

# Medical Negligence in India Vs the Role of Consumer Forum

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## 1. Introduction

Medicine bridges the gap between science and society. The application of scientific knowledge to human health is a crucial aspect of clinical practice. It is medical professionalism of doctors that creates confidence of the public in them. Several health providers have entered the health care arena. The patients expect from their doctors noble values and a standard of medical ethics. Medical professionalism is defined as a set of values, behavior, and relationships that creates the trust the public has in doctors.

Medical service is offering invaluable service to humanity and the profession is a noble profession. The word doctor is derived from the Latin word 'docere' which means to teach. The relationship between the patient and the doctor was considered as very sacred. It was based on mutual trust and faith, and not based on pecuniary considerations.<sup>1</sup>

Nowadays, the onslaught of mechanization and commercialization of the profession had demolished the noble traits for which the medical men were known for long. There has been an element of dehumanization in medical practice.<sup>2</sup> Health care to-day has plummeted down to a business for minting money. The homely atmosphere and the intimacy which the patient and the doctors enjoyed hitherto before has disappeared.<sup>3</sup>

Doctors are considered as visible gods. They give solace and confidence to the persons who are suffering and depressed from various diseases and injuries. The patients approach these gods in human form with the confidence that the doctor will be capable of curing him. The doctor has the onerous responsibility to keep up his confidence by diligent treatment and proper care.

To-day's medical profession has completely changed. From rendering humanitarian service to the exploitation of the gullible common man, Medical personnel adopt deceitful methods to attract the ignorant public and extract sky high charges from them on their treatment than necessary. They inhumanly prescribe many unnecessary tests to the patients and compel to take these tests to the laboratories of their preference where they may have an unethical collusion between them. Today in India, medical treatment has become out of reach for the poor. Many doctors (though not all) have forgotten their oath.

<sup>1</sup> The relevant parts of "Code of Medical Ethics", as propounded by the Medical Council of India.

<sup>2</sup> Phatnani, Pentum, P., *Medico-Legal Aspects of Doctor – Patient Relationship*, Express Pharma Pulse, (November 30, 1995), p. 5.

<sup>3</sup> Mathew, N.M., *Consumer Talk Health for the Millions, CPJ*, (January & February, 1995), p. 62.

## Code of Medical Ethics

Hippocratic Oath is the first code in dealing with the conduct of medical practitioners followed by the International Code of Medical Ethics 1948<sup>4</sup>. The Medical Council of India is authorized to frame rules and regulations in relation to the professional conduct, etiquette and ethics for the registered medical practitioners. Any violation of the code of conduct by any medical practitioner would lead to the charges of misconduct and if proved he may be debarred from practicing medicine<sup>5</sup>. The Code of Medical Ethics covers issues relating to the character of physicians, their duties towards their patients, co-practitioners, those in the paramedical profession and the public. However, the Code does not provide any remedy for the aggrieved who is the victim of violation and it is not enforceable in the court of law. The Code governs the relation between the profession and medical practitioners and in no way concerns with compensating the patient. Similarly, the Declaration of Helsinki<sup>6</sup>, the Declaration of Geneva<sup>7</sup> and the Declaration on the Rights of the Patients<sup>8</sup> which are concerned with rights and duties of physicians and patients are not legally binding to any state without being ratified by them.

The commercial mindedness of doctors has led to more malpractices and instances of negligence. Most of the nursing homes and multi specialty hospitals are not owned by doctors, but by businessmen and promoters. However much the Government brings much stringent legislation to check the malpractice yet the procedures of their implementation are lengthy, clumsy and cause general apathy.

Insufficiency of doctors in the government hospitals is the major cause for such negligence. In India the doctor patient ratio is 1:1596 as on 2017. The shortage exists at all levels of medical fraternity including specialist doctors, nurses and paramedics.<sup>9</sup> The Consumer Protection Act, 1986 was enacted to arm each and every consumer as well as consumer associations with rights to seek speedy, cheap and efficacious remedies. This Act is proving to be very popular and effective. The doctors were brought under the purview

<sup>4</sup> In ancient India, Charaka and Sushruta introduced similar codes.

