CHAPTER V

CRIMINAL LIABILITY OF MEDICAL PROFESSIONALS

5.1. Iran

5.1.1. Negligence as a crime

According to Iranian criminal law Medical negligence which resulted in bodily injuries is known as Jenayat (جنایت). Jenayat (جنایت) is governed by the Penal Code and not by the law on Zemaneh Gahri. A person must have known what the crime is and its possible punishment. Iran has a parliamentary process which has a formal penal code written and based upon the principles of Islamic Law.

Crimes under Iranian Penal Code are divided into five major categories:

1. Had (حد) Crimes (most serious)
2. Ta'zir (تعزیر) Crimes (least serious)
3. Qisas (قصاص) Crimes, revenge crimes restitution
4. Diya (دية)
5. Deterrent punishment (محاسبتهای باز دارندگان)

Had crimes are the most serious under Iranian Penal Code, and Ta'zir (تعزیر) crimes are the least serious. Some Western writers use the felony analogy for Had (حد) crimes and misdemeanor label for Ta'zir (تعزیر) crimes. The analogy is partially accurate, but not entirely true. Iranian legislature states that:

The punishments laid down in this law are [divided into] five categories:

1. Islamic punishment Had (حد) is used in the text and will be defined later, since in some cases there is no English equivalent for this term, in order to clarify the

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meaning, in some instances this term will also be used in translation].

2. QHESAS (قصاص) is the term used in the text which can also be translated as retaliation.

3. Mulcts [DIYAT (ديات) is the term used, which can equally be translated as compensation].

4. Ta’zirat [singular Ta’zir (تعزير), there is no equivalent term in English for this term but it is defined later. The same term will be used in the translation].

5. Deterrent punishments. (مجازاتتهای بار دارند) ²

Book two of the Islamic Penal Code is devoted to Hodoud (plural of Had). Had is defined as a punishment in which its form, extent and character is defined in sharia’ laws. Had crimes are those which are punishable by a pre-established punishment found in the Quran. These most serious of all crimes are found by an exact reference in the Quran to a specific act and a specific punishment for that act. There is no plea-bargaining or reducing the punishment for a Had crime. Had crimes have no minimum or maximum punishments attached to them.

Islamic punishment (HAD) is defined as a punishment for which the extent, manner and mode is prescribed by Islamic Jurisprudence.³

Qesas is defined as a punishment where the criminal’s sentence must be equivalent to their crime. This is the second type of punishment in Iranian criminal law. This is where the perpetrator of the crime is punished with the same injury that he caused to the victim. If the criminal killed the victim, then he is killed. If he cut off or injured a limb of the victim, then his own limb will be cut off or injured if it is possible without killing the criminal. Islamic Law has an additional category of crimes that common law nations do not have. A Qesas crime is one of retaliation. If you commit a Qesas crime, the victim has a right to seek retribution and retaliation. The exact punishment for each Qesas crime is set forth in the Quran. If you are killed, then your family has a right to seek Qesas

² Iranian Penal Code, Article 12.
³ Id, Article 13.
punishment from the murderer. The difficulty of establishing guilt is reducing the opportunities for carrying out the punishment, and protecting the accused. In this vein, we see the principle that punishments are waived in the presence of doubt, and that the benefit of the doubt is always given to the accused. Some prescribed punishments are even waived on the grounds of repentance, as we can see in the case of highway robbery. This is also seen in the permissibility of pardon in the case of retribution and the fact that pardon is encouraged and preferred. The severity of the punishment may result to discourage the crime and limit its occurrence.

*QHESAS* is the punishment to which the criminal is sentenced to and is equal to his/her crime.\(^4\)

Book four of the Islamic Penal Codes is devoted to *Diya* (fines and blood money). *Diya* is paid to the victim's family as part of punishment. *Diya* is an ancient form of restitution for the victim or his family. The family also may seek to have a public execution of the offender or the family may seek to pardon the offender.

*Mulct* is the fine determined by Islamic Jurisprudence for the crime.\(^5\)

*Tazir* (تعزیز) crimes are less serious than the *Had* (حد) crimes found in this system of law, they may analog of misdemeanors, which is the lesser of the two categories felony and misdemeanor of common law crimes. *Tazir* (تعزیز) crimes can and do have comparable minor felony equivalents. These minor felonies are not found in Iranian criminal law. *Tazir* is defined as a sentence or punishment whose crime is not fixed by the Iranian Penal Code, for doing disobedience or offence which is not inflicted by the *Had* and *Diya* punishment.

*Ta'zir* is the punishment whose extent and manner is not determined by Islamic Jurisprudence and it's extent and manner is left to the discretion of the judge such as imprisonment, fine and lashes. The number of lashes must be less than the

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\(^4\) Id, Article 14.

\(^5\) Id, Article 15.
The government has the right to impose this *Tazir* rule with its detailed relevant facts fixed, including the rate of punishment to be received by the criminals, which must be in accordance with the degree of offence done. *Tazir* is some discretionary punishment.

A deterrent punishment is the punishment of chastisement laid down by the State in order to safeguard law and order, interests of the society such as imprisonment, fine, closure of the business premises, cancellation of license, deprivation from social rights, banishment to certain places, inhibition of residence to certain areas and the like.\(^7\)

They are the broadest category of punishments, because the crimes that have fixed punishments are few in number and all other crimes fall under the scope of this last category. They are the most flexible type of punishment, because they take into consideration the needs of society and changing social conditions. Consequently, they are flexible enough to realize the maximum general benefit to society, effectively reform the criminal, and reduce the harm that he causes. Mohammed Salam Madkoar, who was the head of Islamic Law at the University of Cairo, makes the following observation:

*Tazir* punishments vary according to the circumstances. They change from time to time and from place to place. They vary according to the gravity of the crime and the extent of the criminal disposition of the criminal himself.\(^8\)

*Tazir* crimes are acts which affect society, they harm the societal interest, criminal law places an emphasis on the societal or public interest. *Tazir* crimes are written down and codified by Iranian Penal Code, but judge is free to choose from number of punishment which bound by prior legislation. This gave some flexibility in what punishment the judge was able to dispense. *Ta'zir* crimes are set by legislative

\(^6\) *Id*, Article 16.

\(^7\) *Id*, Article 17.

parliament, some of the more common Ta‘zir (تاذير) crimes are: bribery, selling tainted or defective products, treason, usury, and selling obscene pictures and consumption of alcohol and so on. Medical professional negligence is subject to Ta‘zir (تاذير) crime from the viewpoint of punishment but at compensation it is under the rule of Diya (ديه). A single act is subject to two punishment; the assumption is that in professional negligence doer does not committed a single injury, his action affect society interest as much as individual interest. The effect of his conduct is of twosome character. Injuries must occur to render a person legally liable for his act and at the same time if he broke down interest of the society, rendering the doer liable to the society; his act is not restricted to a certain individual who incurred the injury. Iranian legislator defined each sort of liability separately; as such it allocated special crimes into sections for homicide, crimes less than homicide, blood money, adultery, banditry. Their assumption is the real similarity between the effects of the same conduct and thereon their theory is based.

Diya is the prescribed blood money or wergild paid in compensation for a wrongful death or certain other physical injuries. The system of Diya is similar to other forms of compensation prevalent in Roman, Germanic, Anglo-Saxon, and other ancient legal systems. Its inception, however, is in the system of private vengeance prevalent in pre-Islamic Arabia. Tribes in pre-Islamic Arabia would at times renounce their right to vengeance in return for compensation often in form of camels or young brides. While maintaining the basic structure of pre-Islamic Diya, Islamic law modified the practice in significant respects by setting restrictions on the right to punishment and limiting Diya to specific types of goods. There is a broad agreement on the basic theory of Diya among Islamic schools of law, which is usually discussed together with Qeṣūṣ; but this field is marred with disagreements over details. In the Shiite system of law there is broad agreement on the basic theory of Diya, often discussed together with Qeṣūṣ, but disagreements are common over details. The focus here is on the Jafari School of the

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12 J. N. D. Anderson, Homicide in Islamic Law, pp. 811-12, BSO (A) S, 13/4, 1951.
Shiite law. All schools agree that the Diya of a free male Muslim is one hundred camels but disagree over whether Diya can be paid in other types of goods or in money. The Shiite school maintains that the full fixed Diya is of six primary types: one hundred camels of certain ages, depending on the offense, two hundred cows, one thousand sheep, one hundred two-piece garments, one thousand dinars in gold coinage or ten thousand dirham’s in silver coinage. The offender or the party bearing the financial liability chooses the type of Diya, but in case of intentional crimes a settlement has to be reached by both parties. A minority opinion argues that the choice of Diya should be determined according to the trade of the offender for example a goldsmith would pay in gold coinage.\(^\text{13}\) The Shiite school as well as the Hanafites and Malikites hold that in case of intentional homicide or injury the remedy is Qeṣāṣ, punishment. Diya is not a co-equal alternative. Consequently, if the heirs of a victim forgive the offender an automatic right to Diya does not arise. Nevertheless, Diya could be payable through a settlement (ṣolhá) in which the offender agrees to pay an amount that may be more or less than the specified Diya\(^\text{14}\). Schools that consider Diya to be a co-equal alternative to Qeṣāṣ do not require that the offender consent to paying Diya; the choice is entirely that of the victim or the heirs.\(^\text{15}\) Diya, however, might become the only legal recourse if certain legal deficiencies preclude the application of punishment. For example, if punishment cannot be enforced because strict equality is not achievable, the only option other than an outright pardon is the right to full or partial Diya. Accordingly, no punishment is admitted in the case of fractured bones or if experts testify, in a case not involving murder, that punishment is likely to endanger the life of the offender. Furthermore, a right to Diya is the only recourse if punishment is not possible because of certain evidentiary deficiencies.\(^\text{16}\) Diya is also the only legal remedy in the case of accidental injuries. Whether a rule of strict liability or negligence applies to tort liability is a debated

\(^{13}\) Abd-al-ʿAzīz Ebn al-Barrājī Tārābolsī, Mohaḏḏab, II, p. 357, Tehran, Iran, 1986.


\(^{15}\) Zoḥaylī, pp. 286-88.

\(^{16}\) Am Zoḥaylī, al-Feqḥ al-eslāmī wa adellatoho, (VI, Damascus, 1985) pp. 77-80.
Islamic law divides injuries, whether intentional or accidental, into four groups:

1. *Arsh* (ارش), an injury that involves the total loss of an organ;

2. *manāfe* (منفعت), an injury that involves the total loss of a physiological or intellectual function;

3. *šejāj* (سجاح) an injury to the face; and

4. *jorūhá* (جراحات) injuries to the body.

The full amount of *Diya* is due for a loss of an organ or function, the first two types. Therefore, a loss of both legs, for example, would elicit one full *Diya*. A proportional *Diya* is due for a partial loss. Hence a loss of one arm or leg would elicit half a *Diya*. A crippling of both legs would elicit two thirds of the *Diya*. Whether several full *Diya* could be compounded for the loss of several organs or functions is a contested issue. A specified partial *Diya* is prescribed in the case of *šejāj*. Most *jorūhá* injuries do not have a specified prescribed *Diya*. Rather, an assessment of the actual loss suffered (*ḥokūmat ʿadal حكومت عدل*) is applied, determined by reference to the market value of a slave before and after a similar injury. In comparison to their Sunni counterparts, the province of *ḥokūmat ʿadal* is somewhat restricted in Shiite law. Shiite law specifies the *Diya* of several *jorūḥ* that would be covered by *ḥokūmat ʿadal* in Sunni law.

