Chapter Synopsis

Chapter – 4 : Legislative Provisions Regarding Medical Negligence in India

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Chapter 4

LEGISLATIVE PROVISIONS REGARDING MEDICAL NEGLIGENCE IN INDIA

In India, the right to health care and protection has been recognized since early times. India is a founder member of the United Nations, and has ratified various international Conventions promising to secure Health Care rights of Individuals in the society. The Constitution of India, which is the Supreme Law of land, does not expressly deal with right to principles of State Policy have a direct bearing on health care. But Preamble, Fundamental Rights and Directive Principles of State Policy have a direct bearing on health care of Indian citizens. Apart from this, number of laws has been enacted to protect the health interests of the people.

4.1 CONSTITUTIONAL LAW OF INDIA:

Indian constitution is not merely a legal but also a social document. This social document embodies the faith and aspiration of the people for which they relentlessly fought during the freedom movement. The Preamble, Fundamental Rights and Directive Principles were enacted into Constitution to make these aspirants come true.178

There is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. There was a need to reconsider the parameters laid down in Bolam test as a guide to decide cases on medical negligence. In England, Bolam test is now considered merely a rule of practice or of evidence. It is not a rule of law. This is all the more true in India, especially in view of Article 21 of our Constitution which encompasses within its guarantee, a right to medical treatment and medical care. The Supreme Court in several cases has seen that the right to life as enshrined in Article 21179 of the Indian constitution includes the right to health and medical treatment. The right to life would have no meaning unless medical care is insured for a sick. Article 19 (1) provides six fundamental freedoms of all citizens

179 No one may be deprived of his life or personal liberty except according to procedure established by law.
who can only be limited for reasons referred to in points (2) to (6) in Article 19 of the Constitution. These rights can be limited if a person has a healthy life to live with dignity and free from any form of disease or exploitation which further ensured by the mandate of Article 21 of the Constitution. When an infringement of this right arises, the caregiver can be liable for negligence.

The preamble of the Constitution of India secure to all its citizen justice – social and economic. The Preamble has been amplified and elaborated in the directive principles of state policy.

4.1.1 Fundamental Rights:
The Constitution guarantee the fundamental rights which are certain express commands to the Executive and the legislative wings of the state not to do certain things in the governance of the country and in law-making. The following fundamental rights have a bearing on health care.

4.1.2 Article 14 : Equality before law:
This article guarantees equality, i.e. all the Citizens of India should have equal access to reasonable health care services free from medical negligence.

4.1.3 Article 21 : Right to Life and Personal Liberty:
This article guarantees fundamental right to life and personal liberty which includes right to live with dignity and this article casts an obligation on state to secure health to its citizen. The courts in the process of judicial interpretation have explained the scope of Article 21 to bring within its fold the right to health care the Supreme Court has observed in a case that “A healthy body is the very foundation for all human activities. in a welfare state, therefore, creation and the sustaining of conditions congenial to good health, i.e. Right to health.” In another case, the Supreme Court of India, while examining the issue of the Constitutional right to health care under Articles 21, 41 and 47 of the Constitution of India observed that “the right of a citizen to live under Article 21 casts an

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180 The Preamble reads: WE THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SEVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC, REPUBLIC and to secure to all its citizens; JUSTICE, Social, Economic and Political.
181 The Article read: Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
182 The Article reads: Protection of Life and Personal Liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law.
obligation on the state which is reinforced under Article 47; it is for the state to secure health of its citizens as primary duty. No doubt, the government is rendering this obligation by opening government hospitals and health camps, but to the meaningful, they must be within the reach of its people and have sufficient health facilities with sufficient liquid quality.\textsuperscript{184}

In another leading case,\textsuperscript{185} the Supreme Court of India, while widening the scope of Article 21 and government’s responsibility to provide medical aid to every person in the country held that in the welfare state, the primary duty of the government is to secure the welfare of the people. Providing adequate facilities for the people is an obligation undertaken by the government in a welfare state. Article 21 imposes an obligation on the state to safeguard the right of life of every person. Preservation of human life is thus of paramount importance. Failure on the part of a government hospital to provide timely medical treatment, results in violation of his right to life guaranteed under Article 21.\textsuperscript{186}

\textbf{4.1.4 Directive Principles of State Policy and Health :}

Article 38 of Indian Constitution imposes liability on State that states will secure a social order for the promotion of welfare of the people but without public health we cannot achieve it. It means without public health welfare of people is impossible. Article 39(e) related with workers to protect their health. Article 41 imposed duty on State to public assistance basically for those who are sick and disable. Article 42 makes provision to protect the health of infant and mother by maternity benefit.

The obligation of the State to ensure the creation and preservation of conditions congenial to good health is cast by the Constitutional directives contained in Articles 39 (e)\textsuperscript{187}, 39 (f)\textsuperscript{188}, 42\textsuperscript{189} and 47\textsuperscript{190} in part IV of the Constitution of India. The its policy with

\begin{itemize}
\item \textsuperscript{184} State of Punjab v. Ram Lubhaya Baga, (1998)4 SCC 117.
\item \textsuperscript{185} Paschim banga Khet Mazdoor Samity and Ors. v. State of West Bengal and anor (1996) 4 SCC 37.
\item \textsuperscript{186} Ibid.
\item \textsuperscript{187} The protection of the health and the strength of workers, men and women, and the tender age of children should not be abused and that citizens are not forced by economic necessity to avocations unsuitable for their age or strength
\item \textsuperscript{188} That children are given opportunities and develop in a healthy manner and in conditions of freedom and dignity and that youth and young people are protected against exploitation and against moral and material abandonment
\item \textsuperscript{189} The State provides for the possibility to confirm of fair and humane conditions work and maternity relief
\end{itemize}
regard to the health and strength of the workers, both men and women, and the younger age of the children are not being abused and that citizens are not forced by economic necessity to avocations unsuitable for their age or strength (Article 39 (e)) and that children are given opportunities and facilities to develop in a healthy way and in conditions of freedom and dignity and that youth and young people are protected against exploitation and against moral and material abandonment. (Article 39 (f)), the State is obliged to ensure that fair and humane conditions of work and maternity benefits (Article 42). It is the primary task of the State to try the increase of the level of the power supply and the living standards of the population and the improvement of public health and on the prohibition of the consumption, except for medicinal use of intoxicating drinks and drugs which are harmful to health. (Article 47). Protection and improvement of the environment is also one of the main tasks of the State. Article 48 (A). The legislation is in heading 6 of the list in the Seventh Schedule of the Constitution, which is authorized to laws relating to public health and hygiene, hospitals and health centers. Both the Centre and the States have power to legislate in the matters of social security and social insurance, medical professions, and, prevention of the extension from, one State to another of infections or contagious diseases or pests affecting man, animals or plants, by entries 23, 26 and 29 respectively contained in the concurrent list of the Seventh Schedule

In the India the Directive Principles of State Policy under the Article 47 considers it the primary duty of the state to improve public health, securing of justice, human condition of works, extension of sickness, old age, disablement and maternity benefits and also contemplated. Further, State’s duty includes prohibition of consumption of intoxicating drinking and drugs are injurious to health. Article 48A ensures that State shall Endeavour to protect and impose the pollution free environment for good health.

