6.1. Negligence

In the previous chapter under the title the scholar discussed something about the negligence with reference consumer protection. But as the Indian Society is experiencing growing awareness about the patient's rights, which can be easily visualized by the recent spurt in litigation concerning Medical Profession. In most of the litigations negligence of the doctor remains in controversy. So the scholar did the detailed study regarding the medico-legal aspect of negligence, which is presented here.

Negligence is defined as the breach of legal duty to take care & caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and a reasonable man would not do.

Negligence is a state of mind. There may not be any intention or incompetence but the attention required is missing. The action may be reckless or indifferent or there may be momentary loss of concentration. It is something which you are not suppose to do or not to be done in the manner in which it is done or not doing something which you are suppose to do or in the manner in which it is to be done. Both amount to negligence.

There are four components of negligence:

1) The person should owe a duty to do something for some other person or persons;
2) There should be a breach of duty;
3) There should be a damage done to that person due to breach of duty of standard care;
4) The harm should be an immediate cause of the breach of duty and not the remote one.
The person should owe a duty to do something for some other person or persons

Doctors have a right to choose patients except for emergencies. There should be no discrimination on account of race, caste, and creed. But, moment the patient is accepted for treatment, his duty starts and ends only when

(a) The patient is cured or dead or

(b) Patient chooses to change the Doctor and go to other doctor or

(c) When patient does not follow the instructions given to him or

(d) Referred or transfer under some other doctor, either as a more qualified specialist or on request by the patient.

**Breach of Duty:**

A Doctor does not have to ensure, that, every patient who comes to him is cured. He has only to ensure, that he makes a reasonable degree of care and competence. It is said to be breach of duty, when the standard care, prescribed by those considerations which ordinarily regulate the conduct of human affairs, is omitted while doing something which a reasonable man would do or doing something which a prudent and a reasonable man would not do.

The problem is, there is no prescribed standard care and no two doctors can agree on the same subject. The standard care differs from individual to individual but there is a minimum expected standard of management, of the patient in the given situation. Standard care does not mean the highest care. When a standard peer group of medical individuals defines, a minimum standard care for a particular situation, that care becomes standard to compare the action taken by the individual doctor. And that becomes a guideline to decide whether there is breach in the duty to care, or not or whether the care given to the patient was substandard.

This standard peer group of medical individuals also keeps on changing, at the same time, due to advancement of science the mode of treatment also changes, so to decide on the deficiency in service, one has to look back on the circumstances prevailing at
the time of the complaint by the complainant and the treatment given by the Medical Practitioner.

Lord Dennings in a case of *Roe v. Minister of Health*\(^1\) has rightly cautioned the courts to be careful in these matters. He said that every person has duty to take reasonable care to avoid foreseeable harm to his neighbor. The question before us is whether the risk involved in Medical treatment is foreseeable and it is to be judged according to the knowledge possessed by the Medical profession at the time of event and not by wisdom of hindsight.

It is easy to be wise after the event which was only a misadventure, to condemn it as negligent. We ought to be on guard against it, especially in cases against the Hospitals and doctors. Medical Science has conferred great benefit on mankind but these benefits are attended by considerable risk. Every Surgical operation is attended by Risk. We cannot take benefit without taking risk. Every advance in technology is also attended by risk. Doctors, like all others have to learn by experience and experience teaches in a hard way. Something goes wrong and shows up as weakness and then it is put right and that is just what happens in medicine. The subsequent development of Medical Knowledge cannot be taken into consideration to hold the professional negligent. **We must not look at a 1947 accident with 1954 spectacles.**

**Harm caused due to the breach in the duty of standard care:**

This is an essential ingredient. It is not negligent, if harm is not done. It was held in *Sidhraj Dhadda Vs. State of Rajasthan*\(^2\) that If the complainant Proves that the doctor was negligent but fails to prove that any loss or injury was caused thereby, than he will not be entitle to claim any compensation. Harm may be Physical or mental torture or psychological

**The harm should be immediate cause of the breach of duty & not the remote one**

It is very essential so that the association of the harm to the breach of duty can be easily identifiable.

---

\(^1\) *(1954)2QB 66*

\(^2\) *AIR 1994 RAJ 68*
Negligence can manifest itself as active negligence, passive negligence, gross negligence, hazardous negligence, criminal negligence, willful negligence or reckless negligence.

Medical Practitioners, Doctors, Physicians and Surgeons constitute legally recognized category of the professionals possessing greater skill, knowledge and competence in their specialized field and hence they are expected to be more careful, in dealing with their profession. More qualified or skilled person one is-more care is expected from him/her. They are required to observe certain prescribed standards of duty and ethics in their professional conduct. The accepted principle is - every person who enters in to the Medical Profession, he undertakes to exercise a reasonable decree of care and skill.

A Surgeon, when operates on the patient does not undertake that he will positively perform an operation to give cure nor does he undertake to use highest possible skill - as there may be persons of higher education, experience and greater advantages than himself, but he definitely undertakes to bring a fair, reasonable and competent degree of skill.

**Medical negligence / Malpractice can be charged under the following Laws:**

**Civil Laws under Tort compensated by paying damages:** The negligence under tort involves the three ingredients viz. a) a legal duty to exercise due care b) Breach of the duty c) Consequential damages. All three have to be proved by complainant. The extent of liability will depend on the amount of damages done.

**Civil Laws under the breach of contract compensated by paying damages**

Liability in contract will depend upon the express or implied terms agreed upon by the patient and the Medical man. The Doctor undertakes to treat the patient on acceptance of fees and impliedly promises to exercise proper care and skill. Any breach in such exercise of proper care and skill can draw him for claim for compensation.

**Statutory Laws:** e.g. compulsory registration of the Medical Practitioner or health care institutions so as to check their qualifications and/or standard of treatment.
offered or available to the patients who come to them for treatment. Punished by canceling or suspending The License to practice and/or compensation for the damages

**Criminal action under section 304A and 337, 338** under section 304 A-Anybody who causes death by rash and negligent Act amounting to culpable homicide not amounting to murder, will be punished for criminal negligence. Criminal negligence is defined as the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury, either to public or to an individual, which having regard to all circumstances, it was the imperative duty of the accused person to have adopted. It is a bail able offence punishable up to two years imprisonment and fine.

Under section 337 and 338 Punishable when damage leads to grievous hurt caused due to gross negligence. They cover rash or negligent acts which endanger human life or the personal safety of others is made punishable even though no harm follows, and the punishment is more severe if hurt or grievous hurt is caused by such acts ,The extend of liability in criminal Law depends on the amount & degree of negligence.

**Consumer Protection Act 1986; mens rea in Medical negligence:**

An act does not make a person guilty unless the mind is guilty i.e. there is an intention of committing crime. In Medical Negligence there is no mens rea but mens rea in criminal negligence is defined as " without having given any thought to the possibility of there being such risk or having recognized that there was some risk involved, had never the less gone on to take it". One must find out that the rashness has been of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely to be occasioned. The Criminal liability lies in running the risk or doing such an act, with recklessness and indifference to the consequences.

**Burden of Proof:**

- Usually it is on one who alleges has to prove- burden of proof is on the complainant i.e. patient and/or his relative. In criminal case it is to be proved beyond doubt In civil case it is the balance of probabilities.
Sometimes the burden of proof shifts on to the Defendant. In the condition called as **Res Ipsa Loquitor**- i.e. things speak for itself. Here the facts are so clear that it does not required to be proved by the complainant but the defendant has to prove its innocence e.g. leaving an instrument or sponge in the operating cavity or operated on the wrong side e.g. operated on left side instead of right side.

**Ingredients of negligence to be proved by the complainant:**

- The Doctor has accepted the patient to treat on payment or partial payment or promise to pay or partially pay the monetary consideration or pay in kind or deferred payment on conditions accepted by both- the patient and the doctor except in cases of Emergency.
- Once accepted, the doctor-patient relationship is established and he was duty bound to treat the patient, except when the patient was accepted due to Emergency.
- The Doctor did not do his duty properly, as expected from a reasonable competent doctor and in accordance with the prevailing standard of knowledge, care, skill and did not attend the patient or acted in the expected manner.
- Actual damage or harm suffered by the patient, due to failure of doing his duty properly and in accordance with the prevailing standard of knowledge, care, and skill

**Defenses of a doctor against the charges of negligence:**

- Doctor did not accept the patient to treat but treated in good faith due to emergency of the situation, so doctor patient relationship was not established.
- He was not duty bound to treat the patient or he had no duty to treat the patient
- He discharged the duty properly as expected from a reasonably competent doctor and in accordance with the prevailing standard of knowledge, care, skill and attended the patient or acted in the expected manner.
- The damage caused is not due to his negligent act, but was due to interference by the third person, who was also involved in the treatment of the patient with or without his knowledge and/or permission and/ or consent
• The damage caused, is the result of taking some unavoidable risk taken in good faith in the interest of the patient, after taking informed consent from the patient and/or parents and/or relation and/or guardian and/or attendant. Proper care is taken to avoid the risk

• It is a case of contributory negligence as patient did not follow his advice properly.

• Treatment by a doctor does not guarantee a cure and so harm done to the patient is a natural consequence of the disease patient suffered from.

• The Doctor is the best judge to decide what extent of attention should be paid to the patient and/or his complaints.

• That the damage done to the patient is a result of reasonable error of judgment and/or therapeutic or diagnostic misadventure.

• Res judicata: The complaint is already tried before by a competent court so should not be entertained .No person can be tried twice for the same offence.

• The patient persistently insisted on the specific line of treatment which has caused the damage in spite of warning by the doctor, of the risk involved in that mode of treatment

• The patient has not paid his fees or consideration agreed to be paid hence the contract of Doctor-Patient relationship is not in existence and so he is not duty bound to treat him

Precautionary measures to avoid a charge of Medical Negligence:

Regarding the treatment of the patient: We may select a few: Measures which are as follows:

• The registered Medical Practitioner should not guarantee the cure to his patients

• He should apply due care and skill while treating the patient.

• He should take written informed consent from the patient or competent authority specially if, it involves a risk to his person and /or body.

• Necessary clinical check up and/or Laboratory investigations and pre medication should be advised whenever necessary to diagnose or as
precautionary measures for the surgical procedure for the prevention of the calculated risks of the treatment.

- Condition of the patient and his progress should be properly informed to the patient and/or his relative and recorded in detail.
- Consult the professional colleague if necessary for the treatment of the patient.
- Attention to be paid to the label of a medicine as to the date of manufacture and expiry while giving to the patient specially when for internal use.
- Sensitivity tests should be done before giving drugs or injections known to cause allergic reactions.
- No method should be tried beyond the skill or field of the concerned doctor.

- Anesthetists, assistants and/or paramedical staff should be selected with due care
- The treatment should not be given up irrespective of whether the patient is responding to the treatment or not unless the patient desire-agrees to it.
- Patient should not be left unattended especially during an emergency situation

**General precautions for female patients:**

- Female patients should not be examined without the presence of another female and/or relative of the patient
- Consent of husband and wife both should be taken for operation leading to sterility or impotency or medical termination of pregnancy etc.

**General precautions:**

- The condition of the instruments or equipments should be in working conditions
- Instruments needed for surgical procedures should be properly sterilized
- All labels on the bottles of the medicine should clearly mention name of the drug
- No advice should be given on phone or without examination unless in emergency
- Patient should be immunized against the disease
• Give an optimum pre, post and after care to the patient
• In case of death under anesthesia or on operation table inquest should be done.
• The capacity or knowledge of professional colleague should not be criticized
• All records of treatment, investigations should be properly entered in to and kept
• Police should be informed in cases of accidents, and/or unnatural death
• If he is unable to attend the patient due to unavoidable circumstances he should inform the patient and/or his relative and also arrange for competent replacement.
• Death certificate, leave certificates and all other certificates should be issued carefully, only in deserving cases.

