INTRODUCTION

Health is the most precious desirable item or quality of man. In fact, health is the only prominent desirable item or quality of man which is of the centre of all other activities. There is a Persian saying in support of this statement which indicates that: “Wisdom is the result of the health”. It means that the person who has not enjoyed health, he has not got benefit of wisdom. That is the reason why in many legal systems the contract made by the terminally ill person is null and void. And it is for the same reason where the contracts made by the minor are either invalid or voidable in different systems.

Risk is attached to health in the entire life of a human being, and we only should try to reduce and control this factor as much as possible based on medical science as well as the law\textsuperscript{1} and this is the gist of this study.\textsuperscript{2} Health is under the influences of complex and technological medical treatment which has an invasive character to the patient’s body, this method would cause two forms of injury, the first one may be caused inadvertently caused by the diagnosis or treatment of physician and the second is disappointment in patient’s expectations of amelioration of illness. Medical treatment is undertaken for a beneficial purpose involving the hope of obtaining a given benefit, ideally a cure, but the progress of a natural condition cannot be considered as injury, it will be harm where it is carries out from unlawful act or omission. So, the medical profession and society at large need to accept and recognize professional mistakes as unavoidable part of medical practice.

At the outset, discussions about malpractice often start with patient’s complaints about the system, which include the high cost of medical coverage and major injuries and the inefficiency of litigation as mechanism for resolving disputes. Each of these complaints finds an empirical basis in studies of malpractice claims and patients reasonably object that the current tort system is inflexible for many injured patients to access, takes an unreasonable amount of time and expense to deliver compensation,

\textsuperscript{1} Tetali, ‘The Importance of Patient Privacy During a Clinical Examination’, \textit{Indian Journal of Medical Ethics}. April-June 2007, available at http://www.ijme.in\/152\co65.html.

\textsuperscript{2} World Medical Association Declaration on the Rights of the patient, http://www.wma.net\e\policy\14.htm
and often results in different litigation outcomes for patients with similar injuries. The best estimates are that only very little number of patients injured by negligence file claims, only about half of claimants recover compensation, and litigation is resolved discordantly with the merit of the claim. Thus, from the perspectives of this study, evaluations of medical negligence will discuss the frequency of the claims which are brought, the compensation that plaintiffs receive, the litigation process, and the ways in which these factors accommodate into adequate legal system.

Some principles of the law remain fairly constant and immutable but society becomes more complex and technologically advanced, novel circumstances giving rise to those principles of the law, the alteration of moral, social, economic and political values brought about their change and uncertainty. The modern era of our life may regard as human’s senior years; but our complex and technologically advanced life and the erratic and unpredictable dementia has required legislative repair. The capacity of the law should be to satisfy community needs as regards our new life and whether legislative change is appropriate.

India and Iran are developing countries; the expansion of human resources is one of the main foundations and bases of the development; it requires educated and healthy individuals. The expansion of human resources means expanding education and training skillful and effective managers who are healthy in both mental and physical aspects. Mental and physical health is one of the results of every healthcare system. The legal regime when it comes to medical negligence in both countries’ system of law is part of their human resources expansion program. Thus, analyzing this regime and whether it has the necessary staff in order to reach expansion goals is clearly of great importance. Legal practitioners should pay attention to their role in the managerial system. Law should be followed not just because it is the law but because it protects the social system. Following the rules and regulations of the healthcare system will guarantee the expansion of the human resources program. Preventing violation of such rules and regulations requires establishing certain legal mechanisms which include establishing identifying rules and appearance rules. The Supreme Court of India has had to intervene and remind the government that right to health and medical care is part and parcel of to life, which is a fundamental right of every citizen.
Patients may experience adverse events as a result of human error or of flaws in the healthcare system. Human or system errors can cause significant harm to patients or alter patient’s needs for care. More people die annually from preventable adverse events related to healthcare than from motor vehicle accidents. It is true that to err is human is a well known saying that captures the fallibility of human beings. Humans are fallible and as such they will make mistakes in their lives and work be they are builders, bankers or doctors. The doctor-patient relationship, unlike an arms-length transaction, is a fiduciary relationship. A fiduciary is one who owes to another the duties of good faith, trust, confidence and candor. Being a fiduciary relationship, it must rely on principles of autonomy, non-malfeasance, beneficence, justice and fidelity at all times.

In this study, effort has been made to determine the scope of medical malpractice in India and Iran with the comparative perspective in order to enlighten the patient’s legal rights in cases of damages, for unplanned injury suffered in the course of their medical treatment. The law governing medical malpractice is especially prone to influence by moral, social, economic and political values. Broadly and without prejudice to the detailed basic legal rules that constitute and substantiate such actions in the two jurisdictions under study these are referred to as 'medical negligence claims’ in common law system as well as Indian law system. It is referred as 'medical malpractice’ in Iranian law system which arises flowing from improper treatment by health-care professionals, or more generally arising in the course of medical treatment. While the core is civil liability, typically either through contract or tort, attention has also been given to compensation systems outside private law.

