LAWS ON MEDICAL NEGLIGENCE: AN ANALYSIS.

Arundhati Chakraborty.

Submitted under the guidance of: Miss.PoojaGautam

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University of Petroleum and Energy Studies
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CERTIFICATE

This is to certify that the research work entitled **"LAWS ON MEDICAL NEGLIGENCE"-AN ANALYSIS**is the work done by Arundhati Chakraborty under my guidance and supervision for the partial fulfillment of the requirement of B.A., LL.B. (Hons.)degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

Signature & Name of Supervisor

Designation

Date

DECLARATION

I declare that the dissertation entitled **"LAWS ON MEDICAL NEGLIGENCE"-AN ANALYSIS** is the outcome of my own work conducted under the supervision of Professor Pooja Gautam, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Signature & Name of Student
Arundhati Chakraborty.

Date

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ArundhatiChakraborty.

CONTENTS

ABBREVIATIONS

Acquired Immune Deficiency Syndrome	AIDS
Alternative Dispute Redressal	ADR
\American Professional Standards Review Organization	APSRO
American Medical Association	AMA
Indian Medical Association	IMA
Central Government Health Scheme	CGHS
Central Medical Council	CMC
Consumer Protection Journal	CPJ
Consumer Protection Reporter	CPR
Diagnosis-Related Groups	DRG
Enterprise Medical Liability	EML
Family Health Services Appeal Authority	FHSAA
General Medical Council	GMC
Indian Penal Code	IPC
Code of Criminal Procedure	Cr. PC
Code of Civil Procedure	CPC
Indian Medical Council Act	IMCA
Human Rights Act	HRA
Indian Contract Act	ICA

Indian Evidence Act	IEA
Indian Limitation Act	ILA
International Organisation for Consumer Unions	IOCU
National Health Service	NHA
National Service Frame Works	NSFW
Universal Declaration of Human Rights	UDHR
World Health Organization	WHO
Modern Law Review	M.L.R
Weekly Law Reporter	W.L.R
Lawyer's Edition (Unites States Supreme Court Reporters)	L Ed. (USA)
Journal of Medical Ethics	JME
Journal of Legal Studies	JLS
Delhi Law Review	D.L.R
Journal of Indian Law Institute	J.I.L.I
Saint Louis University Law Review	SLULR
British Medical Journal	BMJ
Anglo American Law Review	AALR
Oregon Law Review	OLR
All India Reporter	A.I.R.
Aligarh Law Journal	A.L.J.
Andhra Law Times	A.L.T.

All England Reporter	All. E.R.
English Law Reports Appeal Cases	AC
Allahabad Law Journal	All. L.J.
Allahabad	All.
GujratGuj.	
Bombay	Bom.
Maharashtra	Mah.
Andhra Pradesh	A.P.
National Consumer Redressal Commission	NCDRC
Law Journal Reporter King's Bench	LJKB
Queen's Bench Division	Q.B.D
Bombay Law Journal	BLJ
High Court	H.C.
Supreme Court	S.C.
Criminal Law Review	Cr. L.R
Criminal Law Journal	Cr. L.J
Ibiden	Ibid
Supreme Court Cases	SCC
Medical Law Reporter	Med. L.R.
South Eastern Reporter (second division)	S.E. (2d)
Canadian Rights Reporter	CRR

Scots Law Times SLT

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CHAPTER 1:

INTRODUCTION

Medical Negligence and appropriate laws to combat it is the need of the hour. However, legal professionals have to take a more steady view about the truthfulness of the role played by the doctors in assuming them to be in the ambit of Medical negligence. It is understandable that mistakes are made by human beings, and it is rightly said that to err is to human. Mistakes are made in all areas of professional life. Some laxity causes damage and some do not. In the case of *Hucks v. Cole*[1], Lord Denning noticed that it is very difficult to prove negligence against a medical practioner.

Medical professionals are rendering great service to the society, providing healing and treatment. Doctors are the necessary part of this profession contributing to it through their efficiency and skill. It is, therefore a noble profession. Traditionally, the family doctor was considered to be a friend for the ailing. The relationship between the patient and the doctor was considered sacrosanct since it was based on mutual trust and faith, Increased demand of the profession has brought an element of commercialization in medical practice. Health care has now been reduced to a business which has redefined the doctor-patient relationship[2]. Nowadays it has almost weakened its good faith character. "*Services*" of medical organizationshave become a purchasable commodities.It is very startling to see that most of the hospitals or clinics are not even owned by doctors, but by businessmen and people from other professions. There are stringent legislations which can check exploitation but the procedures are long and of general apathy. Thus the profession has turned the healthy and blooming society into an infected, forged, malfunctioning and deadly one.

The medical profession can be categorized into a business in view of the present scenario. Doctor may ask patients to undergo various tests (which may be unnecessary) in a particular laboratory, because he may be getting commission or other perks. On a higher scale doctors may also have partnership with pharmaceutical companies and prescribe their medicines without being convinced about their efficacy. Various Private Hospital have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely profit-making and not service motive, such doctors and hospitals would advise extensive costly treatment procedures and surgeries, where simple treatment may meet the need, and what used

[1][1993] 4 Med. L.R. 393 at 396

[2]Mathew. N.M, *Consumer Talk Health for the Millions*, *CPJ*, (1995), January- February, p. 62

to be a noble service-oriented profession or a humane one is slowly but steadily converting purely into a business[3]. The money-mindedness of the doctorhas failed to abide by their Hippocratic Oath.India is a developing nation with about thirty percentage of the Indian population living below the poverty line. With increasing cost of treatment, commercialisation of medical practices and unethical practices of those who are in this profession, quality medical care has become unreachable to large sections of the Indian society. Further this trend has increased the medical negligence cases in the country. In fact the consumer complaints have been escalating rapidly over the past few years in-spite of the Consumer Protection Act, l986 which was enacted for the protection of consumers against the negligent acts of the doctors, there does not seem to be reduction in such cases. Medical negligence is a curse to this profession and its abolition can alone bring this noble profession to its former exaltation.

The word doctor is derived from the Latin word '*docere*' which means to teach. The doctor is a teacher who guides his patients about how to maintain health and prevent disease. Doctor has been defined as a qualified practitioner of medicine or surgery in any of its branches and patient means a person undergoing treatment for disease or injury[4].Doctors need scientific knowledge, technical skill and understanding. Those who use these with audacity, with modesty, with perception and in accordance with medical ethics provide a unique service to their patients, and build apersistentsociety within them.According to Voluntary Health Association of India; the present state of medical profession mirrors the rot which seems to have set into our system[5].

The consumers are a very powerful group and the legislature has enacted the Consumer Protection Act, 1986 to support each and every consumer and/or consumer associations with rights to seek speedy, cheap and efficacious remedies which is proving to be very popular and effective as well, leaving behind a trail of rulings and findings where under, so many of us, have benefited.Doctors are considered as visible gods. They give life to the persons who are suffering from various diseases and injuries. They are the trustworthy persons and the patient who approaches a doctor with an infirmity thinks that he is the right and capable person to cure him.

[3]Phatnani, Pentum, P, Meolieo- *Legal Aspects of Doctor -Patient Relationship*, *Express Pharma Pulse*, (1995), November 30, p. 5.
[4] The New International Webster's Comprehensive Dictionary of the English Language. p.374.
[5]Voluntary Health Association of India (2002).*Health for the millions, Special Issue on Consumer Action*, vol. 18.No.6 (December), p.1 editorial.

They approach him with that confidence. Simultaneously, there is a duty on the part of the doctor to turn up such obligation with proper care.

In the current scenario, technology has advanced and the hospitals have evolved into modern, health-providing business centers. A profession as distinguished from trade is based on high ethical standards. Medical profession has its own ethical parametersand code of conduct. This profession is rendering a noble service to humanity and haspublic trust. Any person or professional who serve the public has to perform its duty, not as a matter of conduct, not in consideration ofthe fee, but as an organized public service.

A section of medical professionals seems to bethrust by voracity and greed more than the desire to serve the sufferings in thesociety. There are somedoctors who have become casual and ignorant to their professional code of behavior. Thus,more medical negligence cases are reported in day to day life.Therefore it would be unfair for a doctor to claim resistance from liability oreven criminal action, if rashness, grave negligence and turpitude are made out against him.

When legal steps are taken to provide remedy for negligence or deficiency in service by medical practitioner, it gives rise to twin adverse effects. More and more private doctors and hospital have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedure and test, to avoid any allegation of negligence, even though they might have already identified the ailment with reference to the symptoms and medical history with 90% certainty, by their knowledge and experience.

The nature of doctor-patient relationship is based on Fiduciary Relationship. The extent and nature of information required to be given by doctors should continue to be governed by the *Bolam'*stest rather than the "*reasonably prudent patient*" test evolved in Canterbury[6].It is for the doctors to decide, with reference to the condition of the patient nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patient[7].The Union Minister for Health an Family d Welfare, himself admitted that in 2013, over 90,000 cases of negligence were Bled in consumer court which are

[6] 464 F 2d 772 (D.C. Cri. 1972)
[7] *Martin F. D'Souza* v.*Mohd.Ishfaq* 2009 (3) SCC (1)

almost 50% more than those Bled in 2009. The pharmaceutical company, drug controller, and medical practitioners seem to have formed a nexus to play havoc with the life of patients[8]. At times the doctors have been involved in the kidney racket scam.

It is true that the medical profession has to a great extent become a business and many doctors have departed from their Hippocratic Oath for making money.

Howsoever the complete medical fraternity should not be put to stake and their competence should not be questioned.

In *MukundLalGanguly* v. *Dr. Abhijit Gosh*[9], it was held that, service rendered by doctors at a government hospital are without considerations and the patients are not consumers as defined in Consumer Protection Act 1986. Hence a remedy to a patient in government hospital is denied by the Consumer courts in India.A doctor shall abide by the oath throughout his profession. If a doctor fails to fulfill any of these promises, he will be liable for professional misconduct and liable for removal from the rolls. And they will also be liable for their medical negligence under the Consumer Protection Act 1986.The hospitals are equally liable for the acts of the paramedical staff and/or its doctors.

In*AchutraoHaribhauKhodwav. State of Maharashtra*[10], the Supreme Court held that,the State is liable for acts of negligence committed by doctors in a government- run hospital.Supreme Court of India in *Indian Medical Association v. V. P. Shantha*[11] held that the medical profession is included within the meaning of service under consumer law. Protests against this decision arose from different corners but thecourts confirmed their stand. No doubt, due to this decision, the doctors have becomemore cautious in treatments and a defensive medication slowly took over. In suchcases, the patients would be advised to undergo several tests even before thepreliminary diagnosis, so as to obviate any litigation against them. The ultimatesufferer is the patient himself as the treatment becomes expensive and also because ofthe delay caused in initiating the treatment.

[8] Reported in, *The Hindu*, June 7th, 2013, p.7
[9] 1995 (3) C.P R 391
[10] 1996 (2) SCC 634
[11] 111 (1995) CPJ 1 (SC); 1995 (3) CPR 412:1995.

In accordance to the present scenario, a doctor is not liable to be held negligent simply because things went wrong from mischance or misadventure or through a fault of judgment in choosing one reasonable course of treatment to another. The doctor can only be held liable if his conduct falls below than that of the standards of a reasonably competent practitioner in his field. There are few cases where an exceptionally brilliant doctor performs an operationor prescribes a treatment which has never been tried before to save the life of a patientwhen no known method of treatment is available. In such cases it is advisable for the doctor to explain thesituation to the patient and take his written consent[12].

[12] Reported in, *The Hindu*, March 23rd, 2010

CHAPTER 2:

HISTORY OF MEDICAL NEGLIGENCE

Human body is prone to infirmities and diseases. Human's search for medicines and to preserve and restore health is as old as mankind. He has always been concerned with the

maintenance of his health in the best possible manner that he can avail of and the zest to survive more have compelled him to search out the solution to various problems of illness.

India had a well-developed system of medicine called science of Ayurveda[13]. The Holy Ramayana gives the instances illustrating the advancement of surgical skill and medical treatment in those days.

In ancient India the system of medicine was indigenous (called *AyurvedicChikitsa*).*Dhanvantri* has been regarded as an expounder deity of Ayurveda. Lord *Dhanvantri*appeared as an authority of Ayurveda possessing the stick (*Danda*) and Water pot (*Kamandal*)[14]. One of the classical Vedic documents (comprising *Rigveda, Yajurveda, Samaveda and Adharvaveda*), *RigvedaSamhita* is the only primary collection, the other two being mainly derived from it. It contains a fairly elaborate account of the condition of medicine that prevailed in those days (about 700 B.C.). It provided the essentials for medical practice like administration of herbal drugs, surgical operations, cure of skin ailment by Sunshine, Hydrotherapy, etc. According to *Rigveda, Rudra* was the best of physicians (*Bhisktamobhisajam*) and *Indra* as protector and guarantor of life. The holy book referred above contains prayers to *Indra* for good health and protection from illness. Soma was the God who "healed whoever was sick"[15]. Notable Works on medical science in ancient India are *CharakSamhita, SushrutaSamhita* and *Vagbhata*[16]. *SushrutaSamhita,* a work comprehending the surgical tradition of Indian medicine, ascribed to the *SageSushruta*, the original of which have been composed around 600 B.C. (GN *Mukhopadhyaya*.) It was one of the four treatises regarded as the source book for all the later surgical Works in India.

