CHAPTER-VII
CASE STUDY

Introduction

Medical jurisprudence has evolved through a catena of judicial decisions. One of the major contributions has been through the English courts. The English cases contributed more to the development of law in this area. For a detailed discussion of this topic it is highly necessary to examine the relevant classic decisions one after another. For the convenience of study, this chapter is divided into three, evolution of medical jurisprudence through judicial decision in England, America and in India. The first part deals with evolution of medical jurisprudence through judicial decision in England. The second and third parts deal with the scenario in America and India respectively.

1. Development of Law in England

In England due to the absence of proper law regarding medical negligence the principles were evolved through judicial decisions. These principles were subsequently considered as law. The legal principles evolved through the classic decisions have been explained in detail below.

A. Accepted Practice

Accepted practice is the most important factor of tortious liability. Physician or surgeon acting in conformity with recognized or accepted practice is not guilty of negligence. Accepted practice is derived by the court as practice accepted as proper by the medical science in a particular time at a particular place.

The foremost classic decision under accepted practice is in *Roe v. Ministry of Health.* In this case this principle has been discussed elaborately. Three issues were framed by the court. Firstly, it is said that the defendants were negligent in failing to give the plaintiff a warning of the risks involved in electro-convulsive therapy, so that he might have had a chance to decide whether he was going to

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1. [1954] 2 All ER 131
take those risks or not. Secondly, it is said that they were negligent for failing to use any relaxant drugs which admittedly, if used, would have excluded, to all intents and purpose, the risk of fracture altogether. Finally MC Nair J took the same view of Denning LJ and said 2 “If the anesthetists had foreseen that the ampoules might get cracked which could not be detected on inspection, they would, no doubt, have dyed the phenol a deep blue, and this would have exposed the contamination. But do not think their failure to foresee this was negligence. It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure.”

Court held that having regard to the standard of knowledge to be imputed to competent anesthetists in 1947, the anesthetist could not be found to be guilty of negligence in failing to appreciate the risk of the phenol percolating through molecular flaws in the glass ampoules and, a fortiori, there was no evidence of negligence on the part of any member of the nursing staff. A per incurium was declared by the court as anesthetist was the servant or agent of the hospital authorities who were, therefore, responsible for his acts.

Lord Dennings through this judgment developed a new legal approach to medical profession. The court observed that 3 “two men suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors

Here the plaintiff underwent a surgical operation at the Royal Hospital. Before the operation a spinal anesthetic consisting of Nupercaine is injected by means of a lumbar puncture by the second defendant, a specialist anesthetist. The Napercaaine contained in glass ampoules prior to the use, immersed in a phenol solution. After the operation the plaintiff developed spastic paraplegia which resulted in permanent paralysis from the waist to downwards. The patient should be expressly warned about risks of fracture being treated, or should be left to inquire that what the risk was, and there was evidence that in cases of mental illness explanation of risk might well not affect the patient’s decision whether to undergo the treatment. The plaintiff having sued the defendants for negligence in the administration of the treatment, ie, in not using relaxant drugs or same form of manual control and in failing to warn him of the risk involved before the treatment was given, the jury returned a verdict for the defendants.

2. Ibid.
3 Ibid.
would be led to think more of their own safety than of their patients. Initiative would be shifted and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure. So we decided to dismiss the appeal”. So this finding of the court provided more courage and confidence to medical professionals in undertaking risks.

Court made another relevant observation in *Bolam v Friern Hospital Management Committee*.³ In this case the plaintiff was suffering from mental illness, was advised by a consultant attached to the defendants hospital to undergo electro-convulsive therapy. He signed a form of consent to the treatment but was not warned of the risk of fracture involved. There was evidence that the risk of fracture was very small, i.e., of the order of one in ten thousand. On the second occasion when the treatment was given to the plaintiff in the defendant’s hospital he sustained fractures. No relaxant drugs or manual control (save for support of the lower jaw) were used, but a male nurse stood on each side of the treatment couch throughout the treatment. The use of relaxant drugs would admittedly have excluded the risk of fracture. Among those skilled in the profession and experienced in this form of therapy, however, there were two bodies of opinion, one of which favoured the use of relaxant drugs. Medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Here Dennings J observed that “Every surgical operation is attended by risks. We cannot take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctor’s like the rest of us, have to learn by experience, and experience often teaches in a hard way. Something goes wrong and shows up a weakness and then it is put right. That is just what happened here.”⁴
So the court framed rule of law in this aspect as following:

(i) A doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, merely because there is a body of such opinion that takes a contrary view.

(ii) That the jury might well think that when a doctor was dealing with a mentally sick man and had a strong belief that his only hope of cure was submission to electro-convulsive therapy, the doctor could not be criticized, believing the dangers involved in the treatment to be minimal, he did not stress them to the patient.

(iii) In order to recover damages for failure to give warning, the plaintiff must show not only that the failure was negligent but also that if he had been warned, he would not have consented to the treatment.  

This was one of the famous principles derived by the House of Lords as “Bolam principle of Accepted Practice.” The following are the tests to identify if it complies with Bolam principle. “The test is the standard of the ordinary skilled man exercising and professing to have that special skill.” If a surgeon fails to measure up to that standard in any respect of clinical judgment then he is considered as negligent. This was the most popular Bolam principles latter developed as a new law in this area. The second important legal principle is the difference of opinion.

B. Difference of Opinion

Difference of opinion is one of the relevant principles evolved through case laws. There can be two schools of thought, suggesting two different opinions. A practitioner who accepted and followed one of them cannot be held negligent merely because this was another school of thought. Lord Dennings contributed more to the development of law in this area. One of the oldest

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6 Ibid.
7 Ibid.
contributions of Lord Dennings was in *Hucks v cole*, the Court held that, “a charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave, so should the proof be clear. With the best will in the world, things sometimes went amiss in surgical operations or medical treatment.” A doctor was not being held negligent simply because something went wrong. He was not liable for mischance or misadventure, or for the error of judgment. He was not liable for taking one choice out of two or for favouring one school rather than another. This rule was later developed in *Hunter v Hantey* Lord President held that “In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. In this case, a doctor failed to treat with penicillin, a patient, who was suffering from septic injuries on her skin though he knew them to contain organisms capable of leading to puerperal fever. A number of distinguished doctors gave evidence that they would not, in the circumstances, have treated with penicillin. The court of appeal found the appellant to have been negligent. The third principle is relating to liability of medical staff.

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8  (1968) 118 New. L.J 469
9  1955 SLT 213
A. Liability of Medical Staff

Medical practitioners are assisted by qualified nursing staff and technical experts for clinical procedure. However, expert, skilled or careful a doctor may be, a little carelessness on the part of the assisting staff may cause injury to the patient or may show bad results. Paramedical staff therefore ought to be very careful. This was explained in Gold v. Essex county council. In this case, court of Appeal held that a local authority governing a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged in a work which involves the exercise of professional skill on his part. The plaintiff was injured through the negligence of a competent radiographer, who was a whole time employee, and the plaintiff recovered damages against the local authority.

In this case, Lord Greene M.R. said that the nature of the work of consulting physician and surgeons and the relationship in which they stood to the defendants precluded the drawing of the inference that the defendant’s were responsible for their negligent act. The power of the respondents includes the power of treating patients, and that they are entitled and indeed bound in a proper case to recover the just expense of doing so. If they exercise that power, the obligation which they undertake is an obligation to treat and they are liable, if the person employed by them to perform obligation on their behalf, act without due care.11

Court again clarified the situation as “Even if the nurses and carriers were persons for whose negligence the defendants would be liable, the plaintiff would still fail, because it is clear that they are not liable for the negligence of the surgeon. The plaintiff has to prove his case against the defendants, but he does not do so by showing that he has been injured by the negligence of A, B, C and D or one of them, when the defendants are liable for the negligence of C and D only,

11 [1942] 2 All ER. p.237
12 Ibid.
and not for that of A and B, then they are not. He must prove affirmatively that the negligence was that of the persons for whom the defendants are liable.\textsuperscript{12}

It was again confirmed through another classic decision of \textit{Cassidy v Ministry of health}.\textsuperscript{13} The plaintiff, who was suffering from a contraction of the third and fourth fingers of his left hand, was operated on at the defendant’s hospital by Dr. Fahrni, a whole time assistant medical officer of the hospital. After the operation, the plaintiff’s hand and forearm were bandaged to a splint and they remained so for some fourteen days. During this time the plaintiff complained of pain, but, apart from ordering the administration of sedatives, no action was taken by Dr. Fahrni, or by the house surgeon who attended to the plaintiff in the absence of Dr. Fahrni. Both Dr. Fahrni and the house surgeon were employed by the hospital authorities under contract of service. When the bandages were removed, it was found that all the four fingers of the plaintiff hand were stiff and that the hand was practically useless. In an action by the plaintiff against the defendants for negligence in the post operational treatment which he received, the court held that the evidence showed a prime facie case of negligence of Dr. Fahrni, house surgeon, and members of the nursing staff. So the law developed through this case is that liability can also be attributed to the hospital staff. The fourth principle is law relating to \textit{Mistake in informed consent}.

\textbf{D. Informed Consent}

Informed consent is considered as a basic rule of treatment. This confirmed that the doctor should inform all the complications of his procedure of treatment to the patient. Informed consent is necessary for the subsequent application of treatment.

This was clearly expressed through \textit{Sidaways} case. Here Lord Diplock held that the test of liability in respect of a doctor’s duty to warn his patient of risks inherent in treatment recommended by him was the same as the test applicable to

\begin{itemize}
\item \textsuperscript{13} \textit{Ibid.}
\item \textsuperscript{14} [1951] 1 All ER p. 574
\end{itemize}
diagnosis and treatment, namely that the doctor was required to act in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. Accordingly law did not recognize the doctrine of informed consent. However, although a decision on what risks should be disclosed for the particular patient to be able to make rational choice whether to undergo the particular treatment recommended by a doctor was primarily a matter of clinical judgment, the disclosure of a particular risk of serious adverse consequences might be so obviously necessary for the patient to make an informed choice that no reasonably prudent doctor would fail to disclose that risk.