Important cases:

(1) Bolam Vs Friern Hospital management committee

The plaintiff, a voluntary patient in the defendant's mental hospital for the treatment of his mental illness, sustained fractures of the pelvis on each side, due to driving of the head of femur, through the acetabulum in the course of electroconvulsive therapy (ECT). There were two bodies of opinion for the mode of treatment (a) favored the use of relaxant drug or manual control whereas the (b) claimed a mortality risk in using Relaxant drugs and hence confined it's use only in selected cases, during the ECT treatment.

The plaintiff claimed damages alleging negligence (i) in failing to administer a relaxant drug prior to treatment (ii) in falling to provide some form of manual restraint during the passing of electric current through the brain and (iii) in failing to warn him of the risks involved in the treatment.

3 (1957-I-WLR 582)
Mc Nair J. held doctor, not guilty of negligence in failing to administer relaxant drug prior to the treatment and/or providing some form of manual restraint during the passing of an electric current through the brain of the patient. He further held that in medical field, negligence means failure to act in accordance with the standards of reasonably competent Medical man at that time. A man need not possess the highest Skill while treating the patient. The law does not demand the higher standard of care and skill for highly specialized kind of work within a particular profession. It is sufficient if he exercises the ordinary skill of an ordinary competent man, exercising that particular act. The test is, the standard of the ordinary skilled man exercising and professing to have a special skill at that time.

There may be one or more perfectly proper standards and if his act confirms, with one of these perfectly proper standards, than he is not guilty of negligence. Thus a doctor who acts in accordance with a standard practice accepted as proper by the responsible Medical men and /or body is not negligent merely because there is a group of opinion that takes a contrary view.

Thus A doctor can only be held guilty of Medical negligence, when he falls short of the standard reasonable Medical care, Skill and competence.

2) Maynard Vs West Midlands Region Health Authority

Plaintiff was under the treatment of two consultants who thought that the cause of chest pain was due to tuberculosis or Hodgkin's disease. They decided to perform exploratory operation to determine, whether she was suffering from tuberculosis or Hodgkin's disease, before obtaining the result of the test to determine tuberculosis. The patient suffered damage to the nerve affecting her vocal cord (which is an inherent risk of the operation) which caused impairment of her speech (Hoarseness of voice). Subsequently the diagnosis of Tuberculosis was confirmed. The allegations against the consultants were that they have been negligent in deciding to carry out the operation, before obtaining the result of the tuberculosis test.

The defense put up by the defendant was (a) exploration operation for confirming an extremely dangerous disease was reasonable procedure and in accordance with

4 (1983-I BMLR 122)
the responsible body of medical opinion and (b) The menace of the disease was so
great and dangerous that it was not unreasonable not to wait for the result of the
test for tuberculosis.

The House of Lords did not hold the consultants negligent for committing error of
judgment, in taking the decision to undertake the operation, because the decision
was in accordance with the responsible body of medical opinion. He further held
that difference of opinion & practice will always exist in medical profession, like
other professions. It is not enough to show that there is a body of competent
medical professional opinion, which considers that there was a wrong decision -if,
there, also exists a body of Medical professional opinion, equally competent,
which supports the decision as reasonable in the Circumstances. It is also not
reasonable to show subsequently, that the operation need not have been performed,
if at the time of decision to operate was taken was reasonable in the opinion of the
responsible body of the medical opinion

3) Sidaway V. Bethlem Royal Hospital Governors⁵

The plaintiff Mrs. Sadaway suffered from pain in the neck and shoulder. She was
advised to have an operation on her cervical spinal column. The patient was
warned by the Neuro Surgeon, that there is a possibility of disturbing a nerve root
and its possible complications. They did not mention the 1% risk of damage to the
Spinal Cord. The operation was performed with due care .The Plaintiff suffered
from injury to the Spinal cord, which severely disabled her. In an action for
damages, she contended lack of informed consent and thus breach of duty by the
Surgeon.

The House of Lords held that-The Surgeon was not in the breach of duty by failing
to warn the patient of less than 1% risk, because the Surgeon's non disclosure of
the risk of damage to the patient's spinal cord accorded with a practice accepted as
proper, by a responsible body of neurosurgical opinion. The defendant was not
liable to the Plaintiff.

⁵ 1985-AC 871
Types of Negligence:

a) Composite Negligence:

When the harm is done to the patients by contribution of two or more persons and not contributed by the patient himself, it is said to be Composite negligence. Here the person wronged, has a choice of proceeding against all or anyone or more than one of the wrong doers, e.g. Surgeons, Anesthetists, Cardiologist all together or any one The Gujarat State commission in a case of Arunaben D. Kothari vs. Navadeep Clinic ⁶ has apportioned the liability of Orthopedic Surgeon, Anesthetists, cardiologist As 30%, 60% and 10% respectively.

b) Contributory Negligence:

Sometimes the alleged damage suffered by the patient or the negligent act of the treating physician is related to some undesirable or negligent act of the patient himself. If the patient would have acted in the way as is expected or desirable from a patient, the doctor either would not have committed the mistake or the damage would have not been caused to the patient.

Hence in Contributory Negligence

- There is some contribution by the patient and/or complainant to the damage suffered by him
- The doctor will not be held responsible at all, if the negligent act of the patient is sole responsible for the damage complained of
- The doctor will be held partly responsible, if the damage complained of is partly due to doctor's negligence and/or partly due to patient's negligence.
- It is a good defense for the Doctor in a case of negligence against him in civil liabilities and not in criminal liabilities. The liability is to the extent of damage done to the patient.
- It is no defense in criminal liabilities, because in criminal liability the negligence and the damage suffered by the patient is gross.

⁶1996(3)CPR 20(Gujarat)
The example of Contributory Negligence and its liability

When a doctor prescribes a dangerous drug to his patient he must give detailed instructions about the method of its use and warning against its danger. If he fails to give instructions leading to harm to the patient, he is negligent and is alone liable for the action, but, if he gives the proper instructions to the patient which he does not follow and suffers the harm, than patient alone is responsible for the damage and the Doctor is NOT responsible.

Contributory Negligence as a defense by the doctor

To establish Contributory Negligence as defense for action against him for negligence the doctor or the defendant must prove

- that the plaintiff failed to take ordinary care of himself
- patient's failure to take care has resulted in the harm done to him
- the doctor has explained all the mode of administration, side effects and warning against its danger of the use of drugs or any other mode of the therapy.
- The patient has changed the dose schedule, time schedule and mode of administration, without consulting the treating doctor leading to the harm or damage to the patient.

Case laws of Contributory Negligence

Md. Aslam V. Ideal Nursing home

The patient underwent hysterectomy operation for removal of Uterus and ovaries. The patient developed infection and wound was not healing, as she did not follow the instructions of the doctor. The patient had to undergo emergency operation under General anesthesia and she died of cardiac arrest during the operation. The Doctors were not held liable as damage was considered to be due to contributory negligence.

---

71997(2)CPR109(NC)
Hans Raj V. Dr. K. S. Chugh

The patient was taking extra dose of Steroids without contacting the doctor for three months and thereby suffered a disability. The doctor was not held negligent or liable for the damage suffered by him. He got the defense of Contributory negligence.

(C) Corporate Negligence:

This comes up in cases of Hospitals or nursing homes where patient care is under the responsibility of many- like Doctors, Nurses, paramedical staff, Hospital Administration etc. for the well being of the patient. The treating Doctor and/or Nurses and/or any other paramedical staff and/or Hospital Administration etc. can be charged for negligence and the Hospital authority is vicariously liable for the negligence of its staff.

In Roe Vs. Ministry of health Lord Denning has expressed his view that the hospital is liable for negligence of the doctor, nurse or another employee in charge of the health care of the complainant only if it provides the Specialist, but not if the patient obtains him.

The Hospital authority is vicariously liable for the negligence of its staff like Radiographers, House Surgeons, whole time or part time Assistant Medical officers, Anesthetists, Nurses etc. The private Hospital or the Nursing home will have to pay the compensation for negligence of its staff. He further held that the authorities who run the Hospital, be, they local authorities, Government Boards, or any other corporation, are in law under the same duty as the treating Doctor, whenever they accept a patient for Treatment. They must use reasonable care and skill to cure him. They must do it by the staff they employ and if their staffs are negligent, they are just as liable for that negligence, as is anyone else who employs others to do their duties for him.

8 2000 CTJ 577 (CP) (SCDRC)
9 1954-2QB66
In *Spring Meadows Hospital vs. Harjot Ahluwalia*\(^{10}\) Supreme court has held the hospital responsible and liable to pay compensation for the negligence of the attending doctor and unqualified nurse, as the Doctor allowed the nurse to give intravenous injection to the patient, against advice of the consultant doctor and thereby contributed to the irreparable brain damage of the patient who was minor.

In India, Government is a necessary party in a suit instituted against a doctor attached to the Government Hospital for damages, or other relief, in respect of any act alleged to have been done by the doctor in his official capacity. (*order 27 read with 5A of the code of Civil Procedure 1908.*

Supreme Court of India in a case of *State of Haryana Vs. Smt Santra*\(^{11}\) held the state of Haryana vicariously liable for negligence of a doctor in a Government Hospital in performance of sterilization operation resulting in birth of an unwanted child.

**Arguments against including Hospitals liable for the negligence in Roe Vs. Ministry of health**\(^{12}\) Lord Denning has expressed a concern that "we would be doing a disservice to the community at large, if we were to impose liability on hospital and doctors for everything that happens to go wrong. **Doctors would be led to think more of their own safety, than good of the patient.** A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient on every point but must not condemn that, which is only a misadventure.

**Case laws on vicarious liability of Hospitals or nursing homes for Negligence**

1) *V. P. Shanta Vs. Cosmopolitan Hospital (P) Ltd.*\(^{13}\)

**Death after orthopedic operation on Hip**

The patient had undergone an operation for fracture hip and also for removing salivary gland. The patient remained unattended by any doctor for about one hour

---

\(^{10}\) AIR1998SC1801

\(^{11}\) 2000CTJ481(SC)(CP)

\(^{12}\) 1954-2QB 66

\(^{13}\) 1997-1-CPR 377Ker.
during the post operative period when the patient had experienced breathing trouble. Ultimately the patient died of massive Heart Attack. The State commission of Kerala did not hold the Surgeon as negligent but the hospital was held liable for deficiency in service.

**Shivaji Gendeo Chavan V. Chief Director, Wanless Hospital**\(^{14}\).

**Death Due to injury by needle for dialysis before kidney transplantation operation**

The patient aged 18 years was suffering from Chronic Renal Failure and was admitted for operation of the replacement of Kidney. A needle was put into his blood vessel of the groin for the dialysis and the same was kept in his groin with the application of the adhesive tape. The injury got infected resulting in the formation of the pus which led to A.V. fistula. This caused gangrene of the leg. The leg had to be amputated and he expired within four months. The father claimed compensation from the Hospital on the allegation of negligence in rendering medical Service.

The State commission of Maharashtra opined, that the complainant proved by an expert evidence, the deficiency on the part of the doctors of the Hospital in carrying out the treatment of the son, of the complainant. It was held by the commission that events that led to the amputation of the leg and consequently death of the son of the complainant were clearly the result of negligence in treatment on the part of Hospital.

