Medical Negligence:
A Study in Indian Context

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I. Introduction

Medical negligence in India had adopted the principle laid down in the Bolam case which held that a doctor is not negligent if what he has done would be endorsed by a responsible body of medical opinion in the relevant specialty at the material time. India has been following certain principles of English law that are well developed in common law. Medical negligence related to law of torts is applicable in cases related to compensation and damage as an essential ingredient but that element is not necessary in the law of master and servant. This paper deals with the meaning of negligence, duties of doctor's, degree of care expected of a doctor to a patient, mainly which is based on the mutual trust and confidence. This paper is entirely devoted to tortious liability in medical service. With the increase of the latest technology the risk is increased day by day, the most pertinent question is, no doubt, that every surgical operation involve risk but at the same time it is also true that one cannot take the benefit of risk. We have a catena of cases on the point of negligence of doctors but basic question is what is negligence in deciding relationship of doctor and patient and when a doctor can be called to be negligent with his patient and how this negligent activities can be established. This paper also deals with the medical negligence under Consumer Protection Act, 1986. The basic question is whether the word, 'service', include within its ambit the service rendered by the doctor and persons who avail services are 'consumers' within the meaning ascribed under the Act. This has been judged with the help of judicial delineation, under our study.

II. Negligence Meaning

Negligence comes from the root word "neglect" which means to ignore others. Modern negligence deals with individual conduct in general and in specific situations. The act of a common intelligent man, who commits any fault by ignoring the expected act, would be covered under negligence. Professionals such as lawyers, doctors, architects and others are included in the category of persons possessing some special skill or skill

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generally[2] Medical services and medical practitioners also need efficiency, proficiency and high advanced knowledge of medical treatment. Negligence means failure to act in accordance with the standards of reasonably competent medial men. It has to be remembered that there may be one or more proper standards.

In medical negligence litigation, a key step is for the claimant to prove that the physician failed to meet the required standard of care. Medical negligence is a shortcoming in the service agreed to be rendered by medical professional. Medical negligence is also a 'tort' which calls for a reasonable degree of care expected of a professional like doctor or pathologist. Medical negligence is defined as lack of reasonable care and skill or willful negligence on the part a doctor to accept a patient's examination, diagnosis, investigation, treatment medical or surgical etc. Negligence means failure to act in accordance with the standards of reasonably competent medical men in a particular case.[3] A doctor is not guilty of negligence, if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.

III. Duties of a Doctor

A doctor is a health care provider who practices the profession of medicine, which is concerned with promoting, maintaining or restoring human health through the study, diagnosis and treatment of disease, injury and other physical and mental impairments. Duties of a doctor are to protect and promote the health of patients, to provide a good standard of practice and care, treat patients as individuals and respect their dignity, work in partnership with patients and be honest and open and act with integrity. Duties of a doctor are also to give medical advice, while deciding whether to undertake the case, deciding what treatment to give, what administration of treatment. To advise a patient of risks is a matter for medical judgment.

Thus most revered is the Hippocratic oath[4] which elaborately discuss the duties of a doctor in relation to his art and patient. It is clear from this ancient oath that the doctor is duty bound to remain accessible for the patients without any discrimination and also without any favour. The doctor is duty bound to serve the patient to the best of his ability and judgment as to the disease and is prohibited to have an ill-will towards the patient.

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2 Jacob Mathew vs. State of Punjab, 2005 (6) SCC 1; AIR 2005 SC 3180

3 In *Dr. T.T. Thomas* vs. *Smt, Elisa,* AIR 1987 Ker 52.

4 Hippocratic oath, as cited in Dr. Jagdish Singh Vishnnu Bhushan, *Medical Negligence and Compensation*. Appendix II Bharat Law Publication Jaipur 1999, at p. 500. See also, Dr. B. Hydervali, A note on medical oath and Ethics, *S.C.J.* (1999).

Every injured citizen brought for medical treatment should instantaneously be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death.[5] It is important that he is provided basic first aid which enables him to survive till he reaches the hospital. Art. 21 impose an obligation on the State to safeguard the right to life of every person.[6] If the specialist doctor does not care to attend to a patient admitted in the emergency ward of a hospital and the patient dies, doctor would be liable to pay compensation. [7] The Law Commission of India [8] has given recommendations and also a draft Model Bill for the purpose of emergency treatment of victims. The Bill will cover all types of emergencies requiring immediate medical help, including motor, fire and other accidents, which take place during earthquakes, floods, etc. It can also be in respect of a woman under labour.

