CASE LAW ANALYSIS OF MEDICAL TREATMENT:
THE JUDICIAL APPROACH

Introduction:

Following the discussion on the nature and the scope of medical negligence in terms of standard of care, the present chapter focuses on the judicial dimension towards the medical treatment undertaken by various medical specialists. The judiciary plays a significant role in the adjudication of medico-legal cases. It plays a vital and important role not only in preventing and remedying of medical malpractice but also in eliminating exploitation of innocent patients and injustice. It has to do innovation in order to meet the challenges posed by the health care providers in the administration of medical service. The judiciary in India has to liberate itself from the shackles of European thought, innovate use of the judicial review of medical malpractice cases, devise new methods and create new strategies for the purpose of bringing justice to the victims of negligence. The manner in which the courts including consumer courts have dealt with issue of medical negligence has been analysed and explained at length. The courts have analyzed medical cases in accordance with the standards set by the medical experts. However, statutory law does not define the qualifications of medical experts and mandatory guidelines in order to accept their testimony as admissible in establishing negligence. Since an expert witness testimony is an absolute requirement during medical malpractice claims, the court will play a critical and indispensable role in analyzing or deciding the action of the health care providers. In this chapter we shall come across with what the practitioners do, how they do and where they err in administering treatment.

4.1. ACTS AMOUNTING TO MEDICAL NEGLIGENCE:

4.1.1. Anaesthetist:

Anaesthetist forms an important member of the team–treatment whose role is as significant as a surgeon who performs the surgical operation. No major or medicinal treatment can be undertaken without administration of proper anesthesia. Thus, the failure to check up anesthesia during pre-operative stage cost the life of the subject of the treatment\(^1\), the failure of anesthetist to keep the constant watch over

\(^1\) Dr. Laxman Prakash V. State, 2001, ACJ 1204 (Mad.HC).
cardiac changes\textsuperscript{2} and the failure to observe pulse rate or failure to prepare patient for general anesthesia attracts the liability of anesthetist\textsuperscript{3}.

\textbf{4.1.1.1. Giving anesthesia without defibrillator} (An instrument by which normal rhythm is restored in ventricular or atrial defibrillation by the application of a high voltage electric current): In \textit{Arunna Ben D. Kothari V. Navdeep Clinics and Others}\textsuperscript{4}, an young man sustained injury to his right arm in road accident for which surgery was performed and plates and screws were also inserted. Despite of this, he continued to have pain and deformity at operation site for which he was operated upon by another doctor and advised for revision of surgery. When the operation was half way he developed cardiac respiratory arrest and died\textsuperscript{5}. As a result, the complainant claims that the amount of drugs used for anesthesia were more than maximum and death was the direct result of such use of drugs and proper monitoring of the patient was not done. The opponents defending themselves argued that they were not negligent, they took all possible care, and they are qualified and experienced in the subject. It is very important to note at this point that complications and death of patient occurred within the four walls of the operation theatre where patient’s relatives had no access to whatsoever. It is the responsibility of the doctor to explain what happened in the theatre. Neither anesthetist nor surgeon nor cardiologist was able to explain how the death of the patient happened.

The State Commission held that anesthetist was negligent for acts of omission and commission. In his pre-operative assessment noted BP of 150/100 mm associated with ST-T wave changes in ECG (Electro Cardiogram which means indicating various phrases of heart’s action). This was not a life saving surgery, he should have advised proper investigation and treatment prior to declaring patient first for surgery. The anesthetist was held negligent for not acting on the pre-anaesthetic report, not ensuring presence of defibrillator and failed to prove that the patient did not have “hypoxia”\textsuperscript{6}( low oxygen content due to deficiency of haemoglobin in the blood).

\textsuperscript{2} V.K. Kini V. K. Vasudeva Pai and others, 2001 ACJ 2141.
\textsuperscript{3} Bhanupal V. Dr. Praksh Padode 200(2) CPJ 384.
\textsuperscript{4} III (1996) CPJ 605.
\textsuperscript{5} Ibid.
\textsuperscript{6} Ignorance about the recent advances in Anesthesia is negligence, see Sofelting R.K., Co-existing disease and anaesthesia, 3\textsuperscript{rd} edition 1993, Livingstone publication, Ch.5 page 79.
4.1.1.2. Consent before administering anesthesia: One of the professional obligations is to obtain the consent of the patient before proceeding to give anesthesia drugs and act upon the express advice of the subject of the treatment. A well established principle of law states that giving anesthesia without or against the express words or direction of the subject results in negligence. In *Allan V. Mount Sinai Hospital* where the defendant hospital admitted the plaintiff for a dilation and curettage operation (widening blood vessel to increase blood flow to an organ or tissue or widening the pupil or eye to admit more light to retina; curettage = treatment by the use of a curette(spoon shaped instrument for the removal of unhealthy tissues by scraping). The plaintiff requests the anesthetist not to administer anesthesia on the left arm but the anesthetist simply responds that he would take care. The defendant anesthetist administers injection along with other required anesthetic chemicals into the plaintiff’s left arm. However, a short time later he notices that the needle slips out instead of entering vein. It was observed that administration of anesthesia without the patient’s consent constitutes a ‘battery’. The defendant doctor might have acted with reasonable care, sometimes, the chances of needle moving into other area instead of entering vein might be possible in spite of no fault with anaesthetist but the point was as a reasonable doctor he should have obtained the informed consent.

4.1.1.3. Anesthetist who participates in the process of the treatment is as liable as surgeon:

In *Mumbai Grahak Panchayat V. Dr.(Mrs)Rashmi and Others* the charge against the third defendant –anaesthetist that the final cause of death was shock due to anaesthesia based upon the histopathological report and chemical report. The State Commission held that the anesthetist cannot be held liable for the payment of compensation even if it is proved that he acted negligently in his duty since his service is hired by the hospital authority for consideration and there is no ‘privity of contract’ or ‘physician-patient relationship’ between the anesthetist and the deceased.

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7 (1990) 109 DLR 3(d) 634 (Ont.H.C).
8 Ibid.
9 In *N. Ravi V. Dr. (Mrs) Usharani and Others* it was observed that the administration of general anesthesia by the surgeon was the responsible for complication of operation. The surgeon needs of professional skill to administer anesthesia without the presence of anesthetist. The surgeon has showed to total ignorance as a medical practitioner. However, as a medical practitioner can administer anesthesia in emergent situation where anesthetist was not able to summon.
10 1998 (1)CPJ 49 (NC).
party. On appeal, the National Commission rejected the findings of the state commission and found that even if the services of the anesthetist were hired by the hospital authority, then also the deceased happened to be beneficiary of the medical services of the anesthetist. The privity of contract is not needed, once the anesthetist participates in the process of the medical treatment to the beneficiary is as much liable as the main surgeon if his negligence is proved\textsuperscript{11}.

### 4.1.2. Alternate System of Medicine:

There are various branches of medicines such as Ayurvedic, Unani and Siddha, Allopathic, Homeopathic, Physiotherapy etc., each branch of medical practitioner is governed by separate legislative enactment under which he or she should possess the required qualification. A person who has enrolled as a practitioner under the Ayurvedic Council Act shall practice Ayurvedic system only, if he practices any other area of medicine, it will be deemed to be negligent act. The medical law allows a person to be competent, qualified and authorized to practice a particular system of medicine. Only upon registration under the Council concerned, a person gets right to practice. However, whether a person is registered as medical practitioner with the Ayurvedic Medical Council or Homeopathic Medical Council or India Medical Council, he is expected to exercise a reasonable degree of skill and care in the discharge of his duties towards his patients. A prudent and reasonable skillful doctor limits his practice to the specific area of medicine about which he has possessed required qualifications.

#### 4.1.2.1. Ayurvedic practitioner prescribes allopathic and Ayurvedic drugs:

In \textit{Dr.S.N. Namboodri V. Haneefa}\textsuperscript{12} case in which Dr. Namboodri, an Ayurvedic practitioner prescribed some allopathic and Ayurvedic drugs to a child who was suffering from jaundice, but no sign of improvement, as a result child was shifted to medical college, where the doctor declared child death on the way. Dr. Namboodri had qualification in Ayurvedic system of medicine, as such he was

\textsuperscript{11} Smt. Bhanupal V. Dr. Praksh Padode and others 2000(II) CPJ 384, the patient was admitted for operation of Hernia, on the very day itself the doctor performed operation, but the patient died due to heavy does of anesthesia.

\textsuperscript{12} 1998(1) CPJ 389, Ker. SCDRC
competent to practice ayurvedic and not allopathic, Dr. Namboodri was held negligence\textsuperscript{13}.

4.1.2.2. Unqualified practitioner injects allopathic medicines:

In \textit{Kanaivalal Ramalal Trivedi V. Sathyanarayana & Another}\textsuperscript{14} the opponent No.1 gives injection and some medicines for severe molar toothache, instead of relief, it results in pain and tumor at the site of the injection. Again over again, administers injection and assures the patient not to worry and have confidence in him. When there was no sign of improvement, then, he discloses the fact that he is not dentist and cannot do anything about dental disease. The patient is attacked by infection and gangrene. Steroid has been administered indiscriminately without any relation to the disease by unqualified person. Here use of allopathic medicines, injections and tablets by itself is sufficient to establish negligence on the part of the opponent No.1.

4.1.2.3. Ayurvedic practitioner conducts MTP:

The doctors who are registered under the Mysore Ayurvedic and Unani Practitioner Registration and Medical Practitioner Act 1961, administer general medicine to patients although they have not possessed any specialization in surgical operations. On fateful day the respondent wife consults the petitioners for termination of pregnancy. After the operation she dies due to cardio respiratory failure. The question whether the petitioners could resort to surgical procedure in which they are not specialized. It is held by the State Commission, that the petitioners-doctors are not qualified to practice modern scientific medicines beyond the territory of Karnataka\textsuperscript{15}.

4.1.3. Cardiologist:

The charge of negligence against a cardiologist is very serious one in respect of which the law requires the strict proof of standard of care. Mere allegation that he underwent heart surgery in the hospital, some surgical gauge was left in the site of operation on count of which he sustained severe pain and got removed in another

\textsuperscript{13} In Kharaiti V. Kewal Krishnan 1998 (1) CPJ 181 Punjab SCDRC, an Ayurvedic practitioner administered I.V. drug which led to imputation of three fingers of the patient. In Dr. Ram Sushil Tripathi & Another V Ghanshayam Khatik 2006(II) CPJ 218 (NC), a person who has not possessed MBBS degree persomed operations in a cruel manner leading to death of the complainant’s wife and child.

\textsuperscript{14} 1997(1) CPJ 332.

\textsuperscript{15} Dr. K Mahabala Bhat V. K Krshna 2002(II) CPJ 127 (NC).
hospital would not be sufficient to sue the cardiologist. There should be cogent medical evidence in support of the allegation that the cardiologist did not render during or post operative care and treatment, mere pus formation in the stitches after the bypass surgery operation or side effect of the operation or the difference of opinion over diagnosis between two or more group of cardiologists cannot impute negligence.

4.1.3.1. Damage due to lack of postoperative care:

The patient had undergone quadruple vessel coronary Artery Bypass (CABG =surgery which supplies blood to the heart due to blockage of flow of blood to the heart) which is known as “supra major heart surgery”. After about one month of the operation the patient approaches the hospital for purulent discharge from the site of the operation. The pus culture was done after one month of detection of infection when two types of antibiotics did not work. As the patient developed infection, he was operated at two different stages for removal of three sternal wires. The oozing of sinus continued for next two years from the site of the operation and the postoperative period came to be extended as the patient developed infection after his admission to the hospital. It was found that the hospital was negligent in removing the sternal wires in two different stages and the doctor was negligent in his casual approach of prescribing antibiotics and for failure to make early diagnosis and prompt treatment of post operative sternal infection. There was failure on the part of the hospital and the doctor to carry out pus culture, even minimum task of pus culture was not carried out by the hospital. This was the gross negligence on the part of the opponent parties.

16 Chanchal Oswal V. Santokha Durlabhiji Memorial Hospital 1(1995) CPJ 42 (Raj), the State Commission did not hold the doctor of the hospital negligent, because, there was no iota of evidence to prove that during the first operation a surgical gauze was left in the chest which was removed by second operation.
17 See s. Bhattacharya V. B.S. Hegde 1993 (3) CPR 414.
18 T. Rama Rao V. Vijay Hospital & another 1997(3) CPJ 59.
19 V. Chandra Shekar V. Malar hospital Limited 2001910 CPJ 137; 2001 (1) CPR 628.
21 B. Sekhar Hegde V. Dr. Sudharshan Bhattacharya 1992 (II) CPJ 449, the patient was operated for coronary artery bypass graft surgery, although the patient paid Rs. 40,000, for post operative care, the surgeon did not take care of the patient after operation. The State Commission awarded compensation of Rs. 2,00,000 against the doctor whose indifferent attitude to the patient during post-operative complicacies cause serious mental and physical distress to the patient.
4.1.3.2. Loss of voice due to paralysis of vocal cord:

In *C. Anjani Kumar V. Madras Medical Mission*\(^{22}\) the patient who had congenital heart disease admitted to the hospital for treatment. After undergoing operation the patient suffered voice damage due to injury caused to the nerve during the operation. The State Commission dismissed the complaint on the ground that there was no sufficient proof that nerve was damaged during the operation and under the medical literature, occurring the vocal cord paralysis was possible. Just because the patient suffered damage cannot be attributed to the doctor\(^{23}\).