Medical treatment in Iran and India generally has various standards in its application, and every year millions go through the healthcare system in both public and private

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3 Paschim Banga Khet Mazdoor samiti v. State of West Bengal, AIR 1996 SC 2426
Paramanand Katara v. Union of India, AIR 1989 SC 2039;
Kirloskar Brothers Ltd. v. ESIC, (1996) 2 SCC 682.
sectors with no problems whatsoever. Nurses, doctors, surgeons, dentists, they all provide an invaluable service to us, however, there can be times when even the highest trained medical professionals can make mistakes and these mistakes can sometimes prove to be devastating to patients. In cases where an individual has undergone some form of medical treatment that has gone wrong because the degree of care fell below the reasonable standard at which a competent medical professional should operate at and the harm caused can be attributed to the error, there may be cause to begin a claim for compensation due to medical negligence. The determination of negligence for a harm caused may or may not establish the liability of medical professional for compensation of the damage or injuries. It is generally conceded that common law system of tort law is based upon three fictions. The first fiction is the reasoning that allows common law courts to award an individual damages after injury. The second is the fictional concept of the reasonable prudent person, and the third, is that liability is imposed and the corresponding right to recovery is given, not because the plaintiff is injured, but instead because the plaintiff's injury was the result of the defendant's fault, how ever Iranian law system is not a fictional system, it's based on the fact, it is a regular system based on the legislative statutes and a body of interpretation rules, where there is damage it must be compensated. The focal point of this study is what is the scheme of Iranian and Indian system of law to the medical negligence concept? Before starting the comparative study of Medical Negligence in Iran and India, it would be relevant to discuss the legal systems of both countries.

1. Historical perspective

Practice of medicine is as old as existence of human race. With the passage of time not only has practice of medicine graduated to become independent and noble profession, but doctor's relationship has slowly shifted from ‘Next to God’ to ‘Friend, Philosopher and Guide’, to 'respected professional’ and, today, to ‘service provider’.

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6 Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, Available at http://mciindia.org\Know\rules\ethics.htm.
7 Editorial, A Patient’s Right to Know, Indian Journal of Medical Ethics, February-April 1994, Available at http://www.ijme.in\013mi005.html.
8 Patients’ Rights, http://www.who.int\genomics\public\patientrights\en\
Medical law is a branch of law concerned with the legal rights and responsibilities of both patients and medical care providers. It may include a wide variety of topics, but is considered to have three primary branches: confidentiality, criminal law, and negligence. Laws made for these three branches provide a basis for both legal and disciplinary actions against medical professionals. They may also be used to affirm that a medical practitioner acted according to the law and in the manner expected of him.

The confidentiality part of medical law is concerned with patient’s records that contain the detailed information about a patient’s health and treatment. It deals with who has the right to access the records, including the patient himself. This branch of the law covers the extent to which patient’s records are kept confidential, when and how medical professionals should share information, and which sorts of situations constitute a breach of confidentiality.

The confidentiality branch of medical law also covers patient’s consent. Different jurisdictions have different laws regarding when and how a patient’s consent may be given and to whom a patient’s records may be released. In many places, a patient must give his consent for the sharing of his medical information, no matter who requests it. Not even his lawyer, family members, or new doctor may access it without his consent.

The negligence portion of medical law focuses on a medical professional’s duties to his patients. These duties usually include providing an acceptable standard of care and exercising good judgment. Medical law covers the manner in which cases of negligence may be handled. For example, if a surgeon operates on a patient and closes the patient’s incision, accidentally leaving surgical instrument inside the patient, the surgeon may face a malpractice lawsuit. Medical negligence laws cover the consequences for medical practitioners and the rights of patients when a medical professional makes errors or fails to provide an acceptable level of care.

The criminal law portion of medical law is concerned with the actions of medical care professionals that may be considered criminal. For example, in most places, a doctor must obtain consent from his patient in order to treat him. Providing treatment against
the patient's will can be considered a crime in some places. It may be called assault and battery, for instance.

Sometimes, failure to obtain patient’s consent is considered criminal and other times a medical professional doesn’t have to obtain consent; medical law defines this distinction. For example, a case may arise in which a doctor cannot obtain consent because his patient is unconscious. If the doctor has to provide care in order to save his patient’s life, the law typically allows the doctor to provide the care that is in the patient’s best interest.

In common law system, the law of torts underlies the great themes that have pervaded during the last century; the most obvious main idea is the dominance of the tort of negligence. Although English common law had long imposed liability for the wrongful acts of others, negligence did not emerge as an independent cause of action until the eighteenth century. The concept of negligence developed under English Law in almost eighty years since its commencement as a distinct cause of action in *Donoghue v. Stevenson*. Negligence, as a concept, is easy to comprehend. It does not require an understanding of obscure rules to understand the issues involved in a particular case. The term ‘tort’ was introduced into the terminology of English Law by the French speaking lawyers and Judges of the Courts of Normandy and Angevin Kings of England. As a technical term of English law, tort has acquired special meaning as a species of civil injury or wrong. Till about the middle of the seventeenth Century, tort was an obscure term, at a time when procedure was considered more important than the right of an individual. This emphasis on procedural aspect for determining the success for a case continued for some 500 years, till 1852, when the Common Law Procedure Act was passed and primacy of substance over the