IV. Degree of Care Expected of a Doctor

The duties, which a Doctor owes to his patient, are clear. A breach of duties gives a right of action for negligence to the patient and civil action for tort of negligence. In an action for negligence, the patient has to prove the following essential; that the defendant owned duty of care to the plaintiff; the defendant made a breach of that duty; and the plaintiff auffered damage as a consequence thereof. [9] Every surgical operation is attended by risks. We can not take the benefits without taking the risks. Every advancement in technique is also attended by risks. Doctors like the rest of us, have to learn by experience; and experience often teaches in a hard way.[10] A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill or knowledge for the purpose. In *Bolam v. Friern Barnet Hospital Management Committee*[11], the court lays down the test to determine the liability of a doctor. The test is the standard of the ordinary skilled man exercising and proffessing to have that special skill. It is expected of a professional man that he should show a fair, reasonable and competent degree of skill. Neither he is expected of a higher degree of

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5 Pt. Paramanand Katara v. Union of India AIR 1989 SC 2039.

6 Paschim Banga Khet Mazdoor Samity v. State of West Bengal, 1996 (4) SCC 37.

7 Sishir Rajan Saha v. The State of Tripura, AIR 2002 Gauhati 102.

8 201st Law Commision of India, Report on "Medical Treatment after Accidents and During Emergency Medical Condition and Women in Labour", 2006, available -http://lawcommissionofindia.nic.in/reports/rep201.pdf

9 Bangia, R.K., The Law of Torts, 2005 p. 237.

10 In *Roe and Woolley v. The Ministry of Health and An Anaesthetist, (1954) 2 All ER 131.*

11 (1957) 1 WLR 582.

skill of a person who has higher education and greater advantages nor is he expected to guarantee cure.

Medical men would not be found negligent simply because one of the risks inherent occurs or because in a matter of opinion he legitimately took a view which unfortunately happened to produce an adverse result in particular circumstances.[12] In *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [13] court held that where a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, and a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

The Supreme Court of India in *Dr. Laxman Balkrishna Joshi* v. *Dr. Trimbak Bapu Godbole and Another,*[14] held that duty in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. The doctor is possessed of skill and knowledge for giving medical advice and treatment. Such a person, when consulted by a patient, owes him certain duties, namely 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 administration of that treatment. A breach of any of these duties gives a right of action for negligence to the patient.

The *Bolam* case applies to all the acts and omissions constituting diagnosis and consequential treatment, and *Hedley Byrne* applies to all advisory activities involving the communication of diagnosis and prognosis, giving of advice on both therapeutic and non-therapeutic options for treatment, and disclosure of relevant information to obtain informed consent. In *Kusum Sharma and others* v. *Batra Hospital and Medical Research Centre and Others,*[15] the Supreme Court held that a person, whether he is a medical practitioner, who is consulted by a patient, owes him certain duties of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient. The medical professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/ her suffering which did not yield the desired result may not amount to negligence. Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. 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.

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12 In *White House v. Jordan (1981) 1 WLR 246*
13 [1964] AC 465.
14 AIR 1969 S.C. 128.
15 (2010) 3SCC 480.

V. Tortious Negligence in Medical Services

Tort can be defined as the violation of common law rights of a person due to breach of duty imposed on another in a unreasonable way giving a right to claim un-liquidated compensation. There are three ingredients of tort of negligence, first a breach of duties, second an injury and third damage and it must be shown that there was a causal link between the breach of duty and harm. Negligence is an independent tort which generally determines accountability of doctors. The very basis for negligence is failure to take reasonable care. Tortious liability arises from breach of a duty towards persons generally and its breach is repressible by an action for unliquidated damages.[16] It is consensus that the Indian judicial system of modern time is based on common law system and tort is also a product of common law.

In *Roe v. Ministry of Health and Others, Woolley v. Same*[17] the Court observed that we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. One must insist on due care for the patient at every point, but one must not condemn as negligence that which is only a misadventure. In *Bolam* v. *Friern Hospital Management Committee*,[18] the Court opined that in the case of a medical man, negligence meant failure to act in accordance with the standard of responsibly competent medical man at the time. That is a perfectly accurate statement, as long as it was remembered that there may be one or more perfect standards; and if the doctor conforms to one of the proper standards, then he could be not negligent. A medical man can obstinately and pig-headedly carry on with same only technique if it had been proved to be contrary to what was really substantially the whole of informed medical opinion.

