). Thereafter, the appellant informed the first respondent that Divakar had suffered a mild heart attack. On 25.04.2002 at 9.30 a.m., the appellant unsuccessfully attempted to perform an angioplasty on Divakar. Around 1.30 in the afternoon, the appellant informed the first respondent that the angioplasty failed as the blocks were calcified. Same day at around 3.30 p.m., by-pass surgery was conducted on Divakar in the same hospital. Subsequently, various complications developed and eventually Divakar died on 09.05.2002.

**Held:**

For maintainability of complaint there is a need to show not just negligence, but gross negligence. Criminal proceedings maintainable only if there is prima facie gross negligence as opined by an independent doctor (preferably government doctor) as laid down in Jacob Mathew case<sup>8</sup>.

In the present case was not a case of gross negligence causing death of a patient necessitating proceedings under S. 304-A IPC. Any negligence cannot be equated with gross negligence. Hence, criminal proceedings quashed.

**(b) Manorama Tiwari v. Surendra Nath Rai<sup>9</sup>,****Facts:**

Miss Tapsi Rai, aged 14 years, daughter of respondent Surendra Nath Rai, underwent surgery on 5.8.1997 in Maharani Government Hospital, Jagdalpur, Bastar. The operation necessitated due to pain developed by the patient in the abdomen, was performed by the appellants. Before conducting the surgery, consent to operate was taken from the respondent. However, even after surgery, the condition of the patient did not improve, and she died on the same day.

**Contentions of the appellants:**

The appellants were discharging their public duties and have committed no negligence on their part. It is further argued that assuming but not admitting there was negligence in discharging the public duties, in view of the provisions of Section 197 Cr.P.C., the prosecution against the appellants is not maintainable without sanction from the Government.

**Held:**

“52. Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient.

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7 (2013) 10 SCC 741

8 (2005) 6 SCC 1

9 (2016) 1 SCC 594

1. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.
2. The investigating officer should, before proceeding against the doctor accused of 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 normally be expected to give an impartial and unbiased opinion applying the *Bolam test* to the facts collected in the investigation.
3. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled 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.
4. The High Court has erred in law in dismissing the criminal revision filed by the appellants and affirming the order of the Magistrate rejecting their application as to maintainability of the criminal complaint without sanction from the State Government. In our opinion, it is a clear case where appellants were discharging their public duties, as they were performing surgery on the patient in the Government hospital. It is not disputed that the appellants were the Medical Officers in the Government Hospital. As such, the criminal prosecution of the appellants initiated by the respondent (complainant) is not maintainable without the sanction from the State Government. That being so, we are inclined to allow this appeal.

(c) **Bijoy Sinha Roy v. Biswanath Das**<sup>10</sup>,

**Facts:**

The deceased consulted respondent No.1, a Gynecologist on advice of her family physician. It was found that she had multiple fibroids of varying sizes in uterus. She was advised to undergo Hysterectomy. After about five months, she had severe bleeding and was advised to do an emergency Hysterectomy at Ashutosh Nursing Home. She was also suffering from high blood pressure and her hemoglobin was around 7 gm% which indicated that she was anemic. The treatment was given for the said problems but without much success. Finally, the operation was conducted on 01.12.1993 at about 8.45 A.M. She did not regain consciousness and since the Nursing Home did not have the ICU facility, she was shifted at 2.15 PM to Repose Nursing Home and thereafter to SSKM Hospital where she died on 17th January, 1994.

**Contentions of the appellant:**

Firstly, the decision to perform surgery without first controlling blood pressure and hemoglobin amounted to medical negligence. The surgery was not an emergency but a planned one and conducted six months after the disease first surfaced.

Secondly, having regard to the forceable complications, the decision to perform surgery at a nursing home which did not have the ICU for post operative needs also amounted to medical negligence.

**Contentions of the respondent:**

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10 (2018) 13 SCC 224

The surgeon was entitled to make a choice and to take the risk. If it was not possible to stop the bleeding without performing the surgery, the surgeon rightly decided to do so. This decision cannot be held to be medical negligence. As regards the forcibility of risk in performing surgery at a nursing home which did not have ICU even when better places were available nearby, no specific reply was given.