190 The status should be the increase of the level of the power supply and the standard of living of the people and the improvement of the public health under its primary tasks and, in particular, the State is trying to ban on the consumption, except for medicinal use of intoxicating drinks and drugs which are harmful to health.
Article 47 makes improvement of public health a primary duty of State. Hence, the court should enforce this duty against a defaulting authority on pain of penalty prescribe by law, regardless of the financial resources of such authority\textsuperscript{191}.

Under Article 47, the State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling pollution inasmuch as our materialistic resources are limited and the claimants are many\textsuperscript{192}.

Some other provisions relating to health fall in Directive Principles of State Policy. The State shall in particular, direct its policy towards securing health of workers (Article 39 e). State organised village panchayats and gave such powers and authority for to function as units of self-government (Article 40). This Directive Principle has now been translated into action through the 73\textsuperscript{rd} Amendment Act 1992 whereby part IX of the constitution titled “The Panchayats” was inserted. The Panchayat system has significant implications for the health sector. There will be discussed in relation to relevant Articles 243-243A to 243O contained in Part IX.

Article 41 provides right to assistance in case of sickness and disablement. It deals with “The state shall within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement and in other cases of undeserved want”. Their implications in relation to health are obvious. Article 42 give the power to State for make provision for securing just and humane conditions of work and for maternity relief and for the protection of environment same as given by Article 48A and same obligation impose to Indian citizen by Article 51A.(g).

\textbf{4.1.5 Constitutional Remedies:}

As noted above, right to health is an integral part of right to life and personal liberty guaranteed under Article 21 of the constitution and this has been categorically upheld by the apex court and various high courts in numerous cases. The remedies for the enforcement of this fundamental right has been provided under Article 32 and 226 through which the Supreme Court or the high court can be approached respectively for

\textsuperscript{191} Ratlam Municipal Council v. Vardichand, AIR 1980 SC 1622
\textsuperscript{192} Javed v. State of Haryana, AIR 2003 SC 3057
issuing appropriate writs which can remedy its violation. The aggrieved party can also claim compensation for infringement of their fundamental right to health. Award of compensation for the breach of Article 21 of the Constitution is not only constitutional power but also to assure the citizens that they live under a legal system wherein their rights and interests are protected and preserved. The courts are empowered to grant compensatory relief if the state fails to preserve the life or liberty of the citizen.193 The award of compensation for the breach of Article 21 of the Constitution is not only constitutional power, but also to assure the citizens that they live under a legal system wherein their rights and interests are protected and preserved. The courts have the obligation to protect the rights of citizens, since the courts and laws are made for the people. Therefore, they are expected to respond to their aspirations194.

The right to life is guaranteed in accordance with the provisions of Article 21 which states that 'no one shall be denied his personal liberty except according to procedure established by law". It gives the government to interfere with the pleasure of the life and freedom under the guise of procedure established by law.195 Article 21 a new dimension in Maneka Gandhi v. Union of India196 as by its interpretation, the Supreme Court has changed the scenario of calls for procedural rights in a given that substantive rights. Now, the state is mandated to a person all rights necessary for the exercise of the right to life in its different views.197 The right to health and access to medical treatment is included in the abundance of human rights within the scope of Article 21. The philosophy of the right to life as enshrined in Article 21198 increases the scope for human personality and health offers a wealth of a person to earn his livelihood, support the dignity of his person and life with dignity and equality.

193 Rudul Shah v State of Bihar (AIR 1983 SC 1086) in which the Supreme Court for the first time set up an important landmark in Indian Human Rights Jurisprudence by articulating compensatory relief for infraction of Article 21. Since then the court started awarding monetary compensation as and when the conscience of the court was shocked.
195 As explained in AK Gopalan Usa Madras AIR 1950 SC 27.
4.5 THE INDIAN PENAL CODE, 1860:

The general Penal law of land does not create any distinct substantive offence in regard to medical negligence. But analysis of Indian penal code, 1860 shows that certain Section under Chapter XIV and few sections under Chapter XVI deals with the cases of medical negligence. Chapter XIV of Indian Penal code deals with “of offences affecting the public Health Safety, Convenience, Decency and Morals” contains sections 269, 270, 274, 275, 276 and 284 which cover cases of medical negligence.

If any medical practitioner unlawfully or negligently does any act which is, and which he knows or likely to spread disease which is dangerous to life shall be punished. If any medical professional malignantly spread dangerous disease then he shall be punished under section 270 of Indian Penal Code, 1860, Section 270 provides, punishment, i.e. imprisonment of either description for a term which extend to two years, with five and both.

If any medical practitioner whether practicing Ayurvedic, Unani, Siddha, Homoeopathic and Allopathic system of medicine adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, he shall be punished under section 274 of the Indian Penal Code, 1860. In Juggankhan v State of Madhya Pradesh where a registered homeopathy practitioner administered 24 drops of stramonium and a leaf of dhatura (which are known poisonous substances) on a patient to cure guinea worms. The patient for this reason died. It was brought on record of the court that in no system of medicine except perhaps in the

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199 Section 269 reads: Negligent act likely to spread infection of disease dangerous to life.—Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

200 The Section reads: Malignant act likely to spread infection of disease dangerous to life.—Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

201 The Section reads: Adulteration of drugs.—Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

202 AIR 1965 Sc 831; 1965 (1) Cr. L. J. 763
ayurvedic system, the dhatura leaf is given as cure for guinea worms. The Supreme Court held that it was rash and negligent act to prescribe poisonous medicines without studying their probable effects. It was true that care should be taken before imputing criminal negligence to a professional man acting in the course of his profession, but even taking this care, there is no doubt that that the appellant was guilty of rash and negligent and liable to be convicted under section 304-A of IPC.

