CHAPTER II
MEDICAL NEGLIGENCE LIABILITY UNDER TORT LAW
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2.1 INTRODUCTION

Law of Tort is that branch of law which enables the victim to seek remedy from the person who injured her. Unlike a criminal case, which is initiated and managed by the state, a tort suit is prosecuted by the victim or the victim’s estate. A successful suit results in a judgment of liability, rather than a sentence of punishment. In other words, it requires the defendant to compensate the plaintiff financially. In principle, an award of compensatory damages shifts all of the plaintiff’s legally cognizable costs to the defendant. This chapter will be dealing with civil liability for medical negligence under Tort law specifically and other health care legislations generally.

2.2 WHAT IS A TORT?

Tort means wrong. But, it does not concern with all the wrongs that people do. Tort law provides an institutional mechanism for reconciling conflicting claims of people over things that are important to them-freedom of action, bodily security, property and emotional well-being. Fundamental principle of this branch of law is the dutifulness in undertaking various activities not to injure those, whom our undertakings put at risk. In other words, the core value in torts is the duty not to injure others. Thus, while the notion of a wrong remains important, it also addresses the costs, suffering, or more generally, the losses that victims suffer as a result. Tort law distinguishes between two general classes of duties. Duty not to injure and not to injure negligently. In an activity which the law regards as extremely hazardous, there is a duty not to injure. When you engage in more common activities, the duty is not to injure negligently. In general, the conduct is governed by strict liability in case of duty

24 Peter .M.Gerhart,Tort Law and Social Morality 3-6 (2010)
26 Id
27 Id
28 Id
not to injure. It is governed by fault liability when you are subject to a duty not to injure negligently or carelessly\textsuperscript{29}

2.3 Negligence

According to BLACK’s law dictionary negligence means “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, willfully disregardful of others rights”\textsuperscript{30}

In P.R. AIYER’s Law Lexicon, it is defined as, “Negligence in its legal acceptance includes acts of omissions as well as commissions”. And “negligence is failure to use the care that a reasonable and prudent person would have used under the same and similar circumstances”\textsuperscript{31}.

WHARTON’S Law Lexicon\textsuperscript{32} suggests that negligence can be a question of law or fact or of mixed fact and law, depending entirely on the nature of a duty, which the person charged with negligence, failed to comply with or perform in the particular circumstance of each case.

WILLES,J opines, “Negligence is a negative word. It is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of work, which he is said not to have performed”. Negligence is omitting to do something which a reasonable man would do or the doing of something which a reasonable man would not do\textsuperscript{34}. Negligence as a Tort is a breach of legal duty to take care which results in damage.\textsuperscript{35}

In the words of POLLOCK,

\ldots every tort is an act or omission not being nearly the breach of duty arising out of a personal relation, or undertaken by contract which is

\begin{thebibliography}{99}
\item \textsuperscript{29} Coleman,.Jules et al., supra note 25
\item \textsuperscript{30} Black’s Law Dictionary, 1133-1136(9th.ed. 2009).
\item \textsuperscript{31} Ramanatha Aiyar’s The Law Lexicon 1188-1190 (3rd ed.2012)( Shakil Ahmad Khan ed.)
\item \textsuperscript{32} Wharton’s Law Lexicon, 1146-1147 (15th ed.2009)
\item \textsuperscript{33} Grill v. General Iron Screw Collier Co,35 LJ cp 330
\item \textsuperscript{34} Blyth v. Birmingham Water works C.,25 LJ Ex 212
\item \textsuperscript{35} W.V.H.Rogers (ed.), Winfield & Jolowicz on Tort, 150-151 (18th ed.2010).
\end{thebibliography}
related in one of the following ways to harm including the interference with an absolute right whether there be measurable actual damage or not suffered by a determinate person.\textsuperscript{36}

The word ‘tort’ is derived from the Latin verb ‘tortere’ means to hurt. Since the concept of negligence is part of that branch of law, the idea of hurt is an important consideration in establishing negligence.\textsuperscript{37} A tort is an act or omission which is unauthorized under law, and independently of contract infringes either some absolute right of another or some qualified right of another causing damages; or some public right resulting in some substantial or particular damage to some person beyond that which is suffered by public generally and gives rise to an action for damages at the suit of the injured party.\textsuperscript{38} Negligence is defined in \textit{Blyth v. Birningham Water Works Company}\textsuperscript{39} as, “… omission to do something which a reasonable man guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which prudent and reasonable man would not do”.

In essence, actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence:

- A legal duty to exercise due care
- Breach of the said duty
- Consequential damage.

Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort.\textsuperscript{40} To put it simply, negligence is not ‘neglect or carelessness’. But it is the failure to take such care as required in the particular context.\textsuperscript{41}

\textsuperscript{36} Y.V. Rao, Law Relating to Medical Negligence 2-4 (1sted. 2006).
\textsuperscript{38} \textit{Id} Rao
\textsuperscript{39} Blyth supra note 34
\textsuperscript{40} Ratanlal & Dhirajlal, Law of Torts 441-442 (24th ed. 2002).
\textsuperscript{41} K. Mathiharan & Amrit k Patnaik ed., Modi’s Medical Jurisprudence and Toxicology 153-155 (23rd ed. 2005)
M A. Jones states, that:

...as a tort negligence consists of a legal duty to take care and breach of that duty by the defendant causing damage to the plaintiff. Duty determines whether the type of loss suffered by the plaintiff in the particular way in which it occurred can ever be actionable. Breach of duty is concerned with the standard of care that ought to have been adopted in the circumstances, and whether the defendant’s conduct fell below that standard, i.e., whether he was careless.\(^{42}\)

Sahai J. expressed in *Jay Laxmi Salt Words (P) Ltd v State Of Gujarat*:\(^{43}\)

...the axis around which the law of negligence revolves is duty, duty to take care, duty to take reasonable care. But concept of duty, its reasonableness and the standard of care required cannot be put in straitjacket. It cannot be rigidly fixed. The right of yesterday is duty of today. The more advanced the society becomes the more sensitive it grows to violation of duties by private or even public functionaries. Law of torts and particularly the branch of negligence is consistently influenced and transformed by social, economic and political development.

Salmond did not accept the view that negligence was ever a purely objective fact involving characteristic or essential mental attitude at all. He has not even been of the opinion that negligence is a specific tort. According to him, it is merely a state of mind providing the essential condition of liability for recognized torts.\(^{44}\) But the decision of House of Lords in *Donoghue v. Stevenson*:\(^{45}\) established that, negligence, where there is a duty to take care, is a specific tort in itself.

The fundamental idea behind liability for negligence is the duty of care.\(^{46}\) It was expressed in its modern form by majority of the House of Lords, in *Donoghue’s case*. In this case, a manufacturer of ginger beer sold beer in an opaque bottle to a retailer. The retailer sold it to a person who gave it to another. It was alleged that it contained decomposed part of a snail. The woman who consumed the beer alleged that she became seriously ill in consequence and sued the manufacturer for negligence. The doctrine of privity of contract prevented her

\(^{43}\) 1994 SCC (4) 1, JT 1994 (3) 492  
\(^{45}\) 1932 AC 562  
\(^{46}\) G.H. Fridman, Modern Tort Cases 32-34 (1968)  
\(^{47}\) 1932 AC 562
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bringing a claim founded upon breach of warranty in a contract of sale, but a majority of the House of Lords held that the manufacturer owed a duty to take care that the bottle did not contain noxious matter and that he would be liable in Tort, if that duty was broken.

Lord ATKIN said:

The liability for negligence, whether you style it such or treat it as in other systems as a species of ‘culpa’ is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would ensure cannot in a practical world be treated so as to give a right to any person injured by them to demand relief.

He has used neighbour test to decide the existence of a duty of care for personal injury and property damage:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, who is my ‘neighbour?’ receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.\(^{48}\)

The House of Lords by Majority held that the respondent owed the appellant duty of care. The manufacturer is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the articles are free from defect likely to cause injury to health. It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is too remote from the carelessness. The fact that there is contractual relationship between parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence between the same parties independently of contract\(^ {49} \).

Prior to Donoghue’s case, a claimant would have to establish an existing duty relationship in order to be successful. The neighbor test taken in its widest sense

\(^{48}\) 1932 AC 562

\(^{49}\) RAO ,supra note 36
could be very broad allowing liability in a whole range of situations, however, subsequent cases narrowed down its application to only where a consumer was suing a manufacturer.

However, Lord Wilberforce sought to resurrect an all-embracing test for duty of care\(^\text{50}\) in *Anns v. Merton London Borough Council*\(^\text{51}\).

The question has to be approached in two stages …first, one has to ask whether, as between the alleged doer and the person who has suffered damage there is sufficient relationship of proximity or neighborhood so that, in the reasonable contemplation of the former, carelessness on his part may be likely to damage to the latter-in which case a *prima facie* duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations, which ought to negative, or to reduce or to limit the scope of the duty or class of persons to whom it is owed or the damages to which the breach of it may give rise.

Foreseeability of the act is significant, as it is the determining factor not only in imposing duty to take care, but also in for limiting the liability of persons to whom the duty is owed. It was stated that, “The reasonable man is only bound to foresee the probable consequences of the act and not all the possible consequences, because in the simplest and apparently least harmful act there are always possibilities of damage, improbable though that damage may\(^\text{52}\).”

### 2.4 Professional Negligence

Scrutton L.J. has expressed in *Commissioners of Inland Revenue v. Maxse*\(^\text{53}\) that:

… ‘profession’, in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or manual skill, controlled, as in painting, sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word ‘profession’ used to be confined to the three learned


\(^{51}\) 1977 (2) All ER 492 (HL)

\(^{52}\) RAO, supra note 36

\(^{53}\) 1919 1 K.B. 647
professions, the Church, Medicine and Law. It has now, I think, a wider meaning.

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task.\(^{54}\)

Occupations which are regarded as professions have four characteristics.\(^{55}\) They are the following.

- The nature of the work which is skilled and specialized and a substantial part is mental rather than manual;
- Commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;
- Professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and
- High status in the community.

