CENTRE FOR CONSUMER PROTECTION LAW AND POLICY, NUALS

COMPENDIUM OF PAPERS

One Day National Seminar on
Shifting Frontiers of Law of Medical Negligence in Consumer Protection Law
14/10/2014

A Peer-Reviewed Publication of

The Centre for Consumer Protection Law and Policy

NATIONAL UNIVERSITY OF ADVANCED LEGAL STUDIES,

Kochi – 683503, India

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The views and opinions expressed in this compendium are strictly those of the authors. Every effort has been taken to ensure that no mistakes or errors creep into this peer reviewed compendium of articles. Discrepancies, if any, are inadvertent.

1. Determination of Damages in Medical Negligence Cases: An Overview

Dr. Aneesh V. Pillai[1]

ABSTRACT

Medical professionals are treated as next to God. They provide humanitarian services and gives solace to individuals suffering from various diseases and disorders. Due to their great service to humanity, the doctors and medical professionals are treated with reverence and since the ancient times the medical profession has been considered as a noble profession. However with the passage of time, there has been a change in the doctor – patient relationship. During the last few decades a number of incidents have come to light in which the patients have suffered due to the error and inadvertent conduct of doctors. Due to the increasing conflicts and legal disputes between the doctors and patients, most of the legal systems have developed various rules and principles to deal with such inadvertent behavior of doctors. This has led to the development of a new branch of jurisprudence, i.e. medical negligence. Hence, any negligence on part of the medical professional would be treated as either a tort of negligence or a deficiency in service under Consumer Protection Act, 1986.

In medical negligence cases either under tort of negligence or under Consumer Protection Act, 1986, the remedy is mainly damages. Generally assessing damages in case of negligence is an easy task. However assessing damages for the pain and other mental suffering is a herculean task. Generally, in medical negligence case there is an involvement of pain and mental suffering. The damages are assessed on the ground of loss suffered by the patient. Hence in every medical negligence case the patient is bound to prove the loss suffered by him due to the negligence of the defendant. It is to be noted that, under deficiency in medical service case a patient is not required to prove the loss. Thus in such cases assessing proper damages is not an easy task for consumer protection forums.

The Supreme Court of India in a number of cases observed that, different courts and tribunals in the country after exercising judicial discretion in determining the amount of compensation in an

[1] **LL.M., Ph.D, SET, Assistant Professor, School of Legal Studies, Cochin University of Science and Technology, Kerala.**

inconsistent manner, which led to uncertainty and unpredictability, causing anxiety to the claimants and also leaving room for arbitrariness. The Court also emphasized about the need for a framework to identify just, fair, and adequate compensation in case of medical mishaps. Hence there is a need to have an appropriate framework and clear-cut rules to assess compensation in medical negligence cases. This paper examines the different methods of assessing compensation such as lump sum compensation; just and fair compensation and; multiplier method. It also tries to identify the problems involved in these methods of assessing damages and tries to propose a better framework for assessing damages in such cases.

INTRODUCTION

In medical negligence cases either under tort of negligence or under Consumer Protection Act, 1986, the remedy is mainly damages. Generally assessing damages in case of negligence is an easy task. However assessing damages for the pain and other mental suffering is a herculean task. Generally, in medical negligence case there is an involvement of pain and mental suffering. The damages are assessed on the ground of loss suffered by the patient. Hence in every medical negligence case the patient is bound to prove the loss suffered by him due to the negligence of the defendant. It is to be noted that, under deficiency in medical service case a patient is not required to prove the loss. Thus in such cases assessing proper damages is not an easy task for consumer protection forums.

The Supreme Court of India in a number of cases observed that, different courts and tribunals in the country after exercising judicial discretion in determining the amount of compensation in an inconsistent manner, which led to uncertainty and unpredictability, causing anxiety to the claimants and also leaving room for arbitrariness[2]. The Court also emphasized about the need for a framework to identify just, fair, and adequate compensation in case of medical mishaps. Hence there is a need to have an appropriate framework and clear-cut rules to assess compensation in medical negligence cases. This paper seeks to examine the different methods available for assessing damages in medical negligence cases. It also tries to identify the problems involved in various methods of assessing damages and tries to propose a better framework for assessing damages in such cases.

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[2] *Sarla Verma and Others* v. *Delhi Transport Corporation and Another;* (2009) 6 SCC 121.

DAMAGES IN MEDICAL NEGLIGENCE:

Negligence in the medical field is not different in law from negligence in any other field. Thus law makes no distinction between negligence in the medical field and negligence in any other field[3]. The breach of a duty towards a patient by a medical professional gives the patient a right to damages to compensate the losses which are the result of such breach. This right to damages is an exclusive right in every negligence case; sometimes it can be exercised in conjunction with other remedies. Damages place a monetary value on the harm done; following the principle of *restitution in integrum*. The Latin phrase means restoration to the original condition[4]. The need and importance of awarding damages in medical negligence case is beautifully summarized by Indian Supreme Court in the following words: "A patient who has been injured by an act of medical negligence has suffered in a way which is recognized by the law - and by the public at large as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident.[5]"

The damages suffered by patient in most of the medical negligence case can be classified into two main categories: Economic or Pecuniary Loss and Non-Economic or Non –Pecuniary Loss. The Pecuniary loss is the damage that is capable of being directly calculated in money terms. For example, the loss of earnings, both actual and future, medical expenses, travelling expenses, and the cost of special equipments etc. Non pecuniary losses are immeasurable matters such as pain

[3] Dr. Aneesh V. Pillai, *Protection to Medical Professionals vis-à-vis Patients Interest: A Comment on Kusum Sharma & Ors v. Batra Hospital & Ors*., 4 LEGAL NEWS & VIEWS, Vol. 28, 7 – 10 (2014).

[4] Chibwe, Fanwell. F., *Damages in Negligence Cases in Zambia*, a Research Essay submitted to the University of Zambia Law Faculty in Partial Fulfillment of the Requirements for the Award of the Bachelor of Law Degree, 2010, (5th Oct. 2014) http://dspace.unza.zm:8080//bitstream/handle/123456789/2274/ChibweD0001.PDF?sequence=1.

[5] *Indian Medical Association* v. *V.P. Shanta and Ors*. III (1995) CPJ I (SC); Pandit M S, & Pandit S. *Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - A Legal Perspective*, 25 INDIAN J UROL 372 -378 (2009). (5th Oct. 2014) http://www.indianjurol.com/temp/IndianJUrol253372-1779599_045635.pdf

and suffering which means discomfort and physical pain, but also emotional distress, anxiety, and stress that is linked to the injuries and loss of amenity attributable to such injury[6].

Pain and suffering, loss of pleasure, a shortened life, dismemberment, disfigurement and the like are clearly injuries. They are harms that nearly everyone would prefer to avoid. Indeed, if offered the choice, people would opt to pay money to avoid suffering these injuries rather than suffer them. In fact, to avoid some grievous harms people would be willing to give up all or nearly all of what material wealth they have. Therefore, when patients are involuntarily subjected to these sorts of injuries, they feel aggrieved. In a world where money can often be used to buy pleasure or relief from pain, and where having money is typically associated with status and power, victims can claim compensation for their injuries[7]. Thus non-pecuniary damages in medical negligence cases are generally reddressable by an action for un-liquidated damages. The non-pecuniary damages also cover the damages for 'loss of consortium'.

The 'loss of consortium' generally means all losses suffered as a result of decreased or limited sexual activity between spouses[8]. Loss of consortium damages seeks to compensate the non-injured spouse for the injury's effects on previously existing spousal functions. Thus a plaintiff can claim damages for the following: Deprivation of Companionship; Emotional support; Sexual relations; Affection; Services like household chores, caring for small children, etc; The award of compensation for loss of consortium is left to the discretion of the judge in medical negligence cases[9]. It is generally argued that, the damages for loss of consortium should be awarded in all cases involving a spouse who has died or who has been a victim of medical negligence and thereby prevented from functioning normally[10].

The Supreme Court of India also recognized the importance of damages for loss of consortium in the case of *Rajesh & Ors.* v. *Rajvir Singh and Ors.*[3] The Apex Court observed that, "The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of

[6] MICHAEL A. JONES, TEXTBOOK ON TORTS, (7th ed. 2000)
[7] Stephen D. Sugarman, *Tort Damages for Non-economic Losses (in cases of physical injury to the person),* (5th Oct. 2014) http://www.law.berkeley.edu/files/journals/Sugarman_Non_economic_loss_ReformattedFinal.pdf
[8] James A. Comodeca and Amanda N. McFarland, *Recovery Of Non-pecuniary Damages in Mass Tort Actions in Kentucky: A Defense Perspective*, 35 (2) NORTHERN KENTUCKY LAW REVIEW 198- 238 (2008).
[9] Joellen Lind, Valuing Relationships: The Role of Damages For Loss of Society, 35 NEW MEXICO LAW REVIEW 301-336 (2005)
[10] See generally, Carpenter, Zuckerman and Rowley, LLP, *Damages Arising Out of Loss of Consortium*, (5th Oct. 2014) http://www.czrlaw.com/damages-arising-out-of-loss-of-consortium/

compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head.[11]"

METHODS OF ASSESSING COMPENSATION

The main principles of the law on compensation for injuries were worked out in the 19th century in England, when railway accidents were becoming common[12]. Lord Blackburn in *Livingstone* v. *Rawyards Coal Co*[13]. case observed that: 'where any injury is to be compensated by damages in settling the sum of money to be given…you should as nearly as possible get the sum of money which will put the person who has been injured…in the same position as he would have been in if he had not sustained the wrong'[14]. Thus the fundamental principle applied for the assessment of damages is that the claimant should be fully compensated for his loss. He is entitled to be restored to the position that he would have been in, had the tort not been committed, insofar as this can be done by the payment of money[15].

The Indian Consumer Forums and judiciary also follow the principle of restoring the patient to his original position while awarding the compensation. In *Charan Singh* v. *Healing Touch Hospital*[16], the Supreme Court of India opined that, 'the quantum of compensation is at the discretion of the Consumer Forum irrespective of the claim. The legislative intent behind the Act is to provide speedy summary trial and the Commission should have taken the complaint to its logical conclusion by asking the parties to adduce evidence and rendered its findings on merits. The Court further held, 'While quantifying damages, Consumer Forums are required to make an

[11] Rohit K. Gupta & Vijaya Singh, *India: Medical Negligence - Legal Aspect in India*, (5th Oct. 2014) http://www.mondaq.com/india/x/320666/Civil+Law/Medical+NegligenceLegal+Aspect+In+India
[12] *Supra* n. 4.
[13] (1869) 21 L.T. 326.
[14] *Supra* n. 4.
[15] Hakeem Ogunniran, *Awarding Exemplary Damages in Tort Cases: The Dilemma of Nigerian Courts*, 36 (2) JOURNAL OF AFRICAN LAW, 111-131 (1992).
[16] (2000) 7 SCC 668

attempt to serve the ends of justice so that compensation is awarded, in an established case, which not only serves the purpose of re-compensating the individual, but which also at the same time aims to bring about a qualitative change in the attitude of the service provider. It is not merely the alleged harm or mental pain, agony or physical discomfort, loss of salary and emoluments etc. suffered by the claimant. It is also the quality of conduct committed by the Respondents upon which attention is required to be founded in a case of proven negligence[17].

Further, in *M.S. Grewal* v. *Deep Chand Sood*[18] the Supreme Court held that there can be no exact uniform rule for measuring the value of the human life and measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. In assessing damages, the court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable.

The calculation of pecuniary loss is somewhat an easy task for the Court. But in cases of non-pecuniary loss, different legal systems all over the world use varying methods for its calculation. In United States of America, there is a legal ceiling or cap on the award of pain and suffering damages and that sum. For example, in State of Maryland, non-economic damages are capped at $350,000 and in Wisconsin, non-economic damages for medical malpractice are capped at $750,000[19], etc.

Likewise, in England the "Guidelines for the Assessment of General Damages in Personal Injury Cases" provides information on the sum can be awarded for non-economic loss (pain and suffering damages) and organized them in terms of differing types of injuries. Each new edition updates prior sums on account of intervening inflation, accounts for new decisions judges are making, and includes as appropriate awards for new types of injuries that are being recognized. Although these Guidelines do not have formal legal force, it is widely agreed that they have a substantial impact in the resolution of actual cases[20]. In 1978, the Canadian Supreme Court set

[17] *Ibid.*
[18] (2001) 8 SCC 151.
[19] See, *Non-economic Damages Caps*, (6th Oct. 2014) http://en.wikipedia.org/wiki/Non-economic_damages_ caps.
[20] *Supra* n. 7.

100,000 Canadian dollars as the maximum amount of non-economic loss to be awarded. However this sum can be increased with inflation and it has become $326,000 in 2012[21].

In India, there is no clear rule for determining the amount of compensation in medical negligence cases especially for non-pecuniary losses. However, a close analysis of various decisions of consumer forums and courts shows that, they follow three different methods while awarding compensation. They are as follows:

1. Lump-Sum Compensation

Generally, some of the courts award lump-sum compensation, which may be punitive and exemplary in nature to achieve two purposes, send a very strong signal that such type of cases would be dealt in a very strict manner, and also make available adequate sum of money for the survivor so that life can be led in a reasonable manner in the absence of the deceased. However, it is criticized that, awarding a lump-sum amount may bring into arbitrariness, which at times may be whimsical and fanciful, and, therefore, according to one school of thought, it is better to adopt the multiplier method which ensures a systematic calculation in an objective manner[22].

2. Just and Fair Compensation

In various cases, the Courts have awarded just and fair compensation based on the facts and circumstances of the case. According to the Supreme Court, "Just compensation is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit"[23]. The Court further held that, "at the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the

[21] *Ibid.*
[22] Anurag K. Agarwal *Medical Negligence and Compensation in India: How Much is Just and Effective?*, (6th Oct. 2014) http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/15451890132014-03-27.pdf
[23] *Supra* n. 2.

accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim"[24].

The award of just and fair compensation is also criticized as no amount can be just and adequate in an absolute sense. It all depends on the circumstances and the context and the courts must be open to treating each case in a different manner so that the decisions are just, equitable, reasonable and prudent. There is no fixed solution[25]. Thus the sum can vary depend upon various factors including the mind set of judges.

3. Multiplier Method

The common method of assessing compensation in non-pecuniary loss is the multiplier method. The multiplier method, primarily, uses two numbers – the multiplicand and the multiplier – to arrive at a number, which shall be the compensation. The multiplicand – is the quantum of compensation determined for every year's loss of earning minus the amount the victim would have spent on himself, and the other number – the multiplier – is the difference between the average life, as per the life expectancy data available, and the age of the deceased minus the number of years for which he would be unproductive, and also taking into account any other risk factors of bad health, accident, etc. which would have shortened the productive age without any negative contribution of the medical negligence[26]. Thus, the multiplier used for arriving at the compensation is much lesser than simply the difference between average age and the age at the time of suffering from medical negligence. The major criticism against this method is that, the number 's' to be used as the multiplier raises serious issues about the manner in which it has to be arrived at by the courts[27].

The importance of multiplier method has been recognized by Supreme Court of India in various cases. In *General Manager, Kerala S.R.T.C* v *Susamma Thomas*[28] case, the Court observed that, "We indicate that the multiplier method is the appropriate method, a departure from which can only be justified ill rare and extraordinary circumstances and very exceptional cases". There have

[24] *Ibid.*
[25] *Supra* n. 22
[26] *Ibid.*
[27] *Ibid.*
[28] AIR 1994 SC 1631.

been arguments made by the lawyers that the multiplier method should be adopted in case of medical negligence by doctors and hospitals to bring into objectivity and also disposal of cases promptly and effectively[29]. One of the drawbacks of this method is, the amount for loss of consortium is not a concern while applying multiplier method.

THE WAY FORWARD

The present methods of assessing damages in medical negligence cases are not satisfactory and thus need to be reformed. This was noted by Supreme Court while deciding an appeal in a motor accident case in the following words, "the lack of uniformity and consistency in awarding compensation has been a matter of grave concern…If different Tribunals calculate compensation differently on the same facts, the claimant, the litigant; the common man will be confused, perplexed and bewildered. If there is significant divergence among Tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system[30]". Thus there is an urgent need to have a better framework to assess damages in medical negligence cases. Hence it is proposed that, the best way for calculating damages in medical negligence case is to asses' loss under three heads: accrued pecuniary damages; non-pecuniary damages and loss of future earnings. The accrued damages should be calculated on the basis of physical loss suffered by the patient. The amount can be determined with the help of legal and medical experts. The amount for non-pecuniary damages can be assessed by following just and fair compensation method. For the assessment of loss of future earnings, the multiplier method can be applied. If the consumer forums and courts are will to adopt this strategy for determining the compensation, it would provide a great solace to lakhs of medical negligence victims and their dependants.

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[29] *Supra* n. 25.
[30] *Ibid.*

2. Medical Negligence and Consumer Rights: Changing Dilemmas

Mahesh Menon R.[1]

Aiswarya K. M.[2]

ABSTRACT

Our Constitution guarantees the fundamental right to life and personal liberty by virtue of Article 21. The state is bound to provide adequate and proper medical services to all citizens. For a patient, the doctor is like God, and the God is infallible. But, the reality is that doctors are too human beings. And, to err is human. Doctors may commit a mistake by negligence or due to other causes. Thus, the ultimate sufferer is none other than the patient. Earlier the patients aggrieved by medical negligence did not have any effective adjudicative body for getting their grievances redressed, but now the situation has changed. There are provisions in the Civil and Criminal law offering remedies to aggrieved patients.

The Consumer Protection Act, 1986 has been enacted for the protection to the rights and interests of consumers and for the redressal of consumer disputes. Medical profession has been included within the ambit of the Act. It is important to know what constitutes medical negligence. A doctor owes certain duties to the patient who consults him for illness. A deficiency in this duty results in negligence. The Act has two principal objectives: to compensate patients who are injured through the negligence of healthcare providers and to deter providers from practicing negligently.

This paper evaluates the significance of the Consumer Protection Act to showcase Medical Services vis-a-vis CPA highlighting duties and liabilities of doctors and hospitals, kinds of liabilities, status of private and government hospitals and other remedies available to consumers apart from CPA. This paper examines these changes, analyses the effectiveness of the reforms, and highlights the concerns that still exist. The paper examines the concept of negligence in medical profession in the light of interpretation of law by the Supreme Court of India and the idea of the 'reasonable man'.

[1] **7th Semester, School of Legal Studies, CUSAT**

[2] **7th Semester, School of Legal Studies, CUSAT**

INTRODUCTION

Our Constitution guarantees the fundamental right to life and personal liberty by virtue of Article 21. Thus the state is bound to provide adequate and proper medical services to all citizens. The medical profession is one of the noblest professions in the world. For a patient, the doctor is like God. And, the patient thinks he is infallible but the reality is that doctors are human beings. Hence doctors may commit a mistake by negligence or due to other causes. Thus, the ultimate sufferer is none other than the patient.

Corporatization and commercialization of medical profession has made it like any other business and the medical profession is increasingly being guided by the profit motive rather than that of service. Such a situation gave rise to unethical practices and negligence. When profit motive comes to the force, service to the patients takes place as last row. Today the concept has changed into service for fee coupled with increased the awareness of rights as consumers by the patients. Therefore, if there is a rashness or negligence on the part of the doctor while treating a patient he is being made liable under the Consumer Protection Act, 1986.

