CHAPTER V
REMEDIES
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5.1 INTRODUCTION

In order to seek remedy for an adverse outcome from the medical practitioner, a patient may bring an action under various branches of civil law. It can be Tort, Contract, or Consumer law. A civil suit enables the victim to seek a remedy from the person who injured her. Unlike a criminal case, which is prosecuted by the state, it is initiated by the victim or the victim’s estate. A successful suit is followed by a judgment of liability that 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. On rare occasions, a plaintiff may also be awarded punitive damages, which go beyond what is necessary for compensation.

5.2 LAW OF TORT AND COMPENSATION

Tort law occupies a significant place in private law. Due to historical and epistemological features of this legal system, it is included in the substantial corpus of civil law. There are various theories which explain the purpose of its very existence.

Analytical theories, basically aim to interpret and explain. The fundamental concepts of substantive norms and procedural features are identified to explain how they are related. In this branch of law, the substantive norms are mainly the wrongs that tort recognizes and the remedies that it provides. One of the major procedural features is that tort suits are ‘bilateral’. They are filed by the

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723 Rachel Callinan, Medical Negligence and Professional Indemnity Insurance, Background Paper No 2/01, NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE. Available at: https://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/06606e8109509100ca256ecf00b1907/$File/bg02-01.pdf. Last accessed on 01-07-2016 at 17.47.


725 Id


727 Jule et al supra note 724
victim rather than by the state.\textsuperscript{728} Similarly, Normative theories seek to justify or reform and justificatory theories provide a normative grounding. These theories defend the values Tort law stands for and the goals it aims to achieve. Reformist theories, on the other hand seek to bring improvement in the law. It is achieved mainly, through recommending those changes that would bring the system closer to its core values.\textsuperscript{729} There is no clear demarcation between analytical and normative theories. Analytical theories are closely related to fundamental normative concepts. And, normative theories are always at least partly analytical. Such theories, quite often seek to justify or reform the existing system.\textsuperscript{730}

Traditionally, Tort law has two purposes. The first is to provide timely and reasonable compensation to those who are wrongfully injured and second to deter such wrongful conduct.\textsuperscript{731} The purpose of compensation is to allocate the risk of losses. It is also to create the incentives for potential wrongdoers not to cause harm. Apart from this, the compensation has a purpose of distribution of income, in cases where the wrong doer and victim belong to groups having different levels of income.\textsuperscript{732} The liability component is arrived at by following the philosophy of either corrective or distributive justice.

The concepts of distributive and corrective justice belong to Aristotle, who has coined the relation between parties as bipolarity. Justice according to him is affected by the direct transfer of resources from one party to another. It is as if there is a divided line between unequal parts and he takes what exceeds the half of the bigger segment and adds it to the smaller one. The resources represent the plaintiff’s wrongful injury and the defendant’s wrongful act.\textsuperscript{733} As distinguished by Aristotle, corrective justice requires ‘arithmetic’ allocation and distributive justice ‘geometric’ allocation. While allocating, social and other

\textsuperscript{728} Jules et al., supra note 724
\textsuperscript{729} Id
\textsuperscript{730} Id
\textsuperscript{732} Tudor supra note 726
\textsuperscript{733} Id
factors come into consideration in the second case.\textsuperscript{734} Corrective justice simply requires the reversal of wrongful changes to an initial distribution of resources. If the initial distribution of resources is not just then, it is distributive justice, which will help society maintain the equilibrium from a socialistic point of view.\textsuperscript{735}

The justice concept retains that negligence law is an articulation of our ordinary moral concept of agency and responsibility, carelessness and wrongdoing, harm and reparation.\textsuperscript{736} The economic concept holds it as one which embodies an appropriate public morality. When it comes to preventing harm, by deterrence, the question is which harms we wish to deter, and how to deter them. Or else, if it is reparation, which injury we wish to compensate and how best to compensate for them.\textsuperscript{737} When tort compensation is not limited to the redress of wrong conduct, the liability rule will necessarily serve two functions—it identifies the conditions under which injury compensation is desirable and accordingly creates financial incentives for duty holders to avoid injuring others by acting safely.\textsuperscript{738}

The major battle in tort theory in the last three decades of the Twentieth Century was a battle between two ideologically opposed forces within the theoretical school of law and economics.\textsuperscript{739} One side was represented by Richard Posner whose theory considers negligence to be the fundamental principle of tort law, which has the effect of reducing the liabilities of commercial actors to the amount necessary for them to internalize the costs of their activities, at the same time diminishing the capacity of the state to use tort law as a means of income

\textsuperscript{734} HANOCH SHEINMAN, Tort Law and Distributive Justice in, PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORT (John Oberdiek ed. 2014)
\textsuperscript{735} Jules et al., supra note 724
\textsuperscript{736} Gregory C. Keating, Distributive and Corrective Justice In The Tort Law Of Accidents, 74 So. Cal. Law Rev. 193 (2000)).
\textsuperscript{737} Keating supra note 736
\textsuperscript{739} Benjamin C. Zipursky, Richard Epstein and the Cold War in Torts 3 Journal of Tort Law 1 (2010).
redistribution, and smoothing the way for more unfettered market activity.\textsuperscript{740} The other side was represented by Guido Calabresi whose cheapest-cost avoider based theory placed strict liability as the fundamental principle of tort law.\textsuperscript{741} Calabresi considers that the principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents. The goal is defined as finding the “cheapest cost avoider” and putting the legal responsibility on him.\textsuperscript{742} Each person who infringes upon another’s property Right is required by the law to compensate the property owner for the infringement, so each one who causes injury to another’s body is also liable to the other for the costs of the injury inflicted.\textsuperscript{743} The purpose of tort law is not to compensate or deter certain conducts, but to protect each person and his right against the infringements of others.\textsuperscript{744} Invading the rights of another a wrongdoer upsets a pre-existing equilibrium between the parties. Liability is imposed upon him to re-establish that equilibrium and is for that reason required by justice.\textsuperscript{745} It was explained in this way:

But in a social sense it should be clear that people will act in a manner to minimize their losses, regardless of the legal rules adopted. Once people know that others are not obliged to assist them in their time of peril, they will on their own take steps to keep from being placed in a position where they will need assistance where none may be had. These precautions may not eliminate losses in the individual case, but they should reduce the number of cases in which such losses should occur.\textsuperscript{746}

In \textit{Rylands v. Fletcher}\textsuperscript{747} the principle of liability was laid down that a party who owns land and collects and keeps there anything likely to do harm is liable to compensate that damage, if such thing escapes and does damage to another. This rule applies only to non-natural user of the land and it does not apply in certain situations. That is, if those things are there naturally on the land or where

\begin{footnotes}
\footnotetext{740}{Id}
\footnotetext{741}{Id}
\footnotetext{743}{Hanoch Sheinman supra note 734. See also Richard A. Epstein, A theory of strict liability. 2 Journal of Legal Studies 203-204(1973).}
\footnotetext{744}{Id}
\footnotetext{745}{Id}
\footnotetext{746}{Richard A. Epstein, A theory of strict liability. 2 Journal of Legal Studies 203 (1973).}
\footnotetext{747}{1866 Law Report 1 Exchequer 265}
\end{footnotes}
the escape is due to an act of God. An act of a stranger or the fault of the person injured is exempted. If the thing which escapes are present by the consent of the person injured or in certain cases where there is statutory authority, it is excused. The Indian Supreme Court in M.C. Mehta’s case evolved new principle of liability called absolute liability. This is a stricter form of strict liability by which any person who is engaged in use of land which is inherently hazardous is absolutely liable to compensate the damages it causes. The Court observed:

An enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute non-delegable duty to the community to ensure that if any harm results to anyone, the enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm irrespective of the fact that the enterprise had taken all reasonable care and that the harm occurred without any negligence on its part.

The Court expressed that,

The measure of compensation in such cases must be co-related to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in carrying on of the hazardous or inherently dangerous activity by the enterprise”.

Thereby establishing that the purpose of compensation is not only compensatory, it is deterrence and vindictive too.

5.3 LIABILITY ‘FAULT’ AND ‘STRICT’

In most Anglophone jurisdictions, compensation is paid through a court-based tort law system. The tort systems typically endorse the ‘fault criterion’ according to which the victim of an injury is awarded compensation, paid by

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748 M.C.Mehta v.Union of India 1988 AIR 1115
749 Id
the injurer, only if it is established that the injurer in question was at fault.\textsuperscript{750} In a second group of jurisdictions, including Sweden, Denmark, Norway, Finland, France, New Zealand, Florida and Virginia, the fault criterion has been eliminated, at least for some kinds of medical injury. These moves have been taken to their greatest extent in New Zealand, where a statutory accident compensation system has for over 30 years compensated medical injury on a no-fault basis\textsuperscript{751}.

Under a regime of fault liability, a person is liable for injuries he causes while failing to act as a reasonable person in the similar circumstances. It will not make anyone liable for injuries, causing which he is blameless. The difference between the two regimes of liability is that under fault liability you can avoid liability if you act as a reasonable person, whereas you will be liable subject to strict liability even if you had sufficient reason for what you did.\textsuperscript{752} Justifications or reasonableness will not undermine strict liability.

The philosophical relevance of strict liability consists in accepting certain situation as special, in which a liability can arise, even in the absence of a faulty conduct.\textsuperscript{753} Each of us accepts, in daily life, a degree of risk that we must tolerate in light of our own production of similar risks to others. When people do not use reasonable care in engaging in those activities, they generate a nonreciprocal risk and therefore take responsibility if the risk is realized in an injury. This is negligence based liability. In case of hazardous activities, the reciprocity of risks does not apply and people who engage in such actions will be held liable for the results. This is strict liability.\textsuperscript{754}

In this regime, there is a general principle of responsibility which holds that in order to do justice, liability must depend on the responsibility of the injurer. Responsibility is analysed in terms of causality, not in terms of fault. The


\textsuperscript{751} Jules et al., supra note 724

\textsuperscript{752} Id

\textsuperscript{753} Tudor supra note 726

\textsuperscript{754} Id,
principle of autonomy and negative liberty states that each individual is free to exercise his autonomy until his doing so invades the space of others. At the point of invasion, he is either harming another or invading another's right. Since it does not matter whether the invasion is innocent or deliberate, liability imposed upon invaders is strict.\(^55\)

### 5.4 Compensation and Medical Negligence

Compensation is derived from a Latin word ‘*compensare*’ meaning ‘wiegh together’.\(^56\) In Roman law it is phrased as ‘Suum cuique tribuere’ means ‘give to each man that which is his right’\(^57\). The concept of compensation is derived essentially from the affirmation that the scales of justice should be on an even balance. If someone infringes legal right, he must pay the fair equivalent says, the Scottish law.