4.1.3.3. Sufferings of abdominal discomfort and urine output:

In a recent case\(^{24}\) the complainant has been suffering from Diabetes and Hypertension for the last 20 years with the regular treatment. He developed pain in both the lower limbs for which the opposite party performed angiography. The complainant position worsened and urine output stopped completely. Yet, the doctor assured him there is no cause to worry and everything will be alright. Thereafter, the complainant suffered respiratory arrest followed by cardiac arrest and massive pulmonary oedema. He did not get any relief even after undergoing haemodialysis. Again he was shifted to ICU for ventilator support and haemodialysis and kept him there for one week; the condition became still more worse. It was found that the doctor did not listen to the advice of very eminent doctors in the Hospital, rather conducted procedure as he liked by carrying out the angiography, using a contrast dye which ought not to have been used. There is not only deficiency in service by the opposite party but “gross and criminal negligence” on his part. Assuring the patient that there is nothing to worry and can be taken home knowing angiography test facility in not available in the hospital is another act of “gross negligence”\(^{25}\).

\(^{22}\) 1998 (2) CPR 533; 1998 (2) CPR 308(Chennai); 1998 CTJ 504 (CP) (SCDRC).

\(^{23}\) In Commander Sohan Singh sandhu V. Dr. H.K. Balli (1999) CFJ 932 (Chandigarh), where the State Commission refused to hold the doctor liable for post implantation infection based on the expert witness who opined that post implantation infection was a well known risk of pace maker implantation.

\(^{24}\) M.R. Shanthappa & Others V. Dr. Naveenchandra Raj & Another (2006)II CPJ 316, (Karnataka).

\(^{25}\) Ibid at page 318.
4.1.3.4. Death after undergoing angiogram:

In *Srinivasulu V. Dr. Ramamurthy Binge, Sri. Jayadeva Institute of Cardiology and Others*, the complainant complained that his wife had died a day after she underwent coronary angiogram by the respondent. The Forum found that the respondent had failed to come to the hospital the next day despite repeated request by the patient’s relative after she complained of series problems and was shifted to the intensive care unit. The forum accepted the complaint that there were some problems either with the equipments or procedure while performing the angiogram as the patient was shifted to the ward. The respondent intentionally applied for leave the next day and refused to come to the hospital when the patient’s condition deteriorated as he had anticipated problem. Moreover, he made the patient’s husband and relatives get her discharged from the ICU and take her to his private clinic where he advised them to take her to another hospital situated far way where she died. The forum held that all these acts indicate that respondent wanted to avoid any responsibility for the complications that developed due to faulty angiogram and hence misguided the patient’s relative by advising them to get her discharged from the ICU no doctor would give such an advise when patients are in critical condition and this was against the professional ethics.

4.1.4. Dermatologist:

4.1.4.1. Loss of eye sight due to giving drugs without examining the patient:

In the case of *Devi Rani V. Prakash Rao and Others*, the doctor prescribes medicines by name “Amalar” to the patient who has a mild fever attack on inferring as symptom of malaria. As a result of taking the prescribed drug, the patient body gets swollen and some visible signs of Ammavaru(rashness like chicken pox) in some part of the body. The prescribes another medicine along with a bottle of glycerine, as a result of which the patient complains of swollen body figure, rashes and scratches on the body. The doctor gives treatment to the patient assuming the disease of SJS (Steven Johnson Syndrome which means a form of skin disease wherein skin gets peeled of skin). Consequently, the patient suffers loss of eye sight. Astonishingly, the doctor did not enquire whether the patient was allergic to drugs, nor did he ask the patient or his relative to observe if there was any reaction, report him immediately, he...
did not even examine and instruct the patient to take medicine in the first instance and wait for reaction before taking subsequent drugs\textsuperscript{28}.

4.1.4.2. Medicine prescribed without knowing its side effects:

In \textit{B.K. Ghosh V. Dr. (Prof) P Maulick}\textsuperscript{29}, the complainant who was suffering from rheumatoid arthritis (inflammation of joint) was taken to the opposite party for treatment. The opposite party-doctor after examining her prescribed certain pathological and clinical tests and after reports of such tests were available, he prescribed a medicine called Myocrisin 10 mg. in 0.5ml. Since there had been disorientation of eye-balls of the patient, he advised her to consult some eye specialist. Subsequently the patient contacted O.P. again with acute pain to know the procedure to be followed to combat her rheumatoid arthritis. The O.P. examines her this time and prescribe another medicine "Imuran" without holding any prior investigation or test. Immediately, she had “allopacia” (complete hair loss on her head) and bone marrow suppression as a result of taking this medicine. Since then the patient became completely bed ridden and underwent extreme mental trauma with acute type of physical discomfort. The patient suffered this due to the side effect of the above two medicines which she took as per the advice of the O.P-doctor. It was observed that the O.P. having applied the medicine Imuran to the patient without holding any prior test to ascertain her findings to take such medicine certainly committed an act of gross negligence\textsuperscript{30}.

4.1.4.3. Lack of ICU ventilator facilities:

In \textit{A. Xavier V. Cantonment Polyclinic & others}\textsuperscript{31}, the complainant’s wife who had a slight temperature and body pain due to regular work and strain, received treatment for 3 days as inpatient in the opposite party clinic. Complications developed in passing urine, for which the opposite party performed surgery and removed gall

\textsuperscript{28} Satish Chaturvedi (Dr.) 2006(I) CPJ 271 the deceased who was in critical condition of drug reaction brought to the clinic, after giving treatment sent him home instead of referring him to big hospital. The condition further deteriorated. The doctor without seeing the condition of deceased, advised some medicine. It was held that failure to refer the deceased to specialist especially when condition of deceased was very serious and critical amounts to medical negligence.

\textsuperscript{29} 2005(I) CPJ 737 (West Bengal, SCDR)

\textsuperscript{30} Jayendra Maganlal Pnadiya V. Dr. Lalit P Trividi & Others 1997(1) CPJ 11, a 12 year old boy who had exanthematous fever diagnosed initially as measles diagnosis of measles and bronchopneumonia was found guilty of negligence.

\textsuperscript{31} 2005(I) CPJ 229.
bladder. At midnight one of the complainant’s relative saw the blood oozing from the operated place and the blood had spread up to the patient’s head and her clothe was soaked in her own blood and serious condition of the patient, the opposition party along with some other doctors operated for the second time without any consent from the complainant. The bleeding could not be traced, as a result the patient died. The State Commission held that it was “gross dereliction of duty” and deficiency in service on part of doctor. The opposite party conducted this major without having ICU and ventilator facilities.

4.1.5. Dentist:

There are certain allegations of negligence against the dentist as well on the ground that the dentist has extracted tooth without taking BP and other precautions due to which the patient’s condition deteriorated, the fixing of artificial tooth had led to pain and injury in the mouth or caused damage to the lingual nerve during surgery to remove the wisdom teeth etc., However, the negligence on the part of surgeon in not issuing the warning must be established with the support of the evidence because a responsible body of professional opinion is in favour of not issuing warning the risk of the symptoms. About 2 years ago a Dental Surgeon had fixed a debenture of two front teeth in the upper jaw of the patient. One of them broke which was replaced by a new artificial tooth. But the new tooth differs from the old one. The patient got another tooth made by another dentist to whom this was not disclosed. The Commission did not find any negligence and dismissed the complaint.

The normal standard of care applies to dental practitioners and there is no legal significance in treating them as a separate category of doctors. Every dentist owes to his patient the duty of exercising skill and care of the competent practitioner. Where the patient dies due to extracting all teeth in one operation with the doctor administering the anesthetic followed the persistent bleeding, the court has failed to

32 R.S. Cherian & Others V. Fathima Mary 2006(I) CPJ 147. Asthma patient who was allergic to pencillin, the test dose of penicillin administered inspite of objection, the patient died at the hands of the doctor.
33 See 1992 (II) 118 (NC). See also Vijaya Raghavan V. Dr. Dheg 2000(II) CPJ 251 where the patient continued to have pain and had to be eoroughed by another doctor after getting fixed an artificial tooth.
34 Health V,Berkshire Health Authority (1991)8 BMLR 98.
35 1999(II) CPJ 375. In Dr. K.C. Nasa V. Sahib Chand Sharma 2000 (III) CPJ 622 debenture prepared by dentist found to be irritating lower gum and grinding it became loose so that would come even while talking. Patient had to get another denture prepared by another dentist. The commission rejected the claim.
36 Gordon V. Goldbeirg 1920(2) Lancet 964.
attribute negligence on the ground that mere performance of a mass extraction is not negligence\textsuperscript{37}.

4.1.6. Hospital Administration:

Hospital like any medical practitioner owes certain duties to the patient such as duty to provide doctors of sufficient skill and experience, adequate infrastructure\textsuperscript{38} including latest equipment for treatment, adequate provision to supervise the patient treatment and so on. Breach of this duty constitutes medical negligence on the part of hospital management. Hospital authority is vicariously liable for the error of treatment or neglect act of its staff in the course of the employment\textsuperscript{39} or failure to obtain informed consent\textsuperscript{40} or failure to issue required medical certificates\textsuperscript{41} and even whatever happens in hospital\textsuperscript{42}

4.1.6.1. Tubectomy operation without resuscitative facilities:

In \textit{Rajmal v. State of Rajasthan and another}\textsuperscript{43} the petitioner’s wife while being operated for laparoscopic tubectomy at Primary Health Centre suffers neurogenic shock resulting in cardiac arrest. The reason for death is unknown. The Court directs the State Government for conducting thorough inquiry into the matter and the circumstances resulting in the death of the petitioner’s wife to fix the responsibility for negligence if any. According to the recommendation of the Enquiry committee

\textsuperscript{37} Warren v. White Mc Kinnon J. (1935)1.
\textsuperscript{38} Ranjit Kumar Das V. Medical Officer, ESI Hospital and Others 1997(III) the court condemned the callous and inhuman attitude of the hospital and administration which refusal to admit the patient on account of shortage of bed.
\textsuperscript{39} Bhavini Dutt V. Nehru Hospital of Post Graduate Institute of Medical Education and Research, Chandigarh 1998 (III) CPR 1, where the patient who had only stomach pain at the time of admission got nerve damaged which is incurable due to wrong method of treatment, the hospital authority has been held liable. In Leel Bai V. Sebastian 2002(II) CPJ 363 (DB), it was observed that non-providing of doctor or anaethetist or assistant is essentially lapse on part of hospital authorities and hospital is negligent.
\textsuperscript{40} T.T. Thomas V. Smt. Elisa and Others AIR 1987 52 (Ker), the court held that there was not need on the part of the doctor to insist on consent from his patient for the course to be adopted by him. The consent from the patient is evidently not the safety of the patient but for the protection of the physician or the surgeon.
\textsuperscript{41} Jangeer Singh v, kochar Hospital and Research Centre Pvt. Ltd, 2005(II) CPJ 223, the State Commission observed that the patient cannot be deprived from getting certificate the hospital for treatment given, failure to issue required certificate amounts to deficiency in service.
\textsuperscript{42} Meenakhi Mission Hospital and research Centre V. Samuraj and Another 2005(I) CPJ 33. (NC), wherein the two anaesthetists administered anaesthesia at different hours to perform surgery of cleft lip on the patient and after some she was declared dead. What two anaesthetists were doing inside O.T. not explained and name of anaesthetists also not mentioned in operation ntes/progress record. The Commission held that Hospital was accountable for whatever happens in hospital.
\textsuperscript{43} 1996 ACJ 1166.
the doctors are competent and no willful negligence on the part of the doctor in conducting operation but death occurred due to non-availability of adequate resuscitative facilities. The court observed that it was the responsibility of the State government to have taken adequate care and precaution that all equipments were made available to the concerned doctor who had conducted the operation of the petitioner’s wife. Under the principle of vicarious liability and the doctrine of res ipsa loquitur, the State is responsible for the acts of its employee\textsuperscript{44}.

4.1.6.2. Damage to brain resulting in death due to long time taken in putting the patient on heart and lung machine:

In \textit{S.C. Mathur & Others V. All India Institute of Medical sciences & Others}\textsuperscript{45}, the opposite party took 30 minutes to put the patient on heart and lung machine which ought to have been done within 3 or 4 minutes, since long time taken the blood supply to brain stopped resulting in death the due dead brain. The State Commission holds OP-AIIMS who runs hospitals for the treatment of patients alone guilty for limited medical negligence that the deceased should have been put to heart and lung device within four minutes whereas the members of the team due to being busy somewhere else in the emergency took more time and as a result, the deceased had suffered damage to brain resulting in her death.

4.1.6.3. Doctor leaves the hospital inspite of the fact that the patient suffers from high grade fever:

In \textit{Sharada Hospital & Another V. Shankar Lal Gupta & Others}\textsuperscript{46}, the deceased who was got admitted by on duty doctor in the opposite hospital at that time deceased was suffering high fever for which drip was given by the doctor who after that left the hospital. It was alleged that the doctor did not turn up to the hospital till the next day when the deceased had died in the morning. In the light of facts and circumstances, it was viewed that the doctor was admitted the deceased in the hospital has not taken due and reasonable care and has also not followed the medical standards in treating the deceased and while treating deceased after having been admitted in that

\textsuperscript{44} However in \textit{S.R. Shiva Prakash & Others V. Wockhard Hospital Limited & Others} 2006(II) CPJ 123 (NC), the National commission refused to apply the principle of res ipsa loquitur.