<sup>5</sup> Indian Medical Council Act, 1956.

<sup>6</sup> The Declaration was originally adopted in June 1964 in Helsinki, Finland, and has since undergone five revisions and two clarifications. It is an important document in the history of research ethics as the first significant effort of the medical community to regulate research itself and forms the basis of most subsequent documents.

<sup>7</sup> Adopted in 1948 addresses a physician's ethical duties especially clinical research.

<sup>8</sup> Adopted by the 34<sup>th</sup> World Medical Assembly Lisbon, Portugal 1981 and amended by the 47<sup>th</sup> General Assembly Bali, Indonesia, September 1995.

<sup>9</sup> *The Hindu*, June 7<sup>th</sup> 2017, p. 14.

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of the Consumer Protection Act, 1986 by the Supreme Court, for their negligent acts<sup>10</sup>. The CPA provides for better protection of the interest of the patients who has suffered the negligent treatment by the medical professionals or health care provider. All the confusion regarding the scope of CPA regarding the medical negligence case was cleared by Supreme court of India in its various land mark judgement, *Indian Medical Association vs. V.P shantha vs. others*,<sup>11</sup> *Jacob Mathew vs. State of Punjab and Another*.<sup>12</sup>

The number of medical negligence cases had been increasing over the years. Several patients from the lower strata of the society are affected by medical negligence; the poorest of the poor were unable to get redressal for the suffering caused by medical negligence. Doctors often get away with their act of negligence because of the patient's ignorance in medical knowledge and inaccessibility to evidence helps the negligent doctors to escape from punitive action. The poor people lack the knowledge to approach the proper judicial forum to seek justice. All these situations are favorable to the doctors and corporate medical firms. In India, majority of citizens requiring medical care and treatments belong to low income groups and most of them are illiterate or semi-literate.

In this century, medical technology has advanced and the hospitals have evolved into modern, health-providing business centres. As public health has come into the private sector doctors, hospitals, nursing home and clinics in the commercial sector have sprung up. As these private sector hospitals charge more fees the middle class public have begun to think that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicine, and subject them to unwanted surgical procedures for their own financial gain. They think that it is natural that many doctors who have spent a crore of rupees or more for becoming a specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely commercial and not service motives. Medical profession once a noble service is slowly but steadily turning purely into a business.

This is here where the law enters to prevent the exploitation of the poor people by the greedy medical men. It gives rise to twin adverse effects. More and more private doctors and hospitals have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedure and tests. Secondly, more and more doctors particularly surgeons in private practice are forced to cover themselves by taking out insurance, the cost, of which, is also ultimately passed onto the patient, by way of higher fee. The extent and nature of information required to be given by doctors should continue to be governed by the **Bolam** Test rather than the "reasonably prudent patient" test evolved in *Canterbury*.<sup>13</sup> 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."<sup>14</sup>

### Medical Negligence – Recent Trends

Medical negligence is the commission or omission of an act by a medical professional or health care provider which deviates from the accepted standard of practice leading to injury to the person, it may be defined as lack of reasonable care and skill on the part of the medical professionals. Further the defendant has to establish all the following elements for a successful medical negligence claim.

- 1) Existence of legal duty
- 2) Breach of a legal duty
- 3) The breach caused an injury
- 4) Damages

In *Mukund Lal Ganguly vs. Dr. Abhijit Gosh*<sup>15</sup> it was held that, services rendered by doctors at a government hospital were without considerations and the patients were not consumers as defined in Consumer Protection Act, 1986. Therefore a relief to a patient for the harm done to him in a government hospital was denied by the consumer court in India.

A doctor shall abide by the oath throughout his professional life. If a doctor fails to fulfil any of these promises, he will be liable for professional misconduct and liable for removal from the rolls. And he will also be liable for their medical negligence under the Consumer Protection Act, 1986.