Damages is described as a sum of money given as compensation for loss or harm of any kind.\(^58\) Lord Blackburn in *Livingstone v. Rawyards Coal Co*\(^759\). expressed,

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\text{I do not think, there is any difference in opinion as to being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the person who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation.}\(^760\)
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There is no difference in principle applied to the assessment of damages in a medical negligence case from other actions for personal injuries.\(^761\) The compensatory function of law has been given a very wide connotation by

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\(^56\) J. M. Munkman, *Damages for Personal Injuries and Death* 1-7 (3rd ed. 1966)

\(^57\) *Id*

\(^58\) *Id*

\(^59\) (1980)5 App.Cas. 25

\(^60\) J. M. Munkman supra note 756

Supreme Court in India\textsuperscript{762} by taking in its fold mental agony, harassment, actual loss and expected loss, humiliation, insult, emotional suffering etc.

In case of death due to medical negligence, the valuable life is abruptly terminated. The purpose of awarding compensation is to indemnify the loss of to the dependants or to the estate. The determination of amount of compensation is basically a net balance of the loss and gain to the survivors or dependants. It was held by the Court of Appeal in UK that, the purpose of an award in Tort is to make good the loss suffered as a result of the wrong done\textsuperscript{763}.

\textbf{5.4.1 DAMAGES}

Normal remedy for under civil law –whether it is personal injury or damage to property, or financial loss—is a right to recover damages. In the Victorian cases, it is observed by jurists that there was a warning against excessive compensation and it was insisted that damages are not rewards but simply compensation.\textsuperscript{764} But the impossibility of ascertaining the amount of money which can ‘actually’ compensate personal injury, was prime concern of the judges.

The major issues in deciding the damages are two. One, the items of loss or injury in respect of which damages are given and second, methods to quantify these items in monetary terms. In general, damages are given for all kinds of injury caused by an unlawful act, and for its consequential loss and expense. In personal injuries, these factors include loss of earnings, pain, loss of employment etc. Quantification is easy when the loss has financial character. For example, loss of wages or profit, medical expenses etc. In this case, it is simply a matter of arithmetic calculation. But some other losses such as loss of a limb, hearing capacity etc. involve a broad estimate. In such cases, courts do take guidance from compensation awarded in similar and comparable cases\textsuperscript{765}.

In the words of COCKBURN, C.J:\textsuperscript{766}

\begin{quote}
In assessing [the] compensation the jury should take into consideration two things; first, the pecuniary loss [the plaintiff] sustains by the
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\textsuperscript{762} Ghaziabad Development Authority s. Balbir Singh (2004) 5SCC 65
\textsuperscript{763} Wells v.Wells[1999] AC 345
\textsuperscript{764} British Transport Commission v. Gurley [1956] A.C. 185
\textsuperscript{765} SINGH & BHUSHAN supra note 761
\textsuperscript{766} Fair v. London and North Western Rail.Co. (1969)21 L.T.326
accident; secondly, the injury he sustains in person, or his physical
capacity of enjoying life. When they come to the consideration of the
pecuniary loss they have to take into account not only his present loss,
but his incapacity to earn a future improved income.767

Things acquire value by and in terms of society’s judgement. When courts
assess damages for personal injuries, they endeavour to reach at a fair social
valuation. They don’t consider the probably enormous value that a person would
place on his own life. But they will dispassionately take a neutral value which
the society at large on the basis of the prevailing money values in that society
would give to it.768

DENNING, M.R. said, “….the award of damages in personal injury cases is
basically a conventional figure derived from experience and from awards in
comparable cases.”769

Most actions against medical practitioners are claims in respect of personal
injury or death and the consequential financial loss, and there is no difference
in the principles applied to the assessment of damages in medical negligence
cases from other actions for personal injuries.

“A claim in negligence will only lie where damage has been caused that is worth
suing for.”770 Proof of damage is essential in a claim in negligence.

5.4.2 Types of Damages

The fundamental principle of an award of damages is that the injured party
should be fully compensated. He is entitled to be restored to the position that he
would have been in, had the tort not been committed. The classic statement of
Lord BLACKBURN in Livingstone v. Rawyards Coal Co.771 explains proposition,
where any injury is to be compensated by damages, in settling the sum
of money to be given for reparation or damages, you should, as nearly
as possible, get that sum of money which will put the party who has been
injured, or who has suffered, in the same position as he would have been
in if he had not sustained the wrong for which he is now getting his
compensation or reparation.

767 JOHN MUNKMAN, DAMAGES FOR PERSONAL INJURIES AND DEATH 10-11 (3rd ed. 1966)
768 SINGH & BHUSHAN supra note 761
770 Rothwell v. Chemical & Insulating Co.Ltd [2006] EWHC Civ 27
771 (1980) 5 App.Cas. 25
The statement was reaffirmed by Lord Lloyd in *Wells v. Wells*.\(^{772}\) “The task of the court in assessing damages for personal injury is to arrive at a lump sum which represents, as nearly as possible, full compensation for the injury which the plaintiff has suffered.”

Claimant is entitled to be restored to the position, he would have been in, if the injury would not have caused by the defendant. But practically this is almost impossible in many cases. No amount of money can restore a man to his original position who lost his leg due to medical negligence. No amount of money can reduce the grief of a mother who lost her child to the negligence of a surgeon. In such cases compensating becomes an intricate function. The principle applied by the courts is that non-pecuniary damages should be ‘fair’ and ‘reasonable’ leaving the big question of what is fair and reasonable to be answered by the judges in each case.

**Aggravated damages**

When the award is not limited to the pecuniary loss that can be specifically calculated, the court may take into account, the manner in which the tort was committed in assessing the damages. If they were injuring the proper feelings of dignity and pride, then aggravated damages can be given. Aggravated damages are compensatory. But they are higher than would normally be the case to reflect the greater injury to the plaintiff. In *Kralji v. McGrath*,\(^{773}\) it was held that aggravated damages should not be awarded in an action for negligence against doctors, notwithstanding that the medical evidence indicated that the injured party’s treatment had been “horrific”. If on the other hand, the particular treatment increased plaintiff’s pain and suffering, this should be reflected in a higher award under this head.\(^{774}\) In *Broome v. Cassel & Co.Ltd*,\(^{775}\) Lord Reid said that the commission of a tort in a malicious, insulting or oppressive manner may aggravate the claimant’s injury. It is arguable that some form of treatment could be regarded as oppressive or insulting: sterilisation of a competent adult

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\(^{772}\) [1999] 1 A.C. 345  
\(^{773}\) [1986] 1 All E.R.54  
\(^{774}\) MICHAEL A JONES, MEDICAL NEGLIGENCE 970-1000 (4th ed. 2008)  
\(^{775}\) HL 23 FEB 1972
without consent for example.\textsuperscript{776} In \textit{Richardson v. Howie},\textsuperscript{777} the Court of Appeal clarified that the aggravating factors should be compensated through the award of general damages.

**Exemplary damages**

Exemplary damages are punitive in nature and are awarded in addition to the compensatory damages in order to teach the defendant that “tort does not pay”. Exemplary damages aims to punish the wrongdoer. English common law has limited award of such damages to only two circumstances. One is oppressive, arbitrary or unconstitutional actions by servants of the government and the other is a conduct which has been calculated to make a profit for himself that may well exceed the compensation payable.\textsuperscript{778} But the trend is gradually changing in UK. There are deliberations at the government level on whether that can be allowed in negligence cases as well with a rational basis\textsuperscript{779}. If approved, it will open the way for exemplary damages for clinical negligence as well in respect of conscious wrong doing which is outrageous\textsuperscript{780}.

### 5.5 Remoteness of Damage

Damages, in general, are awarded for the consequential loss and other expenses incurred as a result of injury. In some cases, it can be argued that the loss is too remote to the injury to suffer. Remoteness of damage is a confusing subject, not because it is difficult in itself, but because, like an archaeological site, it has been overlaid with successive theories which are inconsistent with one another\textsuperscript{781}.

In Tort, the defendant is not liable unless the plaintiff had a duty towards the plaintiff to ‘take care’. He does not have any duty if the plaintiff is out of the

\textsuperscript{776} JONES supra note 774
\textsuperscript{777} [2004] EWCA Civ 1127
\textsuperscript{778} [2004] EWCA Civ 1127
\textsuperscript{779} Civil Law Reforms Draft Bill (2009). \url{http://www.justice.gov.uk/docs/cp0907.pdf} Last visited on 09-08-2016 at 22.35
\textsuperscript{780} JONES supra note 774
\textsuperscript{781} MUNKMAN supra note 154
range of defendant’s activities and no reasonable man would expect the plaintiff to sustain any harm.\textsuperscript{782}

It was a long debated issue, whether compensation can be given for nervous shock. If nervous shock accompanied with physical injury, it will be a part of pain and suffering. Though it is possible at a later stage to have adverse physical effects, if it is not immediately accompanied with physical injury, it was not accepted as a cause of action. The justification in these cases was that the damage is ‘too remote’. It was considered as harm ‘too fanciful and speculative ‘to be recognized by the law’\textsuperscript{783}.

\textbf{5.5.1 REASONABLE FORESEEABILITY}

The defendant who is guilty of negligence is only liable to compensate for those consequences of his action which were reasonably foreseeable.\textsuperscript{784} It is not required that the precise nature of the injury should be foreseeable. It is enough if the type, kind degree or order of harm could have been seen in a general way.\textsuperscript{785} Where the plaintiff suffers no damage to his person or property but sustained economic loss, the law does not usually permit him to recover that loss, because it is too remote to be a head of damage.\textsuperscript{786} Mere economic loss unaccompanied by damage to person or property is irrecoverable in an action for negligence. The test of foreseeability determines the liability in damages for the result of wrongful act.\textsuperscript{787}

\textbf{5.6 ELIGIBILITY UNDER GENERAL LAW}

Any adult person of sound mind is entitled to ask for compensation, for the injuries he suffered due to medical negligence.\textsuperscript{788} In case of a minor or an unsound mind person the claim can be made through next friend. That means

\textsuperscript{782}MUNKMAN supra note 154
\textsuperscript{783}Id
\textsuperscript{784}Overseas Tankship(UK) Ltd v. Morts Dock and Engineering Co.Ltd [1961] AC 388
\textsuperscript{785}Bradford v. Robinsons Rentals Limited [1967] All ER 267
\textsuperscript{786}SCM9UK0 Ltd. v.. W.J. Whitfall & Sons Ltd. [1971] 1 QB 337
\textsuperscript{787}BAG supra note 345
\textsuperscript{788}BAG supra note 345
those who are not capable of protecting their interest due to immaturity or unsoundness of mind can also approach the court through their next friend.  