Sale of such adulterated drugs shall be punished with a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.\textsuperscript{203}

Any medical practitioner who rashly or negligently causes hurt or injury to any person with any poisonous substance shall be punished under section 284 of the Indian Penal Code, 1860.\textsuperscript{204}

Similarly, if any medical practitioner does any rash or negligent act with any machinery which endangers human life shall be punished under section 287 of the Indian Penal Code, 1860.\textsuperscript{205} Chapter XVI of the Indian Penal Code, 1860 deals with offence affecting life specifically section 304 A of the Indian Penal Code. This section deals with the cases of death caused by negligence which also include the death caused by the negligent act of medical practitioner such as medical assistants, nurses and doctors, etc. section 304 A prescribe the punishment for imprisonment of either description for a term which may extend to two years, or with fine, or with both.\textsuperscript{206}

\begin{footnotesize}
\textsuperscript{203} Section 274, the Indian Penal code, 1860.
\textsuperscript{204} The Section reads: **Negligent conduct with respect to poisonous substance.**—Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

\textsuperscript{205} The Section Reads: **Negligent conduct with respect to machinery.**—Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

\textsuperscript{206} The Section Reads: Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both
\end{footnotesize}
In *Suresh Gupta v Government of NCT of Delhi*\(^\text{207}\), the accused (plastic surgeon) charged for offences under section 80, 86 and 304-A of IPC for causing death of his patient who was operated by him for removing his nasal deformity. Medical experts opined that there was negligence on the part of accused in “not putting a cuffed endotracheal tube of proper size” as to prevent aspiration of blood from the wound in the respiratory passage. The question to be decided was whether the act attributed to the doctor can be described to be so reckless or grossly negligent as to make him criminally liable? Quashing the criminal proceedings pending against the doctor, the Supreme Court laid down clearly that high degree of negligence is necessary to prove the charge of criminal negligence under section 304-A of IPC. For fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as “gross negligence” or recklessness”. It is not merely lack of necessary care, attention and skill. When a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as ‘criminal’. It can be termed ‘criminal’ only when the medical man exhibits a gross lack of competence or inaction and wanton indifference to his patient’s safety and which found to have arisen from gross ignorance or gross negligence. Where a patient’s death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable.

For all accidents or death to medical treatment, medical man not be criminally liable, but to condemn a doctor, the prosecution has to come up with a high degree of negligence of the doctor. Only lack of good care, precaution and attention or negligence can create legal liability but not criminal. Finally, a decision in favor of doctor, to protect him against criminal liability the court held that there is no negligence or gross negligence is drawn up against the doctor for him to force the test for violations of Section 304-A of the IPC\(^\text{208}\). The approach of the Supreme Court it is clear that strict medical evidence to the debt of the doctor that it would do injustice to the health. The court considered that if

\(^\text{207}\) AIR 2004 Sc 4091 (DB)

\(^\text{208}\) The court relied on the decision of the House of Lords in *R. v. Adomako* (1994) 3 All ER 79 Para 6 20, in which it was noted " so a doctor not be held criminally responsible for the patient death unless his negligence or incompetence has shown that lack of respect for the life and the safety of the patient as a crime against the State."
criminal liability is imposed for the death of a patient as a result of a wrong treatment, then the doctors would be more concerned about their own safety than the treatment of their patients, and this will ultimately lead to shake the mutual trust between physician and patient. However, the court has not, however, answered the question: why the court should the safety of doctors? Protection by the doctors is, it is possible to order the mutual relationship of the doctor and the patient? The Supreme Court approach seems to be in favor of the suspect surgeon.

Any registered medical practitioner causing negligent abortion of a woman shall be prosecuted and punished under sections 312 to 315 of the Indian Penal Code, 1860. Any medical practitioner who negligently by his act causes death of any person as prosecuted under section 304A, i.e. causing death by negligence. But if his act only causes hurt or grievous hurt then such medical practitioner is prosecuted under sections 323 and 325 respectively. If any negligent act of medical practitioner causes hurt to the patient then he shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one thousand rupees, or

209 Section 312 of the Indian Penal Code, 1860. Causing miscarriage. —Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 313 of the Indian Penal Code, 1860. Causing miscarriage without woman’s consent. —Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 314 of the Indian Penal Code, 1860. Death caused by act done with intent to cause miscarriage. —Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; If act done without woman’s consent. —And if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

Section 315 of the Indian Penal Code, 1860. Act done with intent to prevent child being born alive or to cause it to die after birth. —Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.
with both. Similarly, if any negligent act of medical practitioner causes grievous hurt to the patient. The following kinds of hurt only are designed as “grievous”:

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<th>Emasculation</th>
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<td>Second</td>
<td>Permanent privation of the sight of either eye.</td>
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<tr>
<td>Third</td>
<td>Permanent privation of the hearing of either ear.</td>
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<tr>
<td>Fourth</td>
<td>Privation of any member of joint.</td>
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<tr>
<td>Fifth</td>
<td>Destruction or permanent imparting of the powers of the powers of any member or joint.</td>
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<tr>
<td>Sixth</td>
<td>Permanent disfiguration of the head or face.</td>
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<tr>
<td>Seventh</td>
<td>Fracture or dislocation of a bone or both.</td>
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If any medical practitioner causes grievous hurt then he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence on the part of the civil law does not necessarily negligence in the criminal law? In the case of negligence of an offense, the element of __mens rea__ must be displayed.

In the criminal law the extent of the damage is not very large, but the amount of and the extent of failure are always large and is used for the determination of liability. The __mens rea__ is the essential ingredient of the crime and cannot be disregarded if the load a criminal court consists of criminal negligence. There must be an intention to do for a person may be guilty of crime.

**4.3 THE CONTRACT ACT, 1872:**

Liability of health professionals under the Contract Act, 1872 mainly depends upon the express and implied terms agreed upon by the patient or his representatives and the doctor or hospital consent for treatment on payment of fees on the part of a patient can be treated as an implied contract with the doctor, who by undertaking treatment on acceptance of fees, promises to exercise proper care and skill. If any medical practitioner does not undergo proper care and act negligently then his contract get

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210 Section 323, the Indian Penal code, 1860.
211 Section 320, the Indian Penal code, 1860.
212 Section 325, the Indian Penal code, 1860.
213 Prof. (Ms.) S. K. verma, Legal Framework for Health Care in India, 153 (2002)
breached and he is liable to pay compensation to the patient for breach of contract under section 74 of the Contract Act, 1872.