Later *Manu Smriti* laid down comprehensive measures for the protection of the layman from irresponsible Physicians[17]. The penalties provided by the king in the cases of negligence of the physicians varied as per the severity of the lapse on the part of the physician and taking into account all other circumstances. In both the *YajnavalkyaSmriti* and the *VihsnuSmrities* were prescribed for the improper treatment by the physicians. The penalties that were imposed

[13]*CharakaSamhita* (3.8).
[14]*CharakaSamhita* (4.6).
[15]*Rig-Veda*.
[16]Bhishagratna, KunjaLal; *SuhrutaSamhita*, (1-2) ed., Culcutta (1907).
[17]*Manu Smriti*, 1X.284

depended on what extremities the human or the non-human suffered. It also depended on the class of the victim, higher the social class,so was the penalty imposed. But Manu was not bothered with the class of the victim while pronouncing the punishment

*SurshrutaSamhita*says that the physician should always obtain the permission of the king before starting on with any treatment to his patientsPractical training was mandatory for anybody willing to practice medical science in those days.

[18]. According to *CharakSamhita*, physician must have mastery over scriptures, experience, purity and prudence. After undergoing a specified period of training and studying the science of medicine and its practical implementation a scholar would become the physician but before starting his practice he was mandated to get the consent of the king. In ancient Indian Society, there were certain principles of law, which regulated the medical profession by curbing the freedom of practice and imposing certain restrictions as to qualifications granted to the scholars willing to practice the science of medicine. The Arthasastra also provided a particular code of ethics for the medical practioners.

If a physician while treating found that the disease is dangerous to the life, the entire matter should be informed to the authorities concerned and if the person died, the physician was bound to pay a fine, but if death occurred due to an error on the part of the medical practitioner then an average rate of fine will be imposed by the authority concerned generally the king. If death has occurred due to the rashness or negligence of the doctor then a gross punishment should be imposed. It was considered that the person treating a patient whether human or non human, was bestowed with a divine duty of care towards the patient

Definition and Meaning of Medical Negligence

A doctor has a duty to use necessary skill, care, judgment and attention in the treatment of his patient "Medical negligence is the breach of duty owed by a doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or a financial disability[19]."

[18]*SuhrutaSamhita* 1-9

[19] H.M.V. Cox, *Medical Jurisprudence and Toxicology*, Eastern Publication, New Delhi, 2001, p. 16.

Concept of Medical Negligence

"Negligence" was added to the common law in the seventeenth century. Initially in the seventeenth century a very slow but steady progress from an action of trespass on the case to an action for negligence was noticed. [20]. The concept of negligence in the present scenario is not of Indian origin but is a shadow of the English law, where negligence is a separate tort. In the beginning, it was considered as inadvertence as opposed to intentional dereliction of legal duty. Carelessness is actionable only when there is a duty to take care and when failure in that duty has resulted to a certain damage According to Winfield, in one form or another a fair amount of negligence in the sense of doing what a responsible man could not do, or not doing what he would do was covered by medieval law[21].

In *R. v. Bateman*[22], the liability of physician and their duties were discussed. The court stated that if a medical practitioner proclaims to be a skilled one then he is under the obligation to use the due caution, diligence, care, knowledge and skill. The law requires a fair and reasonable standard of care and competence, irrespective of the fact that he is qualified or unqualified practitioner by a lower standard. While adjudicating upon the standard of care to be observed by medical man, one should also have regard to some other relevant factors such as professional position, specialization, state of medical knowledge, development, availability of facilities, locality etc. This was the stand adopted by English Court system.

Indian courts usually rely upon English decisions. Justice Tendulkar observed in 1947, that action for negligence in India are to be determined according the principles of English common Law[23]. The said judgment was confirmed by Bombay High Court in appeal by Chagla C. J and Bhagawati J. They observed[24] that law on the subject in reality was not in dispute. The plaintiff has to establish first that there had been a want of complete care and skill on the part of

[20] Dr. GourdasChakraborty, *The law of Negligence*, Calcutta, Cambray& Co. Pvt. Ltd. Publication, 8th ed, 1996, p.4.
[21] Malcolmkhan and Michelle Robson, *Medical Negligence*, London, Canvedish Publication, 1997 edition, 34.p. 23.
[22] *Supra* 38
[23] Justice Tendulkar referred to principles laid down by Hale C.J. in *Rich v. Rierpont*, (1862) FSF 36, 176, Er 16.
[24] *Amelia Floundurs v. Dr. Clement Peria*, A.1.R. 1950 Bom

defendant to such extent as to establish the necessary connection between the negligence of defendant and the ultimate death of plaintiff's son.

It is noticed that very few victims complained against negligence of medical men and even if they sue for damages the case is decided in subordinate or district level court and it seldom goes in appeal before the High Courts. Number of cases decided in higher courts is negligible and that too without laying down any new principle or theory with regard to liability in torts. The highest court of the country has affirmed the law laid down in Halsbury's Laws of England.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 whether he is a registered medical practitioner or not if he is consulted by a patient he owes the patient certain duties namely a duty of care in administration of the treatment. A breach of any of these duties will support an action for negligence by the patient. This principle has also been followed by the Hon'ble Supreme Court in *Phillips India Ltd. v. Kunjupunnu*[25], and others, relying on English decisions. Similar is the view of Madhya Pradesh High court[26] in *J.N Shrivartava v. Rambiharilal and others*. It would appear from the above line of decisions that our courts have mostly relied on English decisions.

So the essential ingredients of actionable negligence in medical profession is

i. Existence of duty to take care whether it is so or not depends on the question of proximity[27]

ii. Breach of duty to take care

iii. The breach of duty must cause the injury or loss to the defendant. For the analysis of these three components, comprehensive information regarding duty of care, Breach of duty of care and Injury arising out of breach of duty of care is needed.

a. Concept of Duties of Physicians

[25] AIR 1975 Bom. 306
[26] AIR (1982) M.P. 132
[27] *Donoghue v. Stevenson*, (1932) A.C. 31.H.L.

Apart from the qualifications of physicians ancient literature speaks of professional ethics and Physicians duties and their liabilities for causing harm to the patients. Therefore, the prime duty of the Physician was to diagnose the disease aptly and only after ascertaining the disease he could start the treatment with the required skill and due care.Physician (*Vaidyas*)could never treat a patiThere were restrictions on them to treat hunters, fowlers, out castes or sinners[28]. Connecting on with the obligations of physician, *SushrutaSamhita* says that the physician had to sit down and examine his patient by sight, touch and questions. He had to diagnose properly and commence the treatment, if the disease was curable by him. Duties of physician were again confirmed through the relevant ancient documents. In *Kutilya'sArthashastra*, it is stated that physician had to inform the administrative authority about the treatment to patients. If any physician took any person for treatment without informing the administrative authority called '*gopa*' or '*Sthanika*', he would be penalised. Therefore it was the duty of physician to informthe administrative officer about the treatment of an injury. At that time, there were sufficient developments in medico- legal ethics to copeup with the problems arising out of medical profession. *Kutilya's-work* depicts asplendid picture ofthe legal duties and liabilities in medical profession. These are theconcept of professional ethics, duties and liabilities of doctors specified in ancientdocuments. The concept of punishment had its own origin and development.

b. Concept of Duty of Care

According to Lord Wright no case of actionable negligence will arise unless the duty to be careful exists between Doctor and patients. This particular position created many problems. The English court stated that duty to take care arises when the relationship is established. This relationship may differ from case to case because the English Courts have not been able to evolve a formula of general application. This relationship need not necessarily be contractual one, but may also arise if the doctor accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly.

He owes a duty to the patients to use diligence, care, knowledge, skill and caution in administering the treatment[29]. A person professing the science of medicine represents to the

[28]*SushrutaSamhita* (1-2).
[29]*Grant* v. *Australian Knitting Mills*, 1936 A.C. p. 85-1

world that he possesses the skill and competence to practice medicine. Relying on this representation, if somebody assents to the treatment and medical man does something to him, which is likely to cause physical injury unless done with due care, diligence and skill, he will be accountable for breach of duty to take care. Even if a medical man treats the patient out of moral obligation (Such as accident, sudden collapse etc.) the relationship is established and the duty continues until the need for care is over or some alternative arrangement is made. This is the sense of responsibility visualised through theory of responsibility. The concept of breach of duty needs more objective analysis.

c. Breach of Duty to Take Care

Breach of duty to take care means omitting to do something which a reasonable man would do or doing something which he would not do. Standard of reasonable care is variable depending upon the state of knowledge and proficiency in medical skill at the relevant time. Any medical practitioner is expected to possess the requisite skill and competence in his profession. What was an excellent treatment a few years back may be outdated now. Thus, failure to take care is to be interpreted as a failure to exercise reasonable skill and competence, expected of ordinary medical practitioner of ordinary prudence. A doctor cannot be held liable for a trifling injury if he has applied reasonable skill and competence, expected of ordinary medical practitioner of ordinary prudence. Lord Clyde[30] brought in the concept of accepted practice in a case and opined that if the plaintiff pleads the failure on the part of doctor to adopt a particular course, which is regarded as accepted practice then he must prove that the course, adopted by the doctor was one that no professional man of ordinary prudence could have adopted in the ordinary course of practice. According to him, there is enough scope for genuine variation of opinion in the realm of diagnosis and treatment, and a medical practitioner does not become negligent merely because his opinion differs from that of other professional men. Thus the area of discretion is very wide. Moreover the absence of established principles in this respect creates many problems.

To be very brief it can be said that the failure to discharge the duties undertaken or arising from relationship between doctor and patient makes the doctor liable. So before commencing the

[30] *Hunter v. Hunley*, (1955) S.L.T. 213 p.217.

treatment the physician should examine the patient in an appropriate manner. Prescribing medicine on telephone in an emergency is not unreasonable provided the patient is examined as early as possible. During the time of treatment failure in attending to the patient's condition is breach of duty, because a doctor must attend to his patient with reasonable efficiency. Failure to do so would be a breach of duty. In another case on receiving emergency calls his duty is to leave everything in hand and rushes to see the ailing patient whose condition might be serious. Doctor owes duty to supervise postoperative progress of the patient whom he has operated; ailing which he may be liable for breach of duty[31]. Sometimes patient ought to be informed of certain things pertaining to treatment which are likely to harm him. Warning of the risk involved in an operation must be given by surgeon.

Unreasonable delay in carrying out the treatment may amount to breach of duty[32]. So Practitioners are under an obligation to give necessary information about the patient under treatment, to the next doctor to whom patient has been referred or entrusted for treatment. According to Lord Strachan[33], if a doctor of limited experience, such as an ordinary house surgeon, suspected a condition, which would almost certainly endanger life unless attended to immediately; it was clearly his duty to refer the case to someone who had the necessary experience to deal with it. To refrain from doing so was a failure to take reasonable or ordinary care for the life of the patient. This was the position of sense of duty highlighted in common law system. According to Indian Law, it is the obligation of registrar, consultant and other persons involved in the treatment of a patient to see that their subordinate staff are suitably instructed and given necessary information regarding the treatment of the patient, failing which they may be liable in an action for negligence[34]. The wide unstructured concept of breach of duty cannot be enforced in the absence of effective guidelines. Diagnosis of the patient is the very basis upon which whole of the treatment has to be carried out; mistaken diagnosis may result in wrong prescription, and wrong treatment causing harm or injury to the patient. Hence, failure to

[31]*Chatteron v. Gerson*, (1981) 1 All ER.257 Q.B.D.
[32]*Clark v. Meclennon*, (1983) 1 All E.R 418 Q.B.D.
[33]*Macdonald v. Brown and Glasgow Western Hospital*, (1955) C.S. *Mahon v. Osborne*, (1979) 1 All E.R. 535.
[34]*Cosmopolitan Hospital Ltd. & Others v. VP.Shantha and Others*, 1992 (1) CPI 302, 1992(1) (c) CPR 820. 1993 CCJ 198 (NCDRC)

diagnose the patient properly amounts to negligence[35]. But medical practitioners are not infallible. Even a very highly qualified and experienced person may commit mistake in diagnosis, hence for every mistake in diagnosis he is not to be held liable. He can be liable, where he fails to do according to the reasonable standard of care. Mistaken diagnosis is not necessarily negligent diagnosis, unless the symptoms are so apparent that any reasonably competent and skillful physician could say that 'this is disease'. Diagnosis must also be judged in relation to development in science of medicine at that time. If he fails to observe the later developments and adheres to original mistaken diagnosis, he may be held to have been negligent.

Mistakes are excusable, if they are errors which any doctors of normal prudence might be expected to make[36]. Since no general principle has been evolved, so as to form the basis of these circumstances which give rise to the physicians duty to care, the court has through the decisions over a number of instances evolved a jurisprudence where duty to take care exists. The position may be summarized as follows.

1. Physician being in a fiduciary position owes duty to be careful while undertaking to treat or heal a person. His duty is to act with utmost good faith towards the patient. He must refuse to give treatment if he cannot accomplish a cure or the treatment, which will be of any benefit to the patient.
2. Doctor's duty is to be very in careful in diagnosing the patient's disease and acquaint him of the treatment to be given or operation to be performed.
3. Physician ought to give proper instructions and warning to the patient, which he ought to observe during the treatment and dosage to be taken.
4. Physicians are under obligation to give to the patient proper care during treatment and after treatment with due diligence in other words it can be said that patient should not be abandoned.
5. It is the duty of physician to make true and full disclosure as to the illness, treatment and risks involved in treatment.
6. It is the legal duty of every practitioner to take informed consent of patient.

[35] *Gold v. Haringey Health Authority*, (1987) 2 All ER.
[36] *Maynard v. West Midland Regional Heath Authority*, (1985)1 All ER.635 H.L.

