# Chapter Synopsis

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Chapter 1
INTRODUCTION

“In my opinion, our health care system has failed when a doctor fails to treat an illness that is treatable.”

— Kevin Alan Lee

Medical negligence is extremely important factor for patient. Instances of negligence in the medical profession are not a new phenomenon. Medical Negligence is being committed in all over the world every day. The main purpose of this Study is to focus Medical Negligence Law in India.

Medical Negligence is an issue of serious human rights concern that directly affects right to life and right to health care. The overwhelming number of incidents of medical negligence in India mostly goes without any legal action, leading to a frustrating situation where public trust is completely lost on the medical service providers. Although the legal remedies available under the existing laws are limited or difficult to access, such efforts give a clear idea about the shortcoming of the existing law and the underlying difficulties in the judicial system. In order to ascertain the legal status of medical negligence the existing legal regime has been measured in this article. The Constitution of India recognizes right to health care and guarantees right to life. Medical services include a wide range of activities; from diagnosis to medicine, surgery and other forms of treatment. In this research the legal system in India relating to medical and health care services and operation of various clinics, laboratories etc. have been discussed and analyzed. This part starts with the assessment of constitutional safeguards; then it infers India’s obligation to ensure right to health care under the provisions of the international treaties.

The relationship between a doctor and his patients considered sacred in India. A doctor is in comparison to "God". In the past days, cases of malpractice and negligence in medical field have more than quadrupled. The problem arises in determining the liability, whether or not the doctor was negligent or not, is very technical and subjective question, it’s difficult to decide. There is always a possibility of alternative treatment, but that does not mean that the doctor negligent for the deployment of the first treatment. In this situation,
a person who loses his life through a treatment cannot be considered, for compensation and his family is left in a dilemma. Next the doctor will always try to play safe and order more procedures to avoid a liability, in a way which was a burden on the economy.

It is extremely important for medical professionals to understand the meaning of the term ‘profession’, especially in the current scenario of medico-legal conflict. It has been defined by the Oxford Advanced Learner’s Dictionary as a paid occupation especially one that requires advanced education and training.¹ Profession is different from ‘occupation’ as it requires special skill, training, knowledge and education. The nature of work performed by professionals is extremely specialized, which requires more mental than physical work. The Supreme Court observed in Indian Medical Association v. V. P. Shantha and Others that,²

“Profession in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguish from an occupation which is subsequently the production or sale or arrangement for the production or sale of commodities. The line of occupation may vary from time to time.”

One of the most important aspects of professional work is that it is bound by some ethical or moral principles, which require a greater degree of honesty and integrity. These principles are besides legal requisites and give professionals respect and a very high status in the community. The medical profession is considered the noblest of all professionals because of its service to the humanity- the unique ability to save life. Even in the present era of commercialization, the profession has been able to hold on to its position to a great extent because a large section of the Indian society still believes that money is not the most important consideration for a medical profession when he undertakes the treatment of a patient. The medical profession is considered a noble service, rather than an occupation, by the society.

Negligence is simply neglect to some care which we are bound to exercise towards somebody. It is something less than misconduct.³ Medical negligence is not different in

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¹ Oxford Advanced Learner’s Dictionary 5th Edn.
² 1995 (3) CPJ 1 and 1995 (6) SCC 651.
law from any other type of negligence. The basis of liability of professional negligence is negligence.\(^4\)

Another important concept which medical professionals should know is the definition of ‘medical practitioner’. It has been defined by the Supreme Court of India in the \textit{Poonam Verma case}\(^5\) as:

“Medical practitioner or practitioner means a person who is engaged in the practice of modern scientific medicine in any of its branches including surgery and obstetrics, but not including veterinary medicine or surgery or the Ayurvedic, unani, homoeopathic or bio-chemic system of medicine”

\section*{1.1 DEFINITION OF NEGLIGENCE:}

Negligence in law is a type of tort or civil wrong but can also a wrong under criminal and consumer law. It means an act of conduct that is culpable because it misses the legal standard required of a reasonable person in protecting individuals against the foreseeable risky or harmful acts. Negligent behavior towards others gives them a right to be compensated for harm of their physical and mental health, property, financial status, or relationships.

In 1856, B. Alderson, J. gave the classic definition of negligence in \textit{Blyth v. Birmingham Waterworks Company}\(^6\). It was defined as,

‘The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.’

This definition is quoted even today in negligence suits throughout India.\(^7\) The Supreme Court of India, in \textit{Jacob Mathew v. State of Punjab and Another},\(^8\) defined negligence as:

\footnotesize
\(^{6}\) Court of Exchequer, 1856. 11 Exch. 781 and 156 ER 1047.
\(^{7}\) Quoted in the cases: \textit{Poonam Verma v Ashwin Patel and Others; Jacob Mathew v. State of Punjab and Another} and \textit{Dr. Kunal Saha v. Dr. Sukumar Mukherjee and Ors}. Op. No. 240 of 1999, decided on 1st June 2006 by NCDRC.
\(^{8}\) (2005) 6 SCC 1.
Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property… the definition involves three constituents of negligence.

1. A legal duty to exercise due care on the part of the party complained of towards the party complaining the former’s conduct within the scope of duty.
2. Breach of the said duty;
3. Consequential damage.

Hence, negligence in law is basically an unintentional breach of legal duty that proximately causes an enquiry to another person. The law considers those injurious acts to be culpable, in general, which a reasonably prudent man would foresee as being capable of productive of injury and which he would carefully abstain from doing.

In general, there are three meanings of medical negligence, i.e.

i. A state of mind which is opposite to intention.
ii. Careless conduct
iii. The breach of duty to take care imposed by common or statute law.\(^9\)

### 1.1.1 Negligence as a State of Mind:

Negligence and wrongful intent are two alternative forms of *mens rea*. Out of these two alternative forms one form is essentially required by law as an essential condition for establishing liability of wrongdoer. The willful wrongdoer or intentional wrongdoer is one who desires to do harm. The negligent wrongdoer is one who does not sufficiently desires to avoid doing it.\(^10\)

So negligence as a state of mind does not mean an act in order to produce them. But it means indifference or carelessness in guarding whether the act is going to happen or not.

### 1.1.2 Negligence as a Careless Conduct:

Careless man is one, who does not care or who is not sufficiently anxious that his activities are going to cause loss to others. It does not mean breach of a duty to take care,
but simply means careless conduct on the part of the wrongdoer. Negligence with careless conduct is opposite of diligence.\textsuperscript{11}

1.1.3 Negligence as the Breach of Duty to take care:

Negligence as the breach of duty to take care is simply a neglect of some care which we are bound by law to exercise towards somebody. Under the law of negligence, professionals such as Lawyers, Doctors, architects and others are the persons possessing some special skill. Any task which is required to be performed by these professionals wants a special skill. For a medical accident or failure, the responsibility may lie with medical practitioner, and equally it may not. So such negligence necessarily be treated with some difference.\textsuperscript{12}

Generally ‘Medical Negligence’ means failure to act in accordance with the standards of a reasonably competent medical man at that time. It is the breach of a duty owned by Doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or financial disability.\textsuperscript{13}

‘Medical Negligence’ is defined as lack of reasonable care and skill or willful negligence on the part of a doctor in respect of acceptance of a patient, history taking, examination, diagnosis, investigation, treatment-medical or surgical, etc., resulting any injury or damage to the patient. Damage in this means physical, mental or financial injury to the patient.\textsuperscript{14}

Any doctor who has established a relationship of professional attendance with a patient and who has undertaken to bring a reasonable degree of care and skill then he may have shown medical negligence.\textsuperscript{15}

The professional is the one who professes to have some special skill. A professional impliedly assures the person dealing with him:

i. That he has the skill which he professes to possess,

ii. That skill shall be exercised with reasonable care and caution.