Lord Diplock held that surgeon’s non disclosure of the risk of damage to the plaintiff’s spinal cord accorded with a practice accepted as proper by a responsible body of neuro-surgical opinion to warn her of that risk, the defendants were not liable to the plaintiff. The appeal was accordingly dismissed. The court made some observation and stated that, it is plainly right that a doctor may avoid liability for failure to warn of a material risk if he can show that he reasonably believed that communication to the patient of the existence of the risk would be detrimental to the health (including, of course, the mental health) of his patient.\(^{14}\)

Here the House of Lords referred to the principles derived through *Canterbury v. Spence*.\(^{15}\) The court enunciated four propositions (1) the root premise is the concept that every human being of adult year and of sound mind has a right to determine what shall be done with his own body, (2) The consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the option available and the risks attendant on each, (3) The doctor must, therefore, disclose all ‘material risks.’ What risks are ‘material’ is determined by the ‘prudent patient’ test, which was formulated by the Court. But even if the risk be material, the doctor will not be liable if on a reasonable assessment of his patient’s condition he takes the view that a warning would be

\(^{14}\) *Sidaway v. Board of Governors of the Bethlem Royal Hospital* [1985] AC 87;[1985] 1All ER 643

\(^{15}\) 464 2d 772 [1972]
detrimental to his patient’s health. This was the development of law through *Sideway*.

Another case of much relevance is the case of *Chatterson v. Gerson*.\(^{16}\) In this case a person who underwent hernia operation suffered from chronic and intractable pain in the area surrounding the operation scar. She was referred to the defendant who was a specialist in the treatment of chronic intractable pain. The defendant operated on the plaintiff by injecting a solution near the spinal cord with the object of destroying pain conducting nerves which served the scar area. Although the defendant could not remember what he told the plaintiff prior to the operation, it was his practice to explain to patients that the form of treatment used might involve numbness at the site of the pain and a larger surrounding area and might involve temporary loss of muscle power. The plaintiff claimed damages from the defendant alleging that he had not given her an explanation of the operations and their implications so that she would make an informed decision whether to risk them, and that the defendant (i) had committed a trespass to her person since her consent to the operations was vitiated by the lack of prior explanation and (ii) had been negligent for not giving an explanation to her as he was required to do as part of his duty to treat a patient with the degree of professional skill and care expected of a reasonably skilled medical practitioner.\(^{17}\)

In this case the claim against the doctor was put in two way (i) that her consent to operation was vitiated by lack of explanation of what the procedure was and what its implications were, so that she gave no real consent and the operation was in law a trespass to her person, that is a battery and (ii) that Dr. Gerson was under a duty, as part of his obligation to treat his patient with the degree of professional skill and care to be expected of a reasonably skilled practitioner. Thus Miss Chatterton could come to an informed decision on

\(^{17}\) [1981] 1 All ER

\(^{18}\) *Ibid*, at p. 244

\(^{19}\) 1981 All ER Vol.2 p.26720

\(^{20}\) *Ibid*, at p. 201
whether she wanted to have it or would prefer to go on living with the pain. Here the doctor committed breach of that duty. If he had performed that duty she would have chosen not to have the operation and that therefore the unhappy consequences resulting from the operation. However the damages to Miss Chatterson which flows from Dr. Gerson’s breach of duty and for which he is responsible.

House of Lords\(^{19}\) held that the plaintiff’s action would be dismissed for the following reason (i) in an action against a medical practitioner for trespass to the person based on alleged lack of consent to the treatment administered by the practitioner the patient had to show that there had been a lack of mere consent. Furthermore, once the patient had been informed in broad term of the nature of the intended treatment and had given his consent the patient would not then say that there had been a lack of real consent. Since the plaintiff had been under illusion as to the general nature of the operation performed by the defendant, there had been no lack of real consent to her part and her claim for trespass to the person would be dismissed.\(^{20}\)

A doctor was required, as part of his duty to explain to the patient what he intended to do, and the implication involved, in the way in which a responsible doctor in similar circumstances would have done, and if there was a real risk of misfortune inherent in the procedure, however well it was carried out, the doctors duty was to warn of the risk of such misfortune.\(^{18}\) In any event, even if the defendant had failed in his duty to warn the plaintiff of the implications inherent in the second operation, the plaintiff had not proved that if she had been properly informed she would have refused to undergo the operation and the risks involved.\(^{19}\) So it can’t be considered as trespass to person in any sense. This was the positive development of informed consent law framed by the House of Lords in favour of doctors. The sixth principle derived by the House of Lords is the law relating Medical Skill.

\(^{21}\) Ibid, at p. 260

\(^{22}\) Ibid, at p.267
E. Medical Skill

Medical skill is a confusing area. Lack of proper medical skill of a professional considered as a factor amounts to negligence. The law governing this matter is explained through the decision in *White v. Jordan*. In this case the House of Lords were in favour of doctors for protecting their professional rights. Lord Denning M.R decided in favour of Respondent by saying that he had dealt with the case with coverage and skill. A baby’s birth is a dangerous procedure. Birth has been the most dangerous event in the life of an individual and medical science has not yet succeeded in eliminating this dangerous situation. In his judgment the most which was proved against Mr. Jordan was that when he asked himself the question whether he should go on using forceps or proceeds at once to caesarean section he gave himself an answer which subsequent events showed was wrong. It was based on his clinical judgment. Neither he nor any other doctor can always be right. Being wrong is not the same as being negligent. According to Lord Dennings, negligence was not proved against Mr. Jordan. So here the court dismissed the appeal.

[1980] 1 All ER 650 In this case the defendant, a senior hospital registrar, took charge of the plaintiff’s delivery as a baby after the mother had been in labour for considerable time. The notes made by the consultant professor in charge of the hospital maternity unit identified the pregnancy as likely to be difficult and noted that a ‘trial of forceps’ delivery would have to be tried before proceeding to delivery by case caesarian section. Trial of forceps was a tentative procedure requiring delicate handling of the body with forceps and a continuous review of the baby’s progress down the birth canal with the obligation to stop traction if it appeared that the delivery could not proceed without risk. Having examined the mother and read the professor’s notes, the defendant embarked on a trial of forceps delivery. He pulled on the baby six times with the forceps with the mother’s contractions, but when there was no movement on the fifth and sixth pulls he decided. He then quickly and competently delivered the plaintiff by caesarian section. The plaintiff was found soon after the delivery to have sustained series brain damage due to asphyxia. The trial court interpreted the term in its medical sense, namely that the baby’s head had become wedged or struck in the birth canal because of the use of the forceps and force was required to move it. Because of his interpretation of the professor’s report and the mother’s evidence the judge found that the defendant had pulled too hard and too long on the forceps causing the foetus to become wedged in the birth canal, that is unwedging the foetus he had caused asphyxia which in turn had caused cerebral palsy and that in so using the forceps he fell below the high standard of professional competence required by law and was therefore negligent. Hence this appeal came before House of Lords.

By analyzing all these classic decisions it is quite clear that the honourable House of Lords decided the medical-malpractice cases in favour of doctors to encourage them to take any risk. The sixth legal principle is mistake in clinical judgment

**D. Mistake in Clinical Judgment**

A physician or surgeon has to be very accurate in his judgment in diagnosis, in treatment or in the operation theatre. Through the following decisions it has been formulated that ‘mistaken judgment’ amounts to contributing factor of negligence. Mistake in clinical judgment was discussed in *Maynard v. West Midlands Regional Health Authority.* This was a classic decision which redefines the meaning of negligence. Two consultants employed by the defendant’s health authority who were treating the plaintiff for a chest compliant though she was suffering from tuberculosis, but also considered the possibility that she might be suffering from Hodgkin’s disease. Accordingly, before obtaining the result of a test which would have determined whether she was suffering from tuberculosis, they decided to perform an exploratory operation to determine whether she was suffering from Hodgkin’s disease. One of the consultants carried out the operation and informed that she was suffering from tuberculosis and not Hodgkin’s disease. However as a result of the operation the plaintiff suffered damage to nerve affecting her vocal cords which caused her speech to be impaired. Such damage being an inherent risk of the operation, the plaintiff brought an action for negligence against the defendant health authority claiming that the consultants had been negligent in deciding to carry out the operation before obtaining the result of the tuberculosis test. Expert medical evidence, was called from both sides concerning whether the operation should have been carried out. The judge preferred the plaintiff’s expert evidence and accordingly gave judgment in favour of the plaintiff. On appeal, the Court of appeal reversed the Judge’s decision, holding that there had been no negligence. Hence the plaintiff appealed to the House of Lords.

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25 [1984] 5 All ER 135,335
This case can be considered as a typical example of “Clinical Judgment.” Two distinguished consultants, a physician and a surgeon who had experience in the treatment of chest diseases, formed a judgment as to what were, in their opinion, in the best interest of their patient. They recognised that tuberculosis was the most likely diagnosis. But in their opinion, there was an unusual factor, viz swollen glands in the mediastinum unaccompanied by any evidence of lesion in the lungs. Hongkin’s disease carcinoma, and sarcoidosis were, therefore possibilities. They thought that it may cause dangerous situation unless remedial steps were taken in its early stage.

House of Lords decided this case in favour of Appellant by considering the following reasons. The first reason is that, he stressed what he called the risk-benefit ratio. The difficulty in substantiating this point was the existence of a substantial body of professional opinion supporting the view that mediastinoscopy was, and is, reasonably safe procedure. Its particular risks, haemorrhage and pus of the left laryngeal nerve, were accepted, but their incidence was not high. Benefits from the operation could not be assured in advance, but it did provide the opportunity of direct visual observation of the swollen tissue and the procuring of a biopsy for analysis. They might well have provided to be of great values in either establishing or excluding the existence of Hodgkin’s disease in this case.

The second reason is that, it was alleged that Dr. Ross should not have seen the appellant as a ‘classic’ case of Afro-Asian tuberculosis and should have proceeded to a firm diagnosis without calling for a mediastinoscopy. Dr. Ross was not unaware of this difference between the two stocks. On the evidence adduced at the trial, his cautious approach cannot be said to be unreasonable.