In very few circumstances where physician or doctors had the duty to take care, it is implied that a person seeking information from another, who is possessed of a special skill, trust him to exercise all due care and that party knew or ought to have known that reliance was being placed on his skill and judgment. Duty to take care has been explained in *Donoghue. v. Stevenson*[37] by Lord Aitkin who propounded neighborhood principle according to which one must take reasonable care to avoid acts or omissions that he can reasonably foresee would be likely to injure his neighbors.

In the above observation the rate of reasonable foresight as criterion of negligence seems to have been conceived, wherever a physician or doctor foresees that his acts are likely to affect others, he owes duty to take care. The foreseeability on the part of physician or surgeon does not mean extraordinary foresight but reasonable one; therefore, a medical practitioner will not be responsible for the injury caused by his acts or omissions, if it is not foreseeable by a reasonable man. Reasonableness of foresight of a medical man is to be determined according to the medical knowledge and practice approved at that time. In *Roe v. Minister*[38], two patients suffer spinal paralysis following injections. Ampules of injections were stored in phenol and it developed invisible cracks, in consequence of which phenol percolated in the, ampules, which caused spinal paralysis to the plaintiff. The court held that having regards to the state of medical knowledge at the relevant time the doctor was not negligent in having taken no precaution to guard against such a risk.The law neither expected highest degree of care nor the lowest, but of a man of responsible prudence, of the same profession, in similar circumstances. There is no justification in pleading that some other doctors could have done better. The standard of care is flexible and adaptable to circumstance because the same standard of skill or competence is not expected of every medical man that is why the standard of responsible care cannot be defined with mathematical precision. Reasonableness of care depends on numerous factors like advancement of science of medicine, time, place and experience etc. It must be the standard of care and skill, which any medical man exercising the professional skill ought to observe. Medical practitioner is not guilty of negligence if he has acted in accordance with a practice

[37] *Supra* n.48
[38] (1954) 2 Q.B 66 (C.A.).

accepted as proper by a responsible body of medical men skilled in that particular act, merely because there was a body of opinion that would take a contrary view[39].

Thus the judicial decisions affirm that the standard of care required of medical man is that of the average practitioner of the category (e.g.: *Allopathic, Homoeopathic, Ayurvedic*, etc.) to which the negligent practitioner belongs. As already noted, fair and reasonable standard of skill and competence is variable because some people may be more skilled and some may have only the lowest standard of skill and competence. The yardstick is the degree of care, which may be reasonably expected of a practitioner of average skill depending upon the actual circumstances of the case. The patient by being obstructive or difficult may complicate treatment and produce unforeseen results, the time, place and the circumstance prevailing there are important in assessing the degree of care which may reasonably be expected. A practitioner, who is called to a remote country cottage at nigh; in an unexpected emergency, cannot be expected to achieve the same standard, which can be expected in a well-equipped hospital with adequate trained staff and appliances where lives saving drugs are immediately available[40].

Thus, the question of reasonableness of standard is objective, which is to be determined by court taking into account numerous factors. Lord Denning who has attained masterful position in medical negligence cases made a very pertinent observation about standard of care[41]. A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure or for error of judgment. He was not liable for taking one choice out of two or for favoring one school rather than other. He was only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or inexcusable. This was the concept of reasonable foreseeability principle, in common law system. This needed careful judicial observation and subsequent effective legislative guidance for the matter of foreseeability theory.The tort of negligence chiefly operates under a model of fault liability, which is broken down into various components of proof. The plaintiff must prove that in the circumstances the defendant owed him a duty of care, the defendant breached that duty by failing to meet a standard of care required by law, and

[39]*Bolam v. Friern Hospital Management Committee*, (1957) 1 W.L.R.582, 587 per Mc, Nair. J.
[40]Martin, C.R.A., *Law relating to medical practice*, Sweet and Maxwell, London, 1979, p.367.
[41]*Hucks v. Cole*, (1968) 118 New L.J. 469.

that the defendant's breach of duty caused the plaintiff to suffer injury or harm for which compensation may be recovered at law[42]. For determining whether a defendant owned a duty of care to the plaintiff the courts will often pose the question as whether in that circumstances it was 'reasonably foreseeable' that the plaintiff would be injured, was it considered proof of causation for that 'reasonable foreseeability' of injury becomes a critical factor in considering breach of duty[43]. Again the concept of fault analysis was highlighted recently in *Bolitho v. City &Hunckey Health authority*[44], where the professional standard of care or Bolam test was controversially applied by the House of Lord in considering whether caution was proved[45]. Lord Brawne- Wilkinson accepted that this was exceptional but necessary where proof of casual link between the defendant's omission and the plaintiff's injury requires the court to assess what would have happened had the defendant not breached his duty to act (and in this case attended the patient). To ascertain as a matter of likelihood how the defendant would have acted in the hypothetic event of having attended the patient, it was necessary to consider the relevant approved medical practice which one would have expected him to follow[46].

In *JaiprakashSaini v. Director Rajiv Gandhi Cancer Institute & Research Center*[47] it has been held that in order to decide whether negligence is established in any particular case, the alleged act or omission or course of conduct complained must be judged not by ideal standard nor in the abstract but against the background of circumstances in which the treatment in question was given and the true test for establishing negligence on the part of a doctor is that whether a doctor of ordinary skill would be guilty if acting with reasonable care. Merely because a medical procedure fails it cannot be stated that the medical practitioner is guilty of negligence unless it is proved that the medical practitioner did not act with sufficient care and skill and the burden of proving the same, rests upon the person who assists it. So 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.

d. Concept of Punishment

[42] Lord Denning in *Roe v. Ministry of Health* (1954) 2 AII. ER. 131 at 138
[43] *Ibid*
[44] AII.E.R. (1998) 4 A.C.23.
[45] *Ibid*
[46] *Amelia Flounder v. Dr. Clement Pereria*, (1947) OCJ Appeal No: 27 0f 1947.
[47] 2003 (2) CPR.205.

Concept of punishment was specified in several literatures. The word "*Mithya*" has several meanings. It was applied according to the various situations. Itmeans 'false', "Wrong" improper, error, illusive or incorrect. *CharakSamhita* used thisword in the sense of wrong treatment[48]*SushrutaSamhita* uses the word"*Mithyopachara*" in the sense of improper conduct. It is stated that the physicianswho act improperly are liable to punishment[49]. Quantum of penalty varied accordingto the status of victim. As *YajnavalkyaSmriti* says, physician who acts improperlyshould, pay the first fine in the case of animals, the second highest in the case of manand highest in the case of kingsmen[50].Some of the classical literatures classifiedhuman-beings (for imposing penalty on physicians) into *Ragapurush, Rajamanush,Uttammanush* and *Madhyamanush.* Quantum of penalty varied according to thecategory to which the victim belonged. *Manusmriti*did not discriminate persons inthis respect. It prescribed some penalty on the physician for improper treatmentirrespective of the *varna* or category of victim. *SushrutaSamhita*stated that "lf thedeath of patient under treatment is due to carelessness, the physician shall be punishedwith severe punishment, growth of disease due to negligence or indifference of a physician should be regarded as assault or violence". These are the clear specifications in ancient literatures which relate to the specific enforcement of medical practice. Alternatively pecuniary penalties were also awarded. Fine as a form of punishment for improper treatment has a unique origin.

e. Concept of Fine as Specific Form of Punishment

Ancient Indian law relating to practice of medicine furnishes examples ofpenalties for injuries due to negligent treatment. Pecuniary penalty was based on thesocial status of victim, i.e., whether the victim of maltreatment was animal (horse,cow, elephant and so forth) or a person of the middle class or king's retinue.Physician's duty to care varied with the social status of the person under treatment,but degree of pecuniary penalty was not dependent on the degree of guilt[51]. It was anabsolute discretion of the judge to impose penalty, taking into account all factors.The rules relating to the responsibility of physician for their improper medicaltreatment

[48]Bhishgrantha p. 370- 314.
[49]ManavDharmashashua, 9, 284.
[50]Shastri V.L. Yajnavalkyasmriti, 4th ed., Bombay (1988).
[51]J.M.M. Datta& H. K. Sahray, "*Law relating to surgeons in ancient world*". Your health, vol.17 (1968) pp. 15, 20

were not introduced merely to safeguard the patient, but also for goodadministration of the State. There is specific mention in *Dharmashastras* and*Arthashaslra,* of the right of the patient to indemnify. The pecuniary penalty wasimposed by the State and paid to the State (king).Thus, the law prevailing in ancientIndia sought to impose fines, which were deposited in the state exchequer, but nocompensation was to be given to the aggrieved person. So one can see that fine forimproper treatment has some historical importance.

f. Meaning and concept of Injury

Plaintiff must have suffered injury due to the breach of duty to take care .The term injury is of wide importance and it connotes conjunction of *damnum* (i.e., loss) and *injuria* (i.e. a legally recognized wrong). The injury or loss must have been the resultant of wrongful act of medical practitioner involving breach of duty to take care and is breach causing damage are the constituents of negligence. The Court observed that, mere sequence of causes and effect is not enough in law to constitute a cause of action in negligence. Injury is a complex concept, involving a duty as between the parties to take care, as well as a breach of that duty and resulting in damage[52]. Once it is established that the act or omission of defendant amounting to breach of duty to take care is the proximate cause of injury or loss suffered by plaintiff the duty of courts is to measure the loss or damage in terms of money and award the same to the plaintiff. Frivolous action must be dismissed at the outset. The criteria for the purpose of fixation of compensation are unguided and not according to any guidelines. The damages payable by negligent doctor need not be for the injuries which are the result of a breach of duty within proximity as enunciated by Brett M.R, J. in *Heaven V. Pender*[53] "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think could at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger". Later on Lord Atkin approved this principle, by laying down the neighborhood rule, which has already been mentioned earlier.

[52]*Grant v. Australian Knitting Mills* (1936) AC pp. 85-103
[53](1883) 11 Q.B. D pp. 563, 359.

The ambit of duty of proximity established in *Donoghue v. Stevenson*[54] is being gradually enlarged; however it cannot be used to include the things, which are too remote. Because the maxim "*Jura non remote causasedproxima spectacular*" means that the law regards only that cause as proximate which is not remote. Mere evidence of the fact that the doctor deviated from approved practice of medicine or gave improper treatment is not conclusive. It must be proved that the improper treatment or deviation from approved practice was the proximate cause of injuries sustained. This area is not under specific guidelines. It is high time to make a proper law related to the matter of "improper treatment." In India the development of law relating to the matter of compensation is inadequate and unguided. So there is a need for a comprehensive law relating to the matter of injury and compensation.

[54]*Supra* n.48

CHAPTER: 3

CRIMINAL LIABILITIES Vs. CIVIL LIABILITIES

There is a very important role of law, however, in providing a structure within which the conduct of doctor and patient relationship is accompanied. Legal rules can only set a minimum standard of professional behavior, the outer limits of acceptable conduct, whether it is civil law or criminal law which is invoked. All medical professional owes a duty of reasonable care in carrying out their professional skills of treatment, advice, and diagnosis.

Every person who enters into a particular profession undertakes to bring to the exercise of it a reasonable degree of care and skill. A surgeon is expected to show the care and skill not of an ordinary layman but of a member of his class. He does not undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself, but he undertakes to bring a fair, reasonable, and competent degree of skill and care[55]. 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[56], viz., (i) a duty of care in deciding whether to undertake the case, (ii) a duty of care in deciding what treatment to give and (iii) a duty of care in the administration of treatment. A breach of any of these duties gives a right of action for negligence to the patient.

In *Kusum Sharma v. Batra Hospital and Medical Research Centre*[57], the Supreme Court held that the negligence to be established by the prosecution in cases of medical negligence must be culpable or gross and not the negligence merely based upon an error of judgment. Neither the very highest nor a very low degree of care and competence is what the law requires. The liability is attracted only where the conduct of the medical professional fell below that of the standards of a reasonably competent practitioner in his field. The doctor would not be liable merely because he chooses one course of action in preference to the other one available, if the course of action chosen by him was acceptable to the medical profession. Negligence in context of medical profession necessarily calls for treatment with difference. A professional may be held liable on one of two findings—either he was not possessed of requisite skill which he professed to have possessed or he did not exercise with reasonable competence the skill which

[55] *PoonamVerma v. Aswin Patel*, AIR 1996 SC 2111 (2116).
[56] *Dr. LakshmanBalkrishana Joshi v. Dr. TrimbakBapuGodbole*, AIR 1969 SC 1128
[57] (2010) 3 SCC 480.

he did possess. Mere deviation from normal professional practice is not necessarily evidence of negligence. Jurisprudential concept of negligence differs in civil and criminal law.

What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mensrea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action is civil law but cannot form the basis for prosecution.[58]

The aforesaid principles have been followed in almost all the cases in India. By way of illustration, a few cases are as follows:

Criminal Liability

The presumption is that Medical profession itself is at risk and we cannot enjoy the benefit of this profession, unless we take this risk. So in negligence cases criminal liability is not an accepted end of liability. In a few instances criminal liability may occur because of the proof of the intentional negligence. Criminal liability has only limited application in India. The relevant area of criminal liability under Indian law is explained as follows.

a. Mens Rea

One of the essential elements incriminal law is mensrea – the guilty mind or an evil intention. The question arises as towhether in cases of medical negligence – whether slight, ordinary or gross – is there anycriminal liability? As mensrea is essential, it is difficult to argue that the doctor had a guiltymind and was negligent intentionally.