\textsuperscript{11} Ibid.
\textsuperscript{13} H.M.V. Cox, Medical Jurisprudence and Toxicology, 77 (6th Edn., 1990)
\textsuperscript{14} S. K. Palo, Consumer Rights relating to Medical Negligence, 2006, JMC at page xiii.
\textsuperscript{15} Keith Simpson, Taylor’s Principles and Practice of Medical Jurisprudence, 55 (12th Edn., 1965)
The professional is judged by these two standards. So the professional can be held liable for negligence when he was not possessed of requisite skill which he profess to held and when he does not exercise it with reasonable care and caution.\(^\text{16}\)

### 1.2 ESSENTIAL CONSTITUENTS OF NEGLIGENCE:

The essential constituents of negligence have been defined by the Supreme Court in the *Poonam Verma* case\(^\text{17}\) as:

a. A legal duty to exercise due care,

b. Breach of duty, and

c. Consequential damages.

All these constituents of negligence must be proved by the plaintiff to the satisfaction of the court and only then can the defendant be held liable for negligence.\(^\text{18}\) The Supreme Court held that ‘Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort. If the plaintiff fails to prove that any loss or injury was caused to the patient, in spite of proving negligence by the doctor, he will not be entitled to claim any compensation.\(^\text{19}\)

The models in which duties may arise and what amount of care required in their performance will be considered at greater length subsequently, but at present, it is only necessary to state that a legal duty must be shown to have been broken. The plaintiff must show what the duty was and how it was broken. It is not sufficient that a careless act has been done by the defendant, because of which the plaintiff has sustained loss. The liability for an omission to do something depends entirely on the extent to which a duty was imposed to cause that thing to be done. No act is negligent per se; it is only so because it is a breach of duty. Therefore, an act done by one man may be negligent, which, when done by another would not be so because he had no duty with respect to it. If the act is intentional, it becomes fraudulent or criminal.

Hence it is very important that all the components of negligence are understood properly by the members of the medical profession so that they can practice safely from legal point of view.


\(^{17}\) (1996) 4 SCC 332.

\(^{18}\) Jacob Mathew v. State of Punjab and Another (2005) 6 SCC 1

\(^{19}\) Sidhraj Dhadda v. State of Rajasthan AIR 1994 Raj. 68 and 1993 (1) Raj. L.W. 532
1.2.1 Professional Negligence:

Professional negligence is a subset of the general law of negligence, which is meant to cover situations in which the defendant has represented himself or herself as having more than average skill and abilities. By virtue of the services they offer, professionals hold themselves out as having more than average abilities. The specialized set of rules regarding professional negligence determine the standard against which to measure the legal quality of the service actually delivered by those who claim to be among the best in their areas of expertise. The Supreme Court observed in Indian Medical Association v. V. P. Shantha and Others that,\(^\text{20}\)

‘In matter of professional liability professionals differ from other occupations for the reason that professions operate in spheres cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man’s control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors maintained above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence, that they should exercise reasonable care in the discharge of their duties.’ From the above judgment, it is obvious that medical professionals are liable for their negligent acts and that will be treated at par with other professionals. Though earlier, medical professionals were held responsible for their negligent act in various courts of our country under the existing civil laws, this judgment brought them under the purview of the Consumer Protection Act, 1986 as well. Steep court fees and long duration of trials in civil courts were the main factors which deterred aggrieved patients from lodging medical negligence suits in India. The judgment in the case of Indian Medical Association v. V. P. Shantha and Others that,\(^\text{21}\) threw the door wide open for patients to conveniently lodge cases against medical professionals. Medical professionals argued that they are governed by the rules of Medical Council of India, but this view was not accepted by the Supreme Court. It held that:

‘The fact that they are governed by the Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or state Medical Councils is no

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\(^{20}\) 1995 (3) CPJ 1 and 1995 (6) SCC 651.

\(^{21}\) Ibid.
solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.'

The law requires that medical professionals must bring to their task, a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. The law expects neither the very highest, nor the very lowest degree of care and competence in the treatment of patient.

The definition of negligent treatment in *Derr v. Bonney*[^22^], is an excellent statement that defines a physician’s legal responsibility during treatment[^23^].

1. An individual licensed to practice medicine is presumed to possess that degree of skill and learning which is possessed by the average members of the profession in the community in which he practices, and it is presumed that he has applied that skill and learning with ordinary and reasonable care to those who come to him for treatment,

2. The contract, which the law implies from the employment of a physician or surgeon, is that the doctor will treat his patient with that diligence and skill mentioned above,

3. He does not incur liability for his mistakes if he has used methods recognized and approved by those reasonably skilled in the profession,

4. Before a physician or surgeon can be held liable for negligence, he must have done something in the treatment of his patient which the recognized standard of medical practice in his community forbids. In such cases or he must have neglected to do something required by these standards,

5. In order to obtain a judgment against a physician or surgeon, the standard of medical practice in the community must be shown and further that the doctor failed to follow the method prescribed by that standard.

6. It is not required that physicians and surgeons guarantee results, nor that the result must be what is desired, and

7. The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant or a disagreement of

[^22^]: 38 Wn. 2d 876, 231 P., 2d 637, Wash, 1951
[^23^]: Singh, *et. al.*, 2007 pp 995-6
doctors of equal skill and learning as to what the treatment should have been, does not establish negligence.

1.2.2 Actionable Medical Negligence:
‘Actionable negligence’ is that which imports the liability of the doer. In order to establish the liability of medical negligence, it must be shown that:

i. The doctor has a duty to take care toward the patient,

ii. The doctor was in a breach of that duty; and

iii. The patient has suffered damages as a result of the breach of that duty.\textsuperscript{24}

All these three conditions must be present simultaneously otherwise no charge of medical negligence can be maintained.

1.2.3 The duty to Exercise Skill and Care:
It is the first essential condition for establishing liability for medical negligence. Fundamentally the ‘duty’ is an obligation to take proper care to avoid injury in all the circumstances of the case. Duty to take care is a restriction on the defendant’s freedom obliging him to behave in a reasonable manner. In legal sense ‘medical negligence’ means nothing more or less than substandard care.

The duty to exercise skill and care exists when a doctor-patient relationship is established. This relationship is formed extremely easily. It is formed by any formal acceptance of a patient by a doctor, or the payment of a fee. In case of an emergency this doctor-patient relationship is formed as soon as Doctor approaches a patient with the object of treating him.

Thus a doctor, who deals with a patient with an intention of acting as a healer, established a doctor-patient relationship immediately. Therefore, from that moment onwards his legal obligation to exercise a duty of skill and care arises. Any breach of this duty is a ground for a negligent action.\textsuperscript{25}

Duty to take care is a restriction on the defendant’s freedom obliging him to behave in a reasonable manner. In legal sense ‘medical negligence’ means nothing more or less than substandard case.