\textsuperscript{45} 2006(III) CPJ 414 (Delhi).

\textsuperscript{46} 2006(I) CPJ 300.
hospital, he has not performed his duty with proper care and skill. The manner in which he has treated deceased clearly shows that he was guilty of committing medical negligence as he has failed to exercise due diligence and reasonable degree of care in administering the treatment to deceased\textsuperscript{47}.

\textbf{4.1.6.4. Hospital not authorized to conduct MTP:}

One patient who was a doctor by profession consulted the opposite party-hospital concerning her pregnancy and its termination. She knew that a reputed gynecologist who was working in O.P. hospital. However, a nurse who was a friend of the patient gave two injections without any prescription after which the famous gynecologist conducted MTP. As the patient became so serious while being in ICU she was shifted to another where the patient breathed last. Here the very admission of the patient for the purpose of MTP operation itself was illegal and contrary to law since it was not authorized by the government to conduct MTP. The way in which the patient was treated clearly shows the hospital intends to make money by doing such prohibited operations\textsuperscript{48}.

\textbf{4.1.6.5. Patient intubated pulls out tube and suffers subsequently cardiac arrest:}

In \textit{Bhajanlal Gupta & Another V. Mool Chand Kharati Ram Hospital & Others}\textsuperscript{49}, the complainant’s son was admitted in OP-hospital for treatment of his back lower and upper limbs. He had been put on oxygen and being monitored in ICCU, yet there were two very serious lapses, one of the nurses not noticing that the oxygen tube had come out and the other of delay of about two hours in intubating the patient. There was also a further lapse on the part of the nurse not being vigilant to ensure that the oxygen tube remained in place and if at all it is pulled out by the patient it was restored immediately. The court held that there was negligence on the part of doctors in treating the deceased patient because something which is required to be done was not done. It is also a settled principle which states that a specialist is required to know the latest techniques for management of the patient and if he is ignorant about it, then he could be considered to be negligent in following his profession\textsuperscript{50}.

\textsuperscript{47} Ibid page 306 at Para 27.
\textsuperscript{48} Navya S. and Others V. Manipal Northside Hospital & Others 2006(II) CPJ 48.
\textsuperscript{49} 2001(I) CPJ 31 (NC).
\textsuperscript{50} Ibid Para 14.
4.1.6.6. New born child is taken way by a cat and leaves in the bathroom:

In an interesting case of *Jasbir Kaur and another V. State of Punjab and Others*[^51^], the petitioner gave birth to a child after subjected to sonography and caesaren operation. No arrangements are made for any cradle for separately keeping the children born through caesaren operation. The mother and the child were slept apart fearing of infection. After sometime the child went missing from her side and ultimately found in the bathroom with profusely bleeding condition, with one eye totally gouged out along with the eyeball. The defendant defends that the injury was caused due to the negligence and carelessness of the attendants/relatives of the child and not of the employees of the hospital. The court held that the hospital staff was negligent as the staff members of the hospital were under a moral and legal obligation to provide security to the patients admitted therein.

4.1.6.7. Cancer hospital conducts a radical hysterectomy operation for cervical cancer without any test:

The deceased-patient who was suffering from cancer of cervix treated with radiation therapy and thereafter the complainant was advised to consult the respondent upon examining the patient, the respondent-doctor advised immediate operation, after the operation, however, developed symptom indicating that cancer was resurfacing and ultrasound and CT scan were carried at the hospital which confirmed the spread of the disease to the other parts of the body. The Fine Needle Aspiration Cytology (FNAC) and bone scan were carried out at the hospital showed presence of malignancy but the respondent refused to acknowledge and to give treatment for the same. The complainant alleges that three months valuable time was lost due to persistent refusal of the respondent to accept the presence of the malignancy and to give the cancer treatment to the patient. The court observed “*after having radiotherapy treatment, the deceased was totally cured. But for second opinion, she approached the hospital. The hospital without taking any investigation of cancer except CT scan, conducted cancer operation without any test and investigation which was not at all required as per CT scan report and another medical report, which showed negative for malignancy*”. The court stated that

[^51^]: 2005 ACJ 1048 (Punjab & Haryana High court (DB).
hospital even did not carry out the operation properly, which caused the spread of the cancer\textsuperscript{52}.

4.1.7. Obstetrician and gynaecologist:

Obstetrician and gynaecologist are specialists who deal with delivery of child and female reproductive and sexual organs. Any misrepresentation about their qualifications\textsuperscript{53} or undertaking delivery task by any nurse or midwife who has not possessed required qualification constitutes negligence\textsuperscript{54}.

4.1.7.1. Unable to pass urine after surgery:

In the case of Dr. M. Ramarao V. Padmvathi\textsuperscript{55}, the petitioner approaches the opposite party for pain in the lower abdomen. She was passing urine normally but after undergoing surgery for the removal of cyst finds difficulty in passing urine normally, as such, catheter has also been inserted followed by operation. Even then the petitioner is unable to pass urine, therefore a question arises: whether the incapacity of the petitioner to pass urine in a normal way is due to surgery performed by the opposite party. Interestingly, the opposite party does not file the operative notes or the test conducted before operation, the court therefore, draws inference that in the absence of the reasonable explanation from the opposite party, there is negligence in conducting the surgery which alone is responsible for the situation in which the patient is placed.

4.1.7.2. Needle left in the abdomen following caesarean section:

In Dr. (Mrs) Satya Arthi V. Smt. Shashi Sharma\textsuperscript{56}, the proverbial “needle of suspicion” turns out to be a foreign body which is ultimately removed from the


\textsuperscript{53} In Dr. Louie and Others V. Smt. Kannolil Pathumma and another 1993(1) CPR 422, name exhibited by the hospital mentioned M.D.(Gyn) against the respondent name creating an impression and misleading the patients that the respondent possessed P.G. degree in gynecology. The degree M.D. was obtained from Feinberg, Germany which as per the rules of M.C.Lis equal to MBBS in India. The respondent-doctor neither acquired any degree nor diploma in that discipline. The respondent was made liable to misrepresentation.

\textsuperscript{54} In R. Lalitha V. M. Jeeava 1992(2) CPR 409, a nurse undertakes a complicated case of delivery beyond her competence, the child dies on account of rupture of uterus and delayed labor. Thus acted rashly, recklessly and with culpable negligence.

\textsuperscript{55} 2002(1) CPJ 380.

\textsuperscript{56} 2003(I) CPJ 612 (DB) HC (J&K).
system of the respondent-patient. The petitioner who had undergone a caesarean operation complained of pain and irritation in the lower abdominal region. The X-ray, Ultrasound and CT scanning reveal the presence of foreign body lodged in her system. However, the respondent acted on the specific instructions of a consultant whom should be held responsible for the case. The court opined that the foreign body was left in the lower abdominal system of the petitioner when the first operation was performed by the respondent obstetrician.

4.1.7.3. Emergency caesarean conducted without anaesthetist:

In the case of Dr. Radhakrishna Murthy & Another V. P. Elishamma Babu, the complainant’s wife admitted in the OP-doctor for the third delivery after having two normal deliveries. Since the baby in transverse tie position, some medicines were prescribed to bring the baby in the normal position. Although the position of fetus slightly improved became complication for normal delivery. Ultimately baby was delivered by caesarean section but the mother died. The State Commission pointed out two observations: a) there was delay in performing the surgery and b) performing the surgery without the presence of an anaesthetist constitutes negligence. The opposite party did not show enough diligence to contact an anaesthetist in time. If they had taken the precaution to do so there would not have been any problem when the presence of anaesthetist was required. There was negligence in not contacting anaesthetist. However, the court did not hold the conduct of the opposite parties was responsible for the death of the patient.

57 See Harvider Kaur V. Dr. Sushma Chawla and another 2001(I) CPJ 143, Aleyamma Varghese Vs. Dewann Bahadur Dr. V. Varghese & others 1997(I) CPR 310 and Mrs. Meena Vyas V. City Nursing Home & Hospital & another, 2001(I) CPJ 172 where a sponge was left in abdomen while performing caesarean section which was not picked up even though the patient complained of pain. In Sau Madhuri V. Dr. Rajendra & others, 1996(III) CPJ 75 (NC), the opposite parties performed caesarian section of the complainant for the delivery of the child after giving general anaesthesia to her but left a pair of scissors, known as “Artery Forceps” in the abdomen which amounted to negligence in the performance of operation.

58 2002(III) CPJ 193.

59 In Townsend V. Worcester and district Health Authority 1994 (230 BMLR 31 (QBD) the court held that the obstetrician negligent for using untoward force to deliver the baby, as no competent obstetrician would have used that amount of force in the circumstances. In Katra Sathyanarayan V. Laxmi Nursing Home 2003(II) CPJ 262, a woman with previous history of caesarean section died after transfusing A+ instead of A negative blood. In Mumbai Grahak Panchayat V. (Mrs.) Rashmi B. Fadnavis 1996(I) CPR 137 (NC), the patient approached the gynecologist for excess bleeding and white discharge during her monthly period. She was subjected to various tests including X-rays, ECG, blood test etc., and thereafter she was operated for “uterine fibromyometosis”. The patient collapsed on the operation table. It is held by the National Commission that the act of carrying out the operation of a patient with rare blood group and morbid obesity for “uterine fibromyometosis” without making
4.1.7.4. Death due to inordinate delay in carrying out caesarean operation:

In *K. Murugesan & Another v. Dr. S. Sarala Devi*\(^{60}\), a woman with labour pain was advised by the doctor for caesarean operation but delayed operation by 4-5 hours on the pretext of non availability of anesthetist who happens to the husband of the doctor. The patient could have been directed to approach the better equipped hospital where the immediate operation would have been performed. The husband did not turn up to the hospital even after waiting 4-5 hours anyhow the doctor performed caesarean operation with the help of another anesthetist. The consequence of delay in performing operation was death of the child in the womb and the mother on the way to the referred institute. The State Commission held the doctor negligent for causing delay in performance of the operation\(^{61}\).

4.1.8. Ophthalmologist\(^{62}\):

4.1.8.1. History of diabetes not taken in performance of cataract operation:

In *Christian Medical Centre V. A. Shajahan*\(^{63}\), the short question that arises is whether before operating the patient for cataract of the left eye, he should be asked whether he was suffering from diabetes. The first operation was successful and the vision to the left eye was much better than the right eye, yet after sometimes the patient suffered loss of vision. The complainant-patient was subjected to a second surgery to remove his left eye. The doctor did not take proper precautions to ascertain whether the complainant was suffering from diabetes before conducting the cataract operation on his left eye. Admittedly, the patient was diabetic and the precautions that had to be taken in the case of diabetics while operating for cataract were not taken. The patient was not asked whether he was a diabetic before he was set for operation, this oversight constitute negligence and deficiency in service. The doctor

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\(^{60}\) 1999(I) CPJ 542.
\(^{61}\) Dr. Janaki s. Kuar V. Mrs. Sarafunnisa 1999(30 CPR 472 (Ker); it was held that the doctor was negligent in performing caesarean operation without obtaining the informed consent. In Hemanth Bahadur singh V. Dr. (Mrs.) Maya Pathak 2000(1) CPR 191 (Bhopal) there was delay of 5 hours for availing the service of an anaesthetist in performing surgery for which the commission held the doctor negligent.
\(^{62}\) The word ophthalmology is derived from Greek 'ophthalmos' which means 'eye', and 'logos' which means science or study. The ophthalmologist should be confused with other practitioners i.e.,optometrist and optician who also deal with the eye but they are not doctors as they do not perform surgery or administration drugs.
\(^{63}\) 1998(III) CPJ 242.
should make attempt to elicit information about the health and general condition of the patient.

4.1.8.2. Post operation pain following intraocular lens implant:

Dr. A Saibaba goud V. Mrs. L Thomas, the opposite party implants I.O.(intra Ocular) lens by performing cataract operation. The OP ignores when the complainant complains of pain as post operative pain. Due to pain the complainant meets the OP again when he prescribes medicines without admitting and conducting necessary test for the complication that set in. The complainant is relieved of the pain but lost the vision and the I.O. lenses implanted by the OP were explanted. It is held by the State Commission that the OP neglected his duty to admit and diagnose the problem of the complainant as endophthalmitis instead, the OP prescribed medicines mechanically without application of mind. This failure of the OP to diagnose the problems correctly as endophthalmitis which the complication of the surgery performed by him amounts to negligence.

4.1.8.3. Operation for cataract without B scan report:

The evidence adduced before the court reveals that B Scan report is a must to find out the condition of the posterior segment of the eye. The complainant is advised to get it done but the OP performs operation on the right eye of the complainant for removal of cataract without obtaining such report. Consequently, the complainant lost the vision. B scan was done after the operation and the report disclosed retinal detachment. Had this been done before the operation the complainant would have had an opportunity of second or better medical opinion as to advisability of such operation. By operating on the right eye of the complainant without B Scan report the opposite party denied this opportunity to the complainant and committed medical negligence.