5.6.1 **LEGAL REPRESENTATIVE**  
Under the Legal Representatives’ Suits Act, 1855, personal injury claims cannot be commencing by the executor, administrator or representative of the deceased. The Act is intended to protect wrong done to property of the deceased. However such person will also have *locus standi*, if he claims on behalf of wife, husband, parent and child. Legal representative means a person who in law represents the estate of the deceased and includes any person who intermeddles with the estate of the diseased, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. The Madras High Court has held that the word representative used in the Fatal Accidents Act, 1855 means and includes all or any of the persons for whose benefit a suit under the Act can be maintained, and that the persons are representatives in the sense that they are the persons taking the place of the deceased in obtaining reparation for the wrong done. This view was followed by various courts consistently. Therefore under this Act compensation is available to those members of the family of the deceased, who suffer monetary loss as a result of death of the said person caused by wrongful act. Just compensation is that which would enable the legal representative to receive or earn such pecuniary benefit as they could have obtained from the decease, if he had lived his normal life. A modified version of the maxim *auctio personalis moritur cum persona* can be seen in Indian Succession Act. It provides that all rights to prosecute or defend any action for or against a person at the time of death, survive to against his executor or administrator.

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789 Order 32 of Civil Procedure Code.1908  
790 Section 1A of Fatal accidents Act,1855  
791 Section 2(11)of the Code of Civil Procedure,1908  
792 Johnson v. The Madras Railway Company ILR (1905)Mad 479  
795 Section 306
5.6.2 MODE OF ASSESSMENT

Common Law

Under the general principles of tortious liability, the medical practitioner who caused injury or damage by negligence is bound to pay compensation. The medical man is bound to compensate the family of the deceased patient whose death is caused by his wrongful act, neglect or default. In Sideway’s case, the House of Lords did not object to action brought against the executors of the estate of the deceased neuro–surgeon, though the allegation of negligence was not established in the case. However, if the complainant hired the services of the hospital and there is no privity of contract between complainant and the doctor, only the hospital will be liable to pay compensation.

Lord WRIGHT has laid down the general rule of assessing damages in the following ways.

The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In assessing damages which may be legitimately pleaded in diminution of losses must be considered. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing, on the other hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of death.

Lord BLACKBURN said,

I do not think, there is any difference in opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as possible get at that sum of money which will put the person who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

VISCOUNT SIMON formulated a test in the following way. First, the deceased man’s expectation of life has to be estimated having regard to his age, bodily health and the possibility of premature determination of his life by later accidents. Thereafter, the amount required for the future provision of his wife

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796 Section 1A of Fatal Accidents Act,1855
797 Sideway v. Bethlem Royal Hospital Governors [1985]1 All ER643
798 BAG supra note 345
799 BAG supra note 345
800 Livingstone v. Rawyards Coal Co.,(1980) 5 App.Cas.25
801 MUNKMAN supra note 154
shall be estimated having regards to the amounts he used to spend on her during his lifetime and other circumstances. Then the estimated annual sum is multiplied by number of years of the man’s estimated span of life, and the said amount must be discounted so as to arrive at the equivalent in the form of a lump sum payable on his death. And further deductions must be made for the benefit of accruing to the widow from the acceleration of her interest in his estate. Fifthly further amounts have to be deducted for the possibility of wife dying earlier if the husband had lived the full span of life, and it should also be taken into account that there is the possibility of widow remarrying much to the improvement of her financial position.\footnote{Lord Wright stated that the starting point is the amount which was the earning of the deceased. But it has to be ascertained on the basis of the regularity of his employment. Then the amount which would have required for his personal expenses is to be calculated. The balance will be a general figure which will be turned in to a lump sum by taking a certain number of years’ purchase. That sum however had to be taxed down by having due regards to the uncertainties such as remarriage etc. \footnote{Lord Diplock formed another principle. To assess damage, it is necessary to form a view on three matters. Calculate the value of the material benefit for his dependants which deceased would have provided out of his earnings for each year in future during which he would have provided them if he had not been killed. Then the value of any material benefits which the dependants would have obtained in each such year from sources (other than insurance) which would not have been available to them, had the deceased been alive. Thirdly the amount of capital sum with which prudent management will produce annual amounts equal to the difference between first and the second value for each of the years during which the deceased would have provided material benefits for the dependants had he not been killed.\footnote{The Court of Appeal in England held that where the plaintiff received unemployment benefit to which defendant was a contributing party, such sums}}

The Court of Appeal in England held that where the plaintiff received unemployment benefit to which defendant was a contributing party, such sums

must be deducted from the award. These judgments underscored a philosophy that personal injury benefits are only compensatory.\textsuperscript{805}

Much earlier in 1879, Field, J.\textsuperscript{806} warned the jury in this way,

\begin{quote}
You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense, to bear, and you must always recollect that this is the only occasion on which compensation can be given.\[The plaintiff\] can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendant, and you must take care to give him full fair compensation for that which he has suffered.\textsuperscript{807}
\end{quote}

The general rule is that the injured party should give credit for all sums he received in diminution of his loss, save for exceptional cases such as insurance benefits. In \textit{Hudson v. Trapp}\textsuperscript{808}, Lord Bridge said that, “The classic heads of exception to the basic rule are: Moneys accruing to the injured plaintiff under policies of insurance for which he had paid premiums”. Disablement pension does not operate to reduce damages.\textsuperscript{809} It is a kind of pension which the plaintiff is entitled for, because of the premiums which he has paid, the wrong doer should not be allowed to appropriate the benefit\textsuperscript{810}. Similarly the amount which is given to the plaintiff by third parties out of sympathy can also not be deducted\textsuperscript{811}.

\textbf{Indian Law}

In India, compensation payable to a victim of an accident is assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other

\begin{flushright}
\textsuperscript{805} \textit{Id}  \\
\textsuperscript{806} Phillips v. South Western Rail.Co. (1879)  \\
\textsuperscript{807} MUNKMAN supra note 154  \\
\textsuperscript{808} [1988]3 WLR 1281  \\
\textsuperscript{809} Pyane v. Rly. Executive[1952]1KB 26  \\
\textsuperscript{810} Jude v. Hammersmith West London and St. Mark’s Hospital [1960] 1 WLR328  \\
\textsuperscript{811} Redpath v. Belfast and County Down Rly[1947]NI167
\end{flushright}
material loss. So far non-pecuniary damages are concerned, they may include
(i) damages for mental and physical shock, pain suffering, already suffered or
likely to be suffered in future; (ii) damages to compensate for the loss of
amenities of life which may include a variety of matters i.e. on account of injury
the claimant may not be able to walk run or sit; (iii) damages for the loss of
expectation of life, i.e. on account of injury the normal longevity of the person
concerned is shortened; (iv) inconvenience, hardship, discomfort,
disappointment frustration and mental stress in life.” observed the Supreme
Court. Judiciary has put in a lot effort and thought in identifying an appropriate
test in quantification of damages. Supreme Court in Gobald Motor Service
Ltd. v. R. M. K. Velu-swami observed:

It would be seen from the said mode of estimation that many
imponderables enter into the calculation. Therefore, the actual extent of
the pecuniary loss to the respondents may depend upon data which
cannot be ascertained accurately, but must necessarily be an estimate, or
even partly conjecture. Shortly stated, the general principle is that the
pecuniary loss can be ascertained only by balancing on the one hand the
loss to the claimants of the future pecuniary benefit and on the other any
pecuniary advantage which from whatever source comes to them by
reason of the death, that is, the balance of loss and gain to a dependent
by the death must be ascertained.

In Municipal Corporation of Delhi v. Subhagwanti, the Supreme Court relied
upon another observation of Lord Wright in Davies's case, according to
which ‘for the purpose of assessing the amount of compensation due to the
beneficiaries, the amount of wages which the deceased was earning has to be
ascertained after making allowance for the estimated amount which the
deceased was spending on himself during his lifetime and then the balance
should be turned into a lump sum by taking a certain number of years purchase’.
The income of the deceased had been capitalised for a period of 15 years on the
basis of this formula by the High Court. This was approved by the Supreme
Court. In Taff Vale Rly. Co. v. Jenkins, it was held that while estimating the

812 R.D. Hattangadi v. Pest Control (India) Private Limited (1995) 1 SCC 551,
814 AIR 1962 SC 1
815 AIR 1966 SC 1750
816 Davies v. Powell Duffryn Associated Collieries Ltd., 1942 AC 601,
817 (1913 AC 1)
damages solatium cannot be awarded inasmuch as no damages can be awarded for injured feelings or on the ground of sentiment, but prospective loss to the dependants of the deceased can certainly be taken into consideration.

The basis is not what has been called solatium, that is to say, damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss, but then loss may be prospective, and it is quite clear that prospective loss may be taken into account. It has been said that this is qualified by the proposition that the child must be shown to have been earning something before any damages can be assessed. I know of no foundation in principle for that proposition either in the statute or in any doctrine of law which is applicable; nor do I think it is really established by the authorities when you examine them.....

In _Nance v. British Columbia Electric Railway Company Ltd._818, it was held that the claim to damages in cases of death fell under two separate heads; first, what sums the deceased would have probably applied out of his income to the maintenance of his wife and family if the deceased had not been killed and would have lived the full span of life; second, what would have been the additional savings which the deceased would or might have accumulated during the period he would have lived but for the premature death, which would probably have accrued to his wife and family. For the purpose of arriving at the correct assessment under these two heads, Viscount Simon laid down the following principles819:

Under the first head--indeed, for the purposes of both heads it is necessary first to estimate what was the deceased man's expectation of life if he had not been killed when he was (let this be 'x' years) and next what sums during these x years he would probably have applied to the support of his wife. In fixing x, regard must be had not only to his age and bodily health, but to the possibility of a premature determination of his life by a later accident. In estimating future provision for his wife, the amounts he usually applied in this way before his death are obviously relevant, and often the best evidence available through not conclusive, since if he had survived, his means might have expended or shrunk; and his liberality might have grown or wilted

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818 1951 A.C. 601
819 Quoted in Lachhman Singh v. Gurmit Kaur AIR 1979 P&H 50 FB
**Interest theory**

This theory has been laid down by the Supreme Court in *Surjit Singh v. The Co-operative General Insurance Society Ltd.*\(^{820}\) In this case, it was held that as the claimants are getting a capitalised sum, the mode to work out what sum they should get is to see how much interest that amount fetches and if that interest equalizes the benefit they were getting from the deceased, then that amount should be awarded as compensation\(^{821}\).

