ORIGINAL RESEARCH PAPER

Volume-7 | Issue-1 | January-2018 | PRINT ISSN No 2277 - 8179

INTERNATIONAL JOURNAL OF SCIENTIFIC RESEARCH

VICARIOUS LIABILITY IN HEALTHCARE: A MEDICO LEGAL VIEW

Medicine

Dr Madhav Madhusudan Singh Assistant Registrar , Military Hospital , Meerut , UP

Dr Rajiv K Agarwal* MOHS , Military Hospital , Shimla , HP , *Corresponding author.

Dr Pranav Choudhary St. Philomena's Hospital , Bangaluru

ABSTRACT

Right to health and safety is perhaps one of the most fundamental needs of a human being and this need is unerringly recognized by our constitution in its Art. 21 Right to Life. Doctors, Hospitals, Nursing Homes and Poly-Clinics are all liable to provide treatment to the best of their capacity. And whenever a hospital fails to fulfill this responsibility, the institution may be held liable for causing damage to its patients. They can be vicariously as well as directly liable for providing health care facilities.

KEYWORDS

Vicarious liability , healthcare.

Introduction

According to *Black"s Law Dictionary*, "vicarious liability" is "the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between the two persons; indirect or imputed legal responsibility for the acts of another; for example, the liability of an employer for the acts of an employee, or, a principal for the torts or actions of an agent.

In the case of *Maneka Gandhi v. Union of India*[1] , the Supreme Court made it mandatory for states to provide to a person all rights essential for the enjoyment of the right to life in its various perspectives.

Apart from the doctor who has been negligent, the hospital that retained the doctor on its staff can also be held vicariously liable for the doctor's negligence under a theory of "*respondeat superior*."

Respondeat superior, means "let the master answer," is a legal principle that holds an employer liable for the negligence of its employees in certain circumstances.[2]

Explaining the liability of the hospital, in one of the judgment, the court said that 'whenever the hospital authorities accept a patient for treatment they must use reasonable care and skill to cure him of his ailment.

The hospital authorities could not, of course, do it by themselves; they have no ears to listen through the stethoscope and no hand to hold the surgeon's knife.

They must do it by the staff which they employ, and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else, who employs others to do his duties for him.'

Doctrine of vicarious liability

Doctrine of vicarious liability is not applicable to criminal liability. If a senior anaesthesiologist delegates his task to his junior, nursing staff or to any doctor, then for their wrongdoings, the senior anaesthesiologist is responsible. The hospital has vicarious liability for the whole staff, nurses, doctors, anaesthetists and surgeons. It does not matter whether they are permanent, temporary, resident or visiting, full time or part time. The only exception is the case of the consultants selected and employed by the patient himself.

The hospital may be held directly responsible for faulty premises, equipments, inadequate or unqualified staff or other organisational errors, and also, the anaesthesiologist and surgeon. The only exception may be where the consultants use the premises only for their consultation. The hospital is liable for the negligence of the surgeon and it is no more a defence to say that the surgeon is not a servant employed by the hospital. Hospital is liable to the patient for the injury caused to him/her by the negligence of the surgeons, nurses, anaesthesiologist and the members of the hospital in the course of their work. If the staff of the hospital administered wrong injection supplied by the hospital pharmacist without properly reading the prescription, the hospital is held liable for the negligence of its pharmacist and the staff[3].

The principle of vicarious liability is based on a latin maxim "*qui facit per alium facit per se*" which describes that the one who acts through another act in his or her own interest. The patient only requires diligent and proper care, if any of the staff of the hospital is negligent in the performance of their prescribed work, the hospital will be held liable on the negligent conduct of even borrowed doctors for specific performance of certain operations. This principle was established in the case of *Aparna Dutt .V. Apollo Hospital Enterprises Ltd*[4].

Establishing vicarious liability

A plaintiff claiming compensation for vicarious liability bears the burden of proving not only that the physician was an agent, servant, or employee of the entity but also that the physician was acting in the course and scope of his or her employment at the time of the alleged malpractice.

