EXECUTIVE SUMMARY

Availability of legal remedies and access to justice are crucial in protection of rights generally, and particularly in addressing grievances of health and safety. With the opening up of economy and rapid advancement in technology, consumer has become more vulnerable. This vulnerability is absolute in health sector. This is a study on civil liability for deficiency in medical services with special reference to surgical treatment under general law and specifically under the provisions of Consumer Protection Act. A detailed study on vitiated consent and informed consent is attempted. An analysis of remedies available under general law and COPRA is specifically attempted as well. This study aims to suggest legal reforms through a comprehensive analysis of Consumer Protection Act, 1986.

Health sector is booming as an industry in India. Along with that, cases of medical negligence are also increasing in number and extent. A patient, as a consumer is in a peculiar position. The medical terminology and technology is beyond the understanding for majority Indians. He is emotionally delicate, even if he is as empowered as the doctor, socially. Over and above, the innovative marketing strategies complicate the situation making him more and more powerless. Consumer Protection is one of the major concerns of twenty-first century and its implementation through enforcement of consumer rights is an accepted approach internationally.

In all the earlier civilizations Medical Negligence was treated as a crime. The objective of legal machinery was to protect and vindicate the interest of public by punishing the wrong doer. No amount of compensation used to be awarded to the victims or their people. However as society progressed, the trend to consider negligence as a Tort (civil wrong) influenced judiciary and a practice of giving compensation to the victim has developed. Unlike the intentional Torts like, assault, battery and false imprisonment, Negligence which is an unintentional Tort, is relatively a modern legal development. During British rule, English common law was introduced in the administration of justice in
India. Prior to the introduction of Constitution of India in 1950, a very large number of English legal principles were followed and applied by the Indian Courts. The trend is followed till date.

The general law of professional negligence is applicable to medical profession also. It is expected that the practitioner must bring to his task, a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of particular circumstances of each case. If he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, he is not liable, even though a body of adverse opinion also existed among medical men.

In India, the Supreme Court has held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/ his treatment or in her/ his diagnosis if she/ he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient relationship.

Surgery is a medical treatment in which a doctor cuts into someone's body in order to repair or remove damaged or diseased parts. It is a profession defined by its authority to cure by means of bodily invasion. Every surgical operation is fraught with risk. No operation can be considered to be safe as any complication, during the operation may appear any time. No two human bodies are exactly alike. Each has its own deviation and distinctive features. Human bodies are as individual and different in their details as are human beings. In number of decisions various courts, have made candid explanations in respect of liability of doctors and hospital while performing a surgery.

Law of Tort is that branch of law which enables the victim of a wrong to seek remedy from the person who injured her. Unlike a criminal case, which is
initiated and managed by the state, a tort suit is prosecuted by the victim or the victim’s estate. A successful suit results in a judgment of liability, rather than a sentence of punishment. In other words, it requires the defendant to compensate the plaintiff financially.

Negligence means omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate the conduct of human affairs, would do or the doing of something which a reasonable and prudent man would not do. Negligence is not ‘neglect or carelessness’. But it is the failure to take such care as required in the particular context.

The fundamental idea behind liability for negligence is the duty of care. Professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. The Supreme Court of India has settled law that medical professional can be held liable for negligence if, he has not possessed of the requisite skill which he professed to have possessed and (or) he did not exercise with reasonable competence in the given case, the skill, which he did possess. The standard to be applied for judging whether the professional is negligent or not would be that of an ordinary competent person exercising ordinary skill in that profession.

Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can
give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is what the entire person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish her/his claim against the doctor. The complainant has to prove the presence of duty of care, breach of care and the consequential damages suffered by him.

A doctor’s duty of reasonable care involves giving the patient, a description of his conditions and appropriate course treatment including the risks. If there is a probability of the treatment producing results, which are harmful to patient, those factors must be weighed by the doctor, before he recommends the treatment. The patient is entitled to consider and reject the treatment.

US legal system insisted on ‘informed consent’ from the patient’s point view as essential pre-requisite of medical intervention, while UK, for a long time maintained that ‘real consent’ from doctor’s perspective is enough as settled by the Bolam Decision in 1957.

The Indian Supreme Court, following that principle, held that, nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high-degree mentioned in Canterbury (informed
consent) but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.

However, the Bolam Test is out of use and it was established that informed consent is now part of English law. Courts in Australia, Malaysia, New Zealand, Ireland, and Canada, following common law system have legal system requiring informed consent from the patient’s point of view. For medical practice to be effective there should be concordance between the doctor and patient. This being a fiduciary relationship has its foundation well laid in mutual trust and candour. The doctor is no longer ‘God’ and patient the blind devotee. Social dimensions are changing and corresponding changes are required in legal system as well.