The hospitals are equally liable for the performance of the para medical staff and/or its doctors. Nursing homes may also be held negligent if nurses fail to execute instructions delivered to them at the time of treatment. In *Achutrao Haribhau Khodwavs. State of Maharashtra*,<sup>16</sup> 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 vs. V.P. Shantha*<sup>17</sup> held that the medical profession is included within the meaning of 'service' under consumer law. Due to this decision, the doctors have become more cautious in their treatment and a defensive medication slowly took over. In such cases, the patients would be advised to undergo several tests, even before the preliminary diagnosis, so as to obviate any litigation against them. The ultimate sufferer is the patient himself as the treatment becomes expensive and also because of the delay caused in initiating the treatment.

The main objective of the study is to highlight the drawbacks in the existing medico-legal system and the role of consumer forum. In consumer courts, judges are not experts in medical science. Moreover, judges have to rely on the testimonies of other doctors, which may not be objective in all cases. Like in all professions and services, doctors too sometimes have a tendency to support their own colleagues.

<sup>10</sup> *Indian Medical Association vs. V.P. Shantha* 1995(3) CPR 412.

<sup>11</sup> (1995) CPJ 1 (SC) p. 111.

<sup>12</sup> (2005) 6 SCC 1.

<sup>13</sup> (1957) 2 All.E.R. 118.

<sup>14</sup> *Martin F.D 'Souzavs. MohdIshfaq* 2009 (3) SCC (1).

<sup>15</sup> 1995 (3) C.P.R 391.

<sup>16</sup> 1996 (2) SCC 634.

<sup>17</sup> (1995) CPJ 1 (SC) p. 111.

The testimony may be difficult to understand, particularly in complicated medical aspects and to a layman in medical subjects. A balance has to be maintained in such cases. The doctors who cause death or agony by medical negligence should certainly be punished and also it should be remembered that like any other profession, the doctors too can make errors of judgment, and if they are punished for every error no doctor can practice his profession. Indiscriminate proceedings and decisions against doctors are counterproductive and serve no good. They affect the free exercise of judgment by a professional in a particular situation.

A medical practitioner is not liable to be held negligent simply because things went wrong through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be considered guilty only where his conduct falls below that of the standards of a reasonably competent practitioner in his field.<sup>18</sup> For instance, he would be liable, if he leaves surgical gauze inside the patient's body after an operation.<sup>19</sup> There may be few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, the doctor should not be held liable.

The foundation of the term 'deficiency' stems from the objectives of the International Organization For Consumer Unions<sup>20</sup> (IOCU) and the United Nations Guidelines on Consumer Protection. It can be identified that the following circumstances are leading to deficiency in medical services. They are (1) denial of access to health service which include access to basic medical services (2) advanced medical treatments which may be life saving procedures, or procedures for satisfying desirable human needs. (3) Failure to provide safety of products in health care services, experimental medicines and clinical trials on human beings and abuse of diagnostic and curative procedures may also lead to human right violations and (4) denial of health care records, commercial trade of human organs and researches involving human embryo or human cells also need to be evaluated in the context of human rights law principles.

### Legislations on Medical Profession in India

The Government has passed various legislations such as, the Indian Medical Council Act, the Dental Council Act, Indian Medicine Central Council Act, the Homeopathic Central Council Act, etc., relating to all branches of medicine. These laws insist for the compulsory registration of medical practitioners with their respective medical councils before practicing in any branch of medicine. Doctors who had

enrolled with the council concerned have to follow the rules, regulations and the code of ethics set out by the council.

A person who does not have the knowledge of a particular system of medicine but practices in that system is a quack and a mere pretender to medical knowledge or skill. If he trespasses into a restricted system, then, he is liable to be prosecuted under Section 15(3) of the Indian Medical Council Act. His conduct constitutes "medical negligence" for the injury caused to his patient in practicing the system of medicine in which he has not possessed the required skill and knowledge.

In India there are several legislations which permit self regulation in maintaining the professional standards in imparting proper training, determining medical qualification, granting of permission to practice and in enforcing discipline among the practicing medical practitioners of allopathy<sup>21</sup>, ayurveda, siddha, unani<sup>22</sup> and homeopathy<sup>23</sup>, dentists<sup>24</sup>, the nursing staff<sup>25</sup> and the pharmacists<sup>26</sup>.