The Consumer Protection Act, 1986, clearly reveals the recognition and growth of consumer jurisprudence and hence is an innovation for the better protection of the consumers. All goods and services come under the purview of the Act, excluding goods for resale or for commercial purpose, services rendered free of charge and under a contract for personal service. The inexpensive and quick justice without any delay is the commendable objective of the enactment. There are numerous laws to protect the rights of consumers, but many of them deals with a special class of consumers, with regards to only a particular area of consumer behaviour. Whereas the Consumer Protection Act not only recognizes certain basic rights of consumers but also provides for an expeditious mechanism for the redressal of their grievances. Subsequent to a decade of its enactment, in 1995, medical profession was brought within the ambit of COPRA[3] by the Supreme Court of India in a landmark case of *Indian Medical Association v. V. P. Shantha and others*[4]. Though the Consumer Protection Act has not changed the law of medical negligence, it acts as a new legal weapon to safeguard the interests of the consumers with inexpensive and speedy remedy.

[3] Consumer Protection Act, 1986
[4] AIR 1996 SC 550; (1995) 6 SCC 651

THE HISTORY OF MEDICAL NEGLIGENCE

The concept of medical negligence has been recognised since ancient times. Under ancient Egyptian and Roman law the physicians were punished for malpractices. In India as well as other parts of the world since ancient times, certain duties and responsibilities were borne by persons who entered into the sacred medical profession. The Hippocratic Oath that the medical practitioners used to take exemplifies these duties and responsibilities.

In India this concept is not a new one. The ancient text of Charaka's oath clearly proves it. However, medical negligence and the legal aspects of medicine have acquired great significance in recent period. Awareness among people regarding the fundamental rights guaranteed by the Constitution has increased in last few decades which have brought the medical profession under the scrutiny of both the public and the judiciary. The introduction of COPRA[5] had a great influence and changed the scenario dramatically. Aggrieved patients started filing medical negligence cases at consumer forums. The decision of the Supreme Court of India in a landmark case of *Indian Medical Association v. V. P. Shantha and others*[6] to bring medical negligence cases under the purview of the COPRA[7] further complicated the situation thus increasing the number of genuine as well as frivolous lawsuits against the members of medical profession. Thus the conflict between law and medicine is a recent development in India and an early and amicable solution is most desirable.

WHAT IS MEDICAL NEGLIGENCE?

Negligence in law is a type of tort or civil wrong and can also is a wrong under criminal and consumer law. It is basically an unintentional breach of legal duty that causes an injury to another person. As defined by the Supreme Court in the *Poonam Verma*[8] case, the essential constituents of negligence are (1) A legal duty to exercise due care, (2) breach of the said duty; and (3) consequential damages. Medical Negligence is the commission or omission of an act by a medical practitioner or health care provider, deviating from the accepted standards of medical practice, leading an injury to the patient.

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[5] *supra* n.4
[6] *Indian Medical Association*, AIR 1996 SC 550
[7] *supra* n.4
[8] *Poonam Verma* v. *Ashwin Patel and others*; 1996 SCC(4) 332

MEDICAL NEGLIGENCE: THE BOLAM RULE

In United Kingdom the issue of medical negligence was considered in detail in the case of *Bolam v. Friern Hospital Management Committee*[9] where the Court held that "in case of a medical man negligence means failure to act in accordance with the standards of reasonably competent medical men at that time and that there may be one or more perfectly proper standards and if the medical man conforms with one of those proper standards he is not negligent". This case became a seminal authority for determining the standard of care required from medical professionals. Consequently, the courts opined that if he has acted in accordance with the practice accepted as proper by a responsible body of medical men, then a doctor is not guilty of negligence. What other medical professionals do in a similar situation will also be take into consideration while deciding medical negligence by the court. Hence, *Bolam* case laid down a modest and ordinary skilled professional standard of care for determining the liability of the doctors.[10]

Laws governing medical practice

Under Indian law, the remedies available to a person seeking redress for medical malpractice are:

1. Suits for damages under the Civil Procedure Code,
2. Complaint for negligence under the Criminal Procedure Code,
3. Redressal under the Consumer Protection Act, and
4. Medical council of India for disciplinary action.

Multiple grievance redress facilities often case confusion in the mind of aggrieved patients. At present, however, they choose to file their case at the various consumer courts of our country under COPRA[11] because it is the easiest way. The most radical change in the laws governing medical negligence was the introduction of the COPRA[12] in 1986. Under this act the patients have equated with consumers and thus had a big impact on the medical practice in India.

In India civil laws dealing with medical negligence are derived from the English common law. Hence English laws have been adopted with suitable modifications fir the trial of cases in India.

[9] (1957) 1 WLR 582
[10] See M. Srinivas, *Medical Negligence and Consumer Rights: Emerging Judicial Trends,* 6(1) NALSAR. L. REV. at 176 (2011)
[11] *supra* n.4
[12] *Id.*

The concept of negligence is observed under tort as well as contract as observed by the Supreme Court in *Indian Medical Association v. V.P. Shantha and others*[13]. Negligence is tried mainly under the law of torts in India and is independent of the contract that exists. In India, the position was made clear in *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*[14], where the Supreme Court held that if the claim depends upon proof of contract, action does not lie in tort and if claim arises from the relationship between parties, independent of contract, an action would lie in tort at the election of the plaintiff.

As far as criminal cases against doctors are concerned they are mainly filed following the unnatural death of a patient under section 304A of the Indian Penal Code for a rash and negligent act not amounting to culpable homicide or under Sections 336, 337,and 338 of the Code where injuries are less serious. The Supreme Court of India has decided two landmark cases, which have brought some degree of clarity on the issue of criminal prosecution of medical professionals. In *Dr. Suresh Gupta*[15] case the court held that the doctor was 'careless' but not so 'grossly negligent to make him criminally liable'. In the *Dr. Jacob Mathew*[16] *case,* a case of non-availability of oxygen cylinder, the Supreme Court held that accused cannot be prosecuted under Section 304 A IPC. Thus criminal liability can be attracted only if a high degree of negligence is involved.

PATIENT AS A CONSUMER

Earlier, there was no effective adjudicative body for getting the grievances of aggrieved patients redressed. The Indian Medical Council Act, 1956 as amended in 1964, says that the violations of the regulations made by the Council shall constitute misconduct. Secondly, it was a tough task to get access to the state headquarters of the Council. And lastly, there was no power to the Council to award compensation to the injured patients or complainants.

The development of law pertaining to professional misconduct and negligence is far from satisfactory. Still now, the entire field of medical negligence is not covered by adequate

[13] *Indian Medical Association; AIR 1996 SC 550*
[14] (1997) 9 SCC 552
[15] *Dr. Suresh Gupta* v. *Govt. of N.C.T. of Delhi and Another*; SLP (Cri.) No. 2931 of 2003; (2005) 6 SCC 422
[16] *Jacob Mathew* v. *State Of Punjab And Another*; (2005) 6 SCC 1

legislations. In the case of *Pravat Kumar Mukherjee v. Ruby General Hospital & Ors*,[17] the patient was brought to Hospital by a passerby. The doctors assisted the patient but as there was no guardian, they contended that there was no consent for paying up the requisite fees for medical help so they are unable to assist him. The patient was also not transferred to another hospital even if he was in a condition to be transferred. This led to the death of the young boy. This very act shows the commercialization of the medical profession. A doctor is supposed to know his mission, and on humanitarian grounds should start the medical treatment in such cases. Further, when the patient have crossed the dangerous stage it would be comfortable for both the patient and doctor to talk about the matter of payment of the service hired.

The medical services which are excluded from the purview of Consumer Protection Act are:

1. Under the contract of personal service, i.e. where a medical professional, in the capacity of an employee renders some professional service to his employer. In other words, wherever there is master and servant relationship between the recipient of the medical treatment and the doctor, the same would fall outside the purview of the definition of service under the Act.
2. At a government or non-government hospital/health centre/dispensary, where charge or what so ever is not collected from any patients, whether rich or poor, would fall outside the purview of service under the Act.

THE JUDICIAL APPROACH TO THE ISSUE

The Supreme Court of India, in deciding the cases of medical negligence, has followed a liberal approach in some cases, whereas, followed the strict liability rule in some other. According to B. B. Pande, the approach of Judiciary in deciding with, the cases of medical negligence and liability of the doctors has been described as "Two lines of judicial authorities on medical negligence liability in India". He opined that "in India in respect of claims for medical negligence the judicial rulings of the Supreme Court of India and of the State High Courts can be put in two distinct lines. The first line, that favours a limited liability based on 'ordinary professional standard' as laid down in *Bolam* case. The second line, that favours expanding the

[17] 2005 (3) CPR 95, pp. 109& 119

sphere of medical profession's liability and demanding a higher duty of care towards the patient and his relatives, particularly where medical expertise is provided on a commercial basis."[18]

The Supreme Court while adopting a liberal approach, has approved the rule of "*ordinary skilled professional standard of care*" laid down in *Bolam* case, in *Dr. Suresh Gupta v. Govt. of N.C.T. of Delhi*[19], *State of Punjab v. Shiv Ram*[20] and *Jacob Matthew v. Union of India*[21] cases. In *Jacob Matthew v. Union of India*[22] the Supreme Court held that "no sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake".[23]

In *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole & another*[24], the Court observed that a person who held himself out ready to give medical advice and treatment impliedly undertook that he was possessed of the skill and knowledge for the purpose. Such a person owed to his patient certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and/or a duty of care in the administration of that treatment. A right of action for negligence can be availed to the patient if there was a breach of any of these duties. The medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very lowest degree of care and competence, judged in the light of the particular circumstances of each case was what the law required.

The Supreme Court has once again approved the *Bolam* rule in *Martin F. D'Souza v. Mohd. Ishaq*[25] and observed that "judges are not experts in medical science, rather they are lay men. This it often makes it somewhat difficult for them to decide cases relating to medical negligence. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminative proceedings and decisions against doctors are counterproductive and serve

[18] B.B. Pande, '*Why Indian Patients do not deserve the Highest Expert Skills from Doctors?*' (2009) 4 SCC 21
[19] (2005) 6 SCC 422
[20] (2005) 7 SCC 1
[21] *Jacob Mathew*, (2005) 6 SCC 1
[22] *Id.*
[23] See M. Srinivas, *supra* note 9, at 177
[24] (1969) 1 SCR 206
[25] (2009) 3 SCC 1

society no good. They inhibit the free exercise of judgment by a professional in a particular situation"

In this case the Supreme Court has not only taken very liberal approach but also directed the consumer fora to take the opinion of the medical experts before initiating the proceedings in medical negligence cases; thus having extensive affects in deciding medical negligence cases. If the expert committee opines that there is no negligence on the part of the doctor or hospital the victim's remedy will become vein as, he has no chance to say anything in favour of his case.

The Supreme Court *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka*[26] held that in a case involving medical negligence, once the initial burden by making out a case of negligence on the part of the hospital or doctor concerned is discharged by the complainant, then the burden shifts on to the hospital or to the attending doctors to satisfy the Court that there was no lack of care or diligence. In this case the Court awarded Rs. 1 crore as compensation to the victim of medical negligence.

CONCLUSION

Medical practitioners of our country are hardly taught about the rights of a patient in their medical curriculum. It is now high time that they must gain adequate knowledge about the rights of patient so that they do not violate them even unknowingly during their practice. The number of medical negligence lawsuits is increasing day by day in India, and the threat of litigation has increased significantly after the Supreme Court brought Medical Profession under the purview of the Consumer Protection Act, 1986.

The people are now confident enough while visiting doctors and getting treated and can rely on consumer forums to get fast redressal in case of any deficiency in service. The doctors also treat the patients with greater care and caution than they earlier used to because of the existence of this law. But in the cases of medical negligence, it is seen that a very huge burden of proof is imposed on the aggrieved patients to prove negligence. This is a major setback of the law as it is obvious that the hospital authorities and doctors will not be quite open about the mistake on their part.

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[26] (2009) 6 SCC 1

3. Medical Negligence- A Liability for the Doctor and a miracle for the Consumer?

Shivani Gupta[1]
W.V.Pranusha[2]

ABSTRACT

A medical man is not responsible to god or man for such evil consequences of his prescriptions or surgical operations as they are entirely beyond his will and therefore independent of his control. If, on the other hand, his mistakes arise from his ignorance or want to skill, he blamed in as far as he is the willful cause of such ignorance; he should have either known better or, not, knowing better, he should not have undertaken the case for which he knew he was not qualified.

Everybody is subject to the law, the rule of law. It is the price that everybody has to pay for the corresponding benefits of the free and protected society. Law is both restraining and liberating. To what extent is the doctor subject to the law? Medical negligence arises from an act or omission by a medical practitioner, which no reasonably-competent and careful practitioner would have committed. What is expected of a medical practitioner is a 'reasonably skillful behavior adopting the 'ordinary skills' and practices of the profession with 'ordinary care'. Therefore, the professions need to update their understanding of the concepts of medical negligence and consumer protection act, and its amendments to be on a legally safer side. The review attempts to outline the salient features of medical negligence and consumer protection act and giving a judicial view.

INTRODUCTION

According to a Report of Institute of Medicine, medicine, medical errors kill 44,000 to 98,000 hospital patients in USA.

Under new patient safety standards that came into effect recently U.S. hospitals are required to tell patients when they've been subjected to medical errors. Under the new guild lines, hospital

[1] **5th year, MATS Law School, Raipur**
[2] **5th year, MATS Law School, Raipur**

that don't discuss harmful mistakes with patients and prove to commission investigators that they're doing so will risk losing their accreditations.

In India, a claim for medical negligence was always maintainable either in tort or under contract. The enactment of Consumer Protection Act, 1987, landmark welfare legislation no doubt leads to spate of litigation against doctors. Through law has not been changed by the act though no higher standards are prescribed for holding the doctor to be negligent.

The Supreme Court in *Indian Medical Association*[3] case reminded the medical profession about their duty to take care of the patient and undoubtedly brought accountability to the mind of medical professional, which though existed previously was not effective and motivating.

As a matter of fact the Consumer Protection Act did not put the medical profession at any greater peril than any other service provider. Statistics show that the total number of cases against medical professionals is around 1 percent only of the total cases filed in the consumer courts. No doubt some cases filed were vexatious, false of frivolous.

WHAT IS NEGLIGENCE?

Definition:- According to black's Dictionary, "negligence means omission to do something which a reasonable man, guided by those ordinary considerations which ordinary considerations which ordinarily considerations which ordinarily regulate the conduct of human affairs, would do or nothing the doing something which a reasonable and prudent man would not do"

WINFIELD defines 'negligence' as: "breach of a legal duty to take care, which results in damage undesired by the defendant to the plaintiff."

ALDERSON defines negligence as "negligence, as "negligence is omitting to do something which a reasonable which a reasonable man would not do".

Way back in back in 1866 in *Grill* v. *General Iron Screw Collier Co.*[4], WILLS J. referred to negligence as "……. The absence of such care as it was the duty of the defendant to use."

[3] AIR 1996 SC 550
[4] (1860) LR 1 CP 612

The Supreme Court observed, "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, willful or reckless negligence or negligence by perse.

MEDICAL NEGLIGENCE IN INDIA

Prior to the introduction of the Constitution of India in 1950, a very large number of English principles of law of torts were followed and applied by the Indian courts. For instance, J. Tendulkar observed in Amelia Flounders V. Dr. Clement Pereia:

Actions for negligence are to be determined according to the principles of English common law.

In *Dr. Laxman Balkrishna Joshi* v *Dr. Trimbak Bapu Godbole & Another*,[5] medical practitioner owed to his patient certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of this duty gave a right of action for negligence to the patient.

In the case of *Juggankhan* v *State of Madhya Pradesh,*[6] the respondent Deobi felt restless after taking medication and ill and despite administration of antidotes, she died the same evening. It was held that it was a rash and negligent act to prescribe poisonous medicines without studying their probable effect.[7]

In *Indian Medical Association* v *VP Shantha*[8], the Supreme Court authoritatively clarified the following facts relating to consumer law and medical negligence:

• the Consumer Disputes Redressal Agencies are provided with the same powers as are vested in the civil court under the Code of Civil Procedure while trying a suit;

• the procedure followed for the determination of consumer disputes under the Consumer Protection Act is summary in nature involving trial on the basis of affidavits;

[5] (1969) 1 SCR 206
[6] (1965)1 SCR 14
[7] AIR (1943) 30 PC 72
[8] AIR 1996 SC 550

• It will be for the parties to place the necessary material and the knowledge and experience, which would enable the Consumer Disputes Redressal Agencies to arrive at their findings on the basis of the material;

• Obvious faults which do not raise any complicated questions can be speedily disposed by the procedure that is being followed by the Consumer Disputes Redressal Agencies.

• The principle of 'Bolam test' as laid down by McNair J in *Bolam* v. *Friern Hospital Management Committee*[9] is to be applied to determine the standard care which is required by medical practitioner in an action for damages for negligence;

PROVISIONS OF MEDICAL NEGLIGENCE UNDER CRIMINAL LAW

Under criminal law, for a person to be prosecuted negligence proving the presence of *Mens rea*, ie., guilty of mind, is required and the negligence must, such as can fairly be described criminal. Mere carelessness and simple lack of care may constitute civil liability and it cannot be enough to prove a charge of death of a patient by negligence. Further, the standard of negligence must be rated in terms of the circumstances. However, in criminal law, it is necessary to prove beyond reasonable doubt the negligence act of the accused.

In general, the Indian courts adopt a stance of circumstance in not holding qualified medical practitioners criminally responsible for the death of the patients that are the result of a mere mistake of judgment in the selection and application of remedies and when the death resulted merely from an inherent risk or error of judgment or an inadvertent death.

SECTION 304 OF THE INDIAN PENAL CODE- A PENALISING PROVISION FOR MEDICAL NEGLIGENCE

This section mentions about the punishment for the rash and negligent handling of an instrument or vehicle or crafted and causing death to others and the maximum punishment is two years imprisonment fine or both. It covers acts characterized as recklessness or wonton recklessness sufficient to warrant convocations under section 304 A IPC.

[9] (1957) 1 WLR 582, (1957) 2 ALL ER 118, 101 Sol Jo 357.

In the practice of medicine, it may include reckless dispensation of medications; out rigorously negligent performance of diagnostic or therapeutic measures, which leads to death, reckless administration of anesthesia; performing surgery or any therapeutic procedures under the influence of alcohol or drugs.

STRUCTURE OF CONSUMER FORUM/COMMISSIONS AND THEIR JURISDICTIONS

Section 9 of the Consumer Protection Act establishes at the entry level for redressal of consumer grievances at the Consumer Redressal Forum, known as the "District Forum" the state Government is empowered to establish the District Forum in each district of the state or more than one in a district by appropriate notification. There shall be a Consumer Disputes Redressal Commission Known as the "State Commission" established by the State government by a notification to that effect. The central Government shall notify the establishment of National Consumer Disputes Redressal Commission.

WHEN CAN DOCTOR'S BE HELD LIABLE?

Standard of Care

The Supreme Court of India in *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole and Anr*[10], dealt with the duties of the doctors which are as follows:

A person who holds himself out ready to give medical advice and treatment impliedly undertaken that he is possessed of skill and knowledge for the purpose. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise are a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances.

In *M Shobha* v. *Dr. Rajakumari Unnithan*[11], according to the court, 'negligence' means more than careless conduct. It connotes- (a) duty of care, (b) breach of duty and (c) Damages thereby suffered by the person to whom the duty was owed. Such a duty may arise from a contract but it

[10] AIR 1969 SC 128
[11] AIR 1999 Ker 149

can arise independently out of contract, is based upon the fact that he has undertaken the treatment of the patient.

Registered Medical Practioner Duties :

The Supreme Court has laid the observation, with regards to the medical practitioner duties:

- Duty of care in deciding whether to undertake the case
- Duty of care in deciding what treatment to give
- Duty of care in his administration of that treatment
- Duty to answer a question put to him.[12]

Burden Of Proof

In *Dr. AS Nagpal and Anr* v. *Krishan Lal*,[13] it was held:

As observed by the Supreme Court in the case of *Indian Medical Association* v. *V.P.Shantha,*[14]medical negligence on the part of the doctor is to be proved as a fact by leading evidence which may be of an expert. Present is a case which could not be decided simply on the affidavit of the complainant that after few days of the operation, defect was noticed in the right eye and ultimately loss of vision of the right eye and partial loss of vision in the left eye was on the account.