64 Dr. S.B. Jain v. Munni Devi (1998)2 CPJ239 where the patient loses his vision due to complication in conducting operations is held as negligence.
65 2002(I) CPJ 199.
66 In Rogers V. Whitaker 109 ALR 625 (HC of Australia) where the court held Ophthalmic surgeon negligent for failure to warn of the risk of damage to left eye as a result of operation on the right eye. In Ram Babu V. Dr. Anjani Kishore 1998(2) CPR 224; 1998(2) CPR 684 (Bihar), the doctor fails to explain as to how the patient’s eye-sight was damage. The doctor is held negligence by applying the maxim res ipsa loquitur.
4.1.9. Orthopaedician: 68

The orthopaedician often come across with the allegation of negligence in the way of his medical treatment e.g., delay in performing the operation, failure to avoid bleeding from the operation site 69, improper fixation of fracture of the arm or any other part of the body resulting in disability due to shortening of the limb 70, operation was defective due to want of proper reduction of the fracture and skin gangrene developed which ultimately resulted in amputation of the limb 71 etc.,

4.1.9.1. Lack of post operative care leads to gangrene in operation for total hip replacement:

The complainant had pain in her left hip for which the OP conducted two-stage operations for total hip replacement. The post operative day there was no sensation in the left foot besides suffering from continuous pain. A few days later operated leg was found to be shorter than another leg and there was no improvement in blood circulation to the toes and sensation to the leg. The angiogram confirmed that there was a block in the blood vessel and thrombosis appears due to clotting of blood in the blood vessel. The left leg was affected by gangrene due to thrombosis which could not have occurred overnight, OP did not take precautions to avoid incidence of thrombosis while undertaking such a major surgery. Under the medical literature, the incidence of thrombosis would be possible following major hip surgery. The gangrene became incurable leaving no option to the surgeon other then to amputate patient’s leg from above her knee and responsibility for it lay on the OP who had failed to take right step which saved the life of the patient 72.

4.1.9.2. Damage to lower portion of body due to wrong operation:

In Rajendra Kumar Goswami V. Dr. Arun Madharia 73, the complainant’s son who had pain at the rear portion of his waist was advised by the OP after examining

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68 The orthopedist is so called from the Greek roots ‘orthos’ which means straight or correct and ‘paidos’ means child.
69 Aravind Kumar Himmatlal Shah V. Bombay Hopsital Trust 1998(I) CPR 556.
70 Bahvchanbhai Manjibhai Lakhani v. Dr. Bhupendra D. Sagar 1996(2) CLT 323.
71 Gopinathan V. Eskaycee Medical foundation Private Limited 1994(I) CPJ 147 (NCDRC)
72 Ganta Mohan Laxmi V. Dr. C.V. Ratnam & another, II(2002) CPJ 144. In S.A. Qureshi V. Padode Memorial Hospital and Research Centre, 2000(II) CPJ 463, the complainant suffered permanent disability of his leg and cannot walk without the help of crutches as a result of knee joint operation. It was held the OP had committed negligence.
73 2006(I) CPJ 337.
the C.T. scan report that there was growth in the spinal cord and only the option is to operate the same. After the operation the condition of the patient did not improve, it had rather deteriorated. The OP was held negligent on the grounds that the operation was performed without the help of neuro-surgeon and the OP has failed explain why he did not involve a neuro-surgeon in the operation except stating that he, as an orthopedic surgeon was competent to carry out such operation74.

4.1.9.3. Permanent disability of shortening of leg on account of improper treatment.

In K.K. Radha V. Dr. G.U. Sekhar & another75, the complainant was admitted to the hospital for treatment of a fracture sustained on the lower part of her left leg above the ankle. The OP operated on her left leg by inserting plaster. When the plaster was removed it was found that an abscess had developed at the site of operation. By the diagnostic test it was noticed that some foreign objects were left in the leg for which the patient was again subjected to operation to remove such foreign objects. However, the patient could not walk without the help of crutch. The State Commission held the doctor negligent for two reasons: the doctor did not use compression plate after getting it purchased, instead the doctor used wires and screws which the experts viewed deviation from the standard treatment for fracture and the standard of care and skill expected of a doctor was grossly below the average competent expert of the same field76.

4.1.10. Pediatrician77:

4.1.10.1. Child legs burned during operation:

In the case of P.M. Ashwin and Others V. Manipal Hospital, Bangalore78 a three year old child was operated by a paediatric surgeon for right inginal hernia, a

74 In Prasanth s. dhanaka V. Nizam’s Institute of Meidcal Sceinces and Others, 1999(I) CIPJ 43 (NC) wherein the complainant who was admitted for treatment of benign tumour and after undergoing surgery for excision biopsy became paraplegic. Excision surgery was performed without complete involvement of neuro-surgeon and the same has been held to be serious lapse on part of the opposite parties. 75 19994 (III) CPJ 376. 76 P.P. Ismail Vs K.K. Radha 1998(I) CPJ 16 (NC) the National commission upheld the order of the state commission. 77 The word ‘paediatrician is a combination of Greek ‘paidos’ which means child, ‘iatrcia’ means healing and ‘ician’ means expert. Etymologically, thus paediatrics means the medical healing of a child. 78 1997(I) CPJ 238; 19997 (I) CPR 393.
nurse who was on duty kept an extremely hot water bag under the child leg, both his legs got burnt resulting in permanent disability. The court applying the doctrine of Res Ipsa Loquitur held that the paediatric surgeon and anaesthetist did not exercise reasonable care in discharge of their duties and as such committed negligence. However, there is no reason why the duty nurse who was responsible for the pathetic condition of the child escaped from the act of negligence and she had not been made even a party to the litigation\textsuperscript{79}.

4.1.10.2. Child suffers permanent disability due to the failure to conduct the SB test regularly:

In \textit{Dr. Rakesh Jain V. R.K. Khare and Others}\textsuperscript{80}, the newly born child is suffering from jaundice. The SB (Serum Billirubin) test which was performed by the opposite parties indicates the Billirubin level of the blood is 13.3 mg/dl while the normal level should be 0.2 to 1.0 mg/dl. The opposite party proceeds with phototherapy treatment. When the level of bilirubin increases to 36.43mg/dl which is said to be beyond control, the opposite party who noticed it as serious then, refers to the case to another hospital where again the serum billirubin test has been conducted when the level is found to be 41.5mg/dl. The process of blood transfusion the brain and other part of the body are damaged as a result of which the child became permanently physically disabled child. Here, the failures to conduct the SB test regularly and reference for the expert treatment at a later stage when the condition of the child became uncontrollable are breach of the duties required from a reasonable man. The OPs are negligent in administering medical treatment to the child.

4.1.10.3. Failure to monitor treatment results in death of child:

In \textit{Pravinbhai K. Soni V. Dr. Rajendra R. Shah}\textsuperscript{81}, the patient who was diagnosed as bronchiolities treated by the compounder. The opposite party examined the patient, advised treatment but left under the care of the compounder. The opposite party did not visit the child, no attempt was made to summon neurologist, thus the

\textsuperscript{79} Deepak gokarna V. Chariman, Mahant Gurmukh Singh Charitable Hospital Trust and Another 2003(I) CPJ 518, in the treatment of child with acute tonsillitis, inj.Cefotaxime supplied by pharmacy instead of Inj. Monocef which was given to child in adult doses. It was held that it was the duty of the resident doctor who should have checked the medicines before it was injected by the staff.

\textsuperscript{80} 2003(1) CPJ 27.

\textsuperscript{81} 1997(III) CPR 224.
child remained in the hospital without proper care and treatment and died. The State commission held that it was not advisable on the part of the opposite party to leave such serious child under the care of the unqualified compounder, lack of procedure of monitoring was deficiency in services of the child the opposite party.

4.1.10.4. Death of 3 months child due to overdose of medicines:

*M.M. Bagati (DR.) V. Nihal Singh*[^82] is a case which demonstrates the plight of a poor person who lost his three months old child as he could not afford the fees of a Nursing Home, could not get a bed at AIIMS and when taken to another government Hospital, it was referred to private hospital and in the process the child breathed his last there. Poor child was treated like rolling stone and a shuttlecock. The cause of death of the child was renal failure due to overdose of medicines prescribed by the opposition party-doctor. By applying the Bolam test to determine medical negligence, the Court observed that the appellant is guilty of negligence as over-medication of antibiotic drug administered to an infant child of three months without considering the age of the child, the nature of medicine, its dose and its duration. As per the medical evidence, the high dose of gentamycin was responsible that resulted in renal failure. The long chain of events and the treatment given to the child who was taken from one hospital to another leads to the inescapable conclusion that it is a case of medical negligence[^83].

4.1.11. Radiologists:

The radiologist is a technical expert who reads and interprets tests done in the hospital. However, the attending doctor should not completely rely upon the report or result of the radiologist because report of the radiologist is only an opinion based on impression recorded by machine. The doctor in view of this should be very cautious in relying upon the test report.

4.1.11.1. Surgery based upon wrong report of ultrasound:

In *Darshan Kaur V. Dr. J.S. Sodhi & Others*[^84], the complainant meets the respondent for an ultra-sound test of her abdomen; the report shows the presence of

[^82]: 2006 (III) CPJ 48.
[^83]: Ibid Para 19.
[^84]: 1999(I) CLT 274.
stone in gall bladder. Acting upon the report, the patient was operated upon where in reality no stones were found. The complainant sued to radiologist and surgeon for negligence. The radiologist argues that he gave only his opinion as indicated the equipment, the decision to operate was taken the surgeon alone who could be held liable for the surgery. The State Commission held that there negligence on the part of the radiologist in reading and interpreting report which was wholly opposite to the true facts. Where radiologist undertakes the service for consideration, he cannot avoid his liability by reason that his report was as per the impression of the machine, it is his obligation to read and interpret the test report properly. If he gives wrong report, he himself will be responsible to the injured.

4.1.11.2. Wrong laboratory report of blood group:

In *R.C. Purohit V. Usha Devada* 86, there are two contradictory reports of blood group pertaining to the complainant- one shows the blood group RH negative and the other shows positive. Since both reports are contradictory in nature by the respondent centre, it has been inferred or concluded that the respondent centre has given its report in a very casual manner without taking due care and caution which should have taken as a reasonable and prudent man and by doing so negligence on the part of the respondent is well established. There may be error in the report regarding blood group of a person without doing any negligence on the part doctor but in the instant case since the same diagnostic centre give another report contradictory to its previous report, there is negligence on the part of the respondent diagnostic centre.

4.1.12. Surgeon:

The standard of skill and knowledge and degree of care of a surgeon is expected of ordinary competent surgeon of his profession. It is not sufficient to exercise the standard of skill and care of the ordinary competent member of the profession. Where the surgeon fails to act as competent and intelligent surgeon, his integrity and professional proficiency can be attacked in terms of negligence.

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85 Ms. Krishna Moni Tiwari V. Dr. Mrs. Gouri Bandyopadhayay &Others 2003(I) CPJ 288, where the ultra sound report wrongly indicates the live single foetus on regular prenatal check up, but the patient delivered twins at another hospital. Both twines died later due to complications. It was observed that because of the faulty report the patient was prevented from taking extra care for the nourishment of babies in the womb.

86 2006(I) CPJ 489.

87 Dharmendra Kumar Mishra v. Dr. Akhauris Sinha 1996(II) CPJ 298.
Although the charge of negligence against a surgeon is of serious nature, since he is possessed of academic excellent, competency and experience in dealing with medical issues, he cannot be described as exceptional human being; man of perfection or man of success, we do find instances where the surgeon has performed below his professional competency.

4.1.12.1. Ten Major surgery for inguinal hernia due to post-operative complications

In the case of *Abdul K.Suleman V. Saptarshi Medical and Research Centre and Another*[^88^], the surgeon operates upon the patient for inguinal hernia. Two days later, the patient experienced sweating, there was a drop in B.P. and suspecting the problem to be of cardiac origin, the same surgeon who examined the patient found the wound of operation had been indurated and prescribed higher antibiotics, however, the patient condition further deteriorated. Another surgeon who was consulted for second opinion diagnosed the problem as peritonitis as such performed major and minor operation more than 10 times due to post-operative complication. It is held by the State Commission that there has been negligence on the part of the surgeon-opposition party for non-diagnosis of peritonitis and not providing remedial treatment inspite of clear indication given by other doctors[^89^].

4.1.12.2. Surgery not connected with ailment:

In *Varadha s. Nair V. Dr. Rehmani N. Rajan & Others*[^90^], the patient had cyst problem which could lead to cancerous, the surgeon who was consulted prescribed medicine for shrinkage of cyst and performed hysterectomy without waiting for result. The surgery is not connected with ailment at all. In the course of operation the patient’s stomach was kept open for more than half-an-hour on the operation table to get the stapler gun from the residence of opposite party 2. There was no need for having emergent hysterectomy operation. At most what could have been done in the

[^88^]: 2000(III) CPJ 258.
[^89^]: Aphraim Jayanand Rathod V. Dr. Shailesh Shah 1996(I) CPJ 243; 1996(1) CPR 547, wherein the complainant was operated for appendicitis and then a second operation performed due to some complication developed. An inference of negligence was drawn on the basis that the first operation was not performed according to the recognized or standard practice or method of surgery, and there was not explanation as to how the patient developed incisional hernia.
[^90^]: 2005(III) CPJ 36 (NC).
instant case was removal of cyst. It is viewed as ‘gross negligence’ and deficiency on the part of the surgeon and hospital\textsuperscript{91}.