Actions of medical malpractice are especially actions on the basis of the tort of negligence. This is because for the majority of patients there is a weak factual basis in the contract. Most patients are treated in the state hospitals and as such there is no direct agreement between the government hospital patient and his attending physician. Whereas, when a patient approaches a private health professional for medical care, the relationship between the hospital and the patient is one of a contractual nature. The private 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. It has been suggested that a contract between the patient and his doctor even when the medical care is made use of the state hospital. This aspect was sufficient attention for the support of a contract between the hospital and the patient. In theory, this statement should apply for patients under treatment in the hospitals, but was rejected in U. K and India.

4.3.1 Problem areas in Medical Negligence Cases:

i. What is the interpretation of the contract in the context of the right of the doctor/hospital?

ii. Is it possible for a professional to a contractual guarantee that he will achieve a particular result?

iii. A health professional may file a civil suit for recovery of costs of medical care?

iv. What are the damages or remedies for breach of contractual obligation?

v. His story under contract accessible for patients?

4.3.2 Reasonable Care and Skill:

One of the conditions of the contract expressly or tacitly to the service is the service is carried out with reasonable care and skill. The health professional who contracts to perform an operation undertakes to carry out the operation with reasonable care; it does not guarantee that at any price will prove to be a success. Law implies no warranty that

the professional will lead to a desired result, but it is a word that he reasonable care and skill.217

**4.3.3 Damages and Award of Compensation:**
Once the plaintiff has shown that violation of law and has shown that damage is the result of the battle, the court will continue with the treatment of the award of damages. However, not every form of loss and costs may be recovered. If the court concludes that the risk of damage that has occurred is too vague and could not reasonably expect, this injury is not eligible. The estimate of the damage is based on the principles and methods of calculation grown with the laws of the contract or tort. There is, however, an essential difference in the principles applied in the assessment of damages in respect of tort or contractual liability.

**4.3.4 Purpose of Damages:**
The basic purpose is awarding compensation is to put the plaintiff in the position that he would have been if the tort or breach had not been occurred218. He is entitled to be compensated for all of his losses in terms of payment of money. In contract the plaintiff is entitled to be restored to the position that he would have been in had the contract been performed. Granting of compensation for personal injury upon the establishment of liability of the defendant-medical practitioner/hospital, is neither punishment or nor reward. The principle or rationale on which damages are assessed is that they should not be treated as punishment for a wrong inflicted. It is held by the court of appeal in UK that the object of granting damages in tort or in contract is to indemnify the plaintiff so far as personal injury which he had suffered on account of negligence of the defendant219. Nonetheless, assessing the financial value of loss is ultimately arbitrary and indeed no amount of money can restore a lost limb or take away the plaintiff’s experience of pain and suffering.

**4.3.5 Types of damages:**
In a case for personal injury, damage can be divided in two categories:

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217 In Siddaway v. The Popular belief in d Royal Hospital controls (1985) AC 811, 904, Lord Temple Man has said that: the relationship between doctor and patient is contractual origin, the physician performing services for account implied contracts act at all times the importance of the patient.


i) Special damage and
ii) General damages

If incorrect, or unliquidated losses are offset by payment of damages what is known as 'general.' This includes the non-pecuniary losses are compensated under the heads of pain and suffering\(^{220}\), loss joy, future losses of income or profits\(^{221}\) and future costs such as care and accommodation. Whereas, "Special damage" that losses and costs which are actually made and which can be calculated with reasonable accuracy by the date of the process, it usually consists of specific losses of income, such as a loss of income or profits which arise as a result of the claimant cannot work because of the damage\(^{222}\) and also specific costs which arise as a result of the unlawful act or fight, such as medical expenses\(^{223}\), travel costs, the cost of care and attention\(^{224}\). It has been suggested that the classification of compensation is important to pray, and procedural purposes and for the purposes of determining the appropriate interest rate only.

### 4.3.6 Remedies for Breach of Confidence: Injunction:

Next to damages, the exemption from the prohibition may also be granted in cases where the doctor makes an unauthorized disclosure of confidential information. It is not relevant or irrelevant in order to examine the relationship between the two parties is in contract or tort (i.e. whether the plaintiff a private patient or the government hospital patient), what is needed is that the person who has the confidential data should be required to say that confidence. This solution is available in a situation where the plaintiff has reason to believe that the doctor about a disclosure of confidential information. He is entitled to an interim claim submission. In the case of the breach of trust has already taken place, granting of command not pointless\(^{225}\). Because the most obvious reason for the acquisition of an injunction is to prevent a breach of trust.

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\(^{220}\) Ballantine v Newalls Company Limited (2001) 1 KIM 25, it was considered that a person who is suffering fears can cost. Also a person who physically or mentally incapacitated for work by its injury is entitled to reimbursement of the suffering (H West usa Shephard (1964) AC 326

\(^{221}\) Lively nutbrown v Sheffield Health in advance (1993) 4 Med. LR 187, the court has damaged on the basis of the age and the future prospects of the plaintiff.

\(^{222}\) British Transport Commission v Gourley (1956) A. C. 185, Was given that the injured party has the right to compensation for the loss of wages and compensation as a result of the incident.

\(^{223}\) Slitter v Vauxhall Motors Limited (1971) 1 QB 418, it was found that the plaintiff was entitled to recover his medical and other costs, such as travel costs, accommodation costs etc.

\(^{224}\) Rialas v Mitchell, The Times, 17 July, 1984, the court is of the opinion that the medical and other costs is part of the special damages.

\(^{225}\) W v. Egdeell (1989) 1 All ER 1089.

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In *Shanta v. State Andhra Pradesh*\(^{226}\), the patients underwent a cesarean section in a government hospital developed pain and other complications after the operation. The report stated that dirt (MGP) was omitted in para spinal region the course. The High Court made its jurisdiction under Article 226 of the constitution, which the state for compensation of Rs.3,00,000/- the complainant for negligent treatment given by the doctors in a Government Hospital.

