CONCLUSION AND SUGGESTIONS

The present work represents that medical practice is as old as human civilization. There is no any other profession than medicine which has been rendering yeoman service to the mankind. Tracing the genesis of the healing practice, we find that it was primarily dominated by superstitions and religious orders because it was practiced by part time practitioners like priests, charlatans, barbers, magicians, slaves and foreigners etc, who enjoyed low status in society. No monetary consideration was involved. Hippocrates and Galen were also not full time medical practitioners but possessed some art of healing. Then medicine comprised neither scientific technique nor supernaturalism, but religious faith. The Roman emperors who conferred on all physicians’ dignified titles, land grants, special retirement benefits with the result of which the status of practice medicine was enhanced. The medical profession lost its shoddy treatment and became respectable. Romans later established general hospitals and schools to study medicine scientifically and become practitioner. Since then, the world witnessed a tremendous progress in the establishment of hospitals across the globe and further prosperity with the influence of industrialization and rapid growth of trade and commerce in England and in the contemporary world. The 20th century medicine proved sophisticated and high standards of medical treatment around the world.

Today, health care is an industry and a subject of national economy and the same has been expanded beyond national boundaries in terms of medical tourism. The title “doctor” and “hospital” has been replaced by the health care provider in the context of commercialization and globalization of the medical care. The consideration is pivotal in securing a quality of medical care. When a patient is ready to pay to the satisfaction the health care provider, he may not be able to get the desired result. A poor man’s right to medical care is remained a distant dream to be fulfilled. However, the right to health is a human right guaranteed by the national Constitution and international Covenants on Human rights. The fundamental right to life and personal liberty would be rendered meaningless and futile, if life does not comprehend a healthy and vibrant life. The preamble to the Constitution of WHO declares “enjoyment of the highest attainable standard of health is one of the
fundamental rights of every human being”. The Constitution of India not only provides for the health care of the people but also directs the State to take adequate measures improving the health care conditions of the people such as workers, men and women and children of tender age. It also obligates the State to provide, right to work, to education, provision for just and humane conditions of work and maternity relief, living wages, environment, nutrition, adequate sanitation, clean water and air etc.

However, these Constitutional directives are applicable to the State action and not private authorities like private health care hospital. Failure on the State to comply with these constitutional obligations does not amount to ‘medical negligence’ or ‘medical malpractice’. In law, doctors and medical institutions have a legal duty to take care of the patients. When they fail to treat their patients with reasonable care and skill, causing damage or injury is termed as medical negligence. A doctor can be charged with criminal negligence, if he is found to have been endangering the life of his patient; for example, leaving surgical instruments, gauze swabs inside the human body, transfusing the wrong type of blood, operation on the wrong limb, wrong patient or wrong side as a result of mix up in the theatre or operating without informed consent. If the doctor does not foresee that the patient could harm himself and fails to forewarn him that is also amounting to medical malpractice. But the court of law determines the matter in issue, whether it amounts or does not amount to medical negligence while examining the case of medical treatment.

Doctors and medical institutions are liable for the shortcoming of medical care. The aggrieved or victim of negligence may move the High Court or the Supreme Court with appropriate writ petition seeking remedy for the negligence of the doctor or hospital. But this constitutional remedy comes to the rescue of victim only as a last resort after exhaustion of all possible remedy. Litigations against doctors and health care institutions can also be initiated in the civil courts of ordinary jurisdiction under the law of tort or the law of contract. In practice, it would be very difficult to invoke the jurisdiction of the civil court for getting justice; because greater the damages claimed greater will be the court fee, even if victims of medical malpractice afford to pay, the inordinate delay and the strict proof of evidence will increase the mental agony of the petitioner.
In order to secure speedy and inexpensive remedy, the complainant may lodge a complaint in the ‘Consumer Court’ for damages under the Consumer Protection Act 1986. The complainant must prove the hiring of medical service for consideration without which the complaint will be liable to be dismissed. By means of interpretation process, the Consumer Protection Law draws a clear distinction between the ‘paid’ medical service and ‘free’ medical service. The latter is excluded from the purview of the definition of “service”. Hiring of medical service for consideration is a sine qua non for invoking the aid of the Consumer Protection Act. Indeed, poor patients do not have access to consumer remedy. Similarly, the Consumer Forum comprises a judge as a president and two members but none of them possess the knowledge of medical literature. As a result it has been difficult on the part of the existing judges of the tribunal to decide complexities involved in the medical malpractice litigation. It raises a serious doubt as to whether the present consumer court can comprehend and adjudicate medical issues involved in the medical treatment? The professional body apprehends that the complaint might not be determined on merit and doctors are likely to become the victim of judicial error.