Though this theory was reiterated in Naresh Kanta’s Case,\(^{822}\) it was discarded by the full bench of the same High Court in Lachhman Singh’s Case\(^{823}\). “… this interest theory cannot be adopted as an inflexible principle for the purpose of assessing the compensation specially in these days when the purchasing power in terms of money is being eroded after short intervals on account of run-away inflation.” The Court categorically observed that,

> In present day India, when our economy is not so highly developed as in western countries and the banking system has not taken deep roots especially in the villages, it is too unrealistic to adopt interest theory for determining the damages. In a large number of villages, there are neither any bank nor are the people accustomed to make investments therein. Besides, bank interest rates are not stable and static and the same go on fluctuating in view of the inflationary trends in the economy. Only a decade back, the normal bank interest rate did not exceed 4 per cent. As inflation in course of time becomes an essential part of the economy, the banks, in order to mop up the surplus money in the hands of the people, contrived of the inducement to pay higher rates of interest and these interests have been going up from time to time. The adoption of interest theory presumes that the claimant will invest the amount of claim in the bank which will ensure the amount of monthly dependency. In this manner, the claimant while getting the monthly interest will also be having the capital invested in the bank as intact. This argument may be further advanced for the purpose of further reduction in the total amount of compensation. To my mind, the interest theory is impracticable and unrealistic and will not be a proper yardstick for determining the correct amount of compensation.

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\(^{820}\) (1974) 76 Pun LR 353 (1).

\(^{821}\) Quoted in Joki Ram v. Smt. Naresh Kanta (1977)79 Punj LR328

\(^{822}\) Joki Ram v. Naresh Kanta (1977)79 Punj LR328

\(^{823}\) Lachhman Singh v. Gurmit Kaur AIR 1979 P&H 50 FB
Multiplier method

The multiplier method of assessing damages is calculating the net pecuniary loss upon an annual basis and to arrive at the total award by multiplying the figure assessed as the amount of the annual dependency by a number of years purchase. That means the number of years the benefit was expected to last taking into consideration the imponderable factors in fixing either the multiplier or the multiplicand. When person is on the threshold of his career, his income is less, but he has a longer period to serve and as such a higher “multiplier” is called for. A lower “multiplier” is justified as the person grows old, and his income and contribution to the family increases. Multiplier is a notional figure which represents a number of years by which the multiplicand must be multiplied in order to calculate the future losses. The figure is arbitrary and ranges from 10-20 depending upon the approach of the court in each case.

In Subhagwanti’s case, the deceased was 30 year old. The multiplier of 15 years was used by the Supreme Court in calculating the amount of compensation. In another case, the lady who was just about 23 years had 35 years of service remaining. Keeping in mind all the relevant facts and contingencies, a suitable multiplier of 20 was taken by the Supreme court. In Krishnakumari Gupta’s case, the High Court adopted the multiplier of 16 years. A multiplier of 20 was used in where the complainant lost vision of one eye and was at the age of forty. In Damyanti Devi v. Sita Devi, the Court held that it was not necessary to make any deduction on account of the lump sum payment and the amount of annual loss was multiplied by the number of years by which the life had been cut short. Parsani Devi v State of Haryana, the amount of damages was arrived as by multiplying the annual dependency

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824 Madhya Pradesh State Road Transport Corporation v. Sudhakar AIR 1977 SC1189
825 Krishna Kumari Gupta v. Gurbux Sheesh Singh 1985 ACJ 457
826 SINGH & BHUSHAN supra note 761
828 Madhya Pradesh State Road Transport Corporation v. Sudhakar AIR 1977 SC1189
829 Krishna Kumari Gupta v. Gurbux Sheesh Singh 1985 ACJ 457
830 Ram Babu v. Anjani Kishore Prasad 1998(2) CPR224
831 1972 AC 334
832 (1973) 75 P.L.R. 812
by the number of years till the age of retirement. The Court observed in

*Lachhman Singh v. Gurmit Kaur*\(^{833}\) that

…the most ‘just and reasonable’ view appears to be that the total amount of damages should be arrived at by multiplying the annual dependency by a suitable multiplier. The sole basis of awarding compensation to the dependents of the deceased is that on account of culpable negligence or default of the offender, a valuable life who was the source of livelihood to the claimants is cut short. Before the termination of life, the deceased was making some earning either through salary in Government service or any business, enterprise or in any other manner, or was getting earning through his own business or cultivation of land. A part of the same he was spending for his own maintenance and some part, if not the whole, was being utilised for up-keep and maintenance of the dependants who may be his widow, parents or his children. There can be cases where after spending the earnings on all the members of the family, still surplus may be left and may have been utilised for bringing into existence an estate or property. Thus, abrupt termination of life results in loss to the dependants or to the estate. The basic figure of annual dependency has, thus, to be determined after excluding the amount which the deceased was spending on himself or which he was investing in some capital investment or formation of the estate.

**Fatal Accidents Act**

Personal injuries are generally compensated under Law of Torts. A specific legislation for providing damages to the dependants of the deceased was enacted for the first time in India in 1855, through *Fatal Accidents Act; 1855*. This Act entitles the dependants for compensation through pecuniary damages.

The plaintiff, in order to succeed an action under this act, has to prove that, by the death of the deceased, he has lost a reasonable probability of pecuniary advantage. Compulsory damages for wrongful death must be limited to the pecuniary loss to the beneficiaries\(^{834}\). The general principle is that, the pecuniary loss can be ascertained only by balancing on the one hand, the loss to the claimants of the future pecuniary benefit and on the other, any pecuniary advantage which from whatever source comes to them by reason of death. That means the balance of loss and gain to the dependant by the death must be ascertained.

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\(^{833}\) AIR 1979 P&H 50 FB  
\(^{834}\) Section 1A of Fatal Accidents Act, 1855.
Since the elements which determine the value of the deceased to the beneficiaries are necessarily personal in nature, there can be no exact or uniform rule for measuring the value of human life.\textsuperscript{835} The Act gives a detailed list of people who can recover damages for the loss. That is, compensation for pecuniary loss sustained by the dependants.\textsuperscript{836} Damages recoverable for the benefit of the estate is also available in its details.\textsuperscript{837} It also provides for recovery for mental agony, suffering and loss of expectation of life. In awarding damages, there shall not be duplication of the same claim. If the person taking benefit under both the heads is the same, he cannot be permitted to recover twice over for the same loss. If any part of the compensation representing the loss of the estate goes into the calculation of personal loss that portion shall be excluded in giving compensation and vice versa.

**Heads of damage**

A pecuniary award is a composite figure made up of several parts. Some part is calculated in economic terms such as loss of income or future earnings. But it contains non-economic damages also. They are not calculated in money terms but proceeds on a conventional basis. Non-economic damages are compensation for pain, suffering and loss of amenities. Damages are to compensate both pecuniary and non-pecuniary losses. Economic damages are called ‘special damages’ which constitute loss of earnings expenses incurred in treatment as a result of accident and future pecuniary loss. Non-economic damages or ‘general damages’ are for compensating other kinds of losses, such as, pain and suffering, loss of enjoyment of life. And shortened expectation of life.

**Special Damages**

The pecuniary loss to the aggrieved party is assessed based upon a data which cannot be ascertained accurately.\textsuperscript{838} These can be more easily computed and are generally larger than general damages. They include the cost of best available medical treatment, loss of earnings, nursing care, cost of special equiments, cost

\textsuperscript{835} C.K.Subramania Iyer v. T.Kunjikuttan Nair AIR1970 SC 376
\textsuperscript{836} Section 1 supra note 834
\textsuperscript{837} Section 2 supra note 834
\textsuperscript{838} Sheikhpura Transport Co. Ltd.v. Northern India Transporters Insurance Company ltd. AIR1971 SC1624
of taxi fares to attend treatment etc.\textsuperscript{839} The principle of working out a suitable multiplier is the only just and equitable method because the same takes into considerations not only the age of the victim, but also the ages of the dependants and all uncertainties of life, both in the realm of enhancement in the income as well as factors justifying reduction in the amount of compensation.\textsuperscript{840}

- **Loss of Earnings**

Loss of earning has to be assessed between the date of accident and the date of trial. An injured party is entitled to recover damages in respect of any resultant loss of wages, salaries and fees. The plaintiff’s real claim of special damages is the amount of his net loss. The particulars are necessary in order to enable its calculation. Other deductions are income tax which the plaintiff would have paid, any compulsory deductions that he would have made for example, and the contributions that he would have made to the National Insurance and similar obligatory payments and superannuation or pension contributions.\textsuperscript{841}

- **Loss of Future earnings**

There is difference between an award for loss of earnings and for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. On the other hand compensation for loss/reduction in earning capacity is awarded as part of general damages for pain and sufferings as well as for loss of amenities. After the judgment in *Jefford v. Gee*,\textsuperscript{842} the future earning capacity is quantified separately in England.\textsuperscript{843} The amount under this head is basically the net balance of the loss and gain to the survivors or the dependants. It is not possible to visualise all the uncertainties or assess in exact terms. Therefore there bound to be a general estimate.\textsuperscript{844}

\textsuperscript{839} SINGH & BHUSHAN supra note 761
\textsuperscript{840} Lachhman Singh v. Gurmit Kaur AIR 1979 P&H 50 FB
\textsuperscript{841} Colledge v. Bass Mitchells & Butlers Ltd.[1988]1 All ER 536
\textsuperscript{842} [1970]2 QB130
\textsuperscript{843} BAG supra note 345
\textsuperscript{844} Id
• Expenses for Medical Treatment

The plaintiff is entitled to recover the medical expenses which he incurred. The cost of medical expense includes the cost of nursing, fees of the consultants, cost of medicine and other ancillary charges. The injured plaintiff is not obliged to avail himself of free hospital treatment. The claimant can elect to be treated as a private patient but the court may be reluctant to award damages on what would be a speculative basis.

General Damages

The principles governing assessment of damages are that the damages must be fair and reasonable. A just proportion must be observed between damages which are less serious and those which are more serious injuries. An attempt must be done to award a sum according to the general assessment standards made over the years in comparable cases. In the words of Lord SALMON, “the damages awarded should be such that ordinary sensible man would not instinctively regard them as either mean or extravagant, but would consider them to be sensible and fair in all circumstances”.

• Pain and suffering

Pain and suffering is recognized by the law as a head for which damages may be given. Pain and suffering can be physical or mental. They are subjective and difficult to measure in monetary terms. Therefore exact estimation of damages is not possible. Its calculation is a matter of degree which varies from case to case. The assessment of pain and suffering damages in cases of personal injury remains a daunting task for the courts in most legal jurisdictions. An award can be made to cover physical pain and suffering, psychiatric symptoms and nervous shock. Prospective as well as past suffering is allowed in common

845 BAG supra note 345
846 Lim Poh Choo v. Camden and Islington Area Health Authority[1980]AC 174
847 Fletcher v. Autocar and Transporters Ltd.[1968]2QB 322
849 SINGH & BHUSHAN supra note 761
law. The medical care and treatment are included in the actual and prospective suffering. It was opined by the court that state of unconsciousness of the patient eliminates pain and suffering which experienced by being felt or thought, irrespective of the serious nature of the injury. In all cases some extra allowance must be made for unpleasant surgical operation. Pain and suffering includes mental distress. Where the plaintiff realises the extent and severity of injuries by which his activities are being reduced permanently to a lower level, he must be compensated for the mental anguish suffered from such injuries.