**4.4 MEDICAL NEGLIGENCE: RIGHTS AND RESPONSIBILITIES AS A PATIENT\(^{227}\):**

Even the most complicated concept in medical science can be simplified enough for a layman to understand it. It is your doctor’s responsibility to explain your health problem and your treatment choices to you in simple terms. This will help you to make an informed decision about your treatment and this is important for obtaining patient-centred healthcare.’ According to the consumer Guidance Society of India, the patient’s rights as a consumer are the following:

- Patients have the right to be told about their illness; to have their medical records explained.
- Patients should be explained about whatever treatment/medicines are prescribed to them. They should be made aware of the risks and side effects, if any. They have the right to ask questions and clarify their doubts about the treatment.
- Patients have the right to know a doctor’s qualifications.
- Patients have the right to be handled with consideration and due regard for their modesty when being physically examined by the doctor.
- Patients have the right to maintain confidentiality regarding their illness and can expect the same from the doctors.
- Patients have the right to a second opinion if they are doubtful about the medicines or treatment suggested.
- Patients have the right to know what a suggested operation/surgery is for and the possible risks involved. If he/she is unconscious or unable to make the decision

\(^{226}\) (1997) III CPJ 481 (HC of AP)

due to other reasons, informed consent needs to be taken from their nearest relatives.

- Patients have the right to get their medical records/case papers on request from the doctor/hospital.
- If the patient needs to be moved to another hospital, he/she has the right to know the reason for it and also has the right to make their own choice in consultation with the doctor.
- Patients have the right to get details of the bills they have paid for.

Of course knowing the rights isn’t enough and patients have some responsibilities as well:

- The patient should undergo the treatment as prescribed by the doctor faithfully and follow his/her instructions diligently.
- If the doctor has prescribed certain preventive measures in case of infections, the patient should follow the same.
- The patients need to be punctual for the treatments and follow-ups.
- Patients should maintain all the medical records and prescriptions.
- If the patient wants to take a second opinion, consult with your doctor about the same.
- Patients should pay for their treatment as applicable to the doctors and hospitals promptly.

**4.5 PRINCIPALS ADOPTED BY APEX COURT RELATING TO MEDICAL NEGLIGENCE**

1) Though Indian Medical Council Act has to provisions to control the medical practitioners and take disciplinary action against erring doctors, consumer courts are additional remedy to the consumer under consumer protection act to get compensated.
2) Though medical PROFESSION is different from other OCCUPATIONS, but commercialization has already taken place when services are given by payment though it is still a noble profession based on faith and trust.
3) Though medical profession is technical in nature but it cannot be said that the members

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228 [http://nationalconsumerhelpline.in/medicalnegligence](http://nationalconsumerhelpline.in/medicalnegligence)
of the forum are not capable to deal with such matters. They are equipped with expert opinions on the subject, medical literature and other reports, eminent people from the society, judges or retired judges. Three members can be expert of three subjects only and if it is expected them to know every subject, it will be an impossible situation in all the courts.

4) Decisions in criminal case not found negligent do not affect cases under consumer protection act—gross negligence and intention to commit crime is the parameter in criminal cases.

A Doctor cannot be held liable in following conditions

1) If five methods available for treatment, one chosen, not negligent.
2) Doctor not guarantor for healing or curing the disease.
3) Error of judgment differs from wrong diagnosis.

4.6 THE LAW OF TORTS:

Medical negligence as a Tort, is the breach of a duty caused by omission to do something which a reasonable medical practitioner would do, or doing something, which a reasonable medical practitioner would not do.

The remedies for the violation of a right under the Law of Torts are classified into legal remedies and extra legal remedies. Legal remedies includes the remedies by way of damages, injunction. Extra-legal remedies are expulsion, re-entry on land, etc out of above mentioned remedies, the remedy available for medical negligence are damages and compensation.

Negligence is treated as a tort as well as a crime. As a tort it is actionable under the civil law and as a crime under the criminal law. Actions for damages in tort are filed in civil courts and after the coming into force of the Consumer Protection Act, 1986, in consumer courts also. Criminal complaints are filed under the relevant provisions of the Indian Penal Code, 1860 alleging rashness or negligence on the part of the persons concerned. In civil law only damages can be awarded by the court for the loss suffered by the complainant. However, in criminal law doctor can also be sent to jail, apart from the damages in posed by the civil court or by the consumer forum.

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229 http://nationalconsumerhelpline.in/medicalnegligence
4.6.1 Common Law Principles:
The history of the development of the law of tort, particularly regarding medical negligence litigation is of recent origin in India. It has its foundation in the English common law of *Ubi Jus Ibi Remedium*\(^{231}\).

Indian courts, exercise their power to administer the law, according to ‘justice, equity and good conscience’ that indicates that torts are primarily those wrongs for which either statutory remedies are not available or, if available, are inadequate or inappropriate\(^{232}\). In considering actionable negligence, courts are in fact not only identifying the interests which require protection but also the circumstances under which they need to be protected. The interests of aggrieved are preserved and promoted through the grant of a civil right of action for unliquidated damages. In a tort of medical negligence, the cause of action is a personal one that is against the person who has been negligent in discharging his duties and that cause of action does not survive against his estate or the legal representative\(^{233}\). There has been slow growth of tort litigation in India in the area of medical negligence. This is primarily due to lack of awareness about one’s own rights, the spirit of tolerance, the expenses involved and the delay in disposal of cases in civil courts owing to overburden of civil dispute litigations.

4.6.2 Substantive Principles of Law of Torts:

4.6.2.1 Duty of Care:
The starting point for the determination of the tort liability of the caregiver is the duty. A legally recognized health service provider to the patient has a duty to take reasonable care\(^{234}\). The duty to have regard to a doctor occurs on the basis of the legal concept of "business"\(^{235}\) that if the doctor that encourages the patient to believe that he is a doctor, then a duty is applied which measures which person to the standard of the reasonable doctor in that situation. It is an offense for anyone who is unconditionally under the

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\(^{231}\) *Ubi Jus Ibi Remedium* is a Latin legal maxim which means "where there is a right there is a remedy". The basic principle contemplated in the maxim is that, when a person's right is violated the victim will have an equitable remedy under law. The maxim also states that the person whose right is being infringed has a right to enforce the infringed right through any action before a court.


\(^{233}\) *Balbir Singh Makol v. Chairman, M/s Sir Gangaram Hospital and others* (2001) 1 CPR 49 wherein the rule of action personalis moritur cum persona is recognized.

\(^{234}\) Andrew Fulton Philip, *Medical Negligence Right Bakance*, 14 (Publishing Darmonth Company, Vermont, USA- 1997 )

\(^{235}\) *Dickson v. Hygienic Institute* (1990) SC 552; *R Us Bateman* (1925) 94 LJKB 791.