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10 The term Angevin Empire is a modern term describing the collection of states once ruled by the Angevin Plantagenet dynasty. The Plantagenet's ruled over an area stretching from the Pyrenees to Ireland during the 12th and early 13th centuries. This "empire" extended over roughly half of medieval France, all of England, and nominally all of Ireland. However, despite the extent of Plantagenet rule, they were defeated by the King of France, Philip II Augustus of the House of Capet, which left the empire split in two, having lost the provinces of Normandy and Anjou. This defeat, after which the ruling Plantagenet's retained their English territories and the French province of Gascony, set the scene for the Saintonge and the Hundred Years' War.
11 An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common
procedure gradually gained firmer ground. Today, the maxim as it stands is ‘ubi jus
ubi remedium’, i.e. where there is right there is remedy. Tort is the French equivalent
of the English word ‘wrong’ and of the Roman law term ‘delict’. The word tort is derived from the Latin word ‘tortum’ which means twisted or
crooked or wrong and is in contrast to the word rectum which means straight. It is
expected out of everyone to behave in a straightforward manner and when one
deviates from this straight path into crooked ways he is said to have committed a tort.
Hence tort is a conduct which is twisted or crooked and not straight. Though many
prominent writers have tried to define Tort, it is difficult to do so for varied reasons. The key reason among this being that the law of Torts is based on decided cases.

Judges, while deciding a case, feel their primary duty is to adjudge the case on hand
rather than to lay down wider rules and hence they seldom lay down any definition of
a legal term. Furthermore the law of tort is still growing. If a thing is growing no
satisfactory definition can be given. It is pertinent to understand what is meant by
‘tortious’ liability or rather the nature of tort law in order to understand its utility. The
word tort evolved into literary use as a synonym for wrong but after the middle of the
seventeenth century a practice began in the courts of the common law of
distinguishing between actions in ‘contract’ for breaches of contract and actions for
other wrongs, and of using the word ‘tort’ as a compendious title for the latter class of
actions. Since then it was usual to speak of ‘actions in contract’ and ‘action in tort’. So a tort came, in law to refer to that particular class of wrongs for which an action in
tort was recognized by the courts of common-law as a remedy and to lose the generic
sense of wrong which it may have helped in popular use.

Liability is discussed by Iranian jurists under the title of “Zeman”. It is defined as the
responsibility to pay a financial compensation as a result of an injury inflicted on
others; it covers liability in civil as well as criminal cases. Compensated injuries in

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Law at Westminster, and in the Superior Courts at the Counties Palatine of Lancaster and Durham.
Limited, United Kingdom.
Boston.
“Zeman” include injuries inflicted on the human being as well as property injuries. In Iranian civil law, where there is a right there must be a duty, tort exists to protect those rights by establishing that duty. The law of torts defines rights and duties out of contract, when an individual commits a wrong or injury against another. Iranian jurisprudence does not include the terms ‘tort’ and ‘contractual’ liability as well as western law, especially common law, although Iranian jurists are aware of the distinction between these kinds of liability, especially in terms of compensation. While in common law, torts have been defined as ‘an injury other than breach of contract, which the law will redress with damages’, a body of law which has been developed by the common law.16

2. The subject matter of the study

The subject matter of this study is medical negligence. Study on medical negligence is rational and has become need of the day as scope of medical sector is widening and complaints of medical negligence are seen and heard with tremendous high speed.

Liability of medical professionals must be clearly demarcated so that they can perform their duties in good faith without any fear of legal sword. At the same time, justice must be done to the victims of medical negligence and a punitive deterrence must be adopted in deserving cases. Indian Supreme Court in a landmark case has beautifully said: “The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The Interest and welfare of the patients have to be paramount for the medical professionals.”17 The Court further held: "We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is

16 Douroudian, Hassan Ali, hand book on Civil Responsibility, p41, Teheran, Iran.
17 Jacob Mathew v. State of Punjab, 2005 AIR 3180 SC.
imperative that the doctors must be able to perform their professional duties with free mind.\"^{18}

Iranian law requires medical practitioners to have a duty to inform patients about the side effects of the drugs prescribed and the treatment ought to be guided by the theory of Informed Consent and not in accordance with the traditional doctrine of Professional Standard of Care. The principles of law regarding the starting of limitation in medical negligence case, burden of proof of medical negligence, causation necessary to hold doctor liable, duty of doctor towards patient, liability of clinic for doctor's negligence etc. have all been studied, analyzed and discussion in the thesis.

Likewise, Indian Supreme Court on almost all the occasions adopted a balanced approach in deciding with cases of medical negligence by keeping interest of society intact and also had given desired protection to the members of the medical profession. The history of medical negligence in Indian law practice is not longer in comparison to Iran. Indian Consumer Protection Act, 1986 (CPA), has jurisdiction to hear complaints filed by persons feeling aggrieved against medical professionals for 'deficiency in service'. Indian Penal Code, 1860 in Sections 52, 80, 81, 83, 88, 90, 91, 92, 304-A, 337 and 338 contain the law of medical malpractice in India. The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec. 304A or Sections 336/337/338 of the Indian Penal Code, 1860 (IPC) alleging rashness or negligence on the part of the doctors resulting in loss of life or injury of varying degree to the patient.