A plaintiff can claim damages even for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal. All of these intangible injuries, it can be seen, are varieties of feeling as opposed to objective outcomes. The pain and suffering for which recovery may be had includes that incidental to the injury itself and also such as may be attributable to subsequent surgical or medical treatment. It is not essential that plaintiff specifically allege that he endured pain and suffering as a result of the injuries specified in the pleading, if his injuries stated are of such nature that pain and suffering would normally be a consequence of them. The concept of pain and suffering also commonly includes the mental distress accompanying or resulting from injury. Admittedly it is difficult to distinguish mental distress from physical pain in every case but certain types of disturbance which are perhaps more emotional

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850 Heeps v. Perrite, Ltd [1937]2 All E.R.60
852 Birkett v. Hayes [1982]1WLR 816
856 Lane v. Southern Ry. Co., 192 N.C. 287, 134 S.E. 855 (1926). Id
than physical are commonly allowed to be taken into account in the recovery of
pain and suffering. Among these are such things as humiliation or
embarrassment connected with scars or disfigurement incurred as a result of the
injuries. Shock and nervous disturbances comes under this heading. Damages
are awarded for the shock suffered as a result of the accident. A shock is
described as a state of mind, anywhere between nervous shock resulting in
psychiatric illness on the one hand and sorrow and grief from loss of pleasure
on the other hand. The main difficulty about pain-and-suffering damages
seems to be, that they are unpredictable and involves a lengthy procedure in
proving its presence.

- Loss of enjoyment of Life

This can be from physical or mental consequences of the negligent act.
The assessment is subject to the mental suffering. It is settled by House of Lords that
it is in respect of objective loss of amenities that damages are calculated. An
additional sum for mental suffering can be awarded if it is proved. Heep v. Perrite Ltd was a case where the plaintiff lost both his hands. GREER, L.J.
said that the following facts had to be taken into account. “...the joy of life will
have gone for him. He cannot ride a bicycle, cannot kick a football. At any rate,
if he can kick a football he cannot catch one. He cannot have any of the usual
forms of recreation which appeal to the ordinary healthy man...”

The loss of amenities of life has to be assessed on proper consideration on the
effect of injuries on the health and spirit of the injured in carrying out the normal
social and personal life. The complainant is entitled to damages for the inability
to enjoy life in various ways, e.g., inability to play games, sing, dance, enjoy
sexual functions, etc. In every case, the personal circumstances of the plaintiff

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858 Schneider v. Eisocitch[1960]2 QB 430
859 Ronen Avraham, Putting A Price on Pain-and-Suffering Damages: A Critique of the
Current Approaches and a Preliminary Proposal for Change, Northwestern University Law
Review 87-120 (Vol. 100, 2006)
861 Schneider v. Eisocitch
862 [1937]2 All E.R.60
862 MUNKMAN supra note 154 at 102-103
must form the background of the assessment. Age is an important factor to consider while assessing damages under this heading.\textsuperscript{863}

In an action for personal injuries, it is irrelevant to consider whether the victim is unable to enjoy personally the award of damages.\textsuperscript{864} The following factors are considered while assessing such damages. The dependence of the injured on others in daily life, inability to look after others, care, render services, sexual impotency, premature onset of menopause, loss of prospect of marriage and inability to lead the life which the injured used to lead or which he might have led or wanted to lead.\textsuperscript{865}

- Reduction in expectation of Life

From the loss of pleasures of life, it is a natural consequence to the loss of enjoyment of life. Right to life is guaranteed by the Constitution\textsuperscript{866}. The prospect of an enjoyable life is shortened or reduced by injuries sustained by the claimant. It is not merely the fact that he may feel personal misery in knowing that his life is shortened. It is more important and objective fact that he has been deprived of perhaps many happy years. This has been expressed by Lord ROCHE\textsuperscript{867} in 1937.

\begin{quote}
I regard impaired health and vitality, not merely as cause of pain and suffering, but as a good thing in itself. Loss of expectation of life is a form in which impaired health and vitality may express themselves as a result. In such loss, there is a loss of temporal good, capable of evaluation in money, though the evaluation is difficult...\textsuperscript{868}
\end{quote}

The claim for loss of expectation of life can be advanced even when the claimant had been killed. This claim is also available on behalf of a deceased person’s estate. The reduction of happy and enjoyable life must be taken into consideration while assessing damages.\textsuperscript{869} This is apart from the financial

\textsuperscript{863} MUNKMAN supra note 154 at 102-103  
\textsuperscript{864} BAG supra note 345  
\textsuperscript{865} SINGH & BHUSHAN supra note 761  
\textsuperscript{866} Article 21 of Indian Constitution  
\textsuperscript{867} Rose v. Ford [1937] 3 All.E.R.359  
\textsuperscript{868} MUNKMAN supra note 154 at 104-105  
\textsuperscript{869} BAG supra note 345
aspect. As Lord ROCHE\textsuperscript{870} observed “…total loss of good life over part of the normal period of life has to be measured…”\textsuperscript{871}

- Interest on award

There is a distinction between damages in respect of loss already incurred, for which interest may be awarded, and damages for future loss. Damages for future loss represent an accelerated receipt. Therefore interest in respect of future pecuniary loss is not awarded. General damages in respect of pain, suffering and loss of amenities attract interest. Whereas loss of future earning do not attract interest. The interest on award is calculated from the date of service of writ to the date of trial. Special damages should be dealt in broad terms while calculating interest.\textsuperscript{872}

- Physical defects and disabilities

Defects and disabilities such as loss of limb, loss of eye sight, loss of ability to walk, presence of scar as a result of unnecessary operation. Disfigurement has always been regarded as an important element in assessing damages. In case of young people, the prospect of marriage is also impaired. Irrespective of whether there is loss of earning capacity or amenities, the total loss, or the impairment, of a limb or other part of the body or impairment of the body as a whole will attract substantial damages. However, the factor-such as loss of earning capacity- will make a difference to the quantum.\textsuperscript{873} The term “disability”, as so used, ordinarily means loss or impairment of earning power and has been held not to mean loss of a member of the body. If the physical efficiency because of the injury has substantially impaired or if he is unable to perform the same work with the same ease as before he was injured or is unable to do heavy work which he was able to do previous to his injury, he will be entitled to suitable compensation. Disability benefits are ordinarily graded on the basis of the character of the disability as partial or total, and as temporary or permanent. No

\textsuperscript{870} Rose v. Ford [1937] 3 All.E.R.359  
\textsuperscript{871} MUNKMAN supra note 154 at 104-105  
\textsuperscript{872} BAG supra note 345  
\textsuperscript{873} MUNKMAN supra note 154 at 94-95
definite rule can be established as to what constitutes partial incapacity in cases not covered by a schedule or fixed liabilities, since facts will differ in practically every case.”

5.6.3 Award of Compensation

In *R.D. Hattangadi v. Pest Control (India) Private Limited*, the Supreme Court observed that the exercise for determination of compensation in accident cases involve some guess work, some hypothetical consideration and some amount of sympathy linked with the nature of disability. But these elements are required to be considered in an objective manner. In that case, the claimant was a retired judge and practicing when he met with an accident that caused 100% disability and paraplegia below the waist. While determining compensation payable to him the Court stated:

When compensation is to be awarded for pain and suffering and loss of amenity of life, the special circumstances of the claimant have to be taken into account including his age, the unusual deprivation he has suffered, the effect thereof on his future life. The amount of compensation for non-pecuniary loss is not easy to determine but the award must reflect that different circumstances have been taken into consideration.

In *Spring Medows hospitals case*, the Court upheld the order awarding compensation in favour of the minor child taking into account the cost of equipment and the recurring expenses that would be necessary for the minor child who is merely having a vegetative life. The compensation awarded in favour of the parents of the minor child is for their acute mental agony and the lifelong care and attention which the parents would have to bestow on the child. Considering this judgment as an example to follow, in *Nizam’s Institute’s case*, it was stated that,

...we are of the view that the facts and circumstances of the case justify the award to the Complainant of an amount of Rs.8 lakhs towards prospective charges for physiotherapy, nursing and associated expenses,

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874 Ramachandrappa v. The Manager, Royal Sundaram Alliance Insurance Company Limited, (2011) 13 SCC 236
875 (1995) 1 SCC 551
876 See also, Ward v. James (1965) 1 All ER 563
877 Spring Meadows Hospital & Anr v. Harjol Ahluwalia. AIR 2005 SC 3180
878 Nizam’s Institute of Medical Sciences v Prasanth S.Dhananka I(1999) CPJ 43(NC)
Rs.4 lakhs for supplementing the complainant’s future earnings and Rs.2 lakhs as compensation for his mental agony, physical suffering and pain and also for physiotherapy, nursing and associated expenses already incurred by him and award of compensation of Rs.1.5 lakhs to the parents for their perpetual mental agony, stress and depression and for the continued support, care and attention they have to provide to the complainant and for the income loss of the mother due to dislocation in her job to look after her son.

There is no standard set by any statute or judicial pronouncement for determining amount of compensation in the case of death due to medical negligence. Such standard is available only in the Motor Vehicle Act 1988 by way of application of multiplier provided in the Schedule II.\(^879\)

“Determination of compensation is, a difficult task where no standard or formula is laid down in the statute or in judicial decisions by higher fora or courts”, said the State Commission in *Uttam Sarkar v. The Management of Tura Christian Hospital*\(^880\). Moreover, this uncertainty is torturous for those who approach the judiciary for any relief.

Method for calculating compensation in the above discussed cases appears to be compensatory. The major facts which were considered were the cost of recovery, loss of income, including the future income. A serious lack of guidelines exist in respect of calculation of compensation for the death due to negligence of housewives or people who do not have potential income which can be measured in economic terms. In *Lata Wadhwa v. State of Bihar*\(^881\) the Supreme Court held,

So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. ...This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life.

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\(^880\) *Id*

\(^881\) *AIR 2001 SC 3218*
In *Savita Garg vs. Director, National Heart Institute*\(^8\) the court observed that the deceased in the instant case is a housewife and we have keenly borne in mind the following illuminating observations of the Apex Court while determining the quantum of compensation while, at the same time, we are deeply conscious of the fact that no amount of money can ever compensate the sudden loss of a precious life and its heart-rending emotional impact on the deceased's family.

