CHAPTER VI

BURDEN OF PROOF

The plaintiff has the burden to prove each element of a negligence cause of action by a preponderance of the evidence. If the plaintiff fails to carry this burden, the case must necessarily be decided for the defendant. The happening of an accident is never enough by itself to permit a jury to find that a defendant has behaved unreasonably. It is causation that ties the defendant’s act to the plaintiff’s harm and justifies singling out the defendant as the party who should provide compensation for the plaintiff’s loss.

Where there is no obvious link between actions on the one hand and damages on the other, there is no negligence. Causation initially seems different from negligence concepts such as outrageous conduct or negligence, which require the court or jury to make normative judgments about the parties’ conduct and thus may more readily be seen as implicating cultural attitudes toward different social groups. Burden of proof has two elements; the first one is the connection between actions and injuries and the second one is proving this connection by submitting proper evidences. So causation is the main element of burden of proof which evidence circle around it. Hence this chapter is divided into two sections, Iran and India and each section divided into two sub-sections, they are causation and law of evidence.

6.1. India

6.1.1. Causation

Causality is a concept which has been borrowed from philosophy in law. In philosophy, Causality is the relationship between cause and effect. “In seeking to explain any object or event, we have evidence but no proof that its putative cause produced an effect on it”. Without proof of causation, there can be no liability, regardless of the wrongfulness of

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the defendant’s behavior. For example, in a case with respect of the birth and dead of a child who suffered from congenital abnormalities which caused the child psychiatric injury on viewing the child at birth, his parents claimed that the quality of care received from the health authority following an ultrasound scan amounted to a breach of acceptable standards of care for an obstetric service acting with due care and attention. This allegation was refuted by the health authority and therefore instructed an appropriate expert in fetal medicine to seek his opinion as to whether the authority had breached their duty of care. The report confirmed that there was indeed a breach of duty and however if the baby was referred for detailed fetal ultra-sonography in a tertiary fetal medicine center, the baby’s congenital abnormalities would probably have been identified however the equipment used by the health authority at the time was not capable of diagnosing the abnormality so it did not cause the damage and eventual death of the baby. Mother had however suffered from postnatal depression as a result of the shock arising from the birth of the child with abnormalities and her subsequent death resulting there from. This case confirms that even where there has been a breach of a duty of care, the damage resulting from the breach must have been caused by the negligence and reasonably foreseeable and must not be too remote. "Medical negligence is easy to allege but extremely difficult to prove. The general rule is that the burden of proving negligence as a cause of the accident is on the party who alleges it. For establishing negligence or deficiency in service there must be sufficient evidence that a doctor or hospital has not taken reasonable care while treating the patient. Reasonable care in discharge of duties by the hospital and doctors varies from case to case, and expertise expected on the subject which a doctor or a hospital has undertaken. Courts would be slow in attributing negligence on the part of the doctor if he has performed his duties to the best of his ability with due care and caution. It is the duty of the redressal agencies to safeguard the interests of the patients against malpractices by medical professionals but at the same time the inexpensive nature of consumer jurisdiction should not be allowed to become a vicious weapon in the hands of unscrupulous patient to harass the medical professionals without good and adequate
cause."³ Causation is concerned with consequences and non-consequences in a factual sense. A patient, the deceased, had been admitted to hospital with severe vomiting and the doctor concerned failed, negligently, to diagnose the man’s condition. The medical evidence showed that the patient would have died anyway, from poisoning as a result of ingesting arsenic, irrespective of the negligence in diagnosis, which was not an operative cause of the death.⁴ In each case the basic issue to be determined is whether the defendant has materially contributed to the damage; his tort need not be the only cause of the injury.

In negligence, liability exists in general only for consequences of a reasonably foreseeable type or kind. Take in account that an accident where someone is not wearing a seatbelt. Someone is in his car, with the engine running, and he parking his car legally within the lines of the parking stall, but he is not wearing a seatbelt. A car comes rushing down the parking lot and plows into him. It is obvious that he break the law because he was not wearing his seatbelt. However, the “breaking of the law” did not the cause of the accident. In Snell v. Farrell⁵ the court held that;

[c]ausation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former.

Causation refers to the chain of causation between the neglect act and the damage; the claimant must establish an unbroken connection between his damage and the defendant’s wrongful conduct. The element of Causation is divided into two different steps. In order to have causation, the duty breached must be the actual cause of the damages and it also must be the legal cause damages.

6.1.1.1.Cause in fact

In its simplest form, cause in fact is established by evidence that shows that a tortfeasor's act or omission was a necessary antecedent to the plaintiff's injury. There must be a

⁵ Snell v. Farrell, [1990], 2 S.C.R. 311 at 326 [Snell].
causal link between the act of the defendant and the claimant’s injury. Courts have accepted that it is to be resolved as a matter of common sense and convenience, rather than as a scientific or mathematical formula. In the cases where an injury could have had more than one cause the inconsistent tests are categorized as the ‘material contribution’ test and the ‘but for’ or direct cause test. In a case, a steel dresser had contracted pneumoconiosis as a result of exposure to silica dust emanating from both a pneumatic hammer and swing grinders. A statutory duty applied to the grinders, but not to the hammer. The issue was whether the dust that caused the injury came from the grinders or the hammer. It was held that, on the balance of probabilities, dust from the grinders had materially contributed to the injury, and on that basis causation had been established. An employee contracted dermatitis having been required to empty brick kilns in dusty conditions. The medical evidence indicated that the cause had been repeated minor abrasions of the skin by particles of dust; the only way of avoiding the problem was the thorough washing of the skin after exposure to the dust. There were no adequate washing facilities at the workplace and the employee was unable to wash until he had returned home. While the medical evidence did not go so far as to establish that the employee would not have contracted dermatitis if he had been able to wash on site, it was held that the failure of the board to provide washing facilities on site had made a material contribution to the risk of injury. That was sufficient to prove causation. Another case is where employees had developed mesothelioma from exposure to asbestos dust while at work, but there was uncertainty as to which of several employers was responsible for the exposure which had caused the disease. The Court of Appeal had held that for this reason causation could not be proved. However, the Lords held that, where there had been exposure by different employers but the precise causative point could not be identified, it was sufficient to find that the wrongdoing of each employer had materially increased the risk of contracting the disease. The legal test used by courts to prove a causal link between the defendant’s conduct and the claimant’s injury is the ‘but for’ test. While the

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‘but for’ test is the basic rule of thumb, it will have no application where there is more than one cause of an accident. The ‘but for’ test is a test of necessity. It asks was it ‘necessary’ for the defendant’s act to have occurred for the harm to have occurred. For example, in *Hole v Hocking*,\(^{10}\) it was held that a plaintiff would not have suffered a hemorrhage if he had not been involved in a car accident (that is, ‘but for’ the car accident, the plaintiff would not have suffered any injury). However, if no connection can be established, then the action for negligence will fail. For example, in *Robinson v Post Office*,\(^ {11}\) a doctor was found not to be liable for failing to administer a test where it would not have revealed the plaintiff’s allergy. In that case, the plaintiff was wounded in his left side; the doctor gave him an injection of anti-tetanus serum, but did not follow the accepted medical procedure for the administration of a test dose. The plaintiff developed encephalitis which resulted in brain damage and permanent partial disability. The doctor’s failure to give a test dose was held not to have caused or materially contributed to the encephalitis. Courts analyze this issue by determining whether the plaintiff's injury would have occurred "but for" the defendant’s conduct. If an injury would have occurred independent of the defendant's conduct, cause in fact has not been established, and no tort has been committed. The courts have generally accepted the ‘but for’ test notwithstanding these weaknesses, qualifying it by saying that causation is to be understood “as the man in the street” would,\(^ {12}\) Or by supplementing it with “common sense”.\(^ {13}\)

In *Hotson v East Berkshire Area Health Authority*,\(^ {14}\) the plaintiff sustained a fall and was taken to hospital. Five days passed before his injury was correctly diagnosed and treated; he subsequently developed necrosis. Negligence had been admitted but causation remained an issue. There was a conflict of expert evidence. The Lords held that the weight of the evidence indicated that the injury was the primary cause of the necrosis.

\(^ {10}\) *Hole v. Hocking* (1962).
\(^ {14}\) *Hotson v. East Berkshire Area Health Authority*, [1987] 1 AC 750.
This was a ‘but for’ case and the evidence had not established that the delay was a causative factor. In *Wilsher v Essex Area Health Authority*\(^{15}\) a premature baby required additional oxygen administered through a catheter. Unfortunately, the catheter was inserted in the wrong place but this was not noticed by the medical staff. The meters showed abnormal readings over a period of weeks and the baby developed fibroplasias which eventually resulted in blindness. The medical evidence was that there were four other possible causes of the fibroplasias apart from the excess oxygen administered. It was held that this was a ‘but for’ case and that no presumption could be made that the negligent insertion of the catheter made a material contribution to the injury. In a "but-for" test, the question is asked whether the resulting injuries would have resulted "but-for" the act or actions of the defendant. If the resulting injuries would not have occurred “but-for” the defendant's act or actions, then the defendant is the actual cause of the resulting injuries; however, if the resulting injuries would have occurred regardless of the defendant's act or actions, then the defendant is not the cause in fact of the resulting injuries. The ‘but for’ test has been commented upon as being of limited usefulness in determining causation\(^{16}\)because considering the act of the defendant which is the legal cause of the claimant’s damage will generally require some test other than the ‘but for’ test to be applied. In *Gregg v Scott*,\(^{17}\) a lump under the claimant’s arm was diagnosed as benign, but it was a non-hodgkin’s lymphoma. By the time of the correct diagnosis some nine weeks later, the tumor had spread into the claimant’s chest. Treatment was only of limited success and the prospect of the claimant surviving for 10 years was assessed at only 25%. A majority of the Lords held that the ‘but for’ test could not be satisfied because the claimant could not prove that the delay in diagnosis was the cause of his likely premature death. *Bailey v Ministry*\(^{18}\) of Defence is an English tort law case. It concerns the problematic question of factual causation, and the interplay of the "but for" test and its relaxation through a "material increase in risk" test. The fact of the case was

\(^{15}\) *Wilsher v. Essex Area Health Authority*, [1988] 1 AC 1074.
\(^{17}\)In *Gregg v. Scott* [2005] 2 AC 176.
that: Miss Geraldine Bailey went on a holiday to Kenya with her fiancé in late September 2000. She came back with what was suspected to be gallstones. In early January 2001 she was admitted to Royal Hospital. At the hospital there were complications during procedure to remove the stones from her bile duct. She bled extensively, but was put in a ward with little supervision. She was not resuscitated properly during the night, and she was very unwell in the morning. She got worse. At the same time Miss Bailey developed pancreatitis. She was then transferred to another hospital, and put into intensive care. She was critical. For ten days, her life was in the balance. But she started to look better and was moved to the renal ward. The tragedy struck when she was drinking some lemonade. She got nauseous and vomited. Because Miss Bailey was so weak, she could not clear her air passages and she choked. By the time she was resuscitated she had gone into cardiac arrest and had hypoxic brain damage. The question in the Court of Appeal was whether the first Ministry of Defence hospital caused the brain damage. It could not be said with certainty that it was their poor care that led to Miss Bailey's weakness and choking leading to brain damage, because her weakness was also a result of the pancreatitis that Miss Bailey developed and that was not the hospital's fault. Counsel for Miss Bailey argued that the hospital was nevertheless liable because although the brain damage would not, strictly, have been caused "but for" the substandard care, the substandard care had materially increased the risk of harm.

6.1.1.2. Cause in law

Basically, the damage or loss itself must be caused by the breach of a duty of care. This is called causation. A person is responsible only for consequences that could reasonably have been anticipated. The test of causation is a legal test. Legal causation is often called remoteness, and does not concern itself with deciding whether there is causation as a matter of fact, but rather is concerned with whether it is fair to impose liability. When proving the factual causation of a medical malpractice damages, legal causation, otherwise known as proximate cause, must be established to prevent extemporaneous

19 Re Polemis [1921] 3 KB 560.
20 The Wagon Mound [1961] 1 All ER 404.
claims or otherwise dubious and unrelated injuries from being included as worthy of damages. Remoteness is relevant at the stage following the establishment of a factual connection between tort and damage. It is concerned with consequences; but these are said to be legal rather than factual.

The basic legal standard of care in most general negligence cases is the "reasonable person" standard. In essence, the law asks the question: what would a reasonable person have done if faced with the same set of circumstances as did the defendant? Where the defendant's conduct is found not to be reasonable by comparison, then the defendant has breached the duty of care, and may be held liable for negligence provided that the other legal requirements for the tort claim, including damages and causation, are also established. In a case court explains it like as;

so long as the family planning operation done by the first defendant on the plaintiff, the subsequent conception of the fourth child by the plaintiff and the delivery of the same by her are all admitted position, it is for the medical person to prove that the operation was done carefully and without any negligence whatsoever. Having failed to do so, it cannot be inferred that it was properly done exercising care, and even after the child was born, it could not be avoided. Once both the courts have recorded a concurrent finding on the facts, this Court is of the considered opinion that nothing requires to make any disturbance over the same.

Clearly, determining what the "reasonable person" standard of care requires, in the context of a particular situation, is somewhat subjective. It depends on the ex post determination of judges based on their own experience and judgment, together with a review of the defendant's conduct, plus any other relevant evidence about what similarly situated persons would do when confronted with similar circumstances. In a case court hold that;

Award of compensation, by its very nature, depends upon the proof of negligence on the part of the persons against whom it is claimed. The

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failure of the operation conducted upon the first petition is evident from the very fact that the third petitioner was born more than one year after the operation. However, before it is held that the failure was on account of negligence attributable to the respondents alone, specific facts are required to be pleaded and thereafter proved in a given case. Negligence on the part of the person, who has undergone the operation leading to failure, cannot be ruled out. The point of time at which the grievance is made out would also assume significance. If the complaint comes to be made immediately after the grievance is felt, the person, who is otherwise responsible, may have an opportunity to take corrective steps.24

In cases involving medical negligence, proximate cause is not something easier to prove since it's not as easy to tell what the actual damages are. In medical negligence cases, it is usually harder to prove that there was a breach than that the doctor who committed an error was negligent in terms of legal and factual cause. Determining the breach is more difficult since the error that was committed was not necessarily a monumental error or even identifiable as an error at the time it was committed. There must be a sufficient connection between the breach and the loss in order to recover damages. In this regard court held that;

… it is usually a condition of liability that not only should one have done, or been responsible for, some act which the law regards as wrongful, but that there should be a prescribed causal connection between that act and damage or injury for which one is held liable. There may be other conditions as well, such as that the harm should have been foreseeable. But some prescribed causal connection is usually required. Secondly, the question of what should count as a sufficient causal connection is a question of law…25

Damages are likely to be limited to those reasonably foreseeable by the defendant. If a defendant could not reasonably have foreseen that someone might be hurt by their actions, there may be no liability.

6.1.2. Reasonableness

Applying a negligence-based standard of care to situations involving technical or professional practice presents some special challenges. This is true, in part, because the intuitions of juries about what is "reasonable" may not be well-suited to evaluating professional or technical activities, which often fall outside the direct experience and competence of most jury members. The legal standard that applies to these situations shifts slightly. First of all, the standard for negligence in a medical context is usually determined by reference to what a reasonable physician would have done i.e., a person with the same kind of technical background, training, and expertise as the defendant. “The ordinarily prudent person standard, rather than one of individual judgment, applied;”26 “A person is negligent only if he or she, as an ordinary reasonable person, ought reasonably to foresee the exposure of another to an unreasonable risk of harm.”27 Second, figuring out what that standard of care actually means in a particular malpractice case typically involves reviewing evidence about what sorts of clinical practices are customary in the field of medicine: i.e., to determine what a reasonable physician should do in a given situation, we seek evidence about what physicians typically do in practice.28 “Thus, in order to decide whether negligence is established in any particular case, the act or omission or course of conduct complained of must be judged not by ideal standards nor in the abstract, but against the background of the circumstances in which the treatment in question was given and the true test for establishing negligence on the part of a doctor is as to whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with reasonable care. Merely because a medical procedure fails, it cannot be stated that the medical practitioner is guilty of negligence unless it is proved that the medical practitioner did not act with sufficient care and skill and the burden of proving the same rests upon the person who asserts it. The

duty of a medical practitioner arises from the fact that he does something to a human being which is likely to cause physical damage unless it is done with proper care and skill. There is no question of warranty, undertaking or profession of skill. The standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising the ordinary degree of professional skill. A defendant charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. It is not required in discharged of his duty of care that he should use the highest degrees of skill, since they may never be acquired. Even deviation from normal professional practice is not necessarily evidence of negligence.”

There are a number of common law doctrines that contribute to defining the negligence standard of care. Many jurisdictions recognize an "adverse outcomes" admonition or rule, which establishes that the simple fact of a poor outcome following a medical procedure does not itself imply that malpractice has occurred. “The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time.... I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. .... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. ” Likewise, many jurisdictions also follow some version of an "acceptable alternatives" rule, which establishes that the standard of care in medicine is not unitary, and that there are many medical situations where multiple forms of treatment

30 Joseph H. King, Jr., Reconciling the Exercise of Judgment and the Objective Standard of Care in Medical Malpractice, 52 OKLA. L. REV. 166-68 (1999).
32 Bolam v. Friern Hospital Management Committee [1957] 1 WLR 582.
may be consistent with reasonable care.\textsuperscript{33} In the absent unusual circumstances physicians lack a duty to inform a patient of a non-recommended course of treatment based upon views of other health care providers.\textsuperscript{34}

In a related vein, there are also legal doctrines that allow for participation in clinical trials, and recognize that delivering mental treatment in a clinical trial does not of itself constitute negligence, even though such trials might otherwise be viewed as a departure from customary care.\textsuperscript{35} Finally, the legal doctrines governing negligence standards of care also include a "duty to stay abreast," which means that physicians have an obligation to be aware of evolving practices in medical care, and to make appropriate use of new scientific knowledge in medicine as it emerges.\textsuperscript{36} "The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also exists among medical men; nor is a practitioner necessarily negligent if he has acted in accordance with one responsible body of medical opinion in preference to another in relation to the diagnosis and treatment of a certain condition, provided that the practice of that body of medical opinion is reasonable."\textsuperscript{37}

\textsuperscript{33} \textit{Lama v. Borras}, 16 F.3d 473, 478 (1st Cir. 1994).
\textsuperscript{35} \textit{Karp v. Cooley}, 493 F.2d 408, 423-24 (5th Cir. 1974).
what the law requires. The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."38 Dealing with medical negligence, the Court observed that; “Negligence as a tort is the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.”39 Fear causes fleeing and thereby saves lives; this exemplifies a popular and common sense but increasingly untenable view that the direct causation of behavior is the primary function of emotion."Medical negligence litigation is related to errors in medical practice which should never occur if the basic rules of clinical management are followed, clinical information is accurately recorded and analyzed, and there is appropriate communication with patients. Informed consent is a process which depends absolutely on the communication between the doctor and the patient. A well informed patient is less likely to sue a medical professional in case of unfavorable outcome as compared to a less informed one.