In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man’s control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, 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. In general, a professional man owes to his client a duty in tort as

\(^{54}\) Jacob Mathew v. State of Punjab, 2005 CTJ 1085

\(^{55}\) Indian Medical Association v. V.P. Shantha & Ors, 1996 AIR 550
well as in contract to exercise reasonable care in giving advice or performing services\textsuperscript{56}

The famous observation made by McNair J in \textit{Bolam v. Friern Hospital Management Committee}\textsuperscript{57} is defining negligence by professional generally:

\begin{quote}
Where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Claphum omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have this skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.
\end{quote}

The Supreme Court of India in \textit{Jacob Mathew vs. State of Punjab}\textsuperscript{58} after an exhaustive survey on laws in this area and an in-depth analysis of both English and Indian decisions, observed that:

\begin{quote}
A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100\% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. … The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices.
\end{quote}

In the same lines, Bingham L.J. stated “…. that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field….\textsuperscript{59}

\textsuperscript{56}IMA supra note 55  
\textsuperscript{57}(1957)1 WLR 582,(1957)2 All.ER 118  
\textsuperscript{58} Jacob Mathew supra note 54  
\textsuperscript{59}Eckersley v. Binnie, [1988] 18 Con. L.R I, 79,
2.5 LAW ON MEDICAL NEGLIGENCE

2.5.1 HISTORY

The oldest known source that mentions medical negligence is the Code of Hammurabi which was developed by Babylon’s Kings, some twenty centuries before Christ. It fixed fee for treatment and penalty for improper treatment\(^\text{60}\).

The ancient Mosaic Law perpetuated the concept of, ‘lex Talionis’ or Law of Talion by demanding ‘an eye for an eye’ and ‘a tooth for tooth’. Ancient Egyptian law provided for punishment of Medical wrong doer and similar provisions are there in Roman Civil Law. Medieval Law was also hard on errant ‘barbers and surgeons’\(^\text{61}\).

The earliest known treatise on Indian law ‘\textit{Manusmriti}’ states that all physicians who treat wrongly shall be liable to pay a fine. The first authoritative book on Indian medicine is \textit{Agnivesa Charaka Samhita}. It was written somewhere in the 7\(^{th}\) century BC and deals with elaborate code of practice of physicians with regard to their training, duties, privileges and their social status\(^\text{62}\). In this earliest Indian medical literature, the word, ‘\textit{Mithya}’ is used to describe medical negligence. Mithya means false, illusive, incorrect, erroneous and improper. \textit{Charaka Samhita} uses the word in the sense of wrong treatment. In \textit{Sushruta Samhita}, the word ‘\textit{mithyopachara}’ is used in the sense of improper conduct and provides for punishment of such action. Koutilya’s ‘\textit{Arthashastram}’ also contains clear provisions for penalization of improper medical conduct. ‘\textit{Yagnavalkya Smriti}’ indicates 1000 \textit{panas} as the highest penalty for medical negligence\(^\text{63}\).

In all these civilizations medical negligence was treated as a crime. The objective of legal machinery was to protect and vindicate the interest of public by punishing the wrong doer. No amount of compensation used to be awarded

\(^{60}\) \textsc{Justice K Kannan(ed.),} \textsc{Modi’s Text Book of Medical Jurisprudence and Toxicology} 103-138 (25\(^{th}\) ed. 2016)

\(^{61}\) \textsc{Kannan supra note 60}

\(^{62}\) \textsc{Nandita Adhikari,} \textsc{Law and Medicine} 1-5 (2007)

\(^{63}\) \textsc{Kannan supra note 60}
to the victims or their people. However as society progressed, the trend to
consider negligence as a Tort (civil wrong) influenced judiciary and a practice
of giving compensation to the victim has developed.\textsuperscript{64}

Unlike the intentional Torts like, assault, battery and false imprisonment,
Negligence which is an unintentional Tort, is relatively a modern legal
development. In English Common law, the earliest recorded action against a
medical man, brought before the King, was in 1374. Though in that case the
surgeon was held not liable, the court expressed that if negligence is proved, the
court would provide for a remedy.\textsuperscript{65} In 1395, William Leeche was found guilty
for accepting fees without effecting cure.\textsuperscript{66} In 1533 Holy Emperor Charles I
decreed a significant change in the approach that medical malpractice must be
judged by medical men.\textsuperscript{67}

The Industrial Revolution of 18\textsuperscript{th} century accelerated the growth of law of
negligence as a separate Tort. And Law of Medical negligence also originated
as an offshoot of law of negligence. In 1838, CJ Tyndall while deciding the
standards for skill and care in medical treatment said, “…every person who
enters a learned profession undertakes to bring to the exercise of it a reasonable
degree of care and skill.”\textsuperscript{68}

\textbf{2.5.2 INGREDIENTS OF MEDICAL NEGLIGENCE}

The public profession of an art is a representation and undertaking to the entire
world that the professor possesses the requisite ability and skill\textsuperscript{69}. The rule that
a man is expected to exercise only the degree of care which an ordinary prudent
man would exercise is subject to this important exception. A professional who
undertakes something requiring special knowledge or skill will be considered

\textsuperscript{64} KANNAN supra note 60 at 104-106
\textsuperscript{65} MATHIHARAN & PATNAIK supra note 41 ,quoting Swing The Doctors-An Inexorable
\textsuperscript{66} KANNAN supra note 60 at 104-106
\textsuperscript{67} KANNAN supra note 60 at 104-106
\textsuperscript{68} Lauphire v.Phipos (1838),8C & P.P475; 34 Digest 548, (1835-42) All ER Rep 421
\textsuperscript{69} Harmer v. Cornelius (1858) 5 CB (NS) 236 ,quoted by R.M JHALA & V.B.RAJU, MEDICAL
JURISPRUDENCE 53-57 (4\textsuperscript{th} ed.1982)
negligent, if by reason of his not possessing the required knowledge, he bungles although he does his best\textsuperscript{70}. Medical Negligence is proved, if,

- the doctor had a duty of care to the patient
- he has committed a ‘breach’ of that duty and,
- the patient suffered a damage as a result.

**Duty of care**

A doctor owes a duty of care to his patients, once the doctor-patient relationship is established. A doctor has a legal obligation to patients to adhere to a standard of reasonable care\textsuperscript{71}.

According to *Halsbury’s Laws of England*:

A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.\textsuperscript{72}

The extent of civil liability of medical men towards their patients is well established by Lord HEWART in one of the earliest cases *R v. Bateman*\textsuperscript{73}.

If a person holds himself out as possessing special skill and knowledge and is consulted as possessing that special skill and knowledge...he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment....The law requires a fair and reasonable standard of care and competence. The standard must be reached in all the matters above mentioned.

The duty to exercise skill and care exists when a doctor patient relationship is established. Even in an acute emergency a doctor forms a full doctor-patient relationship as soon as he approaches a patient with the object of treating

\textsuperscript{70} Heaven v. Pender (1883) 1 QBD 503
\textsuperscript{71} Dean et al., *Duty of care or a matter of conduct. Can a doctor refuse a person in need of urgent medical attention?*. Australian Family physician 746-748 Volume 42, No.10, October (2013)
\textsuperscript{72} Halsbury's Laws of England 17-18, 4th ed., Vol.26
\textsuperscript{73} (1925) 24 LJ KB 791
him. Thus a doctor who deals with a patient with the intent of acting as a healer establishes a doctor-patient relationship immediately, and from that moment on, he has a legal obligation to exercise a duty of skill and care. Any breach of duty is ground for a negligent action.\(^74\)

**Breach of Duty**

Lord President CLYDE stated “The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with reasonable care.\(^75\)

Lord HEWWART C.J, further noted that, “it is no doubt conceivable that a qualified man may be held liable for recklessly undertaking a case, which he knew, or should have known, to be beyond his powers, or making his patient subject of reckless experiment.\(^76\)”

The locus classicus test of the standard of care required of a doctor or any other person professing some skill or competence is the direction to the jury given by McNAIR J. in *Bolam v. Friern Hospital Management Committee*:\(^77\)

> I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

**Facts of the case**

The plaintiff, a voluntary patient in the defendant’s mental hospital sustained fractures in the course of electro convulsive therapy. There were two bodies of opinion in the profession about the mode of the treatment:

- Relaxant drugs or manual control to be used as general practice.
• The use of such drugs should be confined to cases only there were particular reasons for their use.

The doctor was held not negligent for failing to administer a relaxant drug prior to the treatment and in failing to provide some form of manual restraint during the passing of electric current through the brain of the patient. Mc. Nair J 78 in his classic address to the jury stated the law as:

….where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Claphum omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have this skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

Approving this Test in White House v. Jordan, 79 the House of Lords held that, “error of judgment could be negligence if it is an error which would not have been made by a reasonably competent professional man acting with ordinary care”. Lord Fraser made the candid statement:

The true position is that an error of judgment may or may not be negligent; it depends on the nature of the error. If it is that would not have made by a reasonably competent professional, professing to have that standard and type of skill that defendant holds himself as having, and acting with ordinary care, then it is negligence. If, on the other hand it is an error such a man, acting with ordinary care, might have made, when it is not negligence.

J Streatfield expressed in Patch v. Board Governors, United Bristol Hospital 80:

It is stated that the liability of doctors is not unlimited. The standard of care required of them is not that standard required by exceptional practitioners. Surgeons, doctors and nurses are not insurers. They are not guaranteeing of absolute safety. They are not liable in law not merely because a thing goes wrong…The law requires them to exercise professionally that skill and knowledge which belongs to the ordinary practitioner.

78 Bolam supra note 57
79 (1981) 1 All ER 267 (HI)
80 Mathiharan & Patnaik supra note 41
Lord Denning in *Rao and Woolley v. Ministry of Health*\(^{81}\) held that:

…we should be doing a disservice to the community at large if we were to impose liability for everything that happens to go wrong….We must insist on due care of the patient at every point but we must not condemn as negligence that which is only a misadventure.” In this same decision it was also observed that, “It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors, like the rest of us, have to learn by experience; and experience often teaches in a hard way.\(^{82}\)

In *Eckersley v. Binnie*, Bingham, L.J.\(^{83}\) summarized *Bolam* test in the following words:

From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.

In *Maynard v. West Midlands Regional Health Authority*\(^{84}\) the words of Lord President CLYDE in *Hunter v. Hanley*\(^{85}\) were quoted:

In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men...The true test for establishing negligence in diagnosis or treatment on the part

\(^{81}\) [1954] 2 All ER 131, 2 QB 66 CA  
\(^{82}\) Kusum Sharma v. Batra Hospital & Med. Research Centre AIR 2010 SC 1050  
\(^{83}\) *Id*  
\(^{84}\) (1984] 1 W.L.R. 634  
\(^{85}\) 1955 SLT 213
of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.\textsuperscript{86}

Similar view was reflected in \textit{Indian Medical Association} case as well. “In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, 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.”\textsuperscript{87}

You should only find him guilty of negligence when he falls short of the standard of a reasonably skillful medical man, in short, when he deserving of censure – for negligence in a medical man is deserving of censure….but so far as the law is concerned, it does not condemn the doctor when he only does …which may a wise and good doctor so placed would do... only …when he falls short of the accepted standards of a great profession;…when he is deserving of censure.