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Medical Council Act unduly to represent that he is a doctor.
The duty has many faces. In practice this means in fact that the doctor must take reasonable for the welfare of the patient in all aspects of the medical context in which the doctor is concerned. This includes the consultation (or visit) itself, which opinions while maintaining confidentiality, to make a diagnosis, refers the patient to a specialist or doctor and or prescribing any treatment.

4.6.2.2 The standard required for duty to take care:
In the possession of a health professional in the case of negligence, what is important is the lack of skilled and ordinary skill and care that has led to the unpleasant result. There is a presumption of competence in favor of the registered physician. When the surgeon is registered as a doctor causes damage to his patient in the treatment, the presumption is that he is competent and the treatment scientific correctly and according to the medical literature to the contrary is shown. Din Mohammad J, quoting Bevan on negligence, "a medical man does not undertake that his treatment be infallible; and therefore he is not bound to what can be done usually in similar circumstances. If the doctor has the ordinary degree of skill accepted and applied in his appeal, he has the right to his remuneration although his treatment has failed. This point recognizes that medical treatment is not an exact science, nor favorable results can be expected.
The test for medical negligence is essentially objective and does not take formal account of a doctor’s experience, level of qualification, the resources available within the doctor’s clinic or hospital. In Hatcher v. Black, Lord Denning explains law on the subject of negligence against doctors and hospitals in the following words:
“In the case of an accident on the road there ought not to be any accident, if everyone used proper care and the same applies in the factory; but in a hospital when a person who is ill goes in for treatment, there is always some risk, no matter what care is used. Every surgical operation involves risks. It would be wrong and indeed bad law, to say that simply because a misadventure or mishap occurred, the hospital and doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor

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236 V. N. Whitmore v RN Rao AIR 1935 Lah 247
237 Jones v. Manchester Corporation (1952) 2 All Ed 125, where Lord Denning observed: error due to inexperience or lack of supervision are no defence as against the injured person.
238 1954 Times 2nd July.
examining a patient or a surgeon operating at a table, instead of carrying on his work would be forever looking over his shoulder to see if someone was coming with a dagger; for an action for negligence against a doctor is for him like a dagger. His professional reputation is as dear to him as his body, perhaps more so, and action for negligence can wound his reputation as severely as a dagger can his body. He may be negligent simply because something happens to go wrong; but cannot be found guilty of negligence when he falls short of the standard of a reasonably skilful man.”

In Bolitho’s case a child was ill in hospital, no doctor attended the child in spite of the fervent request made by the night sister. It had been agreed that it was negligent, if a doctor had visited and incubated the child, the cardiac arrest and brain damage that he suffered would have been avoided. But the defendants argued successfully that the plaintiff had failed to prove that if a doctor had come, she would have probably incubated. The defendant’s expert stated that he would not have incubated, while the plaintiff’s expert stated it would have been mandatory to incubate. Facing with the conflict of medical opinion, the court held that the plaintiff had failed to prove that the outcome would have been different if the defendant had responded to the nurse’s call.

4.9.3 Liability of doctor for negligence in failing to exercise proper care and diagnosis:

In Wood v. Thurston a drunken man in the casualty ward of a hospital with a history of are run over by a truck engine. The surgeon was not examined him as closely as the case required, not even with his stethoscope which had enabled him to the patient's true condition. In addition, he has the patient to return home, which, after a few hours have passed away. The surgeon was guilty of negligence in the failure to submit a correct diagnosis.

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239 Bolitho v. City and Hackney Health Authority (1993) 4 Med. LR 381; CA; affd (1997) 4 All ER 771, (HL).

240 Joyce v. Merton, Sutton and Wandsworth Health Authority (1996) 7 Med CR, where it was held that the claimant could not such that the surgeon would have operated within the crucial 48 hour period, if the surgeon had been called to the ward to review the patient following the initial operation done on the patient.

241 1953 C.L.C. 6871.
4.6.3 Institutional Responsibility:

4.6.3.1 Primary Liability:

In *Hillyer v Governors of St. Bartholomew’s Hospital*\(^\text{242}\) the question arose for the consideration of the court was whether the hospital was liable primarily for the injury caused to the patient by the surgeons and anaesthetist during the course of operation. It was held that the surgeons and anaesthetists were not servants as they are professionals and not bound by the directions as to the manner of performance of their work, therefore, as regards these professionals, hospital does not undertake to treat the patients through the agency of the surgeon or anaesthetist, but to procure the services of the surgeon and the anaesthetist. Only the duty undertaken by the hospital is to exercise due care and skill in selecting them and not to ensure that they would not be negligent in treatment.

4.6.3.2 Vicarious liability:

The Hillyer's case the court refused to liability on the hospital for neglect by the staff in the course of their employment. The hospitals can convince the court that they do not refer directly to the patients and their task was entrusted to the patients under the care of an experienced physician. It was in 1940, when the court began accept/ recognizing the vicarious visions liability in the field of medical care. The doctrine of vicarious visions liability extends the primary liability of the hospital for the injustice or neglect of its servants, whatever their employment is permanent or temporary or informal paid or them honorary, whole time or part time as in the case of a visit to doctors or veterinarians.\(^\text{243}\)

The Supreme Court of India in *Spring Meadows Hospital v Harjot Ahluwalia through K.S. Ahluwalia*\(^\text{244}\) held the hospital liable to pay compensation for the negligence of its attending doctor who allowed unqualified nurse to give intravenous injection to the patient against the advice of the consultant doctor and thereby contributed to the irreparable brain damage of the minor patient. In *A.M.Mathew v. Director, Karuna Hospital*\(^\text{245}\) the State Commission directed the hospital to pay compensation to the father of the minor patient suffering from partial disability of the left leg on account of negligence of the unqualified nurse of the hospital in administering injection on the left

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\(^{242}\) (1909) 2 KB 820,


\(^{244}\) AIR 1998 SC 189; (1998) 4 SCC 39.

\(^{245}\) (1998) 1 CPR 39 (Ker).
In Ranjit Kumar Das v Medical Officer, ESI Hospital the hospital was directed to pay compensation for not giving timely medical treatment to the patient and for refusal to admit the patient of acute pain in abdomen due to non-availability of bed.