4.1.12.3. **Suffers permanent disability to pass urine due to circumcision operation:**

In *Shivakumar V. Johan Arthur & Another*\textsuperscript{92}, the first OP performed circumcision operation for urinal problem as a result of which there was over-bleeding from the region of the operation. As a remedial step, the first OP sutured and bandaged and it the end, he advised the patient to approach the Government Hospital where it was revealed that a nerve had been cut that caused permanent damage and permanent disability to pass urine. The surgeon in the government hospital makes another temporary device to pass urine but the genital organ was permanently damaged. The patient could pass urine only through the hole made in the government hospital, thus, virtually, he has been rendered impotent. In view of the facts and circumstances the State Commission held that there was gross negligence on the part of the first OP\textsuperscript{93}.

4.1.12.3. **Transfusion of blood followed by HIV positive:**

In *M. Vijaya V. Chairman and Managing Director, Singareni Collieries Co, Limited and others*\textsuperscript{94}, the petitioner who underwent operation required the transfusion of blood and her brother donated blood. Subsequently, she suffered from ailments and found HIV positive. It was alleged that before transfusion of blood tests, no care was taken to conduct relevant and necessary blood tests and because of negligence on the part of hospital staff she was infected with the disease. The High Court observed that the hospital was negligent as the requisite tests on the patient for detecting ADIS at the time of transfusion of blood were not carried out\textsuperscript{95}.

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\textsuperscript{91} See Gurmit Mahal V. Chauhan Nursing Home private Limited & Another 1998(III) CPR 405, where one inexperience surgeon performed operation for gall-bladder stone by laparoscopic method that resulted in complication.

\textsuperscript{92} 1998(III) CPJ 436.

\textsuperscript{93} In Altaf Hussain Faroqui V. Dr. Ashok Mathur and Others 1998(I) CPR 427, the patient died due to biliary peritonitis and septicemia, ignoring jaundice which the patient had developed post operatively.

\textsuperscript{94} 2002 ACJ 32 (AP High Court (FB) )

\textsuperscript{95} In R.P. Sharma V. State of Rajasthan and Others 2003 ACJ 2093, wherein the high court of Rajasthan observed that death of wife of petitioner due to transfusion blood of wrong group due to negligence of doctors in the government hospital.
4.2. ACTS NOT AMOUNTING TO MEDICAL NEGLIGENCE:

Hitherto case laws of medical treatment where the medical practitioner being found negligent has been discussed on alphabetical order, this part of theses focused on the analysis of cases where medical treatment given by the doctor does not term it as negligent or deficiency. The following discussion clearly shows as to the judicial approach in deciding the medical malpractice litigation.

4.2.1. Best Judgment of the Doctor:

Where two choices are available, exercise of one which is the best in the judgment of the doctor is no negligence: In Charan Singh V. Healing Touch Hospital and Others, where the patient who was suffering from stomach ache and burning sensation in passing urine, operated upon by the OP under spinal anesthesia for the removal stone from urethra. It is contended that his right kidney has been removed during the operation without his knowledge. Before carrying surgery for the removal kidney stone, some tests such as culture test, ultra-sound test, kidney function test, x-rays Intravenous pylography and other various tests must be carried out but not done and surgery should have been performed under general anesthesia rather than the spinal anesthesia. The issue that arises for the consideration is: whether the failure conduct all tests as claimed by the patient and administer general anesthesia can be termed as negligence of the OP. On perusal of expert evidence and medical literature, it is held by the commission that what test ought to be conducted in a situation and find out the general condition of the patient to ensure whether the patient is to be operated upon under general anesthesia or spinal anesthesia are left to the clinical judgment of the doctors and anesthetist. The OPs have carried out certain tests which they considered as necessary before the surgery to be performed; they removed right kidney of the complainant as a life saving measure, procedure, possible implications were also explained to him and spinal anesthesia is preferred over general anesthesia since it has far less complication. Where two choices are available, exercise of one, which is the best in the judgment of the doctor unless proved to the contrary does not amount negligence.

96 2003(III) CPJ 62 (NC).
97 S.K. sharma V. Director, Praful B Desai 2003(II) CPJ 90, it was held that if out of two options, the doctor adopts one; this cannot amount to medical negligence.
4.2.2. Failure of operation does not presume negligence:

Merely because the operation does not yield desired result, it does not mean the surgeon is negligent. In Ashok Nandi V. Dr. Ajit Shah and Others⁹⁸ complainant who consulted the opposition party was advised to take an “audiograph test” and surgery in the right ear for decreasing hearing but after the operation he had lost the power of hearing of the right ear. Keeping reliance on the expert evidence and medical literature the State Commission observed that the operation may or may not successful; it is not successful that doe not mean that the surgeon was negligence and careless. It is possible that inspite of efforts positive result cannot be obtained in a case surgery. It cannot presumed that the Surgeon had done wrong or has been negligence or careless once the operation does not become successful. Here, the court denied remedy to the aggrieved patient even though there was loss of hearing power due to the treatment of the surgeon⁹⁹.

In Surinder Kumar and Another V. Dr. Santhosh Menon & Others¹⁰⁰ wherein the patient died following caesarean operation performed by MBBS doctor, the complainant questioned that the major operation like laparoscopy and hysterectomy ought to be performed by gynecologist and not MBBS doctor. Issue was whether MBBS doctor could perform caesarean operation for delivery of a child? Whether the patient died on account of any negligent act on the part of the opposite party in the matter of caesarean operation conducted on her? The court opines that an MBBS doctor having obtained degree from the University was competent to practice medicines, surgery obstetrics. Caesarean operation is part of the surgery. The opposite party is qualified as well as eligible for conducting caesarean operation on the basis of his experience. Just because condition of the patient was deteriorated, the doctor cannot be held guilty of negligence. Doctor’s duty is to treat whereas it is in the hands of Almighty to cure. Each failure or unsuccessful operation cannot be considered as a negligent of the doctor. In the instant case the patient died as result of performing caesarean operation by the opposite party, where is the remedy for the loss

⁹⁸ 2003(II) CPJ 95.
⁹⁹ Dr. Majith singh Sadue V. Uday Kant Thakur and Others 2002(II) CPJ 242, wherein it was held that in the absence of any expert report merely because the operation was not successful, the doctor cannot be held in any way responsible for patient’s death. In B.G. Ningappa V. Dr. Madan & Another 2006(II) CPJ 227, it was observed that in the absence of expert evidence, failure of any operation does not mean negligence.
¹⁰⁰ 1992(II) CLT 89.
of life of an innocent person? Whether the patient deprived of his life under the due process of law?

4.2.3. Inability of the Doctor to cure:

_Merely because a doctor could not cure and some other doctor cured the patient on a further treatment does not ipso facto negligence:_ In _Anup Kumar Ghosh V. Dr. T.S. Biswas_101, the complainant is discharged from the hospital inspite of continuing extreme pain following the treatment administered by the opposite party for severe injuries resulted in an accident. Thereafter, the complainant consults another orthopedic surgeon who performs second surgical operation and heals the ailment of the complainant. The complainant lodged the complaint against the opposite party on the ground that the opposite party has deliberately failed to cure him with the proper treatment. The question that arises for the consideration of the court is: if the patient is not cured of his ailment by the first operation, will it be termed as negligence on the part of the doctor. The court discarded the complainant as based on the personal notion of the complainant by holding that only the fact that the opposite party could not cure the complainant and some other doctor cured him on a further treatment does not ipso facto, prove the negligence of the doctor. There should be evidence to show that the opposite party was a quack or lacked competence to treat a patient with a fracture, only then the doctor could be held negligence102.

4.2.4. Differnce of opinion:

_The doctor while giving treatment as per established medical practice may come to a conclusion which any other more experienced and qualified doctor may not arrive at, this mere difference in opinion cannot be a ground for holding the doctor negligence:_ In _Santhosh Kaur Sodhi V. Dr. Ajay Manju_103, with the pathological report given by the respondent as diagnosis “endometrium” which in the common parlance cancer, the complainant approached the Tata Memorial Hospital for treatment of cancer which is said to be the best available hospital for treatment of cancer and where the uterus of the complainant was removed relying upon the report

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101 1997(II) CPJ 469.
102 See Alok Kumar Chakraborthy V. Dr. Gautham and Another 1996(II) CPJ 368, it is held by the court that merely because the patient was not relieved from the pain, one cannot jump to the conclusion that the doctor has not given proper treatment.
103 2003(II) CPJ 344.
of respondent. However, the pathological test which was conducted in the said hospital found no cancer in the uterus. The complainant was shocked over the loss of uterus on account of the wrong report, hence, sued the respondent to view the conduct of the respondent as negligent. It is held by the State Commission that the reputed hospital like Tata Memorial Hospital would not have solely relied upon the report of respondent and rather, it would have got the test conducted in its hospital before taking decision for major surgery like removal of uterus. There may be difference of opinion regarding the presence of a particular disease such as cancer in the instant case and mere difference in pinion cannot be a ground for holding the respondent careless of medically negligent.

4.2.5. Adopting a different mode of treatment:

Negligence cannot be inferred when a surgeon of higher education, higher experience and higher degree of skill adopts a different mode of treatment: In *Dr. J.N. Shrivastava V. Rambiharilal and Others* where the petitioner’s wife who was diagnosed as a case of acute appendicitis advised to surgical operation of appendectomy. But due to wrong diagnosis, the opposition party performed cholecystectomy without obtaining consent. The court observed:

“Some discretion must be left to the judgment of the doctor on the spot, so that he uses his common sense, his experience and judgment as far as it suits to the situation of the case. One cannot be guided by what has been written in the text books. Because statements in the textbooks are mere opinion, cannot substitute for the judgment of the surgeon who handles the situation at the spot. Nor can negligence be inferred when a surgeon of higher education, higher experience and higher degree of skill had adopted a different mode of treatment. The court further views that the general practitioner should not be criticized just because some experts disagree. It is important to view the treatment and see matters with the eyes of the attending physician. No medical practitioner was insurer for effecting a cure nor should the court condemn an honest exercise of judgment even though the other practitioner disagree with that judgment”.

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104 The court relied upon the principle followed in Rajkumar Agarwal V. Dr. B. Mukhopadhyay 1995(I) CPJ 260 and Dr. N.T. Subramanyam & Another V. Dr. B Krishna Rao & another 1996(II) CPJ 233 (NC), wherein it was held that when there are two genuinely responsible school of thought about the method of treatment, if medical man conforms with one of those, he is not negligence.

105 AIR 1982 123 (MP HC).

106 The court has relied upon the dictum observed in Challand v. Bell 18 DLR (2d) 150, Roe V. Minister of Health (1954)2 QB 66 wherein the Lord Denning said: “we should not condemn doctors for everything that happens to go wrong. The doctors would be led to think of their own safety rather than the good of patient...” In Hatcher V. Black (1954) Times 2nd July, Lord Denning explained the law of the subject of negligence against doctors and hospital in the following words:

“Before I consider the individual facts, I ought to explain to you the law on this matter of negligence against doctors and hospitals. Mr. Marven Everett sought to liken the case against a hospital to a motor-
Finally, the court came to the conclusion that no fault has been committed by the surgeon, in order to save the life of the patient of the patient, he has performed cholecystectomy, his conduct cannot be condemned as negligence although there was unsatisfactory result. The above approach of the court shows that it is one side approach which favours the medical practitioner rather than viewing the case from viewpoint of human rights of the patient. The right of the victim of the treatment has been completely ignored. The patient has been subjected to cholecystectomy without obtaining consent but in view of the court, the doctor has not committed any negligence. It is sympathetic towards the medical man rather than the plight of the patient. This sort of approach is not only bad in law but also blatant violation of human rights of sick persons. There is no point in protecting the professional man at the cost of the patient.

4.2.6. No expert evidence, no negligence:

_There should be expert evidence of some material in the form of excerpts from medical text books to connect the consequence with the treating doctors_\(^{107}\):

4.2.6.1. Loss of vision due to post-operative infection:

In _Mazharuddinbhai S. Kazi V. Ashoka Mehta & Another\(^{108}\)_ the complainant had undergone eye operation for cataract in the hospital of opponent Ophthalmologist. Thereafter, he experienced some difficulty in the eye and it was noticed that there was infection. The opponent doctor referred the complainant to another doctor who opined that the right eye would need operation again and regaining of vision was difficult proposition. However, the operation was performed but no further improvement. The State Commission did not hold the doctors negligent on the ground

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\(^{107}\) K.S. Bhatia V. Jeevan Hospital and Another, 2003(IV) CPJ 9 (NC); 2004 CTJ P. 175 (CP)

\(^{108}\) 2005(I) CPJ 552.
that there was no expert evidence to connect the doctor with the loss of vision of right eye of complainant. It is misfortune of the complainant that he lost vision of right eye\textsuperscript{109}. The commission rejected the complaint at the initial stage itself only for the reason that the complainant has failed to place before the court cogent evidence to show the link to the treating doctors. The complainant has suffered loss of vision on account of cataract operation, just because he failed to place the expert evidence, his case has been rejected which is clear violation of human rights of the patient.