\textbf{SALMOND} observes:

It is expected of such a professional man that he should show a fair, reasonable and competent degree of skill; it is not required that he should use the highest degree of skill, for there may be persons who have higher education and greater advantages than he has, nor will he be held to have guaranteed a cure. Although the standard is a high one, a medical practitioner should not be found negligent simply because one of the risks inherent in an operation of that kind occurs, or because in a matter of opinion he made an error of judgment, or because he has failed to warn the patient of every risk involved in a proposed course of treatment.\textsuperscript{88}

In \textit{Joyse v. Merton Sutton and Wands Worth Health Authority},\textsuperscript{89} a profound change in the attitude was visible when the court held that the “doctor would be guilty of negligence even if his acts or omissions were in accordance with the accepted clinical practice, … the court is duty bound to see … that a general practice stood up to analysis and was not unreasonable in the light of … medical knowledge of the time”.

\begin{itemize}
\item \textsuperscript{86} Kusum Sharma v. Batra Hospital &Med.Research centre \textit{AIR} 2010 SC 1050
\item \textsuperscript{87} \textit{IMA} supra note 55
\item \textsuperscript{88} R.F.V.Heuston supra note 44
\item \textsuperscript{89} (1996)7 Mad LR 1
\end{itemize}
In *Hucks v. Cole*, a doctor failed to treat with penicillin a patient who was suffering from septic places on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The Court of Appeal found the defendant to have been negligent. Sachs L.J. said,

> When the evidence shows that a lacuna in professional practice exists by which risks of grave danger are knowingly taken, then, however small the risk, the court must anxiously examine that lacuna—particularly if the risk can be easily and inexpensively avoided. If the court finds, on an analysis of the reasons given for not taking those precautions that, in the light of current professional knowledge, there is no proper basis for the lacuna, and that it is definitely not reasonable that those risks should have been taken, its function is to state that fact and where necessary to state that it constitutes negligence. In such a case the practice will no doubt thereafter be altered to the benefit of patients. On such occasions the fact that other practitioners would have done the same thing as the defendant practitioner is a very weighty matter to be put on the scales on his behalf; but it is not, as Mr. Webster readily conceded, conclusive. The court must be vigilant to see whether the reasons given for putting a patient at risk are valid in the light of any well-known advance in medical knowledge, or whether they stem from a residual adherence to out-of-date ideas.

In down *Bolitho v. City and Hackney Health Authority* the House of Lords modified the principle laid in Bolam’s case. It was observed that:

> … in cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant’s conduct, the defendant can properly be held liable for negligence … it cannot be demonstrated to the judge’s satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

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90 [1993] 4 Med. L.R. 393
91 (1997) 4 All ER 771
Indian law

During British rule, English common law was introduced in the administration of justice in India. Prior to the introduction of Constitution of India in 1950, a very large number of English legal principles were followed and applied by the Indian Courts.\(^{92}\)

The law on medical negligence has evolved in India through a series of judgments over a period of time. Currently the law covers practically all aspects of this complex profession and its practice in this country. It takes cognisance not only of the development of the corresponding jurisprudence in the UK, USA and other developed countries but also of the delicate relationship between the physician and the patient, the ground realities of the available medical services and medical infrastructure as well as the socio-economic conditions in India.\(^{93}\)

In *Sabhapati v. Huntley*,\(^{94}\) it was held that:

To render professional man liable, even civilly, for negligence or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown, or a less degree of care even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; that must have been a want of competent and ordinary care and skill to such a degree as to have led a bad result.

J TENDULKAR observed in *Amelia Falunders v. Clement Pereira*\(^{95}\), “Actions for negligence in India are to be determined according to the principles of English common law and those principles have been set out in an action for negligence against medical men”.

EARLE, CJ\(^{96}\) said:

A physician in the normal course is not responsible to his patient for the evil consequences of his prescriptions or surgical operations as they are entirely out of his will and ability to control. However he will be held

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92 MATHIHARAN & PATNAIK supra note 41
93 K. A. Bhandula v Indraprastha Apollo Hospital & Others III (2009) CPJ 164 (NC)
95 Bombay High Court, OOCJ Suit No.808 of 1943 (Unreported), quoted by MATHIHARAN & PATNAIK supra note 9 at 155
96 Rich v. Pierpoint (1862) 3F & F 35
liable if those consequences arise out of his ignorance or want of skill, as far as he is the willful cause of such ignorance or want of skill. It can be either, he should have known better or not, knowing better, he should not have undertaken the case for which he knew he was not qualified.

The Supreme Court in Laxman Balkrishna Joshi v. Trimbak Bapu Godbole quoted Halsbury’s Law of England:

The duties which a doctor owes to his patient are clear. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, when consulted by patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give, a duty of care in his administration of treatment. A breach of these duties gives a right of action for negligence to the patient.

In Indian Medical Association v. V.P. Shanta, the Supreme Court mentioned:

…the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise a reasonable care in discharge of their duties. In general a professional man owes to his clients a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.

The statement made by McNair J. in Bolam case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied to as touch stone to test the pleas of medical negligence.

In Suresh Gupta’s case, Supreme Court of India held that the legal position is quite clear and well settled that whenever a patient died due to medical negligence, the doctor is primarily liable under civil law. Only when the negligence is so gross and his act was as reckless as to endanger the life of the patient, he will be charged under section 304A of Indian Penal Code.

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97 AIR 1969 SC 128
98 AIR 1996 SC 550
99 (1957) 1 WLR 582
A mere deviation from normal professional practice is not necessarily evidence of negligence, so also an error of judgment. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. A doctor has to –at times- adopt a procedure which involves higher element of risk, but which to the best of his knowledge, the right one So long as it can be found that the procedure adopted was one which was acceptable to medical science as on that date, it cannot be held to be negligence.\textsuperscript{103}

**Test of Reasonableness**

As far as medical men are concerned there is always a possibility of a claim for medical negligence by dissatisfied patient. A doctor has a duty to exercise reasonable care, breach of which makes him liable for damages. If he acted in accordance with well established practice he would not be liable\textsuperscript{104}

In *A.S Mittal v. State of U.P.*,\textsuperscript{105} The Supreme Court reiterated its own decision in Dr.Laxman Balkrishna Joshi:\textsuperscript{106} It was observed that, “Mistakes will occur on occasions despite the exercise of reasonable skill and care; the law recognizes the dangers which are inherent in surgical operations”. In that case, though the Court refrained from deciding, whether the doctors were negligent ,the opinion was that If a medical practitioner committed a mistake which no reasonably competent and a careful practitioner would have committed is a negligent one. The Court also took note that the law recognizes the dangers which are inherent in surgical operations and that mistakes will occur, on occasions, despite the exercise of reasonable skill and care.

In Tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the

\textsuperscript{103} *Jacob Mathew* supra note13

\textsuperscript{104} *Indira Kartha v.Mathew Samuel Kalaickal and Another*,2002 NCJ 377 (NC)

\textsuperscript{105} 1989 (3) SCC 223

\textsuperscript{106} AIR 1969 SC 128
light of knowledge available at the time (of the incident), and not at the date of
trial. Secondly, when the charge of negligence arises out of failure to use some
particular equipment, the charge would fail if the equipment was not generally
available at that point of time on which it is suggested as should have been
used\textsuperscript{107}.

In \textit{Malhotra v. A. Kriplani},\textsuperscript{108} it was held that:

Negligence in the context of the medical profession necessarily calls for
a treatment with a difference. A simple lack of care, an error of judgment
or an accident, is not proof of negligence on the part of a medical
professional. So long as a doctor follows a practice acceptable to the
medical profession of that day, he cannot be held liable for negligence
merely because a better alternative course or method of treatment was
also available or simply because a more skilled doctor would not have
chosen to follow or resort to that practice or procedure which the
accused followed.

In \textit{Jagdish Ram v. State of Himachal Pradesh},\textsuperscript{109}, the Himachal Pradesh High
Court, following \textit{Jacob Mathew} decision, observed that:

It is also unjustified to impose on those engaged in medical treatment an
undue degree of additional stress and anxiety in the conduct of
their profession. Equally, it would be wrong to impose such stress and
anxiety on any other person performing a demanding function in society.
While expectations from the professionals must be realistic and the
expected standards attainable, this implies recognition of the nature of
ordinary human error and human limitations in the performance of
complex tasks.

The Supreme Court in \textit{Achut Rao Haribhau Khodwa and others v. State of
Maharashtra}\textsuperscript{110} held:

The skill of medical practitioners differs from doctor to doctor. The very
nature of the profession is such that there may be more than one course
of treatment which may be advisable for treating a patient. Courts would
indeed be slow in attributing negligence on the part of a doctor if he has
performed his duties to the best of his ability and with due care and
cautions. Medical opinion may differ with regard to the course of action
to be taken by a doctor treating a patient, but as long as a doctor acts in
a manner which is acceptable to the medical profession, and the Court

\textsuperscript{107} \textit{Jacob Mathew} supra note 13
\textsuperscript{108} (2009) 4 SCC 705
\textsuperscript{109} 2008 ACJ 433
\textsuperscript{110} AIR 1996 SC 2377, 1996 (2) SCC 634
finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

In *Vinitha Ashok v. Laxmi Hospitals and Another*\(^{111}\) the Supreme Court of India had an occasion to refer to the decision in *Bolitho*. After examining the development in English Law and referring its earlier decisions, *Laxman Balakrishna*\(^{112}\)*IMA*\(^{113}\) and *Achut Rao*,\(^{114}\) relying upon *Bolitho* accepted the test of reasonableness. The Court observed:

Thus in large majority of cases, it has been demonstrated that a doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the courts satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible.

**Chances of error**

Medicine is an inexact science it is unlikely that a responsible doctor would intend to give an assurance to achieve a particular result\(^{115}\). It is not generally acceptable to castigate a mere error of judgment. Errors in treatment can take a multitude of forms and for variety of reasons.\(^{116}\) Even after adopting all medical procedures as prescribed, a qualified doctor may commit an error. The Supreme Court has held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/his treatment or in her/his diagnosis if she/he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient

\(^{111}\) AIR 2001 SC 3914
\(^{112}\) AIR 1969 SC 128
\(^{113}\) 1996 AIR 550
\(^{114}\) AIR 1996 SC 2377, 1996 (2) SCC 634
\(^{115}\) C.S. Subramanian v. Kumarasamy (1994) 1 MLJ 438
\(^{116}\) *Id*
relationship and the attendant mutual trust. In *State of Haryana and others v. Santra*, the Apex court observed that, there is an “implied undertaking” by every person who enters into medical profession that he would use a fair, reasonable and competent degree of skill. The Court has set the standard of care in explicit words in *Nizam’s Institute v. Prasanth Dhananka*, “To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence.” An error of judgment or an accident, is not accepted as a proof of professional negligence.