### Rising Trends in Consumer (Patient) Exploitation

Exploitation of consumers (patients) have become an accepted trade practice in our country. Hospital authorities think their hospital is a commercial establishment and a place for profit making. It is their only motive to exploit the gullible patients rather than a rendering service to the patients. They indulge in unfair trade practices like selling spurious articles, charging high prices, selling low quality products, not fulfilling legal obligations towards the patients and similar other ones. These nefarious practices are common in the hospital sector. Consumer exploitation has becomes synonymous with profit making.

### Need for Justice at Grass-Root Levels

The consumer redressal forums are also not effective in attending to the grievances of the patients. It is also time consuming and their proceedings are lethargic. It is very difficult for the unorganized consumer to get redressal from a well organized producer who is both economically and legally sound. So, the redressal of consumer problems should be quick and efficient. Quick justice in consumer affairs will make both producers and consumers conscious enough to their duties and rights in objective way.

Service Hospitals.<sup>27</sup> In India the extrapolated figures would be 400,000 deaths due to adverse drugs reactions and 720,000 adverse events per annum.<sup>28</sup>

The patients who suffer from the negligence of doctors are too many. But too few are able to approach the court for remedy. Very few patients who have suffered adverse outcomes move the courts and even in that, only a fewer who receive the compensation. In this context, the present

<sup>18</sup> Simply suffering of ailment by the patient after surgery does not mean medical negligence - *Dr. S.K. Jhunjhunwala v. Mrs. Dhanwanti Kumar & Other*, S.C. judgement dated Oct. 1, 2018, (2019) 2 SCC 282.

<sup>19</sup> Mahesh C. Bijawant, *Medical Negligence - Medical Malpractice*, JILI, 1999, Vol. 37, p. 47.

<sup>20</sup> The Montreal Convention adopted the principle that availability of essential services to all people by eliminating poverty is one of the important goals to be achieved by the consumer groups.

<sup>21</sup> The Indian Medical Council Act, 1956.

<sup>22</sup> The Indian Medicine Central Council Act, 1970.

<sup>23</sup> The Homeopathy Central Council Act, 1973.

<sup>24</sup> The Dentists Act, 1948.

<sup>25</sup> The Indian Nursing Council Act, 1947.

<sup>26</sup> The Pharmacy Act, 1948.

<sup>27</sup> As cited in *Indian Journal of Medical Ethics*, Vol. II, No. 4, October 2006.

<sup>28</sup> [www.expresshealthcaremgmt.com/200220630/edti2.shtml](http://www.expresshealthcaremgmt.com/200220630/edti2.shtml) accessed on 18-11-2017.

study assumes its importance in evaluating the effectiveness of the Consumer Protection Act in dealing with medical negligence cases and judicial approach towards doctor patient relationship.

The study, involves critical analysis of judicial decisions of the National Commission and the Supreme Court. An attempt to understand the outcome of judicial decisions and its impact on doctor-patient relationship which may pave way to future studies and research, in the field of medical negligence more particularly under the ambit of Consumer Protection Act is made here. Websites and online literature has been made. So far, some research scholars have undertaken research work on the right to health care, mental health, informed consent, law and medical ethics, law and medicine and medical jurisprudence etc.,

Review of literature is one of the important principles of research process which exposes the researcher to the various studies and information relating to the concerned research area. Survey of related literature is an essential pre-requisite to actual planning and execution of any research project. It helps the researcher in avoiding duplication on the one hand and in getting benefit from similar studies on the other in respect of methods adopted and devices used in the collection of data and their organization and interpretation. For all these reasons, researcher has to go through the available relevant literature before actually commencing the work of his own research.

The history of consumer movement is of recent origin only. The concept of consumerism can be traced back to Adam Smith. In his 'Wealth of Nations', Smith pointed out flaws in capitalism. The United States has been a leader in consumerism in the world since consumers first began to recognize that they had rights in the market place. There is no complete study made on "Medical Negligence and Consumer Forum and its recent trends" so far. This study attempts to present a complete dossier on the hitherto neglected subject.