Also in *M. Gopal Chettiar* v. *S Ravindran,*[15] it was held that the duty cast upon the complainant and adduce proof of negligence or deficiency in service on the part of the opposite party.[16]

Res Ipsa Loquitor

In case of negligence, where the plaintiff cannot make out a breach of defendants duty of care, the *res ipsa loquitor* doctrine may provide this missing element by conclusion from the nature of injury like bruises, burns and fractures, which have no relation whatsoever with the condition, for which he was being treated. The three essentials conditions considered necessary are:

[12] *Philips India Ltd*. v. *Kunju Punnu*, AIR 1975 Bom 306 Also See: Halsbury Laws of England Vol. 30
[13] 2001 CTJ 228 (CP) (SCDRC)
[14] [1995] 3 CPR 412, AIR 1996 SC 550,[1995]III CPJ 1, [1995] 6 SCC 651
[15] Tamil Nadu State Commission AP 543/1998 dtd 13 december 2002
[16] Amar Singh v. Frances Newton Hospital and Anor, [2000]1 CPJ 8

- The nature of injury suggests by common knowledge or expert evidence that without negligence it does not occur.
- The plaintiff must not contribute to his own injury.
- The defendant must be in exclusive control of instrumentalities.

As stated in the case of *PM Ashwin* v. Manipal Hospital[17], both the legs of the plaintiff, a new born baby were burned and scaled permanently on account of an extremely hot water bag kept by the nurse in the operation theatre while an operation was going on. Admittedly the heat was transmitted to the legs of the baby from the metallic platform on which the baby was kept.

In the case of *Beena Gard* v. *Kailash Nursing Home and Ors*[18] the purpose and the scope of the *Res Ipsa Loquitor* was defined stating that, the application of the principle nearly always presupposes that some part of the casual process is known, but what is lacking is evidence of its connection with the defendant's act or omission.

KINDS OF NEGLIGENCE:

Negligence In Surgery[19]

After the operations, there was no sensation below the left knee on the operation side. Toes become totally cold. The left leg and knee had to be amputated. There was proof of deficiency in service because of negligence of surgery.[20]

In the case of *Suyash Hospital (p) Ltd*. v. *Prassanna Kumar Ojha*,[21] a complaint was allowed where because of negligence the operation stitches were removed prematurely leading to bursting of the wound and the patient dying after 2-3 hours of bleeding.

[17] [1997]I CPJ 238: [1997]1 CPR 393
[18] [2002] III CPJ 99 (NC)
[19] Avtar Singh [Law of Consumer Protection(Principles and Practice), Publication- Eastern Book Company, Edition-4th]
[20] *Chanta Mohan Lakshmi* v. *Dr. C.V. Ratnam*, (2003) 4 CPJ 12 (NC); *Mam Chand* v. *Dr.G.S. Mangat of Mangat Hospital*, (2004) 1 CPR 84 (NC)
[21] [2003] 2CPJ 90 (NC)

Failure of Procedure Undertaken By A Doctor[22]

The National Commission in the case of *Dr. Kaligoundon* v. *N. Thangamuthu*, the complainant's wife had gynecological problems in terms of excessive bleeding. She was operated upon and her uterus removed. After this, she complained of giddiness and vomiting and died. The doctor was found guilty of negligence on the ground that despite there being no urgency in undertaking the surgery no tests were conducted prior to the surgery to assess renal functioning.[23]

In the case of *Uttaranchal Forest Hospital Trust* v. *Smt Raisan*[24], the complainant's organ was removed without any fault. When the organ was sent for the diagnosis no cancer was found. There State Commission found the doctor guilty of negligence for performing a surgery that was wholly unnecessary.

Practice in One Discipline, Qualified In Another

A practitioner's duty to use reasonable skill and competence in his profession is ex facie not satisfied when he is practicing in one profession but is qualified in some other. Accordingly, the Supreme Court held the person liable who was qualified in homeopathy but resorted to practice in allopathic and caused death which cost him three lakh rupees as compensation.[25]

Foreign Matter Left In Body After Operation

The doctor who operated upon the complainant for caesarian operation left something foreign inside the operated area. That being negligence in itself a compensation of Rs. 2, 00,000 was awarded.[26]

Breach Of Duty To Maintain Confidentiality

A complainant who was suffering from HIV (+), claimed compensation for breach of duty by the hospital to maintain confidentiality. He also raised the question that whether he would be

[22] *State of Punajb* v. *Shiv Ram*, 2005 7 SCC1
[23] *Eyre* v. *Measday*, 19861 ALL ER 488
[24] 2004 1 CPJ 257
[25] *Poonam Verma* v. *Ashwin Patel*, [1996] 5SCC 332: [1996]2 CPJ 1: AIR 1996 SC 211
[26] *Rohini Pritam Kabadi* v. *R.T. Kulkarni(Dr.),*[1996]3 CPJ 441 Kant. See Also *P.P.Ismail* v. *K.K. Radha(Dr.),[*1998]1 CPJ 16 NC.

committing offence under S. 269 and, S.270, IPC, if he married a willing partner after disclosing the fact of disease to her. [27]

Delay in Time

Where certain doctors were practicing in medicine known as GCIM and were not specialized in surgical operations but performed the surgery at a time when the patient was in an immediate danger to his life and there was enough time to carry the patient to an appropriate centre for the requisite surgical procedure and the patient died, a compensation of Rs. 2, 01, 000 which was awarded by the state commission was held to be quite fair.[28]

Doctor and hospital's negligence on giving facilities they did not offer

The State Commission ordered the recovery of bed charges when the patient was made to sleep on the table amounted to deficiency and not availing standard care and professional knowledge and it amounted to the deficiency in service.[29]

The Supreme Court has stated the following guidelines for joining the nurses and other doctor's as the party in terms of medical negligence they are as follows:[30]

- It was not necessary to join the treating doctors or nurses parties as long as the hospital was made a party.
- Only the initial burden of proving negligence is on the complainant.
- The hospital is responsible for the acts of their permanent staff as well as staff whose services are temporarily requisitioned for the treatment of patients.

CONCLUSION

The Medical Negligence[31] is a very hot topic now- a days in the Consumer Courts. The Profession of Medicine is getting worst with regards to the Supreme Court's decision[32] and the

[27] *Mr.X* v. *Hospital Z*, [2003]1 SCC 500: [2001] 1 CPJ 14 (SC)
[28] *K. Mahabala Bhatt (Dr.)*v. *K.Krishna*, [2002] 2 CPJ 127 (NC)
[29] *R.M.Joshi* v. *Dr. P.B. Tahilramani*, 1993 3 CPR 435 (Bom)
[30] *Savita Garg* v. *Director National Heart Institute*, 2004 8 SCC 56
[31] *Sailesh Munja* v. *All India Institute of Medical Sciences (AIIMS)* 2004 3 CPR 27 (NC). Also See: *B.S. Hegde* v. *Dr. Sudhanshu Bhattacharya*, 1992 CPJ 449

whole aspects are turning its way to criminal prosecution which may hamper the Prestige of Medical Profession. In recent time the cost of the medi- care has gone- up enormously and beyond the reach of common man, the so- called cut- throat competition among the hospitals, notwithstanding. District and general hospitals have in-adequate supply of medicines and medical equipment and the doctors working with no incentives. Provision of medical facilities through government should be raised to higher level by increasing the budget provisions for strengthening the government hospitals with equal facilities. Motive is something, which prompts a man to form an intention, and for the same the doctors must get an advantage as defense, because his major profession is saving life of the people.[33] Also the doctors should be mere careful to perform their duties. Gross lack of competency or gross inattention, or indifference to the patient's safety can only initiate a proceeding against a doctor. A healthy medical environment can create a great society, hence there should be a sense of responsibility in doctors as well as consumers regarding the standard care and knowledge (Doctor's) and regarding marinating the respect and prestige of doctor who save the life of human and are the sole base of saving humanity(Consumer's).

Finally, most importantly the doctors individually and collectively shall introspect their style of functioning and make sincere attempt to strengthen doctor- patient relationship and strive to put forth in their best possible care and skill and competence.

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[32] *Dr. J.J. Merchant* v. *Shrinath Chaturvedi*, (2002) 6 SCC 635. Also see: *P.Venkatalaxmi* v. *Dr. Y. Savitha Devi*, 2004 2 CPJ 14 (NC); *T. Vani Devi* v. *Tugutla Laxmi Reddy*, 2003 1 CPJ 180; *Bhajan Lal Gupta* v. *Mool Chand Kharati Ram Hospital*, 2001 1 CPR 70

[33] *Basdev* v. *State of Punjab*, AIR 1956 SC 488 : 1956 SCJ 554

4. Analysis Of The Impact And Consequences Of The *Jacob Mathew* Case On The Law Of Medical Negligence In India

Goutham Krishna Gujaral[1]

Niranjan Sudhir[2]

ABSTRACT

The standard of proof that is required in order to attribute criminal negligence is much higher for a medical practioner than for an ordinary professional. This was established in the case of *Jacob Mathew v.State of Punjab*[3].

This paper analyses the background and the impact of the case on the practice of medicine in the manner of the procedure established and also the safeguards that have been accorded to doctors.

The said decision of the Supreme Court of India has met with criticism based on certain apprehensions. This paper also seeks to shed light on the same and opine as to whether such apprehensions hold merit by indulging in a thorough analysis of the judgment.

THE LEGAL BACKDROP TO MEDICAL NEGLIGENCE CASES IN INDIA

In *Juggankhan* v. *The State of Madhya Pradesh*[4], the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of dhatura to the patient suffering from guinea worm. The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. Thus the principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is prima facie acting with rashness or negligence.

Dr. LaxmanBalkrishna Joshi v. *Dr. Trimbak Bapu Godbole and Anr*[5] was a case under Fatal Accidents Act, 1855. The duties which a doctor owes to his patients came up for consideration.

[1] **7th Semester, The National University of Advanced Legal Studies**

[2] **5th Semester, The National University of Advanced Legal Studies**

[3] AIR 2005 SC 3180

[4] (1965) 1 SCR 14

[5] 1969 AIR 128, 1969 SCR (1) 206

The Supreme Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. The criminal negligence or liability under criminal law was not an issue before the Court as it did not arise and hence was not considered.

In *Poonam Verma* v. *Ashwin Patel and Ors*[6] a doctor registered as medical practitioner and entitled to practice in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence per se actionable in civil law.

In *Achutrao Haribhau Khodwa and Ors*. v *State of Maharashtra and Ors* [7]the Supreme Court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

[6] 1996 AIR 2111, 1996 SCC (4) 332

[7] 1996 SCC (2) 634, JT 1996 (2) 624

PRECURSOR CASES

I. *Bolam v. Friern Hospital Management Committee*[8]

Mr Bolam was a voluntary patient at Friern Hospital, a mental health institution run by the Friern Hospital Management Committee. He agreed to undergo electro-convulsive therapy. He was not given any muscle relaxant, and his body was not restrained during the procedure. He flailed about violently before the procedure was stopped, and he suffered some serious injuries, including fractures of the acetabula. He sued the Committee for compensation. He argued they were negligent for not:

1) Issuing relaxants.
2) Restraining him.
3) Warning him about the risks involved.[9]

The doctor did not give any relaxant drugs and the claimant suffered a serious fracture. There was divided opinion amongst professionals as to whether relaxant drugs should be given. If they are given there is a very small risk of death, if they are not given there is a small risk of fractures. The claimant argued that the doctor was in breach of duty by not using the relaxant drug. It was held that the doctor was not in breach of duty. The House of Lords formulated the Bolam test:

"I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion."[10]

[8] [1957] 1 WLR 583

[9] http://en.wikipedia.org/wiki/*Bolam_v_Friern_Hospital_Management_Committee* (as on 13-10-2014)

[10] *Supra* n.8

The Bolam test lays down the last[11] and most important part of the addendum to the test of negligence which relates to medical negligence. The other three (of which the Bolam test is the second) criteria are:

1) First, it must be established that there is a duty of care
2) Second, it must be shown that the duty of care has been breached.
3) Third it must be shown that there was a causal link between the breach of duty and harm.
4) Fourth, it must be shown that the harm was not too remote.

II. *Dr. Suresh Gupta v. Govt. of NCT of Delhi and Anr.*[12]

The case involves a mistake on the part of the applicant doctor, whereby he did not insert an appropriate tube in the nasal cavity while performing a rhinoplasty. This led to the blood leaking out and into the respiratory system, which caused the death of the person on whom the operation was being done.

It was almost firmly established in this case that where a patient dies due to negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and the same time, if the degree of negligence so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable to offence under Section 304-A IPC. *"Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State"*.

[11] The House of Lords decision in *Bolitho* seems to be a departure from this. However, the Court in Bolitho did not specify in what circumstances it would be prepared to hold that the doctor has breached his duty of care by following a practice supported by a body of professional opinion, other than stating that such a case will be "rare"

[12] (2004) 6 SCC 422

THE PREMISE OF THE DECISION IN *JACOB MATHEW V. STATE OF PUNJAB*[13]

The phrase 'gross negligence' that was attributed to Section 304-A[14] of the Indian Penal Code, 1860 as per *Suresh Gupta v. Government of N.C.T.of Delhi and Anr*.[15] was expanded in ambit by *Jacob Mathew v. State of Punjab*.[16] According to the latter case, even when doctors are prosecuted under Sections 336[17], 337[18] and 338[19] of the IPC, only 'gross negligence' would amount to criminal negligence. Though the word 'gross' is not used in Section 304-A of the IPC, the indisputable proposition which emerges from the reading of the judgment as a whole is that all acts of doctors which invite culpability due to criminal negligence or criminal rashness, are now qualified by the word gross.[20]The taking of medical opinions prior to the prosecution of doctors for criminal negligence was almost mandated by the *Suresh Gupta*[21] judgment, where the court observed that the in the absence of medical opinion, seeking to establish the guilt of a doctor in this regard would amount to the doing of *"a great disservice to the medical community."* The Supreme Court, through its decision in the *Jacob Mathew*[22] case, strongly suggested that medical opinion ought to be taken prior to proceeding against doctors, by the complainant or the police respectively. Therefore, the objective of the judgment is therefore to *"lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient."*[23]

[13] *Supra* n.3

[14] Section 304-A, IPC, 1860: Causing death by negligence.- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description of a term which may extend to two years, or with fine, or with both.

[15] *Supra* n.11

[16] *Supra* n.3

[17] Section 336, IPC, 1860: Act endangering life or personal safety of others

[18] Section 337, IPC, 1860:Causing hurt by endangering life or personal safety of others

[19] Section 338, IPC, 1860: Causing grievous hurt by endangering life or personal safety of others

[20] Mahendra K. Bajpai, Law of Criminal Liability and Medical Negligence (2006) Pg no. 119.

[21] *Supra* n.11

[22] *Supra* n.3

[23] *Ibid.*

Numerous factors were taken into consideration by the Court prior to delivering its judgment in the *Jacob Mathew*[24] case. Taking into account the fact that complaints against the practitioners of medicine are on the rise in the recent years, it prescribes the following weighty considerations to be employed by any forum adjudicating a case of medical negligence[25]:

1. The legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds.
2. The patients will be better severed if the real causes of harm are properly identified and appropriately acted upon.
3. Many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation – the person holding the 'smoking gun'.

TREATMENT OF MEDICAL MEN ON A HIGHER PEDESTAL

In *Phillips India Ltd v. Kunju Punnu & Ors,*[26] it was held that, *"Courts should be careful in censuring professional men like doctors in the absence of clear and satisfactory evidence of negligence from which the only possible inference is one of negligence. It would be wrong to censure doctors who belong to a learned profession and who are ordinarily expected to maintain high standards of professional conduct in dealing with their patients.* "The reasons for bestowing what may seem to be preferential treatment on doctors are numerous. Foremost is the impact of such cases on the doctor's performance and competency and the consequent impact on the society. Accordingly, the Court held that, *"A surgeon with shaky hands under the fear of legal action cannot perform a successful; operation and a quivering physician cannot administer the end-dose of medicine to his patient."* Postulating that the fear of criminal prosecution will make a surgeon hesitant to perform a surgery which involves substantial risk and will also prevent the administering of a lifesaving dose of medicine, the court went on to say that, *"Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal*

[24] *Ibid.*

[25] *Supra* n.15, Pg no. 114

[26] AIR 1975 Bom 306

patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails."[27] Consequently, owing to his own interests being at stake, the doctor would therefore be forced to resort to the use of a method of resuscitation of the patient that involves a lesser amount or risk but a greater probability of failure. A handicap of such severity imposed on a medical man would not fare well in the interest of the society.

A criminal proceeding initiated against a doctor would have long-term consequences as far as his reputation is concerned for it would cause him/her endless embarrassment and in some cases, even harassment. The stigma of incompetency will persist even if he is exonerated. The Court believes that no sensible medical professional would act contrary to the welfare of the patient for any loss or injury to the patient would tarnish the professional reputation of the doctor and would cost him dearly as far as his career is concerned. As mentioned earlier, there is an increase in the number of proceedings against doctors by the displeased patients. In order to ensure that malicious proceedings are guarded against, the court emphasises the need for care and caution in the interest of the society, the reason being that, *"the service which the medical profession renders to human beings is probably the noblest of all."*[28]

Furthermore, the court takes into consideration the complexity and uncertainties of the human body and the field of medicine and advocates a practical understanding of the same. Comparing the human body to a highly complex machine, the court held that, *"Coupled with the complexities of medical science, the scope of misinterpretations, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may not have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how in real life the doctor functions."*[29]In summation, doctors are placed on a higher pedestal compared to other professionals in the context of negligence. The Court believes that in order to in order to infer rashness or negligence on the part of a doctor certain considerations apply.

[27]*Supra* n.3

[28]*Supra* n.3

[29]*Ibid.*

PROCEDURAL SAFEGUARDS

A private complaint may not be entertained unless the complainant had 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. 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 or 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.

However the doctrine of *res ipsa loquitor* that does apply here is a rule of evidence which, in reality, belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant and a magistrate may then ask for direct proceedings against the practitioner without recourse to medical opinion first.

ASPECTS OF CONTROVERSY AND CRITICISM

The procedural safeguards laid down for doctors in the *Jacob Mathew*[30] case has been a subject of controversy. However, the need for reform in this arena has been the order of the day for quite a while now. For instance, the Government of Kerala had issued an order[31] dated 20/09/1993 with the objective of ensuring through the formation of a panel, that the there would not be any unnecessary harassment of private practitioners, doctors or private hospitals caused due to the filing of frivolous complaints. Furthermore, four illustrations provided in Chapter IV[32] of the IPC, 1860 which deals with statutory defences cite the medical profession. The culpability of a

[30]Supra n.3

[31]G.R. No. 3231/SS-B4/92/Home

[32]Sections 96 to 106 of the IPC, 1860

doctor being decided by another doctor owing to the medical opinion sought from the latter has been critiqued by some. The Supreme Court, in the *Jacob Mathew*[33] case acknowledged that it would be impossible for the complainant, the police or even the judiciary, to draw a *prima facie* conclusion of when medical negligence is alleged. It will also ensure that frivolous suits against doctors would not be initiated by those with vested interests. Furthermore, it is absurd to assume that the doctor would tend to protect his fellow professional, for doing so would mean that he is furnishing false information and would be liable to be criminally prosecuted. He may also be liable for contempt of court and action may be taken against him by the Medical Council. The apprehensions that the obtaining of medical opinion from another doctor would be burdensome for the victim who may be traumatised and that very few doctors may be willing to provide such opinion are unfounded. In case of private complaints, it is only advisable that the complainant obtains medical opinion and in the absence of the same, the Magistrate may call for an opinion from a doctor. Also, with regard to police investigations, it is the duty of the investigating officer to find and convince a competent and independent doctor to provide a medical opinion subsequent to furnishing him with the facts and findings of the case.