The third point is related to the three possibilities other than tuberculosis for the appellant’s illness which had been mooted in evidence: Sarcoid, Carcinoma, and Hodgkin’s disease.\textsuperscript{22}

\textsuperscript{22} Ibid.
By considering all these points court held that there was an element of negligence here. So the court allowed the appeal. This decision formulated a law as “mistaken judgment” amounting to contributing factor of negligence. This decision was followed by another classic decision in Sidaway v. Bethlem Royal Hospital Governors and others. This was a classic decision explaining “the law of informed consent.”

Doctor has a privilege in clinical judgments. If that privilege is understandable to the patient then there is no possibility of negligence within the meaning of medical negligence. This has been explained in Gillick v. West Norfolk and Wisbech Area Health Authority and another. Here a relevant question was raised before the House of Lords. In this case the Department of Health and Social Security issued a circular to area health authorities containing, interalia, advice to the effect that a doctor consulted at a family planning clinic, by a girl under 16, would not be acting unlawfully, if he prescribed contraceptive for the girl, so long as in doing as he was acting in good faith to protect her against the harmful effects of sexual intercourse. The plaintiff, who had five daughters under the age of 16, sought an assurance from her local area health authority that her daughter would not be given advice or treatment on contraception without the plaintiff’s prior knowledge and consent while they were under 16.

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27 [1985] 1 All ER. 643 In Sidaway the plaintiff, who suffered from persistent pain in her neck and shoulders, was advised by a surgeon employed by the defendant hospital governors to have an operation on her spinal column to relieve the pain. The Surgeon warned the plaintiff of the possibility of disturbing a nerve root and the possible consequences of doing so but did not mention the possibility of damage to the spinal cord even though he would be operating within there millimeters of it. The plaintiff consented to the operation, which was carried out by the surgeon with due care and skill. However, in the course of the operation the plaintiff suffered injury to her spinal cord which resulted in her being severely disabled. She brought an action against the hospital governor’s and surgeon claiming damages for personal injury. Being unable to sustain a claim based on negligent performance of the operation, the plaintiff instead contended that the surgeon had been in breach of a duty owed to her to warn her of all possible risk inherent in the operation with the result that she had not been in a position to give as ‘informed consent’ to the operation. The trial judge applied the tort of whether the surgeon had acted in accordance with accepted medical practice and dismissed the claim. On appeal the court of appeal upheld the judgment, holding that the doctrine of informed consent based on full disclosure of all the facts to the patient was not the appropriate test under English Law. The plaintiff appealed to the House of Lords.

28 [1986] AC 112;[1985] 3 All ER 402
When the authority refused to give such an assurance the plaintiff brought an action against the authority, claiming against both the department and the area’s health authority a declaration that was given in the circular as unlawful. Because it amounted to advice to doctors to commit the offence of causing or encouraging unlawful sexual intercourse with a girl under 16, which is contrary to section 28(1) of the Sexual Offence Act, 1956. As against the area health authority a declaration that a doctor or other professional person employed by it in its family planning services could not give advice and treatment on contraceptive to any child of the plaintiff below the age of 16 without the plaintiff’s consent, because to do so would be unlawful as being inconsistent with the plaintiff’s parental rights. House of Lords held that if the doctor thinks that the girl can understand his advice there will be no question of his giving contraceptive advice to very young girls. It is the privilege of doctor under clinical judgment. Privilege of judgment if understandable to the patients in a real sense, can be admitted. Nothing was wrong relating in this kind of communication. This is the law governing privilege in clinical judgments. The seventh principle is relating to complications in sterilization operation.

**E. Law Governing the Matter of Sterilization Operation**

Sterilization procedure is one of the most complicated areas. Court has framed different principles in this situation depending on factual matters. A landmark case with reference to the principle is *MC Farlane v. Tayside Health Board.*

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29 Sec 28 (10) of Unlawful Sextual Offence Act

30 Ibid.

31 [1999] 52 BMLR 1, [2000] 2 AC 59 In this case a married couple decided that they did not want any more children. So the husband Mr. Ma Farlane, underwent a vasectomy. After the operation had been carried out, Mac Farlane submitted sperm samples for examination by the surgeon who had carried out the operation. The surgeon advised Mr and Mrs Mc Farlane that the samples showed the vasectomy had been successful and that they no longer needed to take contraceptive measures. This advice was acted on by Mr and Mrs Mc Farlane but unfortunately was wrong six months or so later Mrs Mc Farlane became pregnant and subsequently gave birth to a healthy baby who, although originally unwanted, became a much loved member of the Mc Farlane family. Mr and Mrs Mac
Court decided that the costs of bringing up a normal, healthy child are not recoverable. Negligence was not admitted- that issue remained to be tried but the appeal was brought on the pleading and negligence had to be assumed. The defenders conceded that they were responsible for having given the advice in question and that they were under a duty to take reasonable care to ensure that it was correct. They acknowledged that they would normally be liable for all the foreseeable consequences of its being wrong. They accepted that Mrs. McFarlane’s pregnancy and the child’s birth were direct and foreseeable consequences of the advice being wrong, causation was not in issue. On conventional legal reasoning Mr and Mrs Mac Farlane would be entitled to recover damages which represented the full extent of the financial and other losses consequent upon Mrs. McFarlane’s pregnancy and the birth of their child including the costs of bringing her up.  

The House of Lords held that the bringing up of the child was not recoverable. This was because a normal pregnancy and labour would not constitute personal injuries for which damages were recoverable and that the benefits of parenthood transcended any financial loss incurred by the parents in looking after and bringing up their child. The second Division of the inner House of the courts of session reversed that decision and held that the wife was entitled, if negligence was established, to damages. The second discussion further held that in accordance with the conventional principles of delict law, the parents would be entitled to recover the costs of bringing up the child and that there was no public policy grounds to disentitle the parents from recovering such costs.  

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Farlane sued for damages in negligence. It may be that the vasectomy had been negligently carried out by the surgeon. And he negligently represented that Mr McFarlane’s sperm counts were negative. This negligent advice was, indeed, the only basis on which Mrs. McFarlane could have based an action. The McFarlanes claimed damages for Mrs. McFarlane’s pain, suffering and distress attributable to the unwanted pregnancy and the trauma of childbirth and also for the costs they would incur in raising the child to adulthood. Nothing, for present purposes, turns on the former damages claim. The House, held, unanimously that the McFarlanes were not entitled to the latter.
Another principle was developed through Parkinson’s case. In this case the sterilisation operation was negligently carried out and the claimant later conceived and gave birth to a child who was born with severe disabilities. Longmore J held that the claimant was entitled to recover damages providing her child’s special needs relating to his disabilities but not for the basic costs of his maintenance, and this decision was upheld by the court of Appeal. House of Lords upheld the decision of court of Appeal in appeal. This decision was followed by another in the Rees v. Darlington Memorial Hospitals NHS.

In this case the claimant commenced proceedings against the hospital trust claiming damages for negligence in respect of the sterilization operation and she sought to recover the cost of bringing up Antony to his majority. The costs which she claimed included the cost which would be incurred by a mother who was not disabled in the bringing up of a child and she also claimed the extra cost that would be incurred by her as result of her severe visual disability.

House of Lords through Robert Walkeg J held that “I would base my decision on there being nothing unfair, unjust, unreasonably acceptable or morally repugnant in permitting recovering of compensation for limited range of expense which (when specified and proved) will be found to have a very close connection

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34 [2001] 61 BMLR 100 at p.75
35 [2001] 61 BMLR.100 p.75 In this case Mr. Karina Rees, a young woman in her early thirties was suffering from the genetic condition of retinitis pigmentosa. Since the age of two she was blind in one eye and had limited vision in the other eye. She was severely visually handicapped. She felt that her eye sight would bar her from properly looking after a child and she was anxious about health matters and frightened by the thought of contraception and she came to a very definite decision that she did not want to give birth to a child. She was referred by her general practitioner to a consultant gynaecologist at Darlington Memorial Hospital and when she saw the consultant she told him of her visual handicap and of the concerns and fears which had led her to the decision that she would never want to give birth to a child. With this knowledge of her concern and of her decision the consultant performed a sterilisation operation on 18 July 1995. The appellant hospital trust admits that the operation was performed negligently and that the right fallopian tube was not adequately occluded. In 1996 the claimant’s son Antony was conceived and he born on 28th April 1997. His father had no desire to be involved with him and the claimant is a single mother who is bringing up Antony alone. It is accepted for the purposes of this appeal that Antony is a healthy child.

36 Supra, n. 28
with the mother’s severe visual impairment, and nothing to do with the blessings which the birth of her healthy son may have brought her”. She was entitled to the benefits of the doctor’s contracted obligation to his NHS employers to carry out the operation with due care. It is open to the court to put a monetary value on the expected benefit of which she was deprived due to doctor’s negligence. So she wanted 15,000 pounds. The court awarded 15,000 as a conventional sum to compensate the respondent for being deprived of the benefit that she was entitled to expect. This was done by the English Court for protecting the right of negligent sterilisation victims.

An opposite view was taken by the House of Lords in *Thake and another v. Maurice*. The plaintiff, a railway guard and his wife, lived in a three bed room council house with their five children. They lived in strained circumstances on the first plaintiff’s income, which was supplemented by the second plaintiff doing domestic work when she did not have a child under school age. In order to prevent any further addition to the family, the plaintiffs consulted the defendant, a surgeon, to see whether the first plaintiff could be sterilised by vasectomy. The defendant discussed the nature of the operation with the plaintiff and made it clear that a vasectomy was final and that the first plaintiff would become permanently sterile. The plaintiffs were asked to sign a form consenting to the operation. The first plaintiff signed a form stating that the nature of the operation had been explained to him by the defendant, that he had been told that the object of the operation was to render him sterile and incapable of parenthood and that he understood that the effect of the operation was irreversible. Subsequently the plaintiff became pregnant but failed to recognise the symptoms until it was too late for an abortion. The plaintiff brought an action against the defendant claiming that their contract with the defendant was not simply a contract to carry out a vasectomy but a contract to sterilise the first plaintiff and that contract had been irreversible.