In Dr. Suresh Gupta's Case[59], the court held that the legalposition was quite clear and well settled that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation. Only when thenegligence was so gross and his act was so reckless

[58] *Laxmi Devi v. State of Madhya Pradesh*, AIR 2011 MP

[59] *Dr. Suresh Gupta vs. Government of N.C.T. of Delhi*, August 4, 2004, Supreme Court of India, AIR 2004 SC 4091

as to endanger the life of the patient,criminal law for offence under section 304A of Indian Penal Code, 1860 will apply.

b. Strict Liability in Medical Malpractice Case

Strict liability is applicable only in me case. The drugs, injection, glucose and blood transfusion to the patients, may sometimes cause harm to the patient. The patient may not be able to prove negligence in such cases. Neither Indian law nor English law accepts the application of strict liability to the health services. If strict liability is made applicable, hospitals will stop providing the drugs and treatment due to fear of strict liability. Life - saving blood may not be available to the patients in the hospital due to hazards of contamination, making them strictly liable[60].

The strict liability for supplying blood contaminated with virus serum hepatitis was questioned in case *Cunningham v. Mac Neal Memorial Hospital*[61] Plaintiffs alleged that she had infected serum hepatitis as a result of blood transfusion, which was contaminated. According to plaintiff the hospital was strictly liable in tort because the blood was defective and unreasonably dangerous[62]. Defendant denied strict liability contending that blood is not a product and transfusion of blood is a service rather than a sale. Further there are no devices which have been developed to test and detect the serum hepatitis in the blood. The trial court dismissed the complaint for want of cause of action, holding that the rule of strict liability was not applicable. But Appeal Court held that the hospital was strictly liable. If the blood supplied is contaminated, it will be considered as if the hospital has sold defective product which is unreasonably dangerous to the consumers.

Though strict liability of hospital has been upheld in the above case theEnglish Courts and Indian Courts have not approved the dictum. Moreover, theabove case pertains to private hospitals, which are charging for supply of blood, butit does not apply to the Government run hospitals where there is no charge.

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[60] K.P.S. Mahalwar, *Medical Negligence and The law Concept, Liabilities Remedies,* Deep & Deep Publications,
Delhi, 2000, p.131
[61](1979) 1 AII. ER. p. 361
[62](1979) 1 AII. ER. p. 301

The question, whether the imposition of strict liability,should be extendedto what has been considered by Pierson's Commission[63],Lord Denning remarked that "we should be doing a dis-service to the community at large, if we were to impose liability on the hospitals and doctors for everything that happens to go wrong[64].

Therefore, the concept of strict liability will do more harm than good to the society. The patient should have redressal for whatever harm is caused to him during his stay in the hospital. He should not be allowed to suffer because of infighting and non- cooperation amongst the hospital staff. The application of strict liability should be restricted to a limited area of medical offences. In order to understand how India deals with the concept of strict liability it would be pertinent to discuss its position first under Indian Penal Code.

c. Criminal Liability under Indian Penal Code

Indian Penal Code does not specify the crime of medical negligence, but if any act causes hurt, grievous hurt or death it may fall within the ambit of penal provision of India Penal Code and the person can be punished under section 304-A.

Similarly, doctors who know about the fact that, a negligent act likely to spread infection of disease dangerous to life or a malignant act likely to spread infection of disease dangerous to lifewould make them `*participant criminis*'[65].

Similarly, whoever causes the death of any person by doing any act so rashly or negligently as to endanger human life or the personal safety of other, is punishable by penal code, with imprisonment of either description for a term which may extend to two year or with fine which may extend to five hundred rupees or with both[66].

Similarly, for causing hurt[67] and grievous hurt to any person by doing an act so rash or negligent, as to endanger human life or personal safety of others, a person is liable to be

[63]Report of Royal Commission on Civil liability and Compensation for personnel injuries London, (1979).
[64]*Roe v. Ministry of Health* (1954) 2 Q.B, p 86-87.
[65]*Dr. TokughaYepthomi v. Appollo Hospital Enterprises*, 1999 CCJ 467 (SC).
[66]See section 336and 337 of I.P.C.
[67] Section 338 of I.P.C.

punished under IPC with imprisonment of either description for term, which may extend to two year or with fine, which may extend to one thousand rupees or with both.

In the *Haryana v. Smt. Santra*[68] case, the Supreme Court has pointed out that liability in civil law is based upon the amount of damages incurred; in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender.

In *PoonamVermavs. Ashwin Patel* the Supreme Court distinguished between negligence, rashness, and recklessness[69]. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. 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.

Thus a doctor cannot be held criminally responsible for a patient's death unless it is shown that she/ he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State[70].

Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under 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. According to 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.

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an

[68] AIR 2000 SC 1888
[69] (1996) 4 SCC 332
[70] *R vsAdomako* (1994) 3 All ER 79

allegation of negligence against a doctor. In cases of medical negligence the patient must establish her/ his claim against the doctor.

In *Calcutta Medical Research Institute v.BimaleshChatterjee*[71] it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant. In *Kanhaiya Kumar Singh v. Park Medicare & Research Centre*[72], it was held that negligence has to be established and cannot be presumed.

Even after adopting all medical procedures as prescribed, a qualified doctor may commit an error. The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/ his treatment or in her/ his diagnosis if she/ he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust.

Under Criminal law, the injured person or representatives of deceased victims get nothing in monetary form, but the wrong doer is to be penalized or convicted. But under the Code of Criminal Procedure, 1973, the Court can make an order to pay compensation to the aggrieved, out of the penalty imposed on accused[73].

The most important legal provision regarding criminal liability in the Indian law is section 304 A of IPC. Medical personnel may be guilty under the provision but their criminal liability depends on rash or negligent act. The rashness or negligence must be such that the victims of medical malpractice have lost their lives, limbs or sustained bodily injuries.

These offences have insufficient protection and remedies under penal law. Under Criminal law the injured person or representatives of deceased victim of medical negligence get nothing as compensation as per Section 357 of Criminal Procedure Code, 1974, but the wrong doer is

[71](1999) CPJ 13 (NC)
[72](1999) CPJ 9 (NC)
[73]Section 357 (1) (2) (3) of Cr. P.C.1973.

penalised or convicted. So the criminal liability has limited application in medical negligence offence. It is restricted to intentional offences. Another relevant area is the position of criminal liability under Medical Council Act.

d. Criminal liability under Medical Council Act

The Medical Council of India constituted under the India Medical Council Act, 1956, regulates criminal liability for professional misconduct of practitioners. It is noticedthat the said Act regulating the medical profession does not contain adequate provisionregarding professional misconduct of medical practitioner. The inadequacy of adequate provision promotes these categories of offences.

The India Medical Council Act 1956 does not contain any provision for theprotection of the interest of person who sustained negligence or deficiency in theservice of medical profession. Lack of adequate provisions promotes amble scopefor professional misconduct. A balance between the legitimate demand from thepublic for proper attention and care by the doctors is the need of the hour. So it isnecessary to amend the legislation in tune with the changing situation of medicalnegligence offence.

Civil liability

Another important liability relating to medical negligence is contractualliability under civil law. Contractual liability has relevant application on variousaspects. Relevant areas of contractual liability have been explained below:

a. Contractual Liability

Contractual liability is the main aspect of civil law. Since the inception ofmedical science, the human beings professing it have been abiding the principleswith fidelity and sincerity. As the physician or surgeon is a skilled person, a patienthas to repose confidence and faith in him. The relationship of fidelity and mutualconfidence occurs at the time when doctor undertakes or

assents to provide medicalservice[74]. A doctor is not under obligation to render service to any one and couldnot be held liable for consequence of such failure to treat a person except as agovernment servant[75]. Therefore the nexus between physician and patientis normally the result of implied contract between them which usually amountsto surrender of a patient before the physician to get the treatment forconsideration. The obligation of physician or surgeon arises when a physicianagrees to provide medical service to a patient.

In contract, liability depends upon the expressed or implied terms ofcontract and is based on what the medical man in question contracts to do. The dutyin contract is only binding to the parties in the contract. A medical man could notexamine, treat or operate a patient without the patients consent except forcommitting a trespass or assault. Where however the medical practitioner isprivately engaged, he owes a contractual duty to attend and treat the patient and toexercise reasonable skill and care in doing so[76].

An agreement supported by consideration is contract. The terms ofcontract may be explicit or implied. The express terms are incorporated in the formof a single memorandum or financial exchange. The terms of implied contract canbe gathered from the circumstances reflected in the custom ofthe profession and the conduct of the parties[77].The House of Lord's is reluctant to allow implied contractto be used as a device to extend professional duties beyond general liability.

Liability in contract depends on the express or implied terms agreed uponby the patient and the medical man. Consent for treatment on payment of fees onthe part of a patient can be treated as an implied contract with the doctor who byundertaking treatment on acceptance of fees, impliedly promises to exercise propercare and skill[78]. The contractual duties are generally more onerous in nature thanthose imposed by tort. Tortious duties in the professional context are limited totaking reasonable care. They do not impose any continuing duty requiring advice

[74]Clause 12, Code of Medical Ethics.
[75]*Ibid*
[76] Clerk and Lindsell, *Law of Tort*, Sweet and Maxwell Publication, London, 1986 p.778
[77]*Ibid.*
[78] A. M. Dugdale and M. Stanton, '*Professional Negligence'*, Sweet and Maxwell Publication, London, 1989, p.284

oraction to be reviewed, as may be the case with a contractual duty. Liability ofretainer is more relevant in this aspect.

1. Liability of Retainer

Professionals often act as agents and contractual relationship may beestablished through agency. In *Everelt v. Griffiths*[79] a doctor retained by a poorlaw infirmary was held to have impliedly contracted with a patient who submittedto the treatment in return for the doctor's implied undertaking to use reasonablecare. Implied contract has been explained below.

2. Implied Contract

The patient-doctor relationship is well defined by 'Code of MedicalEthics', issued by the Medical Council ofthe respective countries or on the basis ofguidelines and recommendations issued by International Medical Organization andthe Common Wealth Medical Association, World Medical Association and WorldHealth Organization. The relationship of fidelity and mutual confidence take placewhen doctor undertakes or assents to provide medical services. Therefore the nexusbetween the doctor and the patient is normally on implied contract between them.Seldom, may formal agreements exist between them. Another aspect is thepartnership relation between doctor and patient.

3. Partnership Relation

According to the British Medical Association, the relationship between adoctor and a patient is based on the concept of partnership and collaboration[80].Decisions are made through discussion between the doctor and the patient.Individual needs and preference are shared to select the best treatment option. Thepatient's consent to receive treatment is the bigger in this deal. The basic principleis that the treatment is undertaken as a result of patient's invitation.According to Knneth[81] for a good patient- doctor relationship the doctorshould be a good communicator as well as technically competent. The good'involved partnership' discloses to the patient about the

[79] [1920] 3 KB 89,163
[80] Ibid
[81] *Aslam v. Ideal Nursing Home*, (1997), CPI Vol.81 NC

various options availablefor treatment involving them in the decision making process. The relevance of legalcontract is another issue related to contractual liability.

4. Legal Contract

The relationship between the doctor and the patient is also legallyrecognized as a contractual nature because its foundation lies in consent andcontract emerges there from. The consent in a contract between a doctor and apatient may be expressed or implied. Consent by a patient may either be given by himself for any person on his behalf

A contractual patient-doctor relationship is established when the patientmakes a request for medical examination, diagnosis, opinion, advice or treatmentand the doctor undertakes to provide these. The patient has every right to terminatethe relationship with his doctor at any time and seek the help of another. Areciprocal right rests with the doctor who at any time takes the help of a colleagueor specialist in the best interest of his patient[82].

The patient, in doubt, despite detailed explanation by his doctor about thenature of his illness and treatment advocated, can ask for a second medical opinion.

The patient is obliged to follow reasonable instructions of the doctor and participateand co-operate in the treatment and is further evaluation. Failure to do so may notallow him to hold that the doctor is responsible for any resultant damage[83]. At thesame time, the doctor, too must not make any promises which he cannot keep, norshould be guarantee any cure which leads to a breach of contract.

The doctor himself can terminate the relationship when he feels that hisknowledge and skills are limited with respect to treatment to a patient when he feelsthe patient could be better treated

[82] *Ibid.*
[83] *Panday v. Sunil K* , Doctor-patient Relationship and Medical Ethics , Journal of Indian Law Institute, 1993, Vol.3, April (April-June), p. 23

elsewhere[84]. Non- payment of fee does not formthe ground for termination of such relationship as the contract between the doctorand the patient exists, irrespective of the payment of fees[85]. The remedy, in such asituation lies in a suit for recovery of the fees rather than the termination ofservices[86]. Thus, if a doctor fails to fulfill his obligation, he is guilty of breach oftrust and the law of contract and the patient is entitled to claim damages for losssuffered by him due to breach of contract, under Section 75 ofthe Indian ContractAct, 1872, breach of contractual fiduciary duty also results in negligence on the partof the doctor under Law of Tom. Another relationship between patient and doctoris fiduciary relationship.

5. Fiduciary Relationship

This principle originated in Roman law and fiduciary concept applies torelationship in which one person entrusts the management of his property to asecond person, wherein the second person is expected to work for the benefit of thefirst person without making profit unfairly.

The fiduciary concept has been applied to the patient-doctor relationship as patient care resembles managing a valuable trust[87]. It refers todoctor's commitment to promote the patient's vital medical interest which includesprolonging life, relieving symptoms and restoring normal functions of the body[88].The patients request for help and doctors offer to give it initiate the patient-doctorrelationship. The doctor thereby becomes a fiduciary or trustee for patient.