The present Consumer Protection Act does not cover the service rendered by a medical practitioner belonging to the governmental or charitable hospital where services are rendered free of charge to patients. The medical practitioners and hospitals undertaking free medical service enjoy immunity from the applicability of the Consumer Protection Law. Poor people who cannot avail the service in sophisticated hospitals operated by the private sector, approach the charitable and governmental health care institutions for medical care but they cannot seek justice in the consumer court for the negligence of the doctor. Socio-economic justice to poor patient is a myth than reality.

In case of criminal medical negligence, the judicial approach is always in favour of the accused medical practitioner which has been adopted by the Indian law courts. It is clear from the recent proposition of law laid down by the Supreme Court in Dr. Suresh Gupta’s case (2004) and Dr. Jacob Mathew’s case(2005) which state that “a mere lack of care, error of judgment or an accident is not proof of negligence on the part of a medical professional. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence,
the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher that is ‘gross or of a very high degree. Negligence which neither gross nor of a higher degree cannot form the basis for prosecution’.

Imagine the plight of victim of medical negligence? Is it possible to prove by the victim the presence of mens rea on the part of the doctor with the supported evidence of medical expert? Can the medical expert offer evidence against his brother-practitioner against whom criminal prosecution is initiated? If the real offender escapes from the punishment due to the lack of technical evidence, does it not amount to mockery of criminal justice?

It is evident from the empirical study that general hospitals have been embroiled in controversy by various issues such as inadequate staff, shortage of ambulances, lack of an emergency wards, modern equipment and corruption. K.R. Hospital which is one of the oldest government-run institutions in the State faces shortage of ventilators, anaesthesia machines, operating tables and lights, defibrillators, echocardiographs, infusion pumps, multi-channel monitors and laparoscopic and endoscopic equipment etc. The survey reveals various causes for medical negligence such as exorbitant fees, failure to fulfil the patient’s expectations, inadequate use of medical technology, change of the physician and patient relationship, inadequate information given to patients over medication, lack standards for disposal of bio-medical waste and lack of emergency medical service. Patients are not aware of their human rights such as right of autonomy, privacy, confidentiality and forth. Similarly, the health care providers are not aware of medical laws which regulate their conduct in rendering medical services.

In KR. Hospital, 7,972 patients died for the last four years through preventable medical errors and more than 3,560 infants died in Cheluvamba Hospital, Mysore. There is no mandatory requirement to report to the authorities concerned whenever patients die due to medical adverse outcomes. The empirical survey reveals that though private hospitals possess sufficient infrastructure, medical personnel, and modern equipment in comparing with public hospitals, medical malpractice is so rampant in both the sectors.

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1 Source: Data obtained from the K.R. Hospital 22-07-2008.
2 Source: Data obtained from Cheluvamba Hospital, Mysore 30-07-2008.
FINDINGS:
On the whole the findings can be summarized as follows.

● Medical Negligence

In order to seek remedy for a medical adverse outcome from the medical practitioner concerned, a patient may institute a suit under various branches of law, depending upon the circumstances. These branches of law are the law of tort, law of contract, consumer protection law. Under the existing tort system, ordinarily, a doctor owes a duty to take reasonable care in dealing with patients. A breach of the duty of care that results in injury to the patient renders the practitioner liable for the injury caused. In order to hold a doctor guilty of negligence, it is essential to prove the components of negligence, such as where the doctor owes the patient a duty of care, where he breaches such duty and that breach causes damage and sufferings. The standard of care for medical negligence is that of the ordinary skilled doctor exercising and professing to have the relevant skill. Whether the conduct of a medical professional meets the standard of care in particular circumstances is to be determined by the court. It is not enough to agree with whatever the evidence offered by the peer members of the professional as correct and consistent with medical literature.

