



## Medical negligence in India: A study with special reference to liability in tort

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### Abstract

The classical concept of doctor-patient relationship born in the golden days of family physicians has undergone drastic change due to dramatic advancement in medical technology, availability of sophisticated imaging system, high-tech electronics and preponderance of new diseases. With the immense strides in technology health care has emerged as a profitable sector attracting investors from varied background in our country and the doctors get to spend less and less time with their patients. Owing to lack of time of the doctors to communicate adequately with the patients, the patient-dissatisfaction is on the rise. Naturally, the disgruntled patients are resorting to legal remedy for 'Medical Negligence'

Medical negligence, now days have become one of the serious issues in India. Our experience tells us that medical profession, one of the noblest professions, is not immune to negligence which at times results in death of patient or complete / partial impairment of limbs, or culminates into another misery. There are instances wherein most incompetent or ill/under educated doctors, on their volition, have made prey the innocent patients. The magnitude of negligence or deliberate conduct of the medical professionals has many times led to litigation.

The present paper aims to analyze the concept of negligence in medical profession in the light of interpretation of law by the various tribunals & courts of India and remedies available to it.

**Keywords:** negligence, tort, duty, breach, damage, liability, crime, burden of proof, expert evidence, compensation

### 1. Introduction

Mahatma Gandhi said:-

*"A consumer is the most important visitor on our premises. He is not dependent on us, we are on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favor to a consumer by giving him an opportunity. He is doing us a favor by giving us opportunity to serve him"*<sup>[1]</sup>.

The medical profession is one of the most noble as well as dutiful professions in the world. However, outrageous increase in corporatization and commercialization of medical profession has made it like any other business and the motive of medical profession has been shifted from service to profit making. Such a situation gave rise to unethical practices which further results in negligence. Therefore, if there is a laxness or negligence on the part of the medical professionals in treatment of a patient he shall be made liable under the tortious liability on ground of Negligence.

Negligence is 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.

Professional negligence or medical negligence may be defined as want of reasonable degree of care or skill or wilful negligence on the part of the medical practitioner in the treatment of a patient with whom a relationship of

professional attendant is established, so as to lead to bodily injury or to loss of life<sup>[2]</sup>.

The Supreme Court has redefined 'medical negligence' which include the overdose of medicines, not intimating the patients about side effects of drugs, not taking reasonable care in case of severe diseases having high mortality rate and hospitals not providing amenities that are the basic fundamental for the patients. A Bench comprising Justice S.B Sinha and Justice Deepak Verma also noted that the legitimate expectations of family members can not be ignored while deciding a case of medical negligence. Considering the scope of the word "Service" in the light of the definition of consumer and other relevant provisions, the Supreme Court held that the persons rendering professionals services would be covered.

The Supreme Court in *Indian Medical Association v. V.P. Santha*<sup>[3]</sup> proceeded as follows to analyses the relevant provisions of the Act:

*"Services rendered to a patient by a medical practitioner (except where the doctor renders services free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within ambit of service as defined in Section 2(1)(o) of the Act".*

### The Concept of Medical Negligence

Medical negligence is part of negligence. Before discussing

<sup>1</sup> Mahatma Gandhi's speech in south Africa (1890), available at: <https://www.goodreads.com/quotes/8284155> (last visited on March 9, 2018)

<sup>2</sup> *Blyth v. Birmingham Waterworks Co.*, 1856 11 ex. 781.

<sup>3</sup> (1995) 6 SCC 651.

medical negligence, it would be in order to understand the concept of negligence. Negligence is culpable (punishable) carelessness-conduct which involves an unreasonably great risk of causing harm to another.

The authoritative text on the subject in India is the 'Law of Torts' by Ratanlal and Dhirajlal<sup>[4]</sup>. Negligence has been discussed as:

*Negligence 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.*

Another shorter definition for negligence is that "negligence as a tort is the breach of legal duty to take care which results in damage, undesired by the defendant to the plaintiff"<sup>[5]</sup>. The definition involves three constituents of negligence:

1. A legal duty to exercise the due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty;
2. Breach of the said duty
3. Consequential damage.

Negligent treatment is that which goes beyond being a simple reasonable mistake or error and that negligence amounts to medical negligence. The classic statement of the test for professional negligence is the direction to the jury of Mr. Justice Mc Nair in *Bolam v. Friern Hospital Management Committee*<sup>[6]</sup>. Now widely known as the Bolam test it has been approved at the highest level on at least three occasions as the touchstone of liability for medical negligence.