6.1.3. Foreseeable

A ship was docked along the wharf and was being worked on by the respondents. The Wagon Mound was unloading gasoline which negligently allowed getting into the water and spreading over to the respondent’s wharf. The Respondent's manager asked the owner of the dock where the Wagon Mound was docked whether it was safe to weld, and after receiving an affirmative answer he told his workmen that they could weld but to be cautious. Some sparks from the welding fell into the water and caused a fire. The trial judge found that some cotton was floating on a piece of debris under the wharf and that sparks from the welding fell onto this. The judge said that the appellants could not have known that it was possible for the gasoline to burn when floating on water. The court held that the Appellants were not liable as the damage by fire was not a reasonably foreseeable consequence.40 A painter employed by a painting contractor was injured

38 Dr.Laxman Balakrishna Joshi v. Dr.Trimbak Bapu Godbole, AIR 1969 SC 128.
39 Supra n 3.
40 Supra n 2.
whilst using some staging erected by a dry dock company. The painting contractor was
gen by the ship owner and there was no contractual relationship between the dry
dock company that erected the staging and the painting contractor. His men were simply
using the staging erected by the defendant. The court held that;

Whenever one person is by circumstances placed in such a position with
regard to another that every one of ordinary sense who did think, would at
once recognize that if he did not use ordinary care and skill in his own
conduct with regard to those circumstances he would cause danger of
injury to the person or property of the other, a duty arises to use ordinary
care and skill to avoid such danger.\(^\text{41}\)

In another case the plaintiff was employed as a herdsman on a farm owned by the
defendants. He alleged that he had contracted a comparatively rare disease Weil's disease
or leptospiroses as a result of the defendants' farm being overrun with rats the carriers of
the disease. The disease was in fact probably transmitted via rats' urine into water troughs
or hay with which the plaintiff had contact. Court held that;

even if it were to be held that the defendants were in breach of their duty
of care in not attempting to eliminate or control the rat population, and
even if they ought to have foreseen that the plaintiff was, or might be,
exposed to some general hazard involving personal injury, illness or
disease in consequence of the infestation, they were nevertheless not liable
because Weil's disease “was at best a remote possibility which they could
not reasonably foresee, and that the damage suffered by the plaintiff was,
therefore, unforeseeable and too remote to be recoverable.\(^\text{42}\)

There are two rules on the context of foreseeable principal, these rules are co-existing but
their co-existence is uneasy. There is an apparent conflict between a rule which requires
that damage be reasonably foreseeable and the other that provides that a \textit{tortfeasor} must
take her victim as she finds her.\(^\text{43}\) Since the defendant, whose victim is especially but
invisibly vulnerable, may be liable for damage which, at least in quantity, it is quite

\(^{41}\) \textit{Heaven v. Pender} (1883) 11 QBD 503.
\(^{42}\) \textit{Tremain v. Pike} (1969) 1307.
impossible to say was foreseeable. Indeed the very kind of the damage which occur
might, except in the very broadest sense, be unforeseeable. In a case the plaintiff had
suffered an injury at work for which the defendant employer was admittedly liable.
Consequently, he was injected with antitetanus serum but, because of an allergy to the
serum, developed encephalitis. Held that;

In our judgment the principle that a defendant must take the plaintiff as he
finds him involves that if a wrongdoer might reasonably foresee that as a
result of his wrongful act the victim may require medical treatment he is,
subject to the principle of novus actus interveniens, liable for the
consequences of the treatment applied although he could not reasonably
foresee those consequences or that they could be serious. 44

For the necessary causal relationship to exist it is not essential that the contravention be
the sole cause of the loss or damage. “… Where two or more events combine to bring
about the results in question, the issue of causation is resolved on the basis that an act is
legally causative if it materially contributes to that result” 45 What constitutes a ‘cause’ is
a commonsense notion. What commonsense would not see as in a non-litigious context
will frequently be seen as according to commonsense notions, in a litigious context. This
is particularly so in many cases where expert evidence is called to explain a connection
between an act or omission and the occurrence of damage.

In these cases, the educative effect of the expert evidence makes an appeal to
commonsense notions of causation largely meaningless or produces findings concerning
causation which would often not be made by an ordinary person uninstructed by the
expert evidence.

“To determine what caused an accident from the point of view of legal liability is
a most difficult task. If there is any valid logical or scientific theory of causation it
is quite irrelevant in this connection. In a court of law this question must be
decided as a properly instructed and reasonable jury would decide it. ‘A jury
would not have profited by a direction couched in the language of logicians, and
expanding theories of causation, with or without the aid of Latin maxims’: Grant

44 Supra n. 11.
v Sun Shipping Co Ltd per Lord du Parcq. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.

6.1.4. **Directness**

Damages direction is a logical fallacy of causation where cause and effect are reversed. The cause is said to be the effect and vice versa. For instance, the statement; Driving a wheelchair is dangerous, because most people who drive them have had an accident. Or it may simply be unclear which ‘the cause’ is and which is the effect. For example; Children that watch a lot of TV are the most violent. Clearly, TV makes children more violent. This could easily be the other way round; that is, violent children like watching more TV than less violent ones. A historical example of this is that Europeans in the middle Ages believed that lice were beneficial to your health, since there would rarely be any lice on sick people. The reasoning was that the people got sick because the lice left. The real reason however is that lice are extremely sensitive to body temperature. A small increase of body temperature, such as in a fever, will make the lice look for another host. The medical thermometer had not yet been invented, so this increase in temperature was rarely noticed. Noticeable symptoms came later, giving the impression that the lice left before the person got sick. In other cases, two phenomena can each be a partial cause of the other; consider poverty and lack of education, or procrastination and poor self-esteem. One making an argument based on these two phenomena must however be careful to avoid the fallacy of circular cause and consequence. Poverty is a cause of lack of education, but it is not the sole cause, and vice versa.

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In *Re Polemis*, stevedores, who were servants of the defendant, negligently let fall a plank into a ship’s hold containing petrol in metal containers. The impact of the plank as it hit the floor of the hold caused a spark, and petrol vapor was ignited. The ship was destroyed. Arbitrators found that the spark could not have been reasonably foreseen, though some damage was foreseeable from the impact. The defendant was found liable because the claimant’s loss was a direct, though not reasonably foreseeable, result. Unfortunately ‘directness’ was not defined, and there is still doubt as to whether ‘direct’ damage is confined to damage suffered by claimants which is foreseeable in a general sense, or to damage to the particular interest of the claimant which was likely to be affected. Provided some damage is foreseeable, liability lies for all the natural and direct consequences flowing from the breach of duty. The decision is based on a broad approach to the definition of ‘kind’ of damage.

“The term 'direct injury' is there used in its legal sense, as meaning a wrong which directly results in the violation of a legal right. 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (damnun absque injuria), does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. ... Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action.' Parker v. Griswold, 17 Conn. 288, 302, 303, 42 Am.Dec. 739. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained.”

6.1.4.1. Contributory negligence

Contributory negligence is negligent conduct by the injured party that is a contributing cause of her injuries, and that falls below the legal standard for protecting oneself from an unreasonable risk of harm. Plain clothes police officers were arresting robbery suspects. The decedent thought the suspects were being attacked and was shot by one of the officers when he came out of his house with a gun. The court held that under the rescue

47 *Re Polemis v. Withy* [1921] 3 KB 560 (CA).
doctrine, contributory negligence is not present if the rescuer had a reasonable belief that the victim was in actual danger. In *Eckert v. Long Island R. R. Co.* case Eckert saw a boy sitting on railroad tracks. He succeeded in saving the boy but was struck and killed by the train. The court held that when a rescuer attempts to save someone in imminent peril, he may assume extraordinary risks or perform dangerous acts without being contributorily negligent.

Defenses to negligence are four:

a. Contributory Negligence is a partial defense to negligence in which the amount of damages the defendant is ordered to pay is reduced because the injury was partly the victim’s own fault as well as the defendant’s fault. When there is a contributory effort of both the victim and the defendant.

b. Limitation Period; There is a limited amount of time the victim has to file a tort action to recover damages in tort. Limits are found under the Limitations Act. There are some circumstances in which a “discoverability principle” applies in which the limitation period begins when the victim becomes aware of the harm. I.e.: childhood sexual abuse.

c. Voluntary Assumption of Risk; means no harm is done to a person who is willing. A plaintiff gives up the ability to sue for damages if they accept the risk of the activity.

d. Illegality; means an action does not arise out of a shameful cause. The purpose is to prevent a person from profiting from a wrongful act or being reimbursed for a criminal penalty.

The standard of care in contributory negligence is the same as in ordinary negligence; i.e., that which a reasonable person would have done under the same or similar circumstances. In *Butterfield v. Forrester* case, Forrester laid a pole across a road. Butterfield was riding at high speed at twilight and did not see the pole. He hit the pole

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and suffered personal injuries. The court held that Butterfield was contributorily negligent because if he had been using ordinary care he would have been able to see and avoid the obstruction. In *Roberts v. Ring*\(^{52}\) case, Ring was 77 years old and had impaired hearing and vision. While driving on a busy street he saw a seven year old boy run into his path but failed to stop in time to avoid hitting him. The court held that while the defendant cannot take advantage of impairments and infirmities to avoid a finding of negligence, the injured party is held to a standard that takes age and maturity into account. In *Brown v. Kendall*\(^{53}\) case Kendall injured Brown while trying to separate their dogs and stop them from fighting. Brown was standing behind Kendall and he was struck in the eye with a stick. The court held that the injured party cannot recover if both parties were not negligent, or if both parties were negligent, or if the injured party was negligent but the defendant was not. Alexander sued Kramer Brothers after he suffered personal injuries in an accident with the defendant’s truck and Kramer Brothers asserted contributory negligence as a defense. The court held that the plaintiff has the burden of proof to show that he or she was not contributorily negligent.\(^{54}\) Martin was killed in an accident while driving a buggy without lights at night. The defendant was driving on the wrong side of the road. The court held that the violation of a statutory duty of care is negligence per se and a jury may not relax that duty. In order for a party to be liable for negligent conduct, the conduct must be the cause of the injury.\(^{55}\) Smithwick was told not to work on a platform but was not told that the wall was about to collapse. He worked on platform despite the warning because he believed the risk of falling was the only danger. The court held that the failure to heed a warning is not contributory negligence if the injury was the result of a different source of risk caused by the defendant, and the injured party was unaware of that risk.\(^{56}\) In a case involved the negligent treatment of a young boy who fell out of a tree, damaging his hip and subsequently developing necrosis. His

\(^{52}\) *Roberts v. Ring*, 143 Minn. 151, 173 N.W. 437 (1919).
\(^{53}\) *Supra note 51*.
\(^{56}\) *Smithwick v. Hall*, 59 Conn. 261, 21 A. 924, 12 L.R.A. 279 (1890).
injury was not correctly diagnosed and, as a result, treatment was delayed by five days. Lord Bridge As stated that;

“Unless the plaintiff proved on the balance of probabilities that the delayed treatment was at least a material contributory cause of the vascular necrosis he failed on the issue of causation and no question of quantification could arise.” 57

In another case the Australian court adopted the same approach:

“It has always been the law that a pursuer succeeds if he can show that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of those causes arose from the fault of the defender. The pursuer does not have to prove that this cause would of itself have been enough to cause him injury.” 58

In *Fairchild* 59 case, the House of Lords dealt with the situation where a man was exposed to asbestos by several negligent employers. It was unknown whether the cancer was caused by a single strand of asbestos being lodged in the lungs or by cumulative exposure. It may have been the case that the strand lodged itself in the Claimant's lungs during the employment of Defendant three, meaning that there is no causation with Defendant one and Defendant two. However, it simply was not possible to state this with evidential certainty. Instead the court used the material contribution to risk test, and said that the Defendants had all contributed to the risk of the Claimant getting cancer. The House of Lords applied the material risk test and found all employers liable. *Fairchild* is an important case because it confirms the material contribution to risk test in McGhee 60 and because the House of Lords gives a discussion of principle and policy behind the law. In 2006, the House of Lords had to deal with the question of apportionment between defendants when one is insolvent. 61 The question was whether the solvent Defendant pays the insolvent Defendant's share; the House of Lords said no. 62

59 *Supra* note 9.
60 *Id.*
62 *Supra* note 9.
6.1.4.2. **Intervening event**

The defendant may argue that his or her conduct no longer operates as the effective legal cause of the plaintiff’s injury, having been replaced by the intervening act or event which is said to have broken the chain of causation. Such a chain-breaking event is referred to by English judges as a *novus actus interveniens*. In these cases, the Defendant's negligence is not sufficient by itself to cause the injury. The latin phrase *novus actus interveniens* is used to describe the intervening act. In Empress Case a factory owner leaves an oil drum in a dangerous place and a worker comes by, lights a cigarette and throws it towards the barrels causing a fire. It would be the owner's fault for leaving the barrels in a dangerous place where an accident was likely to happen. If, however, the workman knew that the barrels were flammable and still threw a match, it would be difficult to say that the factory owner caused the fire. Similarly, if the drum had been struck by lightning it would be hard to say that the owner caused it. It should be clear that the question of whether a novus actus breaks the chain of causation will depend on the duty of care of the Defendant. If the factory owner had a duty of care to protect the barrels from lightning then there would be causation if lightning caused the fire. It is only because lightning striking the barrel is such a rare occurrence that we can say it broke the chain of causation between the owner's negligence leaving the barrels in an unsafe place and the damage by fire.

A novus actus interveniens may take three different forms. From the abovementioned examples, it may consist of the conduct of the plaintiff (the suicide), the act (or omission) of a third party (the hospital and its employees), or some natural event or coincidence independent of any human agency (the extraordinary and unseasonal storm). The legal effect of a successful novus actus interveniens plea is to absolve the defendant or original

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65 A.M. Dugdale and M.A. Jones, *Clerk & Lindsell on Torts*, para. 2.78 (Sweet & Maxwell, 2006) [101].
wrongdoer of legal liability or further legal liability. In *Lamb*\(^{67}\) case Council Lord Denning M.R. stated:

> The truth is that all these three – duty, remoteness and causation – are all devices by which the courts limit the range of liability for negligence or nuisance. As I said recently ‘…it is not every consequence of a wrongful act which is the subject of compensation. The law has to draw a line somewhere’. Sometimes it is done by limiting the range of the persons to whom duty is owed. Sometimes it is done by saying that there is a break in the chain of causation. At other times it is done by saying that the consequence is too remote to be a head of damage. All these devices are useful in their way. But ultimately it is a question of policy for the judges to decide.”

In *Knightley* case, the defendant caused an accident in a tunnel. The police were called but the officer in charge forgot to close the entrance of the tunnel so cars couldn't continue to enter. This was in breach of police codes. The officer in charge then sent two police constables down the tunnel against the flow of traffic in order to close the tunnel. They did so though it was in breach of codes for them to do so. One of the constables was injured by an oncoming car (through no fault of the driver's) and he sued. The trial judge found that 1st Defendant, the driver of the car which originally causes the need for the police to be called out, was liable and the failures by the officer in charge and Claimant himself did not break the chain of causation. The Court of Appeal held that the chain was broken by the officer in charge. They said that the question of when a novus actus break the chain of causation is a matter of common sense but it did enunciate some principles of wider application. The Court asked whether the injury was a probable and foreseeable result of the actions of officer in charge. The answer was yes and thus the chain was broken. In addition, negligent conduct is more likely to break the chain of causation than non-negligent conduct.\(^{68}\) In Reeves case the House of Lords held that the suicide of a prisoner in a police cell did not break the chain of causation as the police had a duty to

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\(^{67}\) *Lamb v Camden London Borough Council* [1981] QB 625 (CA) at 636.

\(^{68}\) *Knightley v Johns* [1982] 1 WLR 349.
watch the prisoner. The police knew that the prisoner had suicidal tendencies and the police owed him a duty of care to stop him committing suicide.  

6.1.5. Evidence

There are four primary types of evidence: testimonial, documentary, real, and demonstrative. Testimonial evidence is the most traditional evidence with which many people are most familiar, involving testimony in court from someone who has information pertaining to the case. Documentary evidence is any evidence which is pertaining to or consisting of documents; relating to or using documentation in literature or art; based on actual events or factual information, it may takes the form of photographs, video, written documentation, or audio, which is introduced to allow people to examine the contents of the document. It deemed relevant if it has a tendency to make a fact more or less probable than it would be without the addition of the offered evidence. All relevant evidence is admissible unless a special exclusionary rule applies or the court determines the probative value is substantially outweighed by pragmatic considerations such as unfair prejudice or undue delay.

Medical negligence lawsuits are usually based upon a claim that a health care provider was negligent. To establish negligence, the plaintiff must prove the practitioner’s actions fell below the accepted standard of care, i.e., the degree of care a reasonable, similarly qualified health care provider would have provided under the same or similar circumstances.

It is for the patient complainant to establish his claim against the medical man and not for the medical man to prove that he acted with sufficient care and skill… The complainant must allege specific act of negligence and prove how that amounts to negligence.

Burden of proof can define the duty placed upon a party to prove or disprove a disputed fact, or it can define which party bears this burden. In criminal cases, the burden of proof

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70 Supra note 3.
is placed on the prosecution, who must demonstrate that the defendant is guilty before a jury may convict him or her. But in some jurisdiction, the defendant has the burden of establishing the existence of certain facts that give rise to a defense, such as the insanity plea. In civil cases, the plaintiff is normally charged with the burden of proof, but the defendant can be required to establish certain defenses.\(^7\) In a civil case, the plaintiff must prove his case by a preponderance of the evidence. The person bringing the lawsuit has the burden of proving the elements of his lawsuit. The degree of proof required in most civil actions. Preponderance means that the greater weight and value of the credible evidence, taken as a whole, belongs to one side in a lawsuit rather to the other side. In other words, the party whose evidence is more convincing has a preponderance of evidence on its side and must, as a matter of law, prevail in the lawsuit because it has met its burden of proof. In criminal litigation, the burden of proof is always on the state. The state must prove that the defendant is guilty. The defendant is assumed to be innocent; the defendant needs to prove nothing. In civil litigation, the burden of proof is initially on the plaintiff. However, there are a number of technical situations in which the burden shifts to the defendant. For example, when the plaintiff has made a prima facie case, the burden shifts to the defendant to refute or rebut the plaintiff’s evidence.

6.1.5.1. The Requirement of Expert Testimony

An expert can be anyone with knowledge or experience of a particular field or discipline beyond that to be expected of a layman. The plaintiff in a medical negligence action is ordinarily required to produce, in support of his claim, the testimony of qualified medical experts. This is true because the technical aspect of his claim will ordinarily be far beyond the competence of the judges. The plaintiff; himself a layman in most instances is not free simply to enter the courtroom, announce under oath that the defendant surgeon amputated his leg instead of saving it, and then request the court to find the surgeon negligent. The judges possessing no special expertise in the relevant field, are incapable of judging whether the facts described by the plaintiff even assuming an accurate

narration by him, add up to negligent conduct.\textsuperscript{72} An expert witness is an expert who makes this knowledge and experience available to a court to help it understand the issues of a case and thereby reach a sound and just decision. A charge of negligence affects the professional status and reputation of a doctor. Therefore the burden of proof on the part of the complainant alleging negligence of the doctor is correspondingly greater. A finding not based on any expert evidence cannot be sustained.\textsuperscript{73} A negligence case is usually proven through one of two types of evidence: direct and circumstantial. Evidence derived from the personal knowledge of a witness or from images in a photograph or video constitutes direct evidence. Circumstantial evidence, by comparison, requires a fact-finder to draw an inference based on the evidence that has been produced.\textsuperscript{74}

Proceedings involving negligence in the matter of medical care by a medical practitioner would arise complicated questions requiring evidence of experts to be recorded. The procedure which is followed for determination of medical negligence is in nature involving trial on the basis of affidavits and is not suitable for determination of complicated questions. It is no doubt true that sometimes complicate questions requiring recording of evidence of experts may arise in a complaint about negligence based on the ground of negligence in rendering medical care by a medical practitioner; but this would not be so in all complaints about negligence in rendering care by a medical practitioner. There may be cases which do not raise such complicated questions and the medical negligence may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the outpatient card containing the warning or use of wrong gas during the course of an anesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers.\textsuperscript{75}

\textsuperscript{72} \textit{Supra note 3}.
\textsuperscript{73} \textit{Id}.
\textsuperscript{74} Ram Chander v. State of Haryana, AIR 1957 SC 318.
\textsuperscript{75} Chinkeow v. Government of Malaysia, (1967) 1 WLR 813 P.C.
Expert evidence is a circumstantial of the genus evidence, thus, like all other evidence; expert evidence is only admissible if it is relevant. Section 3 of Indian Evidence Act 1872 defines evidence which is more definite meaning. Evidence thus signifies only the instruments by means of which relevant facts are brought before the Court. Evidence is generally divided into three categories;

1) Oral or personal
2) Documentary and,
3) Material or real.