Most vicarious liability disputes, however, are decided based on the more fundamental question of whether the physician was an agent, servant, or employee of the principal and, thus, subject to its direction and control. The answer depends on the facts of each case, as well as on the law of the controlling jurisdiction.

EMPLOYER –EMPLOYEE RELATION

To determine whether the principal had the right to control the physician's activities, the courts examine a number of factors, which may include the following:

- What are the terms of the contract between the physician and the principal?
- Does the principal provide the physician with a salary and benefits, which are commonly provided in an employer-employee relationship?
- Does the healthcare entity handle and collect the physician's patient billings through its system and in its name, with the power to determine the physician rates charged?
- Are the equipment, supplies, and/or support staff utilized by the physician supplied by the entity?

Importance cases & Judgement in a case of Vicarious Liability

The Supreme Court of India in Spring Meadows Hospital Vs Harjot

Ahluwalia through K.S. Ahluwalia [5] held the hospital liable to pay compensation for the negligence of its attending doctor who allowed unqualified nurse to give intravenous injection to the patient against the advice of the consultant doctor and thereby contributed to the irreparable brain damage of the minor patient. In A.M. *Mathew Vs. Director, Karuna Hospital*[6] the State Commission directed the hospital to pay compensation to the father of the minor patient suffering from partial disability of the left leg on account of negligence of the unqualified nurse of the hospital in administering injection on the left bullock. In *Ranjit kumar Das Vs. Medical Officer, ESI Hospital*[7] the hospital was directed to pay compensation for not giving timely medical treatment to the patient and for refusal to admit the patient of acute pain in abdomen due to non-availability of bed[8].

In Sharifabi I. Syed Vs Bombay Hospital and Medical Research Centre[9], the hospital was vicariously held liable to pay compensation for suffering of the patient due to wrong report of MRI.

Dr. P. Narasimharao V/s Gundamarappa[10] Patient underwent tonsillectomy and there was a delay on the part of the anaesthesiologist in noticing respiratory arrest which led to cardiac arrest and subsequently hypoxic brain damage occurred. AP High Court held that both surgeon and anaesthesiologist were negligent and passed a decree in favor of the plaintiff.

A paediatric surgeon operated on a child for hernia. Both the legs of the child were burnt by keeping extremely hot water bags during the operation. Here, the anaesthesiologist and surgeon and hospital were held vicariously liable[3].

Smt. *Rekha Gupta Vs. Bombay Hospital Trust & Another*[11] a patient of pulmonary tuberculosis undergoes kidney transplantation, thereafter the right forearm develops heavy swelling which is known as "compartmental comprehension gangrene" leading to his death. Denying the liability for the negligence of the surgeon, the hospital argues that the opposite party-hospital provides infrastructure facilities, services of nursing staff, supporting staff and technicians and it cannot suo motu perform or recommend any operation. The hospital pays fees collected from the patient to the consultant with deducting of 20% as commission and it has no direct control over the consultant, as such it cannot own the responsibility for the negligent of the consultant. The State Commission observed that the hospital is vicariously liable for any negligence on the part of the consultant[12].

It cannot escape liability by mere statement that it only provided infrastructural facilities. Whatever be the outcome of the case, hospital cannot disown their responsibility on these superficial grounds.

The hospital authorities are usually held liable for the negligence occurring at the level of any of their personnel. The primary responsibility of the Hospital authorities is to see that there is no negligence on its part or on the part of its officers.

In the case of Ms Neha Kumari and Anr. V Apollo Hospital and Ors[13], the National Commission held that alleged medical negligence is not proved as the complainant suffered from complex birth defects of the spine and whole body as evidenced by a pre-operative CT scan. Two complaints were filed claiming a compensation of Rs. 26,90,000 alleging that while performing an operation on the spinal canal, a rod was fitted inappropriately at the wrong level that resulted in the non functioning of the lower limbs. The Hon'ble commission held that, we do not find it is a case of medical negligence as alleged.