The referral order dated 09/09/2004 of the appeals by Dr. Jacob Mathew[34] by the Supreme Court bench comprising of Justice ArijitPasayat and Justice C. K. Thakker was a consequence of them disagreeing with the judgment of the apex court in *Suresh Gupta v. Government of N.C.T. of Delhi and Anr.*[35] The reasons for such disagreement were taken up by the critiques of the decision in *Jacob Mathew v. State of Punjab*[36] and are as follows:

1. *" Negligence or recklessness being 'gross' is not a requirement of Section 304-A of IPC and if the view taken in Dr. Suresh Gupta's*[37] *case is to be followed then the word 'gross' shall have to be read into Section 304-A IPC for fixing criminal liability on a doctor. Such an approach cannot be countenanced.*

[33]Supra n.3

[34]Criminal Appeal No. 144 of 2004 and Criminal Appeal No. 145 of 2004

[35]Supra n.11

[36]Supra n.3

[37]Supra n.11

2. *Different standards cannot be applied to doctors and others. In all cases, it has to be seen whether the impugned act was rash or negligent. By carrying out a separate treatment for doctors by introducing degree of rashness ort negligence, violence would be done to the plain and unambiguous language of Section 304-A. If by adducing evidence it is proved that there was no rashness or negligence involved, the trial court dealing with the matter shall decide appropriately. But a doctor cannot be placed at a different pedestal for finding out whether rashness or negligence was involved."*

200 years ago, in the case of *R v. Williamson*[38], the first reported judgment on criminal negligence of doctors, the Privy Council held that, *"To substantiate the charge of manslaughter, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention."* In *John Oni Akerele v. The King*,[39] the Privy Council held that, *"The degree of negligence3 required is that it should be gross, and neither a jury or a Court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation."* In *Shiva Ram v. The State*,[40] the Court held that, *"Criminal negligence is a gross and culpable neglect."* In *Syed Akbar v. State of Karnataka*,[41] the Court held that, *"The negligence to be established by the prosecution must be culpable or gross."* In *Sita Ram v. State of Rajasthan*,[42] it was held that, *"Criminal negligence is the gross and culpable neglect of failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen."* Recently, in *Suresh Gupta v. Govt of N.C.T. &Anr*.,[43] the same was attributed to standard of negligence required to be proved for the fixing of criminal liability. Therefore, the legal history of India and the history of the law of criminal negligence propounds that only the higher degree of negligence, clearly referred to as 'gross negligence', will be culpable.

[38]172 ER 579: [1807] 3 C & P 635

[39]AIR 1943 PC 72

[40]AIR 1965 All 196

[41]AIR 1979 SC 1848

[42]1998 Cri. L.J. 278

[43]Supra n.11

The preferential treatment given to doctors has been criticized by those that oppose the decision of the apex court in the *Jacob Mathew*[44] case. The Supreme Court, in the case of *Paramananda Katara v. Union of India*,[45] elucidated the reason as to why doctors are to be given preferential treatment. With the objective of protecting doctors who act in good faith from harassment, it held that, *"It is hoped that the police, the members of the legal profession, law courts and everyone concerned will also keep in mind that a man in the medical profession unnecessarily harassed for purposes of interrogation or for any other formality and should not be dragged during investigations at the police station and it should be avoided as far as possible".* It is also suggested that members of the legal profession are to honour the members of the medical profession and are to ensure that they are not unnecessarily harassed by way of requests for adjournments or cross-examination and so on.

CONCLUSION

It is interesting to note that the impact of the judgment has permeated the barrier separating the realms of civil and criminal law for the significance of the same is felt in decisions by consumer as well as civil courts. The various propositions of law, ratios, obiter's and observations of the Supreme Court in this judgment are bound to be repeatedly and authoritatively cited before the various judicial forums dealing with cases of medical negligence.[46]

However there is one situation that this test does not adequately resolve, and that is where the judge is faced with differing opinions from two different quarters. In such a situation he is once again faced with a glaring lack of knowledge in a field that only professionals with a particular. This was contemplated in the *Bolitho* case[47] however this was merely a statement of this same criticism, but holding that this would be "rare". A more just test remains to be formulated in this particular regard.

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[44]Supra n.3

[45]1989 4 SCC 286

[46]Supra n.15 ,Pg no. 114.

[47] [1957] 1 WLR 583

5. Frivolous And Vexatious Medical Negligence Proceedings – Need For Medical Tribunal Or Alternative Medical Bodies.

Navanitha.A.Warrier[1]

ABSTRACT

This paper focuses on the concept of medical negligence, the laws under the criminal justice system and civil justice system to tackle with medical negligence cases. The enactment of Consumer Protection Act and the agencies under the act to deal with consumer disputes and provisions under the act to tackle frivolous and vexatious complaints etc. and finally some valuable suggestions like establishment of a separate forum to deal with the medical negligence cases and amending Consumer Protection Act, so as to expressly include medical negligence cases under the ambit of the Act.

INTRODUCTION:

Medical Profession is considered to be one of the noblest professions. From ancient times onwards medical professionals were expected to follow many duties and responsibilities. Charakas Oath (1000 BC) and the Hippocratic Oath (460BC) all contain duties which medical professionals are expected to follow. In India with the enactment of Indian Penal Code negligent act of medical professionals was made punishable. But many did not know that the doctors can be punished for their negligent act and hence number of medical negligence suits was low until 1986. But with the enactment of Consumer Protection Act, people became aware about their right, resulting in large number of medical negligence cases.

NEGLIGENCE AND MEDICAL NEGLIGENCE

Negligence, according to Winfield is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. Medical negligence and negligence are not different. When a doctor is consulted by a patient, the doctor owes certain duties towards the patient, a duty of care in deciding whether to undertake the case, a duty of care in deciding what

[1] **Final Year Law Student, Kerala Law Academy Law College**

treatment to be given and a duty of care in the administration of that treatment[2].A breach of any of these duties and the plaintiff suffering an injury due to this breach of duty results in medical negligence.

MEDICAL NEGLIGENCE UNDER CRIMINAL LAW

For an act of a person to be a crime two things are to be satisfied that is there should be *actus rea* and *mens rea* .The doctor- patient relationship is a very sacred relationship and it cannot be said that there is *mens rea* or intention, except in very exceptional cases. Now the question is whether a negligent act of a doctor, amounts to a crime under Section 304A of the IPC.

Section 304-A of IPC deals with the concept of criminal negligence. Accordingly "whoever causes the death of a person by rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years or with a fine, or both"

The expression "rash and negligent act" occurring in section 304-A of the I.P.C should be qualified by the word "grossly". 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 has resulted was most likely imminent."[3]

Under Section 304-A, if a doctor is arrested; he can very well be released on bail. Doctors can also get the protection provided under Section 80 of the Indian Penal Code, wherein nothing is an offence that is done by accident or misfortune, and section 88 wherein a person cannot be accused of an offence as long as act is unintentional and done in good faith.

[2] *Dr. Laxman* v.*Dr.Trimbak*, AIR 1969 SC 128

[3] *Jacob Mathew v. State of Punjab and Another*, AIR 2005 SC 3180.

MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION ACT

The Consumer Protection Act, 1986 is social welfare legislation. It was enacted by the parliament to safeguard the interest of the consumer.[4] A plain perusal of the preamble of the Consumer Protection Act makes it clear that it is a benevolent social legislation that enshrines the rights and remedies of the consumer.

Do Medical Professional comes under the purview of Consumer Protection Act?

Initially different State Consumer Disputes Redressal Commissions were having different views as to the question whether medical profession is included under S2(1) (O) of the Consumer Protection Act, which defines services and list of services to be included and excluded from the perview of the Act.

But all these confusions were put to an end with the decision of the National Consumer Redressal Commission in *Vasantha P Nair v. Cosmopolitan Hospital and Ors*[5] that medical profession also comes under the purview of S.2(1)(o) of the Consumer Protection Act

After *Vasantha. P. Nair* decision the Indian Medical Association filed a Special Leave Petition before the Supreme Court against the said decision.[6]

The SC in Indian Medical Association case decisively included medical profession under the purview of Consumer Protection Act and had laid down certain facts about medical negligence:

From the various decisions, it is clear that only those medical services which offers free service to all the patients at all times and government hospitals, other than primary health centres which provide free services to all are exempted from the purview of the act.

[4] The Preamble of the Consumer Protection Act,1986 reads as:
An act to provide for better protection of the interests of the consumers and for that purpose to make provisions for the establishment of consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

[5] (1991)II CPJ 444(Kerala SCRDC)

[6] *Indian Medical Association* v. *VP Shantha,* (1995) 3 CPR 412.

CONSUMER DISPUTE REDRESSAL AGENCIES

Section 9 of the Consumer Protection Act provides for the establishment of Consumer Dispute Redressal Agencies for the purpose of discharging their duties provided under the Act. According to Section 9, there are three types of agencies:

1. District Consumer Dispute Redressal Forum.
2. State Consumer Dispute Redressal Agencies.
3. National Consumer Dispute Redressal Agencies.

District Consumer Dispute Redressal Forum is established by State Government in each district of the state. The forum consist a member who is or has been qualified to be a district judge as President and two other members, of which one should be woman.[7] District forum is having jurisdiction to entertain complaints, where the value of the goods and services and compensation claimed does not exceed twenty lakhs.

State Consumer Dispute Redressal Commission were established by State Government. The commission consists of a member who is or has been qualified to be a High Court Judge as President and not less than two members, of which one should be woman. District forum is having jurisdiction to entertain complaints, where the value of the goods and services and compensation claimed exceed twenty lakhs, but does not exceed one crore. Further any person, aggrieved by the decision of the District Forum can very well prefer an appeal to the State Commission within 30 days of the decision of District forum. . State Commission, is also having power to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum where it appears to the National Commission that such State Commission has exercised a jurisdiction, not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.[8]

National Consumer Dispute Redressal Commission was established by State Government. The commission consists of a member who is or has been qualified to be a Supreme Court Judge as

[7] Consumer Protection Act, 1986, Section 10
[8] Consumer Protection Act, 1986, Section 17

President and not less than four members, of which one should be woman. District forum is having jurisdiction to entertain complaints, where the value of the goods and services and compensation claimed exceed one crore. Further any person, aggrieved by the decision of the State Commission can very well prefer an appeal to the National Commission. Any person aggrieved by the order of National Commission can prefer an appeal before the Supreme Court of India within 30 days of the decision of National Commission. The decision of the Supreme Court is final. National Commission, is also having power to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction, not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. The Commission is also having power to review its decision.[9]

Consumer Dispute Agencies are having the same power as that of civil courts under civil procedure code while trying civil suits.

TRIAL PROCEDURE TO BE FOLLOWED BY CONSUMER DISPUTE REDRESSAL AGENCIES

The trial Procedure to be followed by agencies for the determination of disputes should be summary in nature.

In *Dr J.J.Merchant* v. *Shrinath Chathurvedi*, the Supreme Court laid down certain steps to be followed by the National Commission for avoiding delay in disposal of complaints within prescribed period.

(a) By exercise of Administrative control, it can be seen that competent persons are appointed as Members on all levels so that there may not be any delay in composition of the Forum or the Commission for want of Members;

(b) It would oversee that time limit prescribed for filing defense version and disposal of complaints is strictly adhered to;

[9] Consumer Protection Act, 1986, Section 21.

(c) It would see that complaint as well as defense version should be accompanied by documents and affidavits upon which parties intend to rely;

(d) In cases where cross-examination of the persons who have filed affidavits is necessary, suggested questions of cross-examination be given to the persons who have tendered their affidavits and reply may be also on affidavits;

(e) In cases where Commission deems it fit to cross- examine the witnesses in person, video conference or telephonic conference at the cost of person who so applies could be arranged or cross-examination could be through a Commission. This procedure would be helpful in cross-examination of experts, such as, doctors.

DISMISSAL OF FRIVOLOUS OR VEXATIOUS COMPLAINTS

If a complaint is found to be frivolous or vexatious, the consumer redressal agencies, shall, for the reasons recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees[10]

BURDEN OF PROOF

Burden of Proof usually vests with the complainant. National Consumer Dispute Redressal Commission in *Calcutta Medical Research Institute v. Bimlesh Chatterjee* [11] held that the burden of proving negligence and damages are on plaintiff or the complainant.

PROBLEMS FACED BY THE CONSUMER DISPUTE REDRESSAL AGENCIES WHILE DEALING WITH MEDICAL NEGLIGENCE CASES

The Consumer Dispute Redressal Agencies while dealing with Medical Negligence Cases are facing the following problems:

Firstly, in spite of penalty for those who file false and frivolous complaints, there is still a number of false and frivolous complaints file under the provision of Consumer Protection Act.

[10] Consumer Protection Act, 1986, Section 27.
[11] AIR 1992 SC 573.

Secondly, the most serious problem of commissions lack of knowledge about the medical field. The Consumer Protection Act does not provides for appointing of medical professionals in the commission. This is really a serious problem as this lack of knowledge may result in denial of remedy to many complainants and unnecessary delays in disposing of complaints a taking expert opinion in medical negligence cases is in fact time consuming, which itself is great injustice.

Finally, the act is silent about medical negligence and it is in fact creating major problems to the Consumer Dispute Redressal Agencies while dealing with Medical Negligence Cases.

SUGGESTIONS

The following are the Suggestions which I would like to put forward:

1. A forum or machinery to exclusively deal with medical negligence cases should be established, as the consumer dispute redressal agencies are not fully occupied to deal with medical negligence cases. This will also help in solving the problem of unnecessary delay. This should be done keeping in mind that justice delayed is justice denied.
2. A Forum to deal exclusively medical negligence cases can be brought into effect from within the purview of the Consumer Protection Act, as under Section 29 of the Act, the Central Government can by an order make such provisions not inconsistent with the provisions of the Act, to remove difficulty which may in giving effect to the provisions of the Act.
3. The Consumer Protection Act is very much silent about medical negligence, so the act need to be amended so as to widen the scope of the act and to avoid difficulties and confusions arising while dealing with the medical negligence cases.

CONCLUSION

A person's life is very important. Everybody is having a right to life. This right to life also includes the right to health and a right to medical facilities. It is true that doctors hands are considered to be equal to that of gods as they are considered to be saviors of life. But this does not mean that any breach of duty or any wrongful act done by them can be ignored. Consumer Protection Act and Indian Penal Code are effective piece of legislations dealing

with remedies for any negligent act of medical professionals. But these laws are not that effective to tackle with the increasing number of medical negligence cases, and complexities of these cases. This writer concludes with a suggestion that new forum is to be established, so as to deal exclusively with medical negligence cases and that Consumer Protection Act is to be amended.

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6. Dealing with Vexatious and Malicious Medical Negligence Complaints – The Path Forward

Razan Haris[1]
Athira Palangat[2]

ABSTRACT

The medical profession was brought within the purview of the Consumer Protection Act, 1986 through the judgment of the Supreme Court in *Indian Medical Association* v. *V.P. Shantha* (1996 AIR 550). This landmark decision proved a turning point in the field of consumer protection in India, as it provided for the speedy adjudication of medical negligence cases in the Consumer Fora as opposed to long drawn out trials in the Civil and Criminal Courts. There has no doubt been an increase in litigation against doctors and hospitals over the last few decades. The question however, is how many of these complaints are genuine?

Frivolous, vexatious or malicious lawsuits are a malady that afflicts the judicial system in our country. It puts to waste much of the valuable time and resources of the Courts along with that of the parties involved. Moreover, these complaints, instituted mostly with ulterior motives, causes much harassment to the defendants and leads to consequences such as loss of reputation, loss of confidence, practice of defensive medicine etc.

This paper discusses what constitutes vexatious litigation, the problems posed by their rampant existence and solutions to rid the society of this vicious menace.

INTRODUCTION

The medical profession was brought within the purview of the Consumer Protection Act, 1986 through the judgment of the Supreme Court in *Indian Medical Association* v. *V.P. Shantha*[3] wherein it was held that *"Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal*

[1] **VII semester, NUALS**
[2] **III Semester, NUALS**

[3]1996 AIR 550; 1995 SCC (6) 651

service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Act". This landmark decision proved a turning point in the field of consumer protection in India.

MEDICAL NEGLIGENCE LAWSUITS: THE DOWNSIDE

The commercialization of modern healthcare has materially transformed the practice of medicine in this era. Rather than the medicine and the rendering of medical aid, the focus of hospitals and medical practitioners has shifted towards the money-making, which seems to occur at the expense of the former. This in turn has led to the souring of a once much revered relationship between patients and doctors. A rather adversarial relationship has come to exist, where patients lose faith in their doctors and the doctors view the patients as potential litigants.

There is no doubt that there has been an increase in medical litigation by unsatisfied patients over the last decade. On the one hand, there can be unfavorable results of treatment and on the other hand the patient suspects negligence as a cause of their suffering.[4] The inclusion of medical practitioners within the ambit of the Consumer Protection Act has therefore, wound up a double-edged sword.

'Frivolous', 'vexatious' or 'malicious' lawsuits denote actions brought without sufficient legal merit and purely for the purpose of causing hardship and annoyance to the defendant. Apart from affecting the defendants, they are a menace to the society as a whole, as it puts to waste precious time as well as resources of the courts that could be well spent on genuine disputes in a country where the backlog of cases in courts plagues the very administration of justice.

It has been said that bringing doctors within the purview of the Consumer Protection Act, 1986 has exposed them to frivolous complaints, which is detrimental to their professional independence. When dishonest and unwarranted complaints are filed against doctors on grounds of alleged deficiency in service, the defendant is caused mental harassment and agony, as the

[4] M.S. Pandit and Shobha Pandit, *Medical Negligence: Coverage of the Profession, Duties, Ethics, Case Law, and Enlightened Defense - a Legal Perspective.*, 25 INDIAN J. OF UROLOGY (2009), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779963/?report=classic.

reputation which he has built over years, through strenuous training, hard work and skill is questioned and compromised.

The looming threat of negligence and malpractice lawsuits has led to the practice of what has come to be known as 'defensive medicine', which has doctors ordering a battery of tests and procedures so as to minimize malpractice exposure. Physicians now shy away from high-risk procedures preferring rather to safeguard themselves from the possibility of liability. This results in patients going through numerous unnecessary tests and hence, incurring greater expenditure than is otherwise required.

Moreover, the persistent anxiety of getting caught in medical negligence cases and frivolous charges from patients and their relatives is driving doctors to get themselves 'insured'[5] against potential liability for negligence. Doctors and hospitals in this pursuit subscribe to indemnity insurance schemes with huge premiums, the cost of which is ultimately recovered from the patient.

Section 26[6] of the Consumer Protection Act, 1986 provides for the 'Dismissal of frivolous or vexatious complaints'. It lays down that-

> *"Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order"*

Hence, frivolous or vexatious complaints instituted before a consumer forum will be dismissed, such that the complainant will be penalized with a fine amounting upto Rupees Ten Thousand. The exercise of this power is hedged on the condition that the concerned consumer forum must record reasons for the dismissal of the complaint.[7] Both the above provisions are however, more or less ineffective as the maximum penalties that may be imposed under the sections are merely a

[5] Professional indemnity provides insurance cover for claims against the policyholder owing to their professional negligence. This indemnifies hospitals and doctors against loss incurred out of their negligent act, error or omission in carrying out the business.

[6] Inserted by the Consumer Protection (Amendment) Act, 1993

[7] *Dr. V.N. Shrikhande* v. *Mrs. Anita Sena Fernandes,* Civil Appeal No.8983 of 2010

slap on the wrist of the litigant as opposed to serving as a sufficient deterrent against such complaints.