**Held:**

Question for consideration is whether the National Commission applied the right test for holding that there was no medical negligence in the decision of the surgeon to perform surgery. Further question is whether the choice of nursing home to perform surgery amounted to negligence as requirement of ICU was a clear forcibility and centers with ICU were available nearby

Negligence is breach of duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. Negligence in the context of the medical profession calls for a treatment with a difference. Error of judgment or an accident is not proof of negligence. So long as a doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available. A professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence. Every professional may not have the highest skill. The test of skill expected is not of the highest skilled person. Concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be so in criminal. In criminal law, an element of mens rea may be required. Degree of negligence has to be much higher. Res ipsa loquitur operates in the domain of civil law but has limited application on a charge of criminal negligence.

**(d) Deepa Sanjeev Pawaskar And Anr v. The State of Maharashtra<sup>11</sup>,****Facts:**

In June 2017, the complainant, Dnyanada, visited Dr Sanjiv Pawaskar who diagnosed her as pregnant. Dnyanada used to visit the hospital regularly for check-ups. On February 5, 2018, she was admitted to Dr Pawaskar's hospital with labor pains and the next day delivered a female baby via cesarean. She was discharged on February 9. No post-operative instructions were given. However, on February 10, she started vomiting. Dr Deepa, wife of Dr Sanjiv Pawaskar, asked Dnyanada's family to phone her from a chemist shop and she then advised the chemist on which medicines to give them. By evening, Dnyanada had developed a fever and was admitted to hospital. The staff informed her that doctors were not available there. She asked whether she should be taken to another hospital. She was told that was not necessary.

She was treated by two nurses on the instructions of Dr Deepa. At 10.15 pm, one Dr Girish Karmarkar saw the patient and prescribed a tablet, Trazine H. But by 3.45 am, the tip of Dnyanada's nose and her lips had turned black. At 4 am, the staff called Dr Pawaskar, who asked one Dr Ketkar to visit the hospital. By 4.30 am, Dnyanada was getting fits.

Seeing the poor prognosis, Dr Ketkar shifted the patient in his own car and admitted her in the ICU of Parkar Hospital, where she was kept on the ventilator. At 7 am, she expired. The post-mortem revealed the cause of death to be pulmonary embolism.

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11 2018 SCC OnLine Bom 1841



**Held:**

The Court has observed the act to be a criminal negligence, which is defined as “gross negligence so extreme that it is punishable as a crime”. However, culpable negligence is intentional conduct where the accused may not intend to do harm, but which a reasonably prudent man would recognize as involving a strong probability of injury to others. This would be a case of culpable neglect, defined as blameworthy neglect.

An error in diagnosis could be negligence and covered under Section 304A of the Indian Penal Code (IPC). The element of criminality is introduced not only by a guilty mind but by the practitioner having run the risk of doing something with recklessness and indifference to the consequences. This negligence or rashness is gross in nature.

The court had in paragraph 28 ruled that “an error in diagnosis could be negligence and covered under section 304A of the Indian Penal Code. But this is a case of prescription without diagnosis and therefore, culpable negligence. The element of criminality is introduced not only by a guilty mind but by the practitioner having run a risk of doing something with recklessness and indifference to the consequences. The doctors clearly had no mens rea or criminal intention but the Court viewed the case as an act done with the knowledge that it is likely to cause death. Prescription without diagnosis would amount to culpable negligence. This issue is decided in the affirmative.

In the present case, the patient was directed to be admitted in the absence of doctors and medicines were administered on telephonic instructions. It was held that telephone consultation would make the doctor liable for prosecution under Section 304 of the Indian Penal Code (IPC) for culpable homicide not amounting to murder.

The court in paragraph 31 observed that:

In the case where there was an error in diagnosis, it would be a civil liability. But in the present case,

- (i) the patient was directed to be admitted in the absence of the doctors;
- (ii) the medicines were administered on telephonic instructions without even enquiring about the symptoms or nature of the pain suffered by the patient;
- (iii) there was no resident medical officer;
- (iv) no alternative arrangement was made;
- (v) In fact, Dr. Karmarkar was also called by the staff when the health of the patient started deteriorating. The applicants had not even bothered to ask Dr. Karmarkar about the treatment given by him or the condition of the patient.
- (vi) All these when the complainant wanted to admit his wife in another hospital.

If these elements exist in a medical negligence, it is not just a civil wrong it can be tried under Section 304A of the IPC.