Contractual liability subsequently evolved as tortious liability. Tortiousliability has created new dimension to medical negligence offence. Thejurisprudence of medical liability is mainly focused under Tort Law. Tortiousliability and its implications have been discussed extensively below.

b. Tortious Liability

Tortious liability may be the result of *centralegemartis*(Negligence). Actionable negligence occurs when injury is caused by the breach ofthe duty to take care. Duty to take care is the very

[84]Phatmani Pentium P, Medico-Legal Aspect of Doctor-Patient Relationship, *Express PharmaPluse*, 1995, November 30, p.6
[85]*Ibid.*
[86] Ahmed S. A, The Fiduciary Concept: A Basis for an Ethics of Patien Care, souvenir Medimeet, 2009
[87]*Ibid.*
[88]*Grunt v. Australian Knitting Mills Ltd.* (1936) A.C 85,103

essence of negligence. Thetheoretical principle of tortious liability was involved from classic decisions. In*Heaven v. Pender*[89] M.R. Brett laid down the rule that the existence of duty tocare must be to avoid danger. But the scope of this rule was narrowed down byLord Esher after a decade in the case *Le Lieverev. Golud*[90] where it is said that, "*Aman is entitled to be as negligent as he pleases towards the whole world if he owesa duty to them*."

1. Degree of Negligence

The Delhi High Court laid down in 2005 that in civil law, there are three degrees ofnegligence[91]:

(i) *lata culpa, gross neglect*
(ii) *levis culpa, ordinary neglect, and*
(iii) *levissima culpa, slight neglect.*

Every act of negligence by the doctor shall not attract punishment. Slight neglect will surelynot be punishable and ordinary neglect, as the name suggests, is also not to be punished. If weclub these two, we get two categories: negligence for which the doctor shall be liable and thatnegligence for which the doctor shall not be liable. In most of the cases, the dividing line shall be quite clear, however, the problem is in those cases where the dividing line is thin. Inall such cases we fall back upon the test laid down in Bolam case and which has been upheldin Jacob Mathew case.

Subsequently, the principle "*neighbour principle*"was enunciated by Houseof Lord in *Donoghue v Stevenson*[92], Lord Atkin observed that one must love hisneighbour so that no injury is caused to him. Reasonable care must be taken toavoid acts or omissions, which may injure the neighbour. The person who are soclosely and directly affected by your act that contemplates that you can injure themby your acts or omission, are your neighbours. The statement as to principle fordetermining the duty appears to be very sound and is well accepted criteria. Butreasonableforeseeableness is only relevant in testing whether there exists a duty ofcare.

[89] (1883) 11 Q.B.D.503
[90](1893), Q.B. 491.
[91]*Smt. Madhubala vs. Government of NCT of Delhi*; Delhi High Court, 8 April 2005, 2005 Ind law DEL 209 2005 (118) DLT 515
[92](1932) A.C. 562.

Medical man owes duty to take care of patients, which arises out ofassumption of responsibility by the doctor to treat the patient with due care anddiligence.

He owes a duty to the patient to use due caution in the treatment. It isimmaterial that the medical practitioner is qualified or unqualified. Once the patientis accepted for treatment it is the duty of practitioner to diagnose properly and givetreatment according to accepted practice. It is judicially settled that mere error in judgment or mistake in opinion does not render the practitioner liable[93]. To hold thedoctor liable whenever something happens to go wrong would do a great disservice,not on.ly to the profession but also to the society at large. Lord Denning opinionedthat in a profession an error of judgment is not negligent[94].

2. Duty of care towards the patient

When a doctor attends to his patient, he owes him certain duties of care; viz.,

(i) a duty of care in deciding whether to undertake the case,
(ii) a duty of care in deciding what treatment to give and
(iii) a duty of care in the administration of treatment.

A breach of any of the aforesaid duties gives a right of action for negligence to the patient. A breach of duty is committed by a doctor when he does not perform the standard and degree of care like reasonable doctor of his time or as a member of his class. A few cases on this point are as follows:

In case of *State of Gujarat v. BabubhaiUkabhai*[95], death of deceased was caused due to Vasovagal shock caused while administering anesthesia. There was failure on part of doctor to exercise reasonable care and diligence expected from person of medical profession. In such circumstances the court held the doctor guilty of medical negligence.

In *Kusum Sharma v. Batra Hospital*[96], the Supreme Court held that a doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly

[93] *White House v. Jordan* (1980) BMLR 14.(1881)1 All ER.
[94] Ibid
[95] AIR 2011 Guj 77.
[96] (2010) 3 SCC 480.

believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure and just because a doctor, in view of 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.

In case of *Kunjan Sharma v. State of Himachal Pradesh*[97], the deceased gave birth to female child through normal delivery without any complication. There became subsequent death of deceased due to sudden cardio respiratory arrest. The doctors and nursing staff did what they could do in circumstances and doctor performed his duty and exercised an ordinary degree of professional skill and competence. It was held that there was no medical negligence.

In *Malay Kumar Ganguly v. Sukumar Mukherjee*[98], the Supreme Court held that standard of care on the part of a medical professional involve the duty to disclose to patients about risks of serious side effects of medicines or about alternative treatments. If the doctor/hospital knowingly fail to provide some amenities that are fundamental for patients, it would certainly amount to medical malpractice. The Court further observed that an act which may constitute negligence or even rashness under torts may not amount to same under section 304A of IPC.

In *Gian Chand v. Vinod Kumar Sharma*[99] though the victim was admitted to the surgical ward she was shifted to the children medical ward. Due to burn injuries she could not be clothed. She should have been kept in the warmest place available and probably for this reason on the first night she was shifted to the children medical ward. She should not have been exposed to the vagaries of whether. The doctor took umbrage to the fact that the child had been kept in his ward without his permission and forced her leave the ward. The doctor has not given any explanation as to why he shifted her out. The doctor was not only negligent but also he was callous in his approach when he forced the parents to shift the child from the children ward to veranda outside in the cold rainy weather. Thus, the doctor is liable for the death of the child.

In *Dr. LakshmanBalkrishna Joshi v. Dr. TrimbakBapuGodbole*[100], the facts were that the son of the respondent, aged about 20 years, met with an accident on a sea beach, which resulted in

[97]AIR 2010 SC 1162.
[98]AIR 2008 HP 97.
[99]AIR 1969 SC 128.
[100]AIR 2009 SC 2049

the fracture of his left leg. He was taken to the hospital for treatment. In order to reduce the fracture, the doctor did not give an anaesthetic to the patient but contended himself with a single dose of morphia injunction. He used excessive force in this treatment, using three of his attendants for pulling the injured leg of the patient. He then put his leg in plaster. The treatment resulted in shock and caused the death of the patient. The Supreme Court held the doctor guilty of negligence.

In *AchutraoHaribhauKhodwa v. State of Maharashtra*[101], the facts were that a mop (towel) was left inside a woman's peritoneal cavity while she was operated for sterilization in a Government Hospital causing peritonitis which resulted in her death. The presumption of negligence was drawn against the doctors by applying the principle of *res ipsa loquitur*. Explaining the nature of duty of care in the medical profession, the Supreme Court laid down the law as follows:

"The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive, or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence[102]. In the present case, however, the conclusion of negligence was drawn against the doctors by applying the principle of *res ipsa loquitur*, and the Government was vicariously held liable.

The Supreme Court in the case of *Indian Medical Association v. V.P. Shantha*[103] held that the liability to pay damages for such negligence was not affected by the fact that the medical practitioners are professionals, and are subject to disciplinary control of Medical Council of India. The Supreme Court also reversed the order of the Madras High Court[104] and held that the

[101]AIR 1996 SC 2377.
[102]*A.S. Mittal v. State of Uttar Pradesh*,: AIR 1989 SC 1570.
[103]AIR 1996 SC 550.
[104]*Dr. C. Subramaniam v. Kumaraswamy*, (1994) 1 Mad LJ 438.

services rendered by the medical practitioners was covered by section 2(1)(o) of the Consumer Protection Act, 1986 and the same was actionable in the forums established under that Act.

In a suit for damages against doctor the onus is upon the plaintiff to prove that the doctor was negligent and that his negligence caused the injury of which the plaintiff complained[105]. The Delhi High Court in *Madhubala v. Government of N.C.T. of Delhi*[106] did not grant compensation to the claimant who conceived child even after tubectomy operation but failed to prove negligence on part of hospital or doctor concerned. It was held that it was not the case of *res ipsa loquitur*. Claimant was made aware by hospital about chance of pregnancy even after operation. Further the claimant failed to report about irregular menstrual cycle to the hospital which was asked for by the hospital. The claimant was herself negligent, so the court did not grant any compensation. The Bombay High Court in the case of *Philips India Ltd. v. KunjuPunnu*[107], where the plaintiff's son died while being treated for illness by the defendant company's doctor, the court observed that "the standard of care which the law requires is not an insurance against accidental slips. It is such degree of care as a normally skilful member of the profession may reasonably be expected to exercise in actual circumstances of the case in question. It is not every slip or mistake which imports negligence.[108]

The court held that the plaintiff could not prove that the death of her son was due to the negligence of the doctor and, therefore, the defendants were held not liable.

In *State of Punjab v. Shiv Ram*[109], despite sterilization operation, the woman became pregnant. The plaintiffs claimed against doctor on the basis of negligence. The court held that compensation can be awarded only if failure of operation is attributable to the negligence of doctor and not for failure due to natural causes. If the claimant opts for bearing child despite failure of operation, they cannot claim compensation. The burden to prove negligence lies on the claimant.

[105] *A.N. Dais v. F. Augustus*, AIR 1936 PC 154.
[106] (2005) 118 DLT 515.
[107] AIR 1975 Bom 306.
[108] *Dr. S. Vaidya v. Paulo Joel Vales*, AIR 1992 Bom 478.
[109] AIR 2005 SC 3280.

In *Dr. T.T. Thomas v. Elissar*[110] the facts were that the plaintiff's husband had severe abdominal pains and was admitted in a hospital on 11-3-1974. It was diagnosed as a case of acute appendicitis which required immediate operation to save the life of the patient. But the doctor faded to perform the operation and the patient died on 13-3-1974. The Kerala High Court held that the doctor was negligent in not performing the operation in emergency and, therefore, the defendant was liable for the death of the patient. The doctor's plea that the patient had not consented to the operation was also rejected by the court on the ground that the burden of proof was on the doctor to show that the patient had refused to undergo the operation and in this case, the doctor had failed to prove the same.[111]

In *C. Sivakumar v. Dr. John Mathur*[112], the plaintiff had the problem of blockage of urine, and the doctor in an attempt to perform the operation for curing the problem, totally cut-off his penis. The plaintiff became permanently impotent. It was held to be a case of deficiency in service and the defendants were held liable to pay an amount of compensation of Rs. 8,00,000 to the plaintiff.

Similarly, in *Lakshmi Rajan v. Malar Hospital Ltd.*[113], the complainant, a married woman, noticed development of a painful lump in her breast. The hospital's doctor while treating the lump, removed her uterus without justification. It was held to be a case of deficiency in service for which the opposite party was directed to pay Rs. 20,000 as compensation to the complainant.

In State of *Gujarat v. LaxmibenJayantilalKikligar*[114], the plaintiff was suffering discomfort and pain in swallowing. He went to Civil Hospital, Godhra, for treatment and the Civil Surgeon performed the surgery on her thyroid gland. After the operation she suffered permanent partial paralysis of larynx (Voice Box) as a consequence of damage to or cutting of recurrent laryingal nerve. The Court held that the surgeon was negligent as he did not take precaution before and during the surgery and awarded damages amounting to Rs. 1,20,000alongwith interest @ 12% p.a. from the date of the suit till realisation.

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[110] AIR 1987 Ker 42.
[111] *M.L. Singhal v. Dr. P. Mathur*, AIR 1996 Del 261
[112] (1998) III CPJ 436 (Tamil Nadu SCDRC).
[113] Ibid., p. 586.
[114] AIR 2000 Guj 180.

In *Dr. P. NarsimhaRao.v. G. Jayaprakasu*[115], the plaintiff, a brilliant student of 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and the anaesthesist. There was no proper diagnosis and if the surgeon had not performed this operation, the plaintiff could have been saved from the brain damage. The anaesthesist was also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a bag or mask. The defendant was, therefore, held liable.

In *Raymal v. State of Rajasthan*[116], the petitioner's wife died while she was being operated for laproscopictubectomy operation at a Primary Health Centre. The apparent cause of death was not the negligence of the doctor but of adequate facilities in the form of proper equipments, as well as trained and qualified anaesthesist. The court held the Government liable to pay compensation of Rs. 1 lakh to the husband of the deceased.

M.L. Singhal v. Dr. PradeepMathur[117] is another case where the plaintiff's wife suffered from anaemia and had problem in urinating, was admitted in Sir Ganga Ram Hospital, Delhi, under the treatment of Dr. Mathur. The nursing staff of the hospital was negligent and not the doctor. There was leakage of catheter and the patient developed bed sores which hastened the death of the patient. The hospital was liable to pay compensation amounting to Rs. 10,000 to the plaintiff on account of mental torture suffered by him because of bad nursing.

Newly born child missing.—In *JasbirKaur v. State of Punjab*[118], a newly born child was found missing in the night from the bed in S.G.T.B. Hospital, Amritsar. The child was found profusely bleeding and with one eye totally gouged near the wash-basin of the bath room. The plaintiff contended replacement of the child whereas the hospital authorities contended that the child had been taken away by a cat which caused the damage to him. The court presumed that the hospital authorities were negligent and awarded compensation amounting Rs. 1 lakh.