4.2.6.2. Permanent disability after surgery:

In \textit{K. Venkateshwarlu V. Managing Director, Nagarjuna Hospital}\textsuperscript{110}, the appellant approached the respondent as he was getting pains and feelings weakness in both the legs after walking for a few yards. After MRI test, the surgery was conducted, yet, there was no improvement in his legs but on the other hand his two legs have become very weak day by day and it had become impossible for him to walk and even to attend his natural calls. Finally, the complainant approached another hospital where he underwent several tests and it was opined that he will not recover and is permanently handicapped due to the wrong surgery at the respondent hospital. The Commission did not hold the surgeon negligent as there was no expert evidence to establish the fact that the complainant suffered as a result of negligence in conducting the operation. This situation what is known as “medical torture”, there was no reason why the commission did not decide whether there was any need of so urgent operation and did not apply the principle of Res Ipsa Loquitur? It is indeed inhuman to make observation that the complainant suffered a serious set back in life due to his ill-luck and respondent cannot be held negligent in the absence of cogent and reliable evidence supporting the contentions of the complainant\textsuperscript{111}.

\textsuperscript{109} K. Hari V. Minerva Circle Book Bank & Another 2005(II) CPJ 599, the complainant suffered Hepatitis B after blood transfusion but no evidence produced to show that blood supplied was subjected to any test. In M.A. Ganesh Rao V. Dr. T.M.A. Pai Rotary Hospital & Others 2006(II) CPJ 96, the complainant was operated upon for cataract removal and insert lens, and after the operation, the complainant was not able to see though his right eye, as such again the correctional operation was conducted, yet he could not see his right eye. The case was dismissed by holding that merely because the complainant could not regain his vision it cannot be said that there was any negligence on the part of the doctor. The medical literature also discloses that there could be scope for infection after the operation.\textsuperscript{110} 2006(I) CPJ 47 (NC).

\textsuperscript{111} Ibid Page 52. In Krishan Hospital & Others v. P. Shanti & Others 2006(I) CPJ 114, it is held by the commission that hospital not at fault if some equipment suddenly stop functioning. Is not the responsibility of the hospital to ensure the equipment shall function properly?
4.2.6.3. Sufferings due to reaction of drugs:

In *Mathura Mahto V. Dr. Bindeshwar Jha*\(^{112}\), the patient was operated by the O.P for the removal of gall bladder stone, and after one week she developed jaundice. The patient was referred to another hospital where she was treated and the doctor opined that she was suffering from “Encysted Bilioma” and after some months, again she had developed some problem which was diagnosed as “Biliary Stricture” and operated at the hospital. The State Commission did not hold the doctor negligent by stating that after the operation of gall bladder the patient may develop subsequent problem like jaundice, which is a common phenomenon in medical science as it appears in the present case. The subsequent problem was not due to earlier operation but due to reaction of the drugs. There was no fault on the part of the doctor at the time of operation of gall bladder. Since the complainant could not establish her case with the expert evidence, although she suffered due to the medical treatment, the court says “medical practitioner is not insurer and he is not to be blamed every time something goes wrong. Indeed in medicine things can go wrong in the treatment of a patient even with the best of care. Proper treatment found to have been given to the patient\(^{113}\)”. Here, the question to be focused is whether the doctor has explained to the patient about the probable effects of the surgery? The doctor has failed in respecting the right of the patient to be informed of the proposed treatment and side effects of such treatment and likelihood of reaction of the drugs.

4.2.6.4. Death due to cardiac arrest during surgery for removal of ovarian cyst:

In *S.B. Kadkol V. Dr. N. Chandrashekara*\(^{114}\), the complainant’s wife approached the opposition party for problem relating to uterus. After undergoing the laboratory tests, the patient was operated for the removal of cyst but she suffered cardiac arrest at the end of the operation. The patient was rushed to the hospital for better treatment where she died after a week. The complainant argues that the gynecologist was negligence for performing operation in a nursing home which is not

\(^{112}\) 2003(I) CPJ 535.

\(^{113}\) In a recent case of Mrs. Indira Kartha V. Dr. Mathew Samuel Kalarickal and Another report in 2006(I) CPJ 62, the National commission has held : “A medical practitioner is not an insurer and he is not to be blamed every time something goes wrong Indeed in medicine things can go wrong in the treatment found to have been given to the patient and so also proper care bestowed upon him both before and after his operation. The case is not established with the help expert evidence”.

well furnished in order to meet emergent situation and the anesthetist was also negligence for not identifying the cardiac arrest in time and for not taking any preventive steps to save the life of the patient. However, the court refused to hold the doctors negligent as there was no evidence from the side of the complainant to prove negligence in performing operation upon the patient\textsuperscript{115}.

4.2.6.5. Acute renal failure following hysterectomy resulting in death:

In \textit{Meghadut Gordhanbhai Thakkar V. Dr. Anupama Vidhyothbhai Desai & another}\textsuperscript{116}, the complainant’s wife who had problems relating to uterus underwent hysterectomy after the laboratory investigations. The patient’s health continues to be deteriorated due to constant vomiting and pain in abdomen. The opponent parties changed their medical treatment and transfused a bottle of blood which did not improve the patient’s health. The patient developed difficulty in breathing and had swelling over body and eyes and subjected to various investigations such as sonography test, blood test etc., dialysis and other treatment under the care of the opposite parties, but the opponents could be give successful treatment for kidney failure with the result of which both the kidney failed and died. It is alleged that opponents have shown serious negligence and inattention in operation and post operative care that is sonography test should not have been done post operatively. The court held that the complainant has failed to prove alleged negligence in treatment or lack of reasonable care by the opponents. It is a sad fact that young life is lost but then it is an accident; a fatal chance occurrence which was beyond control of treatment of doctors. As it seems whatever was possible by these doctors they did it, just because patient died during treatment a doctor cannot be held responsible\textsuperscript{117}.

By this approach, the court mean to say a patient may die in the course of or after the

\textsuperscript{115} M. Subramani V. Christu Joshi Hospital 1998(3) CPR 428, the patient died after delivery due to excessive bleeding but court dismissed the complainant on the ground that there was no evidence. Similarily, in D.G. Akka (Dr) V. Sarvottam Rao (Dr) 2006(I) CPJ 172, the patient underwent operation for “hysterectomy and removal of ovarian cyst”, after two days of operation the patient complained of pain in abdomen breathlessness and her body was cold. Since the treating doctor (opposition party) was not in station, the patient was shifted to another hospital where she died after 3 days. It is alleged the opposition party was negligent in treating the patient as he left the station without information and without arranging alternative doctor. The State commission dismissed the complaint as there was not evidence to prove negligence.

\textsuperscript{116} 1997(I) CPJ 503.

\textsuperscript{117} Imran Khan V. Dr. Kamal Ashraf 2006(I) CPJ 225, it is held that not performing operation by leproscopic method not amount to negligence because this method was not available in opposite party’s clinic. In K. Sadanadan & Another V. Lisie Hospital & Others 2006(I) CPJ 24 (NC), it is observed that doctor cannot be held negligent if something goes wrong in the treatment to the patient.
operation, but the doctor cannot be held liable unless there is high degree of proof. It is not for the court to decide but it depends upon the expert evidence to decide the issue of medical negligence. This sort of approach is indeed a “medical tragedy”.

4.2.6.6. Death after surgery for mortal stenosis:

In *T. Rama Rao v. Vijaya Hospital & another*\(^{118}\), the complainant’s wife who was a doctor by profession underwent surgery for mitral stenosis and the said operation was successful. After sometimes, the patient lost control of her left side limbs and immediately she was admitted in the opposite party hospital and referred to one Neuro-Physician. But neither the chief surgeon nor any other doctor arranged the service of neuro-physician till a week. When the condition of the patient became very serious the neuro-surgeon attended her but died on very day itself. It is alleged that the death could have been averted had the patient been placed under the treatment of a Neuro-Physician. The opposition parties were guilty of gross negligence in their duties in failing to arrange for proper treatment in time. It is further alleged that the opposition parties declined to issue copies of case sheets and other relevant records of treatment inspite of several requests and demands made by the complainant. It is held that only the reason that case sheets were not supplied to the complainant by the opposite party, it cannot be said that there was negligence in rendering service. There is no law that states that the case sheets should be furnished to the persons like the complainant on requirement, nor there is any undertaking by the opposite parties under an agreement or otherwise to so furnish.

4.2.6.7. Amputation of hand after surgical treatment:

In *Kumari Jayashree V. Kims Hospital & Research Centre & Another*\(^{119}\), the complainant developed pain and numbness on her left thumb and palm which was diagnosed as “Carpal Tunnel Syndrome with bilateral cervical ribs”. The operation that was conducted following C.T. Scan results in “thrombosis which was developed in the left forearm due to decompression” and during the post operative period the complainant had developed vascular complications, Gangrene and thereafter her arm was amputated due to Gangrene. The complainant alleges that this was the consequence of the treatment taken by her in opposite party-hospital. The State

\(^{118}\) 1997(3) CPR 477.

\(^{119}\) 2006(II) CPJ 170.
Commission dismissed the complaint by holding that the complainant has not adduced any acceptable evidence by examining any expert to establish that she developed Gangrene and thereafter her arm was amputated due to the Gangrene. In the absence of such expert evidence it is not possible to accept the case of the complainant the opposition party was not negligent in performing operations. The court did not show humanity redress the patient whose hand was amputated rendering her crippled throughout her life and who had lost future prospects due to the amputation of the hand. Whether the treatment has been fully explained to the patient is not considered by the court.

4.2.6.8. Death due to massive bleeding and cardiac arrest:

The complainant’s husband was admitted in the opposite party –hospital for treatment with some cardiac problem in response to the package deal for a payment of Rs. 2,10,000/-inclusive of angiography and any other treatment required for cardiac problem. The complainant deposited Rs.1,05,000/-immediately and sought time for deposit of the balance amount within next 24 hours but the doctors of the opposite party refused to carry out treatment unless the full amount was deposited. The treatment started after the deposit of the full amount. The complainant was informed that some complications have developed while performing Angiography and fixing the stint for which the open heart surgery was needed. Due to the more complication, the patient was referred to another hospital without giving any treatment where the patient expired due to massive bleeding and cardiac arrest. It is alleged that the patient died due to lack of proper treatment, post-operative care, and negligence in administering the treatment. The State Commission did not hold the doctors negligence as the there was no evidence to prove that the massive bleeding was result of complications of angiography\textsuperscript{120}. Here, the Commission has failed in its duty to take the cognizance of the principle of the Res Ipsa Loquitur which speaks of magnitude of the medical negligence of the opposition parties in treating the deceased during the time of operation.

\textsuperscript{120} Jaswant Kaur V. Dr. R.K. Aggarwal & Others 2006(I) CPJ 466.
4.2.6.9. Removal of breast having non-malignant tumour due to wrong judgment:

In Hinaben Nikubhai Bhavar V. M.P. Shah Cancer Hospital & the Gujarat Cancer and Research Institute & Others\(^{121}\), the complainant was operated for the removal of breast. At the time of discharge, she was shocked to learn that the surgical pathology report did not show any evidence of malignancy/cancer and the tumour was non-malignant. It is alleged that on account of wrong diagnosis and erroneous test carried out from the side of the opponents, she lost her left breast and therefore, she suffered a great deal of hardship and loss her important organ of body on account of negligence in rendition of medical services by the opponents. It is held by the State Commission that the opposite-party was not negligence for removing the tumour and removal the tumour of this kind which the complainant suffered from would require removal of the breast. The complainant has not been able to adduce any expert evidence. The opposite parties may have committed error of judgment in surgical operation but the opposition party has taken the decision with a view to avoid risk to life even if it was found that the tumour was non-malignant that might have developed malignancy in future\(^{122}\).

4.2.6.10. Death due to wrong diagnosis and treatment:

In T.M.T. Chandra V. Dr. Mahesh\(^{123}\), the patient approached the opposite parties for treatment for having a swelling on abdomen over and above the hip portion. The opposite parties performed two operations upon the patient for removal of the lump and then suspecting some sort of a neurofibroma, they did excision biopsy which revealed a cancerous ailment. The patient was referred to another hospital for treatment by radiotherapy and chemotherapy where the patient died. It is alleged that the surgery was done in all hurry and haste the moment the swelling was seen by them and that was the reason for the death of the patient as the cancer spread over the body very quickly. The State Commission did not hold the doctors negligent on the ground that complaint has not taken any steps to produce any expert testimony.

\(^{121}\) 2006(I) CPJ 502.
\(^{122}\) Jagdishwar Sih V. Jaslok Hopsital and Research Centre and Others 2005(I) CPR 15 (NC) the National Commission laid down principle that a reasonable degree of care and skill is expected from doctors, they do not undertaken that they would positively cure the patient nor he undertakes to use the highest possible degree of skill. (Relied)
\(^{123}\) 2000(I) CPJ 361.
in support of allegation. The opposite parties did not perform two operations in hurried and hasty manner. They have done the treatment according to medical practice prevailing in the world\textsuperscript{124}. Thus when the burden of proof is not discharged by the victim of negligence to the greater satisfaction of the court, the law presumes that the doctor is competent and performed the treatment according to the well accepted medical practice prevailed in the world. It is immaterial for the court to consider that why the complaint has suffered injury or expired and approached the court with the complaint for remedy.