CASES

The National Commission, in what is touted as one of its landmark judgments, *Brij Mohan Kher* v. *Dr. N. H. Banka and Anr.*[8], warned against the inclination to file non-meritorious complaints against doctors as follows:

> *"False and vexatious complaints lodged before the Consumer Forum with a view to harass and blackmail those who supply the goods and provide the services to the community, should be discouraged".*

In *Tarun Kumar Pramanik* v. *Dr. Kunal Chakraborty & Ors*[9], the allegation raised by the complainant was that during the surgery for inguinal hernia, one of his testes was removed negligently and without his consent. The State Commission on the basis of the evidence placed on record, and expert opinion held that the testis was removed so as to avoid a gangrenous infection and that the surgery had been performed with reasonable care and skill. The complaint was held to be a vexatious one and the complainant was held liable to pay the costs of the defendant.

In *Subh Lata* v. *Christian Medical College*[10], the complainant alleged that her husband died due to complications from a kidney biopsy. The State Commission, however, held that the complainant had suppressed certain crucial facts in her complaint. Besides serious life threatening diseases, the deceased also suffered from tuberculosis and septicemia which are diseases with high mortality rates. Hence, the complainant having tried to deceive the court was disentitled from relief and the complaint was dismissed with Rupees One Thousand Five Hundred as costs.

In *K. Jayaraman* v. *Poona Hospital & Research Centre & Ors.*[11], wherein the complainant claimed compensation on the grounds of delay of an hour and fifteen minutes, the National Commission dismissed the complaint as being malafide, vexatious and frivolous and the

[8] (1995) CPJ NC 99
[9] 1995(2) CPR 545(WE SCDRC)
[10] 1994 (2) CPR 691; 1995 (1) CPJ 365; 1995 CCJ 512
[11] 1994 (2) CPR 31

complainant was directed to furnish costs to the respondent hospital.

In *Kusum Sharma* v. *Batra Hospital and Medical Research Centre*[12], the Supreme Court held that doctors cannot be "unnecessarily harassed" by patients or their claimants to extract compensation for death or disability due to alleged medical negligence. It was also held that it was the bounden duty of society to ensure that doctors perform their duties without apprehension of malicious prosecution though the interests of the patients should be paramount. The Apex Court in its judgment said:

> *"The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals, particularly private hospitals or clinics, for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners"*

Many a complaint prefers recourse to criminal process as a tool for pressuring the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.[13] Noting the increase in the cases of doctors being subjected to criminal prosecution, the Apex Court has laid down elaborate guidelines so as to shield the doctors from frivolous criminal prosecution. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.[14]

The Supreme Court observed in *Jacob Mathew* v. *State of Punjab*[15]:

> *"A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded*

[12] Civil Appeal No. 1385 of 2001
[13] *Jacob Mathew* v. *State of Punjab*, (2005) 6 SCC 1
[14] *Martin F. D'Souza* v. *Mohd. Ishfaq*, 2009 (2) SC 40
[15] (2005) 6 SCC 1

against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason – whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

SOLUTIONS

The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into account while the legitimate claims of the patient cannot be ignored.[16] It is well settled that frivolous litigation clogs the wheels of justice making it difficult for courts to provide easy and speedy justice to the genuine litigations.[17]

The Indian judicial system is grossly afflicted, with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim.[18] Even though the Consumer Protection Act has proved itself to be an indispensible tool in the hands of victims of unscrupulous and unqualified medical service providers, it has also given rise to fear and apprehension amongst doctors and hospitals of being dragged into frivolous, vexatious, or even

[16] ROGER P. D. STEWART, JACKSON AND POWELL ON PROFESSIONAL NEGLIGENCE (London, 3rd Ed. 1997).
[17] *National Textile Corporation* v. *Kunj Behri Lal*, AIR 2010, Del. 199
[18] *Subrata Roy Sahara* v. *Union of India and Ors.*, (2014) 8 SCC 470

malicious litigation. An unfortunate truism is that, as more people learn to use the legal system for legitimate purposes, many more also learn to use it for illegitimate purposes.[19]

The taking of a tough stance by the Courts and Consumer Fora against frivolous litigation could go leaps and bounds in preventing them. They must identify complaints which are vexatious and speculative in nature and are aimed at harassing doctors and hospitals with the sole purpose of extracting money from them or ruining their reputations.

For this purpose, an ample fine must be imposed so as to act as sufficient deterrent against the initiation of such lawsuits. Presently, the fine that may imposed for frivolous litigation under the Consumer Protection Act is a maximum of Rupees Ten Thousand and Rupees Three Thousand under the Code of Civil Procedure. Unless the cost is brought to a realistic level, the provision authorizing the levy of an absurdly small sum by present day standards may, instead of discouraging such litigation, encourage false and vexatious claims.[20] The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.[21] The Supreme Court while discussing Section 35A of the Code of Civil Procedure in a case suggested raising the maximum amount that may be levied to Rupees One Lakh.[22] The Supreme Court held as follows in *Subrata Roy Sahara* v. *Union of India and Ors*[23]:

> *"The suggestion to the legislature is, that a litigant who has succeeded, must be compensated by the one, who has lost. The suggestion to the legislature is to formulate a mechanism, that anyone who initiates and continues a litigation senselessly, pays for the same. It is suggested that the legislature should consider the introduction of a "Code of Compulsory Costs".*

If this too fails to put a check on malicious complaints, the courts and consumer fora must consider dictating more stringent punitive measures to deal with the problem. The 192nd Report of the Law Commission of India put forth a draft bill, namely, the Vexatious Litigation

[19] John M. Johnson & G. Edward Cassidy III, *Frivolous Lawsuits and Defensive Responses to Them-What Relief Is Available*, 36 Ala. L. Rev. 927 (1985), http://heinonline.org/HOL/Page?handle=hein.journals/bamalr36&div=59&g_sent=1&collection=journals#938.
[20] *Sanjeev Kumar Jain* v. *Raghubir Saran Charitable Trust & Ors.*, (2012) 1 SCC 455
[21] *Vinod Seth* v. *Devinder Bajaj*, (2010) 8 SCC 1
[22] *Supra*, n.20. See also LAW COMMISSION OF INDIA, 240TH REPORT ON COSTS IN CIVIL LITIGATION (May 2012).
[23] (2014) 8 SCC 470

(Prevention) Bill, 2005 to prevent the institution or continuance of vexatious proceedings, civil and criminal, in courts.[24]

The service rendered by those of the medical profession to human beings is one of much nobility, and hence there is a strong need to protect medical professionals from frivolous or unjust prosecution. In *Jacob Mathew*[25] the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, laid down certain rules in this connection:

(i) A private complaint is not to 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.

(ii) The investigating officer should, before proceeding against the accused doctor, 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 opinion applying the *Bolam* Test[26].

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

Given the fact that medicine is not an exact science, and that jurors are typically not experienced in the appropriate standard of care, raising the burden of proof should be further studied in the hopes of achieving a more equitable judicial system. Potentially, this change could result in fewer frivolous claims being filed and only encourages those claims with merit being brought

[24] LAW COMMISSION OF INDIA, 192ND REPORT ON PREVENTION OF VEXATIOUS LITIGATION (June 2005), http://lawcommissionofindia.nic.in/reports/report192.pdf.
[25] (2005) 6 SCC 1
[26] As laid down in *Bolam* v. *Friern Hospital Management Committee,* (1957) 1 WLR 582

forward, making this a favorable outcome.[27] Policy makers must however, ensure that this does not discourage the filing of legitimate claims.

Although large compensation awards to victims of medical negligence act as a warning towards wayward physicians, the practice also has its defects. What constitutes 'adequate compensation' has not been defined under the law. The quantum of compensation awarded in medical negligence cases seems to have given rise to unrealistic expectations among many consumers who opt for litigation to claim huge sums of money on grounds of medical negligence. Unscrupulous litigants seek to take undue advantage of the judicial system. Hence, the existence of a cap on the compensation awarded may help curb such litigation. Under the Consumer Protection Act, there is no cap on the amount of compensation. In the recent judgment of the Supreme Court in *Dr. Balram Prasad* v. *Dr. Kunal Saha & Ors*.[28], a case which dragged out for fifteen years in the courts, a little more than Rupees Six Crores was awarded as compensation to Dr. Saha for the death of his wife due to medical negligence. The two key factors in computing the award was the earning capacity and the loss to the consumer. This would mean that for hospitals with low turnovers, it would not be feasible to treat patients with high incomes. Also, this would mean minimal indemnity insurance as far the doctor or hospital is concerned and hence, lower healthcare costs to be incurred by the consumer.

The reputation of a medical practitioner being one which he/she has acquired through hard work, must not be trifled with lightly. Names of doctors must be kept from public records until a final verdict is pronounced so as to prevent the causing of unnecessary harassment and embarrassment to the doctors.

As warriors of justice, members of the legal fraternity must refrain from entertaining and encouraging the filing of such lawsuits. The pathology of litigative addition ruins the poor of this country and the Bar has a role to cure this deleterious tendency of parties to launch frivolous and vexatious cases.[29] The Supreme Court in *T. Arivandandam* v. *T. V. Satyapal and Anr*.[30]held:

[27] American College of Physicians, *Position Paper on Reforming the Medical Professional Liability Insurance System*, (2003), http://www.acponline.org/acp_policy/policies/reforming_prof_liability_insurance_2003.pdf.
[28] (2013) 13 SCALE 1
[29] *Infra*, n. 30

"The sharp practice or legal legerdemain stultifies the court process and makes a decree with judicial seals brutum fulmen. It may be a valuable contribution to the cause of justice if counsels screen wholly fraudulent and frivolous litigation refusing to be beguiled by dubious clients and remembering that an advocate is an officer of justice and its society not to collaborate in shady actions. The Bar Council of India, we hope will activate this obligation."

A more promising approach would be to empower judges to impose severe sanctions on lawyers for filing frivolous motions and appeals.[31]

Consumers must be made aware as regards what constitutes negligence, the related law and the ill-effects of frivolous litigation. Only proper and ethical judgment, precautions and proper documentation of all facts of the patient details, diagnostic tests and treatment given and informed consent from the patient or his guardian can save a doctor against litigation. [32] A doctor must give precedence to excellence in treatment and patient care, rather than commercial gains. Patients must refrain from harassment of the members of the medical profession for their personal advantage. Only when both the doctor and the patient follow laws and adhere to the ethics can the society progress.

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[30] 1977 AIR 2421; 1978 SCR (1) 742

[31] Nathan Rehn et al., *Justice Without Delay: Recommendations for Legal and Institutional Reforms in the Indian Courts. 2* JINDAL GLOBAL L. REV. p.39 (2010).

[32] Juthika Debbarma, Neha Gupta & N K Aggarwal, *Consumer Protection Act - Blessing or Curse to Medical Profession ?*, 12 DELHI PSYCHIATRY J. p.305 (2009), http://medind.nic.in/daa/t09/i2/daat09i2p302.pdf.

7. Imposing Vicarious Liability On Hospitals : How Far Is It Possible?

A Gowri Nair[1]
Nikhila P.P.[2]

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.

No one wishes to be subjected to harm, especially when he is under the observation of medical practitioners. Thus when a patient puts himself in the hands of the hospital authority or health care providers he expects them to safeguard and protect his life and person with the best possible care and caution.

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.

Focusing on the point of vicarious liability this paper tries to comprehend the degree and extent to which hospitals can be held vicariously liable for the mistakes on the part of its employees.

For this, first there is a brief discussion of the meanings of the terms medical negligence, vicarious liability and the various legal provisions relating to these terms.

The paper then proceeds to discuss some case laws - Indian as well as foreign, where the question of vicarious liabilities of hospitals have come up for consideration and compare the position in different nations. The paper is concluded with a brief discussion on how the prevailing dilemma regarding vicarious liability of hospital can be effectively cured in order to ensure justice to the aggrieved patient.

[1] **Student, School Of Legal Studies, CUSAT**
[2] **Student, School Of Legal Studies, CUSAT**

INTRODUCTION

- ***Constitution of India & right to health:-***

The constitution of India guarantees right to life is under Art. 21 which states that "no person shall be deprived his or personal liberty except according to procedure established by law".

This right to life has been widened to include umpteen number of rights under it and right to health is one of them.

In the case of *Maneka Gandhi v. Union of India*[3] , 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.

Health can be defined as a state of complete physical, mental and social well-being.

The right to health and access to medical treatment has been included within the ambit of Article 21 as lack of health denudes a person of his livelihood.

In yet another case of *Vincent Pani Kurlnagara v. Union of India*[4] , the Supreme Court observed: "maintenance and improvement of public health have to rank high as these are indispensable to the very existence of the community and on the betterment of these depends the building of the society which the constitution makers envisaged."

Thus it is the fundamental right of every person in India to demand for and to expect best possible treatment and care.

Any violation of this right will give the patient a right to approach the court.

[3] AIR 1978 S C 597.
[4] AIR 1987 SC 990

MEDICAL NEGLIGENCE & LIABILITY OF HOSPITALS

The concept of implied undertaking on the part of medical professionals is a very important concept, which envisages the fact that, they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment.

Expectations of a patient who approaches a doctor/hospital are two-fold, that they :

- provide medical treatment with all the knowledge and skill at their command
- will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff.

In the case of the *State of Haryana v Smt. Santra*, the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill"

But many a times we can see that this right is blatantly violated by medical practitioners who are expected to be guardians of the health of their patients. Due to recklessness and negligent attitude and conduct there have been unfortunate situations where doctors have caused severe harm to some patients whom they were supposed to treat and make better.

Such wrong acts on the parts of medical practitioners are referred to as medical negligence.

Negligence is the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence[5].

As per Salmond' Law of Torts, "*negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do*"

In the case of Dr. *Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr*.[6], and *A.S.Mittal* v. *State of U.P*[7]., it was laid down that when a doctor is consulted by a patient, the doctor owes to his patient certain duties which are:

[5]K K S R Murthy , *Medical negligence and the law*. Indian Journal of Medical Ethics. July– Sep 2007; 3:1. Available at: http://www.ijme.in/index.php/ijme/article/view/592/1506

(a) Duty of care in deciding whether to undertake the case,

(b) Duty of care in deciding what treatment to give, and

(c) Duty of care in the administration of that treatment.

A breach of any of the above duties may give a cause of action for medical negligence and the patient may on that basis recover damages from his doctor.

EVOLUTION OF THE CONCEPT OF VICARIOUS LIABILITY ON HOSPITALS

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.

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.

In order for *respondeat superior* to apply, the negligent act must have occurred within the "scope of employment."

Since treating patients and performing surgeries are activities that usually fall within a doctor's scope of an employment, hospitals may be liable for any injuries negligently caused by their doctors during treatment or surgery.

Employers are also liable under the common law principle represented in the Latin phrase, *"qui facit per alium facit per se"*, i.e. the one who acts through another, acts in his or her own interests

[6] AIR 1969 SC 128
[7] AIR 1989 SC 1570

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?

If the principal does not control the time, method, or manner of the services performed by the physician and does not provide direct compensation to the physician, the physician is generally regarded as an independent contractor.

On the other hand, residents working at a hospital are generally viewed as employees and the hospital may be held vicariously liable for any negligence.

ENGLISH POSITION

Prior to 1940's Courts in England were reluctant to extend liability for medical negligence to the employer hospitals .but later on the courts in England started recognizing the vicarious liability in the area of medical care.

The doctrine of vicarious liability extends the primary liability of the hospital for the wrongs or neglect acts of its servants, irrespective of the kind of employment.

In *Gold v.Essex County Council*[8] the court held that the hospital liable for the negligent acts of its radiograph and nurses.

In *Cassidy v. Ministry of Health*[9] the court found that in the case of patient himself chooses the doctor and goes to him, the employer-hospital was not be responsible for the acts of the doctor. Because under such a situation, the hospital acts as a facilitator of providing medical care.

The only exception would be in the case of consultant selected and employed by the patient himself.

UNITED STATES POSITION

In *Gilbert v. Sycamore Municipal Hospital*[10], the Illinois Supreme Court abrogated hospital immunity to vicarious liability of independent contractor physicians. The Gilbert court held that hospitals could be held liable for the actions of independent contractor physicians under the doctrine of apparent authority.

The California Court of Appeals held that a hospital could be held vicariously liable for the negligence of a non-employee radiologist.

In *Columbia Medical Center of Las Colinas v Bush*[11], that the "following orders" may not protect nurses and other non-physicians from liability when committing negligent acts. Relying on vicarious liability or direct corporate negligence, claims may also be brought against hospitals, clinics, managed care organizations or medical corporations for the mistakes of their employees.

[8] (1942) 2 KD 293; (1942) 2 All ER 237.

[10] *156 Ill.2d 511 (1993*)

[11] *122 S .W.3d 835*

INDIAN POSITION:-

A Patient approaching a hospital for treatment expects the best possible care, caution and treatment from them.

Hence whenever there is deficiency of service or , where the operations or treatments has been done negligently without bestowing normal care and caution, the hospital also must be held liable either under the Law of Torts or the Consumer Protection Act.

The Kerala High Court in *Joseph @ Pappachan* v. *Dr. George Moonjerly*[12], 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.

A hospital can be held vicariously liable on numerous grounds on different occasions.

The Supreme Court of India in *Spring Meadows Hospital* v. *Harjot Ahluwalia*[13] held the hospital liable to pay compensation for the negligence of its attending doctor who allowed unqualified nurse to give intravenous injection to a patient

In A. M. *Mathew v. Director, Karuna Hospital*[14] 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 v. Medical Officer,ESI Hospital*[15] 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*.[16] it was held that it was the hospital that was offering the medical services.

[12] [1994 (1) KLJ 782 (Ker. HC)]
[13] AIR 1998 SC 189; (1998) 4 SCC 39.
[14] AIR 1998 SC 189; (1998) 4 SCC 39.
[15] (1998) 1 CPR 165 (Cal)

In another judgment by the National Consumer Redressal Commission in case of *Smt. Rekha Gupta* v. *Bombay Hospital Trust & Anr*[17], observed that the hospital who employed all of them whatever the rules were, has to own up for the conduct of its employees. 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.

It has been held by National Consumer Redressal Commission[18] that in case of the operation being performed in an institution, it is the duty of the institution to render postoperative treatment and care to the hospital's patients.

Thus it is understood that as long as it can be proved that a hospital and a doctor had existing employer-employee relation, the hospital will be liable for the medical negligence on the part of its employee doctor.

RESPONSIBILITY OF THE GOVERNMENT HOSPITALS/DOCTORS

There is a doubt as to whether state government can he held liable for negligence of doctors in government hospitals?

This question has been answered in affirmative in many decisions.

In *State of Rajasthan v. Vidyavati*[19], 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*[20] 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

[16] [2002 ACJ 954 (Mad. HC)],
[17] [2003 (2) CPJ 160 (NCDRC)]
[18] [1993 (3) CPR 414 (NCDRC)]
[19] AIR 1962 SC 933.
[20] [JT 1996(2) SC 664], *Smt. Santra* v. *State of Haryana & Ors*, [(2005) 5 SCC 182]

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*[21], 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.[22]

Compensation can be awarded to an injured person for not being provided treatment in a Government hospital or for death or injury caused therein because of negligence.

In the case of *Paschim Bangal Khet Mazdoor Samity & Ors* v. *State of West Bengal* [23] 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.[24]

The government is required to be impleaded as a party to the suit instituted against a Medical Officer of Government Hospital for damages in respect of neglect act alleged to have been done by him in his official capacity.