The definition of evidence must be read together with that of proved. The combine results of these two definition is that evidence under the Indian Evidence Act which is not only the medium of proof but there are in addition to this, number of other matter which the Courts has to take into consideration, when forming its conclusion. Thus the definition of evidence in the Indian evidence Act is incomplete and narrow. In State Of Maharashtra v. Dr. Praful B. Desai, the Supreme Court has held that under section 3 of the Indian Evidence Act, besides oral and documentary evidence, electronic record can also be admitted as evidence. The Court further stated that evidence ruled in criminal matters could be by way of electronic records, which would also include videoconferencing, Hence what is no evidence. Circumstantial evidence is known as indirect evidence. Circumstantial evidence is usually a theory, supported by a significant quantity of corroborating evidence. What evidentiary value or weight has to be attached to such statement, must necessarily depend on the facts and circumstances of each particular case. In a proper case, it may be permissible to convict a person only on the basis of a dying declaration in the light of the facts and circumstances of the case.

There is a question whether expert testimony may be offered in medical malpractice cases to support a claim brought under the theory of res ipsa loquitur. Whether to permit medical experts to offer opinions on the issue of negligence of the defendants in a

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76 Law Society of India v. Fertilisers, AIR 1974 Ker 308.
78 Ramawati Devi v. State of Bihar, 1983(1) SCC 211.
medical malpractice case that is brought on a theory of res ipsa loquitur rather than based on specific or general negligence. Plaintiff’s decedent went to the hospital to give birth. Defendant doctor told her husband that the fetus was dead in the womb and that he would need to operate immediately to remove the fetus in order to save the mother's life. Once the operation began, the doctor delivered a healthy baby. The mother, however, died shortly after the operation. Her husband sued, alleging that but for the negligence of the doctor his wife would not have died. He did not assert any specific negligent act of the doctor or offer any expert testimony to support his theory, however. Instead, he sought to bring the case on a theory of res ipsa loquitur, arguing that it spoke for itself that if the doctor were not negligent; his wife would not have died. He argued that he should not, therefore, need expert testimony. The res ipsa loquitur doctrine is a rule of evidence whereby a submissible issue of negligence may be made by adducing a particular kind of circumstantial evidence, viz., by showing the fact of an occurrence which, because of its character and circumstances, permits a jury to draw a rebuttable inference, based on the common knowledge or experience of laymen, that the causes of the occurrence in question do not ordinarily exist in the absence of negligence on the part of the one in control. The doctrine does not normally have any application to medical negligence cases except where expert testimony is not required to show a breach of the standard of care, such as in cases in which (1) the patient receives an unusual injury to an area of the body unaffected by the operation or treatment; or (2) the physician left a foreign object in an operative cavity, as even a lay person can assess negligence in such a case.

The Court held that to permit recovery without expert testimony in such cases, it was a prerequisite “that laymen know, based on their common knowledge or experience” that the undesirable outcome would not have occurred unless the defendant physician was negligent.

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79 Janice v. St. Anthony’s Medical Center, SC 88948.
80 Jacob Mathew v. State of Punjab. 2005 AIR 3180 SC.
81 Williams v. Chamberlain, 316 S.W.2d 505, 510-11.
The better rule is to allow expert testimony in medical malpractice cases, where otherwise admissible, to assist the parties in establishing or rebutting the inference of negligence under a theory of res ipsa loquitur. We see no reason to continue to preclude the use of the res ipsa doctrine simply because a claimant's injury is more subtle or complex than the leaving of a sponge or needle in the patient's body. As recognized by the Restatement and a majority of other jurisdictions, the likelihood of negligence necessary to support a charge under res ipsa loquitur may exist even when there is no fund of common knowledge concerning the nature and circumstances of an injury. The use of expert testimony serves to bridge the gap between the jury's common knowledge and the complex subject matter that is ‘common’ only to experts in a designated field. With the assistance of expert testimony, jurors can be made to understand the higher level of common knowledge and, after assessing the credibility of both plaintiff's and defendant's experts can decide whether to infer negligence from the evidence.

The use of expert testimony serves to bridge the gap between the jury's common knowledge and the complex subject matter that is ‘common’ only to experts in a designated field. Where a plaintiff is unable to show which specific act of negligence of the defendants caused his or her injury, but is able to show that all the potential causes are within the control or right to control of defendants, and that they have greater access to knowledge about the cause of the injury than does plaintiff, and a medical expert testifies that such injury does not occur in the absence of negligence of the defendants, then a prima facie case for medical malpractice has been made. Expert testimony may not be used in a medical negligence case to support an inference of negligence based on the doctrine of res ipsa loquitur because that issue deals with how the allegations of a petition might eventually be proven, it is not related to the sufficiency of a pleading. There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

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83 Martin v. Washington, 848 S.W.2d 487, 495 (Mo. banc 1993).
85 S. A. Sattar Khan and others, AIR. 1939, Madras 283.
Courts have the power to exclude expert evidence, even though it would otherwise be admissible. The law of negligence evolved in recognition of the fact that people live and work in the context of their relationships with other people. The law reflects a societal belief that in this context of relationships people should be required to exercise a certain care that their actions do not harm other people they can reasonably foresee might be affect by their conduct, and they should be accountable in the event a lack of care does harm such other persons. There are some cases where expert evidence of a professional’s standard of care is not required. Whether expert evidence is required or not is a question which will be determined on the facts of the case. There are cases where the court may determine the standard of care based on common experience. A court may decide in the context of a professional negligence case that the conduct of the defendant was so egregious and it so clearly fell below the standard required that no expert evidence is required. However, unless a professional’s conduct is that egregious, the court will likely require expert evidence to establish the standard of care. The court can refuse to place any reliance on the opinion of an expert which is unsupported by any reasons. 

Experts have a duty to the court, which overrides any obligation to the person from whom the expert has received instructions or payment. Experts must certify, at the end of the expert report that they understand and have complied with their duty to the court. The rules contain an express statement that expert evidence “is to be restricted to that which is reasonably required to resolve the proceedings. No party may call an expert or put an expert's report in evidence without the court's permission. Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that only one expert give evidence on that issue. Where parties cannot agree, the court may select an expert from a list mutually provided by the parties or elsewhere. Where there is a single joint expert, each party may give instructions to the expert and the court may give directions about the payment of expert's fees and expenses. At any stage, the court may direct a discussion between experts for the purpose of reaching an agreed opinion on issues, or for preparation of a statement on those issues where they agree and disagree.

86 Haji Mohammed Ekramul Haq v. State of West Bengal, AIR. 1959.
along with their reasons for disagreeing. Opinion of experts largely depends upon the material for comparison. The value of the opinion given by an expert depends to a great extent upon the material put before him and the nature of the questions that are put to him.

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate...An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary. The worth of an opinion can be tested by the reasons given in support of that opinion and not by the bare conclusions of the expert. In giving their evidence, expert witnesses are not expected to act as advocates but, rather, as objective vehicles of specialized knowledge. If the court perceives advocacy, the expert's evidence can be discredited or rejected. Where an expert's evidence is tainted with partiality, that expert is sometimes referred to as a hired gun. “The only reason an expert is permitted to give opinion evidence is because the facts that form the basis of the opinion are beyond the ken of the lay observer. Thus, in admitting expert opinion into evidence and giving it weight, the court (to that extent) delegates its fact-finding function to a witness.”

It is the duty of experts to help the court on matters within their expertise. This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid...No party may call an expert or put in evidence an expert’s report without the court’s permission. When parties apply for permission they must identify the field in which expert evidence is

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88 Supra n. 85.
90 Devi Prasad v. State: AIR. 1967 Allahabad 64.
91 Woods, Thomas S., Impartial Expert or Hired Gun: Recent Developments, 60 The Advocate 205 (March 2002).
required.... If permission is granted it shall be in relation only to the expert named or the field identified...  

First a proposed expert witness has to be qualified; a process of submitting the expert's qualifications to the court. A few practice points. An expert's evidence must state the facts upon which the opinion is based. It will be up to the party producing the expert, preferably before but possibly after the expert, to prove the facts upon which the expert opinion is tendered in to evidence. [T]he statement of the opinion of an expert witness for which the rule provides proves no more than the fact that the opinion is adduced to prove. It is not evidence of, and does not prove, the facts upon which the opinion is based. They must be proven in some other way...Expert witnesses will often be able to testify to some or all of the facts necessary to the opinion offered and can prove such from their own knowledge. But it is, of course, not necessary that an expert witness have any personal knowledge of the facts...[T]he opinion must be based on stated facts or hypotheses to be proven by evidence. In the present case the facts were not stated. And certainly the expert could not find facts in any event on hearsay; unsworn and untested...It will usually be for counsel to prove facts in Court upon which the opinion is based.  

An expert witness is a pivotal element in medical cases. The testimony of evidence by experts may address key factual issues in a case. The expert evidence may also be used as explanatory evidence. "The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to guess the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly." This type of evidence may be used in order to clarify psychological testimony or complex evidence. Moreover, causation expert evidence may also be used to explain how an incident occurred. Factual expert evidence is also a significant key in trial because it allows test to be introduced such as alcohol and or drug tests. The testimony of experts is allowed if scientific, technical, or other specialized knowledge will assist the trials of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise; if (1) the testimony is based upon sufficient facts or

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92 English Civil Procedure Rules, at §35.3 and 35.4, 2010.  
93 Rowe v. Bobell Express Ltd., 2003 BCSC 471.  
94 Supra n. 3.
data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Moreover, the statute signifies, "a strong and undeniable preference for admitting any evidence which has the potential for assisting the trials of fact." There are three requirements for expert testimony: (1) that the expert be qualified; (2) that the substance of the testimony be a proper subject for expert testimony; and (3) that the testimony be helpful to the trials of fact.

A complaint alleging negligence by mishandling of needle biopsy as the needle pierce the blood vessel of the patient resulting in death, is dismissed by the National Commission on the grounds that the complainant neither filed any report of a doctor to substantiate the averments made in the complaint nor produced any medical literature in support of the allegations. Thus, there was no evidence on record of any negligence in the procedure adopted for needle biopsy except the bald allegations of the complainants.

The Supreme Court in the case of observed that medical negligence on the part of doctor is to be proved as a fact by leading evidence which may be of an expert. In M. Gopal Chettiar v. S. Ravindram, Tamil Nadu State Commission held that the duty is always cast upon the complainant to adduce proof of negligence or deficiency in service on the part of the opposite party. In Dr. S Gurunathan v. Vijaya Health Centry, National Commission held that in the absence of expert evidence on behalf of the complainant, the commission is held justified in relying upon the affidavit filed by the doctors on behalf of the hospital in a case of medical negligence. In Amar Singh v. Frances Newton Hospital, it was held that all medical negligence cases concern various questions of fact, when the burden of proving negligence lies on the complainant, it means he has the task of convincing the court that his version of the facts is the correct one.

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95 M. Gopal Chettiar v. S. Ravindram.
96 Dr. S Gurunathan v. Vijaya Health Centry [(2003) 1 CPR 222].
97 Amar Singh v. Frances Newton Hospital [(2000) 1 CPJ 8].
98 G. Sampanti v. Hindustan Aeronautics Limited & Anr., 2005 (3) CPJ 369 (Kar).
O. Aisha B. v. Prof. JR Danial, 2004 CTJ 31 (CP) (NC).
The plaintiff in a medical negligence action is ordinarily required to produce, in support of his claim, the testimony of qualified medical experts. This is true, because the technical aspects of his claim will ordinarily be far beyond the competence of the lay jurors whose duty it’s to assess the defendant doctor’s conduct. The plaintiff, himself a layman in most instances, is not free simply to enter the courtroom, announce under oath that the defendant surgeon amputated his leg instead of saving it, and then request the jury to find the surgeon negligent. The jurors, possessing no special expertise in the relevant field, are incapable of judging whether the facts described by the plaintiff, even assuming an accurate narration by him, add up to negligent conduct. And the plaintiff himself is incompetent to supply guidance; he too lacks the training and experience that would qualify him to characterize the defendant’s conduct.

Since the mere filing of a lawsuit, unsupported at trial by any probative evidence, does not entitle one to the payment of damages, the plaintiff has to lose. The plaintiff could hope to prevail only if he comes to the court backed by one or more qualified expert witnesses.

In a medical negligence lawsuit the plaintiff must put qualified medical experts on the witness stand to testify (1) that plaintiff suffered an injury that produced the disability and other ill effects claimed by him; (2) that the cause of this injury, or at least a significant contributing cause of it, was the professional services rendered by the (defendant) doctor; (3) that the standard methods, procedures, and treatments in cases such as plaintiff’s were such and such; and (4) that defendant’s professional conduct towards plaintiff fell below or otherwise unjustifiably departed from the described standard.

(i) **Relevance of Expert Evidence**

The role of the expert medical witness is to inform the judge so as to guide him to the correct conclusions. It must be for the judge to guess the weight and usefulness of such assistance as he is given and to reach his own conclusions accordingly.

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*Indian Medical Association v. V.P. Shantha*, [1995].
An expert witness in a given case normally discharges two functions. The first duty of an expert is to explain technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Court in deciding whether the acts of omissions of medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases, the question whether a medical practitioner or hospital is negligent or not, is a mixed question of fact and law and the Courts are not bound in every case to accept the opinion of expert witness. Although in many cases the opinion of the expert witness may assist the Court to decide the controversy one way or the other.

The real function of the expert is to put before the court all the materials, together with reasons which induce him to came to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials. An expert is not a witness of fact and his evidence is really of an advisory character.

(ii) Authority to Summon expert witness

In Darshan Singh Basra’s\(^99\) case, the District Forum refused to summon two doctors along with case records of the patient to prove the allegation of medical negligence by expert evidence on the ground that the pleading does not disclose that the complainant failed to secure the affidavits of the doctors. By setting aside the order of the District Forum, it was held by the State Commission, Chandigarh, that in case of medical negligence the Consumer Forum can be requested to summon expert witnesses under Section 13 (4) (i) of the Consumer Protection Act, 1986 in order to prove the allegation of medical negligence.

(iii) Cross-examination of experts before Consumer Forum

It is true that reception of evidence on an affidavit is permissible before Consumer Forum, but when a party insists that he wants to cross-examine the deponent of the affidavit to prove that the affidavit cannot be relied upon, natural justice demands that

\(^{99}\) *Darshan Singh Basra v. Dr. Jasbir Singh*, 1988 (1) CPR 304 (Chandigarh).
permission to cross-examine that witness should be given. A doctor charged with negligence can clear himself if he shows that he acted in accordance with the prevailing professional practice.

(iv) Criteria for condemning expert evidence

The principle of law enunciated by the House of Lords is that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge’s satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. The judge has the right to come to the conclusion that the views genuinely held by a competent medical expert are unreasonable when he is satisfied that the body of expert opinion cannot be logically supported at all and that such opinion will not provide the bench mark by reference to which the defendant doctor’s conduct falls to be assessed. Recently the Supreme Court has also expressed the same view in Malay Kumar Ganguly v. Sukumar Mukherjee.

The judge is permitted to take the view that the defence expert is simply wrong, because he has not considered all the factors, or that he does not speak for a responsible body but for himself. In other words, the judge can reject the evidence of defence expert as unreliable or partisan on consideration of the cross-examination of the expert witness. The National Commission, did not consider the certificate issued by an eminent physician to substantiate the allegation of transfusing wrong group of blood to the patient, as the physician was neither a hematologist nor pathologist. The State Commission, Tamil Nadu, did not accept the expert opinion of two doctors on behalf of the

100 Bolitho v. City and Hackney Health Authority, (1974) 4 All ER 771 (HL)
101 Malay Kumar Ganguly v. Dr. Sukumar Mukherjee (2009) 9 SCC 221.
complainant on the grounds that their opinions were not proved by oral evidence and the original records were not examined to substantiate their opinion.\(^{103}\)

**(v) Conflicting expert evidence – duty of court**

In cases of conflicting expert evidence what the judge has to decide is which of the two explanations (of the experts) is to be preferred. That is a question of fact which the judge has to determine on the ordinary basis on a balance of probability. It is a question for the judge to weigh up the evidence of both sides, and he is entitled in a situation to prefer the evidence of one experts witness to that of the other. Judge is the expert of all experts.

In a large number of cases complaints were dismissed as the complainants could not adduce expert evidence to prove medical negligence.

In *NS Sahota*\(^{104}\), it was held that in the matter of giving proper treatment or delay, if any, in referring the patient for specialized treatment depends upon the opinion given by the experts. There is no evidence on record that the doctors were negligent in discharging their duty in the instant case. The burden of proving the negligent act or wrong diagnosis was on the complainant. The complainant has not produced any direct expert evidence to show that the treatment given to his wife by the opposite parties was wrong which resulted in her death, alleging deficiency in service.

In *Charanjit Kaur*\(^{105}\), the patient delivered male child in the clinic of the doctor. She developed complications for which she was shifted to other hospital for treatment. It was alleged that the doctor was negligent, as he was not qualified to give the treatment and to run the clinic for medical treatment. The doctor was not held liable for negligence by the State Commission, Punjab, as there was no expert evidence to substantiate the allegation made out against the doctor.

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\(^{103}\) *P.S. Krishnaswamy v. Apollo Hospital Enterprises Ltd.*, 1997 (3) CPR 199 (Chennai).

\(^{104}\) *NS Sahota v. New Ruby Hospital* [(2002) 1 CPJ 345].

\(^{105}\) *Charanjit Kaur v. Majit Kaur* [(1999) (1) CPR 559 (Chandigarh)].
In *Dr. AS Nagpa*\(^{106}\), it was held that simply on the affidavit of the complainant that after few days of the operation, defect was noticed in the right eye and ultimately loss of vision of the right eye and partial loss of vision in the left eye was on that account, was not sufficient.

In *Rajeswai*\(^{107}\) the patient developed stomach swelling and pain after delivery of child in the hospital. The patient was discharged by the hospital. So, the patient was treated in another hospital and recovered. The State Commission, Tamil Nadu, did not hold the doctor negligent, because there was no expert evidence to prove that the stomach swelling and pain was the result of any deficiency in service on the part of the doctor of the hospital.