**Negligence per se**

In *Poonam Verma v. Ashwin Patel*, the Supreme Court observed that negligence has many manifestations. “It may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence or Negligence per se.” This case is a landmark in Indian legal history for the clarification given by the Court that “a homeopath prescribing Allopathic medicine is negligence per se and makes the person liable even without an evidence of direct nexus between the act and injury.” In a similar verdict, a doctor who is authorized to practice Ayurveda system of medicine was held to be negligent for prescribing allopathic medicine.

### 2.6 Burden of Proof

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish his claim against the doctor. The

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118 (2000) 5 SCC 182
120 (1996) 4 SCC 332
121 S.K.Sharma v.L.C.Sharma 2004 (3) CPJ 612 (Delhi)
complainant has to prove the presence of duty of care, breach of care and the consequential damages suffered by him. Lord Denning in the case of Hatcher v. Black\textsuperscript{122}, expressed,

\ldots the jury must not find a doctor negligent simply because one of the risks inherent in an operation actually took place or because in a matter of opinion he made an error of negligent. They should only find him guilty when he had fallen short of the standard of medical care.

2.6.1 \textit{Res Ipsi Loquitur}

In all civil cases the onus of proof is on the complainant. That means the complainant has to convince the court that his version of the events is more than 50\% likely to correct, which becomes difficult at times\textsuperscript{123}. The principle of \textit{res ipsa loquitur} is reducing this burden.

The Latin maxim \textit{res ipsa loquitur} means that the thing speaks for itself. Application of this maxim places on the defendant the onus of disproving this presumption of negligence. It reverses the burden of Prof. Street\textsuperscript{124} states:

\textit{Res ipsa loquitur} is not principle of substantive law; it is a rule of evidence, an expression which is convenient to apply to those circumstances in which a plaintiff in negligence discharges his task of establishing want of care on the part of the defendant without having to prove any specific negligent act or omission by the defendant.

The following criteria is considered essential to apply this doctrine.

\begin{itemize}
  \item The cause of the injury must be unknown or unascertainable
  \item Common knowledge or expert evidence suggests that the injury, by its very nature, cannot occur without negligence
  \item The doctor(defendant) must have been in control of the situation\textsuperscript{125}
\end{itemize}

\textsuperscript{122} Paul Nisselle, \textit{Is Self-disclosure a Boundary Violation?} J Gen Intern Med (v.19(9); 2004).
\textsuperscript{123} JAGDISH SINGH & VISHWA BHUSHAN,\textit{MEDICAL NEGLIGENCE AND COMPENSATION} 115-117(2nd ed. 1999)
\textsuperscript{124} HARRY STREET,\textit{THE LAW OF TORTS} 130-135 (5th ed. 1972)
\textsuperscript{125} Scott v. London and St. Katherine’s Docks,(1865)2 H&C 596 as quoted by JAGDISH SINGH & VISHWA BHUSHAN,\textit{MEDICAL NEGLIGENCE AND COMPENSATION} 115-117(2nd ed. 1999)
In *Spring Meadows Hospital and another v. Harjol Ahlu Walia* \(^{126}\) The Supreme Court observed, “…use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Gross medical mistake will always result in a finding of negligence”

*Res ipsa loquitur* is a rule of evidence which in reality belongs to the law of torts. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant.\(^{127}\)

According to P.R. Aiyar’s Law Lexicon,\(^{128}\) “…simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held liable for medical negligence by applying the doctrine of ‘*res ipsa loquitur*’\(^{129}\)

In *Achutrao Haribhau Khodwa v. State of Maharashtra*,\(^{130}\) the deceased Chandrikabai was admitted in the Civil Hospital, Aurangabad for delivery. This maternity hospital is attached to the Medical College at Aurangabad. She had got herself admitted to this hospital with a view to undergo a sterilization operation after the delivery. Thereafter Chandrikabai developed high fever and also had acute pain which was abnormal after such a simple operation. Her condition deteriorated further and on 15\(^{th}\) July, 1963 appellant approached Medical Officer and one Dr. Divan, who was a well-known surgeon and was attached to the hospital, but was not directly connected with the Gynaecology department. At the insistence of patients relative, Dr. Divan examined Chandrikabai, and seeing her condition, he has suggested that the sterilization operation which had been performed should be re-opened. This suggestion was not acted upon and the condition of the patient became very serious. Later, Dr. Divan, on being called once again, re-opened the wound of the earlier operation

\(^{126}\) AIR 1998 SC 1801, 1998(4) SCC 39

\(^{127}\) Jacob Mathew supra note 13

\(^{128}\) P.RAMANATHA AIYAR supra note 31 at 1113-1114

\(^{129}\) Martin F D’ souza v. Mohd. Isfaq, (2009) 3 SCC 1,17, para 40

\(^{130}\) (1996) 2 SCC 634
in order to ascertain the true cause of the seriousness of the ailment and to find out the cause of the worsening condition of the patient. As a result of the second operation, it was found that a mop (towel) had been left inside the body of the patient when sterilization operation was performed on her. It was further found that there was collection of pus and the same was drained out. Thereafter, the abdomen was closed and the second operation completed. Even, thereafter the condition of patient did not improve and ultimately she expired in a week’s time.

Holding the doctors liable, the Court expressed that:

In the present case the facts speak for themselves. Negligence is writ large. The facts as found by both the courts, in a nutshell, are that Chandrikabai was admitted to the government hospital where she delivered a child on 10th July, 1963. She had a sterilization operation on 13th July, 1963. This operation is not known to be serious in nature and in fact was performed under local anesthesia. Complications arose thereafter which resulted in a second operation being performed on her on 19th July, 1963. She did not survive for long and died on 24th July, 1963. Both Dr. Divan and Dr. Purandare have stated that the cause of death was peritonitis. In a case like this the doctrine of res ipso loquitur clearly applies.

In .N.K.Gourikutty v.M.K.Madhavan\textsuperscript{131}, the Kerala High Court held that the anesthetist and the other staff liable for negligence applying the principle of \textit{res ipsa loquitur}.

In another case, the doctor who performed the operation did not produce operation notes as regards number of pads issued and instruments used at the time of the operation. The Court held that, principle of \textit{res ipsa loquitur} is applicable in this case\textsuperscript{132}.

\subsection*{2.6.2 \textbf{Causation}}

Causation is more significant in negligence cases, though it is generally applicable to all Tort cases. The law of causation determines not only to what extent damages are recoverable, but also whether the action succeeds at all. In case of a negligence suit, the plaintiff must put in direct or circumstantial

\begin{footnotes}
\item[131] AIR2001 Ker 398(DB)
\item[132] Aparna Datta v. Apollo Hospital,2002 ACJ 954 (Madras)
\end{footnotes}
evidence which will show how the accident that there is an injury and that was resulted from defendants negligent conduct.\textsuperscript{133} Every occurrence is the result of many conditions which are jointly sufficient to produce it. If the event could not have occurred unless that condition existed, that is a cause for the event\textsuperscript{134}. STREET\textsuperscript{135} observes:

...there is no precise legal rule, but common sense and law unite in looking for the abnormal or the deliberate human act, and regarding that as “the cause”. In medical negligence cases, it is necessary to prove that, professional’s breach of the standard of care caused or contributed to causing some harm to the patient.

The ‘but for’ test

If the damage to the plaintiff would not have happened ‘but for’ the defendants negligence, then the negligence is a cause of the damage. If the loss would have caused in any event, then conduct is not cause. In Barnett v. Chelsea an Kensington Hospital Management Committee,\textsuperscript{136} patients attended hospital complaining vomiting. The causality officer, without check-up, advised them to go home and see their own doctors. Within hours, one of them died of arsenic poisoning. It was held that the causality officer was negligent. However, it cannot be said that but for the doctors negligence the patient would have lived, because the medical evidence indicated that even if the patient had received proper treatment, it would not have been possible to diagnose the condition and administer antidote in time to save him. Thus the negligence did not cause the death.

This type of causation problem arises in medical negligence, because, the plaintiff raises the contention that, but for the doctors negligence, he would have opted for an alternate course of treatment\textsuperscript{137}. In Bolitho v. City and Hackney Health Authority\textsuperscript{138}, a two year old boy suffered brain damage as a result of cardiac arrest caused by an obstruction of bronchial air passage. The claimant

\textsuperscript{133} STREET supra note 124
\textsuperscript{134} Id
\textsuperscript{135} Id
\textsuperscript{136} [1968] 1 All E.R.1068
\textsuperscript{137} MICHAEL A JONES, MEDICAL NEGLIGENCE 444-445 (4th ed. 2008)
\textsuperscript{138} [1993]4 Med.L.R.381
was in hospital and the doctor did not attend the calls by nursing staff for assistance. It was common ground that had the claimant been seen by a doctor and intubated, the tragedy could have been avoided. There were two schools of thought, however, whether in the claimant’s circumstances it was appropriate to intubate. The doctor who failed to attend maintained the stand that, even if she attended the patient, she would not have intubated and therefore the cardiac arrest and the resultant brain damage would have happened anyway.

On an appeal to House of Lords, it was contended on behalf of the claimant that, the Bolam test had no relevance in determining question of causation. Lord BROWNE-WILKINSON agreed that, as a general proposition that was correct. In all cases the primary question is one. Did the negligence cause the injury? But in cases where the negligence arises out of an omission to do an act which ought to have been done, the factual enquiry is hypothetical. The question is what would have happened? The Bolam test was not, and could not, be relevant to that question. The defendant doctor says that she would not have intubated, and therefore the claimant in any way would have suffered the injury. She could not escape liability by proving that she would have failed to act as any reasonably competent doctor would have acted in similar circumstances.\(^{139}\)

‘But for’ test operates as an initial filter to excludes events which did not affect the outcome. It cannot however solve all the problems of factual causation\(^{140}\). The complaint in a medical negligence case is always not that the doctor inflicted injury. But that as a result of the defendants negligence, his medical condition did not improve or was allowed to deteriorate\(^{141}\). In determining the liability in cases where there is factual uncertainty was evolved in *Hotson v. East Berkshire Area Health Authority*\(^{142}\). The patient claimed that doctor’s negligence has deprived him of a 25% chance of making a good recovery, whereas the defendant argued that the plaintiff failed to prove, on the balance of probabilities, that the negligence caused the disability. Though the

\(^{139}\) JONES supra note 137

\(^{140}\) JONES supra note 137

\(^{141}\) *Id*

\(^{142}\) [1987]A.C. 750, C.A and H.L.
trial judge and Court of appeal favoured the plaintiff’s contention, the House of Lords reversed the order stating that there was high probability, put at 75%, that even with correct diagnosis and treatment, the patient’s disability would have occurred. The Court held that this is not a ‘lost chance’. It was an all or nothing case. The valuation of a ‘lost chance’ will arise only once the causation is established143.