**Jaspal Singh V. Post Graduate Institute of Medical Education and Research PGI-Chandigarh**\(^{15}\)

**Death due to transfusion of wrong group of Blood**

The patient sustained accidental injury from a stove. She was shifted to Post Graduate Institute of Medical Education and Research PGI-Chandigarh for treatment of 50% burn. The blood group of the patient was A+. The patient was

\(^{14}\) 111-1995-cpj 43 Bom.
\(^{15}\) 2000(2)CPR300Chandigarh
transfused B+ blood on two different dates and she expired. It was alleged that the patient expired due to transfusion of wrong group of blood in the hospital.

It was held by the State Commission Chandigarh, that there was negligence on the part of Doctors and staff of the Hospital for transfusing wrong group of blood to the patient resulting in her death.

A. M. Mathew V. Director, Karuna Hospital\textsuperscript{16}:

Partial disability of the left leg due to administration of Injection.

The patient aged 8 years was taken to the Hospital for treatment of fever and cold. The consultant Doctor prescribed paracetamol injection to be administered on the Buttocks. The Nurse who administered the injection on the left buttock was not qualified because her diploma was not recognized by the Kerala Nurses and Midwives Council. The patient developed foot drop of the left foot immediately after giving the injection. The patient did not recover fully even after prolonged treatment. He was diagnosed as sciatic nerve palsy and suffered from partial disability of the left leg.

The District forum did not held the nurse negligent, on the ground that injury to sciatic nerve might be possible for various reasons, but in appeal the State Commission Kerala held, that the patient suffered partial disability on the left leg on account of negligence of the unqualified nurse in administering the injection. The Hospital was directed to pay compensation for causing injury to the sciatic nerve of the patient by the negligent act of the unqualified nurse of the Hospital.

Aleyamma Varghese V. Dewan Bahadur and Dr.V.Varghese\textsuperscript{17}:

Sponge left in the abdomen during the caesarean operation.

The patient had undergone caesarean operation in the hospital for delivery of a child. The patient developed pain in abdomen and suffered from fever after the operation. The operating Doctor went on leave and the treatment given by other doctors did not improve the condition. The patient was shifted to better equipped

\textsuperscript{16}1998(1)CPR39(Ker)
\textsuperscript{17}1997(1)CPR310(Ker)
hospital where the C.T.Scan report revealed that there was a sponge in the abdomen and there was infection around it. The patient recovered after taking out the sponge from the abdomen by another operation.

The State commission of Kerala held that there was negligence on the part of the nurse in counting the sponges which resulted in suffering physical strain and mental agony of the patient. The surgeon was not held negligent in conducting the operation/The Hospital was directed to pay compensation for negligence of the nurse of the hospital.

**John Andrade Vs. P.D.Hinduja National Hospital**

**Damage due to lack of post operative care:**

The patient had undergone coronary Artery By Pass Surgery called as Supra major Heart Surgery. After about one month of the operation, the patient approached the hospital for purulent discharge from the site of the operation. The two types of antibiotics were prescribed, which did not work even after one month of their use. A pus Culture was done after one month and as the pus did not stop he was operated in two different stages for removal of three sternal wires. The oozing of the pus continued for next two years from the site of operation.

The state commission, Maharashtra held the hospital negligent in removing the sternal wires in two different stages and the doctor was negligent in his casual approach of prescribing antibiotics without doing pus culture and for failure to make early diagnosis and treatment of the post operative sternal infection.

**6.2. The Doctrine of Res Ipisa Loquitor**

The general purpose of the doctrine is "things speak for it or tells his own story". The normal rule is- the burden to prove negligence of the doctor lies on the plaintiff or the complainant i.e. the patient or his relative or guardian, but in some cases considerable hardship is caused to the plaintiff, as the true cause of the accident or negligence causing damage is not known to him but is solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident but

---

18 1998(1)CPR579(Bom)
cannot establish how it happened, to prove negligence against the Doctor. This
hardship is sought to be avoided by invoking the principle of Res Ipsa Loquitor.
As held in a case of Pushpabai Parshottam das Udeshi Vs. M/S Ranjit
Ginning & Pressing Co. Pvt. Ltd.\(^\text{19}\)

The doctrine of Res Ipsa Loquitor is pleaded by the complainant when the
negligence and the damage are quite evident. It is also argued that the damage
would not have been caused if there would not have been any negligence on the
act of person or persons involved in the treatment. It is usually presented when
there is a team work involved in the treatment. The Doctor himself might be
ignorant about the cause of the damage and the person actually responsible may
find it difficult to prove his innocence though he may actually be innocent.

In Arunaben D. Kothari Vs. Navdeep Clinic\(^\text{20}\) it was held that when
complications and death of patient occurs in the four walls of the operation theatre
where the patient's relatives have no access, the onus of proof lies on the doctors in
the operation theatre to explain events and the ultimate outcome i.e. the death

When a doctor in his prescription, wrongfully directs a patient to take some
medicines orally which is exclusively for external use and if the patient suffers
following such written directions of the doctor-the wrong prescription of the
doctor itself will prove his negligence and the Doctrine of Res ipsa Loquitor can
be applied.

Criteria for application of Res Ipsa Loquitor

The Doctrine comes in to application:

- On proof of happening an unexplained occurrence;
- The accident would not have happened in the ordinary course of things
  without the negligence on the part of somebody other than the plaintiff
  involved in the care

\(^{19}\) AIR1977SC1735
\(^{20}\) 1996(3)CPR20(Guj)
• The circumstances point to the negligence in question being that of defendant and not of any other person;
• This is an exception to the rule that the plaintiff to prove the negligence and the defendant to disprove the allegation.
• The circumstances surrounding the things which caused the damage, are at the time of accident exclusively under the control or management of the defendant or his servant and the happenings is such that it does not happen in the ordinary course of things without negligence on the part of defendant It is liable for damages even in absence of evidence or explanation provided by the plaintiff.

Case Laws where the doctrine of Res Ipsa Loquitor was applied

Jaspal Singh V. Post Graduate Institute of Medical Education and Research PGI-Chandigarh 21.

Death due to transfusion of wrong group of Blood

The blood group of the patient was A+. The patient was transfused B+ blood on two different dates and she expired. It was alleged that the patient expired due to transfusion of wrong group of blood in the hospital.

It was held by the State Commission- Chandigarh that there was negligence on the part of Doctors and staff of the Hospital for transfusing wrong group of blood to the patient resulting in her death. This does not require any evidence to prove negligence, and doctor held guilty by applying the Doctrine of Res ipsa Loquitur:

Aleyamma Varghese V. Dewan Bahadur Dr. V. Varghese 22.

Sponge left in the abdomen during the caesarean operation.

The patient had undergone caesarean operation in the hospital for delivery of a child. The C. T. Scan report revealed that there was a sponge in the abdomen and

21 2000 (2) CPR 300 -Chandigarh.
221997 (I)CPR 310 (Ker).
there was infection around it. The patient recovered after taking out the sponge from the abdomen by another operation.

The State commission of Kerala held that there was negligence on the part of the nurse in counting the sponges which resulted in suffering physical strain and mental agony of the patient. The surgeon was not held negligent in conducting the operation. The Hospital was directed to pay compensation for negligence of the nurse of the hospital by applying the Doctrine of Res ipsa Loquitur:

Ms. Sau Madhuri V. Dr. Rajendra

Leaving artery forceps during caesarean section operation

The patient had undergone caesarian section operation and subsequent X-ray abdomen showed an artery forceps in the abdomen. Doctor was held guilty by applying the Doctrine of Res ipsa Loquitur:

Achuttrao Haribhau Khodwa V. State of Maharashtra

Towel left in the abdomen during the sterilization operation

The patient had to undergo second operation in a critical condition for removal of Mop (Towel) left inside the peritoneal cavity during the sterilization operation in a government Hospital. The Supreme Court held the doctor guilty by applying the Doctrine of Res ipsa Loquitur.

Criteria for Rejection of application of the Doctrine of Res ipsa Loquitur

There are conflicting judicial opinions regarding the application of the doctrine when an object or an operation is under control of two or more persons who are in law not responsible for the each other's action. If the defendant gives no rebutting evidence but a reasonable explanation, equally consistent with the presence as well as with the absence of negligence, the presumption or inferences based on the Doctrine of Res ipsa Loquitur can no longer be sustained.

---

231996 (3) CPR 174 (NC).
241996 (2) SCC 634 Mop.
The burden of proving that the defendant was negligent and the accident occurred due to his negligence still remains to be proved by the plaintiff. At the time of Judgment, the court has to decide whether the proven circumstances or disputed facts disclose negligence.

The State commission - Maharashtra in Laxman Thamappa Kotgiri V. Union of India\textsuperscript{25} refused to invoke the Doctrine of Res ipsa Loquitur to prove negligence of the doctor in conducting tubectomy operation when the notes of the Hospital did not indicate any negligence in the treatment and the post mortem report indicated, the cause of death - due to cardiac arrest.

The state Commission in Andhra Pradesh in Air commodore Satyanarayan V. L. V. Prasad Eye Institute\textsuperscript{26} refused to invoke the Doctrine of Res ipsa Loquitur to prove negligence of the doctor where the patient developed infection in his right eye with a coli form bacteria resulting in loss of eye sight after the cataract operation. Doctor’s argument was that he operated many patients on the same day, in the same atmosphere and except the complainant nobody developed the reported infection. So the loss of eye sight after the operation was due to the negligence of the patient himself hence doctrine of contributory negligence should be applied and not that of Res Ipsa loquitur. The court upheld the argument and held doctor not guilty of negligence.

6.3. Sexual Assault

Prior to Codification of Hindu Law, Polygamy was in vogue for a long time. It provided a legitimate outlet for the persons to pacify their sex urge within the family itself. But Post Independence, Legislations on Divorce, immoral traffic in women and children, marriage and other enactments relating to personal laws have narrowed down the scope of legitimate sex activities, leading to increase in sex crimes in recent times. Considering this point of view the codification of Hindu

\textsuperscript{25} 251998 CCJ 1093 (Bom.)
\textsuperscript{26} (1998) CPJ 110 (Hyderabad).
Personal Law 1956 can be treated as a retrograde step so far as the sex offences are concerned. It condemns all forms of sex indulges, excepting, marital unions of spouses as husband and wife. In result, there may be occasions, when a man or a woman might not be in a position to pacify the sex gratification of his wife or husband respectively. The reason for this dissatisfaction may be impotency or disease. The sexual impulse affects all alike whether male or female, rich or poor, educated or illiterate temperamental differences, Physical imbalance, attitude of neglect or distrust to each other, personal occupations or vices in any of the spouses or it may be due to family circumstances etc. This is bound to cause sex frustration among the spouses which in turn results in violation of sex codes thus leading to sexual offences or assaults. The sex Crime arise out of the physiological urge of human beings to satisfy their sexual impulses and if they are not satisfied by the legitimate means the individual may resort to illegitimate means leading to the sexual offences or sexual assaults. To prevent the sex offences and assault there should be proper sex education. Men or Women should try to take care not to provoke any female or male by their actions, cloths or conversation for sexual desires because once provoked it will be difficult to prevent him or her indulging in to sexual activity.