In *Tarachand Jain*\(^{108}\) the patient had undergone prostate operation. The patient developed acute pain in thigh muscles and backbone. The continuous and regular flow of urine which had started immediately after the operation continued. It was alleged that the patient was suffering from incontinence due to damage caused to the sphincter muscle during the operation performed by the doctor. The National Commission, did not hold the doctor negligent on the following grounds; first, there was no expert evidence to prove that damage of sphincter muscle would result in incontinence of the patient; secondly, the doctor who prescribe injection for treatment of sphincter damage, was not examined as witness; and thirdly, the fact that the patient was suffering from incontinence, was not reported to the hospital authority during the period of two months after his discharge from the hospital.

**(vi) Is expert opinion essential in every case**

Ever since medical professionals have been brought under the ambit of Common Protection Act, there is a rise in the number of unnecessary, frivolous and even malicious litigation harming medical fraternity.

\(^{106}\) *Dr. AS Nagpa v. Krishan Lal* [(1996) III CPJ 220].

\(^{107}\) *Rajeswai v. Anthony Hospital represented by Chief Doctor* [(1998) (1) CPR 285 (Chennai)].

\(^{108}\) *Tarachand Jain v. Ganga Ram Hospital* [(1999) III CPJ 53 (NC).
In the light of this, the Supreme Court in *Martin F D’ Souza*\(^{109}\) has directed the consumer forum to first seek an expert opinion from a panel of doctors whether any prima facie case is made out against the doctor or not, and only thereafter send notice to the medical practitioner. This was thought necessary to avoid harassment to doctors who may not be ultimately found to be negligent. However, recently Supreme Court in *V. Kishan Rao*\(^{110}\) held that expert opinion of prima facie negligence is not a precondition for consumer forum to proceed with the case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert assistance. It was further held that direction given in *Jacob Mathew*\(^{111}\), for consulting another doctor before proceeding with criminal investigation was confined only in cases of criminal complain and not in respect of cases before the consumer forum.

In *V. Kishan Rao*\(^{112}\) the appellant got his wife admitted to Respondent 1 Hospital on 20-7-2002 as the wife was complaining of intermittent fever and chills. The wife did not respond to the treatment given by Respondent 1 Hospital for typhoid, rather her condition deteriorated. On 24-7-2002, when her condition became extremely critical (no pulse, no BP and pupils dilated), she was removed to Yashoda Hospital where certain tests were conducted and efforts were made to revive her but she expired on 24-7-2002 itself. It was alleged that when the patient was admitted in the Yashoda hospital, the copy of the hematology report dated 24-7-2002 disclosed blood smear for malaria parasite whereas Widal test showed negative. Respondent 1 Hospital has not given any treatment for malaria. The appellate filed a case for medical negligence against Respondent 1 Hospital. The District Consumer Forum without seeking help of an expert, on the fact of the case itself, awarded compensation of Rs. 2 lakhs plus refund of Rs. 10,000. The State Commission allowed the appeal of Respondent 1 Hospital saying that in the fact and circumstances in the case complainant failed to establish any negligence on the part of the

\(^{109}\) *Martin F D’ Souza v. Mohd. Ishfaq* [(2009) 3 SCC 1].

\(^{110}\) *V. Kishan Rao v. Nikhil Super Speciality Hospital* [(2010) 5 SCC 513].

\(^{111}\) *Supra* n. 80.

\(^{112}\) *Supra* n. 110.
Hospital and there is also no expert opinion to state that the line of treatment adopted by the Hospital is wrong or is negligent. The National Commission dismissed the appellant’s appeal. The appellant then approached the Supreme Court.

Allowing the appeal, the Supreme Court held that expert evidence was not necessary to prove medical negligence in every case. Expert opinion is required only when a case is complicated enough warranting expert opinion, or facts of a case are such that forum cannot resolve an issue without expert’s assistance. Each case has to be judged on it’s own facts. The Court held that the purpose of the Consumer Protection Act is to provide a forum for speedy and simple redressal of consumer disputes. Such legislative purpose cannot be defeated or diluted by superimposing requirement of having expert evidence in cases of civil medical negligence, regardless of factual position of a case. If that is done efficacy of Act would be curtailed and in many cases remedy would become illusory for common man.

On the facts it was held that where a patient who was suffering from intermittent fever and chills, was wrongly treated for typhoid instead of malaria for four days, which resulted in her death, was an apparent case of medical negligence. It was not necessary to obtain expert opinion in the first instance before District Forum could award compensation. As investigation conducted by another Hospital where the patient was removed in a critical condition showed that Widal Test for Typhoid was negative whereas test for malaria was positive, it was sufficient for District Forum to conclude that it was a case of wrong treatment.

The Court observed that before forming an opinion that expert evidence is necessary, the fora under the act must come to a conclusion that the case is complicated enough to require opinion of an expert or that facts of the case are such that it cannot be resolved by members of the fora without the assistance of expert opinion. Each case has to be judged on its own facts. If a decision is taken that in all cases medical negligence has to be proved on the basis of expert evidence, in that event, efficacy of remedy provided under the Consumer Protection Act will be unnecessarily burdened and in many cases such remedy would be illusory. If any of the parties before the Consumer Fora wants to adduce
expert evidence, members of the fora by applying their mind to the facts and circumstances of the case and materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter is left to the members of the fora and there cannot be a mechanical or straitjacket approach that each and every case must be referred to experts for evidence.

The Court held that the present case is not a case of complicated surgery or a case of transplant of limbs and organs in human body. It is a case of wrong treatment in as much as the patient was not treated for malaria even when the complaint was of intermittent fever and chill. Instead, respondent 1 hospital treated the patient for typhoid and as a result of which the condition of the patient deteriorated and she died. There was definite indication of malaria whereas widal test conducted for typhoid was found negative. Even in such a situation the patient was treated for typhoid and not malaria. Expert evidence was not necessary to prove medical negligence in this case.

In *Jacob Mathew*¹¹³ case in para 52, the learned Chief Justice opined that in cases of criminal negligence where a private complaint of negligence against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. The Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard. Till that is done, the aforesaid course should be followed. But those directions in para 52 of Mathew were certainly not given in respect of complaints filed before the Consumer Fora under the said Act where medical negligence is treated as civil liability for payment of damages.

¹¹³ *Supra* n. 80.
This fundamental distinction pointed out by the learned Chief Justice in the unanimous three-Judge Bench decision in Mathew was unfortunately not followed in the subsequent two-Judge bench of the Court in Martin F.D’Souza. It is clear that in D’Souza complaint was filed before the National Consumer Disputes Redressal Commission and no criminal complaint was filed.

The Bench in D’Souza noted the previous three-Judge Bench judgment in Mathew but in para 106 of its judgment D’Souza equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the Consumer Fora and gave the following directions covering cases before both:

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. This is necessary to avoid harassment to doctor who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctor unless the facts clearly come within the parameters laid down in Jacob Mathew case, otherwise the policemen will themselves have to face legal action.

After refereeing to these directions the court expressed the view that the aforesaid directions in D’Souza are not consistent with the law laid down by the larger Bench in Mathew. In Mathew the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only in cases of criminal complaint and not in respect of cases before the Consumer Fora. The reason why the larger Bench in Mathew did not equate the two is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter.

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115 Id. para 106.
116 Supra. n. 3.
6.1.5.2. Circumstantial evidence

In most cases it will be difficult to get direct evidence of the agreement, but a conspiracy can be inferred even from circumstances giving rise to a conclusive or irresistible inference of an agreement between two or more persons to commit an offence.\textsuperscript{117} Circumstantial evidence can be a sole basis for conviction provided the conditions as stated below are fully satisfied. Conditions are:

1) The circumstances from which guilt is established must be fully proved;
2) That all the facts must be consistent with the hypothesis of the guilt of the accused;
3) That the circumstances must be of a conclusive nature and tendency;
4) That the circumstances should, to a moral certainty, actually exclude every hypothesis expect the one proposed to be proved.\textsuperscript{118}

The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. They may not say, for example, that a vehicle was being driven recklessly, only that it ended up in the ditch. It is the function of the court to decide the cause of the accident based on the evidence placed before it and it is the task of the expert witness to assist the court in reaching its decision with technical analysis and opinion inferred from factual evidence of, for example, skid marks. For this reason, expert witnesses are not just allowed to express opinions on the matters referred to them; they are expected to do so. To be truly of assistance to a court, though, expert evidence must also provide as much detail as is necessary to convince the judge that the expert’s opinions are well founded. Expert evidence is sought most obviously in disputes requiring detailed scientific or technical knowledge. Generally speaking, expert evidence is admissible whenever there are matters at issue which require expertise for their observation, analysis or description. Moreover, the courts have customarily afforded litigants wide latitude in adducing such

\textsuperscript{117} V.C. Shukla v. State, 1980 AIR 962.
\textsuperscript{118} Bodh Raj v. State of Jammu & Kashmir.
evidence. One reason for this is that until the evidence has been heard, the judge has little else to go on in assessing the competence of the expert or the weight to be attached to his evidence. It is well-established that the burden of proof is upon the plaintiff in a medical malpractice case.\textsuperscript{119} The negligence of a physician generally must be established by medical or expert testimony unless the negligence and injurious results are so apparent that a layperson with general knowledge would have no difficulty recognizing it.\textsuperscript{120} Expert evidence, also called expert testimony is admissible testimony relating to a professional, scientific, or technical subject. Expert evidence is based on formal or special study, training, or experience that imparts the competency to form an opinion upon matters associated with that subject. It is the duty of the authoritative expert to present the necessary scientific or technical criteria to enable a court to test the accuracy of its own conclusions and to form its own independent judgment of the evidence. Before given the permission to state their opinion, the 'experts' are usually questioned by the court to evaluate their qualifications and experience in the subject. an expert witness may testify thereto in the form of an opinion or otherwise if scientific, technical or other specialized knowledge will assist the judge or jury to understand the evidence or to determine a fact in issue; if the testimony is based upon sufficient facts or data; if the testimony is the product of reliable principles and methods; and if the witness has applied the principles and methods reliably to the facts of the case. For example, when an expert witness did not attach any factual data or opinions to his report; did not attach any information regarding principles or methods he relied on to come to his conclusion; or did not attach information showing that he applied his principles and methods to the facts of the case, the report should be stricken from being considered as evidence at trial. When an expert gives an opinion in the form of a legal standard or legal conclusion, the court will exclude that opinion. Expert witnesses do not have the authority to determine the legal standard to be applied to legal cases; only the judge holds that duty. Expert witnesses also do not have the authority to present a legal conclusion to be used as evidence. The expert’s role was created to help the jury understand complicated topics,

\textsuperscript{119} Morris v. Hoffman, 551 S.W.2d 8 (Ky.App. 1977).
\textsuperscript{120} Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992).
not to replace the jury in deciding the outcome of the case. If an expert’s legal conclusion or legal standard were to be used as evidence during trial, the jury might become confused and place more weight on the report than is due. Evidence tendered as expert opinion evidence is to be admissible if:

1) It must be agreed or demonstrated that there is a field of “specialized knowledge”;
2) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
3) The opinion proffered must be “wholly or substantially based on the witness’s expert knowledge”;
4) So far as the opinion is based on facts “observed” by the expert, they must be identified and admissibly proved by the expert;
5) So far as the opinion is based on “assumed” or “accepted” facts, they must be identified and proved in some other way;
6) it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert’s evidence must explain how the field of “specialized knowledge” in which the witness is expert, and on which the opinion is “wholly or substantially based” applies to the facts assumed or observed so as to produce the opinion propounded.\(^{121}\)

Determining medical neglect requires a special knowledge, personal training, study, or experience,\(^ {122}\) allegations of negligence cannot be sustained in the absence of medical evidence.\(^ {123}\) If a person has specialized knowledge based on the person’s training, study, or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge. The opinion rule itself operates to render evidence of an opinion inadmissible to prove the existence of a fact about the

\(^{121}\) Makita Pty Ltd v. Sprowles (2001) 52 NSWLR 705.
\(^{123}\) AIR 1963 SC 1940.
existence of which the opinion was expressed complaint has to be established through evidence. For a witness to be an “expert” for the above purposes the following two requirements must be satisfied: firstly, the witness must have specialized knowledge; and secondly, that specialized knowledge must be based on the person’s training, study, or experience. In addition, the opinion expressed must be “wholly or substantially” based on that “specialized knowledge”: i.e., the opinion must represent in substance the application of that specialized knowledge to proved or assumed facts. The Expert evidence is covered under S.45-51 of Indian Evidence Act, 1872, which deals with an opinion of third person, where ever relevant and desirable. According to section 45 “When the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impression, the opinion upon that point of persons specially skilled in such foreign law or science or art or in a questions as to identify of handwriting or finger impression are relevant facts, such persons are called experts.” A medical man is called an expert, he is not a witness of fact, A medical witness, who performs a post-mortem examination is a witness of fact. Complaint has to be established through evidence. Complaint regarding medical negligence should allege and support with expert evidence as to what was done which should not have been done or what was not done which should have been done. Though the patient might suffer, there is no deficiency in service, when the medical practitioner deploys reasonable degree of skill and knowledge with adequate care in treating him. The degree of standard or reasonable care varies in each case depending upon expertise of medical man and the circumstances of each case.

The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has discretion in choosing treatment which he

124 Nagindra Bala Mitra v. Sunil Chandra Roy, 1960 CrLJ.
127 Bhagbai Saran Agarwala v. State, 1993 (2) CPJ 1066 (Ori. SCDRC).
proposes to give to the patient and such discretion is relatively ampler in cases of emergency. On this aspect, it would be worthwhile to refer to the enunciation from Halsbury's Laws of England.

With regard to degree of skill and care required by the doctor the practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Failure to use due skill in diagnosis with the result that wrong treatment is given is negligence. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also exists among medical men; nor is a practitioner necessarily negligent if he has acted in accordance with one responsible body of medical opinion in preference to another in relation to the diagnosis and treatment of a certain condition, provided that the practice of that body of medical opinion is reasonable.

The term specialized knowledge is not defined. However, at common law two principles govern the question of whether the field is one on which expert evidence can be called. The first is whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area.

The real worth of the expert depends upon his learning skill and the value of his evidence depends largely on the cogency of the reasons on which it is based. And the second is whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience. Where the expert does not pretend to employ a scientific method and his opinion is not the product of a scientific inquiry, and then the reliability

128 Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128.
130 Saqlain Ahmed v. Emperor, AIR 1936 Allahabad 165.
of her opinion does not rest in its scientific validity.\footnote{Supra n. 89.} For example, in Abbey, the Court was satisfied with Dr. Trotten’s opinion given that it flowed from his specialized knowledge gained through extensive research, years of clinical work and his familiarity with relevant academic literature.”\footnote{Id.}

6.1.5.3. \textit{Res ipsa loquitor}

\textit{Res ipsa loquitor} is no more than a convenient label to describe situations where, notwithstanding the plaintiff’s inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient, in the absence of an explanation, to justify the conclusion that most probably the defendant was negligent and that his negligence caused the injury. The general purport of the words \textit{res ipsa loquitor} is that the accident speaks for itself or tells its own story. The normal rule is that it is for the plaintiff to prove negligence, but in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him, but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by invoking the principle of \textit{res ipsa loquitor}.\footnote{Pushpabai Parshottam Udeshi v. M/s Ranjit Ginning & Pressing Co. Pvt. Ltd., \textit{AIR} 1977 SC 1735.}

Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

The maxim comes into operation:

(a) on proof of the happening of an unexplained occurrence;

(b) when the occurrence is one, which would not have happened in the ordinary course of things without negligence on the part of somebody other than the plaintiff, and
(c) the circumstances point to the negligence in question being that of the defendant, rather than that of any other person.

Some of the examples are amputation of wrong limb or wrong digit at operation, burning of skin caused by strong antiseptic solution, leaving swabs or surgical instrument inside the patient after the operation.

The onus lies on the doctors in the operation theatre to explain events and the ultimate outcome, i.e., the death of the patient.\textsuperscript{135} When keratotomy operation was performed on left eye of a teenager in violation of accepted professional practice, resulting in loss of his eyesight, the burden of proof is on the doctor to establish that he was not in breach of any duty in giving treatment to the minor patient.\textsuperscript{136} The onus of proof shifts upon the attending doctors to prove that there was no negligence in performance of operation when the patient died within 10 hours of admission in the operation theatre in mysterious circumstances.\textsuperscript{137} Where the complainant is not aware of what took place inside the operation theatre, the onus of proof lies on the doctor to establish that there was no negligence on his part resulting in permanent disability of the patient.\textsuperscript{138}

In \textit{Bhanupal}\textsuperscript{139} it was observed that the patient’s relatives must prove positive act of omission but they need not produce evidence to establish the standard of care if the entire operative procedure was carried out in the absence of any of the patient’s relatives. Naturally, when all such medical or surgical procedure was carried out inside the operation theatre when nobody on behalf of the patient was present, the patient’s relatives were unable to see any kind of medical / surgical procedure or what exactly happened inside the operation theatre. Therefore, the opposite parties and the staff attending inside only had special knowledge of what happened inside the operation theatre and the complainant is not in a position to exactly state the factual aspects of whatever took place.

\begin{itemize}
  \item\textsuperscript{135} \textit{Arunaben D. Kothari v. Navdeep Clinic}, 1996 (3) CPR 20 (Guj).
  \item\textsuperscript{136} \textit{Adarsh Bararia v. Dr. P.S. Hardias}, 2002(2) CPR 188 (Bhopal).
  \item\textsuperscript{137} \textit{Bhanupal v. Dr. Prakash Padode}, II(2002) CPJ 384 (Bhopal).
  \item\textsuperscript{138} \textit{S.A. Qureshi v. Padode Memorial Hospital and Research Hospital}, II (2000) CPJ 463 (Bhopal).
  \item\textsuperscript{139} \textit{Bhanupal v. Dr. Prakash Padode and ors}, [(2000) II CPJ 384].
\end{itemize}
inside. Therefore, it was a duty cast upon the opposite parties to prove the fact that no sort of negligence took place inside the operation theatre. Thus, the onus of proof shifts upon the opposite parties to substantiate the fact that there was no negligence on their part.

In Nadiya\(^{140}\) the complainant approached the opposite party hospital for surgery for increasing the height. She underwent Corticotomy with external fixator. However, after the surgery, her left leg remained 1 ½ inch shorter than the right leg. She needed the aid of walker as she had to lean on the left. It was contended by the hospital that the complications suffered by the complainant resulted due to her failure to adhere to the instructions of the doctors. It was held that the burden shifted to the opposite parties to substantiate their case.

In Mahon\(^{141}\) a majority of the court of appeal considered that the doctrine of *res ipsa loquitur* applied. Goddard L.J. said:

> The surgeon is in command of the operation, it’s for him to decide what instruments, swabs and the like are to be used, and it’s he who used them. The patient, or, if he dies his representatives, can know nothing about this matter.

There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient’s body and no one would venture to say that it’s proper, although in particular circumstances it may be excusable, so to leave them.

If, therefore a swab is left in the patient’s body after an operation, it seems to be clear that the surgeon is called for an explanation.

In a 1962 California case, Siverson\(^{142}\) v. Weber, the defendant, a specialist in gynecology, assisted by a general surgeon, performed a hysterectomy on the plaintiff. After the operation plaintiff was found to have a vesicovaginal fistula. Plaintiff instituted action,

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\(^{140}\) Nadiya v. Proprietor, Fathima Hospital and ors, [(2001) II CPJ 93].