(e) In a latest judgment, **Philips Thomas v. State of Kerala**<sup>12</sup>, as per facts, Mini Philip, a young lady aged 37 years, walked to the operation theatre at Deen Hospital, Punalur, on 25/9/2006 at 3.30 p.m. to undergo sterilization by laparoscopy. After the surgery, she developed respiratory complications and was put under oxygen support. Though she was shifted to Poyanil Hospital, Punalur, at 9.00 p.m. and then to Ananthapuri Hospital, Thiruvananthapuram, at 11.30 p.m. for expert management, her life could not be saved. She breathed her last on the next day at 5.30 p.m. at Ananthapuri Hospital.

**Contentions of the appellant:**

Firstly, the decision to perform surgery without first controlling blood pressure and hemoglobin amounted to medical negligence. The surgery was not an emergency but a planned one and conducted six months after the disease first surfaced.

Secondly, having regard to the forceable complications, the decision to perform surgery at a nursing home which did not have the ICU for post operative needs also amounted to medical negligence.

**Contentions of the respondent:**

The surgeon was entitled to make a choice and to take the risk. If it was not possible to stop the bleeding without performing the surgery, the surgeon rightly decided to do so. This decision cannot be held to be medical negligence. As regards the forcibility of risk in performing surgery at a nursing home which did not have ICU even when better places were available nearby, no specific reply was given.

**Held:**

Question for consideration is whether the National Commission applied the right test for holding that there was no medical negligence in the decision of the surgeon to perform surgery. Further question is whether the choice of nursing home to perform surgery amounted to negligence as requirement of ICU was a clear forcibility and centres with ICU were available nearby.

Negligence is breach of duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. Negligence in the context of the medical profession calls for a treatment with a difference. Error of judgment or an accident is not proof of negligence. So long as a doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available. A professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence. Every professional may not have the highest skill. The test of skill expected is not of the highest skilled person. Concept of negligence differs in civil and criminal law. What may be negligence in civil law may not be so in criminal. In criminal law, an element of mens rea may be required. Degree of negligence has to be much higher. Res ipsa loquitur operates in the domain of civil law but has limited application on a charge of criminal negligence.

**(c) Observation more in breach than in practice**

From various reported decisions and our experience in handling several cases, we have learnt that in most of the cases the mandated protocol is observed more in breach than complying with the same.

When we peruse the matter with a view to elicit probable reasons for such non-observance, primarily we realize ignorance on the part of I.Os and also probable pressure from the Patient's family could be the influencing factors.

Speaking for Karnataka context, by and large, in select cities, the Investigating Officers refer the essence of complaint filed by the Patient's family before the Karnataka Medical Council (KMC) and seek its opinion as to whether there is evidence to launch criminal prosecution against the doctor or not.

Generally, in response to such referral from Police, KMC issues notice to the doctor and Patient's family and conducts enquiry seeking evidence, medical records from both the parties. On the basis of same, in the event of necessity permits cross examination by both parties and finally on the basis of written arguments and medical literature pronounces its Order. As per the relevant provisions of Karnataka

Medical Registration Act, 1961, KMC is empowered to either to issue warning or pass rustication order (temporary or permanently) only.

In our experience we realize that whenever KMC issues an Order in the form of a ‘warning’ the police authorities on the basis of such warning, filed the charge sheet claiming compliance with Supreme Court’s mandated protocol.

However, the crucial question in this regard which warrants deeper scrutiny is whether warning issued by KMC indicates ‘gross’ negligence on the part of doctor or not. This issue assumes significance in the light of Hon’ble Supreme Court’s decision in Jacob Mathews case.

In the light of above explanation, let us analyze one case study in the light of KMC’s order and two other case studies in the light of Hon’ble Karnataka High Court’s Order.

#### IV. Case Study Analysis

##### (a) **Dr. Badri Datta v. The President, KMC and others**<sup>13</sup>:

○ Relevant facts and circumstances of the case as recorded in the Order of Hon’ble High Court are excerpted as detailed below:

○ On 09.01.2011 son of Respondent No.2 was admitted in the Hospital for the advised operative procedures. On 10.01.2011 the Patient was shifted to OT preparation and anesthesia started. Surgeons conducted Laryngoscopy. As the extra growth was not accessible, surgeons did not conduct biopsy. Accordingly, reversal of anesthesia took place and the patient was extubated. Patient was awake for few minutes and then became restless and breathless, the anesthesiologists tried to re-intubate, which they could not as he was restless and emergency tracheostomy started. At this point of time, the patient was revived successfully and sent to ICU. Thereafter, the patient was stabilized and till 15.01.2011, while changing tracheostomy tube again the patient developed cardiac arrest, despite CPR could not revived and thereafter at about 11.30 am he was declared dead.