\textsuperscript{24} Supra note 7, Ratan Lal Dhiraj Lal, \textit{the Law of Torts}, 441 (2\textsuperscript{nd} Edn. 2005).
\textsuperscript{25} Ibid.
Under law of torts, the Neighbor principle helps us to decide whether the duty of care exists or not in a particular case. The neighbor principle is:

“You are to love your neighbor; you must not injure your neighbor”

Here neighbors are:

“Persons who are so closely and directly affected by the act of wrongdoer that when he is directing his mind to the acts or omissions the consequential damage can be easily foreseen. In case of medical negligence the neighbors are all the patients which are attended by the doctor”

The basic principle relating the law of medical negligence is Bolam Rule,26 i.e. the test is the standard of the ordinary skilled man exercised and professing to have that special skill. A man need not to possess the highest expert skill, it is well established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical man at the time. There may be one or more perfectly standards, and if he conforms to one of these proper standards, then he is not negligent.”

The concept of ‘reasonable foresight’ is used to determine the standard required in a particular case. Reasonable foresight means the foresight of a ‘reasonable prudent man’. A reasonable man will avoid producing probable undesirable consequences. That is the normal standard of careful conduct. If the conduct in question falls short of that standard, it is negligent one.27 In medical negligent case the reasonable foresight is that of a doctor possessing a reasonable degree of proficiency and who apply it with a reasonable degree of diligence.

The skill of medical practitioners differs from doctor to doctor. A highly experienced doctor may be negligent if he fails to apply his greater knowledge with a sufficient degree of care. Conversely, an inexperienced doctor may be negligent, if he attempts to do some procedure which is clearly beyond his capabilities. The degree of competence is not a fixed quality, but varies according to the status of the doctor on the ladder of medical profession. No doctor is expected to be equipped by all the current medical knowledge

and knowledge of all diagnostic techniques. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treatment. Medical opinion may differ with regard to the course of action to be taken by a doctor treating his patient. But as long as a doctor acts in a manner which is acceptable to the medical profession, then he was attended on the patient with due care, skill and diligence.\(^{28}\)

**1.2.4 Breach of that Duty to Take Care:**

The second essential required to be fulfilled for establishing the liability for medical negligence is that there is a breach of the duty to take care on the part of the defendant towards the plaintiff. The breach of duty may be occasioned either by not doing something which a reasonable man would be under similar set of circumstances, or, by doing some act which a reasonable prudent man would not do.\(^{29}\) The breach of duty to take care must have resulted in consequential damages to the plaintiff. The onus of providing the negligence is on the part of the defendant in on the plaintiff. He must not merely establish the facts of the defendant’s negligence and of his own damage, but must show that the one was the effect of other.\(^{30}\)

**1.2.5 Consequential Damages:**

In an action for negligence the plaintiff must prove not merely that the defendant was negligent but also that there was actual damage. This damage must be resulted to the defendant in consequence of negligent act which was the direct and proximate cause of damage. Damages are awarded to compensate the plaintiff for the damage caused to him and to place him in the same position in which he would have been, if injury was not sustained.

In actions of tort, compensation is the principle of Redressal and the measure of damages is the exact amount of the injury which the plaintiff has suffered in his person, earnings, life expectancy, etc.\(^{31}\)


\(^{30}\) Supra note 18

\(^{31}\) W. Wyatt-Paine, *The Law of Torts*, 140 (7th Edn., 1921)
1.3 STATEMENT OF PROBLEM:

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fall below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable, if he leaves surgical gauze inside the patient after an operation. There may be few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before, to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be liable?

In such situation he should not be held liable. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian Siamese twin\(^\text{32}\) or the first heart transplant by Dr. Barnad in South Africa.\(^\text{33}\) In such cases it is advisable for the doctor to explain the situation to the patient and take his written consent. Several instances of negligence are reported from government hospitals too. But unfortunately the consumer law is silent here as government hospital comes under the “non-paid” service. Thus several loopholes exist.

Supreme Court of India in Indian Medical Association v. V. P. Shantha’s case\(^\text{34}\) held that the medical profession is included within the meaning of service under Consumer Law. Protest against this decision arose from different corners but the court confirmed their stand. Thus medical service comes under Consumer law. No doubt, due to this decision, the doctors became more cautious in treatments and a form of defensive medication slowly took over. In such cases, the patients would be advised to undergo several tests even before the preliminary diagnosis, so as to obviate any litigation against doctors. The

\(^\text{32}\) Surgeons in Singapore have tackled the most critical phase of the world’s first operation to separate adult twins joined at the head. Doctors began the surgery Sunday on 29-year-old sisters from Iran, and say they are pleased the risky procedure is going well. Details available on web-site : http://www.voanews.com/a/a-13-a-2003-07-07-54-iranian-67469217/385973.html visted on 23rd March’ 2016 at 3:11 PM.


\(^\text{34}\) (1995) 6 SCC 651.
ultimate sufferer is the patient himself as the treatment becomes expensive and there is a delay in initiating the treatment.

1.4 SCOPE OF RESEARCH:

Preservation of human lifetime may be a preponderant importance. That’s no on account of the very fact that when life is lost, the establishment ante can't be restored as resurrection is on the far side the capacity of kith and kin.

The General Assembly adopted tips for shopper protection by accord on 9th April 1985. The rules offer a framework for Governments, significantly those of developing countries, to use in elaborating shopper protection policies and legislation. They are conjointly supposed to encourage international co-operation during this field.

Medicine heals, but this fact does not hold true for every patient. According to World Health Organization one in 10 hospital admissions leads to an adverse event and one in 300 admissions to death. Unintended medical errors have become a big threat to patient safety and WHO lists it among the top 10 killers in the world.

Medical Professionals commit errors despite prudence and case in their day to day practice like incorrect identification, improper treatment and lack of consent. This inherent unreliableness within the medical professionals directly associated with legal proceeding. Antecedently medical professionals were chiefly upset regarding failing to save lots of the lifetime of a patient or providing satisfactory treatment to a unfortunate person. These days they conjointly care regarding the legal outcomes of their failure.

Ever since the medical professionals have been brought within scope of Consumer Protection Act, 1986, there has been a drastic gain in the number of lawsuits registered against the physicians. However, it is a great mistake to think that doctors and hospitals are easy targets for dissatisfied patients. They are not liable for everything that goes wrong to the patients. They are only required to exercise reasonable care and skill in their treatment of patients. They will be deemed guilty of neglect only if they fall short of the standards of reasonably skillful medical practitioners.

In the event of indemnity against a physician, the onus is upon the claimant to show that the doctor was negligent and that his negligence had the injury of which the charge is

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drawn. It is he who has to show that the doctor falls short of the measure of a reasonably skillful medical man. This has to be supported by expert evidence or medical literature on the subject. If the initial essence of negligence is discharged by the claimant, it would be for the doctors to substantiate their defense that there was no carelessness.

The issues regarding civil liability of the doctors assume special significance within the gift context, because of the development of medical community. The action against personal injury caused to the litigator at the hands of doctors needs the proof of responsibility to require care, breach of such duty and eventful harm suffered by the litigator. The Supreme Court in A. S. Mittal v. State of U.P.\textsuperscript{36} command that “a mistake by a health professional that no fairly competent and careful practitioner would have committed is negligent one”. A medical man is same to be fairly competent and careful once he adopts the {normal} skills and normal practices of the profession. The law does not expect very high or very low standard from someone who furnishes professional services. In Dr. L. B. Joshi v. T. B. Golbole\textsuperscript{37}, the Court commands that, “the duties that a doctor owes to his patients are:

i) A duty of care in deciding whether to undertake the case;

ii) A duty of care in deciding what treatment to give; and

iii) A duty of care in administration of that treatment.