In *State of Haryana v. Santra*[119], the facts use that Santra was having seven children and therefore approached the C.M.O. Gurgaon for sterilization which was done under the State

[115]AIR 1990 AP 207.
[116]AIR 1996 Raj 80.
[117]AIR 1996 Del 261.
[118]AIR 1995 P&H 278
[119]AIR 2000 SC 1488

sponsored family planning programme. She developed pregnancy after the operation and gave birth to a female child. Thus there was additional economic burden on the poor person. The Court held that the doctor was negligent per se as he obviously failed in his duty to take care and therefore both State and doctor were held liable to pay damages to the plaintiff.

In case of *State of Kerala v. P.G. Kumariamma*[120], the plaintiff asserted that she was given assurance by doctor that once she underwent laparoscopic sterilisation, she would not conceive again. She was also not informed about possible failure of operation. There was evidence to show the possibility of negligence on part of medical practitioner, who had carried out sterilisation operation. There was no attempt from the side of State at all to show that there was no negligence on the part of surgeon, who had conducted sterilisation operation. It was held that subsequent pregnancy was due to negligence by medical practitioner hence State was held liable to pay compensation.

But where the operating surgeon has not given any assurance and tells the patient about the consequences and chances of failure of operation and the patient agrees for sterilization operation, the doctor will not be held liable. Thus, in the case of *Laxmi Devi v. State of M.P.*[121] a child was born despite sterilization operation. It may however be mentioned that the surgical intervention in sterilization operation is under taken under general Anesthesia but it is not a surgery over any part or organ of human body as in sterilization operation right and left fallopian tubes are closed and they are not completely cut which can always have a possibility of opening of the knot of fallopian tube for facilitating spermatozoa to gross embryo into the womb/ovary. In instance case operating surgeon while describing nature of surgery had demonstrated statement that since fallopian tubes are closed by trying than from outside, there exist every possibility of opening of the knot, which may result in conception of pregnancy by a lady on account of variety of physical factors and natural circumstances. Thus, surgeon explained about consequences and chances of failure of operation and the plaintiff (Mrs. Laxmi Devi) voluntarily agreed for the operation. However, even after conceiving child in spite of operation, plaintiff neither complained to the surgeon nor acted for termination of pregnancy. The court held that accidental opening of knot of fallopian that due to physical factors and

[120]AIR 2011 (NOC) 250 (Ker)
[121]AIR 2011 MP 47.

natural circumstances cannot be termed as `negligence' or `gross negligence' as subsequent development was beyond control of surgeon. Plaintiff having failed to establish negligence on the part of surgeon is not entitled to any compensation.

Joint Director of Health Services, Shivagangal v. Sonal[122] is another case where wife of the plaintiff underwent a family planning operation and was discharged the same day. Post-operational treatment was not properly given and two days after she had abdominal pain, her stitches were permitted to be removed by an unqualified motivator and a few days after that, she died. Both the doctor and the State government were held liable.[123]

In *Pushpaleela v. State of Karnataka*[124], a free eye camp was organised by Lions Club and a Social Service Organisation where 151 person were operated for cataract problem and most of them developed infection after surgery. Out of them 72 persons lost sight in one eye and four in both the eyes. It was found that the guidelines laid down by the Government of India were not followed. Thus, there was negligence in performing eye operations. The Madras High Court awarded damages to the victims ranging from Rs. 40,000 to Rs. 1,50,000 on the basis of injury suffered by them.

In *AparnaDutta v. Apollo Hospital Enterprises Ltd*., Madras[125], the plaintiff was living with her husband in Saudi Arabia. She developed some gynaecological problem. She was advised surgery and therefore she came to India for removal of her uterus. She got herself operated in Apollo Hospital, Madras, but due to the negligence of the doctor a foreign object i.e., abdominal pack, had been left in the abdomen. Later on she complained of pain and therefore subsequent operation was performed and the abdominal pack left behind was removed. The maxim *res ipsa loquitur* was applied and the doctor and the hospital were held liable.

In *R.P. Sharma v. State of Rajasthan*[126], the petitioner's wife, Smt. Kamla Sharma, was operated for removal of gallstone in SMS Hospital, Jaipur. The doctor advised transfusion of blood group O+ve to the patient. One bottle of the same blood group was transfused. After that

[122]AIR 2000 Mad 305
[123]*Satish Chandra Shukla v. Union of India*, 1997 ACJ 626
[124]AIR 2000 Mad 340
[125]AIR 2002 Raj 104.
[126]AIR 1999 SC 495.

another bottle of blood was obtained from the blood bank. Due to negligence of the Hospital staff the new bottle was of another blood group i.e. B+ve. Soon after the transfusion of this blood she lost her eyesight and later on died. The defendant was vicariously liable for the negligence of the hospital staff.

3. Accepted Practice

Accepted practice is the most important factor of tortious liability. Physicianor surgeon acting in conformity with recognized or accepted practice is also notguilty of negligence. It was Lord Clyde who brought the concept of acceptedmedical practice in a Scottish Case, *Hunter v. Hanley*[127]wherein, he stated that adoctor adopted, a practice was one that which no professional man of ordinary skillwould have taken, had he been acting with ordinary care. Accepted practice orcustom is relevant in determining, what a man of normal prudence would have donein like circumstance and whether or not, in the case before it, reasonable care hadbeen, exercised. In *Clark v. Maclennon*[128], the surgeon deviated from acceptedpractice of profession and the operation was unsuccessful. As a result the patientbecame disabled, but the court held that departure from orthodox course oftreatment was a breach of duty.

The customary practice, employed by practitioners is not necessarily agood medical practice as it is subject to variation according to development ofscience. The usual or accepted practice of today may become absolutely useless orworst tomorrow. It is therefore, the duty ofthe court to see that practitionersgood medical practice instead of usual practice, 'Custom is relevant in determiningfollowed the standard of care. It gives us information of what is feasible, it warnsthe possibility of far reaching consequences, if a higher standard is required, butcustom can never be conclusive[129]." The true test for establishing negligence indiagnosing or treatment from the part of doctor is to be proved. A doctor chargedwith negligence may be relieved of liability if he proves that he had acted inaccordance with the prevailing professional practice. M C. Nair J[130]

[127](1955) S.L.T. 2.Q.B.
[128](1909) 2 K.B.820.
[129]*Darling v. Charles Community Memorial Hospital*, 3 111 2d. 326. 211 N, E 2d 14 A.L.R 3d 860 (1986)
[130]*Supra* n. 87

has laid down that adoctor is not negligent if he is acting in accordance with a practice accepted by aresponsible body of medical men skilled in that particular art merely because otherdoctors adopt a different practice. This has been accepted by House of Lords asapplicable not only in diagnosis and treatment but also in advice and warning.

Lord Dennings points out that a doctor is not liable for taking one choiceout of two or four favoring one school rather than another. He is only liable whenhe falls below the standard of a reasonably competent practitioner in his Held. Theallegation of negligence against the doctor could not be established due to reason ofexpert medical opinion as to the necessity of situation[131]. The law in this regard iswell-settled by the House of Lords that a judge's preference to one body ofdistinguished professional opinion to another, also professionally distinguished, isnot sufficient to establish negligence of a practitioner whose action has received theseal of approval of those whose opinion, truthfully expressed honestly held, werepreferred[132].

The principle of law propounded by House of Lords[133] is in a subsequentdecision is that, court is not bound to hold that a defendant doctor escape fromliability for negligent treatment or diagnosis just because he received evidence froma number of experts who are genuinely of opinion that doctor's treatment ordiagnosis was according to sound medical practice. A judge has right to come tothe conclusion that views of a medical expert is unreasonable, when he is satisfiedthat the body of expert opinion cannot be logically supported at all, and that suchopinion will not provide the bench mark by reference to which the defendantdoctors conduct is to be assessed. In *Joyce V. Sutton and Wands worth HealthAuthority*[134], the court of appeal observed that the defendant doctor is guilty ofnegligence, even if his acts or omission is in accordance with accepted clinicalpractice because the court is duty bound to see whether "that general practice stoodup to analysis was not unreasonable in the light of the state of medical knowledgeof that time." To establish negligence it must be proved that (i) there is normalpractice which is applicable to the case (ii) that the defendant has not adopted itand (iii) that the course taken by the defendants is one, which no professional manof ordinary skill

[131] *Ibid.*
[132] *Bolitho v. City and Huckney Health Authority* 13 BMLR 111 affirmed by House of Lords [1972] All ER
[133] Ibid.
[134] [1996] Mod. L.R.

would have taken, had he been lacking ordinary care[135]. In a famous case, the plaintiff a voluntary patient in the defendant'smental hospital, sustained fracture in the course of *Electro Convulsive Therapy*(ECT). There were two views of opinion in the profession about the mode oftreatment, one of which favoured the use of relaxant drugs or manual control as ageneral practice, and the other, is that the use of these drugs causes mortality risks.The doctor was held not negligent in failing to administer a relaxant prior to thetreatment and in failing to provide some form of manual restraint during thepassing of electric current through the brain ofthe patient.

In *Sidaway*[136] case the surgeon did not disclose the risk of damages to thespinal cord of the patient, which was less than l%, but if materialized resultinginjury could range from mild to very severe. Since the surgeon's non- disclosure ofthe risk of damage to the plaintiff's spinal cord accorded with a practice accepted asproper by a reasonable body or neuron - surgical opinion. Since the plaintiff failedto prove that the surgeon had been in duty to warn of the risk. Hence doctor washeld not negligent.

But in several cases the court of appeal held that[137] a professional person isnot required to read every article appearing in the professional literature and is notnegligent merely by failing to adopt immediate suggestions in such literatures. Thatthe individual professional person will be at fault in failing to adopt the newtechniques has been proved and accepted as an invariable part of the acceptedpractice in the profession. Streat Field, J[138] opined that a doctor was entitledto use his common sense and experience and judgment in the treatment of eachcase, and a slight departure from the text book would not of itself establishnegligence. The defence of accepted professional practice may not absolutelyprotect the professional, because the court is the final authority to determine what isreasonable. The judiciary has retained the power to declare any recognized practiceof the professional as negligent. Lord Browne Wilkson[139] lays down the criteria forevaluation of accepted professional practice as follows "A doctor could be liable fornegligence in respect of diagnosis and treatment. If a body of professional opinionexamine

[135]*Hunter v. Hanley* 1955 SC 2000
[136]*Sidaway v. Bethlem Royal Hospital Governor* [1984] Q.B.493.[1984]1 All. ER
[137] All ER [1957] 2
[138]Holland v. Devitt and Moore [1998] 3 AII. E.R.
[139]*Supra*, n. 96

his conduct has not been demonstrated to the Judge's satisfaction that bodyof opinion relied on was reasonable or responsible."

In a vast majority of cases the fact that distinguished experts in the fieldwere of a particular opinion would demonstrate the reasonableness of that opinion.However, in a rare case, if it could be demonstrated that the professional opinionwas not capable of withstanding legal analysis, the judge would be entitled to holdthat the body of opinion was not reasonable or responsible[140]." This is thedevelopment of law relating to accepted practice. The second factor is knowledge ofscience.

4. Knowledge of Science

The Medical men are supposed to be aware of latest knowledge, and keepthemselves up to date with the latest developments in techniques through readingof medical literature and from other sources of information available to the prudentdoctor. The practice of medicine is mostly exact science. He should be aware ofconstant changes in the principle and practice of medicine. There are situations inwhich case may go beyond competence and control. Another relevant factor is skillof medical man.

5. Skill of Medical Man

Skill is inevitable in every profession. In *Uma Pinglay v. Dr. N F Mukerjee*[141] it has been held that the skill of medical practitioners differ from doctor to doctor.Medical opinion may differ with regard to the course of action to be taken by doctortreating a patient as long as doctor acts in a manner which is acceptable to themedical profession. The court finds that he had attended on the patient with duecare, skill and diligence and if the patient still does not survive or suffers apermanent aliment it would be difficult to hold a doctor guilty of negligence[142].

Similar view has been expressed in *P.N SudhakarGupta v. ShriAnugrahVittlaNursing Home*[143]. In *V.P. Shanta v. Cosmopolitan Hospital*[144] it was held thata very high degree of probability has

[140] *Ibid*
[141] 1997 (2) CPR 160.
[142] (1996) 2 SCC 634
[143] (1997) 1 CPI 226
[144] 2001 (1) CPR421.

to be established before entering a finding of amedical negligence on the part of doctor. In *Dr. Jasmine Patel v Dr. R.JManeksha*[145], it was held that when doctor rendered his service with due care underthe circumstances, he was not required to guarantee results expected by the patientand therefore could not be accused of negligence in service. Cases beyondcompetence and control are more relevant in this context.

6. Cases beyond Competence and Control

Allegations of reasonable standard of care may arise if the doctor acceptsa case beyond his competence and control. It is the duty of a general practitioner ornon- specialists to consult a specialist when the situation goes beyond his control.This duty is defined by the medical profession through expert opinions. If a personis qualified practitioner, it does not mean, that he is perfect to treat every diseaseand every patient. He may not be liable to cure every disease. He may be held liablefor recklessly undertaking every case, which he knew or should have known to bebeyond his powers, or for making his patient subject to reckless experiments[146]. Inordinate delay of treatment is another area, which constitutes possibility ofcausing medical liability.