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broken when she became fertile again, alternatively that they were induced to enter into the contract by a false warranty or innocent misrepresentation that the operation would render the plaintiff permanently sterile, or in the further alternative that the defendant failed to warn them that there was a small risk that the first plaintiff might become fertile again. There were several questions raised before court (i) whether there had been a contract (ii) whether the defendant had advised the plaintiffs of the risk that the first plaintiff might become fertile again and whether there had been a breach of collateral warranty or a misrepresentation (iii) whether there had been any contractual negligence (iv) whether public policy precluded an award of dangerous birth of a healthy child and if it did not (v) what the appropriate measure of damages was. 35

Here the Queen Bench Division held that although the defendant had not intended to enter into a contract which absolutely guaranteed sterility, the consent form contained no warning that the operation might not succeed in its effect. Although normally surgeons would not deliberately guarantee any result which depended on the treating of human tissue, there was no reason in law why a surgeon should not contract to perform a vasectomy. By considering all these circumstances court held that there would be no award for the distress, pain and suffering undergone by the plaintiffs because that was cancelled out by the joy they had received from the child. They were entitled, however, to damages for the birth and upkeep of the child, but on a moderate basis, in view of the humble house hold into which the child had been born. 36

Another law developed through a classic decision in Rand v. East Desert Health Authority. 37 The defendants had negligently omitted to advise the claimants of the results of a routine scan carried out during the early weeks of Mrs. Rand’s pregnancy. That test had indicated the likelihood that she was carrying a Down’s syndrome baby. It was accepted that this negligent omission deprived the claimant of the opportunity to terminate the pregnancy. The court

40 Ibid.  
41 Ibid.  
42 2000, BMLR, Vol: 56, p.39
held that, It cannot be considered as typical case of negligence because they could not identify these things at early stage through scanning. So the court dismissed the appeal. The eighth component of negligence principle developed through decision is causation and but-for-test.

**F.Causation and But –For-Test**

Causation and but-for-test is applicable in cases where the main instance of negligence arises out the causation. The doctor can avoid this situation if he can avoid the cause of action

This aspect has been clearly discussed through the famous case of *Chester v. Afshar.* In this case the claimant patient suffered from severe back pain. She was referred to the defendant, an eminent consultant neurosurgeon, who advised her to have surgery. Three days later, the surgeon conducted the operation with the patient’s consent. Although the operation was properly performed, it resulted in significant nerve damages and left the patient partially paralysed. Such damage was known to be an inherent risk of the operation, in the region of 1%-2%. In subsequent proceedings for negligence, the patient alleged that the surgeon had failed to advise her of that risk, and that breach of duty entitled her to damages. The judge found that the surgeon had indeed not informed the patient of the risk before the operation, that he had been negligent in not doing so, if the patient had known of the risk, she would not have consented to the operation taking place at that time. She would instead have sought a second or possibly, a third opinion before deciding what to do. On that basis, the judge concluded that the patient had established a casual link between the breach of duty and the injury. The judge therefore gave judgment for the patient on the issue of liability and his decision was confirmed by the Court of Appeal. The surgeon appealed to the House of Lord’s contending that, in order to establish causation in the case of a surgeon’s failure to warn a patient of significant risk of injury, the patient had to prove not only that she would not have consented to run the relevant risk then and there, but also that she would not at any time have consented to run the relevant risk.

43 [2004] 3 All ER at p.587
House of Lords held that the patient right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. The following are the findings of court.

1) Firstly surgeon owes a legal duty to patient to warn him or her in general terms of possible serious risk involved in the procedure.

2) Secondly, not all rights are equally important. But a patient’s right to an appropriate warning from a surgeon when faced with surgery ought normatively to be regarded as an important right which must be given effective prosecution whenever possible.

3) Thirdly, in the context of attributing legal responsibility, it is necessary to indentify precisely the protected legal interest at stake. A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient.\(^{39}\)

Lack of proper warning is the main thing for causation. It is not disputed that the failure to warn could be said to have caused the injury, if Miss. Chester’s position had been that, she would never have undertaken the operation at all, if that warning had been given. Here is the application for but for theory. It can be said that Miss Chester would not have suffered her injury ‘but for’ Mr. Afshar’s failure to warn her of risks, as she would have declined to be operated on him. Lord Scarman described the patient’s right to make his own decision as basic human Rights.\(^{40}\) At last the House of Lords came to the positive conclusion and dismissed the appeal filed by the doctor. Thus the causation and but-for-test was developed by the court. The ninth principle of negligence is Breach of Duty.

\(^{44}\) \textit{Ibid.}\n
\(^{45}\) \textit{Chester v. Afshar} [2004] 3 All ER at p.587
G. Breach of Duty

The law governing breach of duty is developed by the court through a number of cases. The issue of breach of duty is covered with whether the defendant was careless, in the sense of failing to the standard of care applicable to doctors. Development of law relating to breach of duty is discussed through the popular case *Bolitho v City and Hackney Health Authority.*

Here Lord Browne- Wilkinson held that a doctor could be liable for negligence in respect of diagnosis and treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge’s satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. The instant case was not such a situation since it was implicit in the judge’s judgment that he had accepted Dr. P’s as reasonable and although he thought that the risk involved would have called for intubation, he considered that would not dismiss

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[1997] 4 All ER 771 In this case a two year old boy was admitted to hospital under the care of Dr. H and Dr.R. On the following day he suffered two short episodes at 12.40 pm and 2.00 p.m during which he turned white and clearly had difficulty in breathing. Dr. H was called in the first instances and she delegated Dr. R to attend in the second instance but neither attended P, who at both times appeared quickly to return to a stable state. At about 2.30 pm P suffered total respiratory failure and cardiac arrest, resulting in severe brain damage. He subsequently died and his mother continued her proceedings for medical negligence as administrator of his estate. The defendant health authority accepted that Dr. H had acted in breach of her duty of care to P but contended that the cardiac arrest would not have been avoided if Dr. H or some other suitable deputy had attended earlier than 2.30p.m. It was common ground that intubation so as to provide an airway would have ensured that respiratory failure did not lead to cardiac arrest and that such intubation would have had to have been carried out before the final episode. The judge found that the views of P’s expert witness and Dr. D for the defendants, professional opinion espoused by a responsible body of professional opinion espoused by distinguished and truthful experts. He therefore held that Dr. H, if she had attended and not incubated, would have come up to a proper level of skill and competence according to the standard represented by Dr. D’s views and that it had not been proved that he admitted breach of duty by the defendants has caused the injury which occurred to P. The court of Appeal dismissed on appeal by P’S mother and she appealed to the the House of Lords.
Dr. D’S view to the contrary as being illogical. So appeal was dismissed by House of Lords.

But there were some situations in which the House of Lords was ready to support the patients through some judgments like Wilsher v. Essex Area Health Authority. In this case an infant plaintiff was born prematurely suffering from various illnesses including oxygen deficiency. While in a special baby unit at the hospital where he was born, a catheter was twice inserted into a vein of the plaintiff rather than an artery. On both occasions the plaintiff’s retinal condition could have been caused by excess oxygen or from five other conditions common in premature babies and all of which had affected the plaintiff. The plaintiff brought an action against the health authority claiming damages for negligence and alleging that the excess oxygen in his bloodstream had caused his retinal condition. At the trial the evidence was inconclusive whether the excess oxygen had caused or materially contributed to the plaintiff’s retinal condition. The trial judge held that, since the hospital had failed to take proper precautions to prevent excess oxygen being administered to the plaintiff and since the plaintiff had suffered the injury against which the precautions were designed to be a protection, the burden lay on the health authority. The judge held that the health authority had failed to discharge that burden and awarded the plaintiff 2166, 199 pound damages. On appeal, the court of appeal confirmed the judge’s decisions on the ground that the hospital’s breach of duty and the plaintiff’s injury were such that the hospital was to be taken as having caused the injury notwithstanding that the existence and extent of the contribution made by the hospital’s breach of duty could not be curtailed. The health authority appealed to the House of Lords, contending that the plaintiff had failed to establish that the hospital’s negligence had caused the plaintiff’s retinal condition since that negligence was only one of six possible cases of his condition.

Again House of Lords held that, where a plaintiff’s injury was attributable to a number of possible causes, one of which was the defendant’s breach, the

47  Ibid.
48  [1988] 1 All ER
combination of the defendant’s negligence of duty and the plaintiff injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant’s negligence and his injury, although the link could legitimately be inferred from the evidence. Since the plaintiff’s retinal condition could have been caused by any one of the number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him, the plaintiff had not discharged the burden of proof as to causation. So the appeal was allowed.

Here the derived the principle is that, “where a person has, by breach of duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that he had some other cause. Secondly, from the evidential point of view, one may ask, why a man should is able to show that his employer should have taken certain precaution, by the breach of duty, which caused or materially contributed to the injury. In many cases of which the present is typical, this is impossible to prove just because honest medical opinion cannot segregate the causes of an illness between compound causes.

So finally by considering all these classic decisions, the House of Lords framed some good policy of law like, accepted practice, reasonable care, standards of care, Informed consent, Breach of duty, causation and but-for-test. Majority of these decisions are in favour of doctors. It is very difficult for an ordinary litigant to prove the case beyond preponderance of probabilities within a civil court. So it is highly necessary to decide, the case so as to balance the rights of patient’s as well as the rights of medical professionals. Otherwise it may causan irreparable damage to the possibility of access to justice to poor patients for whom there is no possibility of any access to evidence. The next part of this chapter deals with study of cases in America. American case study is necessary to check

49 Ibid.
50 Ibid.
51 Ibid.
the attitude of American Courts to medical negligence cases and the various principles that were evolved through the cases.