4.3. APPROACH OF THE SUPREME COURT OF INDIA

4.3.1. Reduction of fracture without anesthesia:

In the case of \textit{Dr. Laxman Balakrishna Joshi v. Dr. Tribak Bapu Godbole and Another}\textsuperscript{125} the son of the respondent met with an accident on the sea beach which resulted in the fracture of the femur of his left leg. The appellant did the reduction and put the injured leg into plaster. Within four hours of the completion of operation the patient died. The cause of death as mentioned in the certificate was “fat embolism”. It was alleged that the appellant did not perform the essential preliminary examination before starting his treatment and while reducing the fracture, the appellant used manual traction and used excessive force with the help of three men under a morphia effect without giving general anasthesia. This kind of manipulation resulted in shock and death of the patient. The appellant claimed that he had only slight traction for immobilizing the injured leg and not done the reduction of fracture. The issue was: whether the appellant could reduce the fracture without giving anaesthetic to the patient? The Supreme Court held the appellant guilty of negligence and wrongful acts as the document clearly shows that the appellant had done reduction of the fracture; nowhere in the case history had he mentioned that what he had done was only to immobilise the patient’s leg; the appellant used excessive manual force for about an hour for reducing the fracture. The patient death occurred due to shock resulting from reduction of the fracture without undertaking the essential

\textsuperscript{124} Amin Bhagath V. Dr. Dhansukh B Shah 1997(I) CPJ 219, the complainant was known case of herthyroidism with toxic multi-nodular goiter and the doctor suggested the surgery which was subjected to risk of left bundle branch blockade (LBBB). On giving anaesthesia the patient developed malignant tacharrythmia and cardiac shock from which she could not be revived. It was held that the doctor was not negligence as there was not expert evidence to prove that the doctor had not followed the standard medical practice.

\textsuperscript{125} AIR 1969 SC 128; 1968 ACJ 183; 1969(I) SCR 206.
preliminary examination. The court relied upon the medical expert testimony and medical literature which suggested that the time has elapsed since the occurrence of fracture and the patient has arrived after a long journey deferred reduction is advisable.

4.3.2. Post-operative eye infection: guideline for charity eye camp:

We come across often in the Newspapers the report about conducting the “eye camp”, “B.P. check up”, or “Diabetes check up” and so on by the NGO with or without the collaboration of the State Health Department in rural and urban areas. During such camp if a patient suffers any injury due to lack of care or inadequate standard of care, issues such as, whom should be held liable and what are the guidelines required to be followed in conducting such camps arose for the consideration of the Supreme Court in a leading case of A.S. Mittal V State of Uttar Pradesh\textsuperscript{126}, wherein the respondents performed cataract surgery for over 200 persons “during eye camp” out of which about 84 persons suffered irreversible damage due to post-operative infection. The Supreme Court issued guidelines which prescribe norms and conditions for the conduct of “eye-camp” such as; (a) the operations should only be performed by qualified experienced ophthalmic surgeons and an “eye-camp” should not be used as a training ground for P.G. medical students; (b) there should be available a pathologist to examine, blood etc., (c) a physician for general medical check up of the patients should also be there; and (d) all medicines to be used must be of standard quality duly verified by the doctor in charge of camp.

4.3.3. An accident victim dies due to lack of timely treatment: Protection of life, then procedure:

Normally, in medico-legal cases the medical professional apprehends that he will be a witness, may have to face police interrogation and appear to be a witness in the court of law or may be harassed unnecessarily, in case of attending the victim of accident without the case being registered by the police under the criminal law. Here, whether a physician is bound to attend sick and injured person? Is it the duty of the medical practitioner to make immediate and timely medical care to every injured person in accident or otherwise? Or is it the liberty of the practitioner to choose whom he will serve? These issues came up for the consideration of the Supreme Court in a

\textsuperscript{126} 1989 SC 1570 (FB); 1989(3) SCC 223.
historical case of *Pt. Paramanand Katara V. Union of India*\(^\text{127}\), in which it was opined “every doctor whether serving in government or non-government hospital, has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid or delay the discharge of the paramount obligation cast upon members of the medical profession. This obligation being total, absolute and paramount, laws of procedure which would interfere with the discharge of this obligation cannot be sustained and must therefore, give way. The court further states that there is no legal impediment for any medical practitioner when he is called upon or requested to attend an injured person needing his medical assistance immediately. The effort to save the life of the injured is not only the top priority of the medical professional but also the police, any other citizen who happens to notice such an incident or situation. Every doctor wherever he be within the territory of India should forthwith be aware of this position”\(^\text{128}\).

### 4.3.4. Death due to retained surgical products - Negligence per se:

In *Achuta Rao Haribhau and Others V. State of Maharashtra and Others*\(^\text{129}\), a mop was left inside the lady patient’s abdomen during an operation. Peritonitis developed which led to second surgery being performed on her, but she could not survive. On the issue whether the doctors could be held to be negligent? The Supreme Court observed that the sterilization operation which is not known to be serious in nature performed under local anaesthesia; a mop was left inside the abdomen of the patient for which no satisfactory explanation furnished by the surgeon. The surgeon was negligence in breaching his duty to take reasonable care and skill. The court applied the doctrine of Res Ipsi Loquitur to the present case. In the very nature of medical profession, skills differ from doctor to doctor and more

\(^{127}\) 1989(IV) SCC 286 (DB) where the petitioner, who is a human rights activist moved the application Under Article 32 of the Constitution, requesting the court that a direction could be issued to the Union of India to the effect that every injured citizen brought for treatment should instantaneously be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to aroid negligent death and in the vent of breach of such direction, in addition to take any action, appropriate compensation should be admissible. He appended to the write petition a report entitled “Law helps the injure to die” published in the Hindustan Times. In the said publication it was alleged that a scoterist was knocked down by a speeding car. Seeing the profusely bleeding scoterist, a pedestrian picked him up to the nearest hospital where the doctors refused to attend the injured and told that the man he should take the patient to another hospital which handle medico-legal cases. The Samaritan carried the victim but he could reach the hospital the victim succumbed to his injuries.

\(^{128}\) Ibid.

\(^{129}\) AIR 1996 SC 3377; 1996(2) SCC 634; JT 1996(2) 624.
than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other, he would not be liable provided the course of action chosen by him was acceptable to the medical profession. It is a case where a towel was left in the operation site and no explanation offered by the surgeon, it is therefore medical negligence.  

4.3.5. **Homeopathic practitioner prescribes allopathic drug- negligence:**

In *Poonam Verma Vs. Ashwini Patel & Others*, the complainant’s husband was suffering from viral fever and later turned into typhoid when he was treated by the respondent-Homeopathic practitioner with allopathic medications. The patient was subsequently admitted to a nursing home and then shifted to better equipped hospital i.e. Hinduja Hospital where he expired. The Supreme Court held that the respondent No.1 was a quack allopathic doctor who having practiced in allopathy without being qualified in that system was guilty of negligence per se. The respondent treated the deceased patient with antibiotics for viral fever which was prevalent and then for typhoid fever which was also prevalent together with tablets as also intra-muscular injections of sodium compound to relieve him of pain without ascertaining the cause for the pain. The implication of the ruling is that a doctor registered as a medical practitioner under the Homeopathic Practitioners Act, is entitled to practice Homeopathy only and not any other system of medicine. If a person practices medicine without possessing the requisite qualification or enrollment, he trespasses into a prohibited field, and therefore, his conduct amounts to negligence per se actionable in law.

4.3.6. **Denial of Admission in Government Hospitals- Negligence:**

In *Paschim Banga Khet Mazdoor Samity and others, V. State of West Bengal and another*, the Supreme Court observed that Article 21 of the Constitution of India provides protection to life and liberty beyond the personal liberty guaranteed by Article 21. The court noted that the right to life and liberty is a fundamental right in the Indian Constitution under Article 21. It further stated that the right to life includes the right to healthcare. The court held that the government has a duty to provide healthcare facilities to its citizens. The court observed that the government has a duty to ensure that the citizens have access to medical facilities and that they are not denied treatment due to lack of facilities. The court also noted that the government is required to ensure that the medical facilities available to the citizens are sufficient and adequate to meet the needs of the population. The court further stated that the government is required to take measures to ensure that the medical facilities are available to all citizens and that there is no discrimination based on economic status or other factors.

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130 Bolam Vs Friern Hospital Management Committee 1957 (2) All ER 118:1 BMLR 1 (QBD) and Sidway V. Governors of Bethlem Royal Hospital 1985 AC 871: followed.
131 1996(2) CPJ 1(SC); JT 1996 (5) SC I; AIR 1996 SC 2211.
132 1996(5) Supreme 260; AIR 1996 SC 2426; 1996(5) SCC 37; JT 1996(6) 43 SC, one Hakkum Seikh (petitioner No.2) who is member of Paschim Banga Khet Mazdoor Samity (Petitioner NO.1) an organization of agricultural laborers, fell of a train as a result Hakim suffered serious head injuries and brain haemorrhage. He was taken to the Primary Health Centre, since necessary facilities for treatment were not available the medical officer referred him to the Sub-Divisional Hospital for better treatment.
India imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on part of Government Hospital to provide timely treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. The impact of this ruling is that denial of admission to a person of serious injuries in Government hospitals on account of non availability facilities results in denial of his fundamental right guaranteed under Article 21 of the Constitution. However, the scope of the judgment is that it applies to only governmental hospitals and it permits private hospital to choose the patients whom they want to serve. There is no such obligation on the private hospitals to extend adequate medical services to the people.

4.3.7. Child suffers brain damage following injection given by nurse on advice of the senior consultant paediatrician-Negligence per se:

In the case of Spring Meadows Hospital & Another V. Harjot Ahluwalia (Through K.S. Ahluwalia) and Another the appeal preferred against the decision of the National Commission which granted the compensation to the complainants— respondents. The Supreme Court held that a consultant could be negligent where he delegates the responsibilities to his junior with the knowledge that the junior was incapable of performing his duties properly. An error of judgment could be negligence if it is an error which would not have been committed by a reasonably competent professional man acting with ordinary care. Both the nurse and resident doctor were negligent for which the Insurance Company was liable to indemnify the child and its parents. By this observation, the court makes it clear that the hospital can be held negligence where it employs any unqualified persons as nurse or para medical

Again Hakim was referred to another hospital where after taking X-rays prints of his skull recommended to another as no bed was available in Surgical Emergency and regular Surgery Ward was also full. He was thereafter taken to another hospital but there also he not admitted on the ground that no bed was available. Ultimately he was admitted in Calcutta Medical Research Institute, a private hospital, where he received treatment as an indoor patient and he had incurred an expenditure of approximately Rs.17,000/- in his treatment.

1997(2) CPJ 98; 1997(3) CPR 1 (NCDRC); 1998(1) CPR 1 (SC) wherein the child was suffering from typhoid fever, the nurse of the hospital on advice of the senior consultant prescribed the medicine and injected to the child upon which the child collapsed, had cardiac arrest and consequently suffered brain damage and continues to survive in a vegetative state. The nurse pleaded that she acted upon the advice of the senior consultant pediatrician, committed no negligence as it was the duty of the Surgeon who diagnosed the child to write, give the injection and take all possible care. On the other hand, the respondent argued that it was mere an error of judgment which would not amount to negligence.
staff and similarly, where the doctor entrust his duty with the knowledge that his subordinates cannot perform so delegated work effectively. The court concurred with the National Commission which found that there had been considerable delay in reviving the heart of the child and this delay damaged the brain of the child. Here, the question is whether the court acted upon independent judgment of its own or merely upheld the expert testimony who opined there was delay in reviving the heart of the child. Although the judicial rule of prudence requires the court to decide and the expert, the Supreme Court has simply concurred with the expert opinions.

4.3.8. Woman gives birth to an unwanted child due to failure of sterilization operation:

Medical negligence has impact upon the socio-economic conditions of the victim of the medical negligence. Sometimes it plays its game with life; sometimes it gifts an “unwanted child” to a poor labourer woman who had already many children and opted for sterilization, becomes pregnancy and ultimately gives birth to a female child in spite of sterilization operation which is failed. This situation comes up before the Supreme Court in a case of State of Haryana V. Santra wherein at the time of the sterilization operation, only the right Fallopian tube was operated upon and the left Fallopian tube was left untouched. Both the fallopian tubes should been operated. The respondent lady sued the State and its medical officers for compensation for rear the child and maintaining herself on the ground of medical negligence. The Supreme Court observed that the sterilization operation performed upon the respondent was not “complete” as the evidence shows that only the right Fallopian tube was operated upon while the left tube was not touched that exhibits negligence on the part of the Medical Officer who performed the operation. Inspite of the unsuccessful operation, the respondent informed that the sterilization operation was successful and that she would not conceive any child in future. The Medical Officer did not perform his duty to the best of his ability and with due care and caution and due to this act the plaintiff has suffered mental pain and agony and burden of financial liability. Every doctor who enters into the medical profession has a duty to act with a reasonable

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134 2000(5) SCC 182 (DB), the respondent was a poor lady, who underwent a sterilization operation at the General Hospital, as she already had seven children and wanted to take advantage of the scheme of sterilization launched by the State Government. She was then issued a certificate that her operation was successful and assured that she would not conceive a child in future. But she conceived and ultimately gave birth to a female child.
degree of care and skill. This is what is known as “implied undertaking” by a member of the medical profession that he would use a fair, reasonable and competent degree of skill\(^\text{135}\). In *Thake V. Maurice* in which a vasectomy was performed on husband who was told that contraceptive precautions were not necessary after the operation. Yet, a child was born to him and the court awarded damages for the child’s upkeep up to the seventeenth birthday\(^\text{136}\). Thus, the failure of sterilization operation that results in birth of a child amounts to medical negligence provided that the doctor shall be informed the matter of pregnancy at an early state\(^\text{137}\). However, in the recent case of *State of Punjab V. Shivram*\(^\text{138}\) in which the Supreme Court observed that the cause of action for litigation in the case of failure of sterilization should be the negligence of the surgeon and not the child birth. If failure of operation occurs due to natural causes without negligence on the part of the surgeon does not provide a ground for litigation. Once the woman misses menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. If the couple opts for bearing the child inspite of having undergone sterilization, it ceases to be unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed. This ruling shows that the doctor is not responsible for the failure of a family planning operation if after sterilization the woman begets a child. However, considering the illiteracy of the women, ignorance or carelessness, the court directed the Union and State governments to devise a “welfare fund or insurance scheme” to the persons in whose case operations had been unsuccessful.