This comparative study of medical negligence statutes and experiences is expected to be beneficial in addressing the emerging and growing complications related to medical negligence in both countries Iran and India. The study has focused on negligence aspect with detailed analysis of laws of compensation with Indian and Iranian experiences. In this sense, this research has been an original study on the issue that has remained unexplored till this date.

\[18\] Ibid.
The whole study has revolved around to find answer to the following two research problems:

i. What are the various causes that lead to medical negligence at the level of doctor/paramedical staff/hospital authorities in both countries Iran and India?

ii. Is both country Iran and India law adequate to address (control/govern) those causes that lead to medical negligence?

This study has been conducted with the following main objectives:

1. To examine various causes that lead to medical negligence at the level of doctor/paramedical staff/hospital authorities in both countries Iran and India. To examine whether existing Iranian law on medical negligence is adequate in addressing the causes that lead to medical negligence and provide adequate opportunities for victims to ventilate their grievances. To analyze and evaluate the medical negligence decisions and judgments in both countries Iran and India in ensuring adequate compensation to the victims of medical negligence.

2. To examine Iran’s and India’s experiences in medical negligence sector from legal perspective. To recommend legal mechanism or system which can maintain perfect equilibrium between the conflicting interests of service providers and consumers of medical profession in both countries Iran and India in case if the existing law is found to be inadequate?

Negligence in medical care occurs in four avenues or at four levels of treatment viz-

(1) Medical negligence at the level of doctor/paramedical staff/hospital authorities. Liability for negligence may be fixed at individual level and/or jointly or vicariously where hospitals/nursing homes are involved, (2) Negligence at the level of manufacturers of drugs, equipment, etc. (3) Negligence at the level of patient himself or his attendants also known as contributory negligence and (4) Composite negligence, i.e., at more than one of the above three levels. This study focuses only one negligence at level (1) (i.e. Medical negligence at the level of doctor/paramedical
staff (pharmacists and nurses)/ hospital authorities) both in Iran and India. Negligence at level (2), (3) and (4) has not been studied because it is found that each of them is an independent study. This, the rest three levels have been excluded. With respect to research, the study does include some aspect of health related laws. But the health law is a whole independent matter and the study is focused just on medical negligence.

2.1. Indian legal system

India has hybrid legal system where common law principles of judicial review, case laws are practiced in addition to codified statutes. Selection comparative study with Indian experience is because Indian legal system (in the recent years than the previous years) has longer history and more experience in dealing with Medical Negligence cases under Consumer Protection Act than Iran. Liability for Medical negligence in India may be: (a) Civil liability under Consumer Protection Act, (b) Vicarious liability, (c) Tortious liability developed by judiciary even if no law exists (evolved through British case laws) or (d) Criminal liability. Welfare state’s concept imposes obligation on state to respect, protect and fulfill right to health and courts now have expanded as a part of fundamental right to life thereby making it justifiable even if right to health belongs to Directive Principles under Part IV of the Constitution of India, 1950.

Further contribution of Indian Judiciary in delivering landmark precedents and judgments on medical negligence jurisprudence in the Asian Region has a long history. Medical negligence lawsuits are rapidly increasing in Iran and the current problem of crisis seen in patient safety has motivated researcher to select the topics and Indian experience for study. Indeed, comparative study with Indian legal experiences has helped researcher regarding how should Iran march ahead to effectively address and regulate the emerging medical negligence disputes in Iran. Legal system in Iran is not similar with Indian legal system. It is because of this that India and Iran share intimacy in terms of culture, history, religion, mobility due to good relationship despite their difference, in legal system.
Indian legal system is based on English Common law (system of case laws and judicial review) as well as Civil law system in the form of codified statutes by parliaments. In addition, in India, separate personal laws apply to Muslims, Christians and Hindus.

Current legal system of India is an earning and practices of the forefathers and efforts of the present generation. It is the combination of social, economic, political and cultural characteristics of the society and has close connection with history which has created its own unique system of justice.

The law of torts as administered in India in modern times is mainly the English law which itself is based on the principles of the common law of England as found suitable to Indian conditions appeasing to the principles of justice, equity and good conscience and as amended by Acts of the Indian Legislature. Its origin is linked with the establishment of British courts in India. The term “common law” generally refers to the legal principles derived from judicial decisions and is distinguished from statutory laws enacted by legislative department. Since around the 11th century, common law originally developed under the auspices of the adversarial system in England from judicial decisions that were based in tradition, custom, and precedent.

In the common law countries, the courts have an important role in law making by creating the legal principles and rules or confirming the existing customs or usages that the courts deem just and appropriate. This is true especially in private law field, such as the laws of contracts and torts. It is perceived that common law countries seldom enact or codify the common law rules in the private law field.