In Allied Maples Group Ltd. v. Simmons & Simmons144, the Court of Appeal suggested the categorization based on whether the negligence consists in some positive act or omission. In the case of a positive act, of misfeasance, the question of causation is a historical fact, which once established on the balance of probability is taken as true. Where the defendant’s negligence consist of an omission, e.g. to give proper treatment, proper advice, causation depends not on the historical fact but on the answer to the hypothetical question, what would the claimant have done, if the treatment had been provided or the advice given? This will be a matter of inference to be decided from circumstances. Moreover, although the question is hypothetical, the claimant has to prove the balance of probability that he would have taken action to obtain benefit or avoid risk. Similarly with positive act, he has to establish that, there is no discount of damages simply because the balance is only just tipped in his favour145. In Smith v. National Health Service Litigation Authority146, the defendant argued that Allied Maples did not apply to actions for medical negligence. Rejecting the contention, Andrew SMITH J. said that Allied Maples laid down the general principles and there was no reason to adopt a different approach147.

In Gregg v. Scott148, the doctor negligently failed to refer a patient having lipoma—a benign collection of fatty tissue—for a specialist investigation. As a result of this, the patient’s treatment was delayed and this significantly reduced his chances of survival. The trial judge and the Court of appeal dismissed the

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143 JONES supra note 137
144 [1995] All ER 907
145 JONES supra note 137
147 JONES supra note 137
148 [2005] 2 A.C. 176
claim applying *Hutson*. House of Lords too by a majority of 3:2 rejected the claim. Despite the majority decision, it remains arguable that in some circumstances a missed diagnosis could give rise to a claim based on a lost chance of a better medical outcome.\(^{149}\)

Where there are two independent events, each of which were sufficient to have caused the damage sustained by the claimant, the determination of causal responsibility depends on the nature of events and the order in which they occurred. In *Baker v. Willoughby*\(^ {150}\), the claimant suffered an injury to his left leg due to defendants negligence. He was subsequently shot in the same leg during an armed robbery resulting in the amputation of the leg. The defendant claimed that the supervening amputation has submerged the original injury and he has to give compensation only till the date of the shooting. The House of Lords held that the defendant remained responsible for the initial disability even after the amputation.\(^ {151}\) *Wilsher v Essex Area Health Authority*\(^ {152}\), a junior doctor administered excessive oxygen to a premature child during the post-natal care; this lead to blindness. The medical experts provided evidence that there are five further causes that might have led to blindness. The Lords, therefore, found that it was impossible to say that it had caused, or materially contributed, to the injury and the claim was dismissed. In *Whitehouse case* a mother in a high-risk pregnancy, who had been in labour for 22 hours was assisted by forceps. The child suffered severe brain damage. The surgeon was not found negligent as the standard of care did not fall below that of a reasonable doctor in the circumstances.\(^ {153}\)

### 2.6.3 Remoteness of Damage

Remoteness of damage is a confusing subject, not because it is difficult in itself, but because, like an archeological site, it has been overlaid with successive theories which are inconsistent with one another.\(^ {154}\) In remoteness of damage, it

\(^{149}\) *JONES* supra note 137  
\(^{150}\) [1970]A.C 467  
\(^{151}\) *JONES* supra note 137  
\(^{152}\) 1988. A.C 1074  
\(^{153}\) *Whitehouse v Jordan*. 1981. 1 All ER 267.*Id*  
\(^{154}\) *JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH* 19-24(3rd Ed. 1966)
can be argued that either the injury itself is too remote from the negligent act or some of the losses are, to be consequential to the injury. In *S.S.S.Abbey’s* case,155 two ships were cast adrift from their moorings in harbor. Due to the action of the defendant ship, it was alleged that they came in a position of danger. Since it was found that, still the ships were able to navigate as free agents, defendant was not held liable for the accident.

In personal injury cases, such questions can be raised when the injury is caused by a mistake which is made during a medical treatment.156 Generally the defendant is liable for the direct consequences his negligent medical service. If the plaintiff has acted in a reasonable manner in the difficult situation created by the defendant, consequential losses of such intervention are considered to be direct or not remote.157 If the plaintiff has incurred expenses by following mistaken medical advice, it is foreseeable. Lord PATRICK158 said:

> It is a reasonable and probable consequence of a wrongdoer’s breach of duty that a person hurt will incur expense in following the treatment prescribed by reputable experts employed by him to cure him. Each case must be decided on its own merits.”159 However there can be situations where further damage is resulted from the negligence of the doctor. Even suicide can be a result of a disturbed mental state following a wrong treatment160

### 2.7 Vicarious Liability

In general a person is responsible only for his own acts. But there are exceptional cases in which the law imposes on him liability for the acts of others, however blameless he may be. Vicarious liability means liability is incurred for, or instead of, another. The liability arising out of relationship of master and servant is one of the kinds of vicarious liability161

Vicarious liability means that one person takes or supplies the place of another so far as liability is concerned. This phrase means the liability of a person for the tort of another in which he had no part. A master is

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155 *S.S.Singleton Abbey v. S.S.Paludina* [1927] A.C.16
156 *Rubens v. Walker* [1946] SC 215
157 MUNKMAN supra note 154
159 As quoted by MUNKMAN supra note 154
160 MUNKMAN supra note 154
161 RAO, supra note at.83-84
jointly and severally liable for any tort committed by his servant which acting in the course of his employment.162

_Quid facit per alium facit per se_, which means a person who does a thing through another does it himself and _respondeat superior_. i.e., let, let the superior be responsible are the two principles which governs the concept of Vicarious liability. Anyone who is authorizing other person to do an act on behalf of him also allows the other one to have the freedom to decide the method of action. Therefore, in the course of action, if he commits any wrong, the master is answerable for such wrong. Such liability will arise only when, what is done is not an independent action of the servant. The principle demands that it was done in the course of employment. Morover it must be a justifiable method of achieving the purpose.163 This doctrine is not developed out of some identifiable logic, but it is a doctrine of convenience. Lord PEARCE in _Imperial Chemical Industries Ltd. v. Shatwoll_,164 mentioned that, ”It grown from any very clear, logical or legal principle but from social convenience and rough justice.”165

A master becomes liable for the acts done by the servant in the course of his employment. The wrong can be natural consequence of something done by the servant with ordinary care in execution with master’s specific order. The wrong may be due to servant’s want of care, or negligence in carrying out the work or business in which he is employed. The servants’ wrong may be originated from an excess of lawful authority or a mistake of understanding it. But it must be shown that the servant’s intention was to do something which he was originally, authorized to do. And also, he has done it in a proper manner which under that particular circumstance, would have been lawful.166

The wrong may be intentional wrong, done on behalf of master in order to serve his purpose.167 Vicarious liability is the responsibility of A for the wrong act of B done against C. When A himself had no part in B’s conduct. In the literal sense, the doctrine of respondent superior means “let the master answer” and it

162 State of Rajasthan v. Shekhu . 2006 ACJ 1644
163 RAO, supra note 36 at. 83-84
164 1965 AC 656,
165 supra note 162
166 RAO, supra note 36 at. 83-84
167 Id
operates to render the master liable for the wrongs of his servant and the principal liable for the wrongs of his agent committed while furthering the master’s or principal’s business.\footnote{168}

In the case of \textit{Collins v. Hertfordshire County Council},\footnote{169} while undergoing an operation, a patient in a county council hospital was killed by an injection of cocaine which was given by the operating surgeon in the mistaken belief that it was procaine. The operating surgeon had ordered procaine on the telephone, but the resident house surgeon had mis-heard “procaine” as “cocaine”, and had told the pharmacist to dispense a mixture which was, in fact, lethal. The pharmacist dispensed the mixture without making further inquiry and without requiring the written instruction of a qualified person, and the operating surgeon had given the injection without checking that it was what he had ordered. The operating surgeon, the house surgeon, and the pharmacist were all three in the full-time or part-time employment of the council. Suit was filed by the patient’s widow against the county council and the operating surgeon alleging that the death was the result of (a) the council’s negligence in the conduct of their hospital, and (b) the operating surgeon’s failure to exercise reasonable care. It was held as follows:

The county council, in managing the hospital, was permitting a dangerous and negligent system to be in operation, and the operating surgeon and the house surgeon had failed to exercise reasonable skill and care. The council was able to control the manner in which the resident medical officer performed her work and, therefore, the acts of the house surgeon done in the course of her employment were acts for which the council was responsible, although the operating surgeon was a part-time employee on the staff of the council, the council could not control how he was to perform his duties and was not responsible for his want of care.

However, subsequently, this distinction was rejected in \textit{Cassidy v. Ministry of Health} \footnote{170}. Lord \textit{DENNING} observed that a hospital authority is liable for the


\footnote{170}[1951] 2 K.B. 343
negligence of doctors and surgeons employed by the authority under a contract for service arising in the course of the performance of their professional duties.

The hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors but also for the anesthetists and surgeon. It does not matter whether they are permanent or temporary, resident or visiting, whole time or part time. The hospital authorities are responsible for all of them. The reason is because, even if they are not servants, they are the agents of the hospital to give the treatment. The only exception to the case of consultants or anesthetists selected and employed by the patient himself.\textsuperscript{171}

In \textit{Wilsher v. Essex Area Health Authority}\textsuperscript{172}, a small child who has become blind sued for negligence. The event occurred when, he was admitted in ICU after pre mature birth. A junior Physician inserted the catheter after consulting the methods of insertion with his senior doctor. As a result of the excess supply of oxygen due to the wrong insertion, the child suffered damage to retina causing near blindness. The senior doctor was held liable as the junior doctor has acted under the directions of him.

Indian Courts have reiterated this view. Hospital is liable for the negligence of professional men employed by the authority under contracts for service as well as under contracts of service. The authority owes a duty to give proper treatment medical, surgical and such other services. Even if such services are delegated, the one who is delegating becomes responsible, if that duty be not properly or adequately performed by its delegates.\textsuperscript{173} Civil liability of a hospital for injury to a patient may, depending upon the facts, be based upon either the negligence of the hospital entity itself or upon the doctrine of respondeat superior. The hospital’s liability is often referred to as corporate negligence. It can be that of providing a defective equipment, improper selection or retention of incompetent personnel, or the failure to exercise the required degree of care in the maintenance of buildings and grounds. The second type of liability is vicarious. The Supreme Court has observed:

\textsuperscript{171} JAGDISH SINGH & VISHWA BHUSHAN, MEDICAL NEGLIGENCE AND COMPENSATION 115-117 (2\textsuperscript{nd} ed. 1999)
\textsuperscript{172} (1986) 3 All E.R. 801
\textsuperscript{173} Savita Garg v. National Heart Institute, (2004) 8 SCC 56
Once an allegation is made that the patient was admitted in a particular hospital and evidence is produced to satisfy that he died because of lack of proper care and negligence, then the burden lies on the hospital to justify that there was no negligence on the part of the treating doctor or hospital. Therefore, in any case, the hospital is in a better position to disclose what care was taken or what medicine was administered to the patient. It is the duty of the hospital to satisfy that there was no lack of care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities.