In another judgment relating to medical malpractice, the Supreme Court of India reverberated its feeling holding that "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 low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. But where you get a situation which involves the use of special skill or competence, then the test is the standard of the ordinary skill a man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".

The courts have consistently recognized the hazards associated with the medical practice. The Indian law protects the doctors from criminal liability through sections 88 to 92 of Indian Penal Code (IPC), because the law presumes that a doctor always acts in good faith for the well-being of his patient. However, the concept of good faith assumes a complicated role in a medical malpractice suit.

## History of Medical Negligence

During British rule, English common law was introduced in the administration of justice in India. Mr. Wheeler, 555 member of council, Sea customer and chief Justice of choultry in Chennai died due to consumption of wrong medicines. Dr. Samuels were tried and acquitted by the grand Jury when the Bill of Ignoramus<sup>[7]</sup> was brought in. Prior to the introduction of the Constitution of India 1950, a large number of English principles of law of torts were followed and applied by the Indian courts.

The concept of medical negligence is about four thousand year old. The Babylonian kings Hammurabi introduce a law against the physicians whose patient loses an eye. The punishment for such malpractices was to cut the hand of the physician or surgeon. Even the Egyptian and Roman law had such similar provisions for medical malpractices causing death or serious injuries to the patient<sup>[8]</sup>.

The first case ever recorded under English law was in year 1374 against a surgeon J. Mert; the plaintiff had an injury in his hand due to wrong treatment. In USA, the first case was recorded was in the year 1794, the case is known as *Dr. Cross v. Guthrie*. In this case patient's husband sued Dr. Cross, a physician after the patient died as a result of postoperative mastectomy (breast removal surgery) complications three hours after operation. The compensation of 40 pound was awarded to plaintiff.

Consumer Protection is an area of particular prominence in Arthashastra, and lot of materials in this voluminous text is focused on the duties of the government in controlling aspects related to trade and prevention of wrong doings to consumers by sellers. Written in the 300 BC, Arthashastra has intimate details about standardizations of weights and measures which is a critical premise for consumer protection. A standards officer, appointed by the king, routinely visits factories, farms and markets carrying out inspections once every four months for a prescribed fee. All weights and measures had to be stamped by the standards officer, and heavy penalties would be imposed on traders who would use unstamped weights and measures. Chanakya suggests the role of minister of commerce who is the watch dog of the commodity markets; a vital role in achieving consumer protection<sup>[9]</sup>.

The Indian civil law on negligence essentially is the judge made common law followed in England for centuries. In the conduct of professions, the law allows for a variety of levels of qualification, and thus a variety of standards, as long as the level of expertise which can be expected from any given professional is readily apparent from his particular qualification e.g. that he is a general practitioner rather than a specialist. However, every professional must achieve an acceptable level of basic competence. When assessing whether or not a professional has been negligent, the courts will normally use as their benchmark the common practice within the relevant profession. However, where they consider that a profession adopts an unjustifiably lax practice, they may

<sup>4</sup> Justice G.P. Singh, *Law of torts* 441-442 (RATANLAL & DHIRAJLAL, 24th Edition, 2002).

<sup>5</sup> W.V.H. Rogers, *Tort 4* (Winfield and Jalowicz 19<sup>th</sup> edition 2016).

<sup>6</sup> (1957) 1 WLR 582

<sup>7</sup> "We are ignorant". This was the word used by the grand Jury to discuss a bill of indictment and was used in the sense of not a true bill or not found. available at : <https://www.etymonline.com/word/ignoramus> (Last visited on March 12,2018)

<sup>8</sup> Tapas Kumar Koley, *Medical Negligence and Law in India*.

<sup>9</sup> Supra 12

condemn the common standard as negligent <sup>[10]</sup>.

In ordinary negligence cases, the court is fully competent to lay down what the reasonable man should do in everyday circumstances as judges are aware of and understand everyday circumstances. But in cases of medical negligence the judge may not be able to measure the reasonableness of medical activity of which he has no great level of understanding. Medicine is perhaps the classic example of a profession in which results are not guaranteed and are not expected to be guaranteed <sup>[11]</sup>.

## 2. Medical Negligence & Its Essentials

### Components of Negligence

The definition of 'negligence' on ALDERSON Bin Blyth v Birmingham Water Works Co. <sup>[12]</sup> has been modified by Charles worth <sup>[13]</sup> in the following ways: "Negligence is a tort which involves a person's breach of duty that is imposed upon him to take care, resulting in damage to the complainant". The essential components of the modern tort of negligence propounded by Percy and Charles worth <sup>[14]</sup> are as follows:

- a) The existence of a duty to take care, which is owed by the defendant to the complainant;
- b) The failure to attain that standard of care, prescribed by law, thereby committing a breach of such duty; and
- c) Damage, which is both causally connected with such breach and recognised by the law, has been suffered by the complainant.