Shiite sources state that the terms *Arsh* (ارش) and *ḥokūmat ʿadal* are synonymous. Both terms refer to injuries that do not have a specified *Diya*. Most Sunni sources state that *Arsh* refers to money payable for a bodily injury that has a specified partial *Diya*. Nevertheless, Shiite sources in actuality often use *ḥokūmat ʿadal* to refer to compensation for surplus or excess injuries. For instance, if a victim’s hand is severed above the wrist, he is entitled to *Diya* for the hand up to the wrist and to a *ḥokūmat ʿadal*.

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for any loss above the wrist. There is much disagreement over the Diya of a Christian, Jew, or Zoroastrian. The majority opinion in the Jafari school maintains that it is eight hundred Dirham’s. The Jafari school adopted another unique position in prescribing several specific Diya for each stage of fetal development (called reamble). Other schools prescribe a single Diya for an unborn child but disagree as to which stage it becomes due. The Jafari school was also the only school that set specified Diya for the mutilation of a corpse.

In deliberate and quasi-deliberate offenses a particularly heavy Diya (Diya mōallaḍa 内马尔 is prescribed. The ages and sexes of the camels are varied so that the Diya will be of higher value. Additionally, the offender is personally liable for the Diya, which is payable in one year in the case of a deliberate offense and in two years in the case of a quasi-deliberate offense. Other schools hold that the offender is not personally liable for the Diya in a quasi-deliberate offense and prescribe different grace periods for the payment. In an accidental tort the al-aqilah of the offender is liable for the Diya, which is payable in three years unless the amount payable is one-third of the full Diya payable in one year.

Although existing in various forms in several ancient legal systems, the Aqilah grew out of the tribal organization of pre-Islamic Arabia, where the tribe of the offender was responsible for any blood money incurred by the offender. There is much disagreement in Islamic law on what constitutes the Aqilah of a person and on the extent of its liability. In Shiite law the majority view is that the Aqilah of a person is the male relatives from the father’s side. This includes brothers, uncles, and cousins but not sons or fathers. The Aqilah cannot be held liable for any deliberate or quasi-deliberate offense or for any amount of money due by settlement or admission. They are only responsible for an amount that exceeds one-twentieth of the Deya. There are differences of opinion over how the money is to be apportioned among the members of

the *al-aqilah* and as to whether the public treasury (*bayt al-māl*) or the offender becomes liable if the *Aqilah* (*علاقه* الحل) cannot pay. The *Aqilah* (*علاقه* حل) of *ahle ketab* (*اهل كتاب* كتب) is the public treasury because, according to Shiite sources, they pay poll tax (*jezya* جزية).

The public treasury is also responsible for the *Diya* of a person found killed in a public place such as a public road or mosque. However, if the deceased is found with evidence of wrongdoing in a locality or on private property, resort is made to *qasāma* (قضاء), which is similar to the ancient legal procedure of compurgation. The residents of the area are asked to take fifty oaths that they neither killed the deceased nor know who the killer is. According to Shiite law and the majority of Sunni schools, if there is a lawat (independent evidence of wrongdoing such as known hostility or any material evidence), then the locality or the *al-aqilah* (*علاقه* حل) of the owner of the property is responsible for the *Deya*. If there is no lawat, then taking the oaths shields the suspects from liability and the public treasury pays the *Deya*. Deya works in a manner similar to an indemnity system as it reduces uncertainty about the future. Additionally, the distribution of liability burden through *al-aqilah* (*علاقه* حل) system not only reduces the amount of the burden of an injury but also allows the medical professional to form better expectations of his or her share of the compensation.

The abolishment of the secular Penal Code (*Ganoun-e jaza* قانون جزا), which had been adopted from the French code since the 1906-11 Constitutional revolution (q.v.), and the establishment of *Diyat* (ديثات), *Hodoud* (حدود), *Qeṣṣa* (قصاص), and *Tazirat* (جزاءات), the four pillars of Islamic penal Code, has constituted the main agenda of Iran for reconstruction of the Judicial system since its inception in 1357 Š./1979. Thus, on 24 Azar 1361 Š./15 December 1982, the Islamic penal Code of blood money (*Ganoun-e...* 1986, II) pp. 453-516.


mojazat-e eslami-e Deyat (قانون مجازات اسلامی دیات), comprising 210 articles, was ratified by the Majles (مجلس). It was a codified and revised version of a chapter on Diyat in Ayatollah Khomeini’s book. The Code of Diyat had been enforced until 7 Azar (آذر) 1370 Š./28 November 1991 when the Discretionary Council (Shouri maş laḥat-e neẓ am (شورای مصلحت نظام) approved the new Islamic Penal Code (Ganoun-e mojazat-e eslami-e (قانون مجازات اسلامی), comprising Hodoud, Qeṣ aṣ, Diyat, and Tazirat, that had been ratified in July 1991 by the Majles. The fourth book of the Code (Arts. 294-496) is on Diyat. Article 294 defines Diya as a property to be given to a victim of crime or to his guardian (wali) or blood warden (wali-e dam) in compensation for his life or bodily injuries and defects. Article 295 defines three major subjects of Diya:

i. Non-deliberate crime (ḵaṭ a-e maḥż);

ii. Quasi-deliberate crime (shebh-e amd);

iii. And deliberate crime (amd); which is primarily the subject of Qeṣ aṣ.

The Deya of the life of a male Muslim includes one of the following options: either one hundred healthy camel, or two hundred healthy cows, or one thousand healthy sheep, or two hundred of new Yemeni cotton garments (Holla خلی), or one thousand dinar (gold coin), or ten thousand dirham (silver coin). The Diya of the life of a female Muslim is

28 M.-Ḥ. Waṭ anī, (ed). Majmūʿ aye kāmel-e qawānīn wa moqarrarāt-e jazāʿī (Tehran, Iran, 1985).
30 Qorbānī, Majmūʿ aye kāmel-e qawānīn-e jazāʿī (5th ed Tehran, Iran, 1993).
31 Supra n 2, 2, Article 297 “Mulet (or compensation) for a Muslim man is one of the following six mulets and the murderer can choose whichever [he/she] wishes, (but) combining them is not permissible:
a) one hundred camels which are healthy and without deficiency and which are not too slim.
b) two hundred cows which are healthy and without deficiency and which are not too slim.
c) one thousand sheep which are healthy and without deficiency and which are not too slim.
d) two hundred flawless cloths from Yamane.
e) one thousand defectless Dinars [a currency used many years ago]. Every Dinar is equal to 3.51 grams of gold. [measurements are old fashioned, it is impossible to find exact equivalent.]
f) ten thousand defectless Derachem [another currency used centuries ago]. Every Derachem is equal to 2.45 grams of silver. [Same thing as clause e applies.]“
one-half of that of a male Muslim.\textsuperscript{32} In the case of bodily injuries the \textit{Diya} of Muslim male and female is equal up to the ceiling of one-third of the full amount of the \textit{Diya} of a male Muslim; but when it exceeds the one-third ceiling, the \textit{Diya} of female is one-half of that of the male.\textsuperscript{33} Articles 302-496 provide detailed rulings on personal responsibilities in various actions that are subject of \textit{Diya} as well as the \textit{Diya} of bodily injuries of various organs.\textsuperscript{34}

5.1.2. Medical crimes

As a general rule damages which refer to bodily injuries are subject to criminal law at Iranian liability system of law. Mere damagingly accident without bodily injuries is not criminal case. So traffic accident causing monetary damages is a civil case but if there have been a bodily injury it will be a criminal case and the same in medical cases where there is bodily injuries they are subject to criminal law and in other cases it may be subject to \textit{Zemaneh Gahri} (ضمان قهری) or contract law. Medical negligence is a legal term which refers to the failure to use the degree of care and skill expected from and required by a doctor, or other medical professionals, that result in personal injury or wrongful death. Malpractice is the result of negligence on behalf of the doctor, or other medical staff. So a physician who prescribes the wrong medication can be found negligent because all doctors are expected to possess the knowledge needed to correctly prescribe medication. The damages caused by medical negligence are personal damages which accord to the patient’s body. According to the Iranian legal system, a wrongdoer physician is liable under criminal law as much as civil law.

Though the most injuries in medical cases are bodily injuries, we may say that the medical negligence is subject to criminal law and Iranian system of medical negligence is a punitive system with its own rule and concept of punitive damages. The Iranian

\begin{footnotesize}
\begin{enumerate}
\item Id., Article 300 -The mulct for a murdered Muslim woman is half of the mulct for a Muslim man no matter if the murder is premeditated or unpmeditated.
\item Id., Article 301 -Up to the point where the amount of mulct is one third of full mulct, the mulct for men and women is equal [this refers to mulcts other than that for murder]. When the amount of the mulct is more than one third of full mulct, the mulct for a woman is half of that for a man.
\item F. Ş aleh i, \textit{Diye ya mojażat-e mali}, (Tehran, Iran, 1371 Š./1992).
\end{enumerate}
\end{footnotesize}
legislator considered medical negligence as a crime and enacted it in the Penal Code; the reason is that according to the rules of the Penal Code no one can cause harm to body or mind of other. The subject matter of physician activity is human body. There is no specific and distinct law which applies to medical accidents, but Iranian legal system has a very huge of legal literature and terminology which defined and analyzed the notion of liability under civil law which applies to medical negligence too. In order to discuss legally the subject matter of medical negligence liability we have to search in Iranian Penal Code which identify physician's liability and on the other hand determined the method of redress. As it is obvious in criminal law intent has an essential role, there is no crime without mental element. The term of tagsir(تشیر) and also the term of Quasi-tagsir(قصیر) and khata(خطا) are used to designate the obligations which do arise from civil liability, contracts, or criminal offences. The concept of liability in cases of medical professionals is embodied in Articles 316,317,318,319 and 322 of the Iranian Penal Code. Physician, who by act or omission causes injury to patient, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a Jenayat(جنایت) and is governed by the provisions of these Articles. Liability for Jenayat(جنایت) doctrine under these articles requires the following conditions:

(1) An unlawful act or omission amounting to a fault or negligence, imputable to the defendant;

(2) Damage or injury to the plaintiff;

(3) Such damage or injury being the natural and probable, or direct and immediate consequence of the defendant’s wrongful act or omission; and

(4) There being no pre-existing contractual relationship between the plaintiff and defendant.