● Lack of technical knowledge to adjudicate medical malpractice complaint:

Under section 10 of the CPA the district consumer redressal forum shall consists of (1) a person who is or has been or is qualified to be a District Judge; (2) a person of eminence in the field of education, trade or commerce (3) a lady social worker. Section 16 lays down the composition of a State Commission which is to consist of (1) a person who is or has been a Judge of the High Court (2) two other members (one of whom shall be a woman) being persons with ability, standing, having knowledge and experience in speciality fields. It is necessary to observe that none of the members possess knowledge about understanding the complexities of medical case. However, it is not meant to say a judge should become a doctor, but a judge should have knowledge of medical literature when he is deciding medical negligence cases.
- **No competence to adjudicate complex issues:**

  The Supreme Court, National Commission and State Commission have expounded a proposition which states that the consumer court should restrain from trying with summary proceedings any complaint where complex questions of law and facts are involved. Any issue of fact that requires detailed examination of documentary evidence and accurate testimony of expert should be adjudicated by the civil court. The complainant challenges the standard of treatment given by the respondent-doctor in medical negligence complaints such as operation on the wrong patient due to mistake of reading the history sheet, prescribing medicine without studying its side effects, loss of voice due to paralysis of vocal cord, giving anesthesia without defibrillator, leaving foreign objects in abdomen after the operation, etc., and these facts require elaborate expert as well as documentary evidence which cannot be decided with summary proceedings.

- **Struggle between business and noble calling:**

  Under the existing medical system each branch of medicine is regulated by its own professional body such as medical council, dentist council, nursing council, council of Indian medicine, council of homeopathy and like. These regulatory bodies have the power to regulate their members conduct and determine their own standard of practice. In recent times the self regulatory standards in the medical profession have shown considerable decline in identifying and deterring business minded professionals and eradicating them from the nobility of the calling. In a case\(^3\), the Delhi High Court ordered removal of Dr. Ketan Desai as president of the MCI and directed the CBI to initiate prosecution against him for his involvement in corrupt practices while observing that the apex body for doctors was a ‘den of corruption’. The court said: *the first step is removal of Dr. Ketan Desai from office of president of MCI…… if you or anyone will go through the records placed before us, he will be in tears to know how MCI affairs are being run.”* There are reports against doctors of exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs. It would not be an exaggeration to state that some black sheep have entered into the noble profession and the profession has been unable to identify and keep them away from the practice. With the impact of globalization and

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\(^3\) Dr. Harish Bhalja Vs Union of India & others (CWP No. 7746/2000, the order dated 04-06-2001.
Commercialization of medical education, the health service has become a business and economic commodity which is affordable to only few. Denial of medical care on the distinction of wealth results in violation of human rights.

- **Protective Approach of the courts towards of the medical practitioners:**

  A person who complains of negligence is required to prove the alleged fact by adducing acceptable evidence. The complainant has to adduce reliable medical records and examine any expert to prove that the procedure adopted by the respondent was not a procedure that could have been adopted or there was any negligence in the said procedure. The evidence of medical expert is very essential in proving the case. If the medical expert doesn’t give favourable testimony or turns hostile or favor the respondents-practitioner due to professional interest, even wrong operation being performed, the respondent is not guilty of negligence. In the absence of evidence, failure of surgery, error of judgment does not amount to medical negligence. The court presumes that every doctor tries to give relief to the patient when he is approached and medical science is not under the direct control of the treating doctor. As a result if the surgery is failed it does not mean that there is any negligence on the part of the doctor. It is settled law that “if the patient is not benefited by the system, it is his misfortune. In any treatment it is never claimed by the medical profession that every person who receives the treatment must and should be benefited by the same because the benefits of a particular type of system or operation or medicine depends on number of factors… Merely because the patient was not relieved from the pain, one cannot jump to the conclusion that the system is bad or that the doctors have not given proper treatment. If every one has to be benefited by a particular medicine or operation then nobody will die by disease”\(^4\). “A surgeon does not become an actual insurer, he is only bound to display sufficient skill and knowledge in his profession. If for some accident, or some variation particular injury happens, it is not the fault of the medical man”. On the other hand, there is no such presumption in favour of the injured patient.