The form of reasoning used in common law is known as casuistry or case-based reasoning. Common law may be unwritten or written in statutes or codes. The common law, as applied in civil cases (as distinct from criminal cases), was devised as a means of compensating someone for wrongful acts known as torts, including both intentional torts and torts caused by negligence and as developing the body of law recognizing and regulating contracts. Today common law is generally thought of as applying only to civil disputes; originally it encompassed the criminal law before

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21 John C. Coffee, Jr., “the Rise of Dispersed Ownership: The Roles of Law and the State in the
criminal codes were adopted in most common law jurisdictions in the late 19th century. The type of procedure practiced in common law courts is known as the adversarial system; this is also a development of the common law.\textsuperscript{22} Common law evolved in England since around the 11\textsuperscript{th} century and was later adopted in the USA, Canada, Australia, New Zealand, India and other countries of the British Commonwealth.\textsuperscript{23} The most obvious distinction between civil law\textsuperscript{24} and common law systems is that, civil law system is a codified system,\textsuperscript{25} whereas the common law is not created by means of legislation but is based mainly on case law. The principle is that, earlier judicial decisions, usually of the higher courts, made in a similar case, should be followed in the subsequent cases, i.e. that precedents should be respected. This principle is known as stare decisis\textsuperscript{26} and has never been legislated but is regarded

\begin{itemize}
\item Separation of Ownership and Control”, 111\textsc{Yale L.J.} 1, 62 (2001).
\item Winfield, P.H, "The History of Negligence in torts”, \textit{LQR} No CL XVI, April 1926, pp. 186.
\item The Commonwealth of Nations, normally referred to as the Commonwealth and formerly known as the British Commonwealth, is an intergovernmental organization of fifty-four independent member states. All but two (Mozambique and Rwanda) of these countries were formerly part of the British Empire, out of which it developed. The member states co-operate within a framework of common values and goals as outlined in the Singapore Declaration. These include the promotion of democracy, human rights, good governance, and the rule of law, individual liberty, egalitarianism, free trade, multilateralism and world peace. The Commonwealth is not a political union, but an intergovernmental organization through which countries with diverse social, political and economic backgrounds are regarded as equal in status. Its activities are carried out through the permanent Commonwealth Secretariat, headed by the Secretary-General, and biennial meetings between Commonwealth Heads of Government. The symbol of their free association is the Head of the Commonwealth, which is a ceremonial position currently held by Queen Elizabeth II. Elizabeth II is also monarch, separately and independently, of sixteen Commonwealth members, which are known as the "Commonwealth realms". The Commonwealth is a forum for a number of non-governmental organizations, collectively known as the Commonwealth Family, which are fostered through the intergovernmental Commonwealth Foundation. The Commonwealth Games, the Commonwealth’s most visible activity, are a product of one of these organizations. These organizations strengthen the shared culture of the Commonwealth, which extends through common sports, literary heritage, and political and legal practices. Due to this, Commonwealth countries are not considered to be “foreign” to one another. Reflecting this, diplomatic missions between Commonwealth countries are designated as High Commissions rather than embassies.
\item The term "civil law" has two meanings: in its narrow meaning it designates the law related to the areas covered by the civil codes, while broader meaning of civil law relates to the legal systems based on codes as contrasted to the common law system. In this paper the broader meaning of civil law shall be used.
\item H Merryman, \textit{The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America}” (2nd ed Stanford University Press, 1985).
\item Stare decisis in Anglo-Latin pronunciation: "stāri dēsi" is a legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim Stare decisis “et non quieta movere” means "to stand by decisions and not disturb the undisturbed.” In a legal context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.
\end{itemize}
as binding by the courts, which can even decide to modify it. The legal system of India is referred to as common law legal systems. So, Indian law allows the courts to flexibly adjudicate the controversies in most of private law. The law of torts or civil wrongs in India is thus almost wholly the English law, which is administered as rules of justice, equity and good conscience.

In medical negligence, Indian courts followed the English common law. It does not mean that an English law dealing with medical negligence is by its own force applicable to India but may be followed here unless it is not accepted for the reason Indian approach based on Indian culture and Indian system of law. So the Indian courts before applying any rule of English law may see whether it is suited to the Indian society and circumstances. The application of the English law in India, therefore, may be considered as a selective application. In this context, in M.C. Mehta v. Union of India, Justice Bhagwati observed:

“We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for that matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.”

The outstanding fact of India’s legal history relevant to the present context is the growth of her own medical negligence law from a borrowing system to a valuable independent branch of her system of law along with her other laws on the line of progressive nations like those of the U.S.A, Canada and Australia. This was the work of her lawyers and judges who developed the action for damages as a remedy for violations of rights and duties and fashioned it as an instrument for making people

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28 There is a distinction in the way the stare decisis doctrine is applied by American and English courts. In the United States, under this doctrine a lower court is required to follow the decision of a higher court in the same jurisdiction. In England, the previous rule under which courts were bound by their own prior decisions was reversed by the House of Lords (Practice Statement) which declared that it considered itself no longer formally bound by its own precedents and announced its intention "to depart from a previous decision when it appears right to do so." [1966] 1 WLR 1234.
30 M.C. Mehta v. Union of India, AIR 1988 SC 1037.
adhere to standards of reasonable behavior and to respect the rights and interests of one another. Though India has done likewise in borrowing the English law of medical negligence, she made a far greater use of it by the case law in her courts than she did borrowing it and made it serve the purposes for which the people of other countries as aforesaid have used it.