II. Position in America

In America, medical treatment is more expensive as doctors are professionally insured. It is the responsibility of court to protect the right of patients. One of the most important classic cases in America is *Canterbury v. Spence*. The courts in USA have laid down four fundamental elements to establish claim for malpractice. First the patient must prove that a doctor patient relationship had been created. By creating this relationship, the physician is said to have assumed a duty of reasonable care of the patient. Second, the physician must breach the duty of non-negligent care to the patient. The breaching or failure to exercise the requisite duty of care is a relative act e.g.a mistake in diagnosis or a miscalculation in reading a test report is not necessarily automatic evidence of a legally recognized act of negligence. Jurisdictions uniformly apply some general standard relating to the reasonableness of the act with regard to similar practitioner in a similar situation to judge the liability of a physician’s act. In other words, if the duty of care exercised by a physician is determined to be unreasonable as compared to other physician of similar training and practice, then the physician is said to have breached the duty of care owed to the patient. Third, not all acts of negligence will make him liable for malpractice or all instances where the duty of care breached will make a physician liable for malpractice unless the patient suffers some harm. The harm can be physical, or emotional, psychic damage for example as a result of a physician exploiting a patient for sexual purpose. If greater the extent of injury, the greater the potential for successful litigation as well as the possibility of a larger compensatory award if the cause of action is upheld.

The last element, proximate cause, is often confusing and difficult to prove. There must be causal link between the negligent act and the patient’s injury for an

52  464 F2d 772 (D.C. Cri. 1972)
53  “Psychiatric Malpractice”, 24 am, Trial 295 (1981)
action of malpractice is to be sustained. The presence of many intervening agent or event that tends to come between the negligent act and injury is said to sever the causal relationship. In brief an action for malpractice must include evidence of all four elements, viz (i) duty, (ii) breach of duty (iii) harm to patient and (iv) proximate cause, in order to be successful. Any omission of failure to prove one of these factors will defeat the action. The following are the rules developed in America relating to different areas, through judicial decisions

A. Informed Consent

A doctor may be liable for malpractice if, in rendering treatment to which the plaintiff consents, he fails to make a frank disclosure to plaintiff of the risk involved in the procedure. In Natason v. Kine the plaintiff’s left breast had been removed because of cancer. The surgeon had recommended to the plaintiff that a head radiologist of the hospital gave her therapy at the site of the mastectomy. The plaintiff claimed that she was given a series of irradiation treatments in such a negligent manner that the skin, flesh muscles beneath her left arm sloughed away and ribs on her left side were burned. She sued the radiologist and the hospital. The jury found the defendants liable for negligence. The appellate court reversed the judgment and ordered a new trial. It observed on retrial of this case, that the first issue for the jury to determine, should be, whether the administration of cobalt irradiation treatment was given with the informed consent of the patient, and if it was not, the physician who failed in his legal obligation is guilty of malpractice no matter how skillfully the treatment may have been administered and the jury should determine the damages arising from cobalt radiation treatment. If the jury should find an informed consent was given by the patient for such treatment, the jury should next determine whether proper skill was used in administering the treatment.

The argument is frequently advanced by the defendants that to disclose all the risks and hazards of a particular procedure will frighten the patient and possibly deprive him of life saving surgery. In the Kline’s case, the court countered this argument by pointing out that the standard for disclosure was one of reasonableness and sensibility rather than frenzy.
But this does not mean that a doctor is under an obligation to describe in detail all of the possible consequences of treatment. It might be argued that to make a complete disclosure of all facts, diagnosis and alternatives and possibilities which may occur to the doctor could so alarm the patient that it would, in fact, constitute bad medical practice. There is probably a privilege, on therapeutic grounds, to withhold the specific diagnosis where the disclosure of cancer or some other dreaded disease would seriously jeopardize the recovery of an unstable, temperamentally or severely depressed patient. But in the ordinary case there would appear to be no such warrant for suppressing facts and the physician should make a substantial disclosure to the patient prior to the treatment or risk liability in tort. In other words, the court said that the patient should be told, (i) in a simple language the nature of the ailment; (ii) nature of proposed treatment, (iii) probability of success or of alternatives, and (iv) perhaps the risk of unfortunate results and unforeseen condition within the body. The court concluded by observing:

‘We do not think that administrating of such an obligation, by imposing liability for malpractice if the treatments were administered without such explanation where explanation could reasonably be made or presents any insurmountable obstacles’.  

A few other cases on ‘informed consent’ are being discussed by way of illustration. In Bang v. Charles Miller Hospital, the plaintiff underwent a prostrate operation which unfortunately resulted in sterilization. The plaintiff was not told that the defendant would sever the spermatic cord. It was held that the defendant was under a duty to inform even though he said that it was necessary to prevent infection, for the plaintiff had the right to decide to run the risk of infection against sterility. In Scott v. Wilson an ear operation known as

54 All ER [1996] 3 p.1073
55 Ibid.
56 88 N.W.2d. 186 91958)
57 396 S.W 2d 532 (Tex. Cir. App.1956
stapedectomy was done which resulted in total loss of hearing. The proof was that this complication will occur in approximately one per cent of all stapedectomies. The court held that it was the duty of the doctor to inform the patient about this. Another development of law is relating to proximate cause.

B. Proximate Cause

Proximate cause is the rule developed by American courts. Proof that the defendants were guilty of departure from accepted standards of medical practice is not enough. The plaintiff must also prove that such departure was the proximate cause of injuries claimed in the petition. When the defendant treated the plaintiff, the patient may have already suffered an injury, disability pain, the plaintiff must prove that the defendant’s malpractice precipitated, or hastened his condition.

In proving the defendant’s negligence was the proximate cause of the plaintiff’s complication, injuries or death, the plaintiff need not show to a certainty that he would have suffered the injury even without proper medical attention. In *Harney v. Silber*, the court observed it is not incumbent on plaintiff to show to certainty that surgical intervention would have saved his life. It is sufficient if the plaintiff, by a preponderance of the evidence has satisfied you that surgical intervention would with reasonable probability have saved his life.

C. Breach of Contract

In general, an act or omission that constitutes malpractice will give rise both to an action based on, (i) breach of contract, and (ii) tort principles. This is due to the fact that in both contract and tort the duty of care is essentially the same. The defendants are required to conform to the applicable standards of care, not only because he impliedly agreed to do so but also because the law requires it once he undertakes to render care.

58 *Eiselve v. Malone*, 157 N.Y.S
60 2 N.W.2d 483 at 488 (1942)
In *Robins v Firestone*, the plaintiff claimed that the defendant employed a physician, for the sum of $150 to perform an operation for the removal of polyps on the bladder. He alleged that the “defendant agreed, as his part of the contract to perform the operation like a good workman and promised to cure the plaintiff but failed to do so.” The court held that an action was sustainable for breach of contract. Judicial law making relating to battery is relevant in this context.

**D. Liability for Battery**

A doctor who performs an operation without the consent of the patient and in the absence of emergency or other exculpatory circumstances is liable for battery. Consent may be implied, however and the surgeon is authorised to extend the operation in any abnormal condition when this is necessary for the welfare of the patient. This is the approved practice of surgeons generally.

**E. Locality Rule**

Initially in USA the court applied what was called the ‘locality rule’ in deciding the standard of care of a doctor. This rule as applied was that a physician’s care would be judged only by the skill and care generally possessed by similar practitioner in the same or similar locality. This ‘locality rule’ originated over a hundred years ago. The rationale for the rule was essentially to protect the doctor practicing in small, rural area as compared to his or her more sophisticated and scientifically advanced city based colleagues. In essence the rule was made to compensate the manifest inequality existing at that time between physicians practicing in remote rural areas and those in large urban cities. Eventually, this rule came under attack and was given up. In the light of modern conditions where nearly uniform quality of medical school training is imparted throughout USA and the wide dissemination of new and progressive

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61 308 N.Y. CIV. Prac. Law. Sec. 214-a (1972)
63 See *Smothers v. Hanks*, 34 Iowa 286 (1872)
64 See *Teft v. Wilcox*, 6 Kan 46 (1870)
medical technique, discoveries and procedures via professional journals, conference and the media, the inequality of opportunity existing between large and small areas simply does not exist any longer. Now a so-called national standard among medical specialties had been adopted. The national standard is a fairly flexible rule which is basically defined as the degree of knowledge which should be “reasonably” possessed and that is the “standard” by which the physician should be judged.

In India the courts have never applied the ‘locality rule’, perhaps due to the fact that “medical negligence” is a phenomenon which came into being not too long ago. But what would one say when a doctor in a government hospital in a small town or rural area has to operate without proper equipment, and a patient dies; would he be held guilty of medical negligence?. Liability for negligence is other area that developed through judicial decisions.

F. Liability for Negligence

The tort system of liability for negligence has two main purposes. First it provides compensation to those injured as a result of the negligence of others, thereby acting as a source of insurance. Second, by imposing sanctions on persons found negligent, it acts as a deterrent to future negligent behaviour.

The first reported case of malpractice in USA was in 1794. In Cross v. Guthery, the plaintiff and his wife consulted a physician to obtain medical treatment for tuberculosis of breast. The accepted treatment at that time was to surgically remove the diseased tissue. The defendant professed to be an experienced physician as well as skilled in surgery. He further assured the plaintiff and his wife that he possessed the necessary skill and knowledge to remove the diseased breast without risk of harm. He stated that for reasonable fee he would cure the wife’s malady. Relying on the physician’s representations, the

65 "Medical Specialities and The Locality Rule". 14 Stam & Rer 884 at 887-89 (1962)
50 Columbia Medical Centre of Las Colinas v. Bush 122 S.W. 3d 835 ( Tex.2003)
51 U.S.R 1990 Vol.61
plaintiff consented to the operation. Following the surgery, the wife languished for three hours before dying of complications initiated by the surgery. The husband sued the physician. The court found that the doctor’s treatment was ignorant, cruel, wholly unskillful, and totally contrary to all well-accepted standards of practice in cases of this nature. Liability was imposed upon the doctor on the basis of his violation of his promise to the plaintiff to perform the surgery skillfully with due care and safety to the patient as was part of their agreement.