A breach of whatever of these duties gives a right of action for negligence to the patient”.

The purpose of this thesis is to explain how the legal philosophy of medical negligence operates in India taking into account the rising doctor-patient conflict and legal intervention.

1.5 HYPOTHESIS:

1. The existing laws are inadequate in addressing the causes that leads to medical negligence

2. Provisions for calculating compensation in cases of gross negligence are not proper.

1.6 OBJECTIVE OF THESIS:

The objective of research is to analyze and evaluate the situation of patient/consumer and medical practitioner as whether they have been rightly treated or not. Besides this, the

\textsuperscript{36} AIR 1989 SC 1570

\textsuperscript{37} AIR 1969 SC 128
research has view how judicial and quasi judicial body have responded to the cases filed under Hippocratic Oath\textsuperscript{38}. It is widely believed to have been written by Hippocrates, often regarded as the father of western medicine, or by one of his students. The Oath is written in Ionic Greek (late 5th century BC), and is usually included in the Hippocratic Corpus. Classical scholar Ludwig Edelstein proposed that the oath was written by Pythagoreans, a theory that has been questioned because of the lack of evidence for a school of Pythagorean medicine. Of historic and traditional value, the oath is considered a rite of passage for practitioners of medicine in many countries, although nowadays the modernized version of the text varies among them.

The Hippocratic Oath (\textit{horkos}) is one of the most widely known of Greek medical texts. It requires a new physician to swear upon a number of healing gods that he will uphold a number of professional ethical standards.

The profession of healing the suffering has gained respect from all corners of the society since time immemorial. A physician, apart from being a healer, has been looked upon by the masses as a role model of grace personified, though of late this image has transformed to a mere service provider. This can partly be attributed to doctors themselves, owing to the increasing number of cases involving doctors engaging in unethical practices coming to light and, therefore, medical professionals have over the period lost the confidence of their patients and the society.

Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so as they have the skill to decide whether to take a case, to decide upon the likely course of the treatment, and to administer that treatment. This is known as an “implied undertaking” on the part of a medical professional.

The main objective of the study is to highlight the main drawback of the existing medico-legal system. In consumer courts, judges are not experts in medical science; this itself causes difficulty for them to decide cases relating to medical negligence. Moreover, judges have to rely on testimonies of other doctors which may not be objective in all cases. Like in all professions and services, doctors too sometimes have a tendency to support their own colleagues. The testimony may be difficult to understand, particularly

\textsuperscript{38} The Hippocratic Oath is an oath historically taken by physicians and other healthcare professionals swearing to practice medicine honestly.
in complicated medical aspects and to a layman in medical subject. A balance has to be maintained in such cases. The doctors who cause death or agony by medical negligence should certainly be punished, and also be remembered that like any other profession, the doctors too can make errors of judgments, and if they are punished for every error no doctor can practice his profession. Indiscriminate proceedings and decisions against doctors are counterproductive and serve no good.

The basic objective of this research is to highlight about the various types of Medical Negligence that is being addressed in the recent years and what actually constitutes Medical Negligence.

1. To study the complex procedure for claiming Medical Negligence.
2. Response of judicial and quasi-judicial bodies in the cases filed under Medical Negligence.
3. To study the concept of burden of proof (by documentation) on patient to prove Medical Negligence.
4. To evaluate whether existing laws on these sectors are adequate enough to respect and protect interests of the parties.
5. Functioning of consumer courts, National Commission or State Forums in Medical Negligence Cases.
6. Compensation is the appropriate remedy for the person who bear mental agony or not.
7. To understand the dealing of the Medical Council of India with issue of malpractice
8. To examine the efficacy of rights provided to patients to prevent the malpractices/negligence of the doctors.
9. To examine the existing trends in the Supreme Court of India with regard to Medical Negligence.
10. To contributory negligence- some time media not highlight the other part.
11. Critically analyze the concept of standard of care i.e. expected from medical practitioners in cases, both civil & criminal in nature.

1.7 LITERATURE REVIEW:
This research is proposed to meet the existing problems and future challenges. The study of research is on medical negligence on how doctors and hospitals are negligently doing
such an act towards their own patients though doing mal-practising and unethical conduct towards their own services, perhaps doctors are treated in our study like a god or representing on behalf of god and hospitals like a temple therefore behaving like a human god.

Medical services and infrastructure is expanding rapidly in India and is fast turning into an industry in terms of its size, employment capability, service provided and most of all focus on profitability. The problem is that the rapid growth and expansion of medical services, under both government and private sector, has not been supported by laws that adequately provide for checks and balances.

Literature review means a description of the literature published by scholar or researcher on a particular topic or field. The purpose while writing this literature review is to convey the reader about the knowledge and ideas as well as strengths and weakness that have been established on particular topic. The literature review has been written as guiding concept for the objectives of this research covering the problem and issues for discussion.

The literature review will be helpful to provide us knowledge in following areas:

1. **Obtain Information:** It helps in identifying set of useful books and articles.
   Useful material can also be obtained by applying manual as well as computerized methods in present time which is required for the benefit of patient in medical science.

2. **Critical Analysis:** It deals with the ability to apply approach to identify the valid and unbiased studies.

While writing literature review researcher kept in mind that:

1. The study is organized and directly related with the research questions.
2. Tried to synthesize the consequences into a summary of what is and is not known.
3. Tried to formulate the questions need further research for development of medical science which is actually required at present age.

The literature for this research work is as follows:

1.7.1 **Books:**

1. **The Constitution of India:** The book on Constitution of India written by authors such as J. N. Pandey provides us a brief about the special rights for the patient.

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It is clear from the book that the patient rights are essentially indirect rights that arise or flow from the corresponding "articles", which can be applied in the cases of medical negligence. The patient's rights are in principle derived rights, which is based on the duty of the caregiver. Article 21 states that no person shall be deprived of his or her life or personal liberty except according to procedure established by law and Article 32 is related to the legal remedies for the enforcement of rights. The right to constitutional remedies therefore allows the citizens of India, for their rights against anyone even the government of the Republic of India.

The Constitution of India written by H. M. Saravai\textsuperscript{40} give us brief about the Directive Principles of state policy which tells us that directive principles are not enforced by a court, but the principles contained therein are set, but fundamentally in the governance of the country and it will be the duty of the State to apply these principles in laws. Constitution of India written by T. K. Tope and V. N. Shukla\textsuperscript{41} has also given a clear view that the state should note the increase in the level of nutrition and the standard of living of the people and the improvement of public health, such as among his primary tasks and in particular the state should endeavor, on the prohibition of the consumption except for medical purposes of the intoxicating beverages and drugs, are harmful to health.

2. The Indian Penal Code, 1860: 21\textsuperscript{st} edition of Indian Penal Code, written by Surya Narayan Mishra\textsuperscript{42} has compiled various provisions that make the medical negligence punishable and 34\textsuperscript{th} Edition of Indian Penal Code, written by Ratanlal & Dhirajlal\textsuperscript{43} that up to the last in 2005 made it clear that doctors could be liable under both civil and criminal negligence. A landmark judgment in this context was that of \textit{Dr. Suresh Gupta v. Government of NCT of Delhi\textsuperscript{44}}. It was the view expressed by the jury that between civil and criminal liability of a doctor, the death of the patient, the Court has a difficult task of weighing the degree of

\begin{thebibliography}{99}
\bibitem{Mishra42} Surya Narayan Mishra, \textit{Indian Penal Code}, Central law agency 20\textsuperscript{th} Edn. (2013).
\bibitem{Ratanlal43} Ratanlal & Dhirajlal, \textit{Indian Penal Code}, Lexis Nexis 33\textsuperscript{rd} Edn. (2012).
\end{thebibliography}
negligence and alleged negligence on the part of the doctor. For the conviction of a doctor for the alleged offense, the standard should be a proof of recklessness and deliberate wrong doing. To condemn a doctor, so the public prosecutor's office has to come with a case of high degree of negligence on the part of the doctor. The sheer lack of proper care, prevention and attention or inattention may create civil liability, but not a criminal.