If the plaintiff proves that the doctor was negligent, but fails to establish that any loss or injury was caused thereby, then he will not be entitled to claim any compensation <sup>[15]</sup>. The general test for causation requires the plaintiff to establish that the injury would not have occurred, but for the negligence of the defendant <sup>[16]</sup>.

### Negligence as tort

- i) Tortious liability: "Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages <sup>[17]</sup>. This definition of negligence as tort involves the following constituents:

- (a) A legal duty to exercise due care;
- (b) Breach of the duty;
- (c) Consequential damages.

Moreover, the above definition of Winfield enables one to distinguish tortious liability from other liabilities of the professionals. The duty in tort is owed to persons in general, whereas the duty in contract is owed to specific persons. The duty in tort is imposed by law where as duty in contract is owed to specific persons. The duty in tort is imposed by law whereas the duty in contract is fixed by

agreement between the parties. The unliquidated damages awarded in tortious claim is distinguishable from predetermined liquidated damages of contract.

- ii) Concurrent liability in tort and contract: The courts of England did not recognise the concurrent contractual and tortious liability for professional services before 1976. Lord Denning pointed out in *Esso Petroleum Co. Ltd. v Mardon*<sup>18</sup> that a professional is liable in both tort and contract for his negligence. The Court of Appeal<sup>19</sup> in England is in favour of concurrent liability in tort and contract, though it was contended that the existence of a contractual nexus excludes the possibility of a claim in tort. In Australia the decision of the Supreme Court of Victoria<sup>20</sup> is in favour of the concurrent liability in tort and contract. Similarly, the Canadian Supreme Court<sup>21</sup> has held that out of concurrent tortious and contractual liability the plaintiff has a right to assess the cause of action that appears to be most advantageous in respect of any particular legal consequence, but the concurrent liability will not be permissible where liability in tort enables the plaintiff to circumvent a contractual exclusion of liability. The law laid down by the Supreme Court of India <sup>[22]</sup>, is as follows: "If the claim depends upon proof of contract, action does not lie in tort. If the claim arises, from the relationship between the parties, independent of the contract, an action would lie in tort at the plaintiff, although he might alternatively have pleaded in contract"

### Negligence under contract

- i) Contractual liability: It is a trite law that an agreement supported by consideration is contract. The terms of contract may be explicit or implied. The express terms are incorporated in the form of a single memorandum or formal exchange of letters. The terms of implied contract can be gathered from the circumstances reflected in the custom of the profession and the conduct of the parties. The House of Lords <sup>[23]</sup> is reluctant to allow implied contracts to be used as a device to extend professional duties beyond general tortious liability. Liability in contract depends on the express or implied terms agreed upon by the patient and the medical man. Consent for treatment on payment of fees on the part of a patient can be Treated as an implied contract with the doctor who by undertaking treatment on acceptance of fees, impliedly promises to exercise proper care and skill.
- ii) Liability of retainer: Professionals often act as agents and contractual relationship may be established through agency. In *Everett v Griffiths* <sup>[24]</sup> a doctor retained by a poor law infirmary was held to have impliedly contracted with a patient who submitted to treatment in return for the

<sup>10</sup> *Edward Wong Finance Co Ltd v. Johnson, Stokes*, [1984] AC 296

<sup>11</sup> Jackson & Powell, *Medical Negligence Litigation: Time for Reform*, Medical Law and Ethics

<sup>12</sup> *Blyth v Birmingham Water Works Co.* (1856)11 Ex 781; 25 LJ Ex 212.

<sup>13</sup> John Charlesworth *Charlesworth & Percy on Negligence* 16 (9th Ed. 1999).

<sup>14</sup> *Ibid*

<sup>15</sup> *Dhadda v State of Rajasthan* AIR 1994 Rai 68: 1993(1) Raj LW 532.

<sup>16</sup> *Athey v Leonati* [1996]3 RCS 458

<sup>17</sup> *Supra* 5

<sup>18</sup> [1976] QB 801; (1976)2 All ER 5: (1976)2 WLR 583; 120 Sol Jo 131

<sup>19</sup> *Forsikrings Aktieselskapet Vesta v Butcher* (1986)2 All ER 488; (1986)2

<sup>20</sup> *Machpherson and Kelley v Kevin J Prunty & Associates* [1983]1 VR 573

<sup>21</sup> *Central Trust Co. v Rafuse* (1983)147 DLR (3d) 260 affirmed

<sup>22</sup> *Rajkot Municipal Corporation v Manjulaben Jayantilal Nakum* (1997)9 SCC 552.