However, on the question of vicarious liability of the hospital for negligence on the part of the consultants, the Hon'ble Commission relying on the judgment in Basant Seth V Regency Hospital[14] and rejected the contention of the hospital and held that the hospital is vicariously liable for any wrong claiming on the part of consultants.

The Kerala High Court in *Joseph @ Pappachan* v. *Dr. George Moonjerly*[15], stated that „persons who run hospital 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; and if their staffs are negligent in giving treatment, they are just as liable for that negligence as anyone else who employs other to do his duties for him.

In *Ranjit kumar Das v. Medical Officer,ESI Hospital* [16] the hospital was directed to pay compensation for not giving timely medical treatment to the patient and for refusal to admit the patient of acute pain in abdomen due to non-availability of bed.

In another judgment by the Madras High Court in *Aparna Dutta* v. *Apollo Hospitals Enterprises Ltd.*[17] it was held that it was the hospital that was offering the medical services.

In *State of Rajasthan v. Vidyavati*[18], the Supreme Court observed that the State is vicariously liable for the tortious acts of its servants or agents which are not committed in the exercise of its sovereign functions.

The Honorable Supreme Court in *Achutrao & ors* v. *State of Maharashtra & Ors*[19] has observed that running a hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be regarded as being in exercise of its sovereign power. Hence, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees.

In another case of *Rajmal* v *State of Rajasthan*[20], where the patient died of neurogenic shock following laparoscopic tubal ligation done at a primary health centre, an enquiry committee found that the doctor was not negligent in conducting the operation, it was lack of adequate resuscitative facilities and trained staff that was held responsible for the death and the State Government was held vicariously liable and was directed to pay compensation to the husband of the deceased.

A doctor working in a government hospital is performing the duty while he/ she was under the employment of the State and in these circumstances, the master is always responsible for the vicarious liability of the acts committed by the employee in the course of such employment.

In the case of *Paschim Bangal Khet Mazdoor Samity & Ors* v. *State of West Bengal* [21] the Honorable Supreme Court held that providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state Thus the principle of law which emerges here is the Union of India and States are liable for damages occasioned by the negligence of employees serving / employed in the services of the Government Hospital as if law would render an ordinary employer liable.[22]

Improper maintenance of cleanliness and/or unhygienic condition of hospital premises amounts to negligence. In Mr. M Ramesh Reddy v. State of Andhra Pradesh[23] the hospital authorities were held to be negligent, inter alia, for not keeping the bathroom clean [in this case the bathroom was covered with fungus and was slippery], which resulted in the fall of an obstetrics patient in the bathroom leading to her death. A compensation of Rs. 1 Lac was awarded against the hospital.

In one judgment of the Kerala High Court in Joseph @Pappachan v. Dr. George Moonjerly[24] in support of the following effect stated that 'persons who run hospital 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

Approaches in case of vicarious liability

Hospitals, like other corporations, sometimes seek to defend against claims of respondeat superior liability on the grounds that the tortfeasor was an independent contractor, rather than an employee. In such situations, the most important factor in determining whether a worker qualifies as an employee is the alleged employer's right to control the acts of the purported employee. In making this determination, courts have considered the following factors:

(1) Whether the employer maintains control over the type and method of work performed;
(2) Whether the employer furnishes the necessary tools and equipment to perform the work;
(3) Whether the employer pays maintains control over the hours worked; and
(4) Whether the employer has the right to terminate the employer-employee relationship without liability.

Defenses to Vicarious Liability

Employers facing vicarious liability suits often defend themselves by trying to prove that their employees weren't acting within the scope of employment. Since employers aren't liable for the negligence of independent contractors, an employer may also argue that the employee wasn't really an employee at all. For example, a hospital may emphasize the limited role it plays in supervising its doctors' work and show evidence of the doctor's staff privileges.