Supreme Court decided that doctors should not be held criminally responsible, unless it is prime facie evidence before a court in the form of a credible opinion from another competent doctor, preferably a government doctor in the same field of medicine support the cost of a rash and negligent act. Such a decision is expected, the quality of the service in the event of an emergency, the visit to the doctors fear, because the odds will be loaded under Section 304-A IPC for criminal negligence.

3. **The Indian Medical Council Act, 1956**: The Indian Medical Council Act, 1956 empowers the Medical Council of India to remove the name of each person enrolled in a state medical register on the grounds of professional misconduct. The Council also writes standards of professional conduct, etiquette and ethics for doctors.

4. **The Consumer Protection Act, 1986**: The books Consumer Protection (Law and Practice) written by Dr. Avtar Singh is very helpful to clear all doubts regarding the jurisdiction of Consumer Protection Act, 1986 and medical negligence. The Consumer Protection Act 1986 has been enacted with very laudable and ambitious objects to promote and protect the rights of the consumers. It is not the ‘new born baby’ of the legislature, but only a “shorthand term to indicate the different aspects of general law”. It aims to see that the aggrieved or injured consumer should not be left without any remedy and at the same time provides a speed and inexpensive remedy through quasi judicial bodies– District forum.

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State Commission and National Commission. These bodies will perform functions as custodian or watchdog of the rights of the consumers. They are like additional judicial schemes to offer the socially weaker section, an efficient means of access to the law where the regular court system fails to perform adequately.

At present, the medical profession has become commercialized. Practitioners are adopting deceitful methods to attract the innocent patients and thereby procure money. Some doctors suggest their patients to undergo various tests, that too in a particular laboratory which are, in fact unnecessary. There may be unethical collusion between that laboratory and a doctor. And some other doctors prescribe more medicines than necessary on the letter pad of particular medical shop. There may also exist some understanding between doctor and pharmaceutical companies for prescribing their product. The medical profession is a noble profession and it should not be brought down to the level of a simple business. Today in India, many doctors have become totally money-minded, and have forgotten their Hippocratic Oath. Since most people in India are poor, medical treatment is beyond their reach.

The book Compendium of CPA & Medical Judgments written by Neeraj Nagpal has made it clear that the negligence at the time of treatment is not excusable. The doctors were brought under the Consumer Protection Act, 1986 for their negligent acts. The number of medical negligence cases has been increasing over the years. The services of the doctors are liable under the provision of Consumer Protection Act, 1986 and a patient can seek redressal of grievances from the consumer courts. Case laws are important sources of law educating various issues of negligence arising out of medical treatment. In medical negligence there is so many research is going on and this research is that how doctors and hospitals are confined in the combat of Indian Law.

5. **The Law of Torts**: According to the definition of Tort given in the book on Law of Torts and Consumer Protection Act, 1986 written by Dr. S. K. Kapoor, ‘The law of tort means a civil wrong, not classed as a crime, but usually involving a

civil legal action to obtain compensation for injury, loss or damage’. This tort wrong has also been used for the issue of professional Negligence including that of medical negligence. Within the health care industry, there is a nearly universal belief that malpractice litigation has long since surpassed sensible levels and that major tort reform is overdue’. In conjunction to this, the emergence of current awareness regarding hospital cleanliness has raised many concerns especially in the area of tort law. A tort is a civil wrong under civil law while crime is taken under the criminal law. Claims for damages in tort are archived in civil courts and after the entry into force of the Consumer Protection Act, 1986 consumer right also. Criminal complaints are submitted in accordance with the relevant provisions of the Indian Penal Code, 1860 derived from negligence. Ratanlal and Dhirajlal $^{50}$ (2002), Law of Torts in India. It defines contributory negligence towards Indian law. Law of Medical Negligence and Compensation Calcutta; Eastern Law House, in this publication mention that negligent doctors are accountable for their negligence towards their duty.

6. **The Law of Contract, 1872**: The book written by R. K. Bangia $^{51}$ give information about relationship between the hospital and the patient is one of a contractual nature. The patient has the right to sue for his doctor simultaneously in tort and contract, although not in a strictly defined contract with specific written terms of the agreement for medical.

7. **The Indian Medical Council Regulations $^{52}$, 2002** states that “Every physician should as far as possible, prescribe drugs name with generic names and he/she ensure that there is a rational prescription and use of drugs. The Drug and Therapeutics Bulletin recently systematically reviewed the value of this treatment and concluded; “the British Guideline on the management of Asthma, published jointly by the British Thoracic Society and the Scottish Intercollegiate Guideline Network suggests that a single intravenous dose of magnesium sulphate should be used for the treatment of patients with acute severe asthma. However, the

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$^{50}$ Indian Penal Code derived from negligence. Ratanlal and Dhirajlal published at LexisNexix


$^{52}$ The Indian Medical Council (Professional Conduct, Etiquette and ethics) Regulations $^{52}$, 2002
available data are weak and conflicting and do not justify this unlicensed use of the drug.

8. **Medical Law and Ethics** - In this book author Jonathan Herring\(^53\) gives an idea about how medical law is going under massive change and also he works on how significantly society attitude are changing towards health, health services and the medical profession is changing.

9. **Medical Negligence and the Law in India** - In this book author Tapas Kumar Koley\(^54\) discussed about the duties and responsibility of medical professional and also discussed the rights of patient in case he suffers any loss due medical negligence whether civil or criminal.

**1.7.2 Articles and Journals:**

Health is considered to be man’s most valuable asset since all his activities depends on the state of his health. Health has been defined by the World Health Organization as a state of complete physical, mental and social well being and not merely absence or infirmity. Disease implies absence of ease and comfort. Doctors are considered asvisible gods. They give life to the persons who are suffering from various diseases and injuries. They are the trustworthy persons and the patient who approaching a doctor with an ailment thinks that he is the right and capable person to cure him. They approach him with that confidence. At the same time, there is a duty on the part of the doctor to materialize such obligation with proper care.

The research is conducted though various sources which mention hereinafter. UN National Library of Medicine (2006), Journal no. 32, it states that any doctor not fulfilling the standard and quality of care in the appropriate treatment that are set out in these clinical guidelines, will have this taken into account if for any reason consideration of their performance in this clinical areas is undertaken. Department of Health has directed all the registered medical practitioners to prescribe drugs with generic names as far as possible.

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\(^{54}\) Tapas Kumar Koley, *Medical Negligence and the Law in India* (Oxford University Press, New Delhi 1\(^{st}\) edn. 2010)
Singh Shobha (2004) Consumer redress of medical negligence in India: A Critical analysis, Allahabad Law Journal. The research is carried out that how patient get redressal very soon and doctors and hospitals are must be answerable for their conduct.

Satyamev Jayate "every life is precious - medical malpractice in India" episode was an important one to bring awareness towards the medical negligence in the society. This episode encouraged to do deep research for getting better results in my thesis.