<sup>23</sup> *Independent Broadcasting Authority v EMI Electronics Ltd* [1980]14 BLR 1[HL]

<sup>24</sup> *Everett v Griffiths* [1920] 3kb 163 Sol Jo 445

doctor's implied undertaking to use reasonable care. However, it was held by TUCKER, J. that "Where a surgeon is retained to perform an operation, he will perform the operation personally that he would pay such visits as were necessary in the ordinary Case <sup>[25]</sup>.

### **Negligence as crime**

- i) **Criminal Liability:** The extent of liability in tort depends on the amount of damages done, but the extent of liability in criminal law depends on the amount and degree of negligence. The unliquidated damages awarded in tortious action is distinguishable from the mode of punishment imposed in criminal liability.
- ii) **Mens rea in negligence:** The *mens rea* in criminal negligence was defined by Lord Diplock <sup>[26]</sup> in the following way: "Without having given any thought to the possibility of there being such risk or having recognised that there was some risk involved, had nevertheless gone on to take it".

### **Negligence under Consumer Law**

- i) **Consumer law to medical profession:** The Consumer Protection Act 1986 was enacted by Parliament to provide for better protection of the interests of consumers in the background of the guidelines contained in the Consumer Protection Resolution passed by the United Nations General Assembly on 9th April 1985.
- ii) **Deficiency of Medical Services :** Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. It is held by the Supreme Court that a determination about deficiency in service for damages for negligence is to be made by applying the same test as is applied in an action for damages for negligence.<sup>27</sup>
- iii) **Court Verdict on Miscellaneous acts:** It is held by the National Commission<sup>28</sup> that failure on the part of the hospital authority to accede to the request of the complainant to furnish all the papers relating to his operation and treatment, cannot amount to "deficiency in service" within the meaning of the expressions used in the Consumer Protection Act 1986. The similar view expressed by State Commission, Tamil Nadu<sup>29</sup> is that non-supply of case-sheets to the complainant would not amount to deficiency in service.

### **Need of Duty of Care**

Duty to take care-need of Law imposes a duty on everyone to conform to a certain standard of conduct for protection of others to establish liability in negligence, the defendant must owe a duty to take care of the plaintiff. The need for existence of duty of care is illustrated by LORD WRIGHT as follows:

"All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care to be deduced. It is, however, essential in English law that the duty should be established, the mere fact that a man is injured by another's act gives in itself no cause of action, if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists <sup>[30]</sup>.

### **Contractual duty**

- i) **Liability under implied contract:** The relationship between doctor and the patient is mostly contractual, even if the professional services is not paid by the patient himself. The doctor undertaking the treatment of the patient is to advise the betterment of the patient, until the patient terminates the contract by accepting the service of another professional without the consent the previous one or until further performance of the duty becomes impossible for the negligent conduct of the patient.
- ii) **Liability on express undertaking:** The contractual duties are generally more onerous in nature and extent than those imposed by tort. Tortious duties do not impose the extent of personal responsibility and strict liability that may be attached to contractual duties. The strict liability is expected from those professionals who give an express undertaking.

### **Tortious Duty**

- i) **Liability for failure to act:** The tort of negligence applicable to the medical practitioner indicates that a medical practitioner is liable failure to show due care or skill in treatment resulting in pain injury or consequential death of the patient.
- ii) **A Liability for omission:** Omission to inform the patient of the risks involved in course of treatment is actionable negligence, if it is established that the patient suffers damage due to such failure of the medical man.
- iii) **Manufacturers' duty towards patient:** A manufacturer of a product has a duty in tort to warn consumers of damage or ought to know are inherent in the products use. This continuing one, requiring manufacturers to warn not only of de known at the time of sale, but also of dangers discovered after product has been sold and delivered.
- iv) **Obligation for gratuitous service:** The members of medical profession often provide service gratuitously. The professionals cannot escape their liability in tort for negligent performance of duty even if he does the work free of cost or for goodwill reasons <sup>[31]</sup>. An eye camp was organised for extending expert ophthalmic surgical service to the cataract patients of a particular place in Uttar Pradesh unfortunately, the operated eyes of the patients were irreversibly damaged due to post-operative infection of the "intra ocular" cavities of the eyes caused by

<sup>25</sup> *Morris v Winsbury White* [1937]4 All ER 494 (500)

<sup>26</sup> *R. V Lawrence* [1981]1 All ER 974

<sup>27</sup> *Yasmin Sultana v Dr R.D. Patel* 1994(1) CPR407.