[21] AIR 1996 Raj. HC 80
[22] Punjab State v. Surinder Kaur [2001 ACJ 1266 (P&H-HC]
[23] [1996 (4) SC 260],
[24] *Agarwal& Agarwal, " medical negligence & hospital's responsibility" journal of Indian Academy of Forensic Medicine.,*

However, the state is not vicariously liable for negligence committed by Medical Practitioners of Government hospitals in course of their private practice or beyond the course of their employment as public officers.

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.

Medical services have been brought under the purview of Consumer Protection Act,1986 wherein the complainant can be granted compensation for deficiency in services within a stipulated time of 90 -150 days , this goes a long way in eliminating the delay that may be caused by litigations.

Cases, which do not come under the purview of Consumer Protection Act, 1986 can be taken up with criminal courts where the health care provider can be charged under Section 304-A IPC 4 for causing damages amounting to rash and negligent act or in Civil Courts where compensation is sought in lieu of the damage suffered, as the case may be.

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.

But in all these cases of medical negligence it is seen that a very huge burden of proof is imposed on the aggrieved patients to prove negligence. This is a major setback in the law as many a time's hospital authorities and doctors will not be quite open about the mistake on their part.

The law on the subject needs to be more precise and certain. That will surely give a better understanding about the law to the reasonable man.

Thus it is seen that the state has to intervene with statutes and regulations to ensure that a 'standard' of practice is established in hospitals.

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.

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8. Medical Mishaps and COPRA.

Aswathy Sukumaran Ettungapady[25]
Ananthvishnu.V.P[26]

ABSTRACT

This paper deals with the various aspects of medical negligence in the light of Consumer Protection Act 1986 and emphasizes on the liability under 304-A of Indian Penal Code, the Quantum of Punishment, Rising false petitions and the need for reforms in this field. The study is done considering Medical Profession as a service under the Consumer Protection Act 1986 and analyzing various rulings by the Indian Courts.

INTRODUCTION

From time immemorial doctors were seen as incarnations of God as they served mankind with such great nobility and swept away their pains and sufferings with kindness and patience. They were always admired, respected and considered to be serving the greatest service ever done to mankind. Medical profession was always in its glory and considered the bliss of reformation. It gave hopes to unfulfilled dreams and played an important role in building-up a civilized society. But soon with the advent of urbanization and consumer culture, the glory of this life-saving service started to diminish. Gone are the days when doctors themselves took the oath seriously and now medical care has become just a profession. When medical service changed its way to become medical profession, it was accompanied with loss of ethics and moral values and it's after effect was medical negligence.

The skill and care that is reasonably expected of a doctor has now fallen prey to a money-monger society and the inevitable result of this attitude is the increase in cases of medical negligence. The innocent patients who give all their sovereigns and lay their complete trust on erudite professionals lose their everything before they even get a chance to protect themselves.

MEDICAL NEGLIGENCE

[25] **Student, Govt. Law College, Ernakulam**
[26] **Student, Govt. Law College, Ernakulam**

According to Black's Dictionary, "negligence means omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate the conduct of human affairs, would do or the doing of something which a reasonable and prudent man would not do". Medical negligence basically means such negligence resulting from the failure on part of the doctor to act in accordance with the medical standards in vogue which are practiced by an ordinarily and reasonable competent man in practicing the same art. Medical negligence is a crime as well as a civil wrong in India. To constitute the offence of medical negligence, there should be a duty of care, there must be a breach of that duty and as a result a corresponding damage must be also caused.

STANDARD OF DUTY AND CARE

In *Dr. Laxman Balkrishna Joshi v Dr. Trimbak Bapu Godbole and another*[2], the Supreme Court quoting Halabury's laws of England held,

"The duties which a doctor owes to his patient are clear. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, when consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake a case; a duty of care in deciding what treatment to give; and a duty of care in administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient."

The test for determining the standard of care expected of a medical practitioner, known as Bolam' test, is formulated from the classic judgment of law delivered in *Bolam v. Friern Hopital Management Committee,*[27]

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill…..In case of a medical man; negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he conforms to one or more perfectly proper standards, then he is not negligent."

[27] (1957) 1 W.L.R. 582

This statement of law has been invariably cited with approval before the courts in India and applied to as touchstone to test the pleas of medical negligence[28].

To constitute a liability under medical negligence the Courts consider whether or not the doctor has undertook a fair, reasonable and competent degree of skill which may not be the highest skill; if there are many modes of treatment, adoption of any one of them with due care and caution; whether the doctor has failed to act in accordance with the standard practice of treatment prevailing at that time.

The introduction of new and vibrant technologies into the field of health care has led to advanced standards of treatment. Under these circumstances, the standards of accepted medical practice also change. The new era of experimentations has also brought in new risks in treatment as the case study of every patient is different and so is the subject matter of every disease. Many a times the doctor opts to adopt new methodologies of practice in order to save the life of patients, which may as well carry high chances of failure. But as long as it is found to be an accepted practice whatever the other options be, no action can lie against the medical practitioner, nor can be he held negligent for the same.

CRIMINAL LIABILITY UNDER 304-A

A case of medical negligence can incur criminal liability in India under Section 304-A, IPC. S.304-A-Causing death by negligence – "Whoever causes the death of any person by doing a rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

In medical negligence cases, causation is a very important ingredient and always requires careful consideration. This is because the etiology of medical condition is often unclear and because the situation will often be complicated by an under-lying illness or other pro-existing vulnerabilities[29]. The tests of reasonability and foreseeability act as inhibiting factors for doctor's liability. In order to constitute an offence under 304-A, gross negligence must be proved. An error of judgment on the part of doctor does not make him criminally liable[30]. "Every mishap or

[28] (1996) 4 SCC 332; (1996) 2 SCC 634;(1998) 4 SCC 39;2005 (6) SCC 1
[29] Lewis, C.J. (1995) *Medical negligence A Practical Guide* 3rd ed. P. 209
[30] *Dr. Suresh Gupta* v. *Government of NCT of Delhi*, 2004 (6) SCC 422

misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence"[31]. In medical negligence cases, the burden of proof is on the victims.

The Indian Medical Council Act, 1956 discusses professional misconduct in Section 20-A and the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 also lays out the duties, responsibilities and punishments and disciplinary measures. But they do not offer the aggrieved any greater justice. The arena of victimology forms a lacuna. With this turn of events, in 1986, the legislature enacted the Consumer Protection Act, 1986 to regulate the unfair practices under medical profession and thus provide compensation to those aggrieved victims and their families under civil proceedings.

CONSUMER PROTECTION ACT (COPRA)

The Consumer laws protect the interests of consumers who are often exploited in the hands of gigantic companies and servicemen. The Consumer Protection Act, in Section 2(1) (d) (ii) defines consumer as any person who-

"hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose".

Under section 2(1) (o) of the Act defines service. "Service" means service of any description which is made available to potential users and includes but not limited to, the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. The Supreme Court in its landmark judgment in *Indian Medical Association* v. *V.P. Shanta*[32], for the very first time

[31] AIR 2004 SC 4091 at 4095
[32] 1995 (6) SCC 651

discussed and interpreted the meaning of the word 'service' under Consumer Protection Act as well as its scope and applicability to the services rendered by medical professionals, Government hospitals and private hospitals and nursing homes under the following categories:

- Where services are rendered free of charge to everybody availing of the aid service;
- Where charges are required to be paid by persons availing of services, but certain categories of persons who cannot afford to pay are rendered service free of charge.

The Consumer Protection Act, 1986 aims at providing better protection of the interests of consumers and for that purpose established consumer councils and other authorities for the settlement of consumer's disputes and matters connected therewith. It acts as a quasi-judicial authority which is framed so as to provide simple and speedy redressal in cases of consumer disputes. These quasi-judicial bodies observe the principles of natural justice and have the power to give relief of special nature and award appropriate compensation. Penalties for non-compliance with orders given by these quasi-judicial bodies are also provided in the Act. But in practice, there are many loopholes in the Act and these in turn have affected the implementation of the statute. The quantum of compensation that is provided in the medical negligence cases, the number of awards granted over the years, the frivolous and vexatious proceeding and litigations coming out every year and absence of any special body to deal with medical negligence cases have all aggravated the situation.

QUANTUM OF COMPENSATION

A serious drawback of the Consumer Protection Act is its inadequacy in providing appropriate compensation in medical negligence cases. Unlike other consumer disputes, many a times the damage caused is irretrievable in negligence cases. The services that are discussed in the definition clause of the Act deal with mostly non corporal damages, but in medical negligence cases the subject matter is mostly corporal. But unfortunately the compensation awarded by consumer redressal forum in medical negligence cases is not too different from that awarded in cases of other service providers.

The lack of uniformity and consistency in awarding compensation has been a matter of grave concern.

The National Commission uses multiplier method in awarding compensation, applying section 163 of the Motor Vehicles Act 1988. The filing of the complaint/ appeal/ revision is dealt with under the Consumer Protection Regulation 2005. Under Consumer Protection Act, there is no provision as in Motor Vehicles Act, under which a claimant is entitled to compensation under any structured formula.

In 1998, a 36 year old NRI came to India on vacation with her husband. While staying in Kolkata, she developed skin rashness and approached the appellant doctors and hospital for treatment. But they couldn't diagnose that she suffered from Toxic Epidermal Necrolysis (TEN) and instead prescribed steroids. After her condition worsened, she was shifted to another hospital in Mumbai. But she died soon after. The claimant, her husband filed a petition before the National Consumer Disputes Redressal Commission alleging medical negligence on the part of the doctors and hospital and claimed the compensation of Rs. 77 crores. The National Commission dismissed the complaint in 2006. The Supreme Court later disposed of the appeal in 2009 and remanded back the matter to National Commission to award just and reasonable compensation to the claimant. This time the claimant revised the quantum of claim by making an addition of 20 crores to the original claim. However, the National Commission rejected this additional claim and fixed a total compensation of Rs.1.7 crores for medical negligence. The Commission also held the claimant responsible for contributory negligence and deducted 10% from the total compensation and awarded an amount of Rs. 1.5 crores. In the appeal petition before the Supreme Court, the court produced a landmark judgment in deciding the quantum of compensation for medical negligence cases, and awarded a compensation of about Rs.6.08 crores[33]:

"…...The compensation awarded by the National Commission should be meant to restore the claimant to the pre accidental position and in judging whether the compensation is adequate, reasonable and just monitory compensation is required to be arrived at on the principle of *restitution in integram".* [para.70]

[33] *Balram Prasad* v. *Kunal Saha ;(*2014) 1 SCC 384

“The multiplier method was provided for convenience and speedy disposal of no fault motor accident cases. Therefore, obviously, a "no fault" motor vehicle accident should not be compared with the case of death from medical negligence under any condition. The aforesaid approach in adopting the multiplier method to determine the just compensation would be damaging for society for the reason that the rules for using the multiplier method to the notional income of only Rs. 15,000/- per year would be taken as a multiplicand. In case, the victim has no income then a multiplier of 18 is the highest multiplier used under the provision of Sections 163A of the Motor Vehicles act read with the Second Schedule. Therefore, if a child, housewife or other non-working person fall victim to reckless medical treatment by wayward doctors, the maximum pecuniary damages that the unfortunate victim may collect would be only Rs. 1.8 lakh. It is stated in view of the aforesaid reasons that in today's India, Hospitals, Nursing Homes and doctors make lakhs and crores of rupees on a regular basis. Under such scenario, allowing the multiplier method to be used to determine compensation in medical negligence cases would not have any deterrent effect on them for their medical negligence but in contrast, this would encourage more incidents of medical negligence in India bringing even greater danger for the society at large.”.[67]

FRIVOLOUS AND VEXATIOUS LITIGATIONS

The increase in claims on medical negligence has created a difficult situation for the consumer forum to differentiate the frivolous and vexatious litigation from original claims. The term frivolous, according to dictionary, means of little importance, trivial, lacking in seriousness. The term vexatious means causing vexation, teasing, irritating: full of distress or annoying. The Consumer Protection Act goes further and provides for award of cost to the opposite party when a complaint is frivolous.

Section 26 of the Act reads-‘where a complaint instituted before the district forum, the state commission or as the case may be the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost not exceeding 10000/- , as the case may be, specified in the order.’

Instances are many where complainants indulged in speculative litigations and adventure subjecting the opposite parties to unnecessary harassments[34]. In an insurance case, the National Commission observed, "there is a wide spread tendency to lodge false med-claims against insurance companies before the consumer forums because there was no court fee payable. It is essential that such tendency is firmly curved and abuse of Consumer Protection Act is discouraged[35]."

A patient was admitted in serious condition and was given prompt and expert treatment. As a result of such good care, the infection of the patient was quickly brought under control and he was saved from what might have led to his death, when the complainant brought a complaint claiming compensation of 55.9 lakhs. The National Commission found to be vexatious and directed the complainant to pay an amount of R.10000/- to the opposite parties[36]. The Code of Civil Procedure provides for the grant of compensatory cost in the case of false or vexatious claim in section 35-A. The absence of strict procedural formats in the consumer protection laws has made it a platform for unfair practices.

NEED FOR REFORMS

The existing redressal mechanism needs to be supplemented with other active Alternate Dispute Resolution Mechanisms in order to deliver effective and speedier justice. A strong consumer information and advisory system, helpline and Consumer Advice Centre for mediation, better service delivery tools and expanded authority are some of the mechanisms that are at present demanded for the working of the system.

CONCLUSION

As a matter of fact, the Consumer Protection Act did not put the medical profession at any greater peril than any other service provider. Statistics show that the total number of cases against medical professionals are around 1% of the total cases filed in consumer courts. Any increase in filing is only due to easy accessibility since the court fee payable is only nominal unlike in a civil court. Indian society has always kept doctors in an advanced position and this is

[34] *K. Jayaram* v. *Poona Hospital and Research Centre,* 1994 (1) CPJ 23 (NC) *;Shanta Ben Mulji Bhai Patel and Ors.* v. *Beach Candy Hospital and Research Centre,* 2005 CPJ 501 (NC)
[35] *National Insurance Company Ltd.* v. *Surinder Lal Arora,* 1993 (3) CPR 482 (NC)
[36] *Brij Mohan Kher* v. *Dr. N. H. Banka,* 1995 (1) CPJ 99

very much evident in the laws as well. The medical professionals shall introspect their position and must make sincere attempts to strengthen this relationship. There must be a special law and special bodies of law to check the negligence cases. Medical mishaps are a curse to the whole society, and the law-makers must open their eyes and check-out with the age old laws.

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9. Medical Mishaps In India And The Consumer Protection Act, 1986 And Legal And Ethical Standards Of Medical Care – Issues Faced By Consumers, Medical Professionals, Hospitals And Other Stakeholders

Anju Xavier[1]
Kamalakshy Kylasanath[2]

ABSTRACT

Human life is precious and therefore Medical negligence has come to be a very serious issue these days. It happens when injury or death is caused to the patient as a result of breach of duty by the doctors. Even though medical professionals are greatly respected honored; there are a number of cases that are filed against the doctors for medical negligence. This article briefs on medical negligence and related cases. It also explains medical negligence under the consumer protection act and the reasonable standards of care. Finally the issues that are dealt by the consumers and the consumer redressal agencies are also explained.

INTRODUCTION

The service of doctors and other medical professionals is virtuous and dignified. The saying *vidyo narayano harihi* means doctors are equivalent to lord Vishnu. Every medical professional starts his service in the medical profession after taking the Hippocratic Oath. The Hippocratic Oath which starts with "I swear by Apollo physician…" necessitates a physician to swear upon the gods that he will abide by the ethical standards in medicine. There are six ethical principles that has to be followed by the medical professionals. They are autonomy, beneficence which means doing good, nonmalficience which means not doing any harm, justice, telling the truth and remaining faithful. These principles are not followed nowadays leading to a breach of duty which results in negligence.

CONSUMER AND CONSUMER PROTECTION ACT 1986

According to section 2 of the consumer protection act of 1986, a consumer means any person who a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any user of such goods

[1] **Student, Kerala Law Academy Law College**
[2] **Student, Kerala Law Academy Law College**

other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred when such use is made with the approval of such person , but does not include a person who obtains such goods for resale or for any commercial purpose ; or b) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised , or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised , or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.[3]

The consumer protection act of 1986 was enacted by the parliament for protecting the interest of the consumers and also to establish consumer councils for settling the disputes related.

WHAT IS MEDICAL NEGLIGENCE?

Negligence is defined in the law of torts. It can be defined as failure to exercise the care that a reasonably prudent person would exercise in like circumstances. Health professionals owe duties to their patients according to accepted standards of care and, in the absence of a conscience clause, cannot simply refuse to treat or counsel their patients without exposure to liability for abandonment or malpractice. Medical professionals have a duty of care to conform to the generally recognized and accepted practices in their profession. If a doctor fails to provide a treatment in specific circumstances where the standards of care call for it, he could be held civilly liable for malpractice.[4]

In *Calcutta Medical Research Institute* v. *Bimalesh Chatterjee*.[5] it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant A doctor cannot be held criminally responsible for a patient's death unless it is shown that she/ he

[3] Pk majumdar, law of consumer protection in india, orient publishing company, 5th edition 2007
[4] Jill Morrison and Micole Allekote, Duty first: towards patient- centered care and limitations on the right to refuse for moral, religious or ethical reasons, Ave maria law review
http://www.avemarialaw.edu/lr/Content/articles/AMLR.v9i1.morrison.pdf
[5] (1999) CPJ 13 (NC)

was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State as held in House of Lords decision in *R* v. *Adomako*. [6]

In the case of *Dr Laxman Balkrishna Joshi* v. *Dr Trimbak Bapu Godbole*[7], the Supreme Court held that if a doctor has adopted a practice that is considered "proper" by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong.

MEDICAL NEGLIGENCE UNDER THE CONSUMER PROTECTION ACT AND SECTION 304 OF THE INDIAN PENAL CODE

Section 304-A of IPC says as "Causing death by negligence-whoever causes the death of any person by doing any rash or negligent act not accounting to culpable homicide shall be imprisoned with imprisonment of either description for a term which may extend to two years or with fine or both.

The code of medical ethics is laid down by the medical council of India. The medical profession is governed by this code. These days there has been a tremendously growing malpractice among the medical professionals. The unethical practice includes selling of body Parts, fee sharing etc.

Section 71(d) of the consumer protection act of 1986 says about the negligence of doctors. It was held that a doctor cannot be found negligent simply because in a matter of opinion he made an error of judgment.[8]

It was in the case of *Indian Medical Association* v. *VP Shantha*[9], that the medical profession was brought within the sphere of service. The doctor patient relationship is one that is of a fiduciary nature as is based on mutual trust and faith. Nowadays cases where doctors are sued for medical negligence has increased manifold.

The burden of proof in a case of medical negligence is usually on the person who alleges negligence. The complainant must prove the allegation against the doctor by citing the best

[6] (1994) 3 All ER 79
[7] AIR 1969 (SC)128
[8] *Ravanamma* v. *Vijay hospital*, 1991 (2) CPR 210 (Madras)
[9] 1996 AIR 550, 1995 SCC (6) 651

evidence available in medical science and by presenting expert opinion as held in *Dr Laxman Balkrishna Joshi* v *Dr Trimbak Bapu Godbole*. [10]

Res ipsa loquitor means the thing itself speaks. The principle of *res ipsa loquitur* comes into operation only when there is proof that the occurrence was unexpected, that the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor and not any other person was negligent.[11]

CASES ON MEDICAL NEGLIGENCE

There are a vast number of cases on medical negligence.

The complainant in the case of *Kidney Stone Centre* v. *Khem Singh alias Chand*[12] was suffering from a stone in prostatic urethra. The kidney stone centre at Chandigarh promised to remove the stone without surgery on payment of Rs 10000 by the complainant. The opposite party failed to remove the stone from the complainant's prostatic urethra. The district forum ordered the refund of fee of Rs 10000 along with interest. The order of forum was upheld in appeal in the case of.