Article 316 of the Penal Code defines negligence as Jenayat(جنایت). Jenayat means cause wound, which is the act or omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the persons, of the time and of the place. Iran has a religious Penal Code that follows the teachings of Shiite branch of
Islam. The law applicable to medical negligence in general is traditional rules of Islamic law, and there is no a specific law for medical negligence expect just two main articles in Penal Code, in first Article legislatures regard physician completely liable to damages caused by their treatments it states that;

when a medical doctor, even if it is a skilled one, treats [a patient] directly or orders the treatment to be made, even if the treatment is done with the permission of the patient or [his/her] guardian, and the treatment results in loss of life or causes a defect, that medical doctor is responsible [and hence should pay for the damage] \(^{35}\)

While, the later Article let physicians go free by receiving patient’s informed consent, it states that;

If a medical doctor or a vet, prior to treatment of a person or an animal, obtains certification of non-responsibility from the patient or patient's guardian or owner of animal and during the course of treatment harm is done, [he/she] will not be responsible. \(^{36}\)

Article 319 is based upon compulsory liability system whereas the foundation of Article 322 appears to be of contractual character. Because these articles have their validity and legitimacy, we should consider them tantamount. The articles lead us to a clear conclusion that the function of those two articles are not the same, Article 319 has contoured to protect public interest whereas Article 322 has its look to contractual parties and their intent. The incurrence sphere of these two articles is not the same, this interpretation is not upon the Iranian traditional thoughts, it has based up on the main goals of Iranian new legal versions like Iranian tort code. Conveying the risks of medical procedures appropriately depends on successful communication between physicians and their patients. Many patients know little about medical science or the roles and responsibilities of physicians, and many are unconscious or amnesic during much of their time with their illness. The most successful medical procedures are those that have the least impact on patients, leaving them lucid, pain-free, without nausea and sometimes slightly euphoric, so it is understandable if patients occasionally fail to appreciate the

\(^{35}\) Supra n 2, Article 319.
\(^{36}\) Id, Article 322.
importance of the care they have received and therefore the context of the associated risks. The preoperative consultation provides opportunity not only for disclosure of risks but also for explanations, reassurances and the development of rapport. Iranian criminal law is not regarded as a single, unified branch of the law. It is discussed in three separate chapters:

i. Provisions regarding offences against persons, i.e. homicide and wounding, subdivided into;

a) Those regarding retaliation (تقصاص Qesas) and

b) Those regarding financial compensation (ديه Diya).

ii. Provisions regarding offences mentioned in the Quran and constituting violations of the claims of God (حق الله Hage o Allah), with mandatory fixed punishments (حد حدود Hadd, plural Hudud); these offences are:

a) Theft
b) Banditry
c) Unlawful sexual intercourse
d) The unfounded accusation of unlawful sexual intercourse (slander)
e) Drinking alcohol
f) Apostasy (according to some schools of jurisprudence).

iii. Provisions concerning discretionary punishment of sinful or forbidden behavior or of acts endangering public order or state security (تعزیرات Taziraat).37

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37Iranian Penal Code, Article 12 -The punishments laid down in this law are [divided into] five categories:
1. Islamic punishment [HAD is used in the text and is defined later, since in some cases there is no equivalent English for this term, in order to clarify the meaning, in some instances this term will also be used in translation].
2. Talio [GHESAS is the term used in the text which can also be translated as retaliation].
3. Multa [DIYA is the term used, which can equally be translated as compensation].
4. Ta'zirat [singular Ta'zir, there is no equivalent term in English for this term but it is defined later. The same term will be used in the translation].
5. Deterrent punishments.
According to Iranian criminal law, treatment without patient’s consent is considered as a *Jenayat* (جنایت) if it caused bodily injuries.\(^{38}\) Article 60 of Iranian penal code pointed to the doctrine of presumption of innocence, adds;

> If physicians, before they start surgery or treatment, obtain permission of patients’, or their representative’s consent or the owner of animal they are not liable to compensations or financial damages, or maim, in immediate cases which there is not possible to obtain permission, physician is not liable and is not responsible for damages.\(^{39}\)

Iranian legislature has forbidden physician to go to treatment without patients authorization. It is based on this argument that the res work of physician is human body, this res is respectable in the eye of law and is under protection of criminal law, nobody has right to encroach this res, the owner of this res has a legal right to pursue whom overrun his property, whether the abuse person is a physician.\(^{40}\) So the function of the patient permission should consider into this confine and not more. It is obvious that persons have no unlimited reign on their body hence suicide is a crime and contracts for sale of limbs are not valid contracts. Traditionally Iranian courts recognized a general obligation for honesty in protecting people from pecuniary loss through fraud or deceit. The fact is that even quite careful people take less trouble over what they say than what they do, especially when expressing opinions on social or informal occasions rather than in their business or professional capacity. Where the statement which represented has lacked an honest belief in the truth of the statement it constitutes a false representation made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. However, motive is immaterial, so that one may be liable of fraud, even though no harm was intended. Recklessly means consciously indifferent to the truth and not merely gross negligence. Where the physician deliberately shuts his eyes to the facts, purposely abstains from investigation, or consciously lacks sufficient information to support an assertion couched in positive and unqualified terms, the conclusion is open.

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\(^{39}\) *Supra* n 2. Article 60.

\(^{40}\) Husseini, Sayid Mohammad, *Al Figh* , (section of diyyat, vol 90) p 74-76.
that his belief is not really honest. Essentially there are five elements which a plaintiff
must prove to succeed in establishing fraud,

a. A misrepresentation of fact

b. The misrepresentation may be written, oral or by conduct.

c. The physician who makes the statement must know that it is false, or be recklessly
indifferent to its truth or falsity.

d. The patient whom the statement make a must intend that it be relied upon. It is
sufficient if the plaintiff is one of a class which the maker of the statement intended
should rely on it.

e. The plaintiff must have been induced to act to his detriment in reliance on the
misrepresentation. A patient's knowledge of the falsity will not necessarily defeat the
claim. It is no defense that the plaintiff was able to check the accuracy of the
representation but failed to do so.

As a professional rule mere silence or passive failure to disclose the truth are actionable,
even if they are not deceptive. However, a half truth may be just as much a false
representation as a complete lie. If a representation is true when made, but later becomes
false, the maker of the statement must communicate this fact to the patient.

5.1.3. Criminal intention

Iranian medical negligence is based upon a comprehensive and extensive theory of
compensation which simply have been just accepted and adopted by public conscience.
Without any pre-condition to prove intend of guilty person, where there occur damages it
must be compensate\(^4\). In order to achieve this purpose, Iranian legislature has supplied
two legal mechanisms, the first is the rule of \textit{Etlahf} (اتلاف) and the other is \textit{Tahsbib}(تسبیب). For criminal law intend has a very important role, intentional activities which

\(^4\)Safayi, Sayid Hassan, \textit{Hogogeh Madni}, (Tehran, Iran, 1351, vol 2) p542.
caused damages to another person are subject to criminal law. In this situation understanding of medical negligence is a little confusion. In the field of personal injuries there is no distinction between civil and criminal law corresponding to the notion of liability according to Iranian legal terminology. According to Iranian criminal law a crime is constructed from three elements:

- Physical element of crime (actus reus)
- Mental element of crime (mens rea)
- Legal element of crime

Mental element of crime must be formed before the Physical element of crime, and it must unite with the Physical element of crime, although it need not exist for any given length of time before the Physical element of crime. The Mental element of crime which referred to intent and the Physical element of crime which indicate to act may be as instantaneous as simultaneous or successive thoughts. In some cases it is must to prove a specific intent for the conviction but in majority of cases proving general criminal intent is sufficient to constitute a crime. Intent is a state of mind which referred to purpose, aim or design to accomplish a specific act. If such act is prohibited by law that state of mind is known as criminal intent, and constructed the mental element of crime.

The term specific intent is designated a special state of mind that is required, along with a physical act, to constitute certain crime at Iranian criminal law. This term is known as *Ammed* (عمد), it means that, the specified crime be committed with knowledge of the act’s criminality and with criminal intent for example in a murder case. When the assassin pointing and shooting of a firearm demonstrated that he has knowledge of criminal act and criminal intent too, so he has known as murder (*Gatleh Ammad*). An offense that does not contain the above specification termed general intend, for example take in account this particular story: Several years ago Ali had broken his left ankle while playing football. He didn’t know immediately that it was broken. It was a stress fracture and it felt like as he had merely pulled a muscle. He directed to wrap it
with an ace bandage by his mother when he go home. He didn’t think much about it. The next morning he had a feeling that it was more than just a strain. He had almost no strength in his leg and could barely walk unless he supported his ankle by his other leg. He re-wrapped his ankle with the ace wrap and headed off to the hospital. The doctor in duty notice that he was having fairly severe pain as he tried to walk. He had a few x-rays taken and according to the doctor on duty judgment there was no break. He was advised to keep the warp on it until it felt better; he was going to do that anyway. Slowly, very slowly actually, the strength returned to his grip and he felt confident enough to go try to play football once again. After all, it had been about two months that muscle or whatever had to be fully healed by now. It even felt like there was a bit thicker bone in the area too, so he was certain it was completely healed. He met his friends at the football playing area; they were going to take turn doing increasingly heavier play until they hit their limit. Then he never got to do cool, when he was on playing almost his limit. Suddenly he tumbled with accompanying crack sounded like a dried stick being broken over a raised knee. He crouched in pain for some moment as his friends mentioned how loud his whoop. Then they decided he should go to the hospital again. The same doctor that already treated him was on duty again, except this time his ankle was undoubtedly broken. The doctor mentioned that it was unusual to have calcium build up in his ankle, he reminded doctor that several weeks before he had personally assured him that it wasn’t broken, and ….In this case the doctor has made an error in last judgment which he found the error in next time by himself, his conduct referred to intentional application of force upon another which is not in itself illegal but it result unlawful, for instance consider this situation in this story: Sharzad was a forty two year old happily married woman with two children aged three and five years. One evening she was at home, enjoying with her family, her husband and children were in sitting room and watching TV. She was cooking dinner in kitchen, she missed a step between the panty and the kitchen, fell and hit her head very hard on the marble work surface. She was knocked unconscious momentarily but came too quickly. Her husband came into the kitchen and saw her looking pale and rubbing her head. He asked her what the matter was, in replay she told him that she fell
and hit her head but that felt all right now. The pain in her head subsided and she cooked food and after the meal she had a glass of wine and then put the children to bed. Suddenly after that she began to vomit, complained of a headache. Her husband was very worried about her and took her to hospital, where she was examined. The doctor on duty smelt alcohol on her breath heard her husband account of the evening as well as Sharzad’s own recollection. He came to conclusion that she was drunk and had a mild concussion. She left hospital with no painkillers or other treatment and went to bed as normal. When her husband woke up in the morning he was devastated when he realized that his wife had died in bed during the night. A post mortem examination showed that she died as a result of a brain hemorrhage. In this case doctor has done his duty but in some recklessness way, this has known as general intent not only for the simple reason that the definition does not contain any specific intent, but also it appearance legal but in fact is not lawful and damageable.

In addition in some cases it may seems unlawful initialiy but this illegality is not a general rule. Although doer intentionally causes the social harm of an offence but it is not his desire. He has no conscious object to the result. Social harm which caused by his action is not virtually certain to occur as a result of his conduct. His conduct is right and ordinary by its own subject but accidentally or mistakenly causes injury or damages. These damages are unintended damages but the law attributes them to intentional. He needs to have knowledge of the fact of attendant circumstance, but he is a willful blindness or deliberate ignorance. He is aware of probability of the circumstance or must foresee such modifying condition but he fails to investigate the fact. Iranian Penal Code stated that:

Homicide [or murder] is divided into three categories; Premeditated, quasi-premeditated, accidental.\(^{42}\)

There are three categories of state of mind in each case which are must to prove that defendant committed the mental element of crime as Iranian law may require with a

\(^{42}\) Supra n 2, Article 204.
culpable state of mind as set out in the specific statute. Iranian legislature has defined premeditated offence as followed:

Murder in the following cases is a premeditated one:
a) In the cases where the murderer intends to kill a specific person or a non-specific person from a group whether his action is inherently lethal or not but the action results in murder.
b) In the cases where the murderer intentionally makes an action which is inherently lethal, even if [the murderer] does not intend to kill the person.
c) In the cases where the murderer does not intend to kill and his action is not inherently lethal to the person [who is murdered] because of [the murdered person's] condition such as illness, disability, old age, childhood and the like, and the murderer is aware of these conditions.