Similar views were expressed in later decisions also. In 2009, the Court observed:\(^8\)

Loss of wife to a husband may always be truly compensated by way of mandatory compensation. How one would do it has been baffling the court for a long time. For compensating a husband for loss of his wife, therefore, courts consider the loss of income to the family. It may not be difficult to do when she had been earning. Even otherwise a wife's contribution to the family in terms of money can always be worked out. Every housewife makes contribution to his family. It is capable of being measured on monetary terms although emotional aspect of it cannot be. It depends upon her educational qualification, her own upbringing, status, husband's income, etc.

The judicial attitude became clear when the Court expressed in 2010 in *Arun Kumar Agarwal v. National Insurance Company*,\(^8\) “In India, the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family.” And in *Ramachandrappa v. The Manager, Royal Sundaram Alliance Insurance Company Limited*,\(^8\) it was confirmed:

The compensation is usually based upon the loss of the claimant's earnings or earning capacity, or upon the loss of particular faculties or members or use of such members, ordinarily in accordance with a definite schedule. The Courts have time and again observed that the compensation to be awarded is not measured by the nature, location or degree of the injury, but rather by the extent or degree of the incapacity resulting from the injury. The tribunals are expected to make an award determining the amount of compensation which should appear to be just, fair and proper.

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\(^8\) AIR 2004 SC 5088
\(^8\) Malay Kumar Ganguly v Sukumar Mukherjee (2009) 9 SCC 22
\(^8\) (2010) 9 SCC 218
\(^8\) (2011) 13 SCC 236
In Raj Kumar v. Ajay Kumar, the Supreme Court laid down the following propositions:

The provision of the motor Vehicles Act, 1988 makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

As per this proposition, the heads under which compensation is awarded in personal injury cases are the following:

- Pecuniary Damages: Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.
- Loss of Earnings: Expenses which the injured would have made had he not been injured, comprising loss of earning during the period of treatment, loss of future earnings on account of permanent disability, future medical expenses, on-pecuniary damages, damages for pain, suffering and trauma as a consequence of the injuries, loss of amenities and loss of expectation of life.

5.7 Remedies under Constitutional Law

Apart from the remedies available under civil law, the injured party in a medical negligence has a right to receive remedy under the public law also. Under Article 32 and Article 226, a writ lies to Supreme Court and High Court respectively for the enforcement of right to life under Article 21 of the Indian Constitution. Grant of compensation in writ proceedings as a public law remedy for medical negligence is accepted by various judicial decisions.

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886 (2011) 1 SCC 343
The distinction between “Public Law” and “Private Law” was considered by a Three-Judge Bench of the Supreme Court in Common Cause, A Regd. Society v. Union of India & Ors. 887, in which, it was, observed, 

Under Article 226 of the Constitution, the High Court has been given the power and jurisdiction to issue appropriate Writs in the nature of Mandamus, Certiorari, Prohibition, Quo-Warranto and Habeas Corpus for the enforcement of Fundamental Rights or for any other purpose. Thus, the High Court has jurisdiction not only to grant relief for the enforcement of Fundamental Rights but also for "any other purpose" which would include the enforcement of public duties by public bodies. So also, the Supreme Court under Article 32 has the jurisdiction to issue prerogative Writs for the enforcement of Fundamental Rights guaranteed to a citizen under the Constitution.

The Public Law remedies have been extended to the realm of tort by the judiciary in various decisions, and have awarded compensation to the petitioners who had suffered personal injuries at the hands of the officers of the Government 888. Causing of injuries, which amounted to tortious act, was compensated by this Court in many decisions such as Rudal Sah v. State of Bihar 889, People's Union for Democratic Rights v. State of Bihar 890, SAHELI v. Commissioner of Police, Delhi 891, etc. In Supreme Court Legal Aid Committee v State Of Bihar, 892 an application was filed under Article 32 of the Constitution on behalf of the Supreme Court Legal Aid Committee alleging inhumane behaviour meted out to a person. When the passengers of a railway train, where looting had been done by a crowd, had beaten up several persons including the victim. Mahesh had received serious injuries and had to be taken to the hospital for treatment. As no transport was available a rickshaw was hired for the purpose of removing the injured to the hospital. By then the injured had become unconscious. No timely treatment was provided to the injured and he succumbed to death.

The Supreme Court, expressing shock in this incident held that:

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887 AIR 999 SC 2979
888 Chairman, Railway Board v. Chandima Das AIR 2000 SC 988
889 AIR 1983 SC 1086
890 AIR 1987 SC 355
891 1990 AIR 513,
892 (1991) 3 SCC 482
... the compensation of Rs. 20,000/- such a sum is ordinarily paid in the case of death shall be paid by the State of Bihar to the legal representatives of Mahesh Mahto. The amount shall be deposited with the District Judge, Manger and the District Judge directed to institute a proper inquiry to satisfy himself as to who the heirs of the deceased Mahesh Mahto are. The amount of Rs. 20,000/- shall be paid to them by the District Judge and in case he is of the view that the money should be held in a long term fixed deposit in favour of the rightful heir it is open to him to do so. A compliance report of this direction be furnished to the Registry of this Court within three months.

In *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*\(^{893}\), disturbing train of events has led to petitioners moving to the apex court with a prayer to protect the right to health, the most important ingredient of right to life. Hakim Seikh, a member of Paschim Banga Khet Mazdoor Samiti, an organization of agricultural labourers, fell off a train and suffered serious head injuries and brain haemorrhage. He was taken to the Primary Health Centre at Mathurapur. Since necessary facilities for treatment were not available, the medical officer in charge of the Centre referred him to the Diamond Harbour Sub-Divisional Hospital or any other State hospital for better treatment. Hakim Seikh was taken to N.R.S. Medical College Hospital. The Emergency Medical Officer in the said Hospital, after examining him recommended immediate admission for further treatment. But Hakim Seikh could not be admitted in the said hospital as no vacant bed was available. He was thereafter taken to Calcutta Medical College Hospital at about 12.20 A.M., but was not admitted for similar reasons. He was then taken to another hospital, and from there referred to a teaching hospital in the ENT, Neuro Surgeon Department on the ground that the hospital has no ENT Emergency or Neuro Emergency Department. He was taken to the Calcutta National Medical College Hospital, but in vain. At last in the Bangur Institute of Neurology, it was found that there was haemorrhage condition in the frontal region of the head and that it was an emergency case which could not be handled in the said Institute. Ultimately he was admitted in Calcutta Medical Research Institute, a private hospital, where he received treatment as an indoor patient and had incurred an expenditure of approximately Rs. 17,000/- in his treatment. Feeling aggrieved by the indifferent and callous attitude on the

\(^{893}\) AIR 1996 SC 2426
part of the medical authorities at the various State run hospitals in Calcutta in providing treatment for the serious injuries sustained by member of the organization, the petitioners have filed writ petition.

The Supreme Court said,

In a welfare state the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare state. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution.

It was held that, the injured party should be compensated for the breach of his right guaranteed under Article of the Constitution. The amount of compensation was fixed at Rs. 25,000/-. A sum of Rs. 15,000/- was directed to be paid to the injured as interim compensation and the balance amount within one month.

In Parimal Chakraborty. v. Bijaya Paul, the learned single Judge while entertaining the Writ Petition regarding claim of compensation for the death of plaintiff’s husband due to medical negligence, has awarded a compensation of Rs. 1,00,000/- to the writ petitioner with a direction to recover the said amount from the erring doctors of Kakraban Primary Health Centre after making a formal enquiry. Apart from that medical department was expected to initiate separate disciplinary proceeding against the above two doctors for commission of gross misconduct in attending the patient in Government Primary Health Centre at Kakraban.

894 AIR 2007 Gau 72
5.8 Remedies under COPRA, 1986

With improving awareness and gathering consciousness about one’s rights, actions for damages in tort are on the increase. Not only civil suits are filed, complaints filed before Consumer Dispute Redressal Fora also have increased over a period of time. The availability of a forum for grievance redressal under the COPRA, 1986 is widely being used. These Agencies are having jurisdiction to hear complaints against professionals for ‘deficiency in service’ This expression which is very widely defined in the Act, has given rise to a large number of complaints against professionals, particularly against doctors. 895

Consumer Protection Act, 1986, being a unique legislation enacted exclusively for the protection of interest of consumers, “meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law has become illusory” 896 The provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. 897

Section 14, of the Act deals with the power of the forum to grant Redressal. The power to award compensation is included in it. The District Forum if satisfied that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit. Further the Forum is empowered to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently. It can also provide for adequate costs to parties. The appellate authorities such as State Commission and National Commission shall also have original jurisdiction with pecuniary limit and shall exercise similar powers.

895 Jacob Mathew supra note 13
897 Section 3 of the Act.
The Supreme Court in Ghaziabad Development Authority v. Balbir Singh, it was held that Consumer Protection Act has a wide reach and the State Commission has jurisdiction even in cases of service rendered by statutory and public authorities and such authorities become liable to compensate for misfeasance in public office provided loss or injury is suffered by a citizen. Where there has been negligent exercise or non-exercise of power, the Commission/Forum has a statutory obligation to award compensation. Therefore as far as medical services are concerned, if deficiency in service is proved, the forum can award compensation, order removal of deficiency in the services and award costs to the plaintiff.

### 5.8.1 Mode of Assessment

The Award of compensation by Consumer Redressal agencies are guided by well-recognized legal principles related to quantification of damages. These Fora are duty bound to award compensation on a rational basis. The extent of injury suffered and the monetary loss incurred are assessed on the basis of materials produced before the Forum. The loss is ascertained by balancing various factors. Section 14(1) of the Consumer Protection Act, 1986 deals with Calculation of amount of compensation. Under this section, compensation is payable to the consumer for loss or injury suffered due to negligence of the opposite party.

In Air India v. Suganda Ravishankar, it was held that the Consumer Forum is not entitled to grant compensation without proof of negligence on the part of the defendant resulting in loss or injury to the complainant. However, in the case of Hari Bhai Leghar Bhai Solanki v. Dr.Suresh Parikh, on compassionate grounds compensation was awarded, even though the doctor was found not guilty. The insurance company by which the doctor was covered was asked to pay the amount. In the landmark decision of Spring Meadows Hospital v.
Harjol Ahluwalia, the complainant alleged that the minor child on account of negligence and deficiency on the part of the hospital authorities suffered irreparable damages and could survive only as a mere vegetative and accordingly claimed compensation to the tune of Rs. 28 lacs. The Commission came to the finding that there was negligence; error and omission on the part of nurse as well as doctor in rendering their professional services and both of them were negligent in performing their duties. Since the doctor and the nurse were employees of the hospital, the hospital is responsible and liable for their actions. The Commission then determined the quantum of compensation and awarded 12.5 lacs as compensation to the minor patient. In addition to the aforesaid sum of Rs. 12.5 lacs, The Commission also awarded Rs. 5 lacs as compensation for the acute mental agony that has been caused to the parents by reason of their only son having been reduced to a vegetative state requiring lifelong care and attention.