**Shau, G.N.**, in his article 'Consumer Problems in India', explained that consumerism concerns the entire society as everybody is a consumer of some kind or the other of goods/services. According to him, the problems of consumers in India are: over charge, under weight, adulteration, imitation, defective packing and bad services by fraudulent, deceptive, unethical and unscrupulous businessmen. The problems are accentuated by the illiteracy, ignorance and lack of awareness of the majority of Indian consumers about their rights. He had concluded that consumers can be relieved of this menacing problem, if both the government and general public join hands with all sincerity.<sup>29</sup>

**Subramanyam, D.A.R.** and **M.S. Narayana** in the article, 'Consumer from Democracy to Dominancy', identified the loopholes in the administrative machinery, weaknesses of the co-operatives, apprise the efforts taken by some of the

voluntary organizations and suggest ways and means to strengthen them.<sup>30</sup>

**Gurbax Singh**, in the book 'Law of Consumer Protection' has traced the development of consumer protection movement and the history of consumer legislations in different countries of the western world. He had presented a model petition of complaint and appeal etc., for the guidance of consumers. He had provided comprehensive information on all aspects of the consumer protection and is of great assistance, value and utility to the consumer, individual consumers as well as to the legal profession. Though this pioneer work had filled a void in the legal literature relating to consumer protection, it did not deal with the concept of consumer awareness as such.<sup>31</sup>

**Gurjeet Singh** in his book on 'The Law of Consumer Protection in India' had covered all aspects of consumer protection in his book and it is of great assistance, value and utility to consumer organizations, individual consumers as well as to the legal profession.<sup>32</sup>

**Avtar Singh** in his book 'Law of Consumer Protection : Principles & Practices' in the chapter "different kinds of consumer goods and services" had analysed them subject wise on the basis of decisions delivered by the National Commission and State Commission. Some practical notes had also been provided for guidance: viz., how different district forums are to be approached for the purpose of filing complaints and appeals and for getting the orders executed.<sup>33</sup>

**Jag Parvesh Chandra** in the article, 'Consumer Rights Day' had highlighted that the consumer in reality is not the 'king' because he is mostly at the mercy of market forces and advertising hype.<sup>34</sup>

In the landmark **Bolam** case<sup>35</sup>, it was held that in the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do and if that failure or the doing of that act results in injury, then there is a cause of action.

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the

<sup>29</sup> G.N.Sahu, "Consumer Problems in India", India Journal of Marketing, Vol. XI, May 1981, pp.3-8.

<sup>30</sup> D.A.R. Subramanyam & M.S. Narayana, "Consumer from Democracy to Dominancy", Indian Journal of Marketing, 1990, p. 17.

<sup>31</sup> Gurbax Singh, "Law of Consumer Protection", Bharat Law Publications, Jaipur, 1993, p.71.

<sup>32</sup> Gurjeet Singh, "The Law of Consumer Protection in India : Justice with in Reach", Deep and Deep Publication, New Delhi, 1996, p. 26.

<sup>33</sup> Avtar Singh, "Law of Consumer Protection : Principles & Practices", Eastern Book Co., Lucknow, 1997, p. 112.

<sup>34</sup> Jag Parvesh Chandra, "Consumer Rights Day", Consumer Voice, Vol. 1, April 1999, p. 37.

<sup>35</sup> *Bolam vs. Friern Hospital Management Committee*, (1957) All. E.R. 118.



average skill of an average competent man exercising that particular art.

The **Bolam Test** had gained acceptance in many judiciaries and were cited and dealt with in several judicial pronouncements. It was well received in every country and has been accepted as a general norm to measure medical negligence.

In the context of medical negligence the Honorable Supreme Court of India has laid down the law in *Jacob Mathew vs. State of Punjab*<sup>36</sup> that "A doctor accused of rashness or negligence may not be arrested in a routine manner simply because a charge has been levelled against him. Unless his arrest is necessary for furthering the investigation or for collecting a evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld. A simple lack of care, an error of judgment or an accident is not proof of negligence on the part of a medical professional."

In *Post Graduate Institute of Medical Education and Research, Chandigarh, vs. Jaspal Singh & Ors.*,<sup>37</sup> it was laid down that the failure to perform the duties with reasonable competence amounts to negligence.

Hon'ble Supreme Court of India in *Kusum Sharma & Ors. vs. Batra Hospital and Medical Research Centre & Ors.*<sup>38</sup>, ruled that "as long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence".