Quasi- premeditated or quasi- intentional act is referred to some act which in those conduct, doer intentionally causes the social harm of an offence but it is not his desire he has no conscious object to the result.

In the following cases mulct will be paid:
a) Murder or injury or defect of limb caused by accident, that is to say, the criminal neither intended to commit the crime nor did [he/she] intend to make the action which caused the crime, like when a person intends to shoot a prey, but [he/she] hits the victim.
b) murder or injury or defect of limb which accidentally looks like intentional, that is to say, the criminal intends to make an action which is not inherently lethal but does not intend to commit the crime, like when someone beats someone else to correct [him/her] in a manner which is not inherently lethal but (he/she) dies accidentally. Or when a medical doctor in trying to cure someone by usual methods and accidentally causes death.
c) In cases of premeditated murder when retaliation is not permissible.

Note 1 -Premeditated and unpremeditated murders caused by insane people and minors are regarded as accidental deaths.
Note 2 -If a person kills another person, believing [he/she] is enforcing retaliation or if the murdered person is a person whose blood should be shed with impunity and this belief is proven to the court and later on it is proven to the court that the murdered was not subject to any of these cases, the murder will be considered to be accidental [there was no such thing in categories of murder stated in article 204]. If the murderer proves [his/her] allegation that the murdered was a person

\[43\] *Id*, Article 206.
whose blood should be shed with impunity, the murderer will neither be retaliated nor need to pay mulet. [The latter part of this note contradicts the former part].

Note 3 -If as a result of complacency, callousness or un-skillfulness or non-payment of due consideration to regulations of a matter, murder or injury occurs in such a way as if the regulations were abided by, the accident would not have occurred, the murder or injury will be considered to be premeditated.\(^\text{44}\)

As we could understand by above mentioned statutes the distinction between intentional and quasi-intentional acts comes from the line which has drawn on the basis of the intending effects of conduct, that is to say the deviation from the normal results and going in dangerous manner is a tool for measurement of the mind. It is obvious that criminal intent is a fundamental rule of criminal law to obtain a conviction. The function of this rule reflects to this notion that guilt is not based on conduct alone for a person to receive a punishment. It must show a mental state that establishes culpability. This rule is incontrovertible, but controvertible matter is the measurement by tool which we are seeking to determine the mental element of the action. It referred to the quality of the act;

In cases where a person intends to shoot an object or an animal or another person but the bullet hits another person, [his/her] action will be considered to be a simple mistake.\(^\text{45}\)

Intent is a subjective desire or knowledge in its inherent nature. It is confused by notion of motive, but they are differentiated notions in the law. Motive is the cause or reason that prompts a person to act or fail to act, but intent is just a state of mind. There are differences between wanting to kill and kill, wanting to kill is easy to prove but the intent to kill is not easy. Intent refers only to the state of mind with which the act is done. It could not be proved with direct evidence and is inferred from the fact of case. The resulted effects of the act will show the fact of case. Evidence of motive help to prove intent, and is a circumstantial evidence. Intent may be proved by circumstantial evidence and it is not prove by direct evidence. So circumstances have an important role to prove the intent to act. Act will define by its circumstances, and hence these circumstances

\(^{44}\text{Supra n 2, Article 295.}\)

\(^{45}\text{Supra n 2, Article 296.}\)
determined the quality of the act, and finally the quality of the act is the measurement tool for determining whether the act is intentional or accidental, it is not based on the fact of mind in itself.

An individual will be guilty or liable for a crime if he had committed the crime deliberately. His voluntariness is not a subjective notion but it is a medium which is placed in between action and mental state. When we could understand the language of things we should find intended injuries from the result of conduct. So the conduct in its own is the very important element which is a guideline to the fact for interrogator. For example, suppose that an assassin tries to shoot a person but misses and hits an automobile gasoline tank. If the tank explodes and kills some innocent persons, the assassin is still guilty of murder even though the victim's death did not occur in the manner intended. In this case though the intended injury occurred in an unexpected way, but law considers action as intentional, because action in its own is showing its quality with its consequences.

A defendant still possessed the element of intent even though his intended act could not possibly have succeeded as planned. Suppose, for example, that a burglar intended to break into a house and steal an original painting. Once he broke in, however, he discovered that the painting had been removed or that it was just a print and not an original painting at all. The burglar still had the necessary intent for burglary. As a conclusion Iranian system of liability is taking in account that the conduct in itself by its quality make a person guilty, nature of action is the tangible signal of intent. With regard to this restriction, the elements of informed consent are as follows:

a. the nature of the decision or procedure
b. reasonable alternatives to the proposed intervention
c. the relevant risks, benefits, and uncertainties related to each alternative
d. assessment of patient understanding
e. the acceptance of the intervention by the patient
The first four elements are directed to the physicians, while acceptation is given by patients with the condition that physicians will meet certain minimum standards. Legally informed consent is considered as a license to intervention in its own subject regardless of its results. The subject matter of informed consent is something like as to permit, so physicians may not leave free by receiving patient's informed consent. It is very clear there is a distinction between permission and consent, you cannot give consent to something that is created before your consent, but you may permit something to create or accord.

The important issue that must be addressed in a discussion of informed consent is which procedures require it. A good rule of thumb is that any surgical procedure performed under general anesthesia, spinal anesthesia or major regional anesthesia, or a diagnostic procedure with intravenous injection should have consent. Much has been written in the medical literature on why informed consent is so important and what it is in theory and in practice.

The law of informed consent is largely governed by civil law as a form of tort. A tort is composed of three elements: victim, causation, and damage. In addition to these three elements the circumstances leading to the damages and the damage itself must be uncompensated. This is often referred to as a requirement of proximate cause. It is the plaintiff’s (patient’s) burden to prove that the elements of the tort have been met. According to Iranian penal code there are four states in regarding the patient consent which may be taken into account:

1. Physician obtained patient's informed consent and his permission too, in this case the physician is not liable whether criminally or in torts, but when there is causation between damages and the physician act he will be liable, the effect of those consent and permission is just to take out the presumption of liability.

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47 Doyal L, Cannell H. Informed consent and the practice of good dentistry, (Br Dent J. 1995 Jun 24; 178(12):454-60.)
2. Physician obtains just patient's permission and not his consent, in this situation the physician only exonerating from criminal responsibility and he is liable to compensate in accordance to civil law, as previously mentioned permission to the treatment does not mean leave committing damages to the patient health, patient merely permitted treatment and not authorized death, damages and maim.

3. Physician has not taken informed consent or permission, so the treatment has lost its legitimacy; In this case the physician is liable to compensate damages whether he did complying with the medical standard for any damage.

4. Physician neither obtains patient permission nor informed consent; in this case the physician is liable in civil and criminal law.

5.1.4. Compensation

There must be damage as a direct consequence of the conduct. The quantum of damages is the loss suffered, including consequential loss. In particular case the defendants cannot escape liability because of a disclaimer clause, because the principles govern the representations was laid down by the criminal code. Iranian civil code, introduced a compensation for lost income. This undoubtedly adds an uncertainty element into medical professional liability, as the amount of lost income is not easy to predict. However, Iranian jurisprudence emphasizes that whenever lost income is recognized in liability cases, it is only that income which has already been secured or contracted that is subject to compensation. Anticipated future income or any loss of income that involves a probability element is not covered. It would be interesting to consider whether the amount of awards in the Iranian liability system achieves the objective of compensation or not. In this regard it will be useful to restrict discussion to bodily injuries since compensation of property damage is usually small relative to human injuries. Iranian scholars distinguish three kinds of injuries inflicted on human beings:

i. Injuries on the body,

ii. Injuries of sentiments, feelings, social status and financial reputation, and
iii. Abstract injuries which are defined as injuries without financial implications

Injuries of social status, moral injuries and abstract injuries are considered beyond compensation in material or financial terms. They are a kind of social and moral crimes, i.e., they are punishable through the Iranian penal code, but no financial compensation can be given to the injured. The status of the injured can be rendered to pre-injury state by declaring the falsehood of the injurer and punishing him or her. The punishment of the injurer in those kinds of injuries renders reconsideration to the injured. Removal of these categories of harms from the list of injuries that can be compensated reduces the amount of compensation. Personal injuries at Iranian Penal Code are considered as a crime regardless of its causes, and they are governed by two bodies of rules. On the creation stage the rule of Zaman (liability) and in the compensation step rule of Diya will apply. Creation stage is concerned to the specification of damages and cause of it’s while compensation step is involve determining the method of compensation.

Considering Diya system of law, perhaps, be the only explanation of what some jurists talk about when saying that compensation does not only cover the benefit deprived from the lost organ but it also has a beauty of its own, and that wergild is set very high to the extent that it makes it difficult or even impossible for the injurer to pay it. This emphasizes the fact that the objective of compensation and condolences is the most important aim of the award. This indication is strengthened by the following two points:

i. Aqilah system aims at attenuating the financial burden of the injurer. Hence, the amount of the award is not essentially utilized as a means to force revision in the injurer’s behavior. This is consistent with the stipulation that liability is a result of an error rather than intention on the part of the injurer. It is also consistent with the separation between the objective of compensation and condolences, and the objective of deterrence. Moreover, jurists often mention that Aqilah system is invoked in order to guarantee that compensation is paid because the injurer alone may not be able to handle its payment.

49 Khoei, Abu Algasem, Takmala Almenhag, Tehran Iran, vol2, p441.
Hence, *Aqilah* implicitly recognizes that the amount of compensation is usually beyond the capacity of the injurer, i.e., it is aimed for compensation and reconciliation of the injured.\(^{50}\)

ii. The Iranian system invokes means other than the award for deterring potential injurers.

The price list of bodily injuries which calls *Diya (ديه)* allows medical professionals to determine the amount of awards in advance once the expected risk is determined. Iranian criminal law in the field of personal injury arises from Shiite scholars of Islamic law, so the punishment for a bodily injury is *Diya (ديه)*.\(^{51}\) It is a specific sum of money that is decided by *Shari'ah* (شريعة) which judge cannot change at all. There is dissension between Iranian lawyers about the nature of *Diya (ديه)*. Some of them believe that it is a punishment to a crime and the injured party has the right to compensate it through a criminal suit. On the other hand the other side believe that *Diya (ديه)* has a compensate nature and so the injured party has no right to claim more than it. With regards to the interpretation of standards of law the legislature consider *Diya (ديه)* as a penalty in accordance with Iranian criminal law.\(^{52}\) In modern criminal law the penalty has a public nature which is applied by the government and is intended to punish persons convicted of a crime. So even though *Diya (ديه)* is a kind of compensation, it has a punitive character and as a result the injured party has the right to redress by a law suit in civil court to multiple the sum of *Diya (ديه)*, if he can prove his additional damages.