1.7.3 **Reports:**

In order to understand the medical negligence laws, researchers have to understand the origin and development of these laws and the efforts made for the better implementation of these laws. Just after the independence, the Government of India has correctly examined the examined the problems and challenges for the health sector and it tried to make laws for the health care sector.

The committees constituted on for above said purpose were the health Survey and Development Committee, 1946 (Bhore Committee), Sokhey Committee, Mudaliar Committee, Mukherjee Committee, Chadha Committee, Committee Jungalwalla, Kartar Singh Committee; Mehta, Bajaj Committee among the other. The last time a number of Committees are the Mashelkar Committee and the National Commission for the macro-economy and health. The committees are under the leadership of leading experts in the field of public health, who have studied in in-depth and overarching recommendations for various aspects of health care in India.

The reports and recommendations of above said committees have also been taken into consideration while completion of this thesis.

**Vishakha Gupta, “Negligence as Mens Rea”**

— This paper attempts to discuss the offence of criminal negligence in the context of Indian criminal system. Starting with the basics of negligence, which is both a civil and criminal wrong, the paper goes on to distinguish between the ordinary and gross negligence, as only gross negligence is

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55 IJLSS p 50-60, Vil. 1 (10 September, 2014 Available at: https://ijlss.files.wordpress.com/2014/09/pdf6_vishaljkha-gupta.pdf (last visited January 14, 2016)
punishable under criminal law. A detailed discussion of criminal negligence as is shaped under the Indian Penal Code is followed by the difference between recklessness and negligence.

**Dr. Mukesh Yadav, “Recent Scenario of Criminal Negligence in India, Doctor, Community & Apex Court”** – This paper deals with recent scenario of “Criminal Negligence in India, its impact on medical fraternity, law-enforcing agencies and in large on community and applicability of Supreme Court Guidelines of 2005 for registration of cases under section 304-A against doctors in case of death of patient during treatment.

There are various judgments like Jacob Mathew v. State of Punjab and Another, Kurban Hussein Mohamedalli Rangawala v. State of Maharashtra, Poonam Verma v. Ashwin Patel, are very relevant for the research. Some foreign judgments like Bolam v Friern Hospital Management Committee and Bolitho v. City and Hackney Health Authority are also relevant to see the foreign view on this research.

**The Law Commission of India Report**- The Law Commission of India in 42nd report on the basis of a strong demand for the increase in punishment for offence under section 304-A recommended for enhancement of the sentence of imprisonment up to five years. But it was not implemented in order to make the law deterrent.

**Prof. (Dr.) Subhash Chandra Gupta and Shikha Dimri, “Remedies for the Victims of Medical Negligence: Responsibilities in Criminal Law”** – This paper seeks to ascertain the specific considerations upon which the criminal liability for medical negligence is generally based. The paper also attempts to qualitatively figure out the distinctions between civil and criminal liability for medical negligence. For this the basic

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56 *JIAFM*, p 252-257, 2005 C27 (4) Available at http://medind.nic.in/jal/05/14/jal05i4p252.pdf (last visited January 19, 2016)
58 (1965) 2 SCR 622
60 [1957] 2 WLR 582, 586
61 (1974) 4 All ER 771 (HL)
62 Law Commission of India, 42nd Report on Indian Penal Code, 1860 (June, 1971), “16.27, After taking into account our proposal to fix maximum punishment for culpable homicide not amounting to murder at ten years, we recommend that the maximum punishment for causing death by negligence may be half that period, namely, five years”.
principles of the law of negligence are used and the relevant pronouncements of courts are analyzed. The relevant criminal law provisions are also referred and analyzed.

1.7.4 Case Laws:
In the case of medical negligence, the judges find it very difficult to decide the case as they are not specialists in this field and they have to rely on the reports of the experts. Despite the efforts of the legislature to take certain laws which in one way or another can provide a framework for taking a leap, and also be interpreted by the judiciary for as many decades, has not been finally settled what should be the method used for making decision in the case of medical negligence.

Public Interest Litigation (PIL): Each person can directly approach the Court or the Supreme Court by filing a PIL, if all complaints received concern the public are not properly adjusted. PILs are usually used when public health programs are not properly implemented. Some of the most prominent judgments in the area of health issues were a consequence of the Public interest litigations.

To cite an example, a Public Interest Litigation was filed in August, 2008 by Dr Kunal Saha at the Delhi High Court against the National AIDS Control Organization (NACO) for their devious role with sub-standard HIV kits that were used in different Indian hospitals/blood banks during the second national AIDS control project between 1999 and 2006. The court issued notices after hearing the public interest litigation, seeking a CBI investigation of the defective HIV kits being used, which were potentially endangering transmission of the deadly AIDS virus to innocent patients through contaminated blood transfusion.

1. V. Kishan Rao v. Nikhil Super Specialty Hospital and Anothers. In the opinion of the Court, before forming an opinion, an expert opinion is required, the Forum under the Act must come to the conclusion that the case is complicated enough, to the opinion of an expert or that the situation was not so much so that it cannot be resolved by the members of the forum without the help of expert opinion. This court makes it clear that in these matters can no mechanical approach followed by this Forum. Each case will be assessed on its own facts. If a decision is made that

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64 *Dr. Balram Prasad and others v Dr. Kunal Saha and another* (2014) 1 SCC 384.
in all cases medical negligence must be shown on the basis of the expert opinion, in this case the effectiveness of the remedy, in the framework of the law are put under unnecessary strain and, in many cases, such a solution would be a mistake of this Court made it clear, however, that before the consumer forum, if one of the parties wants to experts to provide the members of the Forum, your spirit through the application to the facts and circumstances of the case and of the materials on record, you can provide this evidence to the parties, if it would be appropriate to do so in the facts.

2. *Indian Medical Association v. V. P. Shantha and Others*\(^6^6\) According to the Section 2 (1) (o) of the Consumer Protection Act, 1986, the services provided by doctors and hospitals come under the term “Service”. All types of services of doctor, except when these services are rendered free of charge to all of the personal service and under contract come within the concept of service in the context of the law. A contract of personal service cannot be assumed, in the absence of the relationship of master and servant and service of the hospitals and doctors it services free of cost for all not in the scope of the law. The payment of the fees token will not alter the nature of the benefits of such hospitals, the services of non-governmental hospitals, where the fees are charged to use services in the Act. Hospital, where charges are made, the people who are in a position to pay for a level of service which is within the scope of the law notwithstanding free services to persons who are not in the position to pay services to two category fall under the Act. Law does not apply to public hospitals services are absolutely free of cost for everyone. But in public hospitals services are free of cost and also in the payment of the fee, in the framework of the law. Cases in which the payment of the cost of medical insurance benefits is paid on behalf of the insured patients do not change type of service use by people to free service. Also the use of relatives of those services and charges of this service the employer pays as part of the conditions for the service is not such a service as a free service.