Over hundred years later, American malpractice cases began to demonstrate a change in direction regarding liability based on English common law principles and decisions. A leading Newyork case *Pike v. Hosinger*, 52 described in fairly specific terms the duty of care inherently owned by physician to their patients, regardless of whether certain representations had been made. It was observed ‘A physician and surgeon, by taking charge of a case, impliedly represents that he possesses and the law places up on him the duty of possessing that reasonable degree of learning and skill that is ordinarily possessed by surgeon in the locality where he practiced and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the applications of his learning to accomplish the purpose for which he was employed”….

The law holds him liable for an injury to his patient resulting from want of requisite knowledge and skill or omission to exercise reasonable care, or the failure to exercise his best judgment. The rule in relation to learning & skill does not require the surgeon to possess that extraordinary learning and skill which belongs only to a few of rare endowments, but such as is possessed by the average man’s best judgment. He does not hold him liable for an error of judgment provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician to exercise

52 N.Y. R. (1898) Vol.155 at p.201
reasonable care and extend his best judgment in the effort to bring about a good result. Another judicial evolution of law is relating to surgical negligence.

G. Law Relating to Surgical Negligence

In *Canterbury v. Spence* 53 a new legal principle relating to patient autonomy was declared as rule of law. On appeal one of the main contentions of the appellant is that doctor Spence did not reveal the risk of paralysis from the laminectomy which was considered as violation of the physician’s duty to disclose. There was also testimony from which the jury could have found that the

53 *Supra n.52* at p. 209-

Appellant was nineteen years of age, a clerk-typist employed by the Federal Bureau of Investigation. In 1958, he began to experience severe pain between his shoulder blades. He consulted two general practitioners, but the medication they prescribed failed to eliminate the pain. Thereafter, appellant secured an appointment with Dr. Spence, who is a neurosurgeon.

Dr. Spence examined appellant in his office. He did not identify any abnormality. Dr. Spence then recommended that appellant undergo a myelogram. The myelogram revealed a “filling defect” in the region of the fourth thoracic vertebra. Since a myelogram often does no more than pinpoint the location of the aberration, surgery may be necessary to discover the cause. Dr. Spence told appellant that he would have to undergo myelogram. Dr. Spence performed the laminectomy at the Washington Hospital Center. Appellant testified that during the course of the endeavor he slipped off the side of the bed, and that there was no one to assist him, or side rail to prevent the fall. Several hours later, appellant began to complaint that he could not move his legs and that he was having trouble in breathing, paralysis seems to have been virtually total from the waist down. Mrs. Canterbury signed another consent form and appellant was again taken into the operating room. Appellants control over his muscles improved somewhat after the second operation but he was unable to move properly. At the time of trial in April, 1968, appellant required crutches to walk, still suffered from urinal incontinences and paralysis of the bowels, and wore a penile clamp. The damages appellant claimed include extensive pain and suffering, medical expenses, and loss of earnings.

Appellant filed suit in the District Court. The complainant charged negligent post-operation care in permitting appellant to remain unattended after the laminectomy, in failing to provide a nurse or orderly to assist him at the time of his fall, and in failing to maintain a rail on his bed. During daily trial Dr. Spence described the surgical procedures he utilized in the two operations and expressed his opinion that appellants disabilities stemmed from his pre-operative condition as symptomatised by the swollen, non-pulsating spinal cord. Dr. Spence further testified that even without trauma physician can be anticipated “some where in the nature of one percent” of the laminectomies performed, a risk he practice because it might deter patients from undergoing needed surgery and might produce adverse psychological reactions which could preclude the success of the operation. The trial court decided in favour of doctor by saying that the appellant had failed to produce any medical evidence indicating negligence on Dr. Spence’s part in diagnosing appellant’s malady or in performing the laminectomy
laminectomy was negligently performed by Dr. Spence, and that appellant’s fall was the consequence of negligence on the part of the hospital. The record, moreover, contains evidence of sufficient quality and quantity to render issues as to whether and to what extent any such negligence was casually related to appellant be post- laminectomy condition. These considerations entitled appellant to a new trial.  

The root promise is the concept, fundamental in American jurisprudence, that “Every human being of adult years and sound mind has a right to determine what shall be done with his own body”. Under this decision warning disclosure of information is a strict rule. The evolution of the obligation to communicate for the patient’s benefits as well as the physician’s protection has hardly involved an extraordinary restructring of the law. Respect for the patients right of self- determination on particular therapy demands a standard set of law for physicians rather than one which physicians may or may not impose upon themselves.  

Through this decision the court framed some policy regarding degree of care and skill ordinarily exercised by the profession in own or similar locality. Here the court explains that the standard of care means “the special standards but adaptations of the general standard to a group who are required to act as reasonable men possessing their medical talents presumably would”  

There are two exceptions to the general rule of disclosure. One is the nature of a physician’s privilege not to disclose. Another is anything recognised as important as the patient’s right to know, it is out weighed by the magnitudinous circumstance giving rise to the privilege. The other relevant principle is relating to law of confidentiality

70 Paragraph 27 of judgment Canterbury v. Spence.
55 Paragraph 34 of judgment
56 Paragraph 36 of Ibid.
I. Confidentiality

The law relating to medical confidentiality is explained through the classic decision in America. One of the most important decisions in this aspect is In v. Paul Mac Donald v.O.W. Clinger M.D. The patient brought action against psychiatrist for damages for disclosing confidential information to patient’s wife. Here the court considered whether wrongful disclosure is a breach of fiduciary duty of confidentiality and whether it gives rise to a cause of action in tort.

The complaint alleges that during two extended courses of treatment with defendant, a psychiatrist, plaintiff revealed intimate details about himself which defendant later divulged to plaintiff’s wife without justification and without consent. As a consequence of such disclosure, the plaintiff alleges that his marriage deteriorated, that he lost his job, that he suffered financial difficulty and that he was caused such severe emotional distress that he required further psychiatric treatment. The complaint set forth three causes of action (i) breach of an implied contract (ii) breach of confidence in violation of public policy (iii) breach of the right of privacy guaranteed by Article 5 of the Civil Rights Law. Defendant moved to dismiss for failure to state a cause of action stating that there was in reality only one theory of recovery, that of breach of confidence and such action could not be maintained against him because his disclosure to plaintiff’s wife was justified. That is undoubtedly due to the fact that the confidentiality of the relationship is a cardinal rule of medical profession, faithfully adhered to in most instances, and this has come to be justifiably relied upon by patients seeking advice and treatment. This physician-patient relationship is contractual in nature, whereby the physician, in agreeing to administer to the patient, impliedly, covenants that the disclosures necessary to diagnosis and treatment of the patient’s mental and physical condition will be kept in confidence. The Supreme Court, Appellate Division held that patient could bring action against psychiatrist who

73 84 A. . 2d 482, 483, 446. N.Y.S .2d 801, 802 (1982) 83.
74 232 Ark.133,134 334,S.W 2d.869 [1960]
disclosed personal information, learned during course of treatment to patients for breach of fiduciary duty of confidentiality and it was considered as a typical case of negligence.

Another classic decision relating to this area is *Hummonds v. Aetna cas & sur.Co.* 75 In this case plaintiff sought damages from an insurance carrier for procuring his medical records from his physician by falsely representing that plaintiff was suing the physician for malpractice. Looking to Ohio Law, the court found that such disclosure was contrary to the public policy of the state, evidence of which could be found in the Medical Code of Ethics, the Ohio Statute on privileged Communication and the Ohio licensing statute which prohibited betrayal of confidential information.

Attempting to fashion a remedy based on a traditional legal theory, the court discussed the contractual nature of the relationship:

“Any time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two jural obligations are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor optimistically assuming that he will be compensated. As an implied condition in that contract, this court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient’s permission. Almost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence. The promise of secrecy is as much as exposed warranty as the advertisement of a commercial entrepreneur, consequently when a doctor breaches his duty of secrecy, he is in violation of part of his obligation under the contract. The court then determined that from that contractual relationship arose a fiduciary obligation that confidences communicated by a

75 232 Ark.133,134,S.W.2d.869 (1960)
patient should be held as trust.  Thus in America these kinds of instances are considered as breach of contract.

J. Delay

Delay amounts to medical negligence in American law. This is disclosed in Herskovits v Group health cooperative of pauget sound. The complaint alleged that Herskovits came to Group Health Hospital in 1974 with complaints of pain and coughing. In early 1974, chest x-rays revealed infection in the left lung. Rale and coughing were present. In mid 1976, there was chest pain and coughing, which became persistent and chronic by full of 1974. Herskovits was treated thereafter only with cough medicine. No further effort or inquiry was made by Group health concerning his symptoms, other than an occasional chest x-ray. Herskovits visited Dr. Jonathan Ostrow on a private basis for another medical opinion. Within 3 weeks, Dr. Ostrow’s evaluation and direction to group health led to the diagnosis of cancer. In July of 1975, Herskovits lung was removed, but no radiation or chemotherapy treatments were instituted. Herskovits died 20 months later, on March 22, 1977 at the age of 60.

Dr. Jonathan Ostrow, construed in the most favourable light possible to plaintiff, indicated that had the diagnosis of lung cancer been made in December 1974, the patient’s possibility of 5-year survival was 39 percent. At the time of initial diagnosis of cancer 6 months later, the possibility of a 5-year survival was reduced to 25 percent. Dr. Ostrow testified he felt, a diagnosis perhaps would have been made as early as December 1974, or January 1975 about 6 months before the surgery to remove Mr. Herskovits lung in June 1975.

Dr. Ostrow testified that if the tumor was a “stage 1” tumor in December 1974, Herskovit’s chance of a 5-year survival would have been 39 percent. In June 1975, his chances of survival were 25 percent assuming the tumor had progressed to stage 2”. Thus, the delay in diagnosis may have reduced the chance of a 5 year survival by 14 percent.