\(^\text{135}\) Bolam V. Friern Hospital Management Committee (1957)\(^2\) All ER 118; Whitehouse V. Jordon. (1981)\(^1\) All ER 267; Maynard V. West Midlands Regional Health Authority (1985)\(^1\) All ER 635. Sidaway V. Bethlem Roya Hospital, (1985)\(^1\) All ER 643, relied on.

\(^\text{136}\) 1984(2) All ER 513: (1985)\(^2\) WLR 215.

\(^\text{137}\) In Rukmani V. State of Tamil Nadu and Another (2003 ACJ 1748), the petitioner having two children underwent sterilization in a government hospital, yet she delivered her third and fourth child. The court observed that there was no negligence on the part of the doctor. The petitioner could have brought to the notice of the doctor her third pregnancy at an early stage which could have been terminated. In Suresh Kumari V. State and Others (2004 ACJ 1204), the High Court of Jammu &Kashmir held that the failure of tubectomy operation is not ground for litigation. In Fulla Devi V. State of Haryana and Others (2005 ACJ 51), a woman gave birth to a female unwanted child within 2 years of tubectomy operation. It was contended that operation was performed by a competent doctor, there was not negligence and all care had been taken. Some chance of failure of such operation and conception in future is always there and the woman was informed accordingly. The High court held that the arrival of a child despite sterilization operation is per se proof of negligence of the doctor and the defendants are liable to damages. In State of Madhya Pradesh V. Sundari Bai and Another (2005 ACJ 868), wherein tubal sterilization failed after 6 years, the court held that it cannot be attributed to the negligence of the doctor.

\(^\text{138}\) AIR 2005 SC 3280 (Three Judge Bench).
4.3.9. Emergency uterus hysterectomy for intractable bleeding post MTP in cervical pregnancy- no negligence:

In the case of Vinitha Ashoka V. Lakshmi Hospital and Others the appellant alleges that the gynecologist of the respondent hospital negligently removed her uterus without proper diagnosis by ultra-sonography, if the proper care had been taken this extreme step of removal of uterus could have been avoided. Relying upon the expert testimony and medical literature, the Supreme Court held that Cervical Pregnancy extending to lower segment of the appellant uterus is very complicated and rare of type pregnancy which cannot be diagnosed by clinical or vaginal examination particularly in the early weeks of pregnancy, as such hysterectomy is a recommended and established procedure to tackling excessive bleeding in the case of Cervical Pregnancy, hysterectomy had been performed in order to save her life when excessive bleeding started, and that such bleeding was not on account of any negligence in the diagnosis or on account of any faulty procedure adopted in the course of surgery. The respondent is not guilty of negligence as he has acted in accordance with established procedure accepted as proper by the opinion of the professional skilled in that filed. According to this, the test to determine whether the respondent-doctor is guilty of negligence or not, the court has to take into consideration whether he has acted in accordance with recognized standards of treatment. A doctor is not negligent, if he acts in accordance with such practice and it is not material to consider the satisfaction of the patient over the way in which he is treated. The court has failed to answer the question whether departure from the orthodox course of treatment amounts to negligence. However, in the instant case, the appellant as an unfortunate woman lost her uterus which is vital organ of regeneration as a result of

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139 2002(1) CPJ 4 (SC) the appellant gave birth to a child by caesarean operation. Having suspected that she might to be pregnant again, she and her husband consulted the respondents who after examining informed that she was pregnant and it was decided to terminate the pregnancy. However, the respondent who performed operation informed the appellant’s husband that it was a case of Cervical Pregnancy and her uterus had been removed.

140 In A.S. Mittal V. State of Uttar Pradesh supra 118, it was stated the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties.

141 In Achutarao Haribhau Khodwa’s case the Apex Court held “ courts would indeed be slow in attributing negligence to the part of doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as doctor acts in manner which accepted to the medical profession and the court fitted that he has attended on the patient with the care. Skill and diligence and if the patient does not surve or suffers a permanent ailment, it would be difficult the doctor to be guilty of negligence”.( pp. 645,648)
ectopic pregnancy in the cervical canal and no attempt has been made to redress the grievance of the patient.

4.3.10. Death of a young boy following operation for slipped disc and delay in disposal of case.

The issue of delay in disposal of complaint by the consumer forum draws the attention of the Supreme Court in Dr. J.J. Merchant, Breach Candy Hospital and Others V. Shrinath Chaturvedi, a 21 year old boy was operated upon for a slipped disc as he was suffering from backache. It was stated that just 2 months before that he had returned from USA after obtaining degree in Business Management. He died in the hospital itself. The complaint filed a complaint before the Consumer Forum for compensation and criminal proceedings before the Court of Magistrate for the offence punishable under Section 304-A of IPC. While the criminal case was being pending, there was delay of 9 years in disposal of the complaint in the consumer forum. The appellant challenged the order of the National Commission which rejected his application praying for the dismissal of the complaint in the consumer forum as it involved complicated question and law and facts which can be decided by the civil court or in the alternative, the proceedings be stayed during dependency of criminal persecution. Reasons for delay as submitted by the parties are a) delay in making appointment of the Chairman and member of the forum or commission including National Commission; b) not providing adequate infrastructure; c) delay because of heavy workload and there is only one Bench of the National Commission or the State Commissions for deciding complaints and d) delay in procedure. The issue which arose for the consideration: whether the delay in disposal of cases by the consumer forum or State Commission would be a ground for directing the appellant to approach the civil court? In the present case there is inordinate delay of nine years in disposal of the complaint. If this contention is accepted, then the whole purpose and object of enacting the Consumer Protection Act, 1986 would be frustrated. Therefore, the court held that the consumer forum is competent to decide the medical negligence litigation and directed the consumer court to dispose the complaint within the prescribed period.

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142 2002(6) SCC 635.
143 Ibid.
4.3.11. Death after operation for nasal deformity:

In *Dr. Suresh Gupta V. Government of NCT of Delhi*\(^{144}\), a young man with no history of any heart ailment, underwent operation by the appellant for nasal deformity. The operation was neither complicated nor serious, yet the patient died. On investigation, the cause of death was found to be “not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage”. The case was registered under Section 304-A of IPC. The Bench opined that the conduct of the doctor shows an act of negligence as there was lack of due care and precaution but for this type of negligence, he may be liable in tort, his careless or want of due attention and skill cannot be described so reckless or grossly negligent as to make him criminally liable.

4.3.12. Death due to non-availability of oxygen cylinder in the room:

In *Jacob Mathew (DR) V. State of Punjab*\(^{145}\), the respondent’s father was admitted as a patient in a private ward of CMC Hospital, Ludhiana and after sometime, the patient felt difficulty in breathing. The respondent who was present in the room contacted the duty nurse, and some doctor to attend to the patient. No doctor turned up for about 20 to 25 minutes. Then, the appellants who came to the room of the patient, wanted to connect an oxygen cylinder to the mouth of the patient but the breathing problem increased further. It was alleged that the oxygen cylinder was found to be empty and there was no other cylinder available in the room. In the course of making arrangement 5 to 7 minutes were wasted. By this time, another doctor came who declared that the patient was dead. The respondent alleged that the death was due to the negligence of the appellants. The Supreme Court held that it is a case of non-availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. For this, the hospital may be liable in civil law but the accused-appellant cannot be proceeded against under Section 304-A of IPC. The court condemned the attitude of the people who often move the criminal court for the prosecution of the doctor alleging negligence for the death of the patient and issued guidelines as to the criminal prosecution of the doctor for negligence. The court sympathized with the appellant-doctors who were subjected to criminal prosecution due to non-availability of the gas cylinder.

\(^{144}\) 2004 ACJ 1441 (SC).

\(^{145}\) 2005 ACJ 1840 (SC).
cylinder. However, it should be noted that non-availability of the oxygen cylinder for treatment constitutes negligence on the part of the hospital.

4.3.13. Continuous and regular flow of urine right from time of operation:

In a recent case of Tara Chand Jain V. Sri.Ganga Ram Hospital & Another\(^{146}\), in which the appellant filed a complaint in the National Commission for damages arguing that the continuous flow of urine was the consequence of the negligence of the respondent in conducting the prostate operation. The Supreme Court affirmed the ruling the of the National Commission which held that the complainant has failed to establish the allegation of negligence with the help of materials and the fact that the complaint was lodged after about three years itself shows the hollowness in the claim. The court considered two points in the present case namely the lack of medical experts that substantiate the claim and the period of limitation. However, it is to be noted that the court viewed the case in terms of evidence and period of limitation than the patient’s injury as result of the treatment.

4.3.14. Unqualified doctor performs fatal abortion:

One of the important issues which attracted the attention of the Supreme Court in a recent case was: whether doctors who are not qualified to perform abortion can be prosecuted for criminal medical negligence? In a heart breaking news a woman dies as a result of performing abortion by two doctors who are not qualified to do Medical Termination of Pregnancy. According to MTP Rules 1975, doctors with M.D. (Gynaecology or DGO need not have extra experience for performing an MPT. Doctors registered before 19972 should have three year experience in gynaecology. Doctors registered after 1972 should have six-month house-surgeon ship in gynecology and one-year’s experience in the field. The complainant alleged that the respondents who performed an MPT on his wife did not possess the requisite qualification. On the other hand the doctors said that there was no negligence on their part and the complainant’s wife died though they made very effort to save her and

\(^{146}\) 1(2006) CPJ 6 (SC), wherein the appellant underwent prostate operation for having urinary trouble was told that he would be perfectly normal within one or two months. Instead of getting relief, he started feeling acute pain in the thigh muscles and backbone. The appellant suffered high fever and increase in blood urea as a result to his condition became very serious. Despite the medicine prescribed the problem of continuous urine flow was not cured. It was alleged that the urine flow was continuous on account negligence while the operation conducted.
prayed for quashing the High Court’s order. However, the Bench referred the matter to the larger Bench considering the allegation that appellants were not qualified to perform the MPT\textsuperscript{147}.

4.3.15. Suffering paraplegic-paralysis of the lower limbs of the body after surgery:

In *Prasanth S. Dhananka V. Nizam’s Institute of Medical Sciences, Hyderabad and Others*\textsuperscript{148}, a person who became a paraplegic after surgery argues his case from his wheelchair before the Supreme Court that he was admitted to the hospital for check up as he was suffering from on and off fever for one year. On examination, it was noticed that he had a large mass in his left hemithorax (chest cavity) for which a surgery was performed and removed the tumour. But post-surgery he became a paraplegic due to the negligence of the respondent and therefore entitled for 7 crore as compensation against which the National Commission awarded only Rs.15.5 lakh. The complainant’s main charge was that the tumour being a neurogenic one, the surgery should have been handled by a neurosurgeon. The surgery completely disturbed the nervous system, making him paraplegic. The compensation awarded was grossly inadequate and as such he was entitled for 7 crore as compensation. However, the Supreme Court directed the parties to go for an out-of court settlement as the amount claimed was unreasonable.

4.4. CONCLUSION:

The role of courts in determining what amounts to medical negligence and what not amount to medical negligence reveals that there is a less contribution towards the development of the law in relation to the rights of patients. Several cases of medical malpractice litigations have been discarded on the ground of lack of proper medical expert evidence. What is important for the court, it is the medical expert opinion that generally supports the action of the brother professional rather than the sufferings of the victim of negligence. This shows the absence of humanistic approach in deciding the medical negligence cases and there is also lack of approach that strikes balance between the practitioner’s negligence and rights of the subject of negligence. The present judicial dimension appears to be aiming at protecting the

\textsuperscript{147} THE HINDU, 8\textsuperscript{th} June 2007.

\textsuperscript{148} THE HINDU, 23\textsuperscript{rd} April 2008.
reputation and dignity of the health care provider than considering that the victim has also his own rights that ought to be respected with or without the support of the medical opinion. Therefore, there is need to adopt humanistic approach in deciding medical malpractice litigation as the present role of the court is minimal in terms of rights of the patients.