7. Delay

The medical practitioner ought to provide treatment without undue delay,providing standard of care, but mere delay in treatment is not enough to indict him.The doctor who accepts the patient for treatment, has to diagnose the malady, whichmay take some time (for pathological tests, X-ray, ECG, etc.), before starting thetreatment. Thus, delay instituting treatment depends upon the circumstances ofeach individual case. Unreasonable delay in instituting treatment may amount tonegligence, symptoms which should alert any reasonable doctor that the patientrequired some treatment.

Medical practitioner must continue treatment until the patient dismisseshim. If practitioner wants to discontinue, he must express it and give sufficienttime to the patient to arrange another physician. It is the duty of courts to determine,whether the doctor had requisite skill, care and diligence in rendering professionalservice to his patient. The test to be applied by the court is

[145] 2002 (1) CPR 392

[146] *R v. Bateman* [1925] 94.L.J. K.B 791 at 794

whether the doctor hadrequisite skill, care and diligence in rendering professional service to his patient[147]. The medical practitioner should advise the patient as what is to be done forexample whether any pathological test, ECG test, X-ray etc. need to be which anyother practitioner may do in similar circumstances. Such tests may not be advised inevery case, it depends upon the circumstances of the case and nature of disease.Duty of care is the fourth relevant factor of medical liability which is discussedbelow.

8. Duty of Care

The doctors owe a duty of care to their patients. Failure to show duty of careor skill in medical treatment resulting in death, injury or pain of the patient, givesrise to a cause of action in negligence. Shelat J. delivering the Judgment in *Dr. LammnBalKrishnan Joshi v. Dr. TrimbakBapuGodbole*[148] laid down the criteriafor determination of negligence in the professional duty of a medical man definedas "A person who holds himself ready to give medical advice and treatmentimpliedly undertakes that he has possessed skill and knowledge for the purpose.Such a person when consulted by the patient owes him certain duties, viz. a duty ofcare in the administration of that treatment, a breach of those duties gives a right ofaction for negligence to the patient.

The practitioner must bring to his task a reasonable degree of skill andknowledge and must exercise a reasonable degree of care.[149]" Regarding duty ofcare, it does not become negligence simply because something goes wrong. He isnot liable for mischance or misadventure or for an error of judgment. He is notliable for taking one choice out of two or four. He is only liable when he falls belowthe standard of reasonably competent practitioner in his field so much so that hisconduct may be deserving of censure or inexcusable[150]. A surgeon or anesthetist willbe judged by the standard of an average practitioner of the class to which hebelongs or holds himself out to belong.

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[147]P.S. Mahalwar, *Medical Negligence and Law Concept, Liabilities, Remedies*, Deep & Deep Publication, New Delhi
2000, p.159
[148]AIR 1969 SC 128.
[149]Lord Denning M.G, in *Hucks v. Cole* (1968) 118 New L.J. 469; Soljo 483.
[150]Ibid

The likelihood of injury or damage caused is the criterion for determination what degree of care needs to be taken in a particular case. Lord Dunedin stated that "people must guard against reasonable probabilities, but they are not bound to guard against fantastic probabilities. In *Glasgow Corporation v. Muir*[151] Lord Maxmillan also opined that the degree of care for the safety of their patient varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care varies directly with the risk involved. To be precise, the degree of care must commensurate with the degree of risk involved in an action.

A doctor registered as homeopathic practitioner cannot prescribe allopathic medicine to the patients without being qualified in that system of medicine and without being registered under Indian Medical Council Act 1956 or the State Medical Council Act. In a particular instance a homeopathic practitioner was held guilty of negligence for prescribing allopathic medicine to the patient without being qualified in that system of medicine by the Supreme Court of India[152]. In a situation when a person who holds himself to give medical advice and treatment impliedly undertakes that he is possessing of skill and knowledge for that purpose. A duty of care includes what treatment is to be given or how it is to be administered. A breach of duty or duties gives a right of action to the patient to sue for the negligence. The practitioner must have a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor the very low degree is wanted. Such ordinary care and competence judged in the light ofthe particular circumstances of each case is what the law requires.It is a widely recognized proposition of law that a person will beguilty of negligence, if he undertakes a task, which he knows or ought to know thathe is not qualified to give treatment or advice. He will be guilty of negligence, ifdamage results from such undertakings as held in *GracyKuttyv. Dr. Annamma*[153]. It was held that the duty of a medical practitioner is based on the fact that he ishandling a human being. If the doctor is not qualified in that system his conductamount to actionable negligence. A physician who diagnoses and treats a person fora disease or a surgeon who performs an operation on a patient to remove or rectifya defect is presumably takes an undertaking that he possesses the requiredskill and knowledge for the purpose.

[151][1943] AC 448; [1943] 2 All ER 44
[152]*PoonamVerma v. Aswin Patel*, A.I.R 1996 SC 211, (1996) 4 SCC 332.
[153][1991] 1 CPR251

In *Murphy v. BrentwovdDc*[154] the House of Lords formulated a rulelimiting the scope for recovery of loss from the doctor in certain situations. Anotherkind of damage of tort of negligence is 'nervous shock'- now days usually referredto as 'psychiatric injury' or 'mental distress'. House of Lord's decision in *Alcock v. Chief constable of south Yorkshire*[155] indicates that liability will tend to be limited toa small class consisting for the most part of immediate relative of the victim presentat the scene of accident or its immediate aftermath.The concept of duty is also used to categorise claims forcompensation with reference to class of claimants and defendants. The common lawat one stage failed to recognize the unborn child or embryo in the womb as aclaimant, and thus statutory intervention was required to get the rule revised. Thecourt have since changed their minds on the question ofthe availability of an actionby a child born alive for injuries sustained in the womb, but for the most purposethe English Common law has been now ousted by the Congenital Disabilities (Civilliability) Act 1976.

The Doctor is duty bound in two respects. He owes a "primary" duty of care in deciding whether he should undertake the case. If he undertakes the case, the next duty is cast on him the duty of care in the administration of the treatment wherein he should use diligence, care,knowledge and caution. His failure to perform either of the above two duties, if proved, will offer a valid ground to fasten negligence on him.

According to Lord Nathan[156] the medical man's duty of care is based upon the fact that the medical man undertakes the care and treatment. In other words, a doctor who holds himself out as possessing special skill and assumes responsibility for an individual there by undertakes duty of care[157]. The duty exists between patient and General practitioner, hospital, doctors, institution or health care professionals. They are guilty of negligence, if damage results from such undertaking. So there is no doubt that a medical man has a duty to care. The next important question would be whether this duty can be delegated.

9. Delegation of Duty

[154][1992] AC. 3911
[155][1991] 1 AC. 294
[156]Lord Nathan, *Medical Negligence*, Sweet & Maxwell Publication, London. 1957 p.8
[157]*Supra* n. 108

Delegation of duty is a part of the duty of care. A medical practitioner undertaking the treatment of patient is personally liab1e for the diagnosis and treatment. A surgeon retained to perform an operation will be liable if he delegates his duty to colleague who fails to use reasonable care[158]. Medical practitioners may delegate part of his work to another doctor, but he remains responsible for any lack of care in the performance of the delegated work. The contractual duties of care and skill are non- de1egab1e in the sense that performance of some works of the retainer may be delegated, but the responsibility for it cannot. The general tortious duty which cannot be assimilated to the contractual one is that a person is not liable when another to whom he had delegated a duty performs it negligently, unless that person acted with reasonable care in selecting the person to whom performance was delegated[159].

The hospital authority is not only responsible for the negligence of the physicians, surgeon, and nurses in the course of their professional duties but the hospital authority is legally responsible to the patient for due performance of ministerial or administrative duties of is servants[160]. The distinction drawn by Kennedy, LJ between professional duties and ministerial or administrative duties has been disapproved by the court of *Appeal in Cassidy v. Ministry of Health*[161]. The court laid down that the hospitals are liable for negligence of the members of the hospital staff including nurses and doctors. The nursing home and the private hospital are not responsible for the negligence of the physicians and surgeon who are not appointed by the nursing home and the private hospital[162].

In *HarjolAhuwalia v. Spring Meadows Hospital case*[163] attending doctor allowed the unqualified nurse to give lariago injection intravenously to the patient while the consultant doctor advised that the lariago injection must be given by the doctor. The Supreme Court of India held that the hospital is liable to any compensation for the negligence of its staff. The principle enunciated is that the delegation of duty to another may amount to negligence in certain circumstances. A consultant could be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly.

[158] *Morris V. Winsburry White* [1957] 4 All ER
[159] *D and F Ester v. Church Commission for England*[1988] 2 All ER. 992
[160] [1942] 2 K.B .293; [1942] 2 AII. ER.
[161] [1951]2 K.B 343, [1951]1AII. ER. 574.
[162] *Collins v. HertfordshineC.C* [1947] KB 598, [1947] All ER, 933.
[163] AIR 1998 SCC 1801, (1998) 4 SCC 39.

An instance of leaving critically ill patient under the care of unqualified compounder particularly when the situation demands constant monitoring of the patient amounts to deficiency-in- service. Similarly, negligence isattributed to the doctor for leaving the patient under the care of a compounder whocaused death of the patient by administering "*Nivaquine*" injection[164]. The ESIhospital was held liable for not giving proper timely medical treatment to the patientand for refusal to admit the patient in the hospital for treatment of acute pain inabdomen by the attending doctor of the hospital. Similarly hospital was directed topay compensation to the patient for suffering caused by leaving sponge in theabdomen ofthe patient during operation[165].

The Supreme Court of India[166] directed the State of Maharashtra to paycompensation to the legal representatives of a deceased patient who died aftersterilization operation in a Government Hospital due to the negligence of theGovernment doctor who left a mop (towel) inside the peritoneal cavity of thepatient during the operation. The High court of the Rajasthan[167] also directed theState Government to pay compensation to the husband of the deceased patientwhose death was caused by insertion of *pneumperitoneal*needle during*laparoscopic tubectomy* in a Government hospital.

There are the various aspect of law relating to delegation of duty and,malpractice related to those cases. The next relevant area is breach of duty and itsrelated legal complication.

10. Breach of Duty.

The issue of breach of duty is covered with whether the defendant wascareless, in the sense of failing to conform to the standard of care applicable to him.The level at which the standard is set is a question of law. In *Hazell v British transport commission*[168] Person j said that: A breach of duty arises when doctor does not take proper care and precaution before the treatment which he is supposed to take in accordance with the seriousness of the case.

[164] *AleyammaVurghese v. DewanBahadur* 1996 CPI 911, 1997(1) CPR (Ker.)
[165] *A.M. Mathew v. Director, Karuna Hospital*, 1998 (1) CPR 39(Ker) ,1998 CPI 476 Ker
[166] *Nivrati G. More v. Dr. VinayakDesmukh*, (1994) 2 CPI 614 (CP) (SCDRC) Bom.
[167] *Rajammal v. State of Rajasthan*,1996 ACI 1166
[168] [1958] WLR 169,171.

Chapter: 4

MEDICAL NEGLIGENCE:

A Comparative Study

Medical profession requires the skill, efficiency, accuracy of judgment and carefulness, which are the sine qua non of the profession. Though every profession has it own importance, medical profession is unique as its practice has direct link with the life of people and nothing is more precious than the life of a human being in this world. A business man having lost heavily in his business or industry due to accident or insolvency may regain his position by hard labour but precious life does not come back. Obligations of medical men therefore are very heavy. Medical offences are rooted in various kinds of liabilities like penal liability, tortious liability, contractual liability and consumer liability. This chapter makes an attempt to discuss each of these liabilities in a comprehensive manner. Penal liability under common law is explained as follows:

a. Position in England

Penal liability originated from English common law. It covers crimes in general but the doctors during the course of their practice have to deal with assault, murders and manslaughter. The procedure adopted by criminal law is different to that in a civil claim. The police investigate in criminal cases and collect evidence submitting to the Crown Prosecution Service (CPS) which decides if the case is to proceed. The trial is conducted by the Magistrate's Court or crown court, depending on the nature of the offence[169]. An assault means physical contact with another person. The legal definition of an assault is an act which intentionally causes the victim to apprehend immediate and unlawful personal violence. No touching of the victim is required for an offence to have been committed[170]. In medical negligence case, patient may die during or as a result of the treatment. The death is therefore incidental, accidental or amounts to the crimes

[169]Peter Mavquand and B.S. Mrcp.Soliutor, *Introduction to Medical Law*, Butterworth Publication, Oxford
Auckland, Boston, Johannesburg, 2000, p.123.
[170] Malcolm Khan and Michelle Robson ,*Medical Negligence* , Cavendish Publishing Co. ltd., London ,2001, p.137.

of manslaughter or murder (Collectively termed homicide). The crime of murder occurs when a person's death in caused by someone who intends to kill or cause grievous bodily injury likely to cause death. The distinction between murder and manslaughter is the intention to kill or cause serious. The jury in a trial may find that the defendant intended to kill or cause grievous harm when that was his purpose or when the death (or really serious injury) was a virtually certain consequence of the action[171]. A person may be found guilty of murder even if the victim is dying from other causes like terminal cancer if he is killed deliberately by any other means. However it is different when a patient died due to the effect of a drug given to relieve pain, as it is the act of doctors to alleviate pain and suffering. The primary purpose of administrating medicine is to relieve pain and suffering will be lawful even if death is hastened (referred to the side effects). If this were not allowed, then a lot of palliative treatment would become unlawful[172]. A doctor was found guilty of having attempted to give an injection of potassium to a patient who was suffering constant pain, which is not used in conventional treatment. The patient was suffering from very severe pain to the extent that she asked the doctors to give her an injection to end her life. After injecting her with conventional analgesics and sedatives, the patient was later injected with potassium chloride and died shortly thereafter. The doctor was charged with attempted murder by the prosecution as they could not prove that the potassium was the cause of death in the circumstances of the case. The judge held in this case that the jury has to disregard the doctors possible motive for giving the injection and that it made no difference that the patient wanted to die or that at same point a fatal injection had been requested. Motive is not the same as intent[173]. Another controversial liability is relating to euthanasia.