Plaintiff contends that medical testimony of a reduction of chance of survival from 39 percent to 25 percent is sufficient evidence to allow the proximate causes issue to go to the jury. Defendant Group Health argues conversely that Washington law does not permit such testimony must be at least sufficiently definite to establish that the act complained of “probably or more likely” than not caused the subsequent disability. It is Group Health’s contention that plaintiff must prove that Horskovits “probably or more likely than not” would have survived had the defendants not been allegedly negligent, that is the plaintiff must prove there was at least 51 percent chance of survival. Here court held that a person who negligently renders aid and consequently increases the risk of harm is liable for any physical damages he causes.

Another decision from delay of service is from the Pennsylvania Supreme Court in Hamil v. Bashline.\textsuperscript{78} In this case the theory that delay amounts to negligence was confirmed by court. The plaintiff’s descendent was suffering from severe chest pain. His wife transported him to the hospital where he was negligently treated in the emergency unit. The wife, because of the lack of time, took her husband to a private physician’s office. The main medical witness testified that if the hospital had employed proper treatment, the descendant would have had a substantial chance of surviving the attack. The medical expert expressed his opinion in terms of a 75 percent chance of survival. It was also the doctor’s opinion that the substantial loss of a chance of recovery was the result of the defendant hospital’s failure to provide prompt treatment. The defendants expert witness testified that the patient would have died regardless of any treatment provided by the defendant hospital.

In Hamil the court reiterated the oft- repeated principles of tort law that the mere occurrence of an injury does not prove negligence, but the defendant’s conduct must be a proximate cause of the plaintiff injury. The court also referred to the traditional “but for” test, with the qualification that multiple causes may culminate in injury. The court held that once a plaintiff has introduced evidence

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\textsuperscript{78} 481 Pa 256, 392 A 2d 1280 (1978)
\end{flushright}
that a defendant’s negligent act or omission increased the risk of harm to a person in plaintiff’s position, and that the harm was in fact sustained, “it becomes a question for the jury as to whether or not that increased risk was substantial factor in producing the harm.”

Again the court testified that delay amounted to negligence in Jeanes v. Milner. The plaintiff’s mother brought a malpractice action for the death of her child from throat cancer, claiming that delayed diagnosis of a month caused a shortened life span, pain and suffering. The United States Court of Appeals reversed the dismissal for the insufficient evidence.

Here the Supreme Court held that “there is no evidence from which the jury could find that the delay of approximately one month in the transmission of slides could have been the proximate cause of failure to recover from his cancer, or to increase his pain and suffering or to shorten his life”. In Chester v. United States Court confirmed the position relating to delay. It was a medical malpractice suit for negligent failure to diagnose and treat cancer of the esophagus. The court found that defendant was exhibiting symptoms and complaints that were consistent with cancer. No tests were performed to determine what was causing the illness, and the court determined this was below the accepted medical standard of care. Further, the judge decided that the cancer was indeed present in November 1972, and could have been treated before metastasis. The judge held that, if there was a possibility that the defendant had carcinoma of the esophagus the hospital doctors were negligent in treating him for hypertension only. The court observed that plaintiff in a malpractice case must prove that defendant’s negligence, proximately caused the death.

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79 Ibid.
80 28 F 2d 598 (8th Cir. 1970)
81 403 F Sapp. 458, 460 (W.D. Penn, 1975)
82 Paragraph 14 of judgment in Herskovits v Group Health Co-op Hospital
From this study, it is clear that American jurisprudence evolved from the tort law to the insurance law. As every professional is insured, negligence suit is considered breach of contract. The patient has the power to costly medical service in terms of established contract. Breach of contract creates insurance liability for the doctor/hospital as a service provider. Position in India is entirely different.

**III. Position in India**

In India the law relating to medical negligence has been developed in tune with the English law. Majority of cases decided in India are in accordance with English decisions. Indian Courts developed several drastic changes through the classic decisions. Several theories developed through the judicial decisions. The following are the main theories formulated by the court system.

**A. Law of Consent**

Law of Consent emanated from English decisions. Later Indian Court provided new dimension through the following decisions. First classic decision is *Ram Bihari Lal v. J.N. Shrivastava*.\(^\text{83}\) In this case the court referred to one of the older classic decisions of *Laxman v. Tumbak*,\(^\text{84}\) which held that “The duties which a doctor owes to his patient are clear. A person who holds himself out ready to

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\(^\text{83}\) *AIR 1985 p.150* Here Ram Bihari Lal’s wife underwent operation for appendicitis. In due course of operation the doctors removed infected gall-bladder without the consent of patient or her legal heirs. After the operation her conditions started deteriorating. It was found that there was extensive damaged to the kidneys of the deceased and the liver was also damaged from the development of jaundice. Dr. Mrs. Ganapathy (PW2), medical specialist of the Gandhi Memorial Hospital, Rewa was consulted on phone, Dr. Shrikhande sent Dr. Mrs Ganapathy is the right to attend the patient. Despite the treatment given, the deceased expired at 2.20 am on 3-10-1958. On enquiry the cause of death was due to overwhelming toxemia consequent upon progressive hepato-renal failure which developed after the operation done under prolonged chloroform anesthesia which led finally to peripheral circulatory collapse as was seen from the progressive fall in blood pressure, rapid steady pulse and high temperature. The prolonged chloroform anesthesia on an inadequately prepared patient was probably responsible for the development of hepto-renal failure according to Dr. Shri Khande. The doctors were not take pre requisite for such a major operation. One of the main difficulties was that consent could not be taken as she was under chloroform and the consent of the plaintiff No.1 was implied having already given his consent for the operation of appendicitis.

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\(^\text{84}\) *AIR 1969 SC 128*
give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person who is consulted by a patient owes him certain duties viz a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breaching of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what law requires. The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ample in cases of emergency.” 85

By considering this dictum Supreme Court held that Kanti Devi died of the hepto-renal failure due to rash and negligent act of the defendant. He wrongly diagnosed the ailment to be acute appendicitis without proper investigation and without preparing the patient for the operation. He acted rashly in removing the gall bladder and without caring for the ill- effect of keeping the patient under chloroforms for 2 hours especially when her kidney was affected. No preventive steps were taken to counteract the toxic effect of chloroform on the kidney and liver by giving glucose and vitamins. No consent of the husband, who was present outside, was taken for removal of the gall bladder. He should not have undertaken such a major operation in a hospital which was lacking basic facilities. The operation theatre was under repairs and there was no facility for oxygen and blood transfusion, no anaesthesist was there, even some life saving drugs were not available, pipette, for blood test was broken, the saline apparatus was not in order and there were only two staff nurses for 28 bedded hospitals. The defendant failed in his duty of care in undertaking the operation and in doing the operation without taking necessary precautions. His act of removing the gall bladder was highly hazardous which resulted in the death of patient. So the defendant is liable to pay damages for his wrongful acts. The award of Rs.3000/- for loss of service

85 Ibid.
at the rate of Rs.25/- per month for 10 years on the death of young mother of 7 minor children, youngest being aged 4 ½ months, is hardly adequate. Award of Rs.1000/- for mental agony and physician suffering is also too low. 86 This was one of the most important steps taken by the court for empowering doctors duty of care in due course of administration of treatment.

Another relevant contribution is through A.S Mittal and Another v. State of U.P and others.87 Here the court examined two main questions:

(a) Whether the guidelines prescribing norms and conditions for the conduct of “eye-camps” are sufficiently comprehensive to ensure the protection of the patients who are generally drawn from poorer and less affluent section of society or whether any further guidelines would require to be evolved

(b) What relief, monetary or otherwise, should be afforded to those who have suffered. 88

Here the court held that, the state and doctors are liable for negligent operation and lack of post-operative care. This was a classic decision focusing liability over doctors and Utter Pradesh (U.P) State Government for protecting the rights of patients. Through these decisions it was clear that consent theory is a settled law under English law and not a settled law in India. Another principle that developed through decision making is legal principle relating to delay.

**B. Delay Amount to Negligence in India**

Delay amounts to negligence in India. This principle was commemorated through Dr. T.T. Thomas v. Elisa and others. 89 The plaintiff’s husband was admitted in the General Hospital, Ernakulum for the complaints of severe

86 Ibid.
87 (1989) 3 SCC 223
88 Ibid.
89 1986 KLT. 1026
abdominal pain. It was diagnosed as a case of acute appendicitis. Dr. T.T. Thomas, the appellant, who was one of the civil surgeons of the General Hospital examined the patient and confirmed the diagnosis, pursuant to which the patient was removed from the casualty ward to the surgical ward. No surgery was performed on the patient on the day of his admission in the hospital. The next day his condition deteriorated fast leading to his death due to “Perforated appendix.”

It was a case which required immediate operation to save the life of the patient. The main cause for the delay was lack of consent from deceased. Court held that it was a clear case of emergency in which consent law is not a strict principle there. It is the responsibility of the doctor to inform the seriousness of his condition. So the burden is on the doctor to show that want of consent is necessary for doing operation. He failed to discharge that burden. So the court held that failure to carry out the emergency operation on the deceased amounts to negligence, and the death of the deceased was on account of that – failure. So appeal was dismissed with cost. Here delay was considered the cause of death. Another legal component developed through judicial decision is with reference to Actionable Negligence.

A. Actionable Negligence

Actionable Negligence is explained through the Pinnamaneni Narasimha Rao v. Gunda Varapa Jayaprakash 90. In this case the plaintiff was a brilliant youngster aged 17 years. He had a minor ailment of chronic nasal discharge. Doctor suggested operation. After the operation, he lost all the knowledge and learning acquired by him. After conducting neurological examination and after studying the case history, Dr. Mathai gave a written opinion stating that the plaintiff had cerebral damage and his intellectual ability was that of a boy of five year age in relation to calculation, reading and understanding. Later on a thorough examination identified the cause of this situation to be due to the recklessness and negligence of the defendants 2 and 3. The plaintiff had suffered respiratory and

90 AIR 1990 AP 207
cardiac arrest for about three or four minutes during general anesthesia which led to cerebral anoxia causing irreparable damage to the brain. The Court held that 2\textsuperscript{nd} defendant is liable for actionable negligence.

This decision was followed by a landmark decision, in \textit{Indian Medical Association v. V.P. Shantha}\textsuperscript{91} This is one of the revolutionary decisions in India. It was the first case of medical negligence incorporated within the meaning of deficiency of services. Deficiency in Service is the new development of law in this area.