Earlier, the patients aggrieved by medical negligence did not have any effective adjudicative body for getting their grievances redressed. The Indian Medical Council Act, 1956 as amended in 1964, provides for regulation of medical education .The medical Council is reconstituted under the Act for registration of medical practitioners. The Indian Medical Council (Professional conduct, etiquette and ethics) Regulation, 2002 specify regulations, whose violations shall constitute misconduct. Disciplinary action will be taken against the erring doctors on the basis of a complaint and enquiry by peer group. The Council was available only at the state headquarters, thereby making it hardly accessible to the majority of parties. Further, the Council has no power to award compensation to the patients for the injury sustained.

Consumer movement in India had its roots in the early part of 20th century in India. The Consumer Protection Act was enacted in 1986 to protect the interests of consumers. It is one of the most comprehensive and progressive piece of social welfare legislation. Unlike other laws, which are basically punitive or preventive in nature, the provisions of the Act are compensatory. The Act is intended to provide simple, speedy and inexpensive redressal to the consumers’
grievances. It also provides relief of a specific nature and awards compensation, wherever appropriate. The Act provides for exclusive three tier redressal machinery as an alternative to the civil court and other legal remedies available in the country.

Before the enactment of Consumer Protection Act in 1986, the injured party in case of medical negligence had only two options available, either to approach the civil court under law of Tort or the High Court under its writ jurisdiction. Both are proved to be tedious, time taking and expensive for common man. The Consumer Protection Act, 1986 (COPRA) was enacted ‘to provide for better protection of the interests of the consumers’. The legislation, has the unique distinction of being the only one in the country made exclusively for consumers to protect their interests against defective goods and deficient services, even though a plethora of existing legislations do have provisions to deal with consumer rights in different degrees on specified matters. The provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time being in force.

The critical question that whether a medical practitioner can be regarded as rendering ‘service’ under Section 2(1)(o) of the Consumer Protection Act, 1986 was specifically answered in positive and has been settled by the landmark judgment of the Supreme Court in the case of Indian Medical Association v. VP Shantha & others. And thereafter in number of decisions, Supreme Court, various High Courts and Consumer fora have settled the law in this regard.

COPRA gives protection against deficiency in service. It is available in case of medical service too. As far as surgical treatment is concerned, the National Commission in 1998 observed that inadequate preparation for surgery is deficiency in service. It also includes adopting procedures which are not for the benefit of the patient but safeguard against the possibility of the patient making a claim of negligence. It is the duty of the surgeon to ensure full recovery and rehabilitation. Post-operative care plays a major role in this. Not complying with the very high standards of critical care required in the ICCU is clearly deficiency
in service. Similarly surgeon is required to give and the hospital should provide along with discharge certificate, the instructions for post-operative care. In comparison with the similar laws enacted by other countries, no law matches Indian law as this magnificent piece of legislation works for better protection of interest of consumers at large. This is the first statute brought on the statute book after UN General Assembly passed the resolution calling upon all developing nations to save consumers from exploitation from unscrupulous and unfair trade practices. But when it comes to medical negligence, it has no universal application. As it is only available to consumer, a large section of Indian population is left out of its protection. The adjudicatory forums which are conceived as speedier alternative to Civil Courts have become another form of the latter. Poor Indian consumers still keep themselves distant from medical litigations not because of absence of negligence but because of the sheer expenditure involved and the uncertain end in such cases. Legislative intervention is urgently needed in this respect.

As far as medical negligence is concerned COPRA is proved to be the best available legal solution. The Consumer Fora provides expeditious, informal and inexpensive remedy. However, the experience with this quasi-judicial forum is not perfectly satisfactory. Complaints are increasing in number about, inordinate delay, lack of expert knowledge, and invariable presence of advocates and inefficient or non-functioning of forums in many cases. Further, the protection under Consumer Protection Act is available only to consumers and the beneficiaries of public healthcare system and free services are under outside its purview. This is a serious infirmity. A comprehensive legislation which will extend its protection to all type of patients with specific adjudicatory mechanism is needed.

There is no difference in principle applied to the assessment of damages in a medical negligence case from other actions for personal injuries. In case of death due to medical negligence, the valuable life is abruptly terminated. The medical man is bound to compensate the family of the deceased patient whose death is caused by his wrongful act, neglect or default. While fixing an amount
of compensation payable to a victim of an accident, the damages have to be 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. 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 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.

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. However, the large majority of Indian population still has no accessibility to the protection of COPRA, 1986. The medical services provided by Government hospital are out of the purview of Consumer Protection. Establishment and working of Consumer Fora is influenced by the Human right atmosphere-social, economic, educational disparities. Lack of awareness about the Consumer Rights is major hurdle in implementation of this magnificent piece of legislation. Major attempts are required to create awareness among the population about Consumer Rights.
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. 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 the social status of the victim. In setting that lies the protection of patients in India. In order to ensure consistency and uniformity, award of compensation needs to have clear and certain standards.

Comprehensive legislation, in the lines of Motor Vehicles Act, 1988, exclusively dealing with medical negligence is an urgent need. The Thesis is having a specific suggestion to enact new law and establish a new set of adjudicatory mechanism which will be free from the infirmities of COPRA.