<sup>28</sup> *Poone Medical Foundation v M.L. Titkare* 1995 CPJ 232 (NC)

<sup>29</sup> *T Ramaraju v Vijaya Hospitals* 1997(3) CPR 477 (Chennai)

<sup>30</sup> *Grant v Australian Knitting Mills Ltd.* [1936] AC 85 (103).

<sup>31</sup> *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* (1962)1 QB 396

common contaminating source viz. normal saline used at the time of surgery.

### Duty of the hospital

Very often the claim of medical negligence is based on availability of evidence furnished by medical records kept and maintained in the hospital. In UK the right of a patient to access to his medical record is determined by the statute enacted by British Parliament. It is held by the Court of Appeal in UK<sup>[32]</sup> that a patient does have a right of access to his medical records at common law, but it is qualified at least to the same extent as the statutory right is qualified by s. 5(1)(2) of the Access to Health Records Act 1990.

### Nature of Professional Duty

The doctors owe a duty of care to patients. Failure to show due care or skill in medical treatment resulting in death, injury or pain of the patient, gives rise to a cause action in negligence. *SHELAT, J. delivering the judgment of the Supreme Court of India in Dr. Laxman Balkrishna Joshi v n. Trimbak Babu Godbole*<sup>[33]</sup> lays down the criteria for determination of the professional duty of a medical man in the following way:

"A person who holds himself out ready to give medical advice and 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, 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 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."

### Limitation on Action

- i) Object of Limitation: A statute of limitation does not confer a right of action on the defendant; it is enacted to restrict the period in which the plaintiff must assert his right. The expiry of the period of limitation does not extinguish the right of the plaintiff, but it bars his remedy.
- ii) Limitation- provisions of statute: The Limitation Act 1963 contains no provision specific to actions for negligence as tort, though Arts. 72 to 91 enshrined in Part VII of the Schedule annexed to the said Act deal with suits relating to torts. In the absence of any specific provision in the Limitation Act 1963, an action for damages based on medical negligence will be governed by Art. 113 of the said Act.

It is held by Calcutta,<sup>[34]</sup> Allahabad<sup>[35]</sup> and Bombay<sup>[36]</sup> High Courts that Art. 36 of the Limitation Act 1908 (since repealed by s. 32 of the Limitation Act 1963) is a general or residuary Article governing suits for compensation

founded on torts to which no specific Article applies. Article 113 of the Limitation Act 1963 has replaced Art. the Limitation Act 1908.

- iii) Burden of proof: The dictum of English law is that if the defendant pleads limitation as a defence, the plaintiff bears the burden of proving that his cause of action arose within the period of limitation. In our country the plaintiff is under an obligation, as a matter of pleading, to show the grounds on which the exemption from limitation is claimed.<sup>37</sup>

### 3. Pleading and proof Particulars of pleading

The concept of liability without negligence is opposed to the principles of law. The proof of negligence remains the lynch pin to recover compensation. To succeed in an action for damage and compensation, the claimant has to establish some negligence, breach of duty by the defendant towards him and its causal connection with the injuries sustained by the claimant<sup>[38]</sup>.

In order to succeed in an action for negligence against a doctor the plaintiff must prove;

- i) That the defendant was under a duty to take reasonable care towards the plaintiff to avoid the damage complained of or not to cause damage to the plaintiff by failure to take reasonable care;
- ii) That there was a breach of that duty on the part of the defendant; and
- iii) That breach of duty was the real cause of damage complained of and such damage was reasonably foreseeable<sup>[39]</sup>.

The master becomes liable for the conduct of the servant, when the servant is proved to have acted negligently in course of his employment.

### Construction of Pleadings

The general rule is that the relief should be founded on pleadings made by the parties. Pleadings are loosely drafted in the courts, and as such, the courts should not scrutinise the pleadings with such meticulous care, so as to result in genuine claims being defeated on trivial grounds. The function of the pleadings is only to state the material facts and it is for the court to determine the legal result of those facts and to mould the relief in accordance with that result<sup>[40]</sup>.

### Burden of proof

The general rule is that the burden of proving negligence as cause of the accident lies on the party who alleges it. The elementary principle is that it is for the plaintiff to prove that damage under any particular head has resulted from the wrongful act of the defendant. So, the burden of proving negligence of the defendant doctor is on the plaintiff. The plaintiff has to stand on his own feet and not to take benefit of

<sup>32</sup> *R. v Mid Glamorgan Family Health Services Health Authority* 21 BMLR 1 (CA)

<sup>33</sup> AIR 1969 SC 128; 1968 ACJ 183 (SC); 1968 Mah LJ 599; 1968 SCD 866.