4.7 CONSUMER PROTECTION ACT, 1986:

The liability of medical professionals in India under Consumer Law is of recent origin. From the last few decades attention has turned to the quality of health services. Consumer attention has turned to the quality of health services. Consumers i.e. patients do not have only right to access health care but also have right to receive quality treatment. The Consumer protection Act intended to protect a large body of consumers from exploitation. It provides an alternative system of consumer justice by summary trial.

47.1 Medical Service:

One of the most contentious points since the patient may be regarded as a consumer, or the services provided by a doctor, hospital or nursing home are services within the scope of the definition of the service under section 2 (1) (i) of the Act. It is indeed a test of strength between the medical authority and consumers activists on the issue of inclusion or exclusion of the medical service of the Consumer Protection Act. The term 'service' is defined as "service of the description is made available to potential users." The description connects two categories of services from the influence of the Law, namely: services provided under a contract of personal service and service free. The strong dependence of the exception, it must be pointed out that the services provided by hospitals and member of the medical profession for attention will not "service" because service of a doctor is under the agreement of 'personal service,' and it is depending on the personal service of a doctor so not examined in the framework of the Law. It is further alleged that the members of the medical profession are covered by the Indian Medical Council Act, 1956 offers a complete "code of conduct" and the act is not yet identified by the CPA, which does not apply the provisions of the latter to the members of the medical profession. The term "consumer", "service", "hires each service," 'consumer disputes,'

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246 (1998) 1 CPR 165 (Cal)
247 Sharifabi I. Syed v Bombay Hospital and Medical Research Centre 1998 CCJ 1106 (Mah) the hospital was vicariously held liable to pay compensation for suffering of the patient due to wrong report of MRI.
'defective' and shortcomings have to be understood in a commercial sense only. The CPA shall not apply to the medical profession or to the services provided in the hospital or they are controlled by the government or private agencies and it is completely wrong to claim that the medical service is a service in accordance with section 2 (1) (o) and a patient is a consumer.

The definition of service under section 2 (1) (o) of the Consumer Protection Act, 1986 was divided into three parts by the Apex Court in the case of Indian Medical Association v. V. P. Shantha and Others as the main part, the inclusionary part and the exclusionary part. The main part of the definition delineates service to mean service of any description which is made available to potential users. If this is to be construed literally with reference to the medical profession then treatment provided by a medical practitioner or any health care institution or hospital would come within the purview of ‘service’ as defined under the Act. Besides these, all other services provided to the patients while they are under the care of the hospital and the doctors, including the services rendered by the pathological laboratories or ambulances would be taken as services under the Act. Today, these services squarely fall under the Consumer Protection Act, 1986, but there were a lot of inconsistent views with regard to the application of the act to the medical profession and services when the act was brought into force.

**4.7.2 Patient as Consumer:**

In order to comply with the definition of "consumer", human rights should rent or has made use of the services for a fee. The element of recital should as a test to determine whether a patient is a consumer or not. Although the question of attention is an important criterion, but nowhere in the law, the term is defined. The absence of a definition indicate increases the opportunity to discuss or the treatment so important for an appeal to the jurisdiction of the consumer forum. The literal interpretation of the definition shows that a person who wants to fall within the definition must meet three conditions.

- The service must be hired by him;

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248 *Information and Research Society v. Dr. Ratila B. Patel (Oj)*), the Commission of Gujarat has taken the view that the surgeon and the anaesthetist is rendering "personal service," The Commission has no jurisdiction to entertain complaints against the category of persons.


250 1995 (3) CPJ 1 and 1995 (6) SCC 651.
• The service must be to him.
• For rent, he must have paid or promised to pay.

If services are provided free of charge, it cannot be rented out. If a patient is given free medical treatment in a governmental hospitals or in a hospital charity, without payment, no 'consumer.' on the other hand, if he obtains services or use of medical facilities against payment of a private hospital or nursing home or clinic or run by the Government or charitable institution, he is a 'consumer," and therefore can appeal to resources referred to in the law by a complaint before the appropriate forum. 251

In Consumer Unity & Trust Society, Jaipur v. State Rajasthan252 appeal was lodged by the company against the decision of the Commission, Rajasthan which held that there is no attention to the performance of the company and the treatment by the Government doctor was paid or promised by the applicant, the complaint is not serviceable. The National Commission, rejecting the appeal and affirming the ruling of the Commission as the "... persons who makes use of the facilities of the medical treatment in hospital Government not consumers and the said facility offered in Government hospitals cannot be considered as rent for research."253

The State Commission of Delhi,254 Karnataka,255 Rajasthan,256 Punjab257, Haryana,258 Kerala,259 Maharashtra,260 and Tamil Nadu,261 observed that a person who avails himself of the facility of medical treatment in the Government hospital is not a ‘consumer‘; because the medical facility available in the government hospital cannot be regarded as service hired for consideration. On the other hand, the State Commission of Orissa262 held that services rendered by doctors free of charge in government hospitals are within the scope of scrutiny by the Consumer Forum in as much as the doctors are remunerated for rendering service in the hospital. The view expressed by the State Commission of

252 (1991) 1 CPR 30, 245
253 (1991) 1 CPR 241 (NC).
254 Premchand Sharma v. The Director, Central Government Health Scheme, 1992 (2) CRR 51(Del).
255 Sowbhagya Prasad v. State of Karnataka 1 (1994) CPJ 402
256 Hanuman Prasad Darban v. Dr. C.S. Sharma (1991 (1) CPR 63 (Raj)
258 Birbal Singh v. ESI Corporation II (1993) CPJ (1028)
259 Mrs Mable Roosevelt v. St. of Kerala 1991 (1) CPR 330 (NC)
260 Laxman Thamappa Kotgiri v. UOI 1992 CCJ 1093 (Bom)
261 Mappooyan v. Dr. Premavati Elanto 1991(2) CPR 149 (Mad)
262 Govind Chandra Mohanty v. Director, Medical & Health Services II (1992) CPJ 89 (Ori)
Orissa is no longer good law, because the issue has already been categorically settled by
the National Commission in Consumer Unity and Trust Society’s case. Now it is well
settled by the decision of the Supreme Court which stated that any hospital where the
patient pays charges for treatment is a consumer.263