\(^{141}\) Mahon v. osborne [(1939) 2 K.B. 14].

\(^{142}\) Siverson v. Weber
but did not call expert witnesses. Plaintiff relied on defendant’s answer that usually when a gynecologist exercised that degree of skill and care ordinarily exercised by a reputable gynecologist, a fistula does not follow a hysterectomy, and that a fistula is an uncommon complication. The court held that to permit an inference of negligence under the doctrine of *res ipsa loquitur* merely because an uncommon incident takes place would amount to stretching the doctrine too far.

A doctor is neither a warrantor of cures nor an insurer, where reasonable doubt exists as to the proper treatment to pursue, an inference of negligence is not ordinarily raised from honest mistakes or errors in judgment.

Another rejection of the doctrine in dentistry is reported in an Indiana case *Robinson*. Plaintiff brought an action against defendant who was a dentist for alleged negligence in breaking a hypodermic needle, and allowing it to remain in plaintiff’s jaw. The court said that *res ipsa loquitur* was not applicable in the absence of evidence that the needle was defective, not of a type commonly used by dentists, used in a careless way or that the defendant was negligent in inserting the needle into the jaw of the plaintiff.

The Supreme Court applied the doctrine of *res ipsa loquitur* in *Achutrao*'s case, where the patient had to undergo second operation in critical condition for removal of a mop (towel) left inside the peritoneal cavity of the patient during sterilization operation in a Government hospital. The High Court of Rajasthan also invoked the doctrine of *res ipsa loquitur* to hold the State Government liable for the death of a patient during laparoscopic tubectomy operation operation in the Government hospital. The State Commission, Karnataka held the dental surgeon liable in negligence for slipping of needle into the stomach of the patient at the time of irrigation the mouth after extraction of right molar teeth of the patient by applying the principle of *res ipsa loquitur*, as the surgeon could not

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143 *Robinson v. Fugusing* [107, Ino App, 107 (1939)].
explain as to why the needle was detached from the syringe while irrigation the mouth of the patient.\(^\text{146}\)

The Supreme Court in *Savita Garg*\(^\text{147}\) held that once evidence is placed by the complainant to satisfy that the patient admitted for treatment after taking him to intensive care unit developed jaundice and died because of lack of proper care and negligence, then the burden shifts to the hospital and the doctor who treated the patient to satisfy that there was no negligence on the part of doctor or hospital. It would be too much of a burden on the patient or the family members to undertaken searching enquiry from the hospital to ascertain the names of treating doctors or the staff and to show who was responsible for the death. The hospital is in better position to disclose what care was taken or what medicine was administered to the patient.

Recently the Supreme Court held that in a case where negligence is evident the principle of *res ipsa loquitur* operates and the complainant does not have to prove anything as the thing (res) proves itself. In such a case it is for the respondent to prove that he has taken care and done his duty to repel the charge of negligence.\(^\text{148}\)

In *Manwari Devi*\(^\text{149}\) and *State of Kerala*\(^\text{150}\) the sterilization operation failed and claimants get pregnant. Claimants failed to produce evidence to show negligence in matter of performing operation. The court held that in the absence of proof of negligence, claim for damages is not tenable by invoking principle of *res ipsa loquitur*.

In *Laxmi Devi*\(^\text{151}\) compensation was claimed on account of alleged failure of sterilization operation. Quoting extensively from the Supreme Court judgments in *Jacob Mathew v. State of Punjab*\(^\text{152}\) and *State of Punjab*\(^\text{153}\) the court held that negligence on the part of the

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\(^{146}\) Ambalappa v. Sriman D. Veerendra Heggade, 1999(3) CPR 72 (Bangalore).

\(^{147}\) Savita Garg v. The Director, National Heart Institute [2004 CTJ 1009 (SC)].


\(^{149}\) Manwari Devi v. Union of India, AIR 2010 (NOC) 651 HP.

\(^{150}\) State of Kerala v. Illath Narayanan, AIR 2010 (NOC) 652 Ker.


\(^{152}\) Supra n. 80.

treated doctor or operating surgeon has to be necessarily established as falling under one such category of negligence which can be classified as Gross Negligence because it is expected from the professional medical doctor and surgeon that they would perform their duty well and upto the best of their abilities on being professionally trained in their respective specialties. On the finding that there exist no negligence in performing the sterilization operation upon the claimant, the court refused to award any compensation.

In *Kamla Devi*,¹⁵⁴ case the plaintiff underwent the tubectomy operation which was got done in a family planning camp organized by the State. Despite that, she got impregnated and gave birth to a female child. She claimed damages pleading her operation were not performed properly. She only examined herself and no expert was examined by her to substantiate the claim that operation was performed negligently. On the other hand, the experts produced by the respondent testify that the rate of universal failure of such type of operation is 0.5 per cent to 0.7 per cent despite observing all the precautions even by an expert surgeon for no fault on his part.

As the burden to prove negligence lies on the claimant and also that the methods of sterilization so far known to medical science which are most popular and prevalent are not 100 per cent safe and secure, the court rejected her claim. It was also observed that once the couple decided to give birth to the child, it ceases to be unwanted pregnancy and compensation for maintenance of and upbringing of the child cannot be claimed from the respondent.

In *Dr. Renu*,¹⁵⁵ case 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 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*.

*Res Ispa Loquitur* is a rebuttable presumption or inference that the defendant was negligent, which arises upon proof that the instrumentality or condition causing the injury was in the defendant's exclusive control and that the accident was one that ordinarily does not occur in the absence of Negligence. Ordinarily the patient in a negligence suit must prove the physician's negligence by a preponderance of the evidence which may be circumstantial so long as it is not too speculative. In some situations observing to the factual uncertainties inherent in treatment malpractice litigation, once the patient has established an apparent connection between his injury and the physician's apparent negligence, the latter must disprove that connection, the courts may on occasion invoke special rules modifying the general rules in respect of civil proof. So as to assist the patient the court invokes to the doctrine of *res ipsa loquitur*, Latin: "the matter speaks for itself". *Res Ispa Loquitur* is rule of evidence which in reality belongs to the Law of Torts. Inference as to negligence may be drawn from proved circumstances by applying rule if cause of accident is unknown and no reasonable explanation as to cause is coming forth from defendant. According to the doctrine of *res ipsa loquitur* patient’s injuries consider as a precondition by court to determine whether the defendant doctor acted with the required skill and care. In this regard, it will need to make findings as to the concrete circumstances facing the doctor and what he did in response. Thus the judicial doctrine of *res ipsa loquitur* is a presumption affecting the burden of producing evidence.

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158 Supra n.80.
Private complaint may not be entertained unless complainant produced prima-facie evidence before Court in form of credible opinion given by another competent doctor to support charge of rashness or negligence on part of accused doctor.\textsuperscript{160}

In the common law of negligence, the doctrine of \textit{res ipsa loquitur} states that the elements of duty of care and breach can be sometimes inferred from the very nature of the accident, even without direct evidence of defendant’s conduct. The first prerequisite for invocation of the doctrine of res ipsa loquitur, and the inference of negligence it permits is that, the injury-causing event be of a kind that ordinarily does not occur in the absence of negligence\textsuperscript{161}

No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. It is obvious that simply because a patient has not favorably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable per se by applying the doctrine of \textit{ipsa loquitur}. Even in civil jurisdiction, the rule of \textit{res ipsa loquitur} is not of universal application and has to be; applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule.\textsuperscript{162} Incidentally it may be noted that there may be a case where the proved facts would themselves speak of sharing of common intention; \textit{“res ipsa loquitur”} Nowhere it has been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304 A, IPC cannot be decided solely by applying the rule of \textit{res ipsa loquitur}.\textsuperscript{163}

\textsuperscript{160} \textit{Supra} n.123.\textsuperscript{161} \textit{Mireles v. Broderick}, 117 N.M. 445, 448 (N.M. 1994).\textsuperscript{162} \textit{Syad Kabar v. State of Karnataka}, (1980) 1 SCC 30.\textsuperscript{163} \textit{Supra} n. 84.
There are bodies of more or less direct evidence, like as testimony of the case with regard to medical notes and records and mechanically-generated test results, which court may investigate to achieve at its findings of fact in a treatment malpractice case. A very clear and important matter to notice on it is that almost all medical documents, including those that incriminate the physician are on the hand of physician defendant. In exceptional cases plaintiff may be lacking knowledge as regards the true cause of the accident which may be within exclusive knowledge of defendant. Plaintiff may be able to prove the accident but unable to prove how it happened. Emerges witness statements through the process of cross-examination is the most highly valued form of oral evidence. Where the fundamental items of evidence are lost at the process of trial, court has a duty to reconstruct the contents of the missing evidence in the light of such evidence as is available. Kay's son was admitted to hospital with meningitis. By mistake, he was given a penicillin overdose. It was thirty times the norm. He went deaf. No case had ever been recorded where penicillin had caused deafness. Often, meningitis itself caused deafness. There is a problem about evidence that the failure to provide a shower could have caused deafness. The "could have" element simply reflected that it was uncertain which cause was the operating cause of deafness. Here, the idea that the penicillin overdose "could have" caused deafness was of a different quality. It was not just of lesser degree of possibility, but that there was no evidential basis for the assertion at all. Here the question was whether a missing blood-sugar test more likely than not showed that the claimant’s meningitis had reached its peak prior to the defendant’s faulty intervention. Having heard the rival arguments of the expert witnesses (offering reasoned speculation on the basis of the pattern from surviving records), the court answered this in the affirmative.¹⁶⁴

Res ipsa loquitur is a rule that the fact of the occurrence of an injury and the surrounding circumstances of the defendant’s control and management permits an inference of culpability on the part of the defendant, make out plaintiff’s prima facie case, and present a question of fact for the defendant to meet with an explanation.¹⁶⁵ The medical record

¹⁶⁵ Supra n.126.
should be viewed as an extremely important and valuable tool in patient management. All that happens to the patient; all things done to and done for the patient; all relevant professional plans, therapies, and advice; all invasive and noninvasive procedures; all working diagnoses and long term therapeutic plans and goals should be detailed in the record. It must contain all elements set forth by both the medical record committee and practice standards board of a given hospital. The medical record is viewed as the professional and legal record of a given patient's care. It should therefore be carefully maintained and all entries should be clearly legible. The medical record should be a clear and accurate documentation of the complete clinical course of the patient. All entries should be legibly written, signed, dated, and timed. With the advent of the electronic medical record, legibility has become much less of an issue. Where medical record are incomplete and the details of the particular case is not clear, it may constitute a disciplinary wrong but It is the circumstances overall that are decisive. Thus, even where a doctor is found to have falsified his operation notes after the event, this will not automatically lead to a finding that he performed the treatment negligently. However, sometimes an inference may lie close at hand that a witness has avoided taking the stand, or evidence has been withheld or concealed, to avoid exposing information adverse to the defendant’s case; and this will tilt matters in favor of the claimant. However, res ipsa loquitur cannot be applied in all negligence cases. Res Ipsa Loquitur does not apply when the defendant did not have exclusive control over the property. For example, res ipse loquitur cannot be applied in a claim that farm equipment was damaged by mud over a gas pipeline over which defendant pipeline owner had no exclusive control over. In certain cases facts may be within the exclusive knowledge of respondent. The Doctrine of res ipsa loquitur is applied in such cases to mitigate the hardship faced by the claimant, which renders it permissible to raise inference that the accident occurred owing to rash and negligent driving on the part of driver.

In such eventuality application of principle *Res Ipsa Loquitur* will be justified.\(^\text{170}\) In general terms the Maxim *Res Ipsa Loquitur* means that the accident speaks for itself or tells its own story.\(^\text{171}\) This Maxim is applied to cases where the accident speaks for itself. In a case a Car dashed against a tree four feet away from the extreme right hand side of the metal road with the tree up rooted from the soil and the Car got badly damaged. The impact of the accident was so horrible that the steering wheel and engine of Car receded back pressing down the 3 occupants who died. In the circumstances the maxim *res ipsa loquitur* was held to be applicable.\(^\text{172}\) It was for the Respondents to prove the plea of inevitable accident. Where the accident speaks for itself, plaintiff is required to prove the accident only. The onus shifts to defendant to prove that the accident did not occur owing to rash and negligent driving of driver.\(^\text{173}\) The maxim *res ipsa loquitur* thus carves out an exception to general rule engrafted in section 110 of Evidence Act which lays down the broader principle that the burden of proving a fact rests on the party who asserts the affirmative of the issue. However in its application to criminal trials the said maxim has application only when the nature and peculiar circumstances of the accident induce the belief that the accident would not have occurred but for negligence and the vehicle involved in accident was under control and management of erring driver.\(^\text{174}\) A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient. If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason whether attributable to him or not, neither a


\(^{171}\) *Scott v. London and St Katherine’s Docks Co* (1865) 3 H & C 596.

\(^{172}\) *Ng Chun Pui v. Lee Chuen Tat* [1988] RTR 298.


surgeon can successfully wield his life-saving scalper to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine.\(^{175}\)

“(7) 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.

(8) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law, especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.”\(^{176}\)

Ybarra (P) was diagnosed with appendicitis and arranged for Dr. Spangard (D) to perform an appendectomy. Ybarra awoke the next morning after surgery with a sharp pain between his neck and his right shoulder and eventually developed paralysis and muscle atrophy. The plaintiff filed suit based on res ipsa loquitur against a number of parties including other physicians and nurses. The defendants asserted that res ipsa loquitur did not apply because there was no showing that the act of any particular defendant was the cause of the harm. The defendants also claimed that there were several instrumentalities involved and any of them may have caused the injury. The trial court awarded a non-suit and Ybarra appealed. The Issues were that; does the number or relationship of the defendants alone determine whether the doctrine of res ipsa loquitur applies? Does the doctrine of res ipsa loquitur apply when a plaintiff undergoing a medical procedure sustains an injury to a party of the body not under treatment? Court held:

1. No. Neither the number nor the relationship of the defendants alone determines whether the doctrine of \textit{res ipsa loquitur} applies.
2. Yes. The doctrine of \textit{res ipsa loquitur} applies when a plaintiff undergoing a medical procedure sustains an injury to a party of the body not under treatment.

\(^{175}\) \textit{Dr. Suresh Gupta v. Govt. of NGT}, 2003.
\(^{176}\) \textit{Supra} n. 123.
With regard to three conditions for \textit{res ipsa loquitur}:

1. the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence;
2. it must be caused by an agency or instrumentality within the exclusive control of the defendant; and
3. it must not have been due to any voluntary action or contribution on the part of the plaintiff.

\textit{Res ipsa loquitur} creates a presumption that the party accused of causing harm must overcome with evidence. It arises when the chief evidence is practically accessible to the accused party but inaccessible to the injured person. Without the aid of the doctrine a patient who received permanent personal injuries, caused by the negligence of another, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. The issue is whether the defendant had the right of control and not necessarily actual control. Where a manufacturer has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that there was no change in the condition of the merchandise after it left the manufacturer’s possession. In such a case the manufacturer is in constructive control. \textit{Res ipsa loquitur} may be applied when multiple defendants and instrumentalities may have caused the accident provided there is a finite group at which to point the blame. When a plaintiff receives injuries while unconscious and in the course of medical treatment all parties with control over the patient may be held to answer an inference of negligence.\footnote{Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (Cal.1944).}

\textit{Res ipsa loquitur} is an important form of circumstantial evidence, may be relevant to a plaintiff’s efforts to establish the defendant’s unreasonable conduct. In most negligence cases, the plaintiff specifies what the defendant allegedly did unreasonably. \textit{Res ipsa loquitur} is most important and has its greatest impact in cases where the plaintiff is unable to make specific allegations about what the defendant did wrong. The doctrine of \textit{res ipsa loquitur} exists to obviate the need for direct proof of negligence, and allows cases submitted under the doctrine to proceed to the jury even in the absence of direct proof of negligence.\footnote{Graham v. Thompson, 854 S.W.2d 797, 799 (Mo.App. W.D. 1993).}

In order to invoke the doctrine of \textit{res ipsa loquitur}, a plaintiff must demonstrate:
(1) the occurrence resulting in injury does not ordinarily happen in the absence of negligence;

(2) the instrumentalities that caused the injury are under the care and management of the defendant; and

(3) the defendant possesses either superior knowledge of or means of obtaining information about the cause of the occurrence.\footnote{179}{Bass \textit{v.} Nooney Co., 646 S.W.2d 765, 768 (Mo.banc 1983).}

The conditions traditionally required for the application of \textit{res ipsa loquitur} are: an accident that normally does not happen without negligence; exclusive control of the instrumentality by the defendant; and absence of voluntary action or contribution by the plaintiff. In order for the plaintiff to have the benefit of \textit{res ipsa loquitur}, she must convince the jury that each of these factors more likely than not exists. Once a plaintiff establishes the three elements of \textit{res ipsa}, an inference of defendant's negligence arises. A jury can draw an inference of negligence without expert medical testimony. In fact, the doctrine of res ipso loquitur in a medical negligence case requires that laypersons know based upon their common knowledge or experience that the cause of plaintiff's injury does not ordinarily exist absent the doctor's negligence.\footnote{180}{Hasemeter \textit{v.} Smith, 361 S.W.2d 697, 700 (Mo. 1962).} Once the inference of negligence created by res ipsa is established, it "will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence."\footnote{181}{Schaffner \textit{v.} Cumberland County Hosp. Inc., 336 S.E.2d 116, 118 (N.C. App. 1985).} The skill of two doctors may differ and they may prescribe different treatment. This will not be a basis to come to the conclusion that one doctor who adopted the skill but did not succeed with the patient was negligent in his duty thus A doctor cannot be held responsible if someone else of better skill and knowledge would have
prescribed and performed a better treatment. What is expected of a doctor is whether the procedure adopted by the doctor is acceptable to medical profession.

The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on a patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

The doctrine of *res ipsa loquitur* applies:

when (a) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care; (b) the instrumentalities involved were under the management and control of the defendant; and (c) the defendant possesses superior knowledge or means of information as to the cause of the occurrence.