In *J.N. Shrivastava* v. *Rambiharilal and others*[19] it was held that there can be no doubt that he may find himself held liable in an action for negligence if he makes a wrong diagnosis and thereby causes injury to the patient. But it must be remembered that a mistaken diagnosis is not necessarily a negligent diagnosis. A practitioner can only be held liable in this respect if his diagnosis is so palpable wrong as to prove negligence.[20] The patient under the treatment which is the expert opinion of the doctor, it is in the patients' interest to undergo. To decide what risks the existence of which a patient should be voluntarily warned and the terms in which such

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16 Winfield on Tort, 69, 12th Ed. 1984.
17 (1954) 2 All. E.R.at p. 131.
18 (1957) *W.L.R.* 582.
19 AIR 1982 M.P. 132.
20 *Id.* para 15, at. p. 136.

warning should be given having regard to the effect that the warning may have in, as much as exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient, and expert medical evidence on that matter should be treated in just the same way.[21] The Supreme Court said[22] that the government should conduct a thorough investigation into the conditions which rendered a medical negligence of such a scale, and evolve proper guidelines which will prevent recurrence of such tragedies. The Supreme Court also approved the revised guidelines which prescribes the norms and conditions for the conduct of "eye camps" with the suggested modifications.

In *Allen* v. *Bloomsbury Health Authority*,[23] damages were awarded in the case of negligence in the termination of the pregnancy and it was held that these damages will include general damages for pain and discomfort associated with the pregnancy and birth as also damages for economic loss being the financial expenses for the unwanted child in order to feed, clothe and care for and possibility to educate the child till he becomes an adult. About absence of basic qualification in homeopathic doctor to practice a system of medicine (allopathy) in *Poonam Verma v. Ashwin Patel & Others,*[24] the Supreme Court held that a person who does not have knowledge of a particular system of medicine but practices in that system is a quack. Where a person is guilty of *negligence per se*, no further proof is needed.

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 at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304 A of IPC.[25]

VI. Vicarious Liability

A person is liable for his own wrongful acts and one does not incur any liability of the act done by others. Vicarious liability means the liability

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21 *Sidaway* v. *Board of Governors of The Bethlem Royal Hospital and the Maudsley Hospital and others,* 1 A.C. (H.L.) 1985, 871.

22 *A.S. Mittal and Others* vs. *State of U.P. and Others,* AIR 1989 S.C. 1570.

23 (1993) 1 All. E.R 654; See also *Benarr* v. *Kettering Health Authority, (1988)* 138 NLJ 179; *Lovelace Medical Centre* v. *Mendez,* (1991) 205 p. 2d 603; *CES* v. *Superclinics (Australia) Pty. Ltd.* (1995) 38 NSWLR 47; *L.* v. *M.,* (1979) 2 NZLR 519; *State of M.P. & Ors.* v. *Asharam.* 1987 A.C J. 1224; *Administrator, Nata* v. *Edouard* (1990) 35 A.S. 81., *Robinson* v. *Salfard Health Authority,* (1992) 3 Med. L.R. 270.

24 *(1996) CPS, (SC).*

25 *Dr. Suresh Gupta vs Govt of NCT of Delhi,* AIR 2004 SC 4091

of one person for the act done by another person. Such liability is of principal for this agent, liability of partners of each other's, and liability of the master for his servant.[26] Whether a hospital authority is vicariously liable for the negligence of doctors and surgeons employed under a contract of service/contract for service arising in course of performance of their professional duties.[27] In *Hillyer v. St. Bartholomew's Hospital*,[28] court held that the hospital authorities were not to be vicariously liable for the negligence of the professional staff involving professional care and skill, because they lacked the power of control over them. In *Cassidy v. Ministry of Health*,[29] the court held that the hospital authorities were liable when, due to the negligence of the house surgeon and other staff, during post operation treatment the plaintiff's hand was rendered useless. Where doctor was not liable because he provided the necessary and appropriate treatment, hospital was liable for poor nursing and awarded compensation to victim.[30] In sterilization operation the doctor as also the state must be held responsible in damages if the sterilization operation performed by him is a failure on account of his negligence which is directly responsible for another birth in the family creating additional economic burden on the person who had chosen to be operated upon for sterilization.[31] In *Prashanth S. Dhananka v. Nizam Institute of Medical Science & Ors*, the Hon'ble National Commission deliberated on important issues such as what constitutes medical negligence, duty of a hospital to engage a specialist when a specialist is available, vicarious liability of a hospital for omissions and commissions of doctors and staff, compensation for mental and physical torture etc.