○ Respondent No.2 filed the Complaint as against the Petitioners. The Investigation Officer, Hebbal Police Station sent the Post Mortem Report, sought the opinion from the Karnataka Medical Council. Medical Council commenced the proceedings against the Petitioners and after detailed procedure the Medical Council had administered ‘WARNING’ to Petitioners No.1 and 2 and other two doctors have been exonerated. Challenging the same, petitioners-accused Nos. 1 and 2 are before this Court.

○ Thereafter, the case got transferred to Hebbal Police Station, who in the light of Post Mortem report sought opinion from Hon’ble Karnataka Medical Council with regard to the question who is to be made criminally accountable.

○ Hon’ble Karnataka Medical Council commenced proceedings against the following:

- (i) Dr.Badari Datta, ENT Surgeon, Bangalore Baptist Hospital – Petitioner No.1;
- (ii) Dr.Anitha Thomas, Senior Consultant and ENT Surgeon, Bangalore Baptist Hospital;
- (iii) Dr. Jayashree – Petitioner No.2, Anesthesiologist; and

Dr. Sekhar, Consultant Anesthesiologist, Bangalore Baptist Hospital.

○ After undertaking detailed procedure/proceedings, Hon’ble Karnataka Medical Council has administered ‘WARNING’ to Dr.Badari Datta and Dr. Jayashree as they have failed to conduct Pre-operative Cardiac evaluation and Pulmonary tests during Pre-Anesthetic Check-up (PAC). Other two

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13 WP 9524 of 2017 c/w 54352 of 20017, decided on 20th January, 2020, Karnataka High Court, Bengaluru.

Doctors have been exonerated And accordingly, Hon'ble Karnataka Medical Council has informed in writing to the Sub-Inspector of Police, Hebbal Police Station.

- Aggrieved by the Order passed by the Karnataka Medical Council, the Petitioners have preferred a writ petition seeking quashing of the order dated 28.06.2014 passed by the KMC as well as quashing of Criminal Proceedings in CR 184 of 2011.
- The gist of the allegations of the Complainant before KMC was that due to negligence in the treatment his son (the patient) passed away and hence initiated disciplinary action against the Petitioner. The Petitioners both in their respective Affidavits and more particularly during their cross-examination in Enq No.40 of 2012 before KMC, have clearly stated that they have not conducted Pre-Anesthetic Checkup (PAC) on the patient.
- The KMC held as under:

### **ORDER**

*Karnataka Medical Council unanimously decided to administer a "Warning" to R(1) (Dr.Badari Datta H.C. and (3) Dr. Jayashree for not carrying out pre-operative Cardiac evaluation and pulmonary function tests, since patient was a known case of MucoPolySaccharoidoses (MPS) and Bronchial Asthma. Respondents (2) Dr.Anitha Thomas and (4) Dr. Shekhar are "Exonerated".*

- The Writ Petitioners before the High Court contended that the Hon'ble Karnataka Medical Council was erroneous while finding fault with the Petitioners ***for not carrying out pre-operative Cardiac evaluation and pulmonary function tests*** which forms part of Pre-Anesthesia Checkup (PAC) which is totally outside purview of the Petitioners professional duties and specialty. Since Petitioner No.1 being the Surgeon, sent the patient for Pre-Anesthesia Checkup (PAC) by the Anesthesia Consultant. "Cardiac evaluation" forms part of "Pre-Anaestheticcheck up". The said "Pre-AnaesthesiaCheck up" was in fact conducted by Dr.Shekhar, the Respondent No. 4 in the proceedings bearing Enq. No.40/2012 before KMC along with the resident Dr.Manjunath, not being a party to the proceedings in KMC. On that particular day when such Pre-anaestheticcheck up was done, Dr.Jayashree, the 2<sup>nd</sup> Petitioner was on leave. The said Anesthesia Consultant Dr Shekhar did the Pre-Anesthesia Checkup (PAC) and accepted the patient fit for anesthesia. Petitioner No.1 has acted according to the protocol of the Hospital and was not responsible for carrying out the Pre-Anesthesia Checkup. The Petitioner No.2 was on leave that day. She has not conducted the Pre-Anaesthesia Checkup (PAC) at all and not responsible for conducting the necessary pre-operative investigations or accepting the case for surgery. She did not have any role in Pre-Anaesthetic evaluation. Hence neither the Petitioner No.1 viz., Dr.Badari Dutta nor the Petitioner No.2, Dr.Jayashree were involved in the said process of "Pre-AnaesthesiaCheck up". The said fact has been emphasized in the oral as well as documentary evidence of all concerned Doctors in the aforesaid KMC proceedings. Further, as per relevant medical reports, the ECG Report conducted during the said check up indicated "Normal", which does not indicate or warrant any kind of further cardiac evaluation. In any case, the Petitioners cannot be found fault with in the instance case as the Pre-Anaesthetic checkup falls outside the purview and specialty of 1<sup>st</sup> Petitioner and the same has been carried out by Dr.Shekhar, the Respondent No.4 and as the 2<sup>nd</sup> Petitioner being on leave cannot be fastened with any responsibility in this context. Therefore, the Petitioners are absolutely innocent in the facts of the case. However, the Hon'ble Karnataka Medical Council failed to appreciate these material facts about the conduct of "Pre-AnaesthesiaCheck up" and thus committed a grave error while passing its Order dated 28.06.2014 has erroneously issued "Warning" to the Petitioners who are