6.2. Iran

6.2.1. The litigation

Iranian criminal law in the field of personal injury is given by the Shiite scholars of Islamic law, in this system the punishment for a bodily injury is *Diya* (APSHOT). It is a specific sum of money that is decided according to Shari'ah and judge cannot change at all. There is dissension between Iranian lawyers about the nature of *Diya*; some of them believe that it is a punishment for a crime and the injured party has the right to be compensated through a civil suit. On the other hand, the others believe that *diya* is of a

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182 Supra n.69.
184 Supra n.157.
185 It is a Branch of Islam that encourages a different and independent interpretation of scripture.
186 In Islamic terminology it means a fine for unintentional manslaughter.
187 Lexical means the path to a watering hole and in Islamic terminology it means the eternal ethical and moral code based on Qur’an and sunnah.
compensatory nature, so the injured party has no right to claim more than it. But according to the legal interpretation, the legislature considers *diya* as a penalty in accordance with the Iranian criminal law, and in the 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. Medical practitioners found guilty of causing death or conduct that results in the loss of a body part, may also be liable to pay *Diya* (blood money) or *Arsh* (ارشم) in respect of such bodily injury. These awards are based on the finding of fault and are usually established by way of prosecution. *Diya* is an amount fixed by the statute. So even though *Diya* is a kind of compensation, it has a punitive character and as a result, the injured party has the right to redressal through law suits in the civil courts to the multiples of the sum of *Diya*, if he can prove his additional damages. Iranian jurisprudence believes that *Diya* has a compensation figure. Iranian Supreme Court, in a decision dated 1989, stated that *Diya* is an indemnity to the injured party and that the party has no right to more compensation. But this decision is not obligatory because there is no harmony and cohesiveness in the decisions of the courts on this matter.\(^{188}\) The relationship between physicians and patients under Iranian law is regarded as a contract whereby the doctor undertakes to treat the patient. Notwithstanding this, it is apparent from various criminal court decisions that when considering claims with respect to medical malpractice, the Iranian courts rely on the civil code provisions which are applicable to both tort and contractual claims. In most cases, a claim against a medical practitioner would be made under the criminal law; this would not prevent a claim under tort or contractual relationship, if contractual relationship existed. In a tort situation, a claimant could rely on the general theory of tort that appears in the Civil Code and Tort Code. It provides that a person who commits injury will be responsible for any loss caused by such harm. The preconditions for such a claim would be fault and fault is measured by *Taadi* and *Tafriit*, damage and a causal connection between the fault and the damage. According to Iranian contract law, failure to perform contractual obligations is deemed as a fault. Physicians have not a duty bound to achieve a specific result with

\(^{188}\) *Iranian Supreme Court, the civil Barnchs, 1989.*
respect to claims which are based on a contractual relationship. The Iranian liability system of law does not put a doctor or surgeon under any duty to achieve a specific result, rather what is required of the physician is the same level of care or skill as would ordinarily be expected of a qualified doctor in similar circumstances. Accordingly, in a civil trial, it is necessary to show that the doctor failed to treat the patient with the required standard of care; whereas, in a criminal trial, the burden of proof in establishing a non-deviation from the required standard of care falls upon the physician. Proving non-deviation is clearly not easy because the complaint was not made to investigate deviation, and medical standards have a public character and finding "medical error" is pursuant of a public duty.

An astonishing evolution took place in human life following the industrial revolution. Mankind who had been a victim of natural disasters, self-imposed wars, contagious diseases and deaths caused by them, saw a whole new and different perspective before himself which would fulfill his dreams and wishes. Medicine was based upon the fact that diseases are caused by soil and water infections and that is why people at that time burnt the corpses of those killed by plague and also burnt their houses and eventually they left the burnt land hoping to survive the disease. Pasteur discovery was the starting point of a great revolution in medicine field. This great scientist's research proved that cause of infection is air and it transfer from air to water and soil; and this outstanding discovery overcame all contagious diseases and created a healthy and safe environment for humankind to live. Doctors were respected and appreciated like saints and on the other hand they themselves, idolized medical practitioners as saints and attempted to keep and cherish their moral positions for years to come. On the other side industrial revolution had caused increasing of the surplus resulted by industrial production, this condition has created great investments which later has managed world economics and has started a new chapter in humankind's life. Desiring power and wealth as a moral and...
ethical principle was no longer looked down upon or frowned upon but it seemed now as a social idea.

Doctors has forgotten their benevolence because of their desire on wealth and benefits, and they looked at their patients as a source of income and benefits rather than a patient and they no longer had paid attention to the patients step by step. As a result of decreasing level of their accuracy, attention and attentiveness, patients have been suffered, temporarily or permanently by doctors’ mistakes. States which are in charge of securing their citizen's rights has created rules and regulations which would prevent medical errors, either by passing laws or by legal votes. They have tried to control this situation in either extremes action.

The nature of medicine is always associated with mistakes, errors and danger; danger which is an inseparable part of medicine is the reason which makes it difficult to understand clearly how to prevent and confront medical errors. And there is always the concern that physicians should not behave in a manner which creates perilous situation in medical activities.191

It should be mention that insurance mechanism which is the product of the industrial revolution period was born initially to save capital, has taken place as an important and an influential player in the field of medical errors. In fact by using their professional insurance, doctors mainly feel free of the limitations caused by law and orders of the judge and do not show any signs of concern or worry while making a mistake or committing an error. These are facts that affect legal system when it comes to organizing the medical profession activities. In famous Hemophiliacs case in Iran192 during a certain period of time over 1000 persons with different medical history who were in need of blood were injected unhealthy bloods. Many of these people died and some were diagnosed with diseases that were not curable. In addition to the financial damages, they suffered also from depression, losing their social positions and other moral damages. Of

192 Tehran criminal Public court branch 1060 Hemophiliacs case.
course those related to these victims such as their parents or children were also suffered. Medical supervisors who were clearly responsible for the damage argued that they had used regular methods in process of injection and that they had fulfilled all their legal responsibility. They contended that these damages were not caused by their actions but that they were caused by errors in the tools, methods and management of the organization. The organizations on the other hand maintained their position and stated that these supervisors are professionals and are familiar with their job and functions and that the usual systems and methods used are also the results of the recommendations of these very same professionals and specialists. So it can be seen that regular legal methods would not help to bring justice and it will be vicious circle when it came to this particular case. Hypothetically let's say that the court rules in favor of the victims and convicts the defendants. How the damages caused by machinery error or medical methods or erroneous management can be made up for when the victim is now suffering from HIV and is no longer able to get married or has divorced his/her spouse because of the disease or has lost his/her social position or job and is now suffering from severe depression and has lost all hope for life. The causes of reasons for tort law cannot be calculated. Fault school and the theory of risk and mixed recommendations and go-between view have not been sufficient when they come to answering the main question about basis of negligence. That is why it has been stated that the theory is the basis of Tort Law is rights warrant view, but even this theory is insufficient. Every person has the right to enjoy safety and health in the society and benefit from one's properties but such a right cannot be guaranteed by Tort Law due to the fact that guaranteeing such right equals to limiting other people's freedom and liberty and in addition in all the cases warrant and secure of a right is not the common base for all kind of tort law. Medicine is one of the most needed branches of science which its histories is as much as humanity life history, in time corridor, this branch of science has not much changing in its subject till nineteen century, technological progress, and emphasize to hygienic effects in new life bring out a very

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new face of human quality thought to medical science.\textsuperscript{194} This situation made the permanent place of physicians more effective in new life circumstance, with regards to these views, there is some important question which has enough quality due to study the legal position of physicians and patients relationship. \textsuperscript{195} New conditions and promotion in various branches of medical science and complexity on the treatment process and the violation method of treatment in accordance to new medical science submit a very intricate scenography of the study of medical negligence.\textsuperscript{196} For example since most doctors have very little nutritional knowledge, they are unable to help people suffering from these diseases other than by offering drugs and damaging medical procedures. This is not the result of doctors that they do not want to help; it is the result of the lack of proper education in medical schools.\textsuperscript{197} This system is independent from contract law and does not govern injuries which arise from breach of contract; it is a base of liability in Iranian law system which intended to compensate damages out of agreements. There is some debate as to whether medical wrongdoing is based upon tort system or is subject to contract law, medical wrongdoer have known as negligence, and negligence is referred to a tort, however negligent acts do not come just by tort. In modern law Medical negligence is a term used to describe treatment by a medical professional that has fallen below the accepted standards of care. If this has caused an adverse effect, then the individual affected should be able to claim medical negligence compensation.\textsuperscript{198} It is obvious that, there are some unavoidable occurrences or normal complications that accepted by law as correct, because the adverse event are not investigated and law cannot take them into account for its very nature. We are living in a web of relationship each person has his or her own role in their society and has to perform their duties according to particular rule and social necessity. Duty is outcome of mutual relationship between

\textsuperscript{194} Garratt, Alfred Charles, Myths in Medicine and Old-Time Doctors, 1884.
\textsuperscript{195} Modi JP, Medical jurisprudence and toxicology, N. M. Tripathi Ltd., Bombay, 1947.
\textsuperscript{196} Science and the Law; Journal of Clean Technology, Environmental Toxicology & Occupational Medicine, Volume 6, No. 1:91-100, 1997 USA.
\textsuperscript{197} Casarett and Doull’s Toxicology, The Basic Science of Poisons, 7th Edition, Curtis D. Klaassen (Ed), USA2007.
\textsuperscript{198} Pad, Ibrahim, Hogougeh Kifari Ikhtisasi, vol1, p185, Tehran, Iran, 1973.
individual and individual other than individual solo.\textsuperscript{199} Profession is a social role in its essence; it is not only including some skill but also is an art. A professional is a person who follows a particular occupation as means of livelihood, he is a person who is an expert at their work and who stands as a knowledgeable authority, whose opinion is valuable command in a particular occupation.\textsuperscript{200} There are a set of professional ethics and codes of conduct among professional services. Those professional code and ethics are reclining in term of duty as an essential concept. Individuals who are qualify as professional but are not a member of professional organization is not consider as a professional.\textsuperscript{201} Professional organization is a mandatory element. It differentiates professional from none professional person. They must be degreed, certified, registered, and licensed.\textsuperscript{202} All those terms are alluding to an individual’s expertise, a certain competence in the practice of a profession. Iranian legal system have not a direct Litigation on medical negligence, it does concern to common rules of obligation law which is divided in various branch of civil law like as contract law and civil liability law. Civil liabilities have known as \textit{zeman gahri} and have its merits as a form of dispute resolution. Perhaps the single best quality of litigation under this system is that it seeks to identify an individual or group whose negligent actions resulted in harm to the patient. It holds doctors accountable for their decisions. Because no reasonable doctor wants to be found guilty of harming his patients, litigation or rather the threat of litigation encourages doctors to practice carefully. Thus, litigation, at least in theory, protects patients. In Iran the process of medical litigations starts once a patient or a member of his relatives complains of a medical malpractice from their point of view that ends with a morbidity or mortality. The complaint is directed either to the disciplinary council or the common criminal or civil court of the city according to the medical facility involved in the complaint. A process of investigation and interrogation follows within the medical facility with the medical staff either sharing the responsibility or attending the event. Those organizations then assigns to follow with a process of thorough review of all

\textsuperscript{199} Seraj, Mohammad Ahmad, \textit{Zeman Aludwan fi Fieg Alislam}, p319, Cairo, Egypt, 1990.
\textsuperscript{201} Iranian Medical Organization By-law, 1984, Article 1.
\textsuperscript{202} Iranian Medical Organization Act, 2003, Article 3.
documents and medical filling together with interviewing both sides of the claim the plaintiff and defendant, in order to reach a final verdict of accusation or clearance from the claim according to the liability regime which is based on professional aspects and governed by common statutes law. Professional liability as an entity covers three different aspects:

a. The responsibility of a physician towards the patient when harm is being inflicted as a result of direct action against medical rules from the physician or proven negligence which is not cover by criminal law.

b. The Punitive liability: This deals with physicians who violate the rules and regulations of medical practice even with no subsequent harm resulted to the patient and bodily injuries that stipulated in Penal Code.

c. The Disciplinary liability: Wherein a physician failed to meet with professional standards, requirements, and ethics.

Finally, the claim if reaching a final verdict with accusation may end up in warning or financial compensation, prohibiting medical practice or withdrawal of medical license. One cornerstone of the Iranian civil liability system of law states that it compensates for any disability, morbidity, or mortality resulting from proved negligence or malpractice of medical intervention, while providing that the medical staff indulged being qualified, licensed, and experienced to perform such intervention. Here, the point that matters is not just the occurrence of a complication, but how proactively and professionally it was managed. Medical liability system of law exists to protect patient’s rights. It is a branch of law which governs medical profession activities and deal with rights and obligation of individual. when a physician commits a wrong or injury and cause a bodily damages against another, the system will apply other than the wrong arises from a breach of contract or a tort which law redress with damages. Someone who is in

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203 Iranian Medical Organization By-law, Article 2.
A common duty is subject to negligence, who professed competence in their calling owed a duty to the public, they should exercise their skill and art in a right quality in such quality that they ought to exercise. Physicians are under a common duty to take care about their patient, they have a greater duty to the public. They have a duty to improve their knowledge to the better quality, in which it ought to be improved, Iranian liability system of law on medical negligence based on profession customs is in accordance with the professional standard and principles but these principles implicated with contract law. The Iranian Civil Code, promulgated in 1928, is often considered as having succeeded, to a large degree, in achieving reconciliation between West European jurisprudence on the one hand, and Islamic jurisprudence on the other. Egypt turned look to Iran for assistance in adopting a new system of codified law, more specifically a French-based civil law system. Iranian new Civil Code and its explanatory writings literature of Shiite school were implemented. Its provisions are in harmony with the Shiite’s School of Islamic Jurisprudence and at the same time benefit from the great advances that have been achieved by current legal thinking in the art of legislation and modern procedures. Such reconciliation can also be illustrated by the introduction of new concepts into the Iranian Civil Code such as maintenance of children; domicile, document of identity, and many new aspect of civil law. The legal system is essentially divided into two types of cases: civil and criminal. Thus, a study of civil liability is basically a study of the provisions that apply in cases that are not criminal. Civil liability is a complex subject. It is a term explores the history, structure, and function of Iranian modern civil rights regime, which consists of interlocking constitutional provisions, current statutes, and judicial rulings. It also serves as an introduction to the mechanics of civil rights litigation through the prism of the questions what doctrinal obstacles must be overcome to establish individual or governmental liability? What kinds of remedies are available against individual or governmental actors once a successful case has been made out? The reasons for conflicts between persons are vary. A person might not know or understand the law. A person might choose to deliberately break a law. Laws do not

cover every possible situation. Sometimes one individual comes into conflict with another individual. Sometimes the conflict is between an individual and the government. At other times an individual may offend the general will of the people. These disputes need to be settled in a way that fits the principles of our society. The resolution might be stating the rights of both parties; determining guilt or innocence; directing one person to make up for harming another; or imposing a fine or sentence as punishment for breaking the law. A trial is one way to settle disputes. However, going to court usually should be the last resort. When common ways of settling disputes without going to court couldn’t work out their problems and these methods fail, parties in dispute sometimes go to trial to find a solution. This way of settling disputes is called litigation; litigation is where one party files a lawsuit, legal contest carried on by the judicial process, against another person and they have a trial in court to resolve the dispute. This system followed by courts to try cases is called the adversary system or process. In this procedure, there are two different sides that turn to a third, impartial party. This means that two or more persons who are in conflict present their arguments and evidence before a third party who is not involved in the dispute. This third party makes a decision. This third party is known as a judge. The job of the judge is to be the trier of fact. A trial revolves around an argument involving two or more people. The people who bring their argument to trial are called the parties to the case. In a civil trial, one person is complaining about something another person did or failed to do. The person who does the complaining is called the plaintiff. The person she is complaining about is called the defendant. In a criminal trial, a person is accused of a particular act which the law calls a crime, such as murder or robbery. The person who does the accusing is called the prosecutor. The prosecutor speaks on behalf of the public, which represents the people of the state or nation. The person accused of the crime is called the defendant. Usually both parties will hire lawyers and instruct them to prepare the case and make arguments for them in court. Long before the trial actually happens, some argument or incident occurred. The argument or incident involves many facts, which together make up the case. Persons on opposite sides of a case often will view facts quite differently. This disagreement over the facts forms the
basis for what is to be decided at trial. In a trial, the parties present their differing versions of the facts before an impartial trier of fact, a judge or a jury. The job of the judge or jury is to decide which facts are correct. The judge often needs more information than just the stories of each party. In a trial, each side present all of the factual information they can gather to support their side of the case. This information is called evidence. Evidence may take several forms including:

Testimony: a person, called a witness, tells the court what she saw, heard, did, or experienced in relation to the incident in question. Documents: letters, notes, deeds, bills, receipts, etc. that provide information about the case.

Physical Evidence: articles such as weapons, drugs, clothing, etc. that can provide clues to the facts.

Expert Testimony: a professional person, someone not involved in the incident, who can give medical, scientific, or other instruction to the judge or jury to help decide the case.

In order to establish negligence as a cause of action under the law of *zmaneh gahri*, a plaintiff must prove that the plaintiff was, in fact, harmed or damaged and the defendant's negligent conduct was the cause of the harm to the plaintiff. With the rule of *zarar* the law implies a promise to exercise care or skill in the performance of certain services. This promise to exercise care, whether express or implied, formed the origins of the concept of duty. For example, innkeepers have a duty to protect the safety and security of their guests. *Zmaneh Gahri* is encompassing virtually all unintentional, wrongful conduct that injures others. One of the most important concepts in *zmaneh gahri* law is the *tagsir* which provides the standard by which a person's conduct is judged. A person has acted negligently if she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances and custom too. The hypothetical reasonable person provides an objective by which the conduct of others is judged. In law, the reasonable person is not an average person or a typical person but a composite of the community's judgment as to how the typical community member should behave in situations that
might pose a threat of harm to the public. The law takes into account a person's knowledge, experience, and perceptions in determining whether the individual has acted as a reasonable person would have acted in the same circumstances. Conduct must be judged in light of a person's actual knowledge and observations, because the reasonable person always takes this into account. Thus, if a driver sees another car approaching at night without lights, the driver must act reasonably to avoid an accident, even though the driver would not have been negligent in failing to see the other car. In professional like as Physicians who engages in an activity requiring special skills, education, training, or experience, the standard by which his conduct is measured is the conduct of a reasonably skilled, competent, and experienced person who is a qualified member of the group authorized to engage in that activity. In other words, the hypothetical reasonable person is a skilled, competent, and experienced person who engages in the same activity. As mentioned above in a negligence suit, the plaintiff has the burden of proving that the defendant did not act as a reasonable person would have acted under the circumstances. For example, a defendant sued for negligent driving is judged according to how a reasonable person would have driven in the same circumstances. A plaintiff has a variety of means of proving that a defendant did not act as the hypothetical reasonable person would have acted. The plaintiff can show that the defendant violated a statute designed to protect against the type of injury that occurred to the plaintiff. Also, a plaintiff might introduce expert witnesses, evidence of a customary practice, or Circumstantial Evidence. For example, the law prohibits driving through a red traffic light at an intersection. A plaintiff injured by a defendant who ignored a red light can introduce the defendant's violation of the statute as evidence that the defendant acted negligently. However, a plaintiff's evidence that the defendant violated a statute does not always establish that the defendant acted unreasonably. The statute that was violated must have been intended to protect against the particular hazard or type of harm that caused injury to the plaintiff.