With respect to any personal injury claim, the injury sustained must result from the negligence of someone who had a duty of care towards him at the time of and in the circumstances of the accident. The people in general gathering consciousness about their rights, claims for damages in negligence, civil suits and criminal proceedings are on the argument. Not only civil suits are filed under the Consumer Protection Act, 1986, complaints also filed by the persons aggrieved. The criminal complaints are being filed against doctors alleging commission of offences punishable under Sec. 304A or Sections 336/337/338 of the Indian Penal Code 1860, alleging rashness or negligence on the part of the defendant resulting in loss of life or injury of varying degree to the plaintiff. Although, India has enacted most private law statutes, judicial decisions still play an important role and sometimes influence the trend of legislation and regulatory reforms.

The law of negligence in India is based largely on English law, although there are areas in which the Indian courts have chosen to depart from the principles espoused by the UK courts. While the law referred here will, wherever possible, be that applied by the courts in India, reference will also be made to the jurisprudence of other jurisdictions, notably the UK and USA, which have influenced, or are influencing, the development of the law of negligence in India.

2.2. Legal System of Iran

Civil law is the dominant legal tradition today in Iran. Civil law in Iran is older, more widely distributed, and in many ways more influential than its rival, the Islamic Shiite common law, in Iran. This system is more inquisitorial, it is code-based, and Iranian judges do not interpret the law but instead follow predetermined legal rules. Iranian

law is derived from two sources: Islamic law as incorporated in Iranian historical period after Arab invasion, and customary (local) law.

With the dawn of new life in Iran, in the last years of the nineteenth century, we have seen massive investment and expansion in the health care industry in the country which is evident from the construction and licensing of various specialized hospitals, clinics and universities. This growth has been characterized by a rise in the role of international healthcare problems and diseases, resulting in increased number of medical injuries being exposed to medical malpractice risks, like in other countries. Based on experience, often such injuries remain uncompensated due to defect in the liability regime in respect of medical malpractice claims. This study, therefore, seeks to highlight the basic principles applicable to such claims in Iran on a comparative view.

The first legal issue in professional medicine in Iran dates back to the Qajar(قاجار) period.\textsuperscript{35} Medicine, as a profession came into existence with the opening of the Dar-al-funun(دارالفنون), the first modern higher education institution in Iran. Jokob Eduard Polak\textsuperscript{36} an Austrian physician who worked with the Iranian army and as a teacher atDar-al-funun managed the medical professional engagement under Amir kabir’s(آیزن کبیر) official sanction, at that time. Anyone who was interested in practicing medicine, needed to apply for admission through the governmental council,\textsuperscript{38} which was headed by Polak, and pass the entrance exam. They could then obtain a placard which meant that the bearer of the placard was capable of engaging in medical profession.\textsuperscript{39} Anyone practicing medicine without such permission would be punished by incarceration.

This sanction was found in the amendment 1911, which was named Ganoun Tebabat(قانون طبیت)or Medical Act. According to article 12 of this Act, all physicians must submit their placards to the investigation council which was organized under

\begin{itemize}
  \item \textsuperscript{34} Supra n 17.
  \item \textsuperscript{35} Iranian Royal Family 1794-1925.
  \item \textsuperscript{36} Polak , Jakob Eduard , 12thNov 1818 in Bohmen - 8thOct 1891 in Vienna.
  \item \textsuperscript{37} The Persian chief minister at Nasser-al –din-shah period 1849-1896.
  \item \textsuperscript{38} The Iran Gazette, vol 541, 1861.
  \item \textsuperscript{39} Ekhtiar, Maryam, 1994, The Dar- al- funun, PhD dissertation, New York University, USA.
\end{itemize}
provision of the Act. The council would scrutinize the basis of the placard and if they found any issues, they would withhold it. Candidate, who failed to obtain a new license from the council, was not permitted to get involved in medical profession as per article 12 of the Act.

But the council was not the only authorized organization to give permission and many superstructures such as the army and the police had their own regulations. Physicians who worked with these organizations did not fall within the ambit of this Act. In 1926, another Act was passed by the parliament called the "Centralization of Medical Institutes" Act 1926; According to the third article of this Act, the home minister was empowered to investigate physicians' functions and withdraw their license, if found guilty. This process continued till 1987 with some amendments and new legislations concerning medicine. In 1987, the Medical Council Act was passed by the parliament by which medical professionals obtained their independent institution. This Act was later replaced by Iranian Medical Council Act, 2007.

The word physician should not be confused with physicist, which means a scientist in the area of physics. A physician is a person who practises medicine. In the United States the term physician is traditional and commonly used. In Britain, India, and Iran the term doctor is more common as physician refers to specialists in internal medicine. Medicine in Iran is an undergraduate subject. Students can begin training after leaving the equivalent of high school at eighteen years of age. The minimum time spent at medical school in Iran is five years.