Sex Offences

The Indian Penal Code recognizes eight major forms of Sex Offences which are punishable under the Law: they are

- Rape (section 375)
- Intercourse by a man with his wife during separation.(section-376-A)
- Intercourse by a Public servant with a woman who is in his custody (Section 376B)
- Intercourse by a Superintendent of Jail, Remand home Etc. (section 376-C)
- Intercourse by any member of the management or staff of a hospital or industry with any woman working there. (376-D)
- Assault or criminal force with intent to outrage her modesty (section 354)
• Selling or buying minors for the purpose of prostitution (section 372 & 373)

• Unnatural offences such as carnal intercourse against the order of nature with any man, woman or animal (section 377)

Domestic Assault, marital rape is common form of sex assault. The victim's inability to access to law, and the inability of the law to reach the victim, makes legal remedies ineffective. As a law enforcing agency the police owe a social and legal responsibility to protect women against the crime but they are likely to misuse their power and authority and may misbehave or harass the complaining woman for sex. Adequate safe guards have been provided in law to safe guard the interests of woman.

Assault:

Section 351 of Indian Penal Code defines assault as - who ever makes any gesture or preparation intending, or knowing it to be likely, that such gesture or preparation, will cause any person present to apprehend that the former will use criminal force to the latter, is said to commit an ASSAULT. Mere words do not amount to an Assault but the words which a person uses may give rise to his gestures or preparation, amounting to an assault

Section 351 requires two things

(1) Making of an gesture or preparation by a person in the presence of another and
(2) Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force

Thus an assault is a threat of using force to another, accompanied by a real or apparent capacity to carry out the threat at once. A mere menace of future injury is NOT an ASSAULT, but the words of menace may give such a character to the gestures or preparations of the speaker, as to show an intention to use immediate violence.
**Indecent Assault:**

Assault generally means, sex linked misbehavior towards a person of opposite sex or same sex. The desire may be to get sexual pleasure but not necessarily aimed at intercourse and gratification. Often the acts are aimed to insult the person, or just to have fun or to enjoy the embarrassment of the victim. Some examples of Indecent Assault are to squeeze the breast of a woman, to kiss a woman forcefully, to touch or press the private parts of the females or males, to forcefully embrace a woman, to try to undress a person-male or female etc. they are punishable under section 354 and 355 I.P.C.

**Sexual offences:**

Sexual offences are defined as sexual intercourse or sex related acts performed in a way, which is against the provisions of the law of the land.

They may be natural sex offences when they are performed in order of the nature i.e. penetration of the female genital organ (vulva) by the male genital organ (penis) e.g. Rape, Adultery etc

They may be unnatural sex offences when they are performed against the order of the nature i.e. when the act does not involve penetration of a woman's genital organ (vagina) by the Male genital organ (penis) e.g. sodomy or anal intercourse, oral coitus, lesbianism etc.

**OFFENCE:**

**RAPE:**

It is one of the commonest natural sexual Assault defined under section 375 of Indian Penal Code. It is defined as

"A man who has sexual intercourse with a woman is said to have committed Rape when it is.

   a) Against her will
   b) Without her consent or
c) With her consent
   1) obtained by putting her or any person in whom she is interested in fear of death or hurt or
   2) when he knows that he is not her husband, and that her consent is given because she believes that, he is the man to whom she is, or believes herself to be, lawfully married or
   3) When at the time of giving her consent, she is unable to understand the nature and consequences of that, to which she gives consent, by reason of unsound mind or intoxication or administration of drug or foods stuffs by the rapist-or through another-of any stupefying or unwholesome substance or

d) with or without her consent when she is under 16 years of age.

e) Intercourse by a man with his wife during separation

f) Intercourse by a public servant with a woman in his custody

g) Intercourse by Superintendent of a jail, remand home etc. with an inmate of the same place Jail, remand home etc.

h) Intercourse by any member of the management staff of the hospital, with any woman (patient or junior staff) in that Hospital

There are six ingredients of Rape:

1) Against her will
2) Without her consent
3) With her consent, when her consent is obtained with fraud, miss representation as her husband married to her
4) Consent obtained by putting her or any other person in whom she is interested, in fear of death or of hurt
5) With consent - when at the time of consent she had unsoundness of mind or intoxicated or under the influence of drugs of substance given to her by him
6) With or without her consent when she is under sixteen years of age
Gang Rape:

When the rape is committed on a woman by more than one person

Statutory Rape:

There is no age limit either for the victim of rape or for the accused. When the victim not being a wife, is below 16 years of age, sexual intercourse in any case amounts to rape

Some General consideration for the offence of Rape:

a) There is no age limit either for the victim of rape or the accused.
b) To commit the offence of rape slight penetration of vulva by the penis is sufficient. It is not necessary to have Full erection, intermission and ejaculation to prove rape
c) Will and consent is not one and the same thing. A woman may have will, but need not have given the consent, due to shyness, for fear of being pregnant or fear of being detected or due to social stigma attached to it or woman might have consented without will, due to some other consideration monetary or otherwise.
d) Her expressed unwillingness or absence of consent can be proved by the marks of resistance offered by her on her body -on the back, inner aspects of the thighs, or on arms or on lips or on breasts and private parts and the body of the accused.
e) Even a professional prostitute cannot be subjected to intercourse against her will an, without her consent.
f) Usually the burden to prove unwillingness and absence of consent by the victim, lies with the prosecution, but in rape cases if the victim states in the court of trial, that she did not give consent, than as described under section 376 read with subsection 2,(a, b, c, d, and g) it lies with the accused, to show, that she consented for the intercourse.
g) If a husband performs sexual intercourse forcefully on his wife above the age of 15 years, it will not amount to Rape, because the law states that to be valid, marriage is to be consummated by sexual intercourse, but this
does not mean, he can use unusual force and cause pain and injury to her. He will not be charged for rape but will be charged for cruelty and assault on his wife.

h) Question of giving consent by a girl under 12 years of age does not arise as described in Section 376 subsection 2 clauses (f) so even if she has consented for the Intercourse it will not be accepted as valid consent

i) According to Indian Law a woman cannot commit the offence of rape on a man. But she can be charged to have committed indecent assault on a man.

j) Examination of the Victim and the accused should be undertaken without unnecessary delay so that the findings do not obliterate e.g. spermatozoa if present in the vagina, the blood stains on the cloths of the victim etc.

**General examination of the Victim and the Accused:**

**Pre-examination preparations:**

a) Request must come from the officer in charge of police station or the Court

b) There should be identification of the victim and the accused & should be noted

c) An adult mentally sound female should be present at the time of examination

**History of the case:**

The following thing should be enquired and should be recorded Her age, religion, educational qualification and occupation should be rerecorded. The date, place, time of the alleged occurrence of the rape and examination Relationship of the accused and the victim- whether they are related to each other Whether she was given any food or drug or any other eatable before the alleged crime. Whether she was given any threat to her life or offered any monetary gains whether she resisted, shouted for help or gave any injurious marks to the accused by nails or teeth, whether there was any penetration of her private parts or there was any pain or bleeding during the alleged act. Whether she is married or has a previous
experience of sexual intercourse or was habituated to frequent intercourse or masturbation manually or with some aid.

1. **Examination of the clothing:**
   - The examination of clothes worn by the victim and the accused is very useful. If the cloths are not changed and are the same worn by them at the time of the alleged rape.
   - They may show recent tear (mark of resistance), mud or soil stain matching with the alleged place of occurrence, if the incidence is alleged to have been in an open ground, farm or country side.
   - They may show blood stain marks on the victim as well as accused due to injuries because of violence or resistance shown by the victim.
   - Their clothing’s may exhibit the seminal stain- starchy in appearance.
   - The clothing’s should be preserved for the further examination by forensic laboratory.
   - The clothing’s should be examined for the presence of pubic hair to match with that of accuse or victim.

2. **General examination**

Growth, appearance of breasts, growth of axillaries and pubic hair. To look for injury marks like bruises or abrasions, on the body of the accused as well as victim, on the back of the chest, buttocks, forearms, on and around sex organs, inner side of thighs, back, on breasts, cheeks, lips, face etc. To look for any bleeding from the vagina or any other part, Semen stains or pubic hair on the body of the victim as well as accused. The pubic hair might get matted due to the semen in that case they should be cut and send for examination.

3. **Examination of the private parts of the victim: should be carried out in presence of a competent adult female**

The detailed medical examination of the victim and the accused is very important so as to prove the charge. Many times, there may not be any eye witness and the whole crime is proved by the medical report.
Marks of initial struggle may depend upon, the physical strength of the victim and need of extend of resistance and also strength of the victim and the accuse.

It is inconceivable that, forcible intercourse should take place without production of bruising, effusion of blood or laceration of a private part. But in a married woman or woman, who is use to sexual intercourse or who had delivered a child-these injuries may not be that well seen or may be even absent. Still if there had been a struggle, there is bound to be some injury to the private parts-at least bruise or laceration.

Presence of spermatozoa in the vaginal secretion is a positive sign of rape in case of teenagers and even grown up virgins.

**Anatomical consideration of female genital organs:**

They are divided as external and internal genitalia. The External genitalia includes-

Mons pubic, Vulva, labia majora, labia minora, clitoris, and perineum The Internal genitalia means, vagina, uterus, fallopian tubes and ovaries. The external genitalia are likely to be injured in all cases of rape, due to the struggle. The Internal genitalia are less likely to be injured during the rape, except the vagina and hymen.

Mons pubis is a pad of subcutaneous fat tissue lying in front of the pubis of adult female usually covered by the hair

The Vulva is bounded on each side by the elevation of skin and subcutaneous tissue, which forms the labia majora. Labia minora are thin fold of skin, devoid of fat on either side just below the labia majora.

Clitoris is a small cylindrical erectable body situated in the anterior part of the vulva.

The vaginal orifice lies at the posterior end of the vestibule. The opening is closed by labia minora and a thin septum of mucous membrane called Hymen. The
vaginal orifice is the organ of copulation, communicating uterus with external organs called vulva. It constitutes the secretary channel for the uterine secretion and the menstrual blood.

**Importance of Exmen:**

Intact hymen is considered as sign of virginity, but legally it is not an absolute sign of virginity. Presence of a hymen cannot negate sexual intercourse; also rupture of hymen cannot be a proof of sexual intercourse. In majority of the cases hymen is torn on first sexual intercourse, so if it is intact, there can be only presumption of virginity but not a proof of virginity. In minor girls it may not get torn even by the intercourse, due to the dispensability of the membrane even after full penetration of the male sex organ, but it can become red and congested with inflammation and bruising. The degree of the injury to the hymen and genital canal will also depend upon the degree of disproportion between the genital organs of both parties and also on the amount of force applied and resistance offered.

Even a slight penetration will cause injury to the sexual parts of the female like labia majora, labia minora, vulva, and vaginal canal. The extent of damage will depend upon the resistance offered and force used.

In pregnant woman, the situation is still different because there are changes in all the genital parts during pregnancy, which becomes difficult to differentiate from the injuries caused due to rape. In the later months of pregnancy there can be abortion due to the struggle and the external force used on abdomen during, rape. There might be internal bleeding, without any external injuries.

**Cases related to the intact ox torn hymen as a proof of tape:**

**Tunas Turab Shaikh Vs. State of Maharashtra**¹⁷

The hymen was intact. The labia majora, minora and clitorises were normal. The Doctor said that even without all these signs there still can be rape. In Cross examination he said that it can be a case of rape even if there are no marks of

---

¹⁷ 1993 (3) crimes 454 (Bom).
injury on the genital organs and hymen is intact but the labia majora and minora are separated and are inflamed and flabby. The accuse was held guilty of rape.

**Palaniswamy Gounder V. State of Tamil Nadu**

There was no seminal fluid or blood stain on the vagina or private part of the victim. There was no external injury in the form of scratches or bruises or lacerations to any of the genital parts, Hymen was found absent. There was no redness or bleeding or tear in any part of the vagina. The offence of rape was held, not proved.