In the case of *Jaspal Singh* v. *PGI Chandigarh*[13] the complainants wife was suffering from 50% burnt injuries. She was admitted to PGI Chandigarh. Her blood group was a positive but was transfused with b positive blood group. She died due to the wrong transfusion of the blood group. The state commission here held that the complainant is entitled to compensation for the death of his wife due to negligent transfusion of blood. The appeal filed to the national commission was rejected.

In the case of *Prashanth Dhanaka* v. *Nizams Institute of Medical Sciences (NIMS) Hyderabad*,[14] the complainant was admitted in the hospital for tumor. After undergoing the surgery for excision biopsy, he became paraplegic that is he suffered paralysis of the lower portion of the body and both legs. Opposite party couldn't explain as to why the removal of the tumor in the

[10] Supra *n.*8
[11] KKSR Murthy, article on medical negligence and law, Indian Journal of Medical Ethics, http://www.ijme.in/index.php/ijme/article/view/592/1506
[12] II 2001 CPJ 436 Chandigarh SCDRC
[13] II 2000 CPJ 439 Chandigarh SCDRC
[14] I 1999 CPJ 43 NC

chest wall resulted in spinal card injury and paralysis. It was held that the opposite party was negligent and hence liable to pay compensation.

The most recent case of medical negligence is *Dr. Balram Prasad and others* v *Dr. Kunal Saha*[15] and another where the Supreme Court's judgment was delivered on October 24, 2013. In this case, Anuradha, the wife of Dr Kunal Saha was hospitalized for fever and itching. Her condition was found to be very bad when she was admitted in the breach candy hospital in Mumbai where she later passed away. The negligence of the doctors was proved a complaint was filed by her husband before the National Consumer Dispute Redressal Forum. The case continued for fifteen years and finally the supreme court in its judgment awarded Rs six crore to the husband.

ACCEPTABLE STANDARDS OF CARE

Reasonable degree of care and skill means that the degree of care and competence that an ordinary competent member of the profession who professes to have those skills would exercise in the circumstance in question.[16] The conduct of the doctor should be reasonable and need not necessarily conform to the highest degree of care or the lowest degree of care possible.[17] The degree of care is a variable and depends on the circumstance and is used to refer to what actually amounts to reasonableness in a given situation.[18] Reasonable degree of care also means that the doctor should have sufficient knowledge and has to be updated to meet the standards in medicine. It was held in *Smt J S Paul* v. *Dr (Mrs) A Barkataki*[19] that Doctors must exercise an ordinary degree of skill. If the doctor has adopted the right course of treatment, if she/ he is skilled and has worked with a method and manner best suited to the patient, she/ he cannot be blamed for negligence if the patient is not totally cured. [20]

[15] Reported in 2013 Indlaw SC 696; (2014) 1 SCC 384; 2013 (4) ACC 378;
2014 (1) Bom.C.R. 397; 2013 (6) KarLJ 161; 2013 (7) MLJ 781; 2013 (4) RCR(Civil) 946; 2013(13) SCALE 1

[16] S V Joga Rao, Medical negligence liability under the consumer protection act: a review of judicial perspective, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962/
[17] *Ibid*
[18] *Ibid*
[19] (2004) 10 CLD 1 (SCDRC - MEGHALAYA)
[20] *Dr Prem Luthra* v *Iftekhar* (2004) 11 CLD 37 (SCDRC - UTTARANCHAL)

Doctors are also imposed with a duty to take the consent of a person/patient before performing acts like surgical operations and in some cases treatment as well.[21] All the matters related to the patient which will be useful for him in making the decision has to be revealed to him. In *K. Gracykutty* v. *Annamma Oomen*.[22], it was held that except in some exceptional circumstances, normally a patient should be informed of proposed treatment and his consent also obtained

ISSUES FACED BY CONSUMERS, MEDICAL PROFESSIONALS AND CONSUMER REDRESSAL FORUMS

It is very difficult to ascertain the amount of compensation that should be awarded in a case of medical negligence. It one of the main issue faced by consumer redressal forums and the courts. In the *Kunal Saha*[23] case, in the first appearance, the amount appears to be a huge sum of money, as per the precedents in medical negligence cases and the amounts awarded by the courts in India.[24]However, going a little bit into the details of how the compensation has to be paid will make it amply clear that besides the loss of prestige, reputation and negative publicity, it is not going to be effective and hardly going to make any difference financially. [25]

The world of medicine is so vast that connecting a doctor, for example, there are so many people dependent on him. If a case of medical negligence occurs then that particular system will fall apart. The main personnel's dependent on a doctor are:

(i) Consumers
(ii) Medical professionals
(iii) Hospitals, and
(iv) Other stakeholders

Consumer is the primary beneficiary to a service rendered by a doctor. So it is only natural that if a medical negligence occurs it would be the consumer who would be affected first. It will all depend on the magnitude of the negligence as to how the consumer would deal with the

[21] *Ibid*
[22] 1992 (1) cpr 251
[23] (2014) 1 SCC 384
[24] Anuraj K Agarwal, Medical Negligence and Compensation in India:
How Much is Just and Effective?, W.P. No.2014-03-27, March 2014 ,
http://www.iimahd.ernet.in/assets/snippets/workingpaperpdf/15451890132014-03-27.pdf
[25] *Ibid*

negligence. If the negligence is a small issue it can be resolved by talking. An issue that is faced by the consumer is that as the gravity of the negligence increases the chances to approach the judiciary arises. There are many avenues open to get redressal. For instance, you can make a complaint to the local professional medical body, usually the state medical council. The appropriate medical council can punish the doctor: for example, by removing his name from the medical register, if he has been found guilty of serious professional misconduct, either permanently, or for a specified period, so that he can no longer practice medicine.

CONCLUSION

Medical negligence is a very serious issue these days. One major problems faced by the consumer redressal agencies is deciding the amount of compensation. The consumer, medical professional and consumer redressal forums face various other issues. There is no proper law relating to medical negligence. Even consumer protection act is only impliedly dealing with medical negligence. So there is a very high necessity to take effective measures to tackle the problems faced by consumer redressal agencies by enacting an effective legislation, in which there are proper guidelines for dealing with all the issues.

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10.Medical Negligence and Degree of Care

Vaibhav Sharma[1]
Bhupesh Charan[2]

ABSTRACT

The work of doctors and other stakeholders is considered to be very crucial for the well-being of the patients. The medical profession is thus considered to be a noble profession. However, with the changing times, the profession has become one of the most sought after occupations, primarily due to the rich dividends it reaps. The tremendous developments witnessed in scientific field in the last two decades have changed the face of the medical industry. This has in turn transformed the 'noble' profession into a lucrative business, where the sole aim of the enterprise is to extract money from hapless patients. The inadequate procedures rendered by the doctors lead to the irreparable injury or even death of the patients. Such devious practices must be curbed to protect innocent people who put their lives in the hands of doctors. It manifests a duty on the judiciary to act as benefactors and punish the guilty. In every case of medical negligence, it is essential to determine what degree of care or the absence thereof qualifies to be culpable in the eyes of the law. The global standard of the *Bolam* Rule uses the principle "ordinary skilled professional standard of care" as a parameter to identify negligence. The Supreme Court followed this precedent for some time, but later departed to the "opinion of the experts" view. The adoption of this approach has helped in proving the necessary protection to doctors against the mala-fide litigation aimed at harassing medical professionals. The conflicting interests of both the aggrieved patients and the honest medical practitioners facing vindictive cases need to be harmonised by the judiciary. The apex court in its landmark decision in *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*[3], settled the legal position regarding the degree of care when it said that no fixed formula could be used in every case. The emphasis must be paid on the facts and circumstances of every case in deciding negligence charges. The present paper critically examines the stance taken by the judiciary as regards "degree of care" in various cases. It tries to bring out the advantages and limitations of every method adopted by the judiciary. It takes into account the various observations made by the Supreme Court in judicial decisions, to evolve the standard of skill that a doctor must exhibit in attending to the patient. The paper lauds the

[1] **3rd year BALLB(Hons.) student, Rajiv Gandhi National University of Law, Patiala, Punjab.**
[2] **3rd year BALLB(Hons.) student, Rajiv Gandhi National University of Law, Patiala, Punjab.**
[3] *V. Kishan Rao* v. *Nikhil Super Speciality Hospital* (2010) 5 SCC 513

pragmatic approach of the apex court in not fixing a straight jacket formula for all cases and instead advising the merits of each case to be considered.

INTRODUCTION

The work of doctors and other stakeholders is considered to be very crucial for the well-being of patients. The medical profession is thus, considered to be a noble profession. From time immemorial, it has been associated with the ideals of sacrifice and self-less devotion. However, with the changing times the profession has become one of the most sought after occupation, primarily due to the rich dividends it reaps. The tremendous developments witnessed in the scientific field in last two decades have changed the face of the medical industry. It has revolutionized the medical procedures leading to increased expertise requirement.[4] This has, in turn, transformed the 'noble' profession into a lucrative business where the sole aim of the enterprise is to extract money from hapless patients. This greed for money sometimes takes an ugly turn when the doctors unscrupulously put the lives of people at stake. The inadequate procedure rendered by doctors lead to irreparable injury or even the death of the patients. Such devious practices must be curbed to protect the innocent people who put their lives in the hands of doctors. It manifests a duty on the judiciary to act as a benefactor and punish the guilty.

A patient-centered approach needs to be adopted by the guardians of the rights of the people. Privatization of the medical industry, coupled with the acute dearth in proportion to the population, puts the victim of such unprincipled usage in a compromising position. The aggrieved party could have recourse in a consumer forum or a regular civil or criminal court. The remedy in the civil or criminal courts being expensive and inefficient, approaching the consumer court to attain justice is often advocated. The consumer court offers a fast and expedient way to secure damages for various misdemeanours. Medical negligence as a field of the consumer protection has largely evolved by judicial pronouncements in various cases heard in the High Courts and the Supreme Court of India. The proactive attitude of judges has paved a way for more comprehensive decisions to be provided, thus upholding justice for the people. The fiduciary nature of the doctor-patient relationship puts it in a special category, which has to be

[4] Singh, Avatar, *Law of Consumer Protection, Principles & Practice*, 4th Edition, Eastern Book Co., Lucknow

dealt with extreme caution and care. [5]The technical nature of medical treatment, along with the expertise needed, makes it very difficult to establish a uniform criterion for medical negligence.[6] The adjudication of medical negligence has to be determined by judges who are not trained in medical science. They trust the opinion of experts while deciding upon the standards of reasonableness in a particular case.[7] It may lead to a lot of subjectivity in their decisions. This paper discusses the rule to be followed by the judiciary in deciding upon the degree of care to be exercise by the medical professional. It critically examines the approach adopted by the judiciary while deciding various disputes.

CONSUMER PROTECTION ACT

Consumer protection law in India was statutorily codified by the Parliament as the Consumer Protection Act, 1986, referred to henceforth as '*the Act'*. The Act was a result of the long-standing demand among consumers to cure the lacuna in the present Indian law and provide better protection to them. The advent of the concept of the medical negligence under the Act has been largely due to judicial pronouncements.[8] The section 2(1)(d)(ii) of the Act defines "consumer" as a person who hires or avails of any services for a consideration, while section 2(1)(o) defines "service" to mean service of any description which is made available to potential users. There is no explicit reference to service by medical practitioners to be included under the realm of 'service' under section 2(1)(o). It was initially thought that medical services are not under the ambit of the Act. This controversy was put to rest by the apex court in *Indian Medical Association* v *V. P. Shantha.*[9]

In this case, the plaintiff's husband died due to negligence of the doctors. The treatment was done in a government hospital and no fees were charged. Therefore, no compensation could be paid, as government hospitals and other honorary authorities which render their service free of charge did not fall under the purview of the Consumer Protection Act. The case was dismissed and subsequently the plaintiff filed an appeal to the Supreme Court of India. The apex court in this landmark case, lifted the veil of "consideration" needed under the section 2(1)(o) of the Act

[5] Adil, M S, *Consumer Protection, Law Practice & Procedure*, 2006, JBA Publishers
[6] *Dr. Kamta Prasad Singh* v. *Nagina Prasad*. 2000 (III) CPJ 283 (WB)
[7] Desai, Shreyas , *Consumer Protection Law in India*, 2006, Unique Law Publishers
[8] Chaudhury RNP, *Consumer Protection Law: Provisions & Procedure*, Deep & Deep Publications Pvt. Ltd, Delhi
[9] *Indian Medical Association* v. *V. P. Shantha*, AIR 1996 SC 550

and held the medical profession to be under the ambit of section 2(1) (o) of the Consumer Protection Act, 1986. It only excluded the medical enterprises which render services free of cost.[10] As a consequence of this judgement, virtually all the government and private hospitals are now under the scope of consumer protection law. In a subsequent decision the apex court also held that when a child was taken to a hospital by his parents and the child was treated by a doctor, the parents would come within the definition of 'consumers' having hired the services of the hospital and the child would be considered a consumer under the under the section 2(1)(d) of the Act.[11]

DEGREE OF CARE: NEGLIGENCE

The concept of negligence stems from the Common law system. The term "negligence" encompasses the breach of duty caused by the 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.[12] Negligence is multi-facet in case of professional relationships. Negligence in the medical field is very difficult to ascertain, as the degree of reasonableness is not uniform. In the United Kingdom, the issue of medical negligence was considered in great detail in the famous case of *Bolam* v. *Friern Hospital Management Committee*[13]. The decision in this case is considered as an authority for determining the standard of care expected from medical professionals. The Court held that "the case of medical negligence would lie if there is failure to act in accordance with the standards of reasonably competent medical personnel at that time and that there may be one or more proper standards and if the medical professional conforms to one of those proper standards he will not be negligent". Hence, the Courts expressed the opinion that a doctor is not guilty of medical negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical professionals. The Court will take into account what other medical professionals would have done in similar situation while decreeing medical negligence. Hence, *Bolam* case laid down a pragmatic and "ordinary skilled professional standard of care" for determining the liability of the doctors. The standard laid down by the court in this case became a set principle to

[10] Ramsay, Iain, *Consumer Law and Policy*, 3rd Edition, Hart Publishers
[11] Spring Meadows Hospital & another v Harjol Ahluwalia through K.S. Ahluwalia & Another (1998) 4 SCC 39
[12] Ratanlal & Dhirajlal, *The Law of Torts.* 26th Edition, LexisNexis Butterworth's, New Delhi
[13] *Bolam* v. *Friern Hospital Management Committee*, (1957)1 WLR 582

be followed by the courts of various nations. It laid down a global standard for determining the level of skill needed to be possessed by medical professionals.

A reasonable degree of care and skill means that degree of care and competence that an "ordinary member of the profession who professes to have the skills would exercise in a given circumstances."[14] The distinction between the standard of care and the degree of care is also essential to be understood. While the standard of care is constant in every case, the degree of care is a variable and depends on the circumstances of the case. It is a requirement that the conduct of the doctor must be reasonable and must not necessarily conform to the highest degree of care or the lowest degree of care possible.[15] The degree of care is a variable concept and depends on the circumstances. It literally means what actually amounts to reasonableness in a given situation.

The judiciary in India has not been able to evolve a uniform approach while deciding cases of medical negligence. In many cases the judiciary has stood by the time tested rule laid down in *Bolam* case, while in other cases, the judiciary has departed from this rule to provide relief to the aggrieved. The Supreme Court accepted the *Bolam* rule in the case of *Jacob Mathew* v. *State of Punjab*[16]. The court stood by the "ordinary skilled professional standard of care" test. The apex court ruled that "no sensible medical professional would intentionally commit an act or omit to do an act, which would result in harm or injury to the patient since the professional reputation of the medical professional would be at stake". The observance of the set rule was seen to be a step towards providing the victims with a more comprehensive system of damages.

USE OF *BOLAM* RULE

The determination of the degree of skill has been the subject matter of the landmark judgment in the case of *Martin F. D'Souza* v.*Modh. Ishfaq*[17]. It was in this case where the judiciary reaffirmed the previously established principle in the *Jacob Mattew* case. The respondent in this case filed a complaint before the National Commission claiming compensation from the appellant on the ground that the latter was negligent in prescribing the medicine, the excessive

[14] S.V.Joga Rao, *Medical Negligence Liability under the Consumer Protection Act: A Review of Judicial Perspective*, NCBI at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962/,
[15] *Lakshmi Rajan* v. *Malar Hospital Ltd*., III (1998) CPJ 586
[16] *Jacob Mattew* v. *State of Punjab* (2005) 6 SCC 1
[17] *Martin F. D'Souza* v.*Modh. Ishfaq*, AIR 2009 SC 2049

dosage of which caused hearing impairment to the former. The National Consumer Dispute Redressal Commission allowed the complaint and awarded compensation. The apex court in the civil petition held that general principles relating to medical negligence need to be uniform throughout the country. The test in fixing negligence relates to the standard of ordinary skill which is expected from the doctor and need not be the highest expert skill. While the same standard of care is expected from a generalist and a specialist, the degree of care would be substantially different. Both are expected to take reasonable care but what amounts to reasonable care with regard to the specialist would differ from what amount of reasonable care as according to the generalist. The law expects the specialist to exercise the ordinary skill of his speciality and not that of any ordinary doctor. The court while approving the *Bolam* rule held that judges are not experts in the field of medical science, rather they are lay men. This makes it largely difficult for them to decide cases relating to medical negligence. While doctors who cause death or agony to the patients due to medical negligence should certainly be penalized, it must also be kept in mind that, like all professionals, doctors too can make errors of judgment and are fallible. But if they are punished for minor mistakes, no doctor can practice his vocation with equanimity.

In this case[18], the apex court also provided safeguards against the mala-fide abuse of litigation to harass honest medical professionals. The Supreme Court has declared that whenever a complaint is received against a doctor or hospital by the consumer forum or by the Criminal Court, before issuing notice to the concerned doctor or hospital against whom the complaint was made, the consumer forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field, relating to which the medical negligence is alleged and only after that doctor or committee reports that there is a *prima facie* case of medical negligence, should the notice be issued to the concerned doctor or hospital.[19] This provision ensured avoidance of harassment to doctors who ultimately may have been found to be not negligent. This judgment has far reaching effects in deciding medical negligence cases. If the expert committee is of the opinion that there is no negligence on the part of the doctor or hospital, unwanted harassment of the doctor and wastage of the time of the court could be avoided.

[18] *Supra* n. 18
[19] Khanna, R., *Consumer Protection Law*, 3rd Edition, Central Law Agency

A NEW APPROACH BY THE JUDICIARY AND CONCLUSION

The apex court has also, in a number of cases, deviated from the *Bolam* rule, but every departure has been only to secure the ends of justice.[20] In the cases of grave professional negligence on the part of the doctors like, failure on the part of the doctor to inform or warn the patient about the potential risks involved in the treatment, the court has not followed the rule laid down in *Bolam* case. In *Spring Meadows Hospitals,*[21] the Supreme Court applied the 'higher duty of care rule' in deciding the negligence of the doctors. In the historic judgment in *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka*[22], the Supreme Court held that in a case involving medical negligence, once the initial burden has been discharged by the complainant by making out a case of medical negligence on the part of the hospital or doctor concerned, the onus then shifts on the part of hospital or doctor and it is for the hospital to satisfy the Court that there was no lack of care or diligence.

The recent approach of the apex court in the case of *V. Kishan Rao* v. *Nikhil Super Speciality Hospital*[23] has been a more pragmatic one. The Supreme Court held that there cannot be a fixed or straitjacket approach that can be applied in every case. It further declared that the judgment rendered in *Martin F.D'Souza*[24] is *per incuriam.* This judgment is a progressive decision for ensuring better protection of the rights of the consumers. The decision by the apex court has filled a lacuna in the law by saying that facts and circumstances of each case have to be taken into account before deciding the case.[25] If the requirement of the opinion of experts to be considered in each case is followed stringently, then it would put unnecessary burden and time delay in attaining the remedy. Thus, by correcting its own position regarding the procedure to be followed in cases of medical negligence, the court has displayed a pragmatic and pertinent approach in correctly rescinding the adoption of any straight jacket formula. The apex court has shown a mature and reformed attitude which will go a long way in ensuring that the victims of the medical negligence are compensated along with better protection against unscrupulous litigation with *mala fide* intent.