Iran has a civil law system under which all laws are codified. Under the Iran Constitution, all codified laws are subject to the Islam (Sharīʿah) which the Constitution provides as the main source of legislation, and to which the Iranian courts revert to, when requiring further guidance in interpreting the codified laws.

A recent law which will have important ramifications with respect to claims for medical malpractice in Iran is the Iranian Islamic Criminal Code which was issued in 1991. The Iran's Civil Code which was issued in 1928 and Iran's Tort Code also contain important provisions which are related to claims for medical malpractice. According to these regulations, a doctor is a person who is registered and permitted to

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40 Iranian Centralization of Medical Institutes Act 1926.
engage in medical activities by an official organization and anyone who is not registered is criminally liable if he engages in medical activities. Such activities are construed as fraud, under the criminal law. But if a registered medical practitioner causes damage to another by negligence, he is punishable under the Criminal Act and is liable to compensate the victim under the Civil Act\textsuperscript{41} and Tort law.\textsuperscript{42} The Medical liability system is wide ranging as its provisions are not only applicable to liability for medical malpractice, but also doctors’ responsibilities in specific circumstances like: termination of pregnancy, professional indemnity insurance, investigation and disciplinary process in circumstances of alleged medical malpractice and penalties for violations of the law. Iranian Medical liability system of law therefore sets out principles to assist in determining whether a practitioner’s conduct amounts to malpractice or negligence and also creates a framework for the regulation of medical practitioners.

3. Scheme of study

It is the expectation of patients that medical practitioners such as doctors, nurses, surgeons and pharmacists are properly trained in their various fields of endeavor. They see them as solution providers for all kinds of health problems and thus do put their trust and confidence in them. Despite these expectations, medical professionals sometimes do make serious errors because of poor judgments, inexcusable negligence, and lack of immediate care, malpractice or focus on the wrong ailment. 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 to such other persons.

The Hon'ble Supeem Court in the recent case of State of Punjab v. Shivam\textsuperscript{43} has very aptly observed that in recent times the self-regulatory standards in the

\textsuperscript{41} Iranian Civil Code 1928.
\textsuperscript{42} Iranian Tort Act 1960, Article 1.
\textsuperscript{43} (2005) 7 SCC 1.
profession have shown a decline and this can be attributable to the overwhelming impact of commercialization of the sector.

The need for external regulation to supplement professional self-regulation is constantly growing. The high costs and investments involved in the delivery of medical care have made it an entrepreneur activity wherein the professional look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation whether internal or external. There is need for introspection by doctors individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role. There is need for introspection by doctors individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role. There is a desperate need for making health care easily accessible and affordable.

The scope of negligence in relation tortuous liability, contractual liability, criminal liability and liability for constitutional wrongs is diverse and demands a clear understanding of the duty of care, the chain of causation, the implied obligations in contracts, and propositions of criminal negligence and the emerging rules of consumer jurisprudence under statutory provisions,

Medical negligence law and practice has changed more in the recent years than the previous years. This dissertation aims at comparing the basis of liability in the medical negligence context and main and supplementary systems of dispute resolution in claims for compensation resulting from medical negligence in Iran and India. Providing effective mechanism for resolving disputes arising out of negligence in the course of medical treatment or medical malpractice is an essential part of healthcare rights promotion. System of provision and protection is closely intertwined in every healthcare context. This dissertation comprises of seven main chapters.

4. **Scope of study:**

Negligence in medical care occurs in four avenues or in four levels of treatment viz-(1)
Medical negligence at the level of doctor/paramedical staff/hospital authorities. Liability for negligence may be fixed at individual level and/or jointly or vicariously where hospitals/nursing homes are involved, (2) Negligence at the level of manufacturers of drugs, equipment, etc. and dispensers, (3) Negligence at the level of patient himself or his attendants also known as contributory negligence and (4) Composite negligence, i.e., at more than one of the above three levels. This study focuses only one negligence at level (1) (i.e. Medical negligence at the level of doctor/paramedical staff (pharmacists and nurses)/ hospital authorities) both in Iran and India. Negligence at level (2), (3) and (4) has not been studied because it found that each of them is an independent study. This is why rest three levels have been excluded. With respect to research, the study does include some aspect of health related laws. But the health law in is a whole independent matter and the study is focus just on medical negligence.

This study does not purport to cover the responses of all the branches of medical law or health law system towards negligence. Instead, it takes one branch of medical law i.e., medical negligence law, particularly the physicians misconduct law. The subject matter of this study is medical negligence. Study on medical negligence is rational and has become need of the day as scope of medical sector is widening and complaints of medical negligence are seen and heard with tremendous high speed.

5. **Focus of study:**

The focal point of this study is what is the scheme of Iranian and Indian system of law to the medical negligence concept? Before starting the comparative study of Medical Negligence in Iran and India it would be relevant to discuss the legal systems of both countries. The study has focused on negligence aspect with detail analysis of laws of compensation with Indian and Iranian experiences. In this sense this research has been an original study in the issue that has remained unexplored till the date.