**absolutely innocent in the facts and circumstances of the case.** Therefore, the Order passed by Karnataka Medical Council is totally perverse, prejudicial and untenable and hence deserves to be set aside lest it should result in grave miscarriage of justice to the innocent Petitioners and an apparent instance of blatant violation of the pertinent principles of Natural Justice.

The High Court after considering all materials before it allowed the Petition and set aside the Order passed by the Karnataka Medical Council reasoning to the following effect:

“On close reading of the impugned order passed by the Karnataka Medical Council and on perusal of the records it appears that the role of Petitioner No.1 is concerned, he is ENT Surgeon and he has conducted surgery. But it is the contention of Karnataka Medical Council that the petitioners have failed to conduct pre-operative cardiac evaluation and pulmonary test during pre-anesthetic check-up. It is submitted by the learned counsel for the petitioners that the pre-operative cardiac evaluation and pulmonary test have been conducted on 05.01.2011 and subsequently the anesthesia was administered on 10.01.2011 and on that day the operation has been conducted. When the pre-operative cardiac evaluation and pulmonary test have been conducted earlier to the operative on 05.01.2011, then under such circumstances it appears that no role has been played by petitioner-accused No.1.

Be that as it may, it is brought to my notice that as per hospital protocol (Standards of National Accreditation Board for Hospitals and Healthcare Providers 3<sup>rd</sup> edition) once surgeon decided the surgery, patient is sent for pre-anesthesia checkup by the anesthetist who examines the patient for suitability of anesthesia, decides anesthesia plan explains risk and complications of anesthesia to patient and takes consent and order for relevant investigation needed. It is noticed from the said practice anesthesia checkup was done. During the court of submission, it is submitted that one Dr. Shekhar, Senior Anesthesia Consultant has done pre-anesthesia checkup. If that fact is taken no role has been played by petitioner and even it is not brought on record that it is petitioner who is legally do Pre-Anesthesia Checkup. In the absence of any such material passing of impugned order is nothing but a illegal and wrong order.

Be that as it may. When petitioner No.2 was not present and as she was on leave, under such circumstances how she is held liable has not been properly and correctly evaluated and passed the erroneous and unsustainable order.

Looking from any angle, the order passed by the Karnataka Medical Council appears to be without application of mind and without following the procedure laid down in accordance with law and the same is liable to be set aside.

**(b) Dr. KJ Shetty v. The State of Karnatka and another<sup>14</sup>**

○ The facts leading to this petition are that on the complaint filed by L Frank S/o D Luccas the police have registered the case in Crime No. 129/2011. After investigation the charge sheet has been filed which is registered as C.C. No. 53341/2014. The allegations are that the complainant's brother by name Denzil was admitted to Manipal Hospital as inpatient on 15.08.2011 with the history of fever and cough. On 19.08.2011 he was discharged from hospital as he was cured. After coming home the patient namely, Denzil started suffering from vomiting and diarrhea. Therefore he was again admitted to Manipal Hospital on 21.08.2011 as inpatient. On examination, the doctors opined that his two kidneys are not functioning as such, his health condition is critical.

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14 Criminal Petition No. 6618 of 2015, decided on 09th September, 2020, Karnataka High Court, Bengaluru.