Normally, people are selecting commercially run hospital, owing to their reputation. It is often found that, many hospitals do not provide services up to the mark In case if, it involves some negligence on their part, as per this doctrine, they are bound to reimburse. The principle of ‘respondent superior’ is otherwise known as ‘captain of the ship’ doctrine. As a captain of the ship, the surgeon holds the responsibility for negligent inquiry to the patient while the surgeon is directing the operation. It is the exercise of control over others that is the key to the application of this doctrine. Therefore normally a surgeon is not held liable for the negligence of the anaesthetist. At the same time a doctor has a duty to satisfy themselves that the person to whom the task is delegated He should see to it that, the staff whom he is delegating are qualified or have adequate experience, knowledge and skill to discharge the duties which have been delegated to him. If the person who is administering the anaesthesia is incompetent, the in charge surgeon will be held liable for it.

The Supreme Court has observed that,

175 Savita Garg supra note 173
176 SINGH & BHUSHAN supra note 171
177 J.N.Srivastava v.Rambiharilal AIR 1982 MP 132
178 SINGH & BHUSHAN supra note 171
care or diligence. The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors, being employed on job basis or employed on contract basis, it is the hospital which has to justify and not impleading a particular doctor will not absolve the hospital of its responsibilities. 179

2.8. DEFENSES FOR MEDICAL NEGLIGENCE

If the injured party fails to establish existence of essentials of negligence such as duty of care, breach of duty and the casual link between that breach and damage, his action will fail. In other words, it is defence of the defendant which will succeed. But, sometimes, even if the patient succeeds in proving the required elements of tort of negligence, he may lose or damages may be reduced. This occurs when defendant relies on general defence 180. The following defences are available for a physician in medical negligence cases.

2.8.1 CONTRIBUTORY NEGLIGENCE

Contributory negligence is that conduct on the part of the injured party which is below the reasonable standard of care which he needs to exhibit in similar situation. That is, his action is one which is legally contributing to the negligence of the defendant and thereby brings about harm to the plaintiff. Traditionally at common law the plaintiff’s contributory negligence totally removes any chance of recovery by the plaintiff for damages 181.

The 1809 English case of Butterfield v. Forrester 182 is considered to be the beginning of this concept. In that case, the plaintiff was injured by a fall from his horse when, riding at a fast pace. He ran into an obstruction in the road left by the defendant. It was held that, under these particular circumstances, the plaintiff will be completely denied any recovery due to his contributory negligence.

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179 Balram Prasad supra note 174
180 JONES supra note 137
http://dls.state.md.us/data/polanasubare/polanasubare_courcijuconfirmat/Negligence-Systems.pdf
negligence, even though the defendant’s negligent conduct also was a significant cause of the plaintiff’s injuries. In *Butterfield*, Lord ELLENBOROUGH, did not bother to have the support any authority. He did not even gave any satisfactory explanation for applying this legal doctrine. As Professor Dan Dobbs has observed:

This rule was extreme. The plaintiff who was guilty of only slight or trivial negligence was barred completely, even if the defendant was guilty of quite serious negligence, as contemporary courts have had occasion to observe in criticizing the rule. The traditional contributory negligence rule was extreme not merely in results but in principle. No satisfactory reasoning has ever explained the rule. It departed seriously from ideals of accountability and deterrence in tort law because it completely relieved the defendant from liability even if he was by far the most negligent actor.

In America, this doctrine was accepted due to political reasons. It was the time of rise of industrial enterprise. This doctrine, really became significant, due to the convenience it brought. The early 19th century was a time in which known and relatively safe industrial and agricultural techniques were replaced by strange and not yet perfected machinery. The century witnessed a newer kind of growth with potentially dangerous instruments. The Trains, the steam engines, the saw mill, the cotton gin, and different type of factories, gave the new legal setup good amount of work. The economic developments of this time was marked with the presence of an individualistic political and economic philosophy. This philosophy called for a system favorable to the entrepreneurial class. It wanted to limit the liability of the defendant who was most probably belonged to that class. It had a very strong influence in formation of this principle, which reduced defendant’s liability almost to nothing, if a small amount of mistake is found on plaintiff’s side. In the words of BLACK, CJ. in

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184 Swisher supra note 183
186 James supra note182
187 Id at 692,693
189 James supra note182 at 695
Railroad Co. v. Aspell\textsuperscript{190} “It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties.” The legal thought process had been dominated by the idea that while there may be many causes of an injury in general sense, yet the law should search for a sole or principal proximate cause.\textsuperscript{191} According to Judge Kelsey:

In theory, but hardly in practice, employees in [nineteenth] century factories were protected by their employer’s duty —to provide employees with a reasonably safe place in which to work. Whatever succor this duty provided to employees, it soon surrendered to the —unholy trinity of employer defenses: contributory negligence, assumption of risk, and the fellow servant rule. They became the —wicked sisters of the common law because, working together, they effectively nullified any realistic possibility of holding an employer liable for the great majority of on-the-job injuries.\textsuperscript{192}

The question which is critical is whether the act of plaintiff was such that, it could expose him directly to the danger which resulted in the injury which he has complained about. If the answer is ‘no’ then the plaintiff’s negligence is considered as contributing to the injury. If the dangers to which he has exposed are something which a person with ordinary faculties can understand, he is assumed to have understood it\textsuperscript{193}. If the plaintiff by ordinary care could have avoided the effect of negligence of the defendant, he is guilty of contributory negligence, howmuchever negligent the defendant might have been at any of the later stages\textsuperscript{194}.

**Exceptions to contributory negligence**

However the judges in the later years have sought to reduce the harsh results of the contributory negligence defence by establishing limits and exceptions to its

\textsuperscript{190} 23 Pa. 147, 149-50 (1854) Id at 692
\textsuperscript{191} James supra note182 at 692,693
\textsuperscript{193} Swisher supra note 183
\textsuperscript{195} Turff v. Warmann 2 C.B.N.S.740 Id at 171
application. It was set that, for to establishing that the plaintiff has contributed, it must be a proximate cause of injury.

If the plaintiff got scared and confused due to the action of the defendant and in the attempt to save himself faced with the accident and suffered injury, the plaintiff’s conduct does not contribute to the injury. Similarly the defendants actions if placed plaintiff in a peril, law does not require him to exercise the same degree of care of a normal person who has the full opportunity to make his judgment. The defence is usually not applicable when the defendant’s conduct is so serious that it constitutes, intentional recklessness. In these situations, the plaintiff is only barred from recovery; if the plaintiff’s contributory negligence is similarly aggravated.

Under traditional English and American common law, the “last clear chance” doctrine created an exception to the rule. That is, the plaintiff’s own carelessness will not bar recovery, if defendant had an opportunity to avoid the accident. In the 1842 English case Davies v. Mann, the defendant recklessly drove horses and a the cart into a donkey that had been left fettered in the road. Though the plaintiff had been contributor negligent in leaving the donkey in the highway, the plaintiff was allowed to recover the damages since the defendant had the last clear chance to avoid the collision.

The “last clear chance” exception provides that when the defendant is negligent and the plaintiff is contributory negligent, but the defendant has “a fresh opportunity (of which he fails to avail himself) to avoid the consequences of his original negligence and the plaintiff’s contributory negligence,” the defendant will be liable even though, plaintiff contributed to the negligence. Therefore, under a last clear chance exception, the defendant would become

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195 Negligence Systems: Contributory Negligence, Comparative Fault, and Joint and Several Liability, Department of Legislative Services Office of Policy Analysis Annapolis, Maryland January 1-3 (2004).
196 Coulter v. Exp.Co. 56 NV.585 Id at 170
197 CHAKRABARTI supra note 193
198 James supra note182
200 supra note 195
responsible for the entire loss of the plaintiff, regardless of the plaintiff’s own contribution.

The American Approach

In USA, this principle is applied in different forms in various states. In a Maryland case, the exception allowed to plaintiff injured by sitting on the hood of a running car to recover from the driver. The plaintiff, after being offered a ride up the street, sat on the car’s hood. The driver accelerated quickly, throwing the plaintiff to the pavement. Though the plaintiff was held to be contributory negligent, recovery by the plaintiff was still allowed because the defendant had the last clear chance to avoid the accident. Under the law in Arkansas, a party may not recover any amount of damages if the plaintiff’s own negligence is calculated to be fifty percent or more. A plaintiff whose negligence is less than 50% can recover from a defendant whose negligence is less than plaintiff’s, provided defendants’ combined negligence or fault exceeds plaintiffs.

Similar rules are existing in other states as well. Plaintiff’s failure to use his wisdom and judgment was not accepted as a contributing factor for the negligence of the defendant’s employees in failing to whistle or ring a bell at a crossing. With Alvis v. Ribar, Illinois declared to be the thirty-seventh state to abandon the contributory negligence defense in its strict sense. Under comparative negligence adopted by the Illinois Supreme Court, a negligent plaintiff will be permitted to recover that portion of his damages not attributable to his own fault, and, conversely, a defendant will be liable for only that portion of the damages that he directly caused.

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205 Carlson v. R.Co 96 MNN 504,104 NW.555,41,ra(n.s) 349 113 Am St.Rep.655. See CHAKRABARTI supra note 193
result, most of the states in US have moved from the strict nature of a pure contributory negligence system to some form of a comparative negligence system. Currently, only five states, including the District of Columbia, follow the pure contributory negligence rule.\(^\text{207}\)

**English Law**

According to Halsbury’s laws of England:

> A distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child of young person, the reason being that a child cannot be expected to be as careful for his own safety as an adult. Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for contributory negligence with regard to a matter beyond his appreciation, but quite young children are held responsible for not exercising that care which may reasonable be expected of them. Where a child in doing an act which contributed to the accident was only following the instincts natural to his age and the circumstances, he is not guilty of contributory negligence, but the taking of reasonable precautions by the defendant to protect a child against his own propensities may afford evidence that the defendant was not negligent, and is, therefore, not liable.\(^\text{208}\)

In the case of children, courts have taken serious note of tenderness of age and related infirmities in understanding. Lord Denman in *Lynch v. Nurdin*\(^\text{209}\) said:

> Conduct on the part of such child contributing to an accident may not preclude it from recovering in full in circumstances in which similar conduct would preclude a grown up person from doing so ... Negligence means want of ordinary care, and “ordinary care” must mean that degree of care which may reasonably be expected of a person in the plaintiff’s situation..