\(^4\) 1993 (2) CPR 496.
SUGGESTIONS

The present research work therefore, aims at understanding the plight of those who have been the victim of medical malpractice in the hands of health care providers, eradicating black sheep from the noble profession of medicine, protecting genuine practitioners from unscrupulous patients and strengthening the physician and patient relationship with mutual trust and confidence in the system of medical care. In this regard, following suggestions may be considered.

1) **Medical tribunal or health care court:** Prior to CPA consumers were required to approach the civil court for securing justice for the wrong done to them and it was a fact adjudication took a long time involved huge litigation expenditure. Under the CPA, consumers are provided with an alternative, efficacious and speedy remedy against defective goods and deficient services. The object and purpose of this benevolent piece of legislation is to protect a large body of consumers from exploitation by the unscrupulous traders. Quasi-judicial machinery is established at the District, State and Central level. These quasi-judicial bodies are required to observe the principles of natural justice and have been empowered to give relief of a specific nature and awards, wherever appropriate, compensation to consumers. The Consumer Forum is an alternative forum established under the Act to discharge the functions of a civil court. However, medical service is not expressly mentioned in the Act and it is only the judicial interpretation which states medical service is a service within the meaning and scope of the CPA. There is inordinate delay in disposal of complaint against the health care provider because of technical intricacies and pressure of workload with the existing consumer forum, there is need of establishing the Health Court/Medical Tribunal for adjudicating medical malpractice cases. The said health court can be given jurisdiction over all issues relating to health care.

2) **Enactment of Bill of Rights of patients:** In UK “Patients’ Charter” was first introduced in 1992, followed by US, Canada and other parts of European world. The Charter reveals national standards regarding what patients could expect in terms of access and treatment from the publicly-financed system. At the regional level, Health Authorities and NHS Trusts which manage the public hospitals are encouraged to negotiate even higher standards and every year Health Authorities...
publish an annual report on each hospital’s performance against Charter standards. The Patient’s Charter, expressly states how long patients should expect to wait for various services. Every person has the right to have services provided with reasonable care and skill; that comply with legal, professional, ethical, and other relevant standards; in a manner consistent with her needs; that minimizes the potential harm to, and optimizes the quality of life of, that recipient and every recipient has the right to cooperation among providers to ensure quality and continuity of services. In addition to “rights” the Charter also sets out standards including respect for privacy, dignity and religious beliefs and also in relation to waiting times, such as a guarantee of being seen within thirty minutes in an outpatient clinic. To ensure the realization of the right to health care services as guaranteed in the Constitution of India, the Department of Health should proclaim the “Charter of Patients rights”. By proclaiming patients rights in one comprehensive piece of legislation and providing an enforcement mechanism by means of Ombudsman, right to quality of medical care would be more meaningful and accessible as legitimate right. Such Charter offers some benefits such as the ability to address services provided by health care providers, provide a complaint mechanism, allows investigation into hospitals and educates both the patient and the provider.

3) **Recognizing the right to health care as a fundamental right:** In the present scenario there has been a tremendous disparity in rendering medical service to the people by reason of education and economic prosperity. The poor class of patients is deprived of standards of medical treatment. Affordable classes get modern medical and surgical treatment in private hospital. There is a lot of disparity between the government and private hospital in terms of infrastructure, medical personnel, and medical technology. The data has shown that poor, illiterate, rural people are getting the medical service in the government hospitals. Making the right to medical care as a justifiable right through the constitutional amendment is the need of the hour. The right to health should not only be enforceable against the public health care institutions but also against private health care sectors which are playing substantial role providing health care services.
4) **Reform the existing medical education:** The present graduate programmes are inadequate and do not produce competent doctors. Post graduation and specialization have become a sine qua non. There are problems plaguing medical education such as, lack of adequate training at graduation level, emphasis on degree rather than training, and long waiting period before decent earnings. At the entry level itself the students should be allowed to choose an area of specialization as in the case of engineering courses.