<sup>34</sup> *Jadu Nath v Hari Kar* 36 Cal 141; *Surat v Umar* 22 Cal 877.

<sup>35</sup> *Ram Narain v Umrao* 29 All 615; *Kripa Ram v Kunwar Bahadur* AIR 1932

<sup>36</sup> *Eso v Steamship "Savitri"* 11 Bom 133.

<sup>37</sup> Order 7, r.6 of The Code of Civil Procedure, 1908

<sup>38</sup> *Calcutta State Transport Corporation v Kamal Prakash De* AIR 1976 Cal 2, 1976 ACJ 58

<sup>39</sup> *Philips India Ltd. v Kanju Punnu* AIR 1975 Bom 306; 1975 ACJ 311

<sup>40</sup> *Moolji Jaitha and Co. v The Khandesh Spinning and Weaving Mills Co. Ltd.* AIR 1950 FC 83

any lacunae in the evidence of the defendant doctor<sup>[41]</sup>.

### Expert Evidence

- Value of expert evidence: The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to guess the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly. The expert evidence must be adduced to prove the allegation of negligence by the doctor<sup>[42]</sup>.
- In the absence of expert evidence on behalf of the complainant the National Commission declined to hold that the treatment given by the doctor proper or was given in a slipshod manner or that there transfusion of blood resulting in cardiac decomposition<sup>[43]</sup>.
- Authority to summon expert witness: In Darshan Singh Basra's case<sup>[44]</sup> the District Forum refused to summon two doctors along with case records of the patient to prove the allegation of medical negligence by expert evidence on the ground that the pleading does not disclose that the complainant failed to secure the affidavits of the doctors. By setting aside the order of the District Forum, it is held by the State Commission, Chandigarh, that in case of medical negligence the Consumer Forum can be requested to summon expert witnesses under s. 13(4)(i) of the Consumer Protection Act 1986 in order to prove the allegation of medical negligence.
- Cross-examination of expert under Consumer Forum: It is true that reception of evidence on affidavit is permissible before Consumer Forum, but when a party insists that he wants to cross-examine the deponent of the affidavit to prove that the affidavit cannot be relied upon, natural justice demands that permission to cross-examine that witness should be given<sup>[45]</sup>.
- Criteria for accepting expert evidence: A doctor charged with negligence can clear himself if he shows that he acted in accordance with the prevailing professional practice.
- Criteria for condemning expert evidence: The principle enunciated by the House of Lords<sup>[46]</sup> is that a doctor could be liable for negligence in respect of diagnosis and treatment despite a bode of professional opinion sanctioning his conduct where it had not be demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. The judge is permitted to take the view that the defence expert is simply wrong, because he has not considered all the factors, or that he does not speak for a responsible body but for himself.
- Conflicting expert evidence-Duty of court: A child suffered cardiac arrest and brain damage, as the doctor had not attended and incubated the child in response to the call made by the night sister. The plaintiff's expert said that it would have been mandatory to incubate; the defendants' expert said that he would not have incubated, had he

attended the patient in the night.

### Contributory Negligence

The term 'contributory negligence' squarely and solely applies to the conduct of the claimant alone. If the claimant is guilty of an act or omission, which has materially contributed to the accident and the resultant injury and damages, the matter comes within the concept of contributory negligence and courts are enjoined to apportion the loss between the parties as the facts may justify.

The general rule of law with respect to negligence is that although there may have been negligence on the part of the plaintiff, yet unless he could by exercise of ordinary care have avoided the consequences of defendant's negligence, he is entitled to recover damages<sup>[47]</sup>

To establish the defense of contributory negligence the defendant must prove first, that the plaintiff failed to take ordinary care of himself, and secondly, that his failure to take care was a contributory cause of the accident.

### Inevitable Accident

The defence of 'inevitable accident', 'act of God. Or 'latent defect' in fact mean the same thing.<sup>48</sup>SIR FREDERICK POLLOCK<sup>[49]</sup> defined 'inevitable accident' as an accident not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take. The expression 'inevitable accident has assumed a special meaning in legal parlance and is understood for a long time to connote only those accidents which cannot be foreseen and consequently cannot be averted with care and skill.