In *Jones v. Lawrence*\(^\text{210}\), while dealing with the concept of duty of care by child, Cumming Bruce, J. has held that a child of seven years and three months has

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\(^207\) supra note 204  
\(^210\) 1970 Acc CJ 358
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the propensity to forget altogether what had been talked to him. Therefore, the theory of contributory negligence cannot be applied.211

Till the passing of Law Reform (Contributory Negligence) Act 1945, Contributory Negligence was a complete defense in Common Law. This legislation has regulated the application of this defence. It provided for reduction of damages recoverable in case of contributory negligence. The legislation gives the most important direction that the reduction of damage shall not be unfair, unjust, capricious and arbitrary, but it shall be based on equitable principles of justice.212

Law in India

Contributory negligence was never accepted as a complete defense in India. High Courts in India dealt this matter in the initial independence years. As back as in 1947, the Calcutta High Court213 held that “Ordinarily, in case of contributory negligence, there is negligence on both sides, the real test is whether one party could reasonably have avoided the consequences for the other party’s negligence. Therefore, in the present case, even mere absence of negligence on the part of the deceased would not be sufficient to justify want of contributory negligence.” The Patna High Court made candid observations in Jang Bahadur Singh v. Sunder Lal Mandal214:

Contributory negligence implies negligence on both sides. It is a question of fact in each case whether the conduct of the plaintiff amounts to contributory negligence. Furthermore, it is well-settled that in order that negligence of a party may be contributory, it is necessary that it should be the decisive or effective cause of the accident or collision. Therefore, where a party’s negligence, even though it continued to the end but did not contribute to the accident, or the collision, which was entirely due to the negligence of the other party, the latter is liable to the former in damages.215

211 M.P. State Road Transport v. Abdul Rahman AIR 1997 MP 248
212 CHAKRABARTI supra note 193
213 Jeet Kumari Poddar v. Chittagong Engineering AIR 1947 Cal 195
214 AIR 1962 Pat 258
In a similar expression in 1976:\(^{216}\):

This rule of ‘last opportunity’ obviously failed to give an equitable treatment to the parties concerned because it was based on an illogical postulate that in every case the person whose negligence came last in time was solely responsible for the damage. It took no account of the partial contribution to the unfortunate accident by the other party.

In the instant case the Court observed that, “The question is to what extent she has made this contribution. Answer to this question is necessary because the damages which would eventually be awarded to the petitioner would stand reduced in proportion to her contribution to the accident” Thus not complete bar of recovery but only apportionment was set as a practice in contributory negligence cases.”

In *J. Kumari Poddar v Chitagong Engineering and Electrical Supply Co.*\(^{217}\), it was observed that, “Ordinarily, in case of contributory negligence, there is negligence on both sides, but… the real test is whether one party could reasonably have avoided the consequences for the other party's negligence” Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage. In India the law is clear that, in a case of contributory negligence, the Courts have the power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage is reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage\(^{218}\)

**Contributory Negligence and Medical Care**

If the patient has ignored his doctor’s advice (for example by discharging himself from hospital contrary to medical advice or failing to return for further treatment), contributory negligence is established\(^{219}\). It would have to be shown that a reasonable person would have been aware of the significance of the

\(^{216}\) Rehana Kasamblai v. The Transport Manager  AIR 1976 Guj 37  
\(^{217}\) AIR 1947 Cal 195:  
\(^{218}\) Id  
\(^{219}\) JONES supra note 137
advice, which could depend on the nature of advice given by the doctor and whether the advice and the consequences of not following it, was clear to the patient. In one English case, having been told that the result of the ‘smear test’ is negative, the plaintiff was held to be contributorily negligent for two third of the share in failing to have a further smear test despite frequent reminders.

In Badger v. Ministry of Defence the patient who continued to smoke cigarettes, knowing that it created a risk of damaging his health was held to be contributorily liable in a claim in respect of lung cancer.

Failure to provide complete medical history or to follow instructions will be a contributing factor in medical negligence cases. Sometimes the unexpected results may not be only due to negligence of the doctor but also due to negligence of patients or relatives. Such situations can be (a) Not coming for follow-up as per the advice of doctor; (b) Failure to follow the instructions given by the treating doctor; (c) Investigations advised by the doctor are not done by the patient; (d) Patient fails to take advice of a specialist and he leaves the hospital against medical advice. The liability for the damage in such cases is suitably divided between the doctor, patients and relatives. The burden of proof of contributory negligence on the part of patient is on doctors.

The general view of the physician-patient relationship is based on the assumption that the physician knowledge superior to that of the patient. This assumption is gradually fading over the years and the physician and patient are now placed on practically equal footing. The increased knowledge and awareness of health care issues to the patient is considered by courts also. In Malay Kumar Ganguly’s case holding the claimant responsible for

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220 Munday v. Australian Capital Territory Health and Community Care Service[2004] ACTSC 134
222 [2006] 3 ALL.E.R 173
225 Malay Kumar Ganguly v. Sukumar Mukherjee (2009) 9 SCC 221
contributory negligence, the National Commission deducted 10% from the total compensation. The national commission observed

…even if we agree that there was interference by Kunal Saha during the treatment, it in no way diminishes the primary responsibility and default in duty on part of the defendants. In spite of a possibility of him playing an overanxious role during the medical proceedings, the breach of duty to take basic standard of medical care on the part of defendants is not diluted. To that extent, contributory negligence is not pertinent. It may, however, have some role to play for the purpose of damages.

2.8.2 Accepted by a Professional Body

If a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable. In the words of McNair J. in Bolam’s case, A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.” Bingham L.J. in Eckersley v. Binnie summarised the principle as:

From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.

227 [1957] 1 W.L.R. 582, 586
228 [1988] 18 Con.L.R. 1, 79
Lord Denning, expressed in *Hucks v. Cole*,229 “A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.” In the case of *A.S. Mittal v. State of U.P.*,230 the Indian Supreme Court took note that the law recognizes the dangers which are inherent in surgical operations and that mistakes will occur, on occasions, despite the exercise of reasonable skill and care231.

Lord Scarmar said232, “Differences of opinion and practice exist, and will always exist, in medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment.

2.8.3 Volunti Non Fit Injuria

*Volenti non fit injuria* means ‘no injury is done to one who voluntarily consents’. This is a complete defence to an action in negligence233. If a plaintiff, with full knowledge, voluntarily accepts the risk of injury, he or she will not recover any damages. The defendant needs to prove not only that the plaintiff accepted the risk of injury but also accepted that if injury should happen, the plaintiff would accept the legal risk234.

It consist of a voluntary agreement between the plaintiff and the defendant. By this agreement the plaintiff undertakes to have understood the risk involved in the action of the defendant and consented to it. This will absolve defendant from the unreasonable risk of harm created by him. However, in medical negligence cases, this defence does not apply. The Consent to medical treatment does not mean assumption of the risk. Even in the situation where a patient is told by a doctor that they are inexperienced, it is standard of care which is the determining

229 [1968] 118 New LJ 469
230 AIR 1989 SC 1570
231 Achut Rao Khodwa v. State of Maharashtra and Ors. AIR 1996 SC 2377
232 Hunter vs. Hanley 1955 SLT 213
factor of negligence\textsuperscript{235}. The patient who consents to medical procedure does not agree to face the risk caused by the doctor’s negligence\textsuperscript{236}. In \textit{Lakshmi Rajan v. Malar Hospital Ltd.}\textsuperscript{237} the patient has given consent for removing tumour as she was detected with breast cancer. The surgeon removed her uterus also. The Court held the surgeon liable.

\subsection*{2.8.4 Technical Imperfections}

The Supreme Court in \textit{Jacob Mathew case}\textsuperscript{238} held that “the standard of care, when assessing the practice adopted is judged in the light of knowledge available at the time (of incident) and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use particular equipment, the charge would fail, if the equipment were not generally available at the point of time at which it is suggested as should have been used”

In \textit{Tarun Thakore v. Noshir M. Shroff},\textsuperscript{239} the operation using laser technology resulted in ‘monocular diplopia’. The complainant made a contention that the doctor should have used Lasik Technology instead of PRK (Photo Refractive Keratectomy). The court held that PRK is also a well-recognized method and since at that time Lasik treatment was not largely available, using PRK cannot be considered negligence.\textsuperscript{240}

\subsection*{2.8.5 Absence of Proof}

The standard of reasonable care during the treatment varies from case to case. It is for the complainant to prove negligence by expert evidence or by producing medical literature.\textsuperscript{241} Negligence has to be proved. It cannot be presumed.\textsuperscript{242} In \textit{Achut Rao Khodwa v. State of Maharashtra and others},\textsuperscript{243} the Supreme Court held that “for establishing negligence or deficiency in service, there must be

\begin{footnotesize}
\begin{enumerate}
\item Yule supra note 233
\item JONES supra note 137
\item III (1998) C.P.J. 586 (TN)
\item Jacob Mathew supra note 13
\item 2003 (I) CLD 62 (NC)
\item RAO supra note 36 at 140
\item K.S. Bhatia v. Jeevan Hospital and Another, 2004 CTJ 175 (NC) (CP)
\item Marble City Hospital and Research Centre v. V.R. Soni, 2004 (2) CPJ (102) (Rajasthan)
\item AIR 1996 SC 2377
\end{enumerate}
\end{footnotesize}
sufficient evidence that a doctor or hospital has not taken reasonable care while treating the patient. Reasonable in discharge of duties by the hospital and doctors varies from case to case…” In *Kiran Bala Rout v. Christian Medical College and Hospital, Vellore*, 244 The National Commission dismissed complaint on account of lack of proof of negligence. Similarly, in another case, the patient who was an alcoholic, while shifting to ICU jumped out of third floor resulting in multiple injuries. The Commission held that negligence on the part of respondents is not established.

2.9 **LEGISLATIVE INTERVENTIONS**

Protecting the right to health and health care is the priority for the government and conscious legislative attempts were made in this respect through a number of legislations. However, health regulation in India had always been an intricate issue having various legal political and social concerns. Majority of such legislative interventions were with respect to licensing of medical professionals with a view to control their entry into the market. 245 Statutory regulatory councils have been established to monitor the standards of medical education, promote medical training and research activities, and oversee the qualifications, registration, and professional conduct. Some of the major legislations are,

2.9.1 **INDIAN MEDICAL COUNCIL ACT, 1956**

This legislation was originally enacted for re-constitution of medical council of India and maintenance of a medical register. The Medical Council of India is a statutory body established under the Indian Medical Council Act, 1933 which was later replaced by the Indian Medical Council Act, 1956 (102 of 1956). The main functions of the Council are246:

244 2003 CTJ 978 (NC)
246 Medical Education, Training and Research, Chapter 6. [http://mohfw.nic.in/WriteReadData/l892s/CHAPTER6-67542849.pdf](http://mohfw.nic.in/WriteReadData/l892s/CHAPTER6-67542849.pdf). Last visited on 3-10-2016 at 18:24
• Maintenance of uniform standard of Medical education at undergraduate and post-graduate level.
• Maintenance of Indian Medical Register.
• Reciprocity with foreign countries in the matter of mutual recognition of medical qualifications.
• Provisional/permanent registration of doctors with recognized medical qualifications, registration of additional qualifications, and issue of Good Standing Certificates for doctors going abroad.
• Continuing Medical Education, etc. 247.