Sometimes physical circumstances beyond a person's control can excuse the violation of a statute, such as when the headlights of a vehicle suddenly fail, or when a driver swerves into oncoming traffic to avoid a child who darted into the street. To excuse the violation,
the defendant must establish that, in failing to comply with the statute, she acted as a reasonable person would have acted. In many jurisdictions the violation of a statute, regulation, or ordinance enacted to protect against the harm that resulted to the plaintiff is considered negligence per se. unless the defendant presents evidence excusing the violation of the statute, the defendant's negligence is conclusively established. In some jurisdictions a defendant's violation of a statute is merely evidence that the defendant acted negligently. Often a plaintiff will need an expert witness to establish that the defendant did not adhere to the conduct expected of a reasonably prudent person in the defendant's circumstances. A judge may be unable to determine from his own experience, for example, if the medicine prescribed by a physician was reasonably appropriate for a patient's illness. Experts may provide the judge with information beyond the common knowledge of judge, such as scientific theories, data, tests, and experiments. Also, in cases involving professionals such as physicians, experts establish the standard of care expected of the professional. In the above example, the patient might have a physician offer Expert Testimony regarding the medication that a reasonably prudent physician would have prescribed for the patient's illness. Custom Evidence of the usual and customary conduct or practice of others under similar circumstances can be admitted to establish the proper standard of reasonable conduct. Like as the evidence provided by expert witnesses, evidence of custom and habit are usually used in cases where the nature of the alleged negligence is beyond the common knowledge of the judge. Often such evidence is presented in cases alleging negligence in some business activity. For example, a plaintiff suing the manufacturer of a punch press that injured her might present evidence that all other manufacturers of punch presses incorporates a certain safety device that would have prevented the injury. A plaintiff's evidence of conformity or nonconformity with a customary practice does not establish whether the defendant was negligent; the judge decides whether a reasonably prudent person would have done more or less than is customary. Sometimes a plaintiff has no direct evidence of how the defendant acted and must attempt to prove his case through circumstantial evidence. Of course, any fact in a lawsuit may be proved by circumstantial evidence. Skid marks can
establish the speed a car was traveling prior to a collision, a person's appearance can circumstantially prove his or her age, etc. Sometimes a plaintiff in a negligence lawsuit must prove his entire case by circumstantial evidence. Suppose a plaintiff's shoulder is severely injured during an operation to remove his tonsils. The plaintiff, who was unconscious during the operation, sues the doctor in charge of the operation for negligence, even though he has no idea how the injury actually occurred. The doctor refuses to say how the injury occurred, so the plaintiff will have to prove his case by circumstantial evidence. In cases such as this a plaintiff may prove his injury could not have occurred in the absence of the defendant's negligence. The plaintiff must establish that the injury was caused by an instrumentality or condition that was under the defendant's exclusive management or control and that the plaintiff's injury would not have occurred if the defendant had acted with reasonable care.

6.2.2. Law of evidence

There is a law of evidence or a rule called the burden of proof. The burden of proof is the obligation or necessity to prove the facts that are in dispute at a trial. In a civil case, the person doing the complaining has the burden of proof. This means she must convince the judge that the facts are correct by a preponderance of the evidence, meaning their evidence is slightly more convincing than the evidence of the defendant. Medical trial is a criminal one in Iranian law system. In a criminal trial, the burden of proof is on the government. Defendants do not have to prove their innocence. Instead, the government must provide evidence to convince the judge of the defendant's guilt. The standard of proof in a criminal trial is proof beyond a reasonable doubt, which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime. But the basic elements of culpability should find in Iranian civil law. Within the Iran legal system, civil liability (whether torts or contractual) is distinguished from criminal liability. The latter deals with a person who must answer for losses caused, not to individuals, but to society as a whole. Unlike criminal liability, civil liability is heterogeneous. It is either torts or contractual, and the practical lawyer and academic
opinion both accept this distinction within the notion of civil liability. It is only in the absence of contractual liability that the liability is categorized as torts. Liability is contractual if the loss has its source in the total or partial in execution of a contract between the person who caused the loss and the person who suffered it. Whatever the nature of the liability, the mechanism that it puts in motion is identical. When we are going to talk about Iranian liability system, we are facing a very intricacy in the field of medical negligence, and then it may be so difficult to show a clear view to this law area. This ambiguity has its rote in the absence of a specific law regarding to the medical negligence and in other hand sprawl of some outspread articles in several Iranian statutes, for example the main articles which are enacted in medical field shows in Penal Code and we used to Civil Code to supplement the defect of Penal Code in this respect. This vagueness caused dissension in between lawyer or procedure about the legal nature of medical negligence. In this legal system and much these un-clarity have been affected to determining the substantive rules governed the subject. There are two viewpoints on the legal nature of medical negligence between Iranian lawyers; some of them believe its contractual nature and others advocate its compulsory disposition. As mentioned relationship between physicians and patients formed by starting treatment process, with regard to this fact some lawyer consider that this relation has a contractual nature, in the other hand the process of treatment is govern by medical standards which are not contractual duties and contractual parties have not agreed on them. These duties have compulsory character that determined by medical law and science, there is no mutual consent on them. Contractual duties are based upon contractual consent, there is no contract where there is no consent, and there are no contractual duties where there is no contract. In contract the breach of contractual duty is a fault which laid down to compensation, breach of contract results from the breach of a duty undertaken by the contractual parties. Contract is distinguish from tort in three domains, they are:

208 Karaki Nooraldinebn Ali ebn Hussein, Jameh Almaqased, vol4, p284, Qum, Iran, 1980.
209 Shojaa Pouriyian Siyawash, Liability of medical practitioners in Iran law, PhD dissertation, Azad University, Iran, 2008.
A. The nature of fault
B. Borden of proof
C. Damages

In contract the nature of fault is based on consent and privacy and a breach of contract is an infringement of a personal right available against some determinate person or body and the measure of damages is strictly limited specified and they are generally more or less nearly determined by the stipulation of the contractual parties. Torts duties exist by virtue of the law itself and are not dependent upon the agreement or consent, it is inflicted against consent[^210], in addition in tort the content of duties is fixed by law not by agreement and there is no privacy on the content of duties at tort, tort is a violation in a vested right which available against the world at large, it does not some determinate right to some determinate person, the measure of damages is not fixed or strictly limited nor it capable to being indicated with precision. Physicians’ duties are based upon the standards of medical science as much as the legal duties which arising out from law in general, they are not agreed duties by mutual consent and damages are not liquidated and they have no capacity to stipulation by the contractual parties. The relationship between doctors and patients has a twosome character; the first one is their private connection, like as stipend, which governed by contract law[^211] and the second has not a private character and it is about a public duty.[^212] So it is out of contract law and governed by tort disciplines, the failure to exercise the standard of care that a reasonably prudent would have exercised[^213] in a similar situation, or any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, is not consider as a breach of contract, it is a violation against law and measurement of damages is the duty of court. Yet injured party may forgive wrong doer but he have not a right to make an acquit contract by physician before he have met an accident. It is because of that such contract has not a

specific subject. If you have money you can buy anything, if you have no money you can buy nothing, then when you own a debt you may forgive it, but when you have not possession a debt so how you may forgive it. Medical negligence is viewed as a means to achieving certain social goals, the viability and justification of rests on how adequately medical error system achieves these goals. So Iranian medical negligence system has two possible lines of defense, the first is viewing contract law as a demonstration of the contractual parties intend and goals that guide to private relationship, and the other is how manifestation of moral and ethical principles that guide human behavior in relation to other for determining the effectively of those principals. A medical negligence claim is a demand for punishment for alleged harm caused by substandard medical care. Common reasons for claims include failure or delay in diagnosis, or incorrect treatment. A patient, or other person bringing the claim, has to prove on the balance of probabilities. The standard of proof required by court is currently the standard applied in criminal cases that the court hearing the case is satisfied so that it is sure of any finding of fact. The formulation sure beyond all reasonable doubt also sets a familiar standard. In Iranian jurisdictions medical malpractice claims fall within the ambit of public law, the liability is based on the fault principle; there is no liability without fault. The fault principle remains of central importance in determining the liability of actors in private law and permeates in Iranian criminal law. Indeed one aspect of the dominance of the fault principle within the Iranian contract law is that fault has been made a condition for liability not only in tort, but in contract as well: a party’s objective contractual breach leads initially to a presumption of culpability, which they may rebut by showing that they were not answerable for the breach in question. In this context, 227 of Iranian Civil Code provide that a party will be answerable for willful or negligent breaches.

Finally In a criminal case, the burden of proof is much stricter, because the defendant may go to prison if found guilty. Therefore, the prosecutor must convince the judge beyond a reasonable doubt that the accused committed the crime. The complaining or

Katouziya, Nasi, Zemaneg Gahri, Tehran, Iran 1995, vol1, p326.
accusing parties have the burden of proving their particular version of the facts. The job of the defendant is putting in evidence which prevents the prosecutor from meeting the burden of proof. To do this, the defense evidence should explain, disprove or discredit the evidence presented by the other party. In medical negligence context with the absence of legal aid in Iran, most claimants pursue doctors via the criminal justice system but with a standard not of beyond all reasonable doubt but merely on the balance of probability. As a result, most cases are settled out of court, often regardless of merit. Criminal negligence refers to a mental state of disregarding known or obvious risks to human life and safety. An example would be leaving a loaded firearm within reach of a small child. To be guilty of any crime, a person must act with a criminal intent. Normally this means intentionally or deliberately pursuing a criminal result. But criminal negligence may substitute for criminal intent under very specific circumstances. When it does, it can subject someone to charges such as endangerment or manslaughter even when the actions are unintentional. A physician acting negligently could face criminal liability. Negligence takes place when patient gets injured as a result of physician's carelessness. Criminal negligence takes place when a physician behaves in a way that is an extreme departure from the way that a reasonable physician would act. Criminal negligence is basically analogous to an "I don't care what happens" type of attitude. These standards differ largely because of the consequences associated with each. A physician found liable in a civil case only has to pay money damages. But a physician convicted of a crime may go to jail. As a result, civil cases involve a lesser "burden of proof" than do criminal cases. Criminal negligence may impose where there is just a mistake in judgment, inattention, or simple carelessness. It also pertains to conduct that is so outrageous and reckless that it marks a clear departure from the way an ordinary careful person would act under similar circumstances. It is important to understand that under Iranian law, criminal negligence is only concerned with the consequences, not with the act itself. This means that;

1. if no one is hurt, an individual couldn’t still be held criminally negligent even if his underlying behavior is such that it is likely that someone will be seriously hurt or killed, and
2. When someone is injured or killed, criminal negligence exists even if the act itself clearly does not involve a high-degree of danger. Carelessness, thoughtlessness, or even sheer stupidity does not elevate the conduct to criminal negligence, regardless of the consequences.

A doctor should not be held negligent simply because something goes wrong. He should not be held liable for mischance or for taking one choice out of two or favouring one school rather than another in choosing as to what treatment is to be given to patient. He is only liable when he falls below the standard of reasonable competent practitioner with equal skills. The standard of reasonable care is a flexible criterion capable of setting the boundaries of legal liability of the professionals depending on the duties founded on principles of torts or contracts. The negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitute negligence varies under different conditions and in determining whether negligence exist in a particular case, all the attending and surrounding facts and circumstances have to be taken into account.

6.2.3. **Element of proof**

In Iranian law system medical negligence is a form of *Jenayat* (جنایت), in other words and in most of cases a crime in which an injured person requests damages from an alleged perpetrator in compensation for a wrongful and harmful act. As with criminal-based, a claim for medical negligence generally requires that the plaintiff establish three basic legal elements in order to obtain a deyeh. First, that the victim was harmed and experienced damages; the victim must demonstrate that the failure to conform to the relevant standard of care was a proximate cause of the damages sustained. Stated another way, it must be established that the physician's negligence led the stated injury,
Second, victim must show that the offender (medical professional) has conducted carelessly to the plaintiff; regarding skilled persons or those that possess proficiency or expertise in a particular field the test is still that of the reasonable person but here the reasonable person in the same circumstances must be one with the same qualifications and expertise as the defendant, and

Third that the victim’s harm was caused by the offender's actions; unless damages of some sort are sustained by the patient, there is no basis for a claim, regardless of whether or not the physician was negligent. However, demonstrating some degree of "pain and suffering" or "emotional distress" in cases claiming non-economic damages leaves much latitude for the claimant to claim some harm.

6.2.3.1. Injuries

In the legal sense, personal injury is a type of civil wrong where harm is caused to one individual because another individual failed to use reasonable care. Personal injury law overlaps quite a bit with litigation law. The law recognizes a civil wrong as legal reasons to sue the offender in order to recover for losses caused by an injury or other type of harm, including psychological. Personal injury is a legal term for an injury to the body, mind or emotions, as opposed to an injury to property. The term is most commonly used to refer to a type of tort lawsuit alleging that the plaintiff’s injury has been caused by the negligence of another. In principle, the right to damages belongs to the victim. The victim is the injured party in the matter. The matter has been interpreted broadly by the courts, and the notion of victim includes any person who has suffered a direct and personal loss as a consequence of an illegal action imputed to the offender. This presents no particular difficulty when the victim is a natural person like as a patient. The problem, however, takes on a particular aspect in relation to social groupings which do not have legal personality like as a group of patient which suffers from some injuries in common for example they suffer by blood injection. Equally the matter is less straightforward in the case of those who bring the action for indemnification in their capacity as substitutes
because they are not acting in their capacity as a victim of something personal to
them, but by virtue of a law which has transmitted the right to them. In order to
prove a case in negligence, a party must be able to prove both legal and factual
causation. In other words, the party must not only be able to prove that the actions of
a party proved something but that the actions were also a legally sufficient cause to
hold someone liable and find negligence. Factual and legal causation are said to be
distinguished from each other in an effort to avert the danger of a defendant being
exposed to liability in an indeterminate amount for an indeterminate time to an
indeterminate class. Legal liability means the liability of a person to be punished,
forced to compensate, or otherwise subjected to a sanction by the law. There are
three criteria on which liability may be imposed. The first is the conduct by itself: is
doer responsible on account of his conduct, or is he held responsible irrespective of
his conduct? The second is causal connection. A person may to be held responsible
for harm if it be shown that his conduct caused the harm. It means that his conduct
must occasioned harm, e.g. by providing an opportunity for the harm to be done. In
the absence of any such connection he cannot be held responsible. The third criterion
is fault. A person maybe held responsible when he is shown to have been at fault in
the absence of fault he cannot be held responsible. Liability without fault i.e. on the
basis of strict liability is based upon fault argument. To impose legal liability on
medical practitioner conduct, causation, and fault must be shown. A physician maybe
held responsible when shown he conducted himself in a way which entails fault and
thereby caused the harm then he must be punished or made to compensate. The fault
means violation of a right set by the law. Sometimes such violation will be by
conduct accompanied by an intention to cause the harm complained of. At other
times an unintentional fault, such as a negligent act, will suffice. Either sort of fault
may involve a positive act or an omission, for example the negligent omission to
perform a duty. The link between conduct and causation may show the fault, thus
where it is clear that the defendant's conduct caused the harm, it may consider that
injury show the fault by itself and there is no need to show defendant is at fault. It
same that he is strictly liable for harm caused by his conduct. But because conduct consists of carelessness and a voluntary manner the fault is an implied by conduct itself. It must be shown to have caused the harm complained of on ordinary causal criteria. The fact that the liability is someone like as strict, however, often influences the description of the defendant's conduct and so the ease with which causal connection can be proved. For example, it is easier to show that harm was caused by storing or using explosives than by storing or using them without due care, which will amount to negligence and constitute an instance of fault. The required causal connection between fault and harm is to be assessed according to the common-sense criteria. In some special situations it may be enough that conduct occasioned the harm. Thus the required causal connection is excluded by a superseding cause. This form of liability is found in criminal law, in tort, and in certain types of contract. An example of the latter is the failure of a doctor, in breach of contract, to exhibit reasonable medical skill.

6.2.3.2. The offender

Three different situations must be considered:

A. when there is only one offender,

B. when multiple offenders are involved, and

C. when they are unknown.

a. When there is only one offender

First of all one must note that there is no prevent an association from being offender. The difficulty is that when the offender is a fictional person, the problem, however, takes on a particular aspect in relation to fictional person which does not have legal capacity and may not be the subject of punishment. As a fictional person like as a hospital, they have capacity as an offender of something personal to them, but by virtue of a law which has transmitted the right to them, but they may not punish. In this situation the chief of the fictional person is liable to his association, and he considers as offender and will punish in the case of guilty. When one offender is
involved, the defendant will be either the offender himself or the person legally responsible for torts committed by the offender or the person who bears a presumption of liability for things under his control. One difficulty remains when the responsible person lacks capacity. In such circumstances Iranian Penal code clearly states that someone who is suffering from psychological disorders who causes damage to a third party, remains liable but the compensation impose to his Aqileh (paternal relative عائله ) . However, for minors we should notice that the age of legally capacity is 18 under Iranian Civil code, but the following persons are forbidden to take possession of their property and their pecuniary rights because of disability they are;

1 - Minors.

2 - Persons who have not matured.

3 – Disorder persons.215

By the words “persons who have not matured” is meant a person whose method of dealing in their property and rights is not in accordance with reason.216 At the session of the age of majority no one should be treated as personal disability in respect of insanity or immaturity unless his immaturity or insanity is proved.217 Medical professional is not deal with property and pecuniary rights, so a medical person may consider as Persons who have not matured. In the situation that such professional committed a negligence caused damages to a patient, the compensation impose to his Aqileh (paternal relative).218 In cases of simple mistakes the mulct for murder and mulct for causing injuries where the wound has caused the bone to be exposed or more severe injuries, the paternal relative with the exception of women is responsible for payment the mulct. If the injury is mild the criminal the offender himself (Jani جانی) is responsible for paying the mulct. The premeditated or quasi premeditated murder of a minor or an insane person is regarded as

215 Iranian Civil Code, Article 1207.
216 Id, Article 1208.
217 Id, Article 1210.
218 Iranian Penal Code, Article 306.
simple mistakes (*Khtayi Mahze* خطای محض) and payment of mulct is the responsibility of the paternal relatives [of the criminal] with the exception of women. *Deyeh* or Mulct is a property which should be paid to a victim of murder or his/her heirs and to a victim of injury.\(^{219}\) In cases where a person intends to shoot an object or an animal or another person but the bullet hits third person, his action will be considered to be a simple mistake (*Khtayi Mahze* خطای محض).\(^{220}\)

**b. When multiple offenders are involved**

According to Iranian Penal Code when multiple offenders are involved and when it is difficult if not impossible to determine the extent of the personal liability of each, the case law, the favors principle of liability in solidus. The only onus on the victim is to establish that each offender took some part of the damage. The co-author of damage who took part in the entire damage must bear the full indemnification", or "each liable person of a single damage must be condemned to redress it for the full amount, the sharing of liability decided by the judge deals only with the relationships between the offenders and cannot affect their obligations toward the victim. The principle is now perfectly well stated and the victim is entitled to claim the entire payment from any offender, or unequal shares from each of them, regardless of the nature of the liability which could be different for each offender.

**c. When the offender is unknown**

In such circumstances, and if one follows the strict application of the theory of causation, the absence of the link of causation (a common situation when the offender is unknown) will not prevent to compensation, the solution is oath, in practice the victim may asked court for offender oath on his innocent if he refused to oath then the victim may compensated if he oath that the offender is guilty. In respect of offender matters when there are several persons liable and it is difficult or impossible to determine the share of

\(^{220}\) *Id.*, Article 296.
liability of each, the court recognizes the collective liability of a group member who took part in a common action and completed related steps which were at the origin of the damage. The court takes the view that the offender are bound in solidum towards the victim in such a way that the victim can claim payment from any one of those responsible and even do so when the total due is not necessarily in an equal amount for each co-debtor, and even when the basis for the liability of each of the debtors is different.