3. *Jacob Mathew v. state of Punjab and Another*.\(^6^7\) Negligence by act or omission,
the breach of an obligation to do something that a reasonable person guided by these considerations, the normally controls the behavior of the human affairs would do, or do something, which a prudent and reasonable person would not. Negligence in the context of the medical profession necessarily for treatment with a difference. To determine recklessly or negligence on the part of a professional, especially a doctor, additional considerations apply. A case of professional negligence differs from one of the negligence. Simply, there is a lack of care, an error of judgment or an accident is not proof of the negligence of a medical professional. As long as a doctor follows a practice acceptable to the medical profession of this day, it is not liable for negligence only because a better alternative course or method of treatment was also present or simply because a more qualified doctor was not selected, to follow, or resort, practices or procedures, the accused followed. When it comes to the failure of precautions, what to see, whether these arrangements have been made, the common experience of men has found to be sufficient; a failure to use specific or exceptional precautions, which may prevent the special is done, the standard cannot be assessed for the alleged negligence. So also, the standard of care, while the assessment of the practice as adopted, it is assessed on the basis of the available knowledge at the time of the incident, and not on the date of the test. Similarly, if the charge of negligence arises from the failure to use some special equipment, the load would fail if the equipment was not available to the general public at this time (that is to say, the time of the incident), in which it is proposed that it should have been used.

4. *State of Punjab v. Shiv Ram and Others.* Nourse L J said: "Of all the sciences medicine is one of the least accurate. From my point of view, a doctor will not objectively consider as a guarantee for the success of an operation or treatment, unless he says so much in clear and unequivocal terms."

Therefore, we are clearly of the opinion that, just because a woman under a sterilization Operation became pregnant and delivered a child, the surgeon or his employer not liable for damages due to adverse pregnancy or unwanted child. The

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claim in tort can be maintained only in the case of negligence of the surgeon in the conduct of the operation. The proof of the negligence must meet Bolam test\(^69\). So also, the surgeon would not be liable, in the contract, unless the plaintiff claims and proves that the surgeon had assured us 100% exclusion of a pregnancy after the operation and was only on the basis of such an assurance that the applicant be persuaded, operates. As already stated in the various decisions we have to hereinabove, usually a surgeon does not offer such guarantee.

At present, it is very easy for a doctor to set up a private practice anywhere in the country and start offering his services. There are no checks or balances on the quality of his education or experience and once he receives his medical qualification, there is no intervention from the government or any other agency thereafter to benchmark his services or monitor the quality of his infrastructure.

This becomes the starting point of medical negligence at an initial level in the private sector. At a larger level, lies the unchecked growth of private clinics and mini hospitals that operate with minimal attention to health or hygiene, and to pre and post hospitalization care. In most such places, post-surgical infections and post-surgical complications are frequent, but there is very little recourse of treatment for the suffering patient and their family members.

The situation is no better in government-run hospitals where the overall maintenance and hygiene resembles a railway station toilet. In most of these hospitals, very little attention is given or investment is made to maintain facilities. As a result, the sheer presence of filth within the hospital premises becomes a breeding ground for primary and secondary infections of all kinds.

The situation is so bad that concepts like monitoring of pathogens in the air that enter through air conditioning ducts is unheard of in government-run hospitals and most of the smaller private hospitals. These are only now becoming standard practices is some of the larger private sector hospitals, but they are commercially out of reach for most of Indian population who cannot effort the huge expenses of medicine.

This adds to the overwhelming number of patients in each hospital which puts the attending doctor and support staff under severe work pressure. Under these

\(^{69}\) Bolam v Friern Hospital Management Committee [1957] 2 All ER 118.
circumstances, it is only natural that cases of medical negligence on part of the doctor or support staff occur.

However, the lack of infrastructure and shortage of medical staff is still no reason or justification for medical negligence. Very often, cases be heard where the doctor has left an instrument inside a patient body during surgery or cases where a patient has adversely reacted to a medication prescribed by a doctor, who would not have prescribed it to the patient in the first place, if he had properly probed the patient’s medical history. And when such cases of negligence do occur, where a patient loses his life or a limb, there is very little recourse to justice or compensation.

In our country, medical technology has advanced and the hospitals have evolved into modern, health providing business centers. A profession as distinguished from trade is based on high ethical standards. Medicine has its own ethical parameters and code of conduct. This profession is rendering a noble service to humanity and has public trust. Any person or professional who serve the public has to do its duty, not as a matter of contract, not in consideration of the fee, but as an organized public service. The principle of public service is a major component of all profession, and medical profession cannot be an exception to it.

It was believed that a man of medicine is a missionary and so he takes the oath of service to the suffering human beings, in return receiving subsistence and satisfaction. However, today like everything else in this society, Hippocrates’s noble profession stands as commercialized. A section of medical practitioners seems to be propelled by greed more than the desire to serve suffering humanity. There are very few doctors who have become causal and insensitive to their professional protocols. Thus, more medical negligence cases are reported in a day to day life.

Therefore, if there is any delinquency, culpability, deviancy, rashness or negligence on the part of a doctor while treating a patient, should the law allow him to use the benefit of alibi of this professional status? Any person who deals with public owes a duty of care. Thus the medical profession owes to the community a greater degree of care, more vigilance and higher responsibility in the course of service or practice. Thus, it would be unfair for a doctor to claim immunity from liability or even criminal action, if rashness, grave negligence and turpitude are made out against him.
In India, majority of citizen required medical care and treatment belong to low income groups and most of them are illiterate or semi-literate. They do not even understand the functions of various organs or the consequences of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission or a mere examination, is a common right. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctors experience or institution as acceptable and welcome as long as it is free or cheap; and whatever the doctor decides as being in their interest, it is usually accepted. They are a passive, ignorant folk uninvolved in treatment procedures.

The poor and needy face a hostile medical environment- inadequacy in the number of hospitals or beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy. Major poor patients with serious ailments have to wait for months for their turn even for diagnosis, and due to limited treatment facilities, many die even before their turn comes for treatment. What choice do these poor patients have? Any treatment of whatever degree is a boon or a favor of them. The stark reality is that for a vast majority in the country, the concept of informed consent or any form of consent, and choice in treatment has no meaning or relevance for their treatment to save the life of people who are really need of treatment but due to their financial position they are helpless to get the treatment.

On the other hand, we have doctors, hospitals, nursing home and clinics in the commercial sector. There is a general perception among the middle class public that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicine, and subject them to unwanted surgical procedures for financial gain. The public feel that many doctors who have spent a crore or more for becoming specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely commercial basis and not service motive, that such doctors and hospitals would advice extensive costly treatment procedures and surgeries, where conservative simple treatment may meet the need.
Every doctor wants to be a specialist\textsuperscript{70}. The proliferations of specialists and super specialists have exhausted many a patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide treatment. What used to be competent treatment by one general practitioner has now become multi-prolonged treatment by several specialists. When law steps in, to provide remedy for deficiency in service by medical practitioner, it gives rise to twin adverse effects. More and more private doctors and hospitals have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedure and test, to avoid any allegation of negligence, even though they might have already identified the ailment with reference to the symptoms and medical history with 90% certainty, by their knowledge and experience.

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in performance to another. He would be liable only where his conduct falls below that of the standards of a reasonably competent practitioner in his field.

So, in the situation of the judicial error in acquiring liability level, the negligence regime is relatively more sensitive on the level of care adopted by the injurer (doctor or hospital authorities) and the appropriate level of care. The strict liability, on the other hand does not suffer from such errors. But there are more ways of judicial error in terms of causality and assessment of the damage, i.e., the determination of whether an injury has been caused by medical care, or of the underlying disease and the extent of the damage.

The argument, whether negligence select Rule of strict liability in the area of medical liability continues to be a problem, despite the shortcomings in the legislation the courts have to complete stability and clarity by the creation of a rule of law, for an appropriate remedy.