Iranian jurisprudence believes that *Diya (ديه)* has a compensation figure. Iran Supreme Court, in a decision in 1989, stated that *Diya (ديه)* is indemnity to the injured party and that party has no right to compensate more but this decision is not an obligatory one and there still is no harmony and cohesiveness in the decisions of the courts on this matter. In medical negligence, several factors influence the predictability of liability. These include medical expectations of the behavior of physician with regard to the safety of the

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\(^{50}\) This is unlike criminal liability where the financial compensation is charged to the injurer. Hence the award is used as deterrence in criminal liability.

\(^{51}\) *Supra* n 2, Article 15- Mulct is the fine determined by Islamic Jurisprudence for the crime.

treatment, degree of risk, aversion of the treatment, medical expectations about behavior of the judicial system and the amount of award granted, etc. The effect of the Iranian system of liability on predictability will be looked at from three angles: the court’s authorities, the determination of the amount of award and the compensation of lost income.\textsuperscript{53} There are three principles in the Iranian liability system reduce the area of court authority.

First, the Iranian system of liability opted to put a fixed list of wergild (a price list) for bodily injuries. This is itself a major limitation on the authority of the courts, since damage does not usually represent high proportion of the total award in most liability cases. Besides, in new life of our time injuries are not predictable than other damages.\textsuperscript{54}

Second, the Iranian system of liability does not provide for compensation of certain non-pecuniary harms such as libel cases in which no financial disadvantage is inflicted on the injured. This is based on the stipulation that such damages are beyond compensation and any financial compensation does not render the injured to Economics of Liability.\textsuperscript{55}

Third, the two principles of priority of injurer by direct action over injurer by causation and of material ground of injury further reduce litigation procedure and limit the area left to the court’s discretion.\textsuperscript{56}

5.2. India

5.2.1. Criminal negligence

A criminal liability arises when it is proved that the doctor has committed an act or made omission that is grossly rash or grossly negligent which is the proximate, direct or substantive cause of patient’s death. Under Section 304 A of the Indian Penal Code, a doctor is punishable for criminal negligence. Under this section, “whoever causes the death of any person by doing any rash or negligent act amounting to culpable homicide is


\textsuperscript{54} Majmouehi Didgahai Gazai Gozateh Dadgostari Ostaneh, (Tehran, Tehran, Iran, 1997) p65.

\textsuperscript{55} Madani, Jalal aldin, Hogoug Asasi dar Jomhori islmi Iran, (Tehran, Iran, vol.4) p381.

punishable with imprisonment for a term that may extend up to two years or with fine or with both.” This offence is cognizable, bailable and non-compoundable. It is cognizable in the sense that the offender can be arrested by a police officer without warrant. However, the police officer cannot act unreasonably as he is required to take an objective decision on the basis of either reasonable suspicion or credible information. It is a bailable offence and as such the doctor who is arrested is entitled to be released on bail as a matter of right. It is non-compoundable in the sense that the offence cannot be compounded by compromise between the suspected offender and the victim or his representative.

Other provisions in the Indian Penal Code which may be relevant are Section 312 (causing miscarriage), Section 313 (causing miscarriage without woman’s consent), Section 314 (deaths caused by act done with intent to cause miscarriage), Section 315 (act done with the intent to prevent the child being born alive or to cause it to die after birth), Section 316 (causing death of quick unborn child by act amounting to culpable homicide), Section 337 (rash or negligent act resulting in simple hurt) and Section 338 (rash or negligent act resulting in grievous hurt).

Criminal liability may also arise under a number of other statutes such as the Indian Medical Council Act, 1956, the Dentists Act, 1948, the Medical Termination of Pregnancy Act, 1971, the Preconception and Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the Transplantation of Human Organs Act, 1994 and other penal laws enacted by the Parliament and State legislatures from time to time.

The criminal law has invariably placed the medical professionals on a pedestal different from ordinary mortals. The Indian Penal Code enacted as far back as in the year 1860 sets out a few vocal examples. Section 88 in the Chapter on General exceptions provides exemption for acts not intended to cause death, done by consent in good faith for person’s benefit. Section 92 provides for exemption for acts done in good faith for the benefit of a person without his consent though the acts cause hurt to a person and that person has not
consented to suffer such harm. Section 93 saves from criminality certain communications made in good faith.

The 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 mens rea 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 in civil law but cannot form the basis for prosecution.\textsuperscript{57}

Negligence may be defined as breach of duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or observing ordinary care and skill toward a person to whom the defendant owes a duty of observing ordinary care and skill.\textsuperscript{58} Negligence is tort as well as crime. It may be used for the purpose of fastening the defendant with the liability under the civil law and, at times under the criminal law. Jurisprudentially no distinction may be drawn between negligence under civil and criminal law but degree of negligence must be high to fasten the liability in criminal law. Essential element mens rea cannot be discarded while fixing the liability in criminal sense. Lord Atkin in his speech in Andrews v. Director of Public Prosecutions\textsuperscript{59} stated ‘simple lack of care such as will constitute civil liability is not enough; for purposes of criminal law there are degrees of negligence, and very high degree of negligence is required to proved before felony is established’.

Lord Porter said in his speech in the same case ‘a higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability\textsuperscript{60} and in Syad Akbar v. State of Karnataka\textsuperscript{61} the supreme court has pointed with

\textsuperscript{59} [1937] A.C. 576.
\textsuperscript{60} Charlesworth & Percy.
reasons, the distinction between negligence in civil and criminal proceedings, namely, the proof in civil case mere balance of probabilities is sufficient while in criminal case proof beyond reasonable doubt is required. Negligence must be gross not an error of judgment in both the cases. Indian lawyers believe that;

A criminal liability arises when it is proved that the doctor has committed an act or made omission that is grossly rash or grossly negligent which is the proximate, direct or substantive cause of patient's death.\(^{62}\)

This chapter identifies the factors that tend to bring about criminal prosecutions for medical negligence and which, in turn, result in convictions following trial. Although statutory law is the prevailing source of criminal law and essentially has replaced common law in India, common law may serve to interpret ambiguous statutory terms. The provisions of criminal negligence under Indian Penal Code are;

1. The main section under which a criminal case is filed against doctors is Section 304B of the Indian Penal Code which deals with causing death due to rash and negligent act the punishment is two years imprisonment or fine or both.\(^{63}\)

2. Similarly, S.336 of the Penal Code provides that it is an offence to endanger the human life or personal safety of others through a rash or negligent act. The punishment is three months imprisonment or fine of Rs. 250 or both.\(^{64}\)

3. S. 337 and 338 of the Indian Penal Code make it an offence to cause simple hurt or grievous hurt through rash or negligent act…The punishment can be up to six months of imprisonment or fine up to Rs. 500 or both for simple hurt and punishment up to 2 years or fine up to Rs. 1000 or both for causing grievous hurt.\(^{65}\)

\(^{61}\) (1980) SCC (1) 30.
\(^{62}\) Supra n57.
\(^{63}\) Indian Penal Code, 304A. Causing death by negligence: Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.]
\(^{64}\) Id, 336. Act endangering life or personal safety of others: Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to two hundred and fifty rupees, or with both.
\(^{65}\) Id, 337. Causing hurt by act endangering life or personal safety of others: Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others,
Although a bad outcome is always at the core of any criminal prosecution for medical negligence, even an unconscionably bad outcome is insufficient by itself to explain the successful prosecution of some medically negligent acts. Certain patterns of conduct appear to lead more commonly to criminal prosecutions for medical negligence. By avoiding these patterns of conduct, physicians can reduce the likelihood that they will become defendants in a criminal prosecution. The criminal prosecution of physicians for medical negligence remains relatively rare but there is an increase in the number of doctors appearing as criminal defendants to answer charges arising from medically negligent acts. Even where gross negligence is alleged, a prima facie case must be established before a magistrate at the first instance as was pointed out in Dr. Anand R. Nerkar v. Smt Rahimbi Shaikh Madar. It is necessary to observe that in cases where a professional is involved and in cases where a complainant comes forward before a Criminal Court and levels accusations, the consequences of which are disastrous to the career and reputation of adverse party such as a doctor, the court should be slow in entertaining the complaint in the absence of the complete and adequate material before it. Criminal negligence is a legal term used to describe actions that are so egregiously negligent as to be considered criminal. Generally, intent is an element of most crimes, which means that a person cannot be found guilty of a criminal law unless he performed an intentional action that violated common law or criminal codes; this is referred to as the actus reus or mens rea. Criminal negligence is an alternative way to satisfy the mens rea requirement and find someone guilty of a crime. The standard for negligence in common law is a reasonable person standard. This means that, when the court determines whether an individual behaved negligently and breached his duty of care, the court will determine how a reasonable person would have behaved in that situation and will then compare that to how the defendant in the particular case behaved. If the defendant's behavior falls short of what the reasonable person would have done, the defendant can be considered legally negligent. Criminal negligence requires a more serious deviation from the standard of

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

care than ordinary civil negligence. Typically, criminal negligence requires some gross or flagrant deviation from the standard of care.\textsuperscript{67} For example consider a patient is diabetic and has chest pains and the doctor does not investigate the chest pains and the patient suffers from a heart attack as a result, this could be considered medically negligent because the doctor should immediately investigate a warning sign like that and not dismiss this as heartburn. Also, the fact that the person is a diabetic should also alert the doctor that heart disease is common among diabetic patients and that it should be evaluated. Common examples of criminal negligence include driving while intoxicated or reckless driving. A person who commits these actions and kills someone may be subject to criminal penalties even if he did not intend to kill someone. Driving drunk and killing a victim is an example of criminally negligent homicide, which may be charged as vehicular manslaughter or a related crime. In order for negligence to be punished as a crime, the action must extend beyond ordinary negligence. Failure to behave in a reasonable matter alone cannot stand in for the required intent element of a crime. Only behavior that is so negligent it is almost guaranteed to cause injury constitutes criminal negligence. In investigation to criminal negligence Indian judges created an external standard they observed that:

If a physician is not less liable for reckless conduct than other people, it is clear . . . that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard.\textsuperscript{68}

A doctor should not be held criminally liable when a patient's death results from a physician's error of judgment. It could be termed criminal only when the doctor exhibits a gross lack of competence or inaction or wanton indifference to his patient's safety, which is found to have arisen from gross ignorance or gross negligence. The mistakes of medical professionals which may result in death or permanent impairment can be particularly costly. Medicine is an inexact science, diagnosis is sometimes a hit-or-miss

\textsuperscript{68} \textit{Massachusetts v. Pierce}, 138 Mass. 165; 1884.
affair, medical intervention is often risky, and doctors can and will make honest mistakes. Indian courts believe that;

The 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 mens rea must be shown to exist.  

The issue to provide a clear definition for what constitutes "gross negligence" is the exact conditions under which doctors can be criminally prosecuted. The expression has no basis in criminal law and it is not sufficient to merely say that it is a form of negligence that goes beyond the lack of necessary care. But the Court's ruling, which was delivered in the face of an increasing number of doctors being subject to frivolous criminal prosecution, was focused on laying down safeguards against medical professionals being harassed. Among them are that doctors should be arrested only as a last resort and that private complaints should be acted upon only after obtaining "credible" medical opinion that supports charges of rashness or negligence. The Centre has been directed to frame a comprehensive set of statutory rules that will govern the prosecution of doctors. Such rules must strike the right balance, one that prevents doctors from being subject to vexatious litigation and, at the same time, permits aggrieved patients and their relatives to initiate criminal proceedings against them wherever justified.