**Chotu Mohammad Vs. State of Rajasthan**

The Hymen was ruptured, fresh vagina bleeding with laceration was present which the doctor opined as possibility of penetration of female genital part by the male genital part. Hence it was held as Rape

**Sahajan Khan Vs. State of Orissa**

The hymen was found intact in a girl of 6 years. According to doctor report the vagina could not admit even the tip of finger. There was no external or internal injury on the private parts, or any other part of the body or breasts. There was no foreign hair or semen stains on the cloths or anywhere on the body of the victim or in vagina. The only finding in medical report was a white discharge on the vulva and vagina. The labia minora was red and inflamed. It was opined that it could be due to the disease and the charge of rape was not proved.

**Cases related to the partial penetration of female genitals with male genitals**

To constitute Rape, it is not necessary that there should be complete penetration with emission of semen and rupture of hymen. For the purpose of the law to prove a case of rape, partial penetration or even an attempt at penetration within labia majora or vulva with or without emission of semen is sufficient. It is legally quite

---

28 1993 (3) Crimes 107 (Mad).
29 1993 (1) Crimes 251 (Raj).
30 1994 (2) crimes 203 (Orissa).
possible to commit the offence of rape, without producing any injury to the genitals or leaving any seminal stains. Thus it is important to notice and record even the negative findings of the Medical examination.

**Prithichand Vs. State of Himachal Pradesh**

The victim or prosecutrix stated - Nawal uncle untied his pyjama and took out his male genital organ and put it inside my genital organ and clutched me. Since it was fat it kept sleeping out. After that my vagina was paining. This was sufficient evidence to prove the offence of rape though there was neither injury nor the breaking of hymen.

**Shankar Tukaram Vs. State of Maharashtra**

It was held that for the offence of rape, penetration of Vulva is necessary and must be established. When the medical evidence shows congestion a quarter inch away from the vulva, the accused is guilty of attempt to rape, as there is no penetration of vulva.

3) **Mahesh kumar Vs. State of Rajasthan** and **Sureshchandra Vs. State of Haryana**

The victim was 14 years old girl. A Doubt was raised whether penetration of vagina can take place at such a tender age of the girl. It was held that if penetration takes place there are chances of wide spread damage to the vulva, vagina, labia majora, labia minora, and vaginal canal and these parts cannot escape injuries or at least pain or signs of violence. In these cases, doctor did not notice any injury on the genital parts. Hence the offence of rape was not proved but was charged for an attempt to rape.

---

31 1989 (1) SCC 432.
32 1977 Cr.L.J. 476.
33 1998 Cr.L.J. 1597 (Raj).
34 1975 Punj L.R. 59
6.4. Medico-Legal Aspect of Patient-Doctor Relationship

Medical Services Covered under Consumer Protection Act

- The Supreme Court in Indian Medical Association v. V.P Sharma\(^\text{35}\), has held that:
  - services rendered to a patient by a medical practitioner are covered unless it was a contract of service (i.e. he is employee of patient) or treated free of charge;
  - in case of hospitals/nursing homes/health centres (except Government), all patients who pay the fee, including those who do not have to pay, are covered;
  - where individual doctor employed in hospitals/nursing homes/health centers which recover charges from patient, the responsibility of the doctor and the management of hospital will be joint and several;
  - in the hospital/nursing home where service is free to all – whether rich or poor – neither the management nor the doctor is liable under the Act

Brief introduction of Consumer Protection Act, 1986

It contains total Sections –31 and Schedules -Nil

Object – to provide better protection to the interests of the consumers. The Act is designed to make available easy, cheap and speedy remedy to small consumers.

Background –

There is a principle “caveat emptor” i.e., buyer be aware, under the Sale of Goods Act, 1932. It says that buyer is supposed to take care before he/she buys any goods. She is presumed to be knowledgeable and well informed. This was true in early days of developing market, as they were on equal footing. But, in the present

\(^{35}\) (1995)6 SCC 651
era of developed market manufacturers as well as sellers are more organized and on better footing than the buyers. Now a days the buyer could be easily misled and duped. She needs better support and protection from unscrupulous sellers. A common consumer is not in a position to approach the civil court or MRTP Commission to get relief from whom they are being cheated. United Nations adopted the concept of protection of consumers on 9-4-1985 and all countries were expected to take suitable legislative measures thereof. This Act was accordingly brought in force.

**Consumer**

- Consumer is a person:
  - who buys any goods for consideration and for personal use;
  - who uses such goods with permission of the buyer of goods;
  - who obtains goods on hire purchase or lease;
  - who hires or avails of any services for a consideration;
  - who uses the services with permission of person who has hired the services;
  - who obtains the services on deferred payment basis i.e., hire purchase or lease;
  - who buys goods exclusively for purpose of earning his livelihood as self-employment

- **Who is not consumer?**
  - who buys goods or services for commercial purpose;
  - who has not bought the goods or services;
  - procured goods or services without consideration

- **Rights of the consumer:**
  - right to be informed about the quality, quantity, purity, standard and price of the goods
  - so she may be protected from the unfair trade practices
• and to have protection from marketing of the products which are hazardous to life and property;
• right to consumer education;
• to have access to the authority of the goods;
• to stop exploitation;
• to be heard and assured that his interest will be respected;
• Right of speedy and simple redresses to consumer disputes.

**Rights of Patients**

**Fundamental Right** –
- Not to be discriminated on the grounds of sex, religion, caste, etc.
- Article 21 of the Indian Constitution, right to life and personal liberty, it includes right to health; Doctors’ Assistance; Pollution free Environment. (hospital waste)
- Right to move to the Supreme Court / High Court for the enforcement of these rights. (Writ Petition / Public Interest Litigation can be filed)

**International Human Rights** – Article 12 of the International Covenant on Economic, Social, and Cultural Rights –
- it requires the State parties to strive the highest attainable standards of physical and mental health.
- This can be enforced through different laws, such as Law of Torts, Law of Contract, Consumer Protection Act and Law of Crime, etc.

**Confidentiality and Privileged Communication.**
- Doctor must not disclose the secret information of his patient which he learns during the course of examination/investigation/treatment.

**Privileged communications are of two kinds:** (1) absolute; (2) relative.

**Absolute Communications** under the Indian Evidence Act relate to communication between husband and wife (sec. 122) ; the official secret of the State ( Ss. 123,124 ) ; and between the lawyer and client ( Ss. 126,127 ). The
disclosure of these communications cannot be enforced even in the due process of law.

- **Relative Communications** are between the doctor and patient, chartered accountant and his client. It is though confidential can be revealed in the interest of the society or by the process of law.

- **Right to consent** – all kinds of medical and / or surgical treatment involves interference with human body,
  - Only the patient can determine what should be done to his body.

- Every adult patient has a right to refuse full or part of method of investigation or treatment,
  - Even if, the decision may entail risks, as serious as death and may appear mistaken in the eye of medical profession,
  - The doctor cannot disregard the patient’s instructions.

- Consent should be free from coercion, undue influence, fraud or misrepresentation or mistake.
- The consent form should be in a language understandable by the patient.
- Mere thumb impression on a consent latter which the patient cannot read due to illiteracy or lack of knowledge of the language is invalid.

- **Informed Consent:**
  - Informed consent means informed about the treatment, its pros and cons, possible complications, etc. so as to enable him to take decision and that is his exclusive right, except in emergency.
  - A doctor who violates the law of informed consent is liable to be removed from the rolls of the Medical/Dental Council of India. It is an offence under the IPC, punishable with a fine or imprisonment.
  - Minor, mentally ill or insane has no right of self determination.
  - Circumstances in which the doctrine of self determination can be overruled - in emergency cases, the doctrine of necessity, can protect the Doctor for giving the treatment or performing the operation ;
- the interest of the State in protecting and preserving the lives and health of its citizens in order to eliminate threat to community, etc.

**Rights of the Doctor**

Registration confers certain rights and imposes certain duties upon the Doctors.

- To use the title and description of the qualification.
- Appointment in public or private institution.
- To use Red Cross only in few circumstances viz., serving in medical service of an army in country or Red Cross societies during war or during humanitarian services in peace as per Geneva Convention.
- To choose the patient, but no discrimination.
- To prescribe and/or dispense medicine to his patients.
- To issue medical certificate or report.
- To realize fees and other expenses.
- To give evidence in court as an expert.
- To remove organs from dead body while doing post mortem, subject to the provisions of the law in force

**Duties of Doctors**

- Always be ready to respond the call from sick, especially in emergency.
- Patient not to be neglected.
- Provide standard care.
- Maintain patience, secrecy disclose information where it is necessary.
- Provide information to the patient, his relatives or family members, guardians or attendants regarding necessity of treatment, modality, risk, duration, expenses, etc.
- Correct prognosis no exaggeration – no minimize.
- Get consent for treatment.
- Attend properly once you have accepted to treat the patient.
- Pay special attention to children, disabled, old age people, etc.
- Acquaint with the recent knowledge.
● Investigation - no hurry no hesitation.
● No experiment with the patient.
● No black mailing.
● Act according to law.
● Maintain up to date record.
● Compulsory notify the birth, death, communicable disease, food poisoning, etc.

Self Regulations

● Self regulation means regulating one’s own behaviour through the code of conduct established by the recognised association or peer group of doctors of the same branch or surgical as prescribed from time to time.
● Observe the Code of Medical Ethics of MCI.
  - a physician shall uphold the dignity and honor of his profession.
  - the prime object of the medical profession is to serve, reward or financial gain is subordinate consideration.
  - he should be pure in character, modest, sober, prompt in discharging his duties, etc.
● Organize seminars, symposia, lectures, refresher courses to update the knowledge of the doctors and for the benefits of the profession.
● Annual conferences, midterm seminars provide an opportunity to discuss and remove the doubts if any in the fields of medical practice, medical ethics and etiquettes.

Consumer Complaints

● Complaint means any allegation made in writing that:
  - the goods/services she purchased/hired is defective/deficient;
  - The price charged is exaggerated;
  - Unfair/restricted trade practices has been adopted by the seller;
  - Goods is hazardous to life and property;
Defect means any fault, imperfection, or shortcoming in the quality, quantity, potency, purity, or standard that is required to be maintained by or under the law for the time being in force or under any contract, express or implied, or is claimed by the trader in any manner whatsoever in relation to any goods. (Sec. 2(1)(f))

Deficiency means any fault, imperfection, or shortcoming in the quality, quantity, potency, purity, or standard that is required to be maintained by or under the law for the time being in force or has been undertaken to be performed by a person in pursuance of any contract, express or implied, in relation to any services. (Sec. 2(1)(g))

Unfair Trade Practices means a trade practices which,
- For the purpose of promoting the sale, use or supply of any goods or of any service,
  - adopts any unfair method or unfair or deceptive practice including any false / misleading statements regarding standard, quality, quantity, grade, composition, etc.

Restrictive Trade Practices which requires a consumer to buy, hire, or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services.

Spurious goods and services means such goods/services which are claimed to be genuine but they are actually not so.

Duties of consumer regarding purchase of goods / services:
- Invariably receive the cash memo;
- read carefully the details inscribed on the packet;
- give priority to ISI/Agmark items;
- File complaint invariably, in cases of defect in goods or deficiency in service is found.
Who can file a complaint? –
- a consumer; or
- Consumer association registered under the Act, for the time being in force; or
- Central or State Government.

Remedies and Redressal Machinery

Where to file a complaint?
- if the value of the goods/services or compensation is:
  - less than Rs. 20 lac – District Forum;
  - more than Rs. 20 lac but less than Rs. 1 crore – State commission;
  - more than 1 crore – National Commission.
- Local limits of cause of action, where the defendants resides - applies.
- Time limit – within 2 years from the cause of action arises.