1.8  RESEARCH METHODOLOGY:

Research methodology that has been chosen to answer research questions for the present study based on already defined research objectives. Various factors influence method that

\textsuperscript{70} doctors who have completed advanced education and clinical training in a specific area of medicine (their specialty area). Examples of medical specialists include the following: Addiction psychiatrist. Adolescent medicine specialist.
a researcher chooses for their study. These include researcher’s belief, nature of research problem, status of scientific research & theories, if there are any relevant to problem. When purpose of a research is to test a theory, or to identify or predict factors that would influence an outcome, then it is usually better to use a quantitative approach. Based on these findings, quantitative approach was chosen as preferred methodology for this study.

In pursuing the research on the topic “Critical Analysis of Various Indian Legislations for Medical Negligence”, concept of Doctrinal research with data analysis has been followed. The thesis is compiled with the help of a literary survey. The methodology of the research is the main analytical method with the support of the empirical and descriptive method. The nature of the study is to take a review of the existing literature on the topic and is also on the basis of empirical data collection. The thesis is to follow a certain scheme approach, where define it first, the topic, after which it would be possible. The researcher can immerse the research in the various aspects of the subject, while at the same time the critical analysis of the relevant aspects.

1.9 REASON TO STUDY AND RESEARCH:
Consciousness about medical negligence in India is rising. The lucky doctors of the past were treated like God and people revered and respected them. We witness today the fast pace of commercialization and globalization on all spheres of life and the medical profession is no exception to these phenomena. The medical profession has progressed to
new horizons, facing many ethical and legal challenges in the drill of the profession. The Doctor Patient relationship is changing swiftly and adversely. Commercialization of medical practice, ignorance towards medical ethics, zero tolerance and high expectation of patients, inclusion of health maintenance service within the scope of the Consumer Protection Act, 1986 has created a vicious circle which is manifesting as ever increasing incidents of litigation against physicians and hospitals. The doctor patient relationship is one of the most unique and privileged based on mutual trust and faith. But currently there is a large diminution in the doctor patient relationship. The main cause may be communication gap, commercialization of health help, setting up expectation from doctors or increased consumer awareness.

1.9.1 Poor Remedial System in Cases of Medical Negligence:
After V P Shantha’s\(^{71}\) case it was believed that by providing a remedy through consumer forums, availing damages for the injury caused, would become easier for the patients seeking remedy for the wrong done to them. It was seen that this will deter the caring doctors and would thus aid in bettering the general measures of wellness services in India. However, the current scenario presents a complete different picture. The numbers of medical negligence suits have grown up by several times in the final 10 years. Considering the objects of COPRA to provide speedy, less expensive, more accessible and simple remedy, it would be difficult to conclude that the act has failed in achieving its goals.

1.9.2 The Complex Claim Filing Procedure for Medical Negligence:
In every complaint of medical negligence the complainant is expected to finish in the forms of exhibits certain documents to establish a prima facie case. However the patients rarely have access to these medical documents and are generally not delivered to patients in time, especially in cases where something goes wrong on the pretext of confidentiality. Therefore, at this point it gets hard for the patients to establish their case and many lawsuits are dismissed summarily. The process that is followed afterwards is as complex and unnecessarily lengthy, requiring submission of evidence, examination, cross examination of witnesses and other formalities.

\(^{71}\) Indian Medical Association v V.P. Shanta & Ors, AIR 1996 SC 550.
Apart from these complexities, the trickiest part is proving the negligence of a doctor. The test applied in determining liability is the Bolam test, which apart from ‘reasonable care ‘standard also validates the ‘generally accepted practice’ argument. Further, there is very little scope of applicability of judicial mind and the direct bearing of this is that the law of medical negligence has not evolved and the principles applicable remain the same irrespective of the fact that medical negligence has progressed in leaps and bounds in this time.

Even the functioning of consumer courts has not been very commendable. This was admitted by the Supreme Court in *Dr. J.J Merchant v. Shrinath Chaturvedi*? where the PIL questioning the functioning of the consumer courts was filed and the Supreme Court commented that even after the enactment of the Consumer Protection Act, 1986, appropriate steps have not been taken by the government for ensuring that the National Commission or the State Forums can function properly. Also the consumer dispute redressal agencies have not been fast enough in disposing cases.

**1.9.3 Medical Negligence and Compensation**

Merely providing for compensation is not enough to deal with the issue of medical negligence. What is needed is a proper mechanism to check to determine the cases of medical Negligence. One cannot forget that the purpose of law is not just to punish a wrongful act and give remedy to the adversely affected party, but also to ensure that such deeds are not repeated again. A complete consumer care system should include steps for prevention of such incidents.

There is a lack of effective implementation of the act. The undecided cases have already crossed the statutory point of accumulation. The overall functioning of judicial and quasi judicial bodies can be concluded in one sentence, i.e. “Justice delayed is justice denied”. This indicates that the judicial system has not shown proper concern in cases of medical negligence filed under the Consumer Protection Act, 1986.

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? (2002) 6 SCC 635.
1.9.4 Applicability of Bolam Test in Medical Negligence Cases:

Since 1957, the Bolam test has been the benchmark to assess professional negligence. It is based on the direction of the panel of judges of a high court, McNair, J, in Bolam v Friern Hospital Management Committee.\(^{73}\)

'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. Putting it another way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.'\(^{74}\)

Subsequently the House of Lords approved this decision in a number of important cases as the basis of liability in medical negligence cases. But the Bolam test has been criticized as a state-of-the-art descriptive test based on what is actually exercised, whereas in negligence cases generally, the test is a normative test based on what should be acted. This has made it more difficult for plaintiffs to succeed in medical negligence cases and was commented on by the Pearson Commission who noted the difference between the successes of negligence claims generally (60%–80%) as opposed to medical negligence claims (30%–40%).\(^{75}\)

1.10 CONCLUSION:

The profession of healing the suffering has gained respect from all corners of the society since time immemorial. A physician, apart from being a healer, has been looked upon by the masses as a role model of grace personified, though of late this image has transformed to a mere service provider. This can partly be attributed to doctors themselves, owing to the increasing number of cases involving doctors engaging in unethical practices coming to light and, therefore, medical professionals have over the period lost the confidence of their patients and the society. In India, the health system currently operates in an environment of rapid social, economic and technical changes. These changes enhance the concern for the quality of health care. Hospital is an integral part of the health care system. Accreditation would be the most important approach to improving the quality of the services of the hospitals for provide the better treatment to the patient to save their life with less cost of medicines in India.

\(^{73}\) Bolam v Friern Hospital Management Committee [1957] 2 All ER 118.

\(^{74}\) Ibid

\(^{75}\) Sidaway v Bethlem Royal Hospital Governors [1985] 1 All ER 643.
It is the high time in India make effective legal machinery to prevent medical negligence by the doctors intentionally or under the title of negligence. They committed all these evil things as a racket or as single person for money and some other personal achievements. These manipulations can be controlled only through the hands of proper, effective and skilled legal machinery, otherwise the medical practitioners will create confidence and outstanding courage to do whatever they like as per their own decision seeking monetary benefit for themselves in spite to see the patient welfare. Medical practitioner, hospitals have been committing human right violation a daily basis with little or masses. They have assured “god like” disposition to do anything including depriving people of their basic right to health care. Hence there is a need for codified law with meaningful provisions for balancing the interest of medical practitioners, hospital authorities and patients effectively.

After giving brief description about the problem of medical negligence, the next chapter two of the research deals with historical prospective. In which firstly history of consumerism is discussed and origin of health care as a service industry is discussed.