6. **Objectives of study:**

The prime reason why medical negligence law is studied here is that, the maximum impact of medical negligence is the development countries problem. Secondly, this is one area where in the obligation law has matured with many national legal
instruments on private law. Studying this branch of law and identifying its strengths and weakness would guide the adequacy or inadequacy of other branches of national law. Thirdly, medical care is one sector of health law that has developed substantially and has spread by many developed and developing countries.

This comparative study of medical negligence statutes and experiences of both Iran and India is expected to be beneficial in addressing the emerging and growing complications related to medical negligence in both countries.

The central object of this study is to assess the efficacy of medical negligence law in dealing with the challenges brought out in Iran and India to look for appropriate legal solutions. Keeping this aim in view, this study critically analyzes the legal frameworks contained in both countries and their effectiveness to regulate medical negligence law with special emphasis on global development on human health. The legal instruments relating to Obligation law and contract law are studied wherever they touch upon medical negligence law. Study on both national legal regimes is also looked at for the Purpose of comparative study and identifying their adequacies or inadequacies in handling medical negligence.

The whole study has revolved around to find answer of following two research problems:

i. What are the various causes that lead to medical negligence at the Level of doctor/paramedical staff/hospital authorities in both country Iran and India?

ii. Is both country Iran and India law adequate to address (control/govern) those causes that lead to medical negligence?

This study has been conducted with following main objectives:

1. To examine various causes that lead to medical negligence at the level of doctor/paramedical staff/hospital authorities in both country Iran and India.

2. To examine whether existing Nepalese law on medical negligence are adequate in addressing the causes that leads to medical negligence and provide adequate opportunities for victims to ventilate their grievances.
3. To analyze and evaluate the medical negligence decisions and judgments in both country Iran and India to ensure adequate compensation to the victims of medical negligence.

4. To examine both country Iran and India experiences in medical negligence sector from legal perspective.

5. To recommend legal mechanism or system which can maintain perfect equilibrium between the conflicting interests of service providers and consumers of medical profession in both country Iran and India in case if the existing law is found to be inadequate?

7. **Methodology:**
The study primarily follows doctrinal approach in the analysis, interpretation and Systematization of the primary and secondary source material. The methodology, which is to be adopted for purpose of the study, is a doctrinal method involving multi disciplinary approach having descriptive and critical analysis. The various recourse materials and relevant articles provide ample opportunity and sufficient help to produce in-depth study in this topic. Majority of these materials were available in the faculty of Law, Delhi University library. However library of Indian Law Institute and the Indian Society of International Law (ISIL) is the other important resource for this thesis. Part of my thesis which talks about subsidies in Iran, material for this part was available in the official websites of Iranian parliament.

8. **Cauterization**

Introduction

The present doctrinal work is divided into seven chapters which are preceded by an Introduction. The brief sketch of the chapters of the thesis is as follows:

Chapter I – Medical Negligence in India

This chapter deals with the historical development of law relating to medical negligence in India. An attempt has been made at an in-depth analysis of definition of negligence with special reference to medical negligence, constituents of the tort of
negligence, and test for determining medical negligence. Detailed case law rendered by English and Indian courts thereon has also been discussed incisively.

Chapter II – Medical Negligence in Iran

This chapter endeavors to study and analyse the law relating to medical negligence in Iran. The legal system of Iranian obligation law and compensation system which govern the adjudication of medical negligence complaints in Iran is discussed here.

Chapter III – Disciplinary Approach

In this chapter, various internal control mechanism provided by the Acts and Regulations enacted in India and Iran are discussed. The Medical Council Acts of the two countries and the code of conduct enacted thereunder for the regulation of conduct of profession by medical practitioners and the consequences of their violation has been discussed thread-bare in this chapter.

Chapter IV – Liability under the Consumer Protection Act

This chapter deals with the applicability of the Indian Consumer Protection Act 1986 and Iranian Consumer Protection Act 2008 to the medical profession. The redressal agencies provided by these Act for the redressal of consumer grievances have also been discussed here. Finally, the chapter concludes with an analysis and review of important judgments on this topic.

Chapter V – Criminal Liability of Medical Professionals

This chapter describes the general provisions of Indian and Iranian Criminal Law which are applicable to determining liability of physicians in cases of medical negligence. It also identifies the factors that tend to bring about criminal prosecution for medical negligence.
Chapter VI – Burden of Proof

The fact that the act of the defendant is the cause of the damage suffered by the plaintiff is must to establish liability for negligence. Tests for determining causation and remoteness of damages are discussed in this chapter.

The burden of proving negligence as cause of damage lies on the party who alleges it. Doctrine of res ipsa loquitur and the requirement of expert testimony in establishing cases of medical negligence have been discussed by reference to various case laws on the subject.

Chapter VII – Conclusion of Suggestions

This chapter has presented a brief of findings. It also sums up deficiencies/drawbacks as revealed from the critical analysis of the working of law in India and Iran. Accordingly, this chapter incorporates the remedial measures in the light thereof.

Finally the thesis ends with the Bibliography.