Appeal – within 30 days,
- before the State Commission against an order of the District Forum;
- before the National Commission against the order of the State Commission;
- before the Supreme Court against the order of the National Commission.
- Appellant has to deposit 50% of the amount decided by the appropriate Forum or Rs. 25000/35000/50000, whichever is less, before he prefers an appeal before the State Commission/National Commission/Supreme Court respectively.

Duty of Care

It was further held that the doctor has duty of care in:
- deciding whether to undertake the case, what treatment to give, administration of the treatment etc.;

- He must bring to his task a reasonable degree of skill and knowledge;

- He need not possess the highest expert skill;

- It is sufficient if he exercises ordinary skill of an ordinary competent man.

In A.S. Mittal v. State of A.P., AIR 1989 SC 1570, it was held that:

- law recognizes the dangers which are inherent in surgical operations and that mistake will occur, on occasions, despite the exercise of reasonable care and skill

- A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one.

Negligence

Although the word negligence is discussed earlier in detail but scholar explains here in nutshell

- Negligence – means the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do or the doing of something which a reasonable and prudent man would do.

- Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances.

- Negligence is failure to observe duty to take reasonable care, precaution which the circumstance demands, negligence and duty are correlated.

- When there is a legal duty to take care, and if committing a breach, consequential damages, amounts to tort – an actionable wrong.

- The people would rarely prefer to prosecute a lawyer or a doctor,
because the relationship of a doctor with his patient, and a lawyer with his client, is of uberrimae fidei,

- That is of utmost good faith and abundant confidence.
A diehard criminal would frankly confess before his lawyer and the most sophisticated lady would expose her organs to her physician.

Both are looked as saver or demigod for them.

Except in situations of extreme negligence, gross misconduct, or unaccountable cheating or excessive exploitation, they are being prosecuted.

Therefore, any provision exposing these professions to any criminal liability has to be very strictly interpreted and very liberally explained.

The “rule of law” requires that the wrong should not remain UN redressed. The victim should be compensated.

Compensation is a return for the loss or damages sustained. Justice requires that it should be equal in value, although not alike in kind.

Perfect compensation is hardly possible and money cannot renew a physique or frame that has been battered and shattered.

A patient is entitled to recover compensation/damages in a case of medical negligence under the law of tort or contract.

Under the law of tort it is not necessary that the consideration should have been paid for the treatment.

Where the consideration is paid for the treatment, action is maintainable under the tort as well as contract.

**Remedies for Medical Negligence**

Following remedies are available for claiming compensation for medical negligence:

- under the law of tort and contract in a Civil Court;
- under the Consumer Protection Act in a Consumer Forum/Commission;
- under the Constitution of India by filing a writ petition in the appropriate High Court or in Supreme Court;
- under the Medical Council of India Regulations and the State Medical Council Acts;
under the Fatal Accidents Act, 1855; 
Under the Criminal Law, apart from punishment, compensation also can be awarded against the doctor.

**Medico-Legal Aspects of Road Accidents**

Accident is defined as

a) 'An unexpected, unplanned occurrence involving Injury.
b) WHO Advisory Group in 1956 defined Accident as "Unpremeditated event resulting in recognizable damage"
c) Accident is an occurrence of a sequence of events which usually produces unintended injury, death or property damage.

Accidents are the part of price we pay for, technological Progress. Majority of the Accidents are preventable. They occur more frequently in certain age-group, at certain times of the day and the week, and at certain localities. Some people are more prone to accidents than others. The peak mortality and the morbidity are seen in the age group of 15-24 years and the large portions of vehicles involved are the two wheelers.

Cause of the Accidents;

Accidents are not Prerogative of developed countries. They can as well happen in the developing countries. The common causes encountered for the Road accidents are

a) Large number of Pedestrians and animals share the roadway with Fast and slow moving, new and old poorly maintained vehicles.
b) Large number of motor cycles, scooters and mopeds
c) Low driving Standards and disregard to traffic rules
d) Large number of Buses, or trucks- often over loaded
e) Defective roads, poor street lights, defective layout of road dividers and speed breakers
Prevention:

Accidents are caused and just do not happen. The data of the causation of accidents must be analyzed and the cause treated. There should be safety education right from the school level. The drivers must be trained in proper maintenance of the vehicles, safe driving, traffic rules and safety precautions.

Legislation has embodied codified rules and they must be strictly followed and enforced by the State machinery. These includes Driving tests, medical fitness to drive, enforcement of speed limits, compulsory wearing of seat belts, crash helmets, checking of alcohol content of Blood of the drivers, Road side breath testing for alcohol, regular inspection of the vehicles etc. If all the rules are strictly followed the incidences of road accidents will decrease.

The Investigation of road accident cases involve the following purposes

1) To identify the cause of the accident
2) To allow adequate compensation to the victim, if he is a live, or to next keen, if the victim is dead.
3) To punish the offender, if any offence is involved
4) To search guidelines towards prevention of further accidents.
5) The Investigation must include
6) Collection of the history of the accident
7) Examination of the vehicle or vehicle involved in the accident
8) Examination of the site of the accident or place of the occurrence of the accident
9) Medical and general examination of the driver-i.e. the person driving the vehicle
10) Medical and general examination of the deceased or the injured person
11) Necessary blood tests to judge the alcohol level in the blood
12) A medical man alone is not the proper man to investigate on all the aspects of the Road Accidents and therefore the Road accidents cases should be investigated by a team of experts such as
   a) an experienced investigation police officer,
b) an automobile expert and
c) a medico legal expert

Examination of the deceased or the dead person (Post mortem examination)

The post mortem examination must include Examination of the body with its lie on the road Examination of the clothing and any other material specially for any tears, grease marks, blood stain, soil, mud or any other stain specially for their number, size and placement Examination and proper recording of the injuries. Road traffic injuries are blunt force injuries with forceful impact. The cause of accident can be determined by the manner of production of the injuries.

Types of Victims of Road traffic Accidents:

a) Pedestrian victims- people walking on the road
b) Occupants of the offender vehicle-Driver and/or others
c) Occupants of the offended vehicle-Driver and/or other

Suit for compensation to the family of a person for loss of life by actionable wrong

According to section 1A of the Fatal Accidents Act 1855 whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such so as to cause damage or death of his person, the party shall be liable to an action or suit for damages. Every such action or suit shall be for the benefit of the wife, husband, child, and/or parent. The suit can be brought by them or by the executor, administrator, or representative of the deceased person

Constitution provisions:

The Constitution of India provides: Right to life or personal liberty under article 21 including

a) right to health
b) right to Doctor's Assistance along with other rights- Which implies right to treatment in cases of road accidents
Article 41 Directive Principle

Dealing with social services confers right to Public assistance in cases of sickness and disablement, which implies right to treatment in cases of road accidents

Article 42 Directive Principle:

It requires, that the State, within the limits of its economic capacity and development, to make effective provisions, for securing the right to public assistance, in cases of sickness and disablement and also make provisions for maternity relief, which also implies right to treatment in cases of road accidents

1) Pt. Parmanad Katara Vs. Union of India36

This case refers to the (Art.21) for right to health, Art.32, Art.41 and 42 right to get the treatment in sickness and disablement.

In this case, Pt. Parmanad Katara was a small human right activist fighting for good cause of general public interest. He filed a writ petition on the basis of a report in Hindustan times in which it was alleged that a man traveling by Scooter and was knocked down by a speeding car. He had an head injury and was bleeding profusely. He was picked by a person on the road and he took him to the nearest hospital. The doctor refused to attend to him and give treatment. He could not get the treatment due to lack of operative facilities for a Head injury and non availability of a Neuro Surgeon. He was advised to take him to a different hospital located about 20 km away authorized to treat Medico-Legal cases. At last he died on the way.

The Supreme Court has held that there cannot be two opinions that preservation of Human life is of paramount importance. Every Medical Practitioner whether practicing or attached to government or private Hospital has a profound obligation to extend his services, with due expertise for protecting life. No law or statute can intervene to avoid or delay the discharge of this paramount obligation cast upon the members of the Medical profession. Many a times the Member of the Medical Profession avoid his duty to help a dying person because it might turn out to be a

36 AIR 1989 SC 2039
medico-legal case. No doubt a Physician is free to choose his patient whom he wants to serve However, he should respond to any request for his assistance in an emergency.

The Supreme Court has further held that, whenever a member of the medical Profession is approached and if he finds, that whatever assistance he could give is not sufficient to save the life of the patient, & some better assistance is necessary, it is the duty of the medical man so approached, to provide primary medical aid to the patient and then refer the patient to the hospital, where the expertise facilities required for the treatment are available. The practice of the doctors and certain Government institutions to refuse even the primary medical aid to the patient and referring them to other hospitals simply because medico legal cases is deprecated .and no medical man shall commit an act of negligence that may deprive the patient from necessary care

2) Pachim Bengal Khod Majdoor Samiti and others Vs. Government of west Bengal

This case refers to the (Art.21) for right to health and Art.41 and 42 making it, the duty of the state to provide the treatment in sickness and disablement.

One member of the Pachim Bengal Khod Majdoor Samiti fell from the train and got Head injury, for which he needed a Neuro Surgeon, to operate on him. He moved from 7-8 Hospitals and was turned down for lack of operative facilities for a Head injury and non availability of a Neuro Surgeon. At last, he was admitted and operated at some hospital after wastage of few hours. He was alright, but he sued the Government for not providing adequate facilities for Neuro Surgery in the State Hospital.

The supreme court has held that, it is the responsibility of the State to provide for the facilities of treatment in the state run hospitals and held this inability to provide Neuro Surgery in the State Hospital, as violation of Article 41,42 to be read with art.21 and penalized the Bengal Government with a fine of Rs. 25000.00 and. It was held that Life without health is no life at all.

37 1996 (4) SCC 37.
Medico-legal aspect of Disaster Management

Disaster means calamities. It is defined as "Any occurrence that causes damage, ecological disruption, loss of human life, or deterioration of health and health services on a large scale sufficient to warrant an extra response of help from the outside area and/or the world outside the affected area. It can occur at any time, at any place and requires an immediate attention otherwise leads to vast casualties of human beings, movable and immovable residential and/or industrial properties, animals etc. and provokes greater risk of epidemics. It can develop in many ways. It can be gradual or sudden in the form of an emergency.

The worst disaster to hit India was the Great Bengal famine of 1943 which is estimated to have claimed over three million lives. The economists feel that the root cause of this tragedy was not poverty but failure of food supply. Among other natural disasters were The Earth Quake in Bihar in 1934 which left about 10,000 (Ten Thousand) People dead. The Cyclone in Andhra Pradesh in 1977 killed about the same number of people. In recent years Earth quake in Latur-Maharashtra, Bhuj /Anjar in Gujarat have also taken a heavy toll. The effect of Bhopal gas leakage tragedy has rocked the whole world.

The factors which give rise to gradual disaster can be contributed by environment, quality of food, Pollution, contamination of water, un control of the diseases, Un equal distribution of food, social bad habits etc. They take the form of epidemic, mass sickness in health and thus destruction of human life etc.

The factors responsible for sudden disaster can be earth quake, storm, floods, drought, tidal waves, landslides, volcanic eruptions, fire, heat waves, famines, epidemics, building collapse, nuclear accidents, warfare, Earth warming due to cutting of trees. Etc.