The Council shall maintain a register of medical practitioners in the prescribed manner, to be known as the Indian Medical Register. It will contain the names of all persons who are for the time being enrolled on any State Medical Register and who possess any of the recognized medical qualifications. It shall be the duty of the Registrar of the Council to keep the Indian Medical Register in accordance with the provisions of this Act and of any orders made by the Council, and from time to time to revise the register and publish it in the Gazette of India. This register is a public document within the meaning of the Indian Evidence Act, 1872. 248. The Council is empowered, with the previous sanction of the Central Government, to make regulations to carry out the purposes of this Act 249. Under this provision, Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 was made. It states duties and responsibilities of doctors as follows.

The prime object of the medical profession is to render service to humanity; reward or financial gain is a subordinate consideration. Who—so-ever chooses his profession, assumes the obligation to conduct himself in accordance with its ideals. A physician should be an upright man, instructed in the art of healings. 250.

The Principal objective of the medical profession is to render service to humanity with full respect for the dignity of profession and man. Physicians

247 Id
248 Section 21 of The Indian Medical Council Act,1956
249 Section 33 of The Indian Medical Council Act,1956
250 Section 1.1.2 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations,2002.
should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion. Physicians should try continuously to improve medical knowledge and skills and should make available to their patients and colleagues the benefits of their professional attainments. The physician should practice methods of healing founded on scientific basis and should not associate professionally with anyone who violates this principle. The honoured ideals of the medical profession imply that the responsibilities of the physician extend not only to individuals but also to society.\(^{251}\)

### 2.9.2 Dentist’s Act, 1948

The Act was enacted to make provision for the regulation of the profession of dentistry and for that purpose to constitute Dental Councils. Dental Council is a statutory body to regulate the Dental education and the profession of Dentistry in India.\(^{252}\) It lays down standards of profession and ethics including duties and obligations of a Dentist.\(^{253}\) In exercise of the powers given by the Act, the Dental Council of India has made Dentist’s (Code of Ethics) Regulation in 1976. It lays down the standards to be followed by practitioners of Dentistry.

### 2.9.3 Transplantation of Human Organs Act, 1994

Organ transplantation was a breakthrough in medical history. Transplantation means the grafting of tissues taken from one part of the body to another part or another individual.\(^ {254} \) In order to curb the unethical and uncontrollable trade in human organs, the Transplantation of Human Organs Act, 1994 was passed by the Parliament. Its objective is to provide for the regulation of removal, storage and transplantation of the human organs for the therapeutic purpose and for the prevention of commercial dealings in human organs. It is originally applicable the whole of the States of Goa, Himachal Pradesh and Maharashtra and to all the Union territories and it shall also apply to such other State which adopts this

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251 Section 1.2.1 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

252 Section 17 A of the Dentists’ Act, 1948

253 LILY SRIVASTAVA, LAW & MEDICINE (2010)

254 LILY SRIVASTAVA, LAW & MEDICINE (2010)
Act by resolution passed in that behalf under clause (1) of article 252 of the Constitution.\textsuperscript{255}

The Act necessitates that\textsuperscript{256}

- The donor must be not less than 18 years and must voluntarily authorize.
- The consent of the donor must be informed
- Removal organ by any person other than a registered medical practitioner is prohibited
- The hospitals engaged in removal, storage or transplantation must be registered.

**2.9.4 THE CLINICAL ESTABLISHMENTS (REGISTRATION AND REGULATION) ACT, 2010**

The Clinical Establishments (Registration and Regulation) Act, 2010 is, perhaps, the most important public health legislation enacted so far with far reaching effects\textsuperscript{257}. The Act was enacted by the Central Government to provide for registration and regulation of all clinical establishments in the country with a view to prescribing the minimum standards of facilities and services provided by them. The Act has taken effect in the four states namely; Arunachal Pradesh, Himachal Pradesh, Mizoram, Sikkim, and all Union Territories except the NCT of Delhi since 1\textsuperscript{st} March, 2012\textsuperscript{258}. Other states have a choice of implementing this legislation or enacting their own legislation on the subject\textsuperscript{259}. The states of Uttar Pradesh, Uttarakhand, Rajasthan, Bihar and Jharkhand have adopted the Act under clause (1) of article 252 of the Constitution\textsuperscript{260}. The Act provides for the constitution of a National Council consisting of representatives of Medical Council of India, Dental Council of India, Nursing Council of India, the Pharmacy Council of India, the Indian Systems of Medicines representing

\textsuperscript{255} Transplantation of Human Organs Act, 1994
\textsuperscript{256} SRIVASTAVA, supra note 254
\textsuperscript{258} The Clinical Establishments (Registration and Regulation) ACT, 2010
\textsuperscript{259} S.K.Joshi, supra note 257
\textsuperscript{260} supra note 258
Ayurveda, Siddha, Unani and Homoeopathy systems, the Indian Medical Association, the Bureau of Indian Standards, the zonal councils setup under the States Reorganization Act, 1956, the North-Eastern Council, etc.; the function of the National Council shall be to determine the standards for the clinical establishment, classify the clinical establishment into different categories, develop the minimum standards and their periodic review, compile, maintain and update a National Register of clinical establishments, perform any other function determined by the Central Government, from time to time\textsuperscript{261}.

The Act will be applicable to all clinical establishments (hospitals, maternity homes, nursing homes, dispensaries, clinics, sanatoriums or institutions by whatever name called, that offer services for diagnosis, care or treatment of patients in any recognised system of medicine (Allopathy, Homeopathy, Ayurveda, Unani or Siddha), public or private, except the establishments run by the armed forces.\textsuperscript{262} Registration is mandatory for all clinical establishments. No person shall run a clinical establishment unless it is registered.\textsuperscript{263} In order to get registered; the establishment has to fulfil the following conditions.\textsuperscript{264}

(a) The maintenance of minimum standards of facilities and services and staff, as prescribed\textsuperscript{265}

(b) Maintenance of records and submission of reports and returns as prescribed.\textsuperscript{266}

The clinical establishment shall undertake to provide within the staff and facilities available such medical examination and treatment as may be required to stabilise the emergency medical condition of any individual brought to any such establishment.\textsuperscript{267}

\textsuperscript{261} Section 3 supra note 258
\textsuperscript{262} Section 2 supra note 258
\textsuperscript{263} Section 11 supra note 258
\textsuperscript{264} Section 12 supra note 258
\textsuperscript{265} supra note 258
\textsuperscript{266} Id
\textsuperscript{267} Section 13 of the Act
CHAPTER II - MEDICAL NEGLIGENCE LIABILITY UNDER TORT LAW

This Act, if implemented throughout the country will give a factual census of the number, category, specialty and location of all the physicians and all the medical establishments of all the systems of medicine in the country\textsuperscript{268}. That would be a great achievement as it would be a great help in the countrywide planning and posting of physicians as well as healthcare establishments. Up to now the authorities do not know exactly how many and what categories of doctors are available in different areas\textsuperscript{269}. It will also help isolate and identify the hundreds of thousands of quacks that are playing havoc with the lives of millions of people all over the country. Once in place, the system of registration will necessarily help in improving the standards of healthcare establishments within a couple of years\textsuperscript{270}. It will also bring about some uniformity in the standards of care across the country\textsuperscript{271}.

For maximum benefits and uniform effects, ideally the Central Act should have been made applicable in all the states and union territories\textsuperscript{272}. However, being a state subject, that is not possible. Since most of the states would be enacting their own legislations, there will be some variation in the provisions from state to state.\textsuperscript{273} Another criticism leveled against is that the national council is restricted to government agencies and medical associations. And also, civil society organizations which were responsible for the successful campaign for the enactment is kept away from the functions under the Act.

2.10 LIABILITY FOR NEGLIGENCE

In general, these laws establish councils for prescribing uniform standards for education and qualification of practitioners. And each statute specifically establishes a central registry that will give a complete list of individuals certified

\textsuperscript{268} supra note 261
\textsuperscript{269} supra note 261
\textsuperscript{270} Id
\textsuperscript{271} Id
\textsuperscript{272} Id
\textsuperscript{273} Id
to practice the particular field of medicine.\textsuperscript{274} Most of them define professional conduct and prescribe standards of it.\textsuperscript{275}

Under the Indian Medical Council Act, any complaint with regard to professional misconduct can be brought before the appropriate Medical Council for Disciplinary action.\textsuperscript{276} Upon receipt of any complaint of professional misconduct, the appropriate Medical Council would hold an enquiry and give opportunity to the registered medical practitioner to be heard in person or by pleader. If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner.\textsuperscript{277}

This Act does not give any remedy to the injured party through compensation. The punishments given to the erred doctor by the council does not comfort the complaint in that sense. Therefore as far as civil liability is concerned this legislation is not functional from the patient’s point of view. Similarly the Dentist’s Act, 1948 also empowers the state Council to take disciplinary action against practitioners who are found to be violating the professional conduct or resorting to unethical practices. However no provision for compensating the victim is included. The Transplantation of Human Organs Act, 1994 which provides for the regulation of removal, storage and transplantation of human organs for therapeutic purposes prescribes authority and restrictions for removal of Human Organs by surgeons. There are Penal provisions against the doctors and hospital for violations of provisions, but the Act does not cover the civil liability part. The Clinical establishments Act, 2010 which is landmark legislation in this arena will revolutionize Indian Health sector, if implemented effectively. The Act provides for monetary penalty for non-registration both for

\begin{flushleft}
\textsuperscript{274} supra note 245 \\
\textsuperscript{275} Id  \\
\textsuperscript{276} Section 8 of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002  \\
\textsuperscript{277} Id
\end{flushleft}
clinical establishments as well as the doctors working in them. However, compensating the injured patient is beyond the purview of this Act.

2.11 CONCLUSION

In India the vast majority of medical professionals, as well as clinical establishments, are in the private sector which accounts for the large section of healthcare. Therefore the growing number of medical negligence cases raises concern about the effectiveness of law in fixing liability and awarding compensation.

Law of Tort recognizes medical negligence as a specific tort; nevertheless its characteristics have evolved over a period of time. The test of ‘ordinary prudent man of his profession’ has given way to more stringent standards of reasonable care. Still existence of duty of care, its standard, reasonableness breach and consequential damage, the concepts which forms the foundation of law of negligence are making it abstract and tough for an injured patient to prove. Though there are myriads of legislation in the health care sector, none of them effectively deal with medical negligence and its compensation mechanism.

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