Any action that violates the law like as fraud, illicit sexual contact, theft, and illegal distribution of narcotics is a criminal offense, whether perpetrated in the course of medical practice or under other circumstances. But a physician, by the nature of his work, is in a unique position in regard to the law: When a patient in his care suffers severe or lethal injury, he may face a charge of criminal negligence, manslaughter. The practice of medicine is full of uncertainties. There is never a guarantee that the outcome of a medical procedure or treatment will be curative or without risk. When an outcome is bad, nothing the physician could have done would, in most instances, have averted the catastrophe. On rare occasions, however, a bad outcome is the result of physician negligence.

death cases are not a separate form of civil case. A wrongful death claim arises from some wrongful act of another person which caused the death of another person. In a wrongful death tort suit, the administrator or executor of an estate of a deceased person who was killed as a result of negligence or other wrongful acts of another sues to get compensation for the loss of financial and other damages concerning the deceased person. Wrongful death cases may involve automobile collisions, medical negligence, product liability and any number of other claims. Jonathan Quick, director of essential drugs and medicines policy for the World Health Organization, wrote in a recent bulletin as below:

If clinical trials become a commercial venture in which self-interest overrules public interest and desire overrules science, then the social contract which allows research on human subjects in return for medical advances is broken.\(^\text{70}\)

Negligence has distinct meanings in different jurisdictions. In criminal law, there are series of offences based on negligence in which loss or injury is not matter of the case, for applying criminal law it is enough where the act is likely to cause injury or endanger life. Operation of patient without his consent is an example of negligence even without actual apparent damage. Negligence is a tort as well as a crime. As a tort it may be used for the purpose of fastening the defendant with the liability under the civil law and, at times under the criminal law. But it should be noted that a simple lack of care, an error of judgment or an accident, is not sufficient to impose criminal negligence on a medical professional in this regard court held that;

Simple lack of care such as will constitute civil liability is not enough; for purposes of criminal law there are degrees of negligence, and very high degree of negligence is required to prove before felony is established.\(^\text{71}\)

From the analyzing of a bad outcome it is clear that at common law the element of duty requires that a doctor–patient relationship existed when the injury occurred, such that the physician had a duty to render appropriate care to the plaintiff. The plaintiff must prove, usually by means of expert testimony, that the physician has breached that duty by acting


in a way that does not meet prevailing standards of care. The plaintiff must show that he or she suffered damage, and that the damage was caused by the physician’s acts or failure to act. Criminal negligence is characterized by the same four elements as civil negligence, and adds a fifth element: The physician’s state of mind (in legal terminology, mens rea). That state of mind can range from inattention to premeditation. Criminal negligence is a legal term used to describe actions that are so egregiously negligent as to be considered criminal. Generally, intent is an element of most crimes, which means that a person cannot be found guilty of a criminal law unless he performed an intentional action that violated common law or criminal codes. The level of gross negligence is so high that proving that a departure from the standard of care has occurred is unnecessary. A case in point is the growing number of physicians who are under the influence of drugs or alcohol when they treat patients. The applicable standard of care varies from jurisdiction to jurisdiction. Each societal unit determines and defines the limits of acceptable conduct by its professional members, beyond which certain actions become intolerable. The standard of care is the knowledge available at the time of the incident, and not at the date of trial. In criminal prosecutions for negligence expert testimony is required to

1) Attest to the relevant standard of care and

2) Characterize the defendant’s actions as a marked departure from such a standard.

Deviating from accepted modes of treatment, or employing dubious approaches known to be highly risky constitutes such a departure. In Indian medical negligence law no case of criminal negligence should be registered without a medical opinion from Expert Committee of doctors and it should be given within a reasonable time. Indian Medical Association Punjab claimed “they had secured a directive from Director General of Police Punjab that no case of criminal negligence can be registered against a doctor without a report from an Expert Committee. Similar situations exist in the case of State of

Delhi where Lieutenant Governor issued directions to the Delhi police regarding how to arrest a doctor in medical negligence case, the Delhi High Court also decided to form guidelines for lower judiciary as well as the police to deal with such cases.

Criminal prosecution of doctors without adequate medical opinion would be great disservice to the community, as it would shake the very fabric of doctor, patient relationship with respect to mutual confidence and faith the doctors would be more worried about their own safety instead of giving best treatment to their patients.

The degree of medical negligence must be such that it shows complete apathy for the life and safety of the patient. Apathy is not a clear word. It may show some gross negligence but it will make the concept more complex because there is not a definition about gross negligence and its measurements. A patient developed postoperative paralytic ileums with intractable vomiting. The attending doctor inserted a nasogastric tube and administered intravenous fluids in the form of 5% dextrose in water. The patient died 6 days later from hypovolemic shock and cardiac arrhythmias. Serum electrolytes were not measured until the last day, when severe hyponatremia and hypokalemia became evident. A lawsuit for wrongful death alleged gross negligence and sought punitive damages. This case may consider as a clear case of gross negligence because the standard of care showed so low as to shock the conscience. In common law punitive damages commonly are not awarded in medical malpractice cases until negligence has caused death by gross negligence. Gross negligence is something more than ordinary negligence, but it may be less than reckless or wanton misconduct. The notion of gross negligence is different from ordinary negligence, and this distinction may find in its legal implications. The vast majority of medical negligence cases allege ordinary rather than gross negligence. While it is agreed that gross negligence denotes something more "substandard" than ordinary negligence, there is no precise legal definition. In some jurisdictions gross negligence may constitute an exception to the need for expert testimony, yet in others expert testimony treats as a main requirement to establish medical negligence.
In some medical negligence cases, expert testimony to establish a standard of care is unnecessary. When a physician does an obviously negligent act, such as fracturing a leg during an examination, amputating the wrong arm, carelessly dropping a knife, scalpel, or acid on a patient, or leaving a sponge in a patient's body, lay persons can infer negligence. Failure to furnish medical care to a patient with a serious head injury for a period of two hours can be judged by a common sense standard. Expert testimony in a negligence action is unnecessary where the common knowledge of laymen is sufficient to infer negligence from the facts. Despite lack of expert evidence, failure to attend a patient is not reasonable care, when the circumstances show the serious consequences of that failure. Negligence means any breach of duty or any negligent act or omission proximately causing injury or damage to another. The standard of care required of every health care provider, except a hospital, in rendering professional services or health care to a patient, shall be to exercise that degree of skill ordinarily employed, under similar circumstances, by the members of his profession in good standing in the same community or locality, and to use reasonable care and diligence, along with his best judgment, in the application of his skill. Criminal Negligence is an offence against the State while Civil Negligence is an offence against the individual. Criminal negligence requires a more serious deviation from the standard of care than ordinary civil negligence. Typically, criminal negligence requires some gross or flagrant deviation from the standard of care. Whether a physician’s conduct deviated from the standard of care, and if so, whether that deviation amounted to a gross deviation, is determined by reference to an external or objective standard. The court stated that:

If a physician is not less liable for reckless conduct than other people, it is clear . . . that the recklessness of the criminal no less than that of the civil law must be tested by what we have called an external standard.

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74 Hammond v. Grissom, (Miss., 1985).
75 Thomas v. Corso, 265 Md. (1972).
77 Supra n 66, pp 113, 116.
78 Massachusetts v. Pierce, 1884 WL 6544.
Negligence is a concept found in both criminal and tort, or civil, law. The concept of negligence relates to the Indian law belief, developed in some judicial cases over years that every individual owes a duty to other individuals. Breach of that duty is a legal lapse that is punishable either by a lawsuit, by criminal sanctions or both. Criminal negligence requires a greater standard of proof on those who wish to prove it.\(^\text{79}\) Whether the negligence, in the particular case, amounted or did not amount to a crime the court held that;

In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.\(^\text{80}\)

Authors believe that Negligence at tort, on the other hand, looks at the defendant's conduct in comparison to a standard of reasonable care.\(^\text{81}\) Courts agreed with Authors and observed that;

[T]he omission to do something which the reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which a prudent and reasonable man would not.\(^\text{82}\)

According to The Supreme Court of India for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be as high as can be described as “gross negligence”. It is not merely a lack of necessary care, attention and skill. The apex court held that;

Thus a doctor can’t be held criminally responsible for patient’s death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State...Thus, when a patient agrees to

\(^{80}\)R v Bateman (1925) CCA.
\(^{82}\)Blyth v Birmingham Waterworks Co, 156 ER 1047.
go for medical treatment or surgical operation, every careless act of the medical man can’t be termed as ‘Criminal’. It can be termed ‘Criminal’ only when the medical man exhibits as gross lack of competence or inaction and wanton indifference to his patient’s safety and which is found to have arisen from gross ignorance or gross negligence. Where a patient’s death results merely from ‘Error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but wouldn’t suffice to hold him criminally liable. Criminal punishment carries substantial moral overtones. The doctrine of strict liability allows for criminal conviction in the absence of moral blameworthiness only in very limited circumstances. Conviction of any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrong doing, levels four and five are classification of blame, are normally blameworthy but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence…Blame is a powerful weapon. When used appropriately and according to morally defensible criteria, it has an indispensable role in human affairs. Its inappropriate use however, distorts tolerant and constructive relations between people. Some of life’s misfortunes are accidents for which nobody is morally responsible. Others are wrongs for which responsibility is diffuse. Yet others are instances of culpable conduct, and constitute grounds for compensation and at times, for punishment. Distinguishing between these various categories requires careful, morally sensitive and scientifically informed analysis.

In common law and India system of law, a tort is a type of civil wrong for which a person adversely affected or injured thereby can claim damages. Damages are sums of money, awarded by a court to compensate a person for loss or harm resulting from civil wrongs, including torts. A tort is not a crime. Although criminal law and tort law grew from the same roots they are today quite distinct and different. Criminal law is designed to provide security for the citizens of the state. It attempts to define that conduct which society finds abhorrent and therefore necessary to control. Those who commit crimes are prosecuted by the state and are subject to punishment which reflects the state's or society's

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83 Supra n68.
84 J.R. Nolan & M.J. Connolly, Black’s Law Dictionary, 5th ed. (St. Paul, Minn.: West, 1979) at 1335. Other types of civil wrongs can result from a failure to pay a debt or to respect contractual, fiduciary, or statutory obligations.
abhorrence for the particular crime. Gross negligence is when a person shows unrestrained disregard of consequences; where ordinary care is not taken in circumstances where, as a result, injury or grave damage is likely.

5.2. 2. Gross negligence

Indian law has not defined gross negligence in the contexts of medical negligence and Case law also has created a knot of legal standards for culpability, with formulations ranging from gross negligence or willful misconduct. Gross negligence denotes a higher degree of culpability than ordinary negligence, signifying to;

more than ordinary inadvertence or inattention, but less perhaps than conscious indifference to the consequences...The formula under which this usually is put to the jury is that the doctor must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing.\(^6\)

The California Supreme Court approved the definition of gross negligence as; "the want of even scant care or an extreme departure from the ordinary standard of conduct".\(^7\) Likewise, the law in Texas stipulates: "Gross negligence means more than momentary thoughtlessness, inadvertence or error of judgment. It means an entire want of care as to establish that the act or omission was the result of actual, conscious indifference to the rights, safety and welfare of the person affected".\(^8\)

Court decisions on the issue of gross negligence, predicated on inconsistent standards, can cut both ways, some favoring the plaintiff and others the defendant. In Jackson v. Taylor, Dr. James Taylor prescribed birth control pills for plaintiff Lois Jackson, who subsequently developed bleeding liver tumors allegedly caused by the birth control pills.