It is a global problem and has an appreciable effect on the advances being achieved in health and socio-economical development of the society. Therefore it requires immediate Management. It adds an extra load on the existing facilities of hospital, society, Fire brigade, police reserve security forces, home guards, medical and Para-medical staff.
Classification of disaster

They can be classified as Natural Disaster and Manmade disaster. Natural Disaster:

They can be further classified as

- a) Natural Phenomena beneath the surface of the earth like Earth quake, landslides, volcanic eruptions etc
- b) Natural phenomena on the surface of the earth like storm, tidal waves, landslide, avalanches, building collapse, Earth warming due to cutting of trees, fire, heat waves etc.
- c) Metrological/Hydrological Phenomena like Windstorm, cyclone, Snowstorm, Sea surge, Flood, Drought, Famine Epidemics etc.
- d) Biological Phenomena like Locust Swarm, Disease Epidemic

Man Made Disaster:

The list can be very exhaustive, it includes

- a) Caused by warfare like conventional, Nuclear, biological and chemical warfare
- b) Caused by accidents: Vehicular (Plane, train, ship), Drowning, Collapse of a building, or Explosion e.g. Bhopal gas leak Tragedy (in 1984), or Fire in residential complex or factory or industry, Biological and chemical destruction or pollution including food or alcohol poisoning.

Effects of disaster:

The relative number of injuries and deaths due to Disaster depends upon the type of Disaster, how, when and where it strikes, the density of the population at the site of Disaster, Condition of the environment, degree of preparedness, and opportunity of warning.

There are four basic causes of earthquake. Ground shaking, Ground Failure, Fire and Tsunamis. In earthquakes there is a high level of mortality as people are crushed by falling objects and collapsing buildings. The extent of damage depends upon the intensity duration, frequency, geological and ground conditions, quality
of construction etc. Earthquakes at night are more deadly as more people are in the house and are sleeping. They are not prepared for it and may not get time to interpret the rescue instructions. The combined effect of rain and wind will worsen the situation by causing more houses to collapse. Earthquake disaster cannot be stopped but its effect can be reduced by designing and strengthening the building structures to prevent their fallings, e.g. in Canada in the earthquake prone areas the buildings are constructed with wood and not usual bricks and cement.

The Disaster can cause following type of situations Lots of Injuries, Emotional Stress, Spread of Epidemic of the diseases, etc.

**Principles of disaster management plan:**

The main objective of the plan is to ensure that the appropriate systems, procedures and resources are in place to provide prompt effective assistance to the Disaster victims.

a) The plan should be simple so that it can be understood by everyone and implemented easily and immediately.

b) The plan should be flexible so that it can be adapted for all types of Disaster.

c) The plan should be clear and concise—short so that even in the noise and confusion all concerned can act upon it immediately.

d) It should be adequate for all the times during day as well as night including holidays when majority of the staff is not available.

e) It should be extension of normal working so that people can act on it immediately.

**Disaster Management Plan**

It is an ongoing multi sectoral activity. It should form an integral part of the national development and disaster management.

The disaster management plan includes Initial alert, activation of the concerned people working for the plan and formulation of the command nucleus. The plan should give complete details of the resource mobilization.
Initial Alert

It should be loud, simple, Concise and clear enough and kept at a place audible and reachable to everybody so that all the people around should know the place and time of accident. This will prevent further loss and the alert the safety measures. There should be sufficient announcement system to inform the public about the development of the management of the disaster.

Activation of the concerned people:

A rapid assessment of the damage due to disaster must be carried out in order to identify the needs and resources.

Nearby police station, fire brigade, police reserve security forces, home guards, medical and para-medical staff, government and non-government voluntary service organizations etc. should be easily approachable to control the disaster and the traffic of the people. There is always a chaos, when such disaster takes place.

The nearby hospital should be easily contactable, so that they can make immediate arrangements to receive the wounded or the dead, make arrangement for blood, medical and para-medical team to receive and treat the casualties.

Formulation of the command Nucleus:

All concerned should be allowed to take care of the wounded irrespective of caste, creed and religion. There are two main types of problem while managing disaster 1) is the victim and/or injured and 2) administrative

Transport of the Injured:

Victim needs transport vehicle and reliable person to carry the wounded, and treat them accordingly. If required voluntary NGO’s should be contacted to inform the relations and help in transport of the victims. All the facilities like control of hemorrhages, Protection of air way, Ventilator support, Anti shock treatment should be available for the treatment.

The administrative officer has to identify the injured and/or dead and inform the relatives accordingly. They also help in shifting the victims, Arrange for blood
transfusion, medicines etc. The whole area should be cordon off and only the authorize people should be allowed to enter the area.

The other administrative problems are

- Documentation of the wounded and/or dead and/or Unconscious patients.
- Crowd control-usually the crowd gather near the Hospital gate or at the site of the disaster. They should be efficiently controlled otherwise It is difficult to transfer the patients/ wounded to the hospital.
- Anxious, excited friends and relatives want to know the welfare of their kith and keen. The authority should calm them and give them the maximum information about their relatives.
- Communication is the most important aspect of the disaster management,
- Taking proper care of the victim's dead or alive. In disaster, it is not possible to Itemized each and every article recovered, it is, better practice to keep them in separate polyethylene bags and label them properly so that they can be handed over to relatives.
- Press and publicity: Giving correct information is necessary to avoid rumors,

Every department where disaster can be anticipated there should be a work out plan

  a) for the safety of the workers working there
  b) for the safety of the visitors or third parties who visit the site for the business or any Other purposes

Relief Phase:

This phase begins when the assistance starts reaching the Site of Disaster. The most critical health supplies are those needed for the treating of the casualties and preventing the spread of Communicable diseases. Following the emergency phase, the needed supply will be food, blankets, clothing, Shelter etc. **It is very essential to understand the needs of the victims before sending the supplies.** It is observed that the NGO's Collect old cloths, Blankets, nutritive food packets etc.
for the Victims of the Disaster but many such items either do not reach the needy or fall in the hands of wrong people who distribute them as per their interest in their community, political field, or use them for some form of personal gains e.g. women need petticoats to cover their body but what is sent is old silk, jari saries., or old suites which do not even fit the people. Lot of such articles is west and are of no use. People send lots of costly medicines but what are needed are bandages ointments, Medicines for simple cough, fever and diarrhea etc.

It is very essential that the Government, NGO's and concerned citizens sit together and discuss the relief plan. What should go in food packets, how and where they can be airfield, what cloths are needed, what medicines are required etc.

Rehabilitative Phase:

This means restoration of the Pre-disaster conditions. It starts from the very first moment of the Disaster. In first week, after the disaster, the pattern of health care changes from casualty treatment to more routine primary health care. Than the priorities will shift from the Primary Health care to environmental health care preventing the spread of the diseases

Than the next step is re-establishment of Water supply, Food supply, Basic sanitation, Disposal of the Contaminants etc.

Precaution during Rehabilitative Phase:

The great concern for donors and the citizens is the fear that their money will be misused. There are instances of some NGOs, bogus Government agencies or bogus organizations siphoning the funds, medicines, and clothing’s etc. for commercial or political use. The proposed rehabilitation schemes remain on the paper. The Donors should keep track of their money and their supplies. They should assure that the right person is receiving the help and should try to get the updates on their projects. They should release the money after receiving the full information of the utilization of the funds already send.
United Nation's Disaster management Plan was introduced at a high level meeting of 130 Senior Government officials, Industrialists, leaders of international and non Governmental organizations from 40 countries on 12-14 December 1988 at France in Paris. It was called APELL -i.e. Awareness Preparedness for Emergencies at Local Level. It included:

a) Publication to facilitate and promote information-brochures, hand books Bulletins, directories etc.

b) Training activities to strengthen and increase development of expertise for accident prevention and emergency responses

c) To promote co-operation between countries and various agencies dealing with Disaster management.

Law and disaster management:

Our disaster management policy has to assume a new dimension in our plans and legal regulations. The recent legislative measures have covered the hazardous process of manufacture, hazardous micro-organisms, transportation of toxic chemicals and provisions for disaster planning. Legislature has made laws under different headings making the disaster management- the responsibility of the management.

There can be action in torts for negligence and nuisance

There is vicarious liability of the master for failure to take care of their workers. Specially during the disaster.

There is also criminal liability of the owners if necessary precautionary measures are not adopted in the Industries.

Statues have provided pollution control boards, drug control boards and various such authorities who can take steps to prevent and/or control the disaster.

Under the factories or Industrial acts it is made mandatory to provide for safety measures and if not provided, is made punishable.
Judicial activism and Public Interest Litigation is a great tool to deal with the problems of the Disaster victims.

In M. C. Mehta Vs. Olem Gas Leakage case\(^{38}\) Bhopal Gas leak Disaster Ganga pollution case\(^{39}\)

In Kinkere Devi Vs State of Himachal Pradesh\(^{40}\) court observed that under Art. 48(A) there is a duty cast on the citizens to protect, preserve and improve the environment, rivers, lakes and other water sources of the country.

They not only give guidelines to prevent the Disasters but also help in getting the solutions for the Disaster victims

**International agencies involved in disaster management:**

(1) **who-world health Organization:**

It is Non profitable, non political and one of the biggest international organization of the United Nations. It came into force on 7\(^{th}\) April 1948 and it is observed as WORLD HEALTH DAY. It meets annually at its head quarters in Geneva-Switzerland. The executive Board is of 24 members nominated by each country elected by the world health Assembly. They are technically qualified experts. They have their own constitution, governing body, own membership and own budget. The problems of the member countries are discussed in the annual or special health sessions. The objective as mentioned in its constitution is "The attainment of the highest possible level of health of all people of the world."

The Objective of The WHO is the Attainment of highest standard of health by all the people that will permit them to lead a socially and economically productive life.

**Functions of WHO :**

a) It tries to promote health and to prevent the outbreak of diseases

\(^{38}\)AIR 1987 SC 965  
\(^{39}\)AIR 1988 SC 8 Med. - 11  
\(^{40}\)AIR 1988 SC 8 Med. - 11
b) It helps the member countries to improve and strengthen their health services

c) It helps to plan and co-ordinate the efforts of the member countries to eradicate Diseases like Malaria, Tuberculosis, Venereal disease, Viruses and Parasitic disease.

d) It works with member countries and health organizations a) To collect information of epidemics b) To develop international quarantine regulations c) To standardize medical drugs, Vaccines and treatment

e) It assists the Governments of member countries to eradicate diseases and promote: a) Maternal and child health b) Mental health c) Medical research d) Prevention of accidents.

f) It helps government of member countries to improve standard of teaching and training in health profession

g) It helps governments of member countries to improve nutrition, Housing, and working conditions and other aspects of environmental health.

h) It sends International financial or otherwise aid to member countries when devastated by natural disaster such as flood, earth quake, etc.

i) It helps the governments of member countries to prevent, control and cure serious tropical diseases like leprosy, small pox, Polio etc.

j) It also works to promote peaceful uses of atomic energy in diagnosis and treatment of diseases.

k) It also provides ways and means for protection against radiation and safe disposal of radioactive wastes.

l) It also has research programs for prevention of non-communicable diseases such as cardio-vascular, cancer etc.

m) Immunization against the common diseases of childhood is now a priority program

n) It acts as a clearing house for health literature and has published many articles on the health care system on various diseases.
2) Red Cross:

It is an international, non profitable, non political and one of the biggest international organization with the main aim to minimize and prevent human suffering by offering practical, voluntary service programs to all people especially to the sick and victims of war and other disasters. It was established in 1920 and has a network of about 400 branches in India. It was the idea of Jean Henry Dunant- a Swiss businessman. It was established with an objective of prevention of the diseases, to decrease the human sufferings and to uplift the health programmers. It supplies Vitamins, clothes, food, blankets and necessary articles during the war or natural disasters like famine, earthquakes, floods cyclones etc.