Grievance Redressal Mechanisms

Mechanisms at the national level

As it has already been observed, the Government of India has enacted various legislations for the purpose of regulate medical professional education, practitioners and their code of conduct, viz, the Medical Council of India, 1956, the Dentist Act 1948, the Nursing Council 1947, Indian Medicine Central Council Act 1970, State Medical Council Acts. Any person who feels aggrieved by the act of the practitioner may lodge a complaint before the concerned medical council in which register, the practitioner has been enrolled as qualified professional. Beside this, the similar complaint can be referred to the Secretary, Ministry of Health and Family Welfare, with a request to take appropriate action against the concerned practitioner for contravening the code of ethics and the provisions of the statute. The Council and Ministry of Health and Family Welfare are empowered to regulate the conduct of health professionals.

Mechanism at the state level:

Under the state legislation, any aggrieved person can make a complaint to the State Council or to the secretary, Ministry of Health and Family Welfare. The disciplinary committee constituted by the State Council looks into the complaint and recommends the necessary action to be taken against the accused-practitioner. The Council in collaboration with the Secretary, Ministry of Health and Family Welfare may launch prosecution against those persons who are practicing medicine without possessing recognized medical qualifications.

Mechanism at the district level

Although a complaint can be filed before the Chief Medical Officer of the concerned district, it is always beneficial to approach the state council for legal action. It is the primary responsibility of the District Magistrate and Chief Medical Officer to trace and initiate criminal action against the quake medical practitioners. However, there is lackadaisical attitude on the part of the chief medical officer in preventing unauthorized practitioners. It has become a common sight in the district where unqualified and unregistered medical practitioners are playing with the health and life of the innocent people.

Prosecution of doctors

Procedure In the case of death of a patient due to the rash or negligent act of the medical man, the legal representatives of the deceased may lodge information with the SHO of the police station for registration of the First Information Report (FIR). The code does not prescribe a particular format for giving information to the police. The information may be given to the police either by word of mouth or in writing. If it is oral, it shall be the duty of the SHO to reduce the information into writing in the language known to the informant. There should not be any inordinate delay in lodging the information. If there is any delay the reasons for the delay should be explained. The informant is entitled to get a copy of the FIR at free of cost. If the SMO refuses do register the information, the aggrieved may send to the same information to the Superintendent of Police concerned, who on his satisfaction that such information discloses the commission of an offence, shall investigate the case himself or direct information to be made by any police of five subordinate to him .

The person aggrieved may also lodge a private complaint under section 200 of the Cr. P.C before a Magistrate. However, a private complaint cannot 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. After taking/recording the statement of witnesses and hearing the prosecution and the accused, the court passes the order of conviction or acquittal of the case. A complaint may be lodged with the Executive Magistrate under sections 133 to 135 of the code against 'quacks' or persons practicing unauthorizedly in any area on the ground of threat to the lives of the public.

Defense of Medical Profession

In defense of medical profession Supreme court in *Kusum Sharma & Ors vs. Batra Hospital and Medical Research case* held that the law of negligence has to be applied according to facts and circumstances of individual case. No one can ignore that medicine is an evolving science, and there is no precise outcome of effect for every person. The operations involve certain calculated risk which cannot be denied because of complication in the operation if some risk is done, the doctors cannot be held liable for negligence as the patient himself has consented to the risk involved in the operation.

In another case of *Jacob Mathew .V. State of Punjab,* the Supreme Court held that in some cases of medical profession the doctors are equipped in certain situation where they have to make choices between a devil and the deep sea. Sometimes in certain situation there must be greater risk in the operation but higher chances of success and in another move there would be lesser risk but higher chances of failure. So the decision, that which course would be follow will depend on facts and circumstances of case.

In this era of deteriorating doctor patient relationship, the legal cases are going to increase. If you wish to avoid such situation, *attend* all patients personally and carefully.