\(^6\) Prosser's Textbook on Torts.
\(^7\) Van Meter v. Bent Construction Co., 1956.
\(^8\) Texas Civil Practice & Remedies Code [section] 41.001[7].
The plaintiff's expert testified that Dr. Taylor's acts and omissions demonstrated his conscious indifference to the welfare of his patient. 89

The case of D is another example where D a drug dealers supplied a 15-year-old girl with heroin. It became apparent that the girl was in need of medical attention but the defendants left her alone until the next day when they found her dead. They dumped her body on waste ground. The court held that;

The actus reus of the offence was the omission to summon medical assistance and not the supply of heroin. To say a drug dealer owed a duty of care to a person to whom he supplied heroin would be too wide an extension. 90

The jury should have been directed to decide whether a duty of care was owed by the defendants to the girl, whether there was a breach of that duty and whether that breach constituted gross negligence and was therefore a criminal act. In another case, the Oklahoma Supreme Court ruled that a 6 ½ inch clamp left in a surgical incision "might be construed to support a willful, wanton conduct amounting to gross negligence". 91

Conviction for manslaughter should follow if the defendant was proved to have had a "criminal disregard" for the safety of others. “There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would ex necessitate commit manslaughter. A very high degree of negligence is required to be proved before the felony is established.” 92 In a case of manslaughter by gross negligence subsumes reckless manslaughter, D, an anesthetist, failed to observe during an eye operation that the tube inserted in V’s mouth had become detached from the ventilator, causing V to suffer a cardiac arrest and eventually die. Held that;

91 Fox v. Oklahoma Memorial Hospital, 1989.
D was guilty of manslaughter by gross negligence, which is established where D breached a duty of care towards V that caused V’s death and that amounted to gross negligence.\(^3\)

In this case Lord MacKay LC states that:

“…gross negligence…depends…on the seriousness of the breach of the duty committed by the defendant in all the circumstances in which he was placed when it occurred and whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in the jury’s judgment to a criminal act or omission”.\(^4\)

There is distinction between unlawful commission and omission in the context of existence of duty of care. In a case D lived with her aunt, who was suddenly taken ill with gangrene in her leg and became unable either to feed herself or to call for help. D did not give her any food, nor did she call for medical help, even though she remained in the house and continued to eat her aunt's food. The aunt's dead body was found in the house decomposing for about a week. Held that;

A duty was imposed upon D to supply the deceased with sufficient food to maintain life, and that, the death of the deceased having been accelerated by the neglect of such duty.\(^5\)

In this case Lord Coleridge, CJ observed that;

It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.\(^6\)

Gross negligence subsumes reckless manslaughter. Gross negligence does not have to amount to willful, wanton, or malicious misconduct. It does not even have to reach the level of reckless disregard. Thus an authoritative source of law, the authors differentiate reckless disregard from gross negligence by stating that the former creates a degree of

\(^3\) Ibid.
\(^4\) Ibid.
\(^5\) R v. Instan, [1893] CCR.
\(^6\) Ibid.
risk so marked as to amount substantially to a difference from gross negligence in kind. Court decisions on the issue of gross negligence, predicated on inconsistent standards, can cut both ways, some favoring the plaintiff and others the defendant.

As in common law, negligence and recklessness, therefore, require the same degree of risk-taking: substantial and unjustifiable, and the difference between them lies in the fact that the reckless defendant consciously disregards the risk, whereas the negligent defendant’s risk-taking is inadvertent.

In Paramanand Katara vs. Union of India, Supreme Court of India has declared that right to medical aid is an integral part of right to life. It is an obligation on the state to preserve life by extending required medical assistance. In fact, the apex court has held that right to health and medical care is a fundamental right under the Constitution of India, 1950. Further, Supreme Court in State of West Bengal vs. Paschim Banga Khet Mazdoor Samity has held that providing adequate medical facilities for the people is an essential part of the obligation undertaken by the government in a welfare state. The Constitution of India, 1950, Art, 21 imposes an obligation on the state to safeguard the right to life of every person and reach of may move the Supreme Court or the high court through writ petition. So where a plaintiff signs a release for public policy reasons

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97 Paramanand Katara v. Union of India 1989, AIR.
98 West Bengal v. Paschim Banga Khet Mazdoor Samity (1996) AIR.
99 21. Protection of life and personal liberty. — No person shall be deprived of his life or personal liberty except according to procedure established by law.
100 32. Remedies for enforcement of rights conferred by this Part.—(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution. 32A. [Constitutional validity of State laws not to be considered in proceedings under article 32.] Rep. by the Constitution (Forty-third Amendment) Act, 1977, s. 3 (w.e.f. 13-4-1978).
101 226. Power of High Courts to issue certain writs.—(1) Notwithstanding anything in article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo
many jurisdictions will apply the release only to conduct which constitutes ordinary negligence and not to acts of gross negligence. It is not good public policy to allow a defendant to escape liability for reckless indifference to the safety of others, particularly in contexts where the defendant is responsible for creating unsafe conditions, or is profiting from their existence. Criminal negligence requires a more serious deviation from the standard of care than ordinary civil negligence. Typically, criminal negligence requires some gross or flagrant deviation from the standard of care.  

A physician’s failure to foresee consequences contrary to those the physician intended is immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious. In other words, court should look to what it believes a reasonable physician would have done under the same or similar circumstances. If a physician to be found liable for a negligent act, causation and a deviation from the standard of care must be proven. Causation or cause in fact, means the “particular cause which produces an event and without which the event would not have occurred. Standard
of care is the degree of care which a reasonably prudent person should exercise in same or similar circumstances.\textsuperscript{105}

The law relating to criminal negligence was laid down by Straight J., in the case of Reg v. Idu Beg,\textsuperscript{106} where the court said that while negligence is an omission to do something which a reasonable man guided upon by those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances of the case out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

The court in R. v. Prentice & Sullman\textsuperscript{107} and in R. v. Adomoko\textsuperscript{108} have settled the law as to how to determine criminal negligence in medical practice. The following is the test to bring home the charge of criminal negligence in medical field as settled in R. v. Adomako.

a) Indifference to an obvious risk of injury to health;
b) Actual foresight of the risk coupled with the determination nevertheless to run it;
c) An appreciation of the risk coupled with an intention to avoid it, but the attempted avoidance involves a very high degree of negligence and
d) Inattention to a serious risk which goes beyond “mere inadvertence” in respect of an obvious and important matter which the doctor’s duty demanded, he should address.

\textsuperscript{105} Supra n 83, P221.
\textsuperscript{106} 1881 [1] 3 All 776.
\textsuperscript{107} Court of Appeal (1993) 4 Med LR 304.
\textsuperscript{108} (1993) 4 All ER 935; 15 BMLR 13; CA affirmed by (1994) 3 All ER 79 (HL).
In John Oni Akirele v. King\textsuperscript{109} case a duly qualified medical practitioner gave to his patient the injection of sobita which consisted of Sodium BismuthTartarate as given in the British Pharmacopeia. However, what was administered was an overdose of Sobita. The patient died. The doctor was accused of manslaughter, reckless and negligent act. He was convicted. The matter reached in appeal before the House of Lords. Their Lordships quashed the conviction on a review of judicial opinion and an illuminating discussion on criminal negligence. What their Lordships have held can be summed up as under:

(i) That a doctor is not criminally responsible for a patient’s death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime as against the state;

(ii) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. There is a difference in kind between the negligence which gives the right to compensation and the negligence which is a crime.

(iii) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible except by means of illustrations drawn from actual judicial opinion. The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.

Their Lordships refused to accept the view that criminal negligence was proved merely because a number of persons were made gravely ill after receiving an injection of Sobita from the appellant coupled with a finding that a high degree of care was not exercised. Their Lordships also refused to agree with the thought that merely because too strong a

\textsuperscript{109} AIR 1943 PC 72.
mixture was dispensed once and a number of persons were made gravely ill, criminal
degree of negligence was proved.

In Dr. Krishna Prasad v. State of Karnataka\textsuperscript{110} case the patient was admitted for a
delivery in a Nursing home. The doctor decided caesarian operation under spinal
anesthesia. The blood pressure began to fall soon after administering spinal anesthesia
and ultimately the patient died. The criminal proceeding against the anesthetist was
started on the allegation that he was not an anesthetic expert and that the test dose of
spinal xylocaine injection was not given to the patient.

The Court quashed the criminal proceeding on the ground that the doctor holding
degrees like MBBS, FRCs and DGO is qualified to administer anesthesia and that the
omission to give test dose does not amount to rashness or negligence.

Where a Kaviraj who was not a qualified surgeon cut the internal piles of a patient by an
ordinary knife in consequence of which the patient died of haemorrhage. The Kaviraj was
convicted u/s 304A IPC for his rash and negligent act. He pleaded for the benefits of S-
88 IPC saying that what he did was in good faith and he had obtained the consent of the
patient and in the past had performed several operations of the same type. His plea was
unacceptable to the court\textsuperscript{111}

Another similar case is that of Dr. Khusal Das Pamman Das v. State of M.P.\textsuperscript{112} where it
was held that the fact that a person totally ignorant of science of Medicine or practice of
surgery undertakes a treatment or performs an operation is very material in showing his
gross ignorance from which an inference about his gross rashness and negligence in
undertaking the treatment can be inferred.

In this case the accused, a Hakim, not educated in allopathic treatment and having no idea
about the precautions to be taken before administering the injection and effects of the
procane penicillin injection, gave it to the deceased. This act was taken to be clearly rash
and negligent within the meaning of S-304A of IPC 1860.

\textsuperscript{110} (1970) 3 SCC 904
\textsuperscript{111} SukaroomKaviraj v. Emperor, ILR (1887) Cal 566
\textsuperscript{112} AIR 1960 MP 50; 1960 Cri. LJ 324
It is important to note that the criminal liability for negligence has not been invoked in certain cases where other sections were applicable. The example for this may be the recent case of Surender Chauhan v. State of M.P.\textsuperscript{113} where a medical practitioner was registered to practice in electro homeopathy and ayurveda only but he performed abortion on a lady. He was charged with S-314 of IPC 1860 but was not charged with S-304A for gross negligence.

In Jaggankhan v. State of M.P.\textsuperscript{114}, a homeopathic doctor gave to his patient who was suffering from guinea worms, twenty-four drops of stramonium and a leaf of datura without contemplating the reaction such a medicine could cause, resulting in the death of the patient. The doctor was held guilty of criminal negligence for committing the offence under this section.

The Supreme Court in Dr. Suresh Gupta v. Govt. of NCT\textsuperscript{115} has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as “gross negligence” or “recklessness”. The court, in this case, held: “Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A IPC.”