### Evaluation of Evidence

The hospital was held guilty of deficiency in service in giving treatment to the patient, as the case papers and treatment sheets of the patient were not produced to refute allegation of lack of standard care and treatment to the patient<sup>[50]</sup> Devendra Kantilal Nayak's case<sup>[51]</sup> the State Commission disbelieve evidence of the surgeon for producing two sets of photocopy of case papers in order to substantiate his evidence without any cogant explanation about non-availability of the original.

## 4. Conclusion and Suggestions

### 4.1 Conclusion

The foregoing discussion reflects that how a patient who intends to sue the doctor or hospital for medical negligence may resort to different mechanisms available under the Constitution and various statutes. In our country, there is no specific law which exclusively deals with the rights and obligations of the health care providers and patients. A person can get remedies for medical negligence under the Indian Constitution for protecting his right to health or can get compensation under the Consumer Protection Act, 1986. Strictly speaking, the Constitution of India does not guarantee

<sup>41</sup> *Harbhajan Singh v Dayanand Medical College & Hospital* III(1996) CPJ 263 (Chandigarh)

<sup>42</sup> *Dr C.V Methew v P. Babu* 2000 cpj 134 (Ker.)

<sup>43</sup> *Dr. T.N. Subrahmanyam v Dr. B. Krishna Rao* 1996(2) CPR 247 (NC)

<sup>44</sup> *Darshan Singh Basra v Dr. Jasbir Singh* 1998(1) CPR 304 (Chandigarh).

<sup>45</sup> *Salgaocar Medical Research Centre v R.B. Raikar* 1996(2) CPR 50 (NC).

<sup>46</sup> *Bolitho v City & Hackney Health Authority* [1977]4 All ER 771(HL)

<sup>47</sup> *Sindhu Mohanty v Gourkrishna Mohanty* AIR 1976 Ori 213

<sup>48</sup> *Bimala Devi v Pepsu Road Transport Corporation* 1984 ACJ 473 (P&H).

<sup>49</sup> F Pollock, *Pollock on Torts* 97 (15th Ed, 1951).

<sup>50</sup> *Kanaiyalal Ramanlal Trivedi v Dr. Satyanarayan Vishwakarma* 1996(3) CPR 24 (Guj.).

<sup>51</sup> *Devendra Kantilal Navak v Dr. Kalyaniben Dhruv Shah* 1996(3) CPR 56 (Guj.).

any special rights to the patient. The patient's rights are basically derivative rights, which emanates from the obligation of the health care provider. The Supreme Court in various cases has viewed that the right to life as enshrined in Article 21 of the Constitution of India includes the right to health and medical treatment. The right to life would be meaningless unless medical care is assured to a sick person<sup>[52]</sup>. Article 19(1) provides six fundamental freedoms to all its citizens which can be restricted only on grounds mentioned in Clauses (2) to (6) of Article 19 of the Constitution. These fundamental freedoms can be effectively enjoyed only if a person has healthy life to live with dignity and free from any kind of disease or exploitation which further ensured by the mandate of Article 21 of the Constitution. When breach of this right occurs, the health care provider will be held liable for negligence.

Also, any person whose rights have been infringed can move the Supreme Court under article 32 of the Constitution. The court has liberalized traditional rule that "only a person who has suffered injury by reason of his legal right or interest is entitled to seek judicial redress<sup>11</sup>. The Supreme Court has enlarged the rights of citizens under which any person or group of person or public spiritual individual may move the Supreme Court or High Court for the enforcement of fundamental rights of people who are unable to approach the court due to their illiteracy or social or economic condition.

The law of torts, providing for a residuary remedy, i.e. when no other legal remedy is available under any law time being in force, the tortious remedies may be invoked. The law relating negligence as a tort is very well developed and is capable to meet newer kinds of cases because the emphasis of negligence as a tort is on D.B.D formula, i.e. Duty owed by the defendant to the plaintiff; Breach of duty by defendant; and the damage caused as a result of the breach of the duty.

## 4.2 Suggestions

Various remedies available to patients under various laws in India can be summed up as under:

### i) Compensatory action

Involving complaint against doctors, staff or hospital whether private or government hospitals who committed negligence seeking monetary compensation before Civil Court under law of Torts or Law of Contract, High Court under the constitutional law, or Consumer Courts under Consumer Protection Act (Individual liability and Institutional or hospital liability).

#### (a) Action under the Tort Law

Law of torts circumscribes the principle to compensate the victim for the injury or loss suffered by him. Since it is in the nature of civil proceeding a civil court has to be approached to seek the remedy. Under the law of torts action for medical malpractice lies in the civil court where the burden of proof is high and adheres to the strict proof of evidence. Mere complying with the requirements like duty of care, breach of duty and damages will not sufficient to find the defendant

doctor being guilty of negligence. The issue of negligence should be proved by the plaintiff with the cogent evidence of medical expert and medical records.