VII. Res-ipsa Loquitur

Res ipsa loquitur means 'the thing speaks for itself.' When the accident explains only one thing and that is that the accident could not ordinarily occur unless of defendant had been negligent, the law raises a resumption of negligence on the part of the defendant.[32] If the patient has suffered an injury in circumstances, which are explicable only as being attributed as negligence on part of the doctor, the maxim *res ipsa loquitur* (thing speak for itself) may be applied. The patient is then entitled to succeed

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[26] Bangia, R.K., Law of Torts, 2005.

[27] *Cassidy v Ministry of Health* 1951 (2) K.B 343 and later in *Gold and ors v Essex county council* .1942 2 All ER 237.

[28] (1909) 2 K.B. 820.

[29] (1951) I All. E.R. 574.

[30] *Shri M.L. Singhal* v. *Pradeep Mathur and another,* AIR 1996 Delhi 261.

[31] *State of Haryana* v. *Smt. Santra, S.L.P.,* 2000 (3) P.L.J.R., p. 45.S.C. ; See also (2000) 5 S.C.C. 182.

[32] Supra Note.

unless the doctor can bring evidence to rebut the possibility of negligence The doctrine may be used where first the accident is of a kind which ordinarily does not occur in the absence of negligence, second the apparent cause of the accident being within the control of the defendant and third the plaintiff could not have contributed to it. Negligence is writ large. In a case[33] where a patient died a day after surgery and the relatives found a pair of scissors utilized by the surgeon while collecting the last remains, a compensation was awarded, on the grounds that negligence was writ large on record in handling the case though it was argued that arterial forceps and sponges were left behind in an attempt to save the life of the patient and (the said things were to be later removed, but could not be done as the patient died) the same did not contribute to patient's death.

In Mrs Aparna Dutta v. Apollo Hospital Enterprises Ltd.,[34] the abdomen of the plaintiff was opened by fannenstel incision and uterus was removed along with some mass that was found around the uterus. The court said that the doctrine of res ipsa loquitur was applied and the concerned doctor and the hospital were held liable for negligence. In *Achut Rao Haribhau Knodwa and Others* vs. *State of Maharastra and Others*[35] the Supreme Court considered two issues first whether the doctors could be held to be negligent and second once negligence is established of a doctor employed in a Government Hospital, whether the State can be held liable for the negligence of its employees. In other case[36] like this the doctrine of *res ipsa loquitor* clearly applies. It is the leaving of that mop inside the abdomen of patient which held to the developments of peritonitis leading to her death.

VIII. Criminal Negligence in Medical Services

In criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. The criminal law essential ingredient of *mens-rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. The criminal negligence shall have to be found out on the ground that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent.[37] In

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33 *Nihal Kaur v/s Director, P.G.I.M.S.R, .III (1996) CPJ 112*

34 AIR 2000 Mad. 340.

35 AIR 1996 S.C. 2377.

36 *Achutrao Haribhau Khodwa and others* v. *State of Maharastra and others,* AIR 1996 S.C. 2377, see also *Rajmal* v. *State of Rajasthan,* AIR 1996 Raj. 80.

37 Supra Note 1.

Andrews v. *Director of Public Prosecutions* [38] For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.

In *Syad Akbar* v. *State of Karnataka*[39] the Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. The criminal liability is concerned, as *mens rea* is not abandoned. Section 338 of I.P.C. lays down that only that 'act' which is "*so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished....*" The concern revolves around the acts of omission and commission which amounted to an "act" so *rashly* or *negligently* as to have had endangered the life of patient constituting an offence punishable under Section 338 of the I.P.C. Thus, it was the doctor's "duty" to act, such an omission can be treated as an "act".