In *Achutrao Haribhau Khodwavs. State of Maharashtra & Ors.*<sup>39</sup>, the Apex Court held as under:

"A doctor will not be guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art and if he has acted in accordance with such practice then merely because there is a body of opinion that takes a contrary view will not make him liable for negligence."

### Medical Negligence

Medical negligence simply amounts to the absence of care on the part of a doctor in discharging his duties to his patient. In other words, breach of duty by a medical practitioner that results in an injury to a patient is what is known as "medical negligence" or "medical malpractice" in the terms of American and English laws. Medical negligence tantamount to a medical professional's "failure to exercise the skill, care, and prudence causing injury to his patient". It is an improper conduct on the part of any member of the medical profession in discharging his duties.<sup>40</sup> Medical negligence assumes many forms. They are viz., failure to

attend a patient with due care and caution, refusal to treat a patient in emergency cases, failure to extend post-operative treatment, error in conducting pathological tests, error in clinical judgments, conducting operation without administering proper anesthesia or without informed consent, transfusion of mis-matching blood, leaving a foreign object in the patient's body after operating and administering wrong medicines etc.

### Standard of Care

To assess whether a doctor has been negligent or not, the yard stick generally followed would be that of an ordinary competent person exercising ordinary skill in that profession. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or yardstick for judging the performance of the professional. This proposition is what is popularly called Bolam's test.<sup>41</sup> Accordingly when a doctor strictly follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence.

The standard of care of a medical professional was observed and clarified in *Bolam vs. Friern Hospital Management Committee* in the following words "where you get a situation which involves the use of some special skill or competence then the test as to whether there has been negligence or not the test of man on the top of clapham omnibus, because he has not got this special skill, A man need not possess the highest expert skill. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".

The Bolam test has been used to define the standard of care and to determine the negligence in several important medical negligence cases in India like *Achutroa vs. Hari Bhau Khodwa and Others vs. State of Maharashtra and Others, Poonam Verma vs. Ashwin Patel and in Numerous cases in NCDRC and SCDRC.*

### Health Care and Deficiency in Service

The medical profession or medical practice is one of the dimensions of "healthcare" or "health care delivery". With the entry of corporate sector into the health care arena, a patient who avails of medical treatment in the hospital is termed as a "consumer" or a "recipient". The hospital is called "service-provider". The treatment (medical or surgery), diagnosis and consultation is considered a "service". Any deficiency in medical service may be termed as medical negligence within the meaning of the Consumer Protection Act.

The Supreme Court in *Dr. Laxman Balkrishna Joshi vs. Dr. Trimbak Babu Godbole & Anr.*<sup>42</sup> case has laid down the criteria for determination of the professional duty of a medical man as follows:

<sup>36</sup> AIR 2005 SC 3180.

<sup>37</sup> (2009) 7 SCC 330.

<sup>38</sup> AIR 2010 SC 1052, p. 1058.

<sup>39</sup> (1996) 2 SCC 634.

<sup>40</sup> Tapas Kumar Koley, *Medical Negligence and the Law in India : Duties, Responsibilities, Rights*, (2010), OUP, Delhi, India, p. 62.

<sup>41</sup> *Bolam vs. Friern Hospital Management Committee*, (1957) 2 All Eng. 118. In India the principle of Standard of Care was laid down by the Supreme Court in the case *Dr. LaxmanBalakrishna Joshi vs. Dr. TrimbarkBabu, Goldbole* AIR 1969 SC 128 and *A.S. Mittal vs. State of U.P.* AIR 1989 SC 1570.

<sup>42</sup> AIR 1969 SC 128.

"A person who holds himself out ready to give medical advice and treatment impliedly undertaken that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, 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 /or (iii) a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care".

The Supreme Court in *Indian Medical Council v. V. P. Shantha* (1995) decisively included the Medical profession under Section 2 (1)(O) of the Consumer Protection Act (CPA) which includes in its ambit all medical services offered by the private and government doctors and hospitals. It exempts only those hospitals and the medical practitioners of such hospitals, which offer free service to all patients at all times.