#### (b) Action under the Law of Contracts

The scope of liability of the health professional for the breach contractual is very limited in comparing with law of torts. Whenever a patient approaches a private health professional for medical care, the relationship between the hospital and the patient is one of contractual in nature. The civil suit under law of contract is not maintainable unless the plaintiff proves that he availed of service of the defendant health carer for consideration and thus a contractual obligation exists between the patient and the doctor No suit can be brought in the civil court for remedies under the law of contract without hiring the service for.

#### (c) Remedy under The Consumer Protection Act, 1986

A consumer who has suffered loss or damage as a result of any deficiency of service can file a complaint under Consumer Protection Act, (hereinafter referred as Act), 1986. The Act ensures that the aggrieved consumer should be provided with remedy through its three tier quasi-judicial bodies:-District forum, State Commission and National Commission.

#### (d) Remedy under the Constitution of India

Per se the Constitution of India does not guarantee any special rights to the patient. However, the same can be interpreted under widest interpretation to the Article 21 of the Constitution of India which guarantees right to health and medical treatment. The right to life would be meaningless unless medical care is assured to a sick person. Article 19 (1) provides six fundamental freedoms to all its citizens which can be restricted only on grounds mentioned in Clauses (2) to (6) of Article 19 of the Constitution. These fundamental freedoms can be effectively enjoyed only if a person has healthy life to live with dignity and free from any kind of disease or exploitation which further ensured by the mandate of Article 21 of the Constitution. When breach of this right occurs, the health care provider will be held liable for negligence.

### ii) Punitive action

Involve filing a criminal complaint under the Indian Penal Code against the doctor.

Criminal Negligence under Section 304-A of Indian Penal Code (45 of 1860)

To impose criminal liability under Section 304-A of Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that the act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans* (immediate or operating cause); it is not enough that it may have been the *causa sine qua non* (a necessary or inevitable cause). That is to say, there must be a direct nexus between the death of a person and rash or negligent act of the accused. The doing of a rash or negligent act, which causes death, is the essence of Section 304-A. There is distinction between a rash act and a negligent act. 'Rashness' means an act done with the consciousness of a risk that evil

<sup>52</sup> Sharma MK, "right to Health and Medical Care as a Fundamental Right" AIR 2005, p. 255.

consequences will follow. (It is an act done with the knowledge that evil consequence will follow but with the hope that it will not). A rash act implies an act done by a person with recklessness or indifference as to its consequences. A negligent act refers to an act done by a person without taking sufficient precaution or reasonable precautions to avoid its probable mischievous or illegal consequences. It implies an omission to do something, which a reasonable man, in the given circumstances, would not do. Rashness is a higher degree of negligence. The rashness or negligence must be of such nature so as to be termed as a criminal act of negligence or rashness. Criminal rashness is resulting into a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or 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, it was the imperative duty of the accused person to have adopted.

### iii) Disciplinary Action

Complaint before the Medical Council of India

The Medical council of India grants recognition to medical degrees granted by universities or medical institutions in India and such other qualifications granted by medical institutions in foreign countries. It lays down and prescribes the minimum standards of medical education required for granting recognition to the degrees awarded by Universities in India. Furthermore, the Council is empowered to have disciplinary control over the medical practitioners including the power to remove the names of medical practitioners permanently or for a specific period from the medical registers when after due inquiry they are found to have been guilty of serious professional misconduct.

### iv) Recommendatory Action

Complaint before Human Rights Commission

Irrespective of different remedies medical negligence and medical malpractice discussed above, there is yet an alternative mechanism for the protection of patients' rights under National and State Human Rights Commission (NHRC and SHRC). Each patient irrespective of its caste, creed, religion, economic status enjoys various Human Rights including Right to Life. Human Right Commissions at national and state level protects are guardian of these rights. For instance, NHRC/SHRC can hold the state accountable for violation of human rights of patients. NHRC can play vital role in fulfillment of national and international human rights norms. Patient can file complaints regarding violation of human rights before NHRC/SHRC as the case may be. NHRC/SHRC then seeks explanations from the government for such violations and can also initiate proceedings including independent investigation, issuance of summons to witness, examination on oath etc. Thus, NHRC/SHRC is endowed with the powers of a Civil Court. It persuades the state to pay compensation to the victims, patients in present case and also

recommends for the grants of immediate interim relief to the victim or his/her family.

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