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[20] Wadhwa, DP, *The law of Consumer Protection,* 2nd Edition, LexisNexis Butterworth's, New Delhi
[21] *Supra* n. 11
[22] *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka,* (2009) 6 SCC 1
[23] *V. Kishan Rao* v. *Nikhil Super Speciality Hospital,* (2010) 5 SCC 513
[24] *Supra* n. 11
[25] Rao, R., *Consumers: Know your Rights,* Universal Law Publishing Company

The Consumer Protection Act, 1986 is a benevolent legislation which is aimed at providing easy remedy to the aggrieved party.[26] In cases of medical negligence where the bargaining power of the consumers is very less, adequate regard has to be paid to the standard of care that has to be followed by the medical professionals. The strict adherence to either the *Bolam* Rule or a strict interpretation of the same would be unfavourable for securing justice. The judiciary has to tread a balanced path to accommodate the conflicting interests.[27] The aim of law is to be impartial to any side in the administration of justice.[28] The emphasis being paid to the facts and circumstances of each case in deciding whether there was medical negligence would be essential in bringing the culprits to book, while at the same time avoiding its misuse, that would disadvantage the innocent doctors.

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[26] *Supra* n.5
[27] Eradi, V.B., *Consumer Protection Jurisprudence,* LexisNexis Butterworth's, New Delhi
[28] *Government of Andhra Pradesh* v. *A. P. Jaiswal,* AIR 2001 SC 212

11.Medical Negligence and The Law

Sajid Andathode Thechan[1]

ABSTRACT

"*Disease is the biggest money maker in our economy*."

These words of John .H. Tobe who was a well-known medical researcher of the twentieth century depicts an unblemished picture of the present day medical practitioners. From the immemorial, medical profession is considered to be a noble one. As far as the medical practitioners were concerned, the pleasure of healing the disease and imbibing newer ideas outweighed the monetary benefits that are attached to the profession. But with advent of globalization coupled with the advancement of science and technology, the main objective underlying the medical profession has undergone a drastic change which has converted the medical profession into a commercial one.

In pursuit of garnering maximum profits, the medical practitioners, through their conducts have compromised the ethical values which delineate their profession. These conducts in turn inflicted loss on the patients. This article deals with the various dimensions of the medical negligence and explores legal safeguards to combat this menace.

HEALTH CARE AND ITS IMPORTANCE

Health care is one of the important facets for the human existence. Generally health is a subjective concept which varies according to persons. Literally, The English word "health" comes from the Old English word *hale*, meaning "wholeness, being whole, sound or well," *Hale* comes from the Proto-Indo-European root *kailo*, meaning "whole, uninjured, of good omen". *Kailo* comes from the Proto-Germanic root *khalbas*, meaning "something divided".[2]

From the medical parlance, health connotes the state of humans which is devoid of diseases. This was the notion attached to the health during ancient times but with the advancement of the

[1] **4th year student, Kerala law Academy Law College**

[2] What is health? What does good health mean? ; Christian Nordqvist ; Medical News Today ; accessed from http://www.medicalnewstoday.com/articles/150999.php

technology, the concept of health has undergone a drastic change. Now, mere absence of disease cannot be termed as good health but it must enable the person to fully deliver and perform to his best. This concept was the basis for defining health in the Constitution of the World Health Organization as adopted by the International Health Conference in New York, which reads:

> *"Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity[3]."*

There are several factors that influence the health of persons. These factors may act as catalyst or turns detrimental to healthy wellbeing depending on how we handle these factors. For example, environment is one of the important factors that influence health, it can be made beneficial by maintaining safe and adequate water supplies, sanitation, drainage and solid waste disposal and all these benefit health by removing disease vectors from human contact. On the other hand, Dirty environments, by contrast, encourage the spread of disease and may adversely influence the mental and emotional well-being of individuals. Similar to this, awareness of individuals and communities about health, personal hygiene, health care and diseases substantially influences the health.[4]

In a democratic society governed by the rule of law, active participation of the people in all the spheres of governance is pertinent. This entrusts the government with the duty of ensuring that health well-being of the people must be safeguarded. Now, maintaining a good health is not only the concern of individual but is also the responsibility of the government. This is evident from the shift in the definition of health propounded by World Health Organization. The WHO pointed out that health is:

"a resource for everyday life, not the objective of living. Health is a positive concept emphasizing social and personal resources, as well as physical capacities. "[5]

LEGAL SAFE GUARDS FOR HEALTH CARE

[3] Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States *(Official Records of the World Health Organization, no. 2, p. 100)* and entered into force on 7 April 1948.
[4] Achieving good health ; accessed from http://www.who.int/water_sanitation_health/hygiene/settings/hvchap2.pdf
[5] The definition was amended in During the Ottawa Charter for Health Promotion in 1986

1. In international arena

In this era of globalisation, its illogic to confine the issue of health care within the national boundaries. International communities have been conscious about this fact and recognized its importance through various international legal instruments. The General Assembly of the United Nations, has adopted various resolutions to safeguard the interest of patients Article 25 of the Universal Declaration of Human Rights states that

"*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, and housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control".*

Article 12 of the International Covenant on Economic, Social, and Cultural Rights 1966 also reiterated these rights, states:

"The State parties to the present convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

The aforesaid rights of 1966, the un declaration on elimination of all forms of discrimination against women 1967, the convention on the elimination of all forms of discrimination against women 1979 and the convention of the rights of the child provide, inter alia, for the protection of health care rights of persons including women, children and other disadvantaged sections of society.[6]

2. National scenario

Every country has evolved its own policies and institutional mechanisms to safe guard the health of its citizens. In India, right to life and liberty is one of the cardinal fundamental rights guaranteed under Article 21 of the constitution of India which can't be terminated even during emergency.[7] While interpreting this provision, the Supreme Court in a plethora of cases has read

[6] Legal framework for Health Care in India – LexisNexis – Butterworth's 2002 edition.
[7] Jagadish Swaroop and Dr. L.M. Singhvi, Constition of India, 2nd Edition 2007, Vol. 1, Modern Law Publications, New Delhi,

into it the right to health. [8] The right to life would be meaningless if right to health is segregated from it.[9] It is also important for the enjoyment of freedoms enshrined in Article 19 of the constitution. The importance attached to right to health can be gauged from the words of the apex court in the case of *Vincent Pani Kurlnagara* v. *Union of India.*

"*Maintenance and improvement of public health have to rank high as these are indispensable to the very existence of the community and on the betterment of these depends the building of the society which the constitution makers envisaged. Attending to public health in our opinion, therefore, is of high priority – perhaps the ones at the top."*

MEDICAL LAW

Medical law is essentially concerned with the relationship between health care professional and patients.[10] The relationship between doctor and patient is that of fiduciary in nature[11] which means the doctor enjoys discretionary powers over significant practical interest of the patient. From a layman's point of view, the fiduciary is a relation based on trust and confidence. Literally, *Fiduciary* derives from the Latin word for "confidence" or "trust". The bond of trust between the patient and the physician is vital to the diagnostic and therapeutic process. It forms the basis for the physician-patient relationship.[12]In the ancient times, the relationship between patient and doctor is based on the professional authority of the doctor in which the role of the patient in the decisions made for treatment is very negligible and the type and mode of treatment is not disclosed to the patient. With the passage of time, the relationship has undergone a drastic change and in its present form the doctor has a duty to divulge the information with regard to the diagnostic and therapeutic methods. In short the relationship between doctor and patient has been liberalised.

In India, there is no recognised legal instrument that governs the relationship between doctor and patient. The statutory body, Medical Council of India (MCI) is only concerned with the assessing

[8] *Consumer Education and Research Centre* v. *Union of India*, AIR 1995 SC 922: (1995) 1 JT 636.see also *Bharath Kumar K. Palicha* v. *State of Kerala*, AIR 1997 Ker. 291; (1997) 2 ker LT 287
[9] Sharma MK, "right to Health and Medical Care as a Fundamental Right" AIR 2005, p. 255.
[10] (Jonathan Herring – medical law and ethics 3rd edition
[11] Hall MA. Law, medicine, and trust. *Stanford Law Review* 2002; 55: 463–527. Rodwin MA. Strains in the fiduciary metaphor: divided physician loyalties and obligations in a changing health care system. *American Journal of Law & Medicine* 1995
[12] Ethics in medicine; MaryJo Ludwig, MD Clinical Faculty, Department of Family Medicine; University of Washington School of Medicine; accessed from http://depts.washington.edu/bioethx/topics/physpt.html

the competency of the doctor to practice i.e. it looks into the qualification of the doctor only at the time of entering into the profession. It seldom has a mechanism to look into the acts of the doctors during their profession. This lack of checks on the acts of the doctors has led the doctors to adopt unethical and careless methods of treatment which is detrimental to the patient. In most cases, the doctors succumb to the pressures of the hospital authorities whose interest is concerned with garnering maximum profits. This in turn led to the surge in the medical negligence cases.

NEGLIGENCE

The wrong of negligence is derived common law and is classified under 'Law of Torts' which developed through the judicial precedents. The definition of negligence given by Ratan lal and Dhiraj lal, which has been relied by various courts is the breach of a duty caused by the 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. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property[13].

So in order to prove negligence, the plaintiff must establish the following three elements:

- A duty to take care.
- Breach of that duty.
- The plaintiff must have suffered damage.

In short, the test applied by the courts to determine negligence is the 'test of reasonability', i.e. the court looks whether the act alleged to be negligent is the act which a reasonable person would do or refrain from doing in the given circumstances. Reasonable man is a hypothetical person which falls in the objective domain of the court.

PROFESSIONAL NEGLIGENCE

In general terms, a professional is the one who has special skill in a particular field. Unlike an amateur, who does something for pleasure, a professional is the one who works for payment.[14]

[13] Law of Torts, Ratanlal & Dhirajlal, Twenty-fourth Edition 2002, edited by Justice G.P. Singh;
[14] Oxford Advanced Learner's Dictionary of Current English, A. S. Hornby

The supreme court of India has enunciated law governing the professional negligence *in Jacob Mathew's case*[15] as:

"*In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Judged by this standard, a professional may be held liable for negligence on one of 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."*

Therefore, the elements that constitute professional negligence is similar to that of negligence but the only deviation is with regard to the standard of care required to be undertaken by the defendant. In professional negligence, the standard fixed is not that of a highly skilled person but of an ordinary person. As doctors are professionals, their conduct is governed by the law of professional negligence.

MEDICAL NEGLIGENCE

The wrong of medical negligence is invoked when a medical professional breaches in his duty to care which resulted in the loss to the patient. The duty to care comes into existence through the 'theory of holding out'[16] which means Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is also known as 'implied undertaking'. In other words, if the medical practitioner allows or encourages the patient to believe that he is a doctor, then a duty of care is applied which measures that person by the standard of the reasonable doctor in that situation. If a person disguise himself before patient as a medical practitioner without fulfilling the qualifications stipulated by Medical Council of India, he shall be criminally liable[17].

[15] *Jacob Mathew* v. *State of Punjab*, 2005 (6) SCC 1 = AIR 2005 SC 3180
[16] *Dickson* v. *Hygienic Institute,* (1990) SC 552; *R* v *Bateman* (1925) 94 LJKB 791
[17] Andrew Fulton Philip, Medical Negligence Law Seeking a Balance, 1st edition, 1997, Dartmonth Publishing Compnay, Vermount (USA).

The liability for medical negligence is established in the backdrop of two models[18]:

- Doctrine of Paternalism.
- Doctrine of informed consent.

Doctrine of paternalism was originated in U.K according to which a doctor is not liable in negligence medical claim when he acted "in accordance with a practice accepted as proper by a responsible body of medical men, skilled in the particular art".[19]

Doctrine of informed consent is evolved in U.S. By virtue of this doctrine, a patient must be given all the required information about the nature of treatment, risks involved and the feasible alternative, so as to enable him her to make a rational and intelligent choice whether to proceed with treatment or surgery or not. In informed consent of the patient concerned is not obtained, then, the doctors will be liable.[20]

Generally, the duty of the doctor to care includes giving full details of the ailment, its cause, what went wrong, mode of diagnosis , solutions available to cure the disease and which is the best suited remedy for the patient taking into consideration his circumstances. [21]Apart from these duties, it also extends to maintaining confidentiality[22], dealing with adverse effects of the treatment administered.[23]

A mere negligence on the part of doctor cannot be brought before the court for action but the alleged negligence must have resulted in the damage the plaintiff. Apart from proving the damage, the plaintiff must also establish that plaintiff's negligent conduct was the direct cause of damage inflicted upon the plaintiff.[24]

REMEDIES

The right becomes ineffective unless it is provided with some remedy against its infringement. There are various remedies available for medical negligence.

[18] Nayak RK, "Medical Negligence, Patient's Safety and the Law", Regional Health Forum- Vol. 8, No.2 2004
[19] *Bolam* v. *Friern Hospital Management Committee,* (1957) 2 All ER 118
[20] *Schloendroff* v. *Society of New York Hospital*, 211 N.Y 125 N.E. 92 (1914)) as per Justice Cardozo).
[21] *Coles* v. *Reading and District Hospital Management Committee,* (1963) 107 SJ 115.
[22] *Tucker* v. *Tees Health Authority* (1995) 6 Med LR 54.
[23] *Fowlers* v. *Greater Glasgrow Health Board,* (1990) SLT 303.
[24] *McWilliams* v. *Sir William Arrol & Co. Ltd* (1962) SC (HL) 70.

a. constitutional remedy

As noted above, right to health is an integral part of right to life and personal liberty guaranteed under Article 21 of the constitution and this has been categorically upheld by the apex court and various high courts in numerous cases.[25]The remedies for the enforcement of this fundamental right has been provided under Article 32 and 226 through which the Supreme Court or the high court can be approached respectively for issuing appropriate writs which can remedy its violation. [26] The aggrieved party can also claim compensation for infringement of their fundamental right to health. Award of compensation for the breach of Article 21 of the Constitution is not only constitutional power but also to assure the citizens that they live under a legal system wherein their rights and interests are protected and preserved.[27]

b. civil remedy

The civil remedy is invoked through the tortuous liability of negligence. The quantum of compensation varies on the facts and circumstances of each case taking into consideration the loss incurred by the plaintiff. The main objective of the compensation is

- To place the plaintiff in such a position as if the tort of negligence hasn't been committed or in other words to heel the loss through monetary compensation.
- To prevent the replication of the tortuous conduct.

The judicial precedents laid down by the apex court delineate a dual approach of strict as well as liberal approach for adjudicating the matters of medical negligence.

The apex court while applying the rule of liberal liability in the case of *Martin F. D'Souza* v. *Mohd. Ishaq*[28] has stipulated that prior to initiating the proceedings against medical the doctor or the hospital, the Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is prima facie case of medical negligence should notice be then issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors

[25] *Supra* no:07; see also; *Bharath Kumar K. Palicha* v. *State of Kerala*, AIR 1997 Ker. 291; (1997) 2 ker LT 287
[26] *Supra* no:07.
[27] *D.K. Basu* v. *State of Best Bengal*, AIR 1997 SC 610 at 625.
[28] (2009) 3 SCC 1.

who may not be ultimately found to be negligent. This rule was reiterated in a plethora of cases[29] including *Jacob Mathew v. Union of India*[30]in it has been categorically ruled that:

> "*No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake".*

The strict rule in deciding the medical negligence was enunciated by the apex court in the case of *Nizam's Institute of Medical Sciences* v. *Prasanth S. Dhananka*[31] in which it has emphasized that the complainant by making out a case of negligence on the part of the hospital or doctor concerned, the onus then shifts on to the hospital or to the attending doctors and it is for the hospital to satisfy the Court that there was no lack of care or diligence. This rule also has been followed in numerous cases.[32]

In certain cases, the court invoked the 'doctrine of *res ipsa loquitor'* or the thing speaks for itself'. This principle is applied when there is proof that the occurrence was unexpected, that the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor and not any other person was negligent.[33] This frees the plaintiff from the burden of proof.

The civil remedy of compensation also encompasses contractual liability. Under the law of contract, even if the damage to the plaintiff is not established, the courts are empowered to award nominal compensation. In India, Compensation under the law of contract can only be claimed against the private doctors and not the government doctors because in case of government doctors a valid contract is not formed for the lack of consideration. Even though government doctors are paid from the taxes levied from the public, the Supreme Court has ruled that it cannot be classified as consideration[34]. In case of medical negligence committed by the medical practitioners of the governmental hospitals, the state would be vicariously liable. So, in order to

[29] *Dr. Suresh Gupta* v. *Govt. of N.C.T of Delhi* (2004) 6 SCC 422) ; see also; *State of Punjab* v. *Shiv Ram* (2005) 7 SCC 1.
[30] (2005) 6 SCC 1.
[31] (2009) 6 SCC 1.
[32] *Dr. Khusaldas Pammandas* v.*State of M.P.,* AIR 1960 50 see also; *Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996) 2 SCC 634.
[33] Medical negligence and the law; K K S R Murthy; Indian Journal of Medical Ethics Vol IV No 3 July-September 2007.
[34] *Ibid*

claim damages for the negligent conduct of the doctors in government hospitals, the government should be impleaded as a party.[35]

c. remedy available under criminal law

The offence of medical negligence is dealt under section 304[36] of the Indian Penal Code. Unlike civil law, in order to punish the accused under criminal law, the criminal intention *(Mens rea)* of the accused will have to be established. In case of section 304 of IPC, the mental state that is required to be proved is rashness or recklessness. The supreme has defined theses terms as

> *"A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of her/ his act. A reckless person knows the consequences but does not care whether or not they result from her/ his act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability."*[37]

Hence, in order to book a person under section 304 of IPC, apart from the conduct of negligence that the medical professional has acted with utter disregard to the life and safety of the patient that it amounted to crime against the state[38].

The defences to the charge of medical negligence are provided under section 80 and 88 of the IPC. As per Section 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. By virtue of Section 88, a person cannot be accused of an offence if she/ he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.

[35] Rodney Nelson-Jones and Frank Burton, Medical Negligence, Case Law, (2nd Edition 1995) Butterworths,
[36] Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.
[37] P*oonam Ve*rma v. Ash*win Patel* (1996) 4 SCC 332
[38] *Supra* no: 33.

d. disciplinary action

Medical Council of India (MCI) is the recognized statutory body to supervise and ensure discipline in the professional conduct of medical practitioners. MCI is empowered to initiate disciplinary action against the medical practitioners upon the receipt of compliant from any person or body alleging professional misconduct or upon the conviction by any court of law on any matters affecting the medical profession[39]. The disciplinary action includes striking out the name of the medical practitioner from the registry of medical practitioners maintained by MCI and also extends to the termination from the service.

CONCLUSION

As noted above, being healthy is an integral part of the human survival. Medical negligence which threatens health care must be combated with stringent measures. Right to health enshrined in right to life guaranteed under Article 21 of the constitution of India should not be confined to negative duty reposed in the government, but should adopt proactive methods to secure better health for its citizens.

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[39] *Joseph @ Pappachan* v. D*r. George Moonjely*, 1995 (1) ACJ 253.

Centre for Consumer Protection Law And Policy,
The National University of Advanced Legal Studies
HMT Colony P.O.,
Kalamassery, Cochin. PIN 683503. KERALA
Contact No.: 0484-2555990, 0484-2555991
Email: ccplap@nuals.ac.in
Website: www.nuals.ac.in/web/ccplap