The Supreme Court held that:

If the parents of the child having hired the services of the hospital, they are consumer within the meaning of Section 2(1)(d)(ii) and the child also is consumer being a beneficiary of such services hired by his parents in the inclusive definition in Section 2(1)(d) of the Act. The Commission will be fully justified in awarding compensation to both of them for the injury each one of them has sustained. In the case in hand the Commission has awarded compensation in favour of the minor child taking into account the cost of equipment and the recurring expenses that would be necessary for the said minor child who is merely having a vegetative life. The compensation awarded in favour of the parents of the minor child is for their acute mental agony and the lifelong care and attention which the parents would have to bestow on the minor child. The award of compensation in respect of respective consumers is on different head. We see no infirmity with the order of the Commission awarding different amount of compensation on different head, both being consumers under the Act. Accordingly, the Commission in our considered opinion rightly awarded compensation in favour of the parents in addition to the compensation in favour of the minor child.

In U.K. Kini. v K. Vasudeva Pai And Ors., The defendant on examination found that deceased had developed non-toxic adenoma and requires surgery. He

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903 AIR 1998 SC 1801
904 II (2000) ACC 429, 2001 ACJ 2141
accordingly advised her to undergo surgery. After surgery, plaintiff was shifted to ward in an unconscious state. It is not disputed that the plaintiff did not regain her consciousness till she died on 25.10.1985. However, she was discharged from the nursing home on 6.12.1981. The plaintiffs filed the suit for damages in a sum of Rs. 2,50,000/- but confined it only for a sum of Rs. 2,00,000/- alleging medical negligence. They have further contended that pre-operative tests required to be done in such type of operations were not conducted. More serious allegations were there, that the consent of the patient or her husband was not obtained in writing even though it was not a case of emergency. Thus defendants have failed to maintain the high standards of professional conduct in dealing with their patient. The High Court held that from the evidence and the pleadings it is clear that the defendants have failed to discharge their duty they owed and thus they are guilty of negligence. The trial court ordered in favour of the plaintiff and accordingly passed a decree for Rs. 2,00,000 apportioning the liability against defendant-the doctor and the hospital in the ratio of 1:3 upheld by the High Court.

In *Nizam's Institute Of Medical Science v. Prasanth S.Dhananka*, the complainant, then 20 years of age and a student of Engineering, was admitted for the operation and tumour was excised. It appears that immediately after the surgery, the complainant developed acute paraplegia with a complete loss of control over the lower limbs, and some other related complications, which led to prolonged hospitalization. He was completely paralyzed and required continuous physiotherapy and nursing care on account of infection of the urinary tract and the development of bed-sores etc. A complaint was filed before the National Consumer Redressal Commission alleging utter and complete negligence on the part of doctors and also making NIMS vicariously liable and the State of Andhra Pradesh statutorily liable for the negligence of the doctors concerned.

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905 (2009) 6 SCC 1
It was held that there was negligence on the part of defendants and deficiency of service to the Complainant and therefore liable to pay the compensation. The Court said,

We feel that the items mentioned under this category such as regular dressing material, bags and tape for urine drainage, cotton rolls for defecation, material for loin clean up and treatment, dressing, nursing services including cleaning, giving bath, bed sores etc. physiotherapy and extra nourishment are necessary and allowable. …. Regarding the compensation claimed on account of loss of future earnings, we realize that the incident has severely affected the career of the complainant which, as seen from his academic record prior to the operation, would have been a good one otherwise….We also perceive the anxiety, agony and distress of the parents on the condition of the complainant consequent to the operation. It is stated in the complaint that the Complainant's mother had to give up her teaching job in a school so as to look after the Complainant who is totally breed-ridden and requires round the clock assistance and attention. It has also been stated that complainant's brother was mentally upset which affected his performance in his examination and resulted in securing admission in a college by paying huge fee. Further, the complainant's maternal uncle had to supplement the physical efforts of his parents in attending on the complainant and also bring food to the hospital even on curfew-bound days with great difficulty. In short, the entire family was put in disarray.

The Court has explained the method by which the amount of compensation was arrived at:

While determining the compensation to the complainant as also to his parents, we have kept in view the broad parameters followed by us in an earlier case of medical negligence … we are of the view that the facts and circumstances of the case justify (i) the award to the complainant of an amount of (a) Rs.8 lakhs (expected to yield a monthly interest of about Rs.8,000/-) towards prospective charges for physiotherapy, nursing and associated expenses, (b) Rs.4 lakhs (expected to yield a monthly interest of about Rs.4,000/-) for supplementing the complainant's future earnings and (c) Rs.2 lakhs as compensation for his mental agony, physical suffering and pain and also for physiotherapy, nursing and associated expenses already incurred by him and (ii) award of compensation of Rs.1.5 lakhs to the parents for their perpetual mental agony, stress and depression and for the continued support, care and attention they have to provide to the complainant and for the income loss of the mother due to dislocation in her job to look after her son.

Regarding ‘adequate compensation’ the Court observed that,
We must emphasize that the Court has to strike a balance between the inflated and unreasonable demands of a victim and the equally untenable claim of the opposite party saying that nothing is payable. Sympathy for the victim does not, and should not, come in the way of making a correct assessment, but if a case is made out, and the Court must not be chary of awarding adequate compensation. The “adequate compensation” that we speak of, must to some extent, be a rule of the thumb measure, and as a balance has to be struck, it would be difficult to satisfy all the parties concerned. It must also be borne in mind that life has its pitfalls and is not smooth sailing all along the way (as a claimant would have us believe) as the hiccups that invariably come about cannot be visualized. Life it is said is akin to a ride on a roller coaster where a meteoric rise is often followed by an equally spectacular fall, and the distance between the two (as in this very case) is a minute or a yard. At the same time we often find that a person injured in an accident leaves his family in greater distress, vis-à-vis a family in a case of death. In the latter case, the initial shock gives way to a feeling of resignation and acceptance, and in time, compels the family to move on. The case of an injured and disabled person is, however, more pitiable and the feeling of hurt, helplessness, despair and often destitution endures every day. The support that is needed by a severely handicapped person comes at an enormous price, physical, financial and emotional, not only on the victim but even more so on his family and attendants and the stress saps their energy and destroys their equanimity. We can also visualize the anxiety of the complainant and his parents for the future after the latter, as must all of us, inevitably fade away. We, have, therefore computed the compensation keeping in mind that his brilliant career has been cut short and there is, as of now, no possibility of improvement in his condition, the compensation will ensure a steady and reasonable income to him for a time when he is unable to earn for himself.

In *Arvind Kumar Mishra v. New India Assurance Co. Ltd. and another*, the Court sought to assess future earnings of a final year engineering student who received injuries to the brain among others which resulted in 70% permanent disability and he needed a helper throughout his life. It was observed:

We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time’s earnings lost.

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906 (2010) 10 SCC 254
because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum.

In *Kusum Sharma and others v. Batra Hospital & Medical Research Centre and others*, the apex court has expressed its reservations in this area. Complaint was filed under section 21 of the Consumer Protection Act, 1986 claiming compensation of Rs.45 lakhs attributing deficiency in services and medical negligence in the treatment of the deceased. Upholding the order passed by the National Commission, the Supreme Court observed that,

It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension… The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners… The interest and welfare of the patients have to be paramount for the medical professionals.

In *Dr. Rama Hegde v Ningappa*, wife of the respondent who was in advance stage of pregnancy was examined by the petitioner. After conducting the blood test and scanning informed the respondent that the normal delivery is not possible and caesarean has to be conducted. On the consent given by the respondent, operation was conducted, which was successful and the patient was shifted to the ward on the same day. The mother and new born child were very healthy. Later, the patient was complaining about some abdominal distension and there was some septicaemia. She was administered Glucose and other medicines through blood veins. Thereafter, she has recovered and she started taking food orally. When the dressing of the operated portion was opened, it was found that there was puss formation and the same was cleaned and again dressing was made. The relatives of patient requested the petitioner to discharge

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907 (2010) 3 SCC 480 (7)
908 Writ petition number 65704/2009 (GM-CON) 1st day of August, 2013, High Court of Karnataka, Circuit Bench, Dharwad. 
http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/896471/1/WP65704-09-01-08-2013.pdf. Last visited on 17-08-2016 at 14.45
her from the said hospital to take her to KIMS Hospital at Hubli for better treatment. On their request, Ambulance arrangement was also made by the petitioner. Subsequently, she died at KIMS Hospital.

The respondent filed a complaint before District Forum for deficiency of service, alleging medical negligence. The specific case of the petitioner is that death of the respondent's wife is not due to the medical negligence; on the other hand, death was due to septicaemia. She died 25 days after the caesarean, for which, the petitioner cannot be held responsible. Apart from that, the medical Officer who is employed in a Government Hospital renders service on behalf of the Government at free of charge. The services rendered in Government Hospital do not fall within the ambit of Section 2(1)(o) of the Act.

The District Forum without considering any of the contentions raised by the petitioner, gave direction to the petitioner herein to pay Rs.50,000/- as compensation towards deficiency in service and mental agony to the complainant with interest at the rate of 6% and the cost of litigation. Being aggrieved by the order passed by the District Forum, the petitioner filed an appeal before the State Commission. The State Commission without critically examining the contention of the petitioner dismissed the appeal confirming the order passed by the District Forum holding that the material placed by both the parties clearly discloses that there is deficiency in service. Being aggrieved by the order passed by the State Commission as well as the District Forum, the petitioner has filed this writ petition before the High Court. The Court held that, “…the petitioner has got statutory and efficacious remedy under Section 19 of the Act909. Hence, the writ petition filed by the petitioner is not maintainable and he has to avail the remedy under the Act.”

909 Section 19: Any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:
Balram Prasad v. Kunal Saha & Ors\textsuperscript{910}

“I cannot say I’m pleased with the quantum of compensation after spending so much money to fight this legal battle, but this fight was never for money. The verdict has sent the right message to the medical community in India.”\textsuperscript{911}

These words are relevant not only because it talks volumes on the difficulties, one will have to face in fighting medical negligence in India, but more importantly it resurges important questions on the purpose of awarding compensation in such cases.