- He was under treatment in ICU. Later on 28.08.2011 afternoon at about 4.25 p.m. the patient expired. Due to the negligence of the doctors the patient could not survive, thereby the petitioner has committed the offence punishable under Section 304A IPC.
- It is an admitted fact that the petitioner was working in Manipal hospital and the complainant's brother died in the said hospital while he was under treatment. The main question that arises for consideration is that whether the petitioner can be held responsible for the death of complainant's brother.
- In the light of furnished evidence and detailed arguments presented by respective Counsels, Hon'ble High Court held:
- It is not a general rule that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient of that is required to emphasize the needs of care and caution in the interest of society, for the service which the medical profession renders to human beings. Many a times complainant prefers the recourse to criminal process as a tool for pressurizing the medical professionals for extracting uncalled for or unjust compensation. Such malicious proceedings shall have to be rather against.
- In the present case on going through the averments made in the complaint this Court is of the opinion that there are no specific allegations that the petitioner doctor Mr. K J Shetty alone had treated the patient and thereby he was responsible for his death. The allegations made in the complaint, even it were held to be proved, do not make out a case of criminal rashness or negligence on the part of the petitioner. It is not the case of the complainant that the petitioner was totally careless and negligent in treating the patient and there was omission on the part of the petitioner to do something which a medical professional was required to do to save the life of the patient.
- On going through the medical papers accompanying the petition, this Court do not find any grounds of recklessness or gross negligence in order to attract the ingredient of Section 304A IPC.
- For the foregoing discussion and on the factual aspect this Court is of the view that there are no valid grounds to continue the prosecution against the petitioner.

**(c) Manipal Hospital and another v. Mr. Binayak Bhattacharjee<sup>15</sup>**

This petition is filed under Section 482 of Cr.P.C. praying this Court to set aside the impugned order dated 18.08.2020 passed by the LXXIII Additional City Civil and Sessions Court (CCH-74) Mayo Hall Unit, Bengaluru in CrI.R.P.No.25021/2019.

Relevant facts and circumstances of the case as recorded in the High Court Order are excerpted as detailed below:

“The factual matrix of the case is that the respondent had filed a private complaint before the Trial Court and the same is numbered as P.C.R.No.55291/2018. The Learned Magistrate after taking the cognizance proceeded to record the sworn statement and dismissed the complaint. Being aggrieved by the order of dismissal of the complaint, revision petition was filed before the Revisional Court, which is numbered as CrI.R.P.25021/2019. The Revisional Court after considering the material on record, set aside the order of the learned Magistrate in dismissing the complaint and restored the complaint and directed to take cognizance against the accused/petitioners herein and proceed in accordance with law. Hence, the present petition is filed.

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<sup>15</sup> Criminal Petition No. 6186 of 2020, decided on 02nd March, 2021, Karnataka High Court, Bengaluru.

The factual matrix of the case is that the complainant/respondent is a citizen of USA, who is residing in India as an Overseas Citizen of India, on his employment. The Complainant's mother was also residing with him. The petitioner No.1 is the hospital and petitioner No.2 is the doctor Shankar Kumar who gave treatment to the complainant's mother Mrs. Gouri Debi @ Gouri Bhattacharya. The Complainant had taken his mother to Manipal Hospital, petitioner No.1 herein, for treatment with a history of profuse bleeding inside her mouth, for consultation of Dr.Shankar Kumar, petitioner No.2 herein, who is doctor of internal medicine in petitioner No.1 hospital, wherein the petitioner No.2 is practicing.

The Complainant had informed the petitioner No.2 herein that his mother is suffering from anemia and GI (gastrointestinal) bleeding in anemia and she had taken treatment on previous occasion in the same hospital for bleeding and anemia, informed hypothyroidism and uncontrolled chronic hypertension, previous treatment for the same, but, the complainant had informed petitioner No.2 that his mother had no any heart problems or chest pain, chest discomfort and she never had any heart attack or stroke in the past and present.

The complainant also contended that petitioner No.2 herein failed to ascertain the exact nature of disease, from which the complainant's mother was suffering. But, by ignoring the previous and recent treatment history of the patient, the petitioner No.2 without going to the history of the patient, without proper treatment, without ascertaining the disease of the patient, had prescribed a new medicine i.e., Zyrova-C capsule that contained Rosuvastatin and blood thinner antiplatelet medication Clopidogrel, but, Clopidogrel is not recommended for patient with a history of bleeding. Without giving any treatment for controlling the blood pressure, petitioner No.2 used to give new medicine, which is not meant for disease from which the patient was suffering.