***Behave* humanely;** avoid rough, rude or inhuman behavior with the patients or their relatives.

Communicate with the patient and take proper *consent* after explaining the condition.

Documents related to a particular case should be maintained properly. Be *efficient* and have proper *expert* opinion especially in serious illnesses.

***Finances* and bills** should be properly explained and informed at the time of admission or even before admission. Always give *guarded prognosis* especially in diseases known to have high mortality or morbidity.

H*ospital staff* should be properly trained and adequately experienced. ***Insurance* and *indemnity*** schemes should be availed whenever possible and available.

***Junior staff* and locums** should be qualified and starting of group practice is a better option in this era.

Keep *knowledge* updated and *latest instruments* should be available, if possible.

Creation of *medico legal cells* and *Medical organizations* may be helpful in setting the grievances before going for legal action.

No manipulations should be done in patients records. A second *opinion* should be taken in serious and complicated cases [25].

CONCLUSION

Hospitals & doctors in India may be held liable for their services individually or vicariously.

They can be charged with negligence and sued either in criminal/ civil courts or Consumer Courts. The hospital has both a vicarious as well as an inherent duty of care (corporate obligation) to its patients.

The complex legal relationship between hospitals, doctors and paramedical staff leads to issues, which the courts find difficult to resolve. Even though the matter of medical negligence and the liability of hospitals are dealt under Indian Penal Code , 1860 , Law of Torts and the Consumer Protection Act, 1986, there is a need for a separate legislation to deal with such complex issues exclusively.

Further there is an ever increasing need to impart education and awareness in the general public regarding these matters and the state and other local authorities need to take measures to effectuate the same.

References

1. AIR 1978 S C 597.
2. A Gowri Nair & Nikhila P.P., Imposing Vicarious Liability On Hospitals: How Far Is It Possible? Centre for consumer protection Law and policy, NUALS , p 57-59.
3. Shivakumar Kumbar , Vicarious liability – Medicolegal status of anaesthesiologist, Indian Journal of Anaesthesia | Vol. 54| Issue 2 | Mar-Apr 2010, http://www.ijaweb.org

on Sunday, October 16, 2016, IP: 120.59.162.200
4. 2002 ACJ 954 (Mad. HC)
5. M/S. Spring Meadows Hospital & Anr vs Harjol Ahluwalia, CIVIL APPEAL NO. 7858 OF 1997, https://indiankanoon.org/doc/1715546/ October 16, 2016
6. (1998) 1 CPR 39 (Ker).
7. (1998) 1 CPR 165 (Cal)
8. In Sharifabi I. Syed Vs Bombay Hospital and Medical Research Centre 1998 CCJ 1106 (Mah)
9. [1990(1) ACJ350AIR 1990 AP 207].
10. [1991(1) ACJ352AIR 1990 AP 208].
11. [2003) 2 CPJ 160 (NC).
12. [2003) CPJ 145 (AC)
13. Narasimha Reddy and Ors. Vs. Rohini Hospital and Anr (2006) CPJ144 (NC)
14. State of Haryana and Ors. Vs. Raj Rani IV (2005) CPJ28 (SC)
15. [1994 (1) KLJ 782 (Ker. HC)]
16. 1998) 1 CPR 165 (Cal)
17. [2002 ACJ 954 (Mad. HC)],
18. AIR 1962 SC 933.
19. [JT 1996(2) SC 664], Smt. Santra v. State of Haryana & Ors, [(2005) 5 SCC 182]
20. AIR 1996 Raj. HC 80
21. [1996 (4) SC 260],
22. Agarwal& Agarwal, " medical negligence & hospital's responsibility" journal of Indian Academy of Forensic Medicine.,
23. [2003 (1) CLD 81 (AP SCDRC)],
24. [1994 (1) KLJ782 (Ker. HC)],
25. Satish Tiwari, Legal Aspects in Medical Practice, Indian Pediatrics 2000;37: 961-966.