In this case, the patient was operated by the appellant plastic surgeon for removing his nasal deformity resulting in the death of the patient. It was alleged that the death was due to ‘asphyxia resulting blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum’. The cause of the death was found to be not introducing a cuffed endo-tracheal tube of proper size so as to prevent aspiration of blood from the wound in the respiratory passage. The court held that the carelessness or

\begin{footnotes}
\item[113] 2000 Cr LJ 1789; AIR 2000 SC 1436
\item[114] [1965] 1 SCR 14
\item[115] [2004] 6 SCC 422
\end{footnotes}
want of due attention and skill alleged in this case cannot be described to be so reckless or grossly negligent as to attract criminal liability.

The principle laid down in Dr. Suresh gupta’s has been upheld in Jacob Mathew v. State of Punjab,116 where the court observed: “To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.” As an illustration, the court said that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, posses that knowledge, he is prima facie acting with rashness and negligence.

In this case, it was contended by the respondent that the death of his father has occurred due to the carelessness of doctors and nurses and non-availability of oxygen cylinder and also because of the fixing up of an empty cylinder on his mouth due to which his breathing had totally stopped.

Rejecting the charge of criminal negligence, the court held that the averments made in the complaint, even if held to be proved, did not make out a case of criminal rashness or negligence on the part of the accused appellant. The court further observed: “It is not the case of the complainant that the accused appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinders either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law or maybe not, but the accused-appellant cannot be proceeded against under S. 304-A IPC.”

The Court issued the following guidelines which should govern the prosecution of doctors in future:

116 [2005] 6 SCC 1
• A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

• The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation.

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

In Poonam Verma v. Ashwin Patel\textsuperscript{117} where a registered medical practitioner in homeopathy was held guilty of negligence per se for prescribing allopathic medicines to a patient resulting in her death, the court ordered the Medical Council of India and the State Medical Council to consider the feasibility of initiating appropriate action under Section 15(3) of the Indian Medical Council Act, 1956 for practicing allopathic system of medicine without possessing the requisite qualifications.

In Dr. Saroja Dharampal Patil v. State of Maharashtra,\textsuperscript{118} a pregnant woman was taken to the hospital of the applicant where she delivered a child by a normal delivery through vertex. The applicant noticed that patient was bleeding profusely after the placenta had come out. Since, in spite of immediate treatment, the bleeding could not be stopped; she

\textsuperscript{117} \cite{1996} 4 SCC 332

\textsuperscript{118} MANU/MH/1263/2010
was shifted to another hospital. There also the prognosis continued and the flow of bleeding could not be controlled in spite of medical treatment. She died ultimately due to inversion of the uterus. The father of the deceased gave statement to the police that he had no grievance against anyone about the death of his daughter. After two day, however, he lodged an FIR alleging that deceased died as a result of negligence of the applicant while treating her. The applicant sought quashing of the charge sheet filed in pursuance of the said FIR.

The investigating officer obtained the opinion of the independent medical authority which purports to show that the applicant was duly trained for conducting delivery and, therefore, was competent to undertake the work of conducting delivery of deceased, gave necessary treatment to the patient while conducting the delivery, medicines administered to the patient were proper and correct treatment was given and there was no undue delay committed by the applicant in referring the patient to obtain treatment at the higher centre when the hemorrhagic flow could not be stopped inspite of immediate treatment. The court after stating the general principles relating to medical negligence as laid down in Jacob Mathew v. State of Punjab, and reiterated in Kusum Sharma v. Batra Hospital and Medical Research Centre\textsuperscript{119} explained the rule for holding medical practitioner liable and held that no medical negligence was committed by the applicant.

In Dr. Renu Jain v. Savitri Devi,\textsuperscript{120} the complainant became pregnant after six years of sterilization operation. She alleged that the applicant assured the complainant that latest technologies were available in her Nursing Home and she was specialist of surgery of sterilization. Taking cognizance of her complaint, the applicant was summoned under Sections 337, 420, 467, 471 of IPC. Applicant approached the court for quashing that proceeding. She pleaded that it might be a case of failure of the operation but since there was no material to show that there was any negligence on her part in conducting the surgery for which she was qualified, she cannot be blamed. Further that there was no evidence of cheating or any false assurance. The court held that the applicant is not liable

\textsuperscript{119} AIR 2010 SC 1052
\textsuperscript{120} MANU/UP/1242/2010
for prosecution as no evidence or expert opinion by any other competent doctor was produced against her, which was made mandatory by the Supreme Court in Jacob Mathew’s case.

In Dr. Shivanand Doddamani v. State of Karnataka, a complaint was filed against the doctors of the District Hospital Dharwad. Complainant pleaded that his brother sustained injuries to his thigh in a road mishap and was admitted to the District Hospital. Doctors failed to provide any treatment to him which resulted in his death after four days. Magistrate issued summons and charged the doctors for the offence under section 304-A of Indian Penal Code. The impugned order was assailed by the doctors before the High Court mainly on the ground that the statement in the complaint did not make out any prima facie case to show that the doctors were guilty of negligence of higher degree as laid down by the Apex Court in the case of Jacob Mathew v. State of Punjab and the guidelines laid down in that case for initiating action against the medical officer were totally flauted by the Magistrate. Dismissing the claim of the doctors, the Court held that guidelines of the Apex Court when applied to the facts in question will make out a prima facie case.

The allegation was that the patient died due to treatment not been provided by the doctors. The doctors had ‘duty’ to treat the patient who was admitted to the hospital, not treating him is ‘breach of duty’ and ‘death’ being the ultimate result due to breach of duty, negligence of higher degree is noticeable.

The Supreme Court has been pragmatic and considerate in dealing with the criminal liability of the medical practitioners for medical negligence, but not in the least lenient as some of the medical practitioners might like to believe. In its latest judgments the Hon’ble Supreme Court has not only erected safeguards against indiscriminate prosecution of physicians but has also impressed upon the need for taking certain precautions by the physicians/Hospitals while treating patients. The physicians must also

121 2010 (3) KCCR 1832
rise to the occasion by assuming greater responsibility & imbibing greater public confidence.\textsuperscript{122}

5.2.3. Guilty intent

Criminal Law is concern to offences against the state, or society in general. If an offender convicted he is subject to punishment rather than paying just some form of compensation. In a Criminal case a defendant can be found guilty while in a civil case e.g. contract or tort a defendant can be found liable. In Civil cases, liability is determined on the balance of probability.\textsuperscript{123} In a Criminal case, guilt must be established beyond reasonable doubt. Most crimes require two elements;

(1) The \textit{actus reus} or prohibited action.

(2) The \textit{mens rea} or guilty mind (this can be either intentional or reckless).

The \textit{actus reus} may not always be simply the act by itself. Criminal codes do not restrict themselves to proscribing harmful conduct or results, however, but also criminalize various acts that precede harmful conduct. Indeed the \textit{actus reus} varies depending upon the type of offence. It can be a voluntary act or omission which causes the result and, in some circumstances, the circumstances surrounding the event e.g. a rugby game or boxing bout. If somebody is sleepwalking it could be argued that they are not aware of their activity. Suppose, while sleepwalking, they cause criminal damage they could argue this was not a voluntary act. They did the act unconsciously. In Law actions need not be the sole or even the main cause of the consequence. Results must be a foreseeable consequence of the actions of the accused. For example consider that V becomes unconscious and is placed on a life support machine. What if V dies as a result of a doctor switching off the machine? Could D still be charged with murder? In a case the victim had been shot in the stomach and leg by the accused, during an argument in a fish and chip shop. He was operated on but experience breathing difficulties and he had to

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\textsuperscript{122} Supra n 57.
\textsuperscript{123} De Costa v. Optalis [1976].
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have a tracheotomy tube inserted. He died two months later. It was discovered that his windpipe had narrowed and this caused the severe breathing difficulties that he was experiencing at the time of his death. It was argued that this was due to the negligence of the hospital when the tracheotomy tube was fitted and this, therefore, had broken the chain of causation. The trial judge directed the jury that a non *actus* intervenes would only have occurred if the doctors had acted recklessly. Thus, the defendant was found guilty. The Court of Appeal criticized the Judges reference to recklessness, but still upheld the conviction. The court came to the conclusion that despite the fact that the immediate cause of death was due to the negligence of the doctors, this would not excuse the defendant from liability unless the negligent treatment "was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant". The Court of Appeal clearly considered that the defendant’s action made a 'significant contribution' to the death.\(^\text{124}\) Another case is that the victim was stabbed. He was admitted to hospital and died 8 days later, with the defendant being convicted of murder. Later evidence came to light that the medical treatment had been palpably wrong, and the defendant successfully appealed against the conviction. The new evidence showed that the victim had been given *Terramycin*, to which he had proved to be allergic. It had been withdrawn by one Doctor, but inadvertently had been reintroduced later by another Doctor. Large quantities of liquid had also been given intravenously and bronchi-pneumonia had set in. The conviction therefore was squashed, because two separate features and independent features of medical treatment were, in the opinion of Doctors, palpably wrong and these were the direct and immediate cause of death.\(^\text{125}\) Circumstances such as playing in a rugby match could establish innocence in relation to a battery. Usually a person can found guilty of a criminal offense where both guilty act and guilty mind are present. Guilty mind refers as *mens rea* which is the Latin term for guilty mind\(^\text{126}\) is usually one of the constituent elements of a crime. Guilty intent, deals with what the defendant needs to have been thinking at the time he or she

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\(^{124}\) *R v. Cheshire* [1991] 3 All ER 670.


committed the guilty act for criminal liability to attach. In order to be guilty of most crimes, the defendant must have had the Guilty intent required for the crime he was committing at the time he committed the criminal act. As with the guilty act, there is no single guilty intent that is required for all crimes. Rather, it will be different for each specific crime. The *mens rea* is not the same thing as motive. The *mens rea* refers to the intent with which the defendant acted when committing his criminal act. On the other hand, the motive refers to the reason that the defendant committed his criminal act.

The essential ingredient of *mens rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence. The Supreme Court of India has held the factor of grossness or degree does assume significance while drawing distinction in negligence actionable in civil wrong and negligence punishable as a crime. To be latter, the negligence has to be gross or of a very high degree. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonable man, beyond all reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. Since to be the criminal negligence it requires very high degree of negligence the ingredients of mens rea cannot be ruled out that has to be proved by sufficient evidence to prove the criminal negligence. While civil negligence is an omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. Based on these principles the criminal negligence can be tried and punished in India. Mens rea, then, is the criminal intent or mind-set the
prosecution must prove to secure a criminal conviction. The *actus reus* and the *mens rea* must coincide to form the commission of a crime.

**Conclusion**

Criminal negligence could be ascertained only by scanning the material and the expert evidence and the complainant should be given an opportunity to present his case before the magistrate as culpability could be established only on the proper analysis of the expert evidence that may be adduced by the complainant.

A doctor cannot be prosecuted for simple lack of care and error of judgment or accident during treatment. The act complained against a doctor must show negligence or rashness of such a high degree as to indicate a mental state which can be described as totally apathetic, towards the patient. Such gross negligence alone is punishable.

To fasten liability in criminal law, higher" degree of negligence is required. Indian Supreme Court in Jacob Mathew Case held that for negligence to amount in a criminal Offence element of *mens rea* must be shown to exist. It is recklessness that constitutes the *Mens rea* in criminal negligence. It was also held: The 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 Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability. To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law 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 in civil law but cannot form the basis of prosecution.