It is contended that Clopidogrel is a dangerous drug, which is meant for patient who had heart attack, stroke or coronary stent insertion. The petitioner No.2 has given wrong treatment to the complainant's mother, on account of which, the complainant's mother died. The petitioner No.2 gave treatment without ascertaining the disease which caused side effect to old age patient, when the patient was suffering from heavy bleeding in her brain and sub-arachnoid hemorrhage, which was caused on account of consumption of Clopidogrel, a wrong medicine prescribed by the doctor, petitioner No.2. Though petitioner No.2 found that the patient has uncontrolled chronic hypertension, failed to change the correct medication. The wrong treatment and consumption of wrong medicine Clopidogrel prescribed by petitioner No.2 led to rupture of aneurysm, subarachnoid hemorrhage, excessive bleeding and worst prognosis, on account of which patient went in coma for 28 days and died on 14.10.2015.

The learned Magistrate after receiving the complaint, recorded the sworn statement and passed the order dated 03.11.2018 dismissing the complaint. While dismissing the complaint, the learned Magistrate has given the reason that the complainant has produced medical certificate of cause of death, which is marked as Ex.C.2 issued by the Institute of Neurosciences, Kolkata. The certificate discloses the cause of death as natural and the age of the mother is mentioned as 81 years. On perusal of the materials available on record, same are not sufficient to hold that due to wrong medication the mother of the complainant passed away and as such medical certificate for cause of death discloses the death of mother of the complainant is natural.

Being aggrieved by the order of the learned Magistrate, the revision petition is filed and the Revisional Court vide order dated 18.08.2020, reversed the findings of the learned Magistrate. While reversing the order of the learned Magistrate, the Revisional Court has observed that it is not in dispute that the deceased was not suffering from any chest pain, heart attack or stroke and the complaint clearly

discloses that she was having bleeding in the mouth. It is further observed that petitioner No.2 herein has given Zyrova-C and Clopidogrel to the patient, which was not required for the treatment of the deceased. The Revisional Court also came to a conclusion that these materials are sufficient to take cognizance of medical negligence against petitioner No.2 and it requires a full fledged trial. A doctor or other medical practitioner, has a duty of care in deciding whether to undertake the case or not, duty in deciding what treatment to give, duty of care in administration of that treatment, duty not to undertake any procedure beyond his or her control and it is expected that the practitioner will bring reasonable degree of skill and knowledge and will exercise a reasonable degree of care. Hence, the order requires to be interfered and to set aside the order and direct to take cognizance and to proceed in accordance with law.

After a detailed analysis of the furnished evidence and arguments of respective Counsels, Hon'ble High Court held that, it is not in dispute that the patient was treated as out patient for the above period and no material is placed before the Court with regard to cardiology evaluation for assessing AS and possibility of anemia due to critical AS. It is the contention of the learned counsel for the petitioners that the patient was taken to the cardiologist without the knowledge to the petitioners. Hence, it is clear that when the patient was taken to the hospital for the third time, the doctor also suspected and advised for cardiology evaluation. The very contention of the learned counsel for the respondent that she was not having cardiac problem, cannot be accepted. On perusal of the diagnosis, it was suspected chronic anemia and cardiology evaluation was also advised. When such being the case, the tablet Zyrova-C was continued. When petitioner No.2 advised Zyrova-C suspecting cardiac problem, the very contention of the respondent cannot be accepted.

It is also important to note that the learned Magistrate while dismissing the complaint referred the document Ex.C.2, wherein the report was given that the death was natural and the patient was 81 years old. In order to take the cognizance, there must be material before the Court. For the offence of criminal liability for negligence, there must be a substance before the Court. In the absence of documentary proof, criminal prosecution cannot be continued. No doubt, the Revisional Court comes to a conclusion that the tablet Zyrova-C and Clopidogrel ought not to have been provided to the patient. The Revisional Court did not discuss the out patient record dated 30.05.2015, 27.06.2015 and particularly the report dated 27.07.2015, wherein cardiology problem was suspected and advised to rule out blood loss in view of occult blood positive test earlier in the past. Without examining these documents, the Revisional Court reversed the findings of the Trial Court. It is important to note that the Revisional Court directed the learned Magistrate to take cognizance and on entire reading of the order, nowhere discussed the penal provisions to be invoked. In the complaint also no specific penal provision is invoked. The Revisional Court also failed to take note of the penal provisions and only formed an opinion that materials are sufficient to take cognizance of medical negligence against the petitioners. In order to come to a conclusion of criminal rashness or criminal negligence, there must be material before the Court. In the absence of the material, the Revisional Court ought not to have directed the learned Magistrate to take the cognizance for criminal negligence.