### Consent in Medical Practice

Consent is an expression of autonomy and represents the right of a patient to make a conscious decision in a medical matter concerning him. This is an area of profound importance in contemporary medical science and health care.<sup>43</sup>

The doctrine of informed consent aims at giving sufficient information to a patient to enable him to make a knowledgeable and informed decision about the use of a drug, device or procedure in the course of treatment.<sup>44</sup> It also includes the duty to warn a patient of any likely harm in the course of treatment.

### Role of Expert Witness

The court held that it was not necessary in all cases to seek expert opinion before proceeding with the matter. In the Case of *V. Kishan Rao vs. Nikhil Super Specialty Hospital*<sup>45</sup> the Apex court held that expert witness opinion should be taken in complicated or criminal negligence cases only.

### Res ipsa loquitur

In some situations the complainant can invoke the principle of *res ipsa loquitur* or "the thing speaks for itself". In certain circumstances no proof of negligence is required beyond the accident itself.<sup>46</sup>

Normally, the liability arises only when the plaintiff is able to discharge the burden on him of proving negligence. However, in some cases like a swab left over the abdomen of a patient or the leg amputated instead of being put in a cast to treat the fracture, the principle of 'res ipsa loquitur' (meaning thereby 'it speaks for itself') might come into

play. The following are the necessary conditions of this principle.

### Hospital Liability

Hospital liability with respect to medical negligence can be direct liability or vicarious liability. Direct liability refers to deficiency of the hospital itself in providing safe and suitable environment for treatment as promised. Vicarious liability means the liability of employer for the negligent act of his employees.<sup>47</sup>

### Contributory Negligence

The patient, by his own lack of care, contributes to the damage caused by the negligent or wrongful act of the defendant.<sup>48</sup>

### Composite Negligence

Composite negligence would arise when negligent acts or omission of two or more treating doctors have caused damages to a patient. In such a case, the said patient does not contribute to the mishap or to the damages and as such, he is entitled to sue all or any one of the negligent doctor for damages. Therefore, two or more persons owe a duty of care towards any individual.

### Criminal Liability

Criminal negligence is a form of negligence that arises when the doctor shows gross lack of competence, or gross inattention or inaction, gross recklessness or gross negligence in the selection and application of remedies. A criminal complaint can be filed against the hospital or doctor for medical negligence under Sec. 304A of the Indian Penal Code, 1860, which deals with the crime of Causing Death due to negligence or rash acts.<sup>49</sup> Criminal liability involves an extreme departure from the ordinary standard of care.<sup>50</sup> It amounts to an utter disregard for life and safety of patients and conduct deserving of strong punishment. Consequently the degree of negligence is a material factor.<sup>51</sup>

<sup>43</sup> Dogra, T.D., (ed), Abhijith Rudra, *Lyon's Medical Jurisprudence & Toxicology*, Delhi Law House, New Delhi, 2007.

<sup>44</sup> *Samira Kohli v. Prabha Manchanda* (2008) 2 SCC 1.

<sup>45</sup> (2010) 5 SCC 513.

<sup>46</sup> Modi, A., & Karmakar R.N., (ed.), *Textbook of Medical Jurisprudence & Toxicology*, 3<sup>rd</sup> ed., Academic Publishers; Kolkata, 2008, p. 21.

<sup>47</sup> Karmakar R.N., *Mukharjee's Forensic Medicine and Toxicology*, 3<sup>rd</sup> ed. Academic Publishers, Kolkata, 2008, p. 47.

<sup>48</sup> Krishnan Vij., *Textbook of Forensic Medicine & Toxicology Principles & Practice*, 3<sup>rd</sup> ed. New Delhi, 2011, p. 61.

<sup>49</sup> *Poonam Verma v. Ashwin Patel* (1996) 4 SCC 332.

<sup>50</sup> Narayan Reddy, K.K.S., Murthy, K. Suguna Devi, *The Essentials of Forensic Medicine & Toxicology*, Hyderabad, 25<sup>th</sup> ed, 2013, p. 18.

<sup>51</sup> Rights - Tapas Kumar Kobey, *Medical Negligence and the Law in India : Duties, Responsibilities*, OUP, Delhi, 2010, p. 32.