[171] Smith J, Smith and Hogan, *Criminal Law*, Butterworth's, 8th Edition, oxford, 2001, p.58
[172] *Ibid.*
[173] *R v. Adomako* (1994) 3 All ER 81

b. Position in U.S.

In United States, criminal prosecutions of physicians for negligent treatment of a patient are so rare as to be virtually non-existent[174]. Obviously the most skilled physician will lose some patients unless he practices in a specialty in which death is virtually unknown. Failure to adhere to the proper standard of due care, skill and knowledge and thus becoming liable in civil damages is by no means sufficient to impose criminal liability on a physician[175].

Where a physician adopts an illegal procedure and the patient dies, he will be liable for murder. The physician who performed an illegal abortion was tried and convicted of either first degree murder or manslaughter[176]. In some of these cases where the woman died during abortions, physicians are not guilty of murder, but on.ly for the offence of abortion. In one such case, the appellate court observed that, where death results from the consequences of negligence it would see that to create criminal responsibility, the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence while it might create civil liability would not suffice to create criminal liability"[177]. Abortion was legalized on medical ground in January 1973 by the Supreme Court decision. Where women have died during abortions in the second or third trimester of pregnancy, physicians have been convicted of "Criminal negligence homicide" defined as "gross deviation from the standard of care", and these convictions have been upheld when medical testimony was presented that no reasonable physician would have performed a late abortion by such methods in his office[178]. A physician is charged with manslaughter if there is "culpable negligence, gross ignorance and lack of ordinary knowledge". During an operation, where the doctor made large dents in the uterus of the patient pulling her intestine through them, the conviction was upheld. The court found that although a physician may use his best skill and judgment in an honest effort to care for the patient, he may be as grossly ignorant of the facts of surgery as to render him criminally responsible for the result of his ignorance[179]. In another case, a patient died of burns from over exposure to x-rays administered by the doctor, and he

[174]Angela Roddey Holder, *Medical Malpractice Law*, a Wiley Medical Publication, New York, 2nd ed., 1978, p. 361.
[175]*Ibid.*
[176]*People v. Long*, 96 P. 2d 354, cal (1939) 1939. U S R
[177]*State v. Mc. Mahan* 65 P 2d 156, Idaho 1937. U S R 1937.
[178]*Munson v. Janklow*, 1973 (3) U S R.
[179]*Hampton v. State* S.E 2d 752 (2009)

was indicted for manslaughter. "Not every careless act is criminal. Only when a physician exhibits a gross lack of competency or inattention or indifference to a patients safety, which may arise from gross ignorance or gross negligence does criminal liability attach. Where the patient's death results from an error of judgment or an accident there is no criminal liability[180]. Of course, assault and battery is crime, and if the patient has not consented at all and he dies as a result of the operation, the question of manslaughter may be raised[181]. Before any person is convicted, the prosecution must establish and prove that the act did in fact cause the death.

As long as the treatment given to any patient is approved by a majority of the medical professionals, it is legal. Criminal liability will not attach if the patient dies unless there is a clear evidence of total and wanton disregard. If a surgeon for example, performed a non-emergency operation under influence of narcotics to the degree that he became totally reckless and the patient died, he might be subject to criminal prosecution.

All non- physicians practicing medicine without a license will be guilty of crime if their patients die. It is relatively uncommon for physician to be prosecuted for the death of their patients. Most prosecutions are for manslaughter, not for homicide. Since the latter require a proof of intent to kill[182].

Several chiropractors have been convicted of manslaughter for "Practicing medicine", for example taking a diabetic off insulin and telling a paralyzed patient to fast which he did for 35 days until he starved to death. Another chiropractor performed surgery with a "shocking degree of unskillfulness, evincing an almost incredible ignorance of surgery and anatomy and utterly wanting in skill". It is however, absolutely necessary that the defendants action contribute at least in some material degree to the death of a sick person. "If there is no evidence that the patient could have been saved by proper medical treatment there is serious doubt that a manslaughter conviction against a charlatan can be sustained[183]. So the American law regarding Criminal Liability in almost the same as that in England.

c. Legal Liability of Doctor's under Euthanasia

[180] *State v. Lester* (1996) 111 Ohio App.3d. 736
[181] *Washington v. Gite*, 82 L.Ed. 864. 1984. U.S.
[182] *Ibid.*
[183] *Ibid.*

There is an ethical debate about euthanasia but the law does not allow one to kill another person and there is no exception for the medical profession, even when a patient wants to die and agrees to being killed. Consent is not a defence to a murder charge. A patient may, for any reason, decide to commit suicide and that is a criminal offence. It is a crime to help or assist in any way another person to commit suicide. It would be a criminal offence to deliberately prescribe drugs for a patient with terminal cancer which would assert them in ending their life. When a person kills another in circumstances that would amount to murder, the law reduces the crime to manslaughter if the defendant was either (1) provoked or (2) suffering from diminished responsibility. A person may also be found guilty of manslaughter when, he carries out a dangerous and criminal act or when somebody dies due to gross negligence. The duty of care owed to the victim and which if breached, causing the death of the victim's is negligence. The jury has to decide whether there is required standard of care. If not, then decide whether, the risk of death is due to the conduct of the defendant[184]. An anesthetist was found guilty of manslaughter when he failed to detach the patient from the ventilator. The endotracheal tube had become detached and after about four and a half minutes, the blood pressure monitor alarmed. The anesthetist carried out various procedures including the administration of atropine for bradycardia, but failed to check the endotracheal connection and the patient suffered a cardiac arrest. The prosecution expert witness described the standard of care as "abysmal" and stated that the conduct amounted to 'a gross dereliction of care'[185].

Medical procedures which involve bodily touching might come within the potential scope of the crime of battery[186] (popularly known as assault). But the absence of consent is an essential element of the offence[187]. If legally effective consent has been given, the medical touching will not constitute the offence of battery. If legally effective consent has not been given to the doctor the therapeutic medical touching will amount to the offence of battery. The absence of consent is the essential element. The law insisted that 'application of force' to which legally effective consent could not be obtained is offence of battery. The leading cases, which supported the existence of such a category, were concerned with issues as far removed from medical practice

[184] *Ibid.*
[185] *Ibid.*
[186] *Foulknerv.Tubaf*(1981) 1 W.L.R.1538, 1534
[187] *Fagan v. Commissioner of Metropolitan Police* (1969) 1 Q.B.439, 444 E

as prize-fights[188] and flagellation for the purpose of sexual gratification[189]. But the importance of these cases has been diminished by Attorney - Generals Reference[190]. According to the opinion of the court of Appeal[191], that touching which occurring the course of medical practice does not involve 'any hurt or injury' calculated to health or comfort. In the course of medical practice there is often good reason in attempting something which is beneficial to patient's health, even though there is a risk of harm resulting[192].

All medical procedures are not intended to benefit the person on whom they are performed[193]. Sometime a procedure is conducted on a person with the knowledge that it will certainly be to that person's bodily detriment, like in the case of a kidney taken from a healthy person, for transplantation into some one who is in need of it. The operation is a major one, and is not without risks[194].But it is not always unreasonably dangerous, and the probable benefit to the recipient outweighs the probable detriment to the donor[195]. The courts may be expected to take the view that the operation did not amount to the offence of battery, even though the operation causes serious bodily harm. There are also favourable arguments in favour of non-therapeutic medical experimentation; even if it may cause bodily harm[196]. Another basis of Criminal liability is the crime of causing grievous bodily harm.

[188] *R v Coney* (1882) 8 Q.B.D.b 534.
[189] *R v. Donovan* (1934)2 K.B. 498. (19a1) Q.B. 715
[190] (1981) Q.B 719 E.F.
[191] *Ibid*
[192] *R v. Hyan* (1975) A.C. 55- 74, 77-78.
[193] *Bravery v Bravery* (1954)1 W.L.R.1169, 1180 Denning LJ.
[194] R.G. Simmons & A.B. Cosimi, *The Donor and Donor Nephrectomy, in kidney Transplantation*, Oxford
Publication, London, 2000, p.234
[195] Edmand Davies, "Transplants" p.634 see also Ormord, *Medical Ethics* Oxford Publication, London 1998, p.341.
[196] *Haluksha v. University of Saskatchewan* (1965) 53 D.L.R. p.436.

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CHAPTER: 5

CONCLUSION

Rapid development in science and technology has made remarkable contribution to the modem society. But at the same time, the progress of civilization has increased the complexities of human activities. Medical science has done a tremendous service to the human kind in numerous ways. The medical professional's cardinal aims are to preserve life, prevent disease and to affect the cure of illness. But success or failure of a system depends on the people who handle it. Hence medical men, running the profession or an institution are the pivots who make it successful.

Health care, (like education) can thrive in the hands of charitable institutions. Moreover it also requires more serious attention from the State. In a developing country like ours, where teeming millions of poor, downtrodden and illiterate cry out for health care, there is a desperate need for making health care easily accessible and affordable. Remarkable developments in the field of medicine might have revolutionalised health care, but they cannot be afforded by the common man. The woes of the economically disadvantaged patients have in no way decreased. Gone are the days when any patient could go to a neighbourhood general practitioner or family doctors and get affordable treatment at a very reasonable cost with affection, care and concem. Such a noble tribe is slowly dwindling. Every doctor wants to be specialist. The proliferation of specialists and super specialists, have exhausted many patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide adequate treatment. What used to be competent treatment by one general practitioner has now become multi- pronged treatment by several specialists.

Apart from taking every care in high risk situations which are common causes for medical negligence actions, the medical practitioner are expected to safeguard their position, career and financial aspect through risk insurance. This kind of liability risk is the professional hazard for medical personnel while the risk of the ordinary person is life, health, expenditure, agony, loss of future earning etc. It is clear that both the patient and the doctor are under a risk of either physical injury in the shape of spoiled health, or sudden burden to pay compensation under direction of Consumer forum. Even if the issue of rights and liabilities are left to the decision of the courts, which may take a long time, there is an urgent practical necessity for patient to recover and doctor to be in position to pay. The only remedy available is the insurance. The professional indemnity insurance provides insurance cover in respect of error and omissions on

the part of the professionals while rendering their services. As a consequence, it is now common that a comparatively simple ailment, which earlier used to be treated at the cost of a few rupees by consulting a single doctor, requires an expense of several hundreds or thousands which the common man is subjected, and is merely voicing the concern of those who are not able to fend for themselves.

In private practice, where the relationship of doctors and patients are contractual in origin, the services are in consideration of a fee paid by the patient, where the contract implies that the professional men possessing a minimum degree of competence would exercise reasonable care in the discharge of their duties while giving advice or treatment.

The position of doctors in government and charitable hospitals is not better. They are overworked, understaffed, with little or no diagnostic or surgical facilities and limited choice of medicines and treatment procedures. They have to improvise with non-existent facilities and limited dubious medicines. They are required to be committed, service oriented and non-commercial in outlook. What choice of treatment can these doctors give to the poor patients? What informed consent can they take from them? One may say that they are trying to do their best in such limited circumstances. But unfortunately not all doctors in government hospitals are paragons of service, nor fortunately, all private hospitals/ doctors are commercial minded. There are many doctors in government hospitals who do not care about patients and unscrupulously insist upon ‘“unofficial” payment for the treatment or insist upon private consultation. On the other hand, many private hospitals and doctors give the best treatment without exploitation, at a reasonable cost charging a fee, which is reasonable recompense for the service rendered.

Suggestions

A wise doctor always takes preventive steps to avoid litigation rather than inviting it. The preventive measures are the following.

- When condition of a patient deteriorates for one reason or the other, the doctor should take the relatives into confidence by politely explaining the situation.
- The doctor should always obtain individual consent in writing, preferably in presence of a witness.
- A good doctor will always be optimistic but at the same time be should never draw a colorful picture about recovery of a patient, otherwise the dissatisfied patient or relatives may allege that the doctor had misled them.
- A doctor should always examine a female patient in presence of a nurse or her female relatives, so that no allegation may be made regarding the doctor's behavior or conduct.
- He should explain to the patient about approximate expense of the treatment before starting the treatment.
- He should never do experiments on the patient without consent, and without practical experience.
- He should keep Medical record of the patient up -to -date, which would constitute good evidence, and it will prove whether proper care was taken from time to time.
- He should never try to change or manipulate medical record of the patient; as such a change may prove the doctor's negligence.
- A doctor should never issue a bogus certificate and he should always keep a complete record of the certificates issued by him and preserve the record at least for a period of 5 years.
- After accepting the patient and starting the treatment, the doctor should not leave it halfway without the patient's consent and the doctor should attend to his indoor patients round the clock.
- Fully inform a patient of his condition.

- Notify a patient of the results of a diagnosis or test.
- Inform the patient of the need for different treatment or refer the patient to a specialist.
- Continue medical care until proper termination of the relationship.
- Give proper notice before Withdrawal from treatment
- Not to abandon a patient, and also make arrangements for treatment during absences.
- Equal treatment to all patient irrespective of their ability to pay for the same
- Due diligence in treatment in providing all necessary care.
- Obtain a patient's informed consent before performing a medical procedure.
- Warn others of exposure to communicable and infectious disease

CHAPTER: 6

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