The Apex Court in the judgment in the case of Jacob Mathew (supra) issued the guidelines for prosecuting of the doctors for offences of which criminal rashness or criminal negligence is an ingredient. It is further observed that a private complainant may not be entertained unless the complainant has produced prima facie evidence before the Court in a form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The Investigating Officer should, before proceeding against the doctor accused of rash or negligent act or



omission, obtain an independent and competent medical opinion preferably from a doctor in Government service qualified in the branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test laid down in (1957) 1 WLR 582, 586 to the facts collected in the investigation.

Having perused the principles laid down in the judgment referred supra and considering the material on record, first of all there is no prima facie material before the Court that the death was caused due to wrong medication and no documents are produced before the Court for criminal prosecution that the prescription of the said tablet Zyrova-C itself leads to death. It is also not in dispute that the patient was treated as out patient. The patient went to the hospital for treatment i.e. throat irritation, weakness and shoulder pain and the doctor suspected cardiac problem and advised for cardiology evaluation since the occult blood was found. When such being the facts and circumstances, the Revisional Court has committed an error in reversing the finding of the Trial Court. Apart from that, in the complaint also no specific penal provision is invoked to prosecute petitioner No.2. The Revisional Court has also not discussed anything about which provision applies for continuing the criminal proceedings, except directing the learned Magistrate to take cognizance. Both the courts failed to note that no penal provision is invoked against the petitioners. The learned Magistrate having perused the documents, particularly Ex.C.2, comes to a conclusion that no material to continue the criminal prosecution against petitioner No.2 herein. The Medical Council of India report and the KMC report also not against the petitioners. When such being the case, the Revisional Court has committed an error in reversing the finding of the learned Magistrate and directing to take cognizance. At the most, it is a civil negligence and not a case for criminal negligence in view of the judgment of the Apex Court in the case of Jacob Mathew (supra) and the guidelines laid down in the said judgment are aptly applicable to the case on hand. There must be a criminal culpability to proceed against the doctor who gave the treatment. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis of prosecution. Criminal prosecution is a serious matter. But in the case on hand, the doctor treated the patient, that too three months prior to the death as out patient and not as an in patient.

## V. Summation and recommendations

Undeniably Supreme Court's mandated protocol renders transparency and objectivity which is a deserving need when it comes to the subject matter of criminal prosecution of doctors. However, such guidance would be purposeful only when it is practiced in its letter and spirit. Recent pronouncements of various Hon'ble High Courts while allowing petitioners under S. 482, Cr.P.C clearly reveals non-observance of this protocol in several instances.

How to make the protocol purposeful in nature? No doubt, this kind of challenge is faced in several respects in criminal justice enforcement in this Country.

Following recommendations are made in the light of our experience and whatever we learnt from practice:

1. In every State/Union Territory, the State level Police Authorities need to generate a Standard Operating Protocol (SOP) with clear inputs pertaining to the procedure to be adopted in the light of Supreme Court's guidelines;

2. Such State Police Authorities must ensure strict adherence to such SOP in every district and Class II/Class III tier cities pertaining to this subject matter;
3. Similarly, concerned police authorities in consultation with Registered Medical officers and through their respective professional associations must disseminate about this SOP to the Public in general through media and other popular channels;
4. Periodic and regular training and capacity building programmes need to be organized for different levels of Police cadre;
5. The concerned High Courts must undertake appropriately structured training programmes for District and Taluka level Judicial Officers with a view to disseminate the Supreme Court's mandated protocol;
6. Further, such State and District level police authorities need to coordinate with various doctors in Government Hospitals and members of State Medical Council to sensitize them about their role and responsibilities whenever they seek medical opinion prior to initiating criminal prosecution of doctors and
7. To create and establish a helpline for the benefit of public and medical doctors.
8. Hopefully by adopting above recommendations, the Supreme Court's mandated protocol will become purposeful in the days to come.