In the above mentioned case, Supreme Court ordered the AMRI Hospital in Kolkata and three doctors to pay Rs 60 800 000/- plus interest in compensation to Indian-American doctor Kunal Saha for medical negligence that led to the death of his wife, Anuradha, aged 36, in 1998. This is the highest compensation ordered by the apex court of India in a case relating to medical negligence. The event occurred when the patient came to Kolkata from the United States for a vacation and consulted Dr. Sukumar Mukherjee after developing skin rashes. Mukherjee did not prescribe any medicines and asked her only to take rest. The rashes intensified in May and Mukherjee then prescribed injections, a step later faulted by experts. However, patient’s condition worsened and she was admitted to AMRI Hospital under Mukherjee’s care. When matters worsened, she was flown to Mumbai where she was admitted to Breach Candy Hospital where she died.\textsuperscript{912} The claimant filed Original Petition in 1999 before the National Commission claiming compensation for Rs.77,07,45,000/- and later the same was amended by claiming another sum of Rs.20,00,00,000/-. The National Commission held the doctors and the AMRI Hospital negligent in treating the wife of the claimant on account of which she died. However, the claimant, the defendant hospital and the doctors were aggrieved by the amount of compensation awarded by the National Commission and also the manner in

\textsuperscript{910} (2014) 1 SCC 384
\textsuperscript{911} Nivedita Choudhuri, *Record damages are awarded in medical negligence case in India*, BMJ 2013; 347:f6551. (Last visited on 8-10-2016 at 19.38) http://www.bmj.com/content/347/bmj.f6551. (News published on October 30\textsuperscript{th} 2013)
\textsuperscript{912} Id
which liability was apportioned amongst each of them. While the claimant was aggrieved by the inadequate amount of compensation, the appellant-doctors and the Hospital found the amount to be excessive and too harsh. They further claimed that the proportion of liability ascertained on each of them is unreasonable.  

**5.8.2 Remedy: Only Compensatory?**

As far as, medical negligence is concerned, there are specific factors which makes it non-comparable with other forms of negligence, particularly that of motor vehicle accidents. It requires a separate treatment because, it effects the rights of the patients who approach doctors, nursing homes and other similar establishments, spending all their money with the hope to live a better healthy life. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their human right but fundamental right also. This is not the case of a victim of other form of negligence, even though; there is certainly a violation of right which demands reparation.

The purpose of remedy in medical negligence, no doubt, is compensating the loss in pecuniary terms. However, is it the only function? Is it not expected to prevent such mishaps in future? Regarding the preventive function, the question arises how we can deter? Unlike traditional torts like battery or assault, negligence lacks a wrongful intention. Rather it stems from an absence of application of mind. It is an omission to take care. A wrongful absence of sense of duty. In order to deter a potential wrong doer, the compensation should be something which the person wants to avoid at any cost. It should be an incentive to a person for being delegenet. Do the practices of compensating medical negligence in India does that job?

Private health care services in India have grown rapidly to meet rising expectations and incomes. Surveys indicate that 75% of human resources and advanced medical technology and 68% of hospitals are provided by the private sector. Around 90% of dentists and 80% of practitioners of ayurveda, yoga and

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913 (2014) 1 SCC 384
naturopathy, unani, siddha and homeopathy (AYUSH) are also in the private sector\textsuperscript{914}. The private sector has world class facilities and high end marketing strategies. Health care has emerged as the most lucrative industry along with a wide scope for medical tourism. The power-both political and economic- put health care professional, in a position almost near to impunity.

Medical negligence liability is needed not just to induce patient specific, post-action investments; it is also needed to induce physicians to invest in measures—such as expertise and equipment—whose benefits are collective and durable. They should reduce the risk of error for both existing and future patients. To provide optimal incentives, liability must ensure improved quality care that is the result of a conscious and collective attempt. Its benefits extend to future patients\textsuperscript{915}

In Kunal Saha’s, \textsuperscript{916} loss of income had been a significant criterion in determining the amount of compensation. The victim being a young lady with a good potential income was the single factor that made the damages huge. Therefore, the amount is not comparable. It changes, largely according to the age, earning capacity and socio-economic status. Standards are uncertain, rather absent, when it comes to victims who do not earn or earn insignificantly. The amount of compensation awarded was arrived at by calculating the prospective loss of income for the wrongful death of claimant’s wife based on her future potential in the U.S.A. by an economic expert. This was a weighty factor in the amount being the highest ever granted by a court of law in India in such cases. But imagining that the victim was poor house wife of a daily wage worker with

\textsuperscript{916} (2014) 1 SCC 384 supra note 910
nominal academic qualifications, the amount would have been some mere thousands.

Arithmetical allocation of compensation satisfies the concept of corrective Justice. But from a socialistic angle, how the equilibrium can be maintained when the initial distribution of resources is not just? It does not do justice, when the allocation is among a mighty professional and a poor worker, an influential establishment and an insignificant woman or a strong doctor and a delicate patient.

In Sarla Verma’s case\(^\text{917}\) the Court, held that the multiplier method is the proper and best method for computation of compensation as there will be uniformity and consistency in the decisions. The said view has been reaffirmed in Reshma Kumari. v Madan Mohan\(^\text{918}\).

..... “just Compensation” is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit. \(^\text{919}\)

Justice emanate from equality in treatment, consistency and thoroughness in adjudication, and fairness and uniformity in the decision-making process. While it may not be possible to have mathematical precision or identical awards in assessing compensation, same or similar facts should lead to awards in the same range. Consistency and uniformity should be the result of adjudication\(^\text{920}\).

The methods of computation used in motor accidents cannot be used in medical negligence. In a motor accident, how much ever, the driver is negligent; he has no idea about the victim of his recklessness. That means, his behaviour is not affected by the socio-economic and political background of the victim. In other words, the increase or decrease in amount of compensation linked to the social position of the victim will not influence his behaviour. On the other hand, a doctor or a hospital gets a clear idea about the socio-economic background of

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\(^\text{917}\) Sarla Verma v. Delhi Transport Corporation (2009) 6 SCC 121
\(^\text{918}\) (2013) 9 SCC 65
\(^\text{919}\) Sarla Verma supra note 916
\(^\text{920}\) (2014) 1 SCC 384
patient. Therefore, this factor can influence the care in the treatment or the lack of it. At this point of time ‘intention’ creeps into negligence, since, he has a choice to be negligent or not. It is dangerously associated with the victim’s position. Therefore, if the potential income or loss of income is the determining factor in calculating compensation in medical negligence, it can be counter-productive in current Indian socio-economic profile.

In civil law, compensatory damages are the primary monetary remedy, awarded on the basis of the loss or injury to the plaintiff, rather than on the basis of the defendant’s fault. The common law has, however, long made provision for the award of non-compensatory damages. These have been variously described as punitive, exemplary, aggravated, vindictive, or retributive. The place of these damages, in a civil law that is ostensibly purely compensatory, has always been precarious, and they have often been criticised as anomalous. Non-compensatory damages exist on the boundary between the civil and the criminal law, and appear to import elements of the criminal law. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory; and the award may also have an important function in vindicating the rights of the plaintiff. The award signals to the defendant that “tort does not pay” and at the same time it vindicates the rights of the plaintiff and the strength of the law. Subjected to a closer analysis, the distinction between the compensatory and punitive purposes of monetary sanctions is difficult to distinguish. It is argued that a monetary award for the loss of a limb cannot in any real sense compensate for the loss. And the real purpose of the award of compensatory damages is “to put the plaintiff in possession of a sum of money which in the court’s judgment ought to be enough to satisfy his vindictive

922 Fay v Parker, 53 N. H. 342 (1873) at p.382.
923 Id
feelings against the wrongdoer.” Lord Hope said, ‘The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached.’ It is agreed that the basic purpose of tort damages is to compensate for the loss of the plaintiff. But in *Blake*, the House of Lords acknowledged that English ‘law does not adhere slavishly to the concept of compensation for financially measurable loss’: Damages may be measured by the gain made by the defendant. There exist a controversy regarding the true nature of such damages. Gain-based damages are considered by some as restitutionary and compensatory by some others. The better view is that these damages are vindictory in nature. Vindicatory damages, which to date have only been explicitly recognised in public law, are neither loss-based nor gain-based: they are a rights-based remedy. It is this function that a remedy must also do while compensating medical negligence. As it was held in *Ghaziabad Development Authority*.

The Commission/Forum can determine the amount for which the authority is liable to compensate the consumer. Such compensation is for vindicating the strength of the law. It acts as a check on arbitrary and capricious exercise of power. It helps in curing social evil. It will hopefully result in improving the work culture and in changing the outlook...

**5.9 CONCLUSION**

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925 *Id*, See J.M.Kelly, *The Malicious Injuries Code and the Constitution*, *The Irish Jurist*, Vol.4, New Series(NS)221. See also Poul Ward, Torte Law in Ireland. https://books.google.co.in/books?id=OtPwqIDHdiQC&pg=PA37&lpg=PA37&dq=j.m+kelly+purpose+of+awarding+compensation&source=bl&ots=ZAAjDznI8I&sig=wrIVnE7qimYFUq5Ykbyf_r1eY&hl=en&sa=X&ved=0ahUKEwig_u7Bw8vPAhVCMY8KHeM1C_0Q6AEIGzAA#v=onepage&q=j.m%20kelly%20purpose%20of%20awarding%20compensation&f=false (E-book, Last visited on 8-10-2016 at 21.22)


929 (2004) 5 SCC 65
The primary nature—lack of care—of deficient medical service can be originated from the disadvantaged position of victim. It makes the wrong different and therefore demands separate treatment.

While awarding costs, a conservative approach has been adopted by Consumer Fora. Calculating the potential income of the victim is not always advisable. This may encourage the wrongdoer to have different standards of duty of care to different people, based on their social position. Compensation is not possible in many cases as the loss is not computable in monetary terms. Undoubtedly remedy should compensate, but it should also vindicate the rights of the victim. In appropriate cases the amount of compensation awarded should be commensurate with the loss and injury suffered by the complainant/respondent. In addition, the provision relating to punitive damages need to be utilized in public interest. The method of computing damages needs to have components satisfying both-compensation and prevention-functions of remedy.

In order to ensure consistency and uniformity, award of compensation needs to have clear and certain standards. With respect to medical negligence, it is absent in India. It is a serious infirmity which is certain to affect basic rights of people in galore. A comprehensive legislation, in the lines of Motor Vehicles Act, 1988, exclusively dealing with deficiency in medical service is an urgent need.

In the words of Friedman, function of the law is to lay down certain standards of conduct which the community is expected to observe since without the observation of such standards civilised life could not be carried on satisfactorily. This is termed as the social purpose of the law of torts. It is essential that the damages awarded in the medical negligence cases gives the right message to the medical community that ‘tort does not pay’ irrespective of

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931 Id
the social status of the victim. In setting that lies the protection of patients in India.