In Dr. P.B. Desai v. State of Maharashra & Anr.,[40] the Supreme Court clarify that undoubtedly, within the realm of civil liability, the doctors has breached the well essence of "duty" to the patient. We emphasize that the question of criminal liability has also to be examined in the context of Section 338 of I.P.C. which is the real issue. The Supreme Court observed that the Exploratory Laparatomy was not an act of negligence, much less wanton negligence, and under the circumstances it was a plausible view which an expert could take keeping in view the deteriorating and worsening health of the patient. As a consequence, opening of the abdomen and performing the surgery cannot be treated as causing grievous hurt. It could have been only if the doctors would have faltered and acted in rash and gross negligent manner in performing that procedure. It is not so. At the same time, his act of omission, afterwards, in not doing the surgery himself and remaining absent from the scene and neglecting the patient, even thereafter, when she was suffering the consequences of fistula, is an act of negligence and is definitely blame worthy.

However, the SC said the omission is not of a kind which has given rise to criminal liability under the given circumstances. The negligent conduct in the nature of omission is not so gross as to entail criminal liability under section 338 of the I.P.C. It is to be kept in mind that the crime as mentioned in section 338 I.P.C requires proof that the patient's condition to

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[38] All ER p. 556 C.
[39] AIR 1979 S.C. 1848.
[40] Criminal Appeal No. 1432/2013; SLP(CRL.) NO. 9568 OF 2012.

the acute stage can he be said to have caused such a result, by his omission to act? We do not find it to be so.

IX. Medical Negligence under the Consumer Protection Act

Medical negligence is a necessary ingredient for liability under the Consumer Protection Act. Jurisdiction is on a somewhat different footing and though in certain areas the consumer law and tort law may imperfectly mix. There is a clear line of distinction between the two, medical liability within the consumer jurisdiction is only a species of genus of deficiency in service hired. This extends the somewhat narrower concept of negligence in torts. The modern era is the era of consumerism and any person rendering a service for a price can be made accountable for the deficiency in service. A consumer is a person who buys goods or avails services for consideration and provides speedy and inexpensive remedy. Service rendered by medical professional is covered under the C P Act and deficiency in service is actionable.

IX.I. Deficiency in services under CPA

The doctor also render the service for a price, therefore, they can also be made accountable under the Consumer Protection Act, 1986. The consumer[41] has been defined under the Act as, any person who,

(i) **"***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 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 payment when such use is made with the approval of such person, but does not include a person who obtains such goods for re-sale or for any commercial purpose; or*

(ii) *[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 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;"*

Therefore, it is ample clear from these definitions that the purchaser of (i) good and services is a consumer; (ii) moreover, a user of such goods

[41] Section 2(d) of the Consume Protection Act, 1986.

and services is also a consumer. Service means service of any discretion which is made available to potential users and includes to provisions of facilities in connection with banking, financing, insurance, transport, processing etc.[42] The word 'any' means 'one or some or all'. In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users. The meaning of the word was further expanded in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc. Each of these are wide-ranging activities in day to day life. They are discharged both by statutory and private bodies.[43]

In case of 'service,' the doctor can be made accountable only if there is 'deficiency' which is defined to "mean 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."[44] In *Indian Medical Association v. V.P. Shantha*[45] the Supreme Court has defined the meaning of service under the Consumer Protection Act and doctor's accountability under these kind of services as follows;

Service 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 the ambit of service. A "contract of personal service" means in the absence of a relationship of master and servant between the patient and medical practitioner to the patient cannot regarded as service rendered under a contract of personal service.

Service rendered free of charge by a medical practitioner attached to a hospital / nursing home or a medical officer employed in a hospital / nursing home where such services are rendered free of charge to every body would not be 'service' as defined in section 2(1)(O) of the Act. Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing of the service and all patients (rich and poor) are given free service is outside the purview of the expression 'service' as defined in section 2(1)(O) of the Act.

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42 Section 2(O) of the Consume Protection Act, 1986.

43 *In Lucknow Development Authority* v. *M.K. Gupta* (1994), S.C.C. 243.

44 Section 2(g) of the Consume Protection Act, 1986.

45 AIR 1995 SC 550; (1995) 6 S.C.C. 651; See also leading case has been made by Dr. H.L. Chualini "Vicarious Liability of Hiospital Authorities in India, AIR 2001 (J) 53.

Service rendered at a non-government hospital / nursing home where charges are required to be paid by person availing of such services falls within the purview of the expression 'service', and service is rendered free of charge to persons who are not in a position to pay for such services free service would also be services as defined in section 2(1)(O) of the Act.

If the person availing of the service has taken an insurance policy for medical care where under the charges for consultation diagnosis and medical treatment these are doctor's by the insurance company, such service would fall within the ambit of 'service' and would not be free of charge and would constitute 'service' as defined in section 2(1) (O) of the Act.