5) **Accreditation of Hospitals:** The Union government should look into the indiscriminate mushrooming of medical colleges and hospitals which may not be maintaining good quality. Hospitals should go for accreditation so that they maintain high standards of quality and the patient should be at the centre of all services. It should be noted that while in Karnataka and Kerala there is one medical institution for every one million population, in some of the northern States such as Uttar Pradesh there is one for a population of nine million, which shows there is a huge disparity in the distribution of healthcare expertise across the country. Recently the State Government of Karnataka has established 6 medical colleges but there is no recruitment of faculty and no adequate infrastructure to teach students. If this trend continues there will be further deterioration of standards of medical education and treatment as a result of which ultimately patients will be put to hardship and subjected to victim of negligence.

6) **Make professional indemnity compulsory:** One of the ways of protecting against the outcome of malpractice litigation is to secure insurance coverage. If the medical practitioners or health service providers obtain insurance, the company will indemnify against financial consequences of legal liability. The professional indemnity insurance cover is available for doctors and other health service provider since 1991 but is not mandatory. The survey reveals that majority of doctors have not taken insurance coverage. However, in this direction, recently the Government of India has launched an insurance coverage for both performing doctors and those undergoing sterilization operations with a view to minimize legal complications arising out of the procedure but this scheme is limited to only failure of sterilization. The insurance scheme provides for Rs.1 lakh as compensation for death in hospitals; Rs.30000 for death due to
sterilization within 30 days of discharge from hospital; Rs.20,000 for failure of sterilization and Rs.20,000 for medical complication occurring within 60 days of sterilization operation. However, this scheme should be extended to the injuries and deaths of patients by reason of medical negligence.

7) **Recognize the principle of No Fault Liability:** Where a patient dies as result of administering nitrous oxide instead of oxygen at the time of the performance of surgical operation upon him or the negligence on the part of the Staff of a hospital, the court should be empower to award reasonable sum by way ad interim compensation. Such a course of action would not only help in protecting, preserving and enforcing the fundamental right to life but also prevent its violation of human rights. Besides, dependant family of the deceased will be saved from penury and undeserved want till the litigation is adjudicated.

8) **Change the present pro-professional approach:** Under the current position of law, the Court decides the case of medical malpractice according to the **Bolam’s test**. That is to say, a practitioner may be held liable only when his conduct falls below the standard of a reasonably competent practitioner in his filed and he is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art. Consequently, the court has to decide the litigation of malpractice on the basis of the expert evidence. Where the court decides the litigation as such, it raises a question as to who evaluates the performance of the doctor? Is it by the court of law or by the medical expert? The rule of evidence allows the court of law take into account the evidence of expert where a case involves the technical or medical issue, but the expert evidence is not a conclusive proof. If the court were to accept the opinion of the expert witness as admissible in evidence without examining its merits objectively, it would not be acceptable as a sound principle of law. Therefore, the court needs to shift its protective perception that a doctor’s professional reputation is dear to him, and an action for negligence can wound his reputation as severely as a dagger can wound his body. It would not be ethically unjust and legally untenable to punish a doctor for wrong treatment resulting injury to his patient.
9) **Prohibit private practice while in service:** It has been revealed from the survey that, majority of doctors who are in the Government health care sector, involve in their private practice for monetary consideration. As a result, the patient will be ultimate sufferer as the doctor is not available to meet any emergency service. Therefore, the State may take legislative steps to prohibit private practice while the practitioners are in service.

10) **Medical Council to take suo-moto action:** The Medical Council of India Act empowers the State Medical Council to initiate disciplinary proceedings against a medical practitioner after due investigation into the alleged infamous conduct. But the Council does not have power to take action without being a complaint by the affected person. The complaint by aggrieved party is a condition precedent for the Council to move disciplinary proceedings. There is a need to confer on the council suo moto power to tackle the menace of medical malpractice.