4.7.3 Medical Negligence under Consumer Protection Act, 1986:
The term ‘medical negligence’ does not feature in the body of the Consumer Protection
Act, 1986. So, what recourse does a patient have, if he is aggrieved due to the treatment
provided to him or medical facility made available to him by a medical practitioner,
hospital, medical institution or pathological laboratory? The answer of this question can
be found in sections 2 (1) (c) and 2 (1) (g) of the Consumer Protection Act, 1986. Section
2 (1) (c) of the act defines ‘complaint’ as a written allegation and enlists the situations
when a complaint can be filed under the act and one such situation is when the services
hired or availed of by a person suffers from deficiency in any respects. Section 2 (1) (g)
of the act defines ‘deficiency’ as any fault, imperfection, shortcoming or inadequacy in
the quality, nature and manner of performance of the service.
Thus in order o initiate any action against a doctor or a hospital on the grounds of
medical negligence under the Consumer Protection Act, 1986, a complaint has to be
made to the concerned Consumer Disputes Redressal Forum alleging “deficiency in
Service” as defined under the Act. The Supreme Court of India in the case of Indian
Medical Association v. V. P. Shanta264 clarified that a determination about deficiency in
service under section 2 (1) (g) of the Consumer Protection Act is to be made by applying
the same test as is applied in an action for damages for negligence in a civil court.265
Hence, the principles which apply for the determination of medical negligence and award
of compensation in a civil court, would be apply for the determination of deficiency in
service before a Consumer Disputes Redressal Agency.

4.7.4 Contract of Service versus Contract for Service:
However, the National Commission in M/s. Cosmopolitan Hospitals and Another v.

263 Indian Medical Association v. V.P. Shanta AIR 1996 SC 550
264 AIR 1996 SC 550
265 Niraj Kumar, Medical Profession and Consumer Protection 1st Edn. (New Delhi Bharat Law
Vasantha P. Nair\textsuperscript{266}, rejected the above contention by holding that while a medical officer’s service may be called personal in the loose sense, it will be incorrect, infelicitous and even crude to call the professional or technical services as personal service. A contract of personal service stems from a master and servant relationship which is totally different from a medical doctor-patient relationship. The reason for excluding the rendering of service “under a contract of personal service” from the definition of ‘service’ under the Act is obvious. Such a servant or employee can be dismissed from the service by the master at will and therefore no occasion arises for the master to complain about the deficiency in rendering service by the employee. Providing medical assistance for payment by hospital and members of the medical profession falls within the scope of the expression ‘service’ as defined in the CPA and in the event of any deficiency in the performance of such service the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the consumer forum having jurisdiction.

The decision of the National Commission is based on the distinction between contract for service and contract of service. In the latter case, the master commands or requires what is to be done while in the other case, in addition to command what is to be done, he commands how it shall be done\textsuperscript{267}. It implies relationship of master and servant and involves an obligation to obey order in the work to be performed and as to its mode and manner of performance. In a contract to render service, one party undertakes to render services e.g. professional or technical services for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion\textsuperscript{268}.

4.7.5 Remedies under The Consumer Protection Act, 1986:

The importance and utility of consumerism has been felt considerably due to a changed role of state from merely a welfare state of that of service state. This is because there was a systematic demand that the state and its repositories must serve the people and get state confidence to secure creditability among the consumer. This otherwise with all persuasive terms, mean nothing more than realizing better values against the price paid

\textsuperscript{266} (1992) I CPJ 302 (NC)

\textsuperscript{267} A.C. Madagi v. Crosswell Tailor and another (1991) II CPJ 586 (NC).

\textsuperscript{268} Dharangadh Mechanical Works Ltd v. State of Maharashtra (1957 SC 267)
for it. In this regard, the Consumer Protection Act, 1986 is a sound force designed to aid and protects the consumer by exerting legal, moral and economic pressure on the defaulter against inadequate or deficient services. Services rendered at a government hospital/health centre/dispensary where no charge is made from any person availing the services and all patients are given free service is also outside the purview of the Act. Services rendered at a government hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such service would fall within the ambit of the Act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service.

It must be mentioned that this particular statutory liability under the Consumer Protection Act, 1986 is uniform throughout the nation and that there is a clear and express liability on the part of government hospital, health centre and dispensaries.

4.7.6 Procedures for filing Complaints Regarding Medical Negligence in India:

1. Medical Negligence is highly intricate to be proved. You need to discuss with your lawyer the evidences that you have of the alleged occurrence of such medical negligence.

2. A medical negligence is different from a normal negligence. Medical practitioners have been given more autonomy and freedom under the law so that they could practice well. A medical negligence can only be established if we could show that the negligence committed was grave and apparent. For eg, leaving a scissor inside stomach is a medical negligence.

3. Victim must obtain second opinion from another doctor before filing the case. If the second opinion is favourable to you then you may sue the doctor for damages and also slap a criminal case against him. Obtain his written opinion whether your doctor has messed up your surgery or not.

4) Victim must file police complaint against the doctor and hospital.

5) police after investigations will file FIR against doctor for negligence

6) Victim must also complain to MCI against doctor and hospital.

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270 https://www.kaanoon.com
7) Victim must file complaint before consumer forum for deficiency of service and seek compensation for irreparable damage caused to you

4.8 CONCLUSION:

The fourth chapter of this research work is an overview of various laws related to the medical negligence in India. The right to life as enshrined in Article 21 of the Indian constitution includes the right to health and medical treatment. The right to life would have no meaning unless medical care is insured for a sick. Article 19 (1) provides six fundamental freedoms of all citizens who can only be limited for reasons referred to in points (2) to (6) in article 19 of the Constitution. These rights can be limited if a person has a healthy life to live with dignity and free from any form of disease or exploitation which further ensured by the mandate of article 21 of the Constitution.

In the criminal law the extent of the damage is not very large, but the amount of and the extent of failure are always large and is used for the determination of liability. The mens rea is the essential ingredient of the crime and this cannot be disregarded if the load a criminal court consists of criminal negligence. There must be an intention to do for a person may be guilty of crime.

A criminal liability where there is evidence that the doctor has been guilty of an act or omission that is rash or grossly negligent, that the preceding, director physical cause of the patient died. Other provisions in the Indian Penal Code, 1860 which may be of interest are Section 312, section 313, section 314, section 315, section 316, section 337 and section 338.

Negligence is treated as a tort as well as a crime. As a tort it is actionable under the civil law and as a crime under the criminal law. Actions for damages in tort are filed in civil courts and after the coming into force of the Consumer Protection Act 1986, in consumer courts also. The role of consumer courts as well as state and national commissions has broadly discussed in this chapter.

Next chapter 5 deals with the laws of other countries regarding medical negligence and Indian medical laws have been compared with the medical laws of developed countries.