### 6.2.3.3. *Tagsier* تقصير

The Civil Code of Iran never used the word ‘delict’ or ‘quasi-delict’ in any of its provisions nor Criminal Code. It is because of that Iranian law is in Farsi language, and then it used its terminology which is based on Islamic law branch of Shiite. Terminologically the term of delict is almost equal to *Tagsir* (قصير) and the term of quasi-delict almost equal to *Gousour* (قصور). *Tagsier* as a word derives from the Arabic language and as a branch of Iranian Law revolves around the fundamental concept *Zeman Gahri* (ضمان قهرى) literally loss wrongfully caused. Where A has suffered wrongful loss at the hands of B, generally where B was negligent, B is under a legal obligation to make reparation. There are many various *Tagsier* which can be committed, ranging from assault to procurement or breach of contract. *Tagsier* deals with the righting of legal wrongs in civil law on the principle of liability for loss caused by failure in the duty of care whether deliberate or accidental. *Tagsier* is the area of the law which governs the obligation to refrain from wrongful conduct which may harm the interests of another and the duty to compensate one who is harmed as a result of some wrongful conduct. The term *Tagsier* can also be used to refer to specific forms of action arising under this area of the law. Where there is a duty for an individual to compensate another (also known as the duty to make reparation) the one compelled to make payment is referred to as being *Zeman Gahri* (ضمان قهرى). *Tagsier* can be categorized within three heads, depending upon how the harm arises. Thus, *Tagsier* is intentional, and quasi- *Tagsier* (Shebehe Ammed شبه عمد) or ‘unintentional’. Each such category has developed distinct and specific rules regarding the creation of *Tagsier* liability.
6.2.3.3.1 Intentional Tagsier

Intentional Tagsier arise where one individual intentionally harms the interests of another. Such Tagsier tend to have specific names can be further subdivided with relation to the type of harm suffered. Thus, for example, the Tagsier named ‘assault’ exists within the category of intentional Tagsier relating exclusively to harm caused to the physical integrity of individuals.

6.2.3.3.2 Unintentional ( quasi- Tagsier )

Unintentional quasi- Tagsier occurs where unintended but careless conduct results in harm to another individual. Such careless acts may also be referred to as ‘negligent’ with this area of Tagsier also commonly referred to as ‘the law of negligence’. Unlike intentional Tagsier, where a quasi- Tagsier act relates to a single individual, there is potential for a careless act to cause harm to a wide range of individuals. To prevent such unlimited liability, this area of the law has developed a number of tests which must be fulfilled for Tagsier liability to arise. The most notable of these is the requirement that there must have been a Wajib (واجب) or a Statutory Obligation, which is any action that is commanded by law the performance of which is a legal duty and its neglect is assured punishment. In the most narrowly construed sense, Tagsier is an Arabic word and a legal term, which, in Iranian law of obligation, signifies a willful wrong, similar to the common law concept of tort though differing in many substantive ways. It is to be differentiated from quasi- Tagsier which is an unintentional wrong, similar though differing from the common law concept of negligence.

Under Iranian law of Zemaneh Gahri (ضمان فهری) or delictual liability, referring to damages arising outside contract, claims to damages can arise from either intentional or negligent infliction of harm. Under Articles 328 and 331 of Iranian Civil Code,

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221 _Id_, Article 328 - If anyone destroys the property of another person, he will be held responsible and must either produce its equivalent or its value, whether or not the property was destroyed intentionally and
damages can either be based on harm inflicted either on an object protected by legal protection such as life, health or property, or on the violation of a law protecting a certain legal interest. There are two elements to every Zeman Gahri (ضممان قهرمان) claim; Harm to an interest that is protected by the law is the first element and second one is damages.

6.2.4. Harm

Every Tagsier requires some form of harm to an individual. Such harm can be classified with relation to the damage caused to the different types of personal interest. Thus, harm may relate to an individual’s physical integrity, their property, their finances or their reputation. However, it should be noted that the law, depending upon circumstance, may offer varying levels of protection to the different types of interest. For example, the law will always regard ones physical integrity as worthy of protection, whilst there is generally less protection of an individual’s financial affairs.

6.2.5. Wrongful conduct

For a successful Zeman Gahri action, any harm suffered by an individual must not be as the result of wrongful conduct. But in contract there must not be any legal justification for the harm to have occurred. An example of legally justified harm to the interests of another would be where one individual sues another in damages for breach of contract. This action will clearly will cause financial harm to the individual who is sued, but legal policy considers such actions justified for the protection of contracting parties.

6.2.6. Strict Liability

Strict liability arise where the harming of the interests of an individual are sufficient for the existence of Tagsier liability, regardless of the intentions or the negligence of the

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whether it was the actual property or profits there on that were destroyed; if he causes defect or damage to such property, he is responsible for the depreciation in price.

Article 331 Anyone who causes some property to be destroyed must give back its equivalent or its value, and if he causes a defect or damage to it he will be held responsible for any depreciation in value.
individual who causes the harm. The concept of strict liability is relatively rare and is exclusively imposed by statute. Tagsier relate to private interests being wronged. The law of Tagsier lays down what is required for an act that causes damage to qualify as a Tagsier and what remedies are available to the party who suffers the damage. On the grounds of justification there are special circumstances which convert an otherwise unlawful act into a lawful act. The following grounds of justification are like in the case of the criminal law but not exactly the same are usually distinguished:

(i) Necessity;
(ii) Self-defence;
(iii) Consent to injury and consent to the risk of injury;
(iv) Statutory authority;
(v) Provocation.
(vi) Fault (intent of negligence).
(vii) Causation.
(viii) Damage or impairment of personality.

6.2.7. The system of compensation

Jenayat (جنایت) or crime is divided into three categories:

a. premeditated,

b. unpimeditated,


c. accidental.\textsuperscript{222}

In accordance with the articles of section \textit{Qisas}(retaliation) of Iranian Penal code, premeditated murder will result in retaliation and the heirs of the slain person, by permission of the Spiritual Leader, can retaliate the murderer. In doing so they should observe the conditions stated in the following sections. The Spiritual Leader can delegate

\textsuperscript{222} \textit{Iranian Penal Code}, Article 204.
retaliation to the Head of the Judiciary power or another person. Intentional bodily injuries to a person will caused to *Qisas* (retaliation). A medical professional person who causes injuries to a patient may be subject to retaliate, especially in the case of absence consent of the patient. Injuries in the following cases are a premeditated one:

a) In the cases where the guilty person intends to make an injury to a specific person or a non-specific person from a group whether his action is inherently damageable or not but the action results in injuries.
b) In the cases where the guilty person intentionally makes an action which is inherently damageable, even if the guilty person does not intend to injured the person.
c) In the cases where the guilty person does not intend to make an injury and his action is not inherently damageable to the person who is injured because of the injured person's condition such as illness, disability, old age, childhood and the like, and the guilty person is aware of these conditions.

In the following cases mulct (*Deyeh*) 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 intend to make the action which caused the crime, like when a person intends to shoot a prey, but he 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 in a manner which is not inherently lethal but he 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.

\[223\textit{Id.}, \text{Article 205}.\]
\[224\textit{Id.}, \text{Article 206}.\]
Premeditated and quasi premeditated murders caused by insane people and minors are regarded as accidental deaths. If as a result of complacency, callousness or un-skillfulnessness 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.\textsuperscript{225}

The punishment for medical negligence is \textit{Deye}(\textit{Mulpt}) \textsuperscript{(دیه (معلت))} and patient have not paid more than the fixed price, thus in medical negligence the civil action is not acceptable suit for compensation. \textit{Deyeh}(\textit{Mulpt}) \textsuperscript{(دیه (معلت))} consider as fully compensation for injuries. \textit{Deyeh}(\textit{Mulpt}) \textsuperscript{(دیه (معلت))} or The blood money is a fixed sum which have determined by the law and judge has no right to change it and will apply in \textit{Jenayat} \textsuperscript{(جنایت)}. It seems as punitive damages in civil law as well as punishment in criminal law. The perfect understanding of this mechanism is difficult for the lawyers who devoted to the new terms and conceptions of modern law. It is a very serious question to them, if the blood money is a kind of punishment, so why it will be given to the plaintiff, it will be unintelligible when they found that in some situations the treasury(\textit{Beat Al Mall}) \textsuperscript{(بیت المال)} is responsible for it. If we consider it as compensation in civil law it should enforce at all injuries but it doesn’t worked out of \textit{Jenayat}, and more a generic fixed sum is not accordance to the standards of modern law systems. While the blood money is a fixed sum rule, according to the modern law standards and in the light of freedom to contract, the contractual parties may create a fixed sum as eventual compensation in their contracts but the legislature has no right to create such compensation as a generic rule. So we can imagine the complexity and uncertainty of the nature of blood money. This complexity and uncertainty is not a mere theoretical difficulties, it is a practical problem more than a theoretical one after 1976 whit Iranian criminal law systems. If Iranian judges exert it as a punishment, then the injured party has a right to make a compensation too, thereupon the guilty person will pay it because of his offence to public rights and will make a compensation in order to replace the former condition, but in cases which the blood

\textsuperscript{225} \textit{Id.} Article 295.
money seemed as compensation, there is no reason to avarice. In such presumption the main question is that whether the court decision resolved the disputation or it disorders the borders of punishments and compensations. When the blood money prescribed because of the injured party’s compensation, to his affability and case cost, it will be for court unbearable to pay attention on the extra sums which have been claimed by plaintiff, in the view of legislature, they have no a clear idea about the nature of blood money in corresponding to the new standards of modern systems of law. They have been enacted the blood money in Iranian Penal Code 1981 as a kind of punishment, Article ten of Deyyat(دیяت) Code observed that “blood money is a religious monetary punishment for crimes which has been determined by ” after some years and when the defects of this definition aroused by courts experience, in their amendment 1991 they enacted that “the blood money is a religious sum of money for crimes which has been determined by God ” hence they did nothing, not only the ambiguity unresolved but also it increased, and the twosome nature of the of blood money took complexity more than ago. The legislature’s changing phrase showed that they have been found their error but their solution have no sufficient and they made a serious mistake by unspecified the nature of blood money in their new define, and this mistake resulted on much difficulties in the practical Iranian criminal law system, judges lost their unity decisions, some of them considered blood money as compensation while another’s paying attention on it as a penalty and arise dissentions, the last definition had an explicitly character, properly or improperly, but the current one has not as much as obviously as last one, in the other hand article 12 of Iranian Deyyat(دیяت) Code increased the complexity more than the former because according to article 12 blood money have been considered as a penalty yet.

6.2.8. Iranian judicial system

Burden of proof is a matter of jurisdiction; jurisdiction is the product of judicial system. A nationwide judicial system in Iran was first implemented and established by Ali Akbar Davar and some of his contemporaries such as Abdolhossein Teymourtash under Reza Shah, with further changes during the second Pahlavi era. After the 1979 with the
establishment of the Islamic Republic of Iran, judicial institutions and the administration of justice were subjected to drastic changes mandated by the provision of Republic’s Constitution; this system was changed drastically over the years. The legal code is now based on Shiite’s Islamic law. According to the constitution of the Islamic Republic, the judiciary in Iran "is an independent power." The entire legal system “from the Supreme Court to regional courts, all the way down to local and revolutionary courts" is under the purview of the chief justice. There is a Minister of Justice for the subject of administrative and official rules too. According to Article 160 of the constitution, the Minister of Justice owes responsibility in all matters concerning the relationship between the judiciary, on the one hand, and the executive and legislative branches, on the other hand. ... The head of the judiciary may delegate full authority to the Minister of Justice in financial and administrative areas and for employment of personnel other than judges. The minister is to be chosen by the president from a list of candidates proposed by the head of the judiciary. The head of the Supreme Court and Prosecutor General are also to be "just mujtahids” "nominated” by the head of the judiciary "in consultation with the judges of the Supreme Court" and serving for a period of five years. The structural changes in the Iranian legal system, particularly in civil and criminal codes of procedure, have resulted in substantial flaws in the administration of justice. Since the sixteenth century A.D. Iran has been the only country in the world having Shiite Islam as its official religion, consequently the general principles of its legal system differed somewhat from those of other countries which followed Islamic law. Among the ways law in Iran and the rest of the Muslim world differed from European law was in its lack of a single law code. "Thirteen centuries of Islamic - more particularly Shiite tradition" called for jurists to base decisions on their legal training as it applied to the situation

227 Article 160 [Minister of Justice] (1) The Minister of Justice owes responsibility in all matters concerning the relationship between the judiciary on the one hand and the executive and legislative branches on the other hand. He will be elected from among the individuals proposed to the President by the head of the judiciary branch. (2) The head of the judiciary may delegate full authority to the Minister of Justice in financial and administrative areas and for employment of personnel other than judges in which case the Minister of Justice shall have the same authority and responsibility as those possessed by the other Ministers in their capacity as the highest ranking government executives.
being judged.\textsuperscript{228} The Iranian court structure includes Revolutionary Courts, Public Courts, and Supreme Courts of Cassation. Public courts consist of civil courts and criminal courts. The courts of the Islamic Republic are based on an inquisitorial system, such as exists in France, rather than an adversarial system of the United Kingdom. The judge serves not only as judge but as prosecutor, jury, and arbiter. However, according to Article 168 of Iran's constitution, in certain cases involving the media, a jury is allowed to be the arbiter. The judge holds absolute power. All judges are certified in Islamic law. The rulings of the public Court, and its functions is independently of the any judicial power and is accountable only to the Revision court and in special cases like as murder in the Supreme Court, are also final and cannot be appealed. Public courts are govern by just one judge and his decisions are accountable in the Revision court, which governed by three judges. All cities across the country has their public court, the public court in a city may has its branch as much as its need, but establish of a courts is under the purview of the chief justice, who is the head of judiciary power. Public court divided into three subjective branches and one geographic branch, the subjective branches are:

1. Public court civil branch
2. Public court criminal branch
3. Public court family branch

And the geographic branch of public court is the district branch which has the purview in all civil, criminal and family cases. A province consists from some cities, Iran has thirty one provinces, each provinces across the country has its Revision court, it may has its branches as much as its needs, Revision court has its purview to revise on all the public court decisions unless such exclusive decision which are accountable in Supreme Court. Revision court has initial purview in some important cases such as murder, and its decisions on those cases are accountable in Supreme Court. Such exclusive decisions of the public court which are not accountable in Revision court and initial decisions of

revision courts are under the purview of Supreme Court, in fact in such cases the functions of the Supreme Court is the same as Revision court. It is because of that, generally speaking, Iranian procedure system is a two stage kinds, the initial stage and the revise stage, and the stage of Cassation removed from Iranian procedure system in the last amendment. Just some exclusive family cases such as the marriage and divorce, other cases are not accountable in Cassation stage. Thus a massive number of Iranian court’s decisions are not accountable in front of Supreme Court. Medical negligence, in a high level damages, will cause a death, the death of decease patient is not an intentional act so it is not consider as a murder and it is just a manslaughter, and it is under the purview of public court and the decision of public court in this cases are accountable in Revision court. Aside from articles those Articles, Penal Code in chapter on the cause of liability also provides for ‘special torts’ which incorporates not only principles of equity but also universal moral precepts such as: Every person who, contrary to law, willfully or negligently causes damage to another shall indemnify the latter for the same. Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy, shall compensate the latter for the damage.

Conclusion

Law of evidence is different from the evidence itself. Law of evidence as a collection of rules governing what facts may be proved in court, what materials may be placed before the court to prove those facts, and the form in which those materials should be placed before the court. Evidence may be defined in general terms as any material which has the potential to change the state of a fact-finder’s belief with respect to any factual proposition which is to be decided and which is in dispute and the law of evidence is part of procedural (adjectival) law dealing with proof of facts in judicial proceedings. Testimony is a form of evidence, it is a statement which the court permits or requires to be made before it by expert witnesses in relation to matters of fact under inquiry, and such statements are called oral evidence. The plaintiff in a medical negligence action is ordinarily required to produce, in support of his claim, the testimony of qualified medical
experts. This is true because the technical aspects of his claim will ordinarily be far beyond the competence of the judges.' the plaintiff; himself a layman in most instances, is not free simply to enter the courtroom, announce under oath that the defendant surgeon amputated his leg instead of saving it, and then request the court to find the surgeon negligent. The judges possessing no special expertise in the relevant field are incapable of judging whether the facts described by the plaintiff, even assuming an accurate narration by him, add up to negligent conduct. And the plaintiff himself is incompetent to supply guidance; he too lacks the training and experience that would qualify him to characterize the defendant's conduct.229

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts are relevant, and of no others. Parties' present evidence before judge and judge decides admissibility on questions of law. A trial is an inquiry into past events, the main purpose of which is to establish to an acceptable degree of probability those past events which it is claimed entitle the court to grant or deny some relief in accordance with law. Because judge is a neutral umpire; Decide admissibility of evidence refers to foundational facts required by a rule of evidence before it can be applied e.g., a statement to the police is only admissible if the prosecution can show that it was ‘voluntary’, facts showing voluntariness have to be proved first.

At common law of India if there is nothing on record to prove that doctors have been negligent in carrying out the operation, the principle of res ipsa loquitur will not be applicable and the plaintiff would not be entitled for damages.

In order to succeed in an action for negligence against the doctor the plaintiff must prove (1) that's the defendant was under duty to take reasonable care towards the plaintiff to avoid the damage complained of or not to cause damage to the plaintiff by failure to take reasonable care; (2) that there was a breach of that duty on the part of the defendant; and

229 Supra note 2.
(3) that breach of duty was the real cause of damage complained of and such damage was reasonably foreseeable. To Determination of Medical Negligence law notes that:

a) Medical Negligence cannot be confirmed under assumption: Doctor/hospital cannot be held liable for medical negligence under assumption simply without clear proof of negligence in their part even if patient dies.

b) Standard of service delivered should be compared with reasonable objective standard determined by law: It is to be identified objectively what is the reasonable standard of medical service to be given in course of such treatment and which standard of medical service was indeed delivered to patient while confirming medical negligence by court.

c) Expressed doctor-patient relationship necessary to determine medical negligence: To determine medical negligence it is to be seen whether the doctor, hospital or health care centre has impliedly or expressly agreed to undertake doctor patient relationship.

d) Injury/loss mandatory for claim: If patient has not suffered any loss despite breach of duty by service providers, it is not a medical negligence case.

e) Death of patient is not determining factor for negligence: If doctor treats patient with dedication applying his experience, skill, education, efforts and knowledge and despite that treatment fails or patient dies, doctor cannot be held guilty for medical negligence.

f) Decision ought to be reasoned based on fact and evidence: Decision of courts ought to be reasoned based on fact and evidence(s) and should comply with the principle of “one cannot be judge in one's own case.

g) Court has to see cause and effect with time factor while identifying medical negligence: Court has to see how close or distant interrelation is there between cause and effect.
h) Patients and doctors are treated equal in the eye of law and court: Court cannot treat two parties of suit (Patient versus doctor and hospital) differently. Both are equal in the eyes of justice and court. So no immunity can be claimed by doctor because they are members of medical profession.

In Shiite law, the sources of law (usul al-fiqh) are the Qur'an, Prophet Muhammad’s practices and those of the 12 Imams, and the intellect (aql). The practices called Sharia today, however, also have roots in local customs (Al-urf). Islamic jurisprudence is called Fiqh and is divided into 2 parts: the study of the sources and methodology (usul al-fiqh - roots of the law) and the practical rules (furu’ al-fiqh – branches of the law). Medical negligence in Iran is governed by Islamic criminal law. To substantiate a crime is the claimant’s responsibility, and the person who refutes it will have to swear an oath (sayyidat al-qura), is words of the Prophet. Iranian law just as it is in accordance with the universally acceptable methods of legal ethics endorsed by sense and reason. Consequently, if circumstantial evidence, medical check-ups, post mortem reports, fingerprint, testimony of witnesses, confession of criminals, oaths and various other methods are employed to ascertain a crime, then this would be perfectly acceptable by Iranian law. In medical negligence crimes, patients have an initial onus of proof. After initial onus was discharge by complainant then subsequent duty of defendant to satisfy court. If the initial onus is discharged by the complainant, then the doctor must show to the satisfaction of the court that it has taken all due and necessary care and exercised reasonable degree of professionals kill and expertise.