IX.II. Nature of medical services within purview of CPA

All kinds of services rendered by medical practitioners except where such services are rendered free of charges to all and under contract of personal service come within ambit of "service" under CPA. Contract of personal service cannot be assumed in absence of relationship of master and servant. Hospitals where medical services are rendered free of cost to all held not within purview of CPA. Payment of token charges will not alter nature of services rendered by such hospitals. Wherever charges are collected from those patients who are able to pay- those hospitals are covered under the Act. When the young child is taken to a hospital by his parent and the child is treated by the doctor, the parent would come within the definition of consumer having hired the service and the young child would also become a consumer under the inclusive definition being a beneficiary of such service. The definition clause being wide enough to include not only the person who hires the service but also beneficiary of such service which beneficiary is other then the person who hires the service. The conclusion is irresistible that both the person as well as the child would be consumer within the meaning of Section 2(1) (d) (ii) of the Act and as such can claim compensation under the Act.[46] In *Ganesh Prasad* case[47] a 4½ years old child suffering from cerebral malaria was admitted in hospital. Life saving injection was given. As opined by child specialist, doses were safe and treatment was proper. Though death of the child is unfortunate, it can not be said that there was negligence on the part of the doctor. Where a patient could not be operated due to critical condition, doctor can not be held guilty of negligence if proper course of practice is adopted and reasonable care is taken in administration of treatment.[48] When the death of a patient is due to infection after operation, medical negligence was alleged. No negligence on the part of the nursing

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[46] Ms *Spring Meadows Hospital* v. *Harjot Ahluwalia,* AIR 1998 S.C. 1801.

[47] *Dr. Ganesh Prasad & Anr. V. Lal Janamajay Nath Shahdeo,* I(2006) *CPJ 11 7 (NC)*

[48] *Narasimha Reddy & Ors. v. Rohini Hospital & Anr*., I(2006) CPJ144(NC).

home or the doctors attending the patient is to be prosecuted if patient did not follow the advice given to her and the appeal was dismissed.[49]

When the complainant was operated for hip bone fracture and he passed away in same evening. Complainant alleged no proper post operative care and patient had excessive bleeding, negligence attributed to massive outflow of blood to the extent of 2500 ml.[50] When the complainant has failed to prove negligence on the part of the doctor and the doctor took precaution and the standard practice which is as followed in the case of the patient who was under shock and coma and was suffering from Pyogenic Mengitus, he cannot be attributed with any negligence.[51] Whether negligence is established in any particular case, the act or omission or course of conduct complained of must be judged not by ideal standards, nor in the abstract, but against the background of the circumstances in which the treatment in question was given and the true test for establishing negligence on the part of a doctor is as to whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with reasonable care.[52] The duty of a medical practitioner arises from the fact that he does something to a human being which is likely to cause physical damage unless it is done with proper care and skill.

There is nothing on record to suggest that doctor had prescribed medicines which were not indicated according to the condition of the patient prevailing at that time or that it injuriously affected the health of the patient, and held that the doctor was negligent.[53] While claiming compensation under tort for any loss or injury caused due to defective or negligently covered medical services, an aggrieved consumer has to face tremendous difficulty in proving "negligence" of the medical personnel rendering such services and the aggrieved person has been able to get adequate remedial protection in only exceptional cases.[54]

Under Consumer Protection Act the doctor can be made accountable only if there is 'deficiency' which is defined to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance. It was a wide cover in the medical services. From time to time the High Courts and the Supreme Court of India have given many view of medical negligence, such as unsuccessful sterilization operation,[55] careless in

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[49] *Md. Aslam v Ideal Nursing Home and Ors., 1986-99 Consumer 4233 (NS)*

[50] *Smt. Archana & 4 Ors. v/s Chaudhari Chest Hospital & Ors., 1998(1) CPR 556,*

[51] *Manohar Lal* v. *Dr. Ajay Kumar Jain,* 1999 (2) CPR 493, (S.C.U.P.).

[52] *Smt. Jaiwati* v. *Seva Sanstha & Anr.,* 2000 (1) CPR 338, (S.C. Delhi)

[53] *Shiva Gopal* v. *Dr. (Smt.) Sudha Gupta & Anr.,* 2000 (1) CPR 243.

[54] *Dr. C.J. Subramania* vs. *Kumaraswamy* (1994) CPJ 509.