The activities of the Red Cross can be summarized as

a) Relief work; When disaster e.g. earth quake, floods, drought etc. strikes any part of the country. It immediately mobilizes its resources and goes for the rescue

b) Milk and Medical Supplies: A number of Hospitals, dispensaries, schools, nurseries receive medicines, vitamins and the necessary medical help as often as needed from it.

c) Armed Forces; The care of the sick and wounded among the members of the armed force is one of the primary function of the Red Cross.

d) Maternal and Child welfare: There are many such centres which receive the help from the Red cross

e) Family Planning: another important aspect of women and child care, is being run by the red cross and necessary libel is given by them

f) Blood Bank and First Aid. Many Blood Barks are run by the Red Cross. First Aid is given and taught at the various centers of the Red cross to the General Public So as to help in Disaster management.


It is an international, non profitable, non political and one of the biggest international organization established on 11.November 1946 by the United nations General Assembly. It has the main aim to assist and help all nations, concerned with the
promotion of the health of the mothers and the children, without discrimination of color, race, religion and political ideology.

It has been assisting the countries in the field of child health, Nutrition, Education and social welfare of the Children and the mothers. It helps the under developed and the developing countries to strengthen their national services for children, and youth.

It provides technical knowhow and equipment for the Primary health centers. It assists in giving science education through social services. It provides help for improvement of nutrition through nutritional projects and their rural supply.

It has financed and helped many projects involved with the development of children and mothers like BCG campaign, Venereal disease control program etc.

It provided funds to establish DDT, Penicillin factories and also to buy equipment required for improving the general health of the Children.

UNICEF is currently propagating GOBI Campaign which means G- Growth Charts to monitor the child development O- Oral hydration to treat all mild to moderate dehydration B- Propagating Breast feeding and it’s the advantages I-Immunization against measles, Diphtheria, polio, Tetanus, tuberculosis etc.

4) CARE- The Co-Operative for American Relief to Everywhere

It has a head quarters in New York and was established in 1945 by 26 relief agencies, It is one of the largest independent, nonprofit making international relief and development organization. It provides emergency aid and long term development assistance. It supplies food, clothing and other packages to the needy people of most of the countries in the world with immediate relief to refugees and other victims of disaster It began its operation in India in 1950 Till the End of 1980 it provided food for the children in the age group of 6-11 years. From Mid 1980 Care-India focused its food support and development programmers. It is helping in Integrated Nutrition and health Projects, Better health and Nutrition Projects, Anemia Control programme, child Survival project, Family Spacing projects. Etc.
Scholar has studied so many case laws relating to human health issues and the judgments of the various courts of India. Some of them are discussed below.

**Cases relating to human organs transplantation**

**Dr. Shyam Sundar Prasad vs. State of Bihar (now Jharkhand)**

The appellant Dr. Shyam Sundar Prasad was put on trial along with other accused to face charges under Sections 307, 326, 328 and 420 of the Indian Penal Code, Section 34 of the Indian Penal Code read with Sections 109, 201 and 343 of the Indian Penal Code on the allegation that accused persons in conspiracy with each other fraudulently and in deceitful manner removed the kidney of Nasir Ali. The trial court while referring the case of the other accused persons to the court at Bombay where the case instituted under Sections 18, 19 and 20 of the Transplantation of the Human Organs Act was pending, convicted the appellant under Sections 109 and 201 of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for five years and further for one year for the offence under Section 109 and 201 of the Indian Penal Code respectively.

The case of the prosecution was that one Nasir Ali lodged a complaint case before the court of Judicial Magistrate, Bhilwandi under Sections 420, 406/34 of the Indian Penal Code and Sections 18.19 and 20 of the Transplantation of the Human Organs Act, 1994 against Shyam Kumar Sharma, a nurse, named as Mery, Dr. Tabrez and also 2-3 Doctors (not named) of Harkisandas Narrotumdas Hospital and Research Center, Bombay alleging therein that accused persons fraudulently and in deceitful manner got his kidney removed, The investigations from Harkisandas Narrotumdas Hospital and Research Center, as to whether one person named as Nasir Ali has been operated open in the Hospital as a kidney donor was replied in negative by the Hospital. However, it was informed that one Nasir Ali had been tested for HLA typing on 13.3.1997. Thereafter in order to get the matter regarding removal of kidney verified Nasir Ali was referred to J.J. Hospital, Bombay and on being examined it was reported by the said Hospital as "left kidney not visualized". It has been alleged that some times in May, 1997 he came across with one Deepak at Bombay to whom he expressed his desire to go to Saudi Arab, he introduced him to Shyam Kumar Sharma who asked for Rs. 40,000/- for the work to be done. The informant paid him Rs. 40,000/- and then brought him to Harkisandas Narrotumdas Hospital and Research Center, Bombay alleging therein that accused persons fraudulently and in deceitful manner got his kidney removed.

---

41 MANU/JH/0679/2006
Center where stool and urine were given for test. Then he introduced him to Dr. Tabrez and a nurse Mery, who brought him to Ranchi and took him to a Nursing home where blood sample was taken on the plea that if everything is found normal in the test, then only he could be sent to Saudi Arab. He was kept in one room of the Nursing home where in the night Dr. Tabrez, nurse Mery, who had come from Bombay as well as Dr. Prasad and his staff came and informed that blood report is not normal and hence he cannot be sent to Saudi Arab, then Dr. Tabrez told him that things can be set at right if blood transfusion is done and for that he will have to undergo a small operation, to which he agreed and then one injection was administered and thereafter he became senseless and after a week he found him in a bed of Hospital named as Harkisandas Narrotumdas Hospital and Research Center, Bombay, where he was kept for about 7-8 months. The nurse Mery disclosed him that after removing his kidney it has been sold to some foreign national but neither they are paying money to her nor they are ready to share the money and in this way he has been duped by the accused persons. After knowing all these things, he fled from Hospital and reported the matter to the police station and thereafter he on the advice of his well wishers lodged the case in the court.

He was further brought to Rachi and taken to Prasad Nursing Home. The authorities of the Hospital denied that any kidney was taken out at Prasad Nursing home, and flatly denied that any kidney of the informant has been taken out. There was no record showing removal of the kidney in the Nursing Home. But certain documents the affidavits of different donors indicating therein that donors voluntarily agreed to donate kidney to different recipients and gave consent to be operated upon at the Prasad Nursing Home- were seized. On investigations it was found that several instruments installed were meant for transplantation of the kidney. Some of the witnesses deposed that only dialysis was being done in the Prasad Nursing Home. Some said that Doctors from outside used to be called for kidney transplantation., One Nurse administered injection to him, as a result of which he became unconscious and when he woke up, he found that he has been operated upon at Bombay.

On the basis of evidence as indicated above the trial court did hold that Nasir Ali got his kidney removed on his own volition and sold it to someone for its transplantation in another human beings and that kidney of Nasir Ali was removed under the supervision of the appellant in the Nursing Home belonging to the appellant. Having
holding so, the trial court, however, did refer the case of other accused namely, Shyam Kumar Sharma to the court at Bombay where the case instituted under Sections 18, 19 and 20 of the Transplantation of the Human Organs Act, 1994, was pending. However, the trial court did find the appellant guilty under Section 109 of the Indian Penal Code for abating the commission of the offence under Sections 18, 19 and 20 of the Transplantation of the Human Organs Act and also under Section 201 for causing the evidence of commission of the offence under Sections 18, 19, and 20 of the Transplantation of the Human Organs Act disappeared. Accordingly, the appellant was convicted and sentenced as aforesaid. Being aggrieved with that order of conviction and sentence, the appellant filed an appeal. It was held on perusal on the records, that the informant Nasir Ali when he was brought to the Nursing Home of the appellant at Ranchi, the accused persons, who had brought him from Bombay got his blood test done at Prasad Nursing Home and then Dr. Tabrez told him that report is not normal and in order to get the things right he has to undergo small operation to which he agreed and then injection was given and he became unconscious and when he regained consciousness, he found in a bed of a Hospital at Bombay, he found that he has been operated upon and all these things were done at Bombay. Thus, it is evident that there has been absolutely nothing in the evidence to show that he was ever operated upon at Prasad Nursing Home. Similarly, it was shown that kidney transplantation was being carried out at Prasad Nursing Home for which Doctor used to come from different places such as Ahmedabad, Bombay, Lucknow, Delhi, Kolkata etc. However Nasir Ali, did identify the Prasad Nursing Home. I do find that there has been no evidence to the effect that Nasir Ali was operated upon at Ranchi in Prasad Nursing Home

In the circumstances, the order of conviction and sentence passed by the court below was set aside.

Pt. Parmanad Katara vs. Union of India

This case refers to the (Art.21) for right to health, Art.32, Art.41 and 42 rights to get the treatment in sickness and disablement.

---

42 AIR 1989SC2039
In this case, Pt.Parmanad Katara was a small human right activist fighting for good cause of general public interest. He filed a writ petition on the basis of a report in Hindustan times in which it was alleged that a man traveling by Scooter and was knocked down by a speeding car. He had an head injury and was bleeding profusely. He was picked by a person on the road and he took him to the nearest hospital. The doctor refused to attend to him and give treatment. He could not get the treatment due to lack of operative facilities for a Head injury and non availability of a Neuro Surgeon. He was advised to take him to a different hospital located about 20 km away authorized to treat Medico-Legal cases. At last he died on the way.

The Supreme Court has held that there cannot be two opinions that preservation of Human life is of paramount importance. Every Medical Practitioner whether practicing or attached to government or private Hospital has a profound obligation to extend his services, with due expertise for protecting life. No law or statute can intervene to avoid or delay the discharge of this paramount obligation cast upon the members of the Medical profession. Many a times the Member of the Medical Profession Avoid his duty to help a dying person because it might turn out to be a medico-legal case. No doubt a Physician is free to choose his patient whom he wants to serve. However, he should respond to any request for his assistance in an emergency.

The Supreme Court has further held that, whenever a member of the medical Profession is approached and if he finds, that whatever assistance he could give is not sufficient to save the life of the patient, & some better assistance is necessary, it is the duty of the medical man so approached, to provide primary medical aid to the patient and then refer the patient to the hospital, where the expertise facilities required for the treatment are available. The practice of the doctors and certain Government institutions to refuse even the primary medical aid to the patient and referring them to other hospitals simply because medico legal cases is deprecated .and no medical man shall commit an act of negligence that may deprive the patient from necessary care

**Pachim Bengal Khod Majdoor Samiti and others vs. Government of west Bengal**

43. 1996 (4) SCC 37
This case refers to the (Art.21) for right to health and Art.41 and 42 making it, the duty of the state to provide the treatment in sickness and disablement.

One member of the **Pachim Bengal Khod Majdoor Samiti** fell from the train and got Head injury, for which he needed a Neuro Surgeon, to operate on him. He moved from 7-8 Hospitals and was turned down for lack of operative facilities for a Head injury and non availability of a Neuro Surgeon. At last, he was admitted and operated at some hospital after wastage of few hours. He was alright, but he sued the Government for not providing adequate facilities for Neuro Surgery in the State Hospital.

The supreme court has held that, it is the responsibility of the State to provide for the facilities of treatment in the state run hospitals and held this inability to provide Neuro Surgery in the State Hospital, as violation of Article 41,42 to be read with art.21 and penalized the Bengal Government with a fine of Rs. 25000.00 and. It was held that Life without health is no life at all.

..........................................................