[55] *State of Haryana v. Smt. Santra,* AIR 2000 S.C. 1888 and *Joint Director of Heath Service, Shivagangai v. Sonai,* AIR 2000 Mad. 305.

performing eye operations,[56] lack of preventive measures resulting in doctor's death,[57] penis cut off,[58] uterus removed without justification,[59] death due to transfusion of blood of a wrong group,[60] disclosed the information about his health to his fiancé[61] etc

X. Medical negligence and the Judiciary

In *Martin F. D'Souza v. Mohd. Ishfaq*[62] the Supreme Court has made an interesting observation that the law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood. It is a matter of individual understanding as to what is reasonable and what is unreasonable. Even experts may disagree on certain issues. They may also disagree on what is a high level of care and what is a low level of care. It was very difficult or rather impossible to understand, and therefore, define as to what is "reasonable" and what is "simple" and what is "gross". The court observed that judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. In this case judgment is like a confession by the judges that in cases of medical negligence, the judges are ill-equipped to make any decision and that too on the finer aspects of "simple" or "gross" negligence. In *V. Kishan Rao v. Nikhil Super Speciality Hospital and Anothers*,[63] the Supreme Court held that it was not bound by the earlier decision of the same court in Martin D'Souza's case as that judgment was per incuriam regarding the directions for expert opinion is concerned. The court held that it was not necessary in all cases to seek expert opinion before proceeding with the matter. For simple and obvious cases, the consumer courts were free to proceed without seeking expert opinion and the instant case fell in such a category. In *Minor Marghesh K. Parikh vs. Dr. Mayur H. Mehta*,[64] the Supreme Court observed that the National Commission should have been much more diligent and

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56 *Miss Pushpaleela v. State of Karnataka*, AIR 1999 Kant. 119.
57 *Suraj Mal Chhajer v. State*, AIR 1999 Raj. 82.
58 *C Siva Kumar v. Dr. John Mathur & Another*, III (1998) CPJ 436 (Tamil Nadu SCDRC).
59 *Lakshmi Rajan v. Malar Hospital Ltd.*, III (1998) CPJ 586 (Tamil Nadu SCDRC) & *M. Sobh v. Dr. Mrs. Rajkumari Unithan*, AIR 1999 Ker. 149.
60 *R.P. Sharma v. State of Rajasthan*, AIR 2002 Raj. 104.
61 *Mr. X v. Hospital Z*, AIR 1999 S.C. 495.
62 AIR 2009 SC 2049
63 (2010)5 SCC 513.
64 AIR 2011 SC 249.

cautious. It is more to do with the way the National Commission functions and also a message as to how the consumer courts need to exercise discretion. The facts of the case very clearly tell us that the patient was not brought in a precarious condition to hospital and the treatment given resulted in amputation of the left leg. There was no apparent reason for this to happen and hence, Dr. Mehta and his hospital are prima facie liable. However, the Supreme Court remanded the matter to the National Commission to be finally decided in a speedy manner.

XI. Conclusion

The medical profession is to serve the humanity with full respect of dignity of a man. One area where laws interact with medicine, parting to a field of medical negligence and country like, England, has evolved sophisticated judicial norms for adequately protecting the interest of the victim and their dependents. India has been following English law relating to medical negligence has instances of medical mal-practices endangering the life and health of the people.

A doctor on duty is to use the necessary skill, care and attention in the treatment of patient. But they must also remember that he has a duty in torts towards a patient, whether there is any contract or not. A medical negligence may be defined as want of reasonable degree of care, skill or willful negligence on the part of doctor in the treatment of the patient with whom a relationship of professional attention is established. Negligence involve not only negligent act, carelessness but also failure to take such care as the circumstances demand and doctor can be called to be negligent when he had fallen short of standard of the reasonable medical care.

Medical negligence can be taken up by the consumer Court under Consumer Protection Act, 1986 also and the study shows that only those doctor's negligent activity can be initiated when the recipient is consumer and service render by the doctor is a service defined under Consumer Protection Act. It is necessary to educate the public not to ignore medical negligence. It is true that doctors are also human beings with all inherent short comings, so they must not unnecessary be harassed or prosecuted, while they are doing their duty properly, sincerely and carefully. Hence I suggest that it would be better if a mechanism of the sort of ‘medical ombudsman’ should be created to deal with complaints of negligence against the doctors as and when they tend to be indifferent or negligent in performing their functions.