\textbf{B. Deficiency in Service}

In this case special leave petition and the writ petition filed by doctor’s association raise a common question as to whether medical service can be considered as ‘service’ under section 2(1) (0) of the Consumer Protection Act, 1986. The definition of ‘service’ in section 2(1) (0) of the Act can be split into three –the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users, the inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or boarding or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excluded rendering of any service free of charges or under a contract of personal service.\textsuperscript{92}

In this case the court came to several conclusions;

1. Services rendered to a patient by medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of ‘service’ as defined in Section2 (1) (0) of the Act.

\textsuperscript{91} AIR 1996 SC 550
\textsuperscript{92} \textit{Ibid.}
A ‘contract of personal service’ has to be distinguished from a ‘contract for personal service’. In the absence of a relationship of master and servant between the patient and medical practitioner to the patient cannot be regarded service rendered under a ‘contract of personal service’. Such service is service rendered under a ‘contract for personal service and is not covered by exclusion clause of the definition of ‘service’ contained in section 2(1) (0) of the Act.

(3) The expression ‘contract of personal service’ in section 2(1)(0) of the Act cannot the confirmed to contract for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of ‘service’ as defined in section 2(1) (1) of the Act.

(4) Service rendered at a Government hospital/ Health centre/ dispensary where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service are defined in section 2(1)(0) of the Act. The payment of a token amount for registration purpose at the hospital/ nursing home would not alter the position. This is the main verdict from the Court. In this landmark decision Supreme Court brought the medical profession under the meaning of “Commercial Trade” and the patient as a “potent consumer.” After V.P. Shantha’s decision medical liability has turned into a commercial liability and corporate liability. There is no scope for protection of medical ethics and patient’s valuable human rights. Even though the consumer law is ready to provide speedy, inexpensive remedial system in the positive way it has so many negative aspects which affects the rights of patient. After this decision the medical profession has been exclusively commercialised and everything valued with eye on profit. This decision does not protect the negligence taking

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93  Ibid
place in the Government hospitals and health centers. Following the decision, the service rendered by unqualified doctors came into discussion.

Service rendered by unqualified doctors was discussed in *Ponnam Verma v. Ashwin Patel.* This was a notable decision. Here the court tried to uphold the importance of proper qualification of medical professionals and thereby prevent the service of quack doctors. In this case Dr. Ashwin Patel who qualified in Homeopathic medicine treated Pramod Verma for viral fever. Later his condition deteriorated and he was shifted to Sanjeevani’s Maternity and General Nursing Home of Dr. Rajeev Warty (Respondent No:2) as an indoor patient on 12th July 1992. This was done on the advice of Respondent No:1. He was then transferred to Hinduja Hospital in an unconscious state where, after about four and half hour of admission, he died.

Respondent No.1 was negligent in administering strong antibiotic to Pramod Verma initially for the treatment of viral fever and subsequently for typhoid fever without confirming the diagnosis by blood test or urine examination. He was not qualified or even authorised to practice in Allopathic System of medicine and prescribe allopathic drugs and therefore his lack of expertise in the Allopathic System of medicine was responsible for deficiency in the treatment administered by him. Respondent No:2 also put intravenous Glucose (Dextrose) drip without ascertaining the level of blood sugar by a simple blood test. This was responsible for steady deterioration of patient’s condition.

Court held that the combined reading of Bombay Homeopathic Practitioners Act, 1959, the Indian Medical Council Act, 1956 and the Maharashtra Medical Council Act, 1965 indicates that a person who is registered under the Bombay Homeopathic Practitioners Act, 1959 can practice only Homeopathy and that he cannot be registered under the Indian Medical Council Act, 1956 or under the

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94 AIR 1996 SC 2111
95 Ibid.
96 Ibid.
State Act namely, the Maharashtra Medical Council Act 1965, because of the restriction on persons not possessing the required qualification.

By considering all these aspects the apex court cancelled the decision of National Commission and awarded compensation of Rs.3,00,00/- to his wife. Court concluded the judgment by saying that *sic utere tuo ut alienum non loedas* (a person is held liable at law for the consequences of his negligence). Through these cases the court has made substantive contribution by upholding the standard of medical profession. Another principle is relating to Right to privacy and Medical Negligence.

E. **Right to Privacy and Medical Negligence**

This matter had been settled by Supreme Court in ‘*X* v hospital ‘*Z*’. 97 The appellant’s blood was to be transfused to another and therefore, sample was tested at the respondent’s hospital and he was found to be HIV (+). On account of disclosure of this fact, the appellants proposed marriage to one ‘A’ was called off. Moreover, he was severely criticized and was also ostracised by the community. He came to Supreme Court through civil appeal.

Appellant’s contention was that the respondents were under a duty to maintain confidentiality on account of the code of Medical Ethics formulated by the Indian Medical Council Act. Right to privacy has been carved out of the provision of Article 21 and other provision of the Constitution relating to the Fundamental Rights read with the Directive Principles of State Policy. 98

Court in this case observed that it is the basic principle of jurisprudence that every right has a correlative duty and every duty has a correlative right. But this rule is not absolute. It is subject to certain exceptions in the sense that a person may have a right but there may not be a correlative duty and this case falls within the exception.

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97 (1998) 8 296
Court held that appellant was found to be HIV (+), its disclosure would not be violative of either the rule of confidentiality or the appellant’s right of privacy. By such disclosure the life of Mis ‘Y’ with whom the appellant was likely to be married, was saved in time. Otherwise she too would have been infected with the dreadful disease. Hence the court dismissed the appeal. Supreme Court confirmed that right to disclosure of confidential information for the welfare of public will prevail over right to privacy. Another principle is relating to the extended meaning of patient as a potential consumer.

F. Patient as Potential Consumer

This principle was explained through Spring Meadows Hospital v. Harjot Ahluwalia. In this case a minor Haryol Ahluwalia was being treated at a Nursing Home in Noida. Later she was admitted to Spring Medows Hospital. There the doctor made the diagnosis that the patient was suffering from typhoid and prescribed the treatment for typhoid fever. The injection- Lariago was administered intravenously to the minor patient. The patient, immediately on being injected collapsed while still in the lap of his mother. Subsequently he was reduced to a vegetative state. A complaint has filed before the consumer commission later the matter was discussed by the Supreme Court. Negligence was alleged against the doctor. The doctor had the duty to decide the course of treatment and the nurse was only working under his control and direction. It is the duty of doctor to give the injection and take the necessary care. Hospital is also negligent having employed such unqualified persons such as the nurse and having entrusted a minor child to her care. Gross negligence was attributed to the doctor as he delegated the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly.

Here the court held that the parents of the child having hired the service of the hospital are consumers within the meaning of section2 (1) d(ii) and the child also is being a beneficiary of such services hired by his parents in the

99 AIR 1998 SC 1801
100 Ibid.
inclusive definition under sect 2(1) (d) of the Act. So the court awarded 28lakhs rupees as compensation for the mental agony and for the vegetative state of their child. Through this decision, court confirmed the status of the parents as potential consumer on behalf of the children. Another legal principle is relating to *Res Ipsa Liquitor*.

**G. Res Ipsa Loquitur**

This is explained in *Achutrao Haribhau Khodwa v. State of Maharashtra & others.* In this case an express case of negligence was reported before Court. It was a typical example of Res Ipsa Loquitur. The appellant raised the contention that after the operation the doctor left some cotton mop inside the intestine causing severe pain and infection. Peritonitis developed and a second surgery was performed and the cotton mop along with the puff was removed, but she did not survive.

Here the court held that “The skill of medical practitioner differs from doctor to doctor”. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Court would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by the doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he had attended on the patient with due care, skill and diligence and if the patient still does not survive and suffer a permanent ailment, it would be difficult to hold the doctor guilty of negligence. Supreme Court framed the rule in this case. In cases like this where there is Res Ipsa Liquitor, it can be considered as typical case of negligence. The doctor was held liable as a valid explanation for the mop having been left inside the abdomen of the lady. The Res Ipsa Liquitor itself considered the proof for negligence. Another relevant component of negligence developed by the court is lack of duty of care and caution.

101 1996 (2) SCC 634
H. Lack of Care and Caution

This was one of the most important legal components of negligence. It was discussed through a relevant decision in Vineetha Ashok v. Lekshmi Hospital.\textsuperscript{102} The petitioner was aborted by respondent No.2. After the abortion the doctor removed the uterus because of cervical pregnancy. One of the main allegations against the doctor is that had he not acted with due care and caution required of medical professionals in diagnosing the problem, in the performance of their duties and lack of necessary facilities and infrastructure at the hospital. The appellant pleaded that the dialation & currettage (D&C) procedure was unnecessarily done on her which led to other problems resulting in loss of uterus at a very young age.

The doctor resisted by saying that the appellant approached the doctor for termination of pregnancy because she had a small son aged eight months who was born after a caesarean section. The appellant was having a cervical pregnancy extending to the lower segment of her uterus which is very complicated and rare type of pregnancy which cannot be diagnosed by clinical or vaginal examination particularly in the early weeks of pregnancy. Hysterectomy is recommended as an established procedure for tackling excessive bleeding in case of cervical pregnancy, to save her life when excessive bleeding started. Such bleeding was not on account of any faulty procedure adopted in the course of surgery.\textsuperscript{103}

But here the court held that doctor will not be guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art and if he has acted in accordance with such practice merely because there is a body of opinion that took a contrary view will not make him liable for negligence. Through large amount of medical literature stated that ultrasonography would not have established ectopic pregnancy, some text books indicate that it was possible to identify such problem.

\textsuperscript{102} 2001 (3) KLT 606 (SC)

\textsuperscript{103} Ibid.
But even with two views if possible, the general practice in the area in which the respondents practiced such procedure was followed and, therefore, no negligence can be attributed to the respondents on that ground. In majority of cases, it has been demonstrated that a doctor will be liable for negligence in respect of diagnosis and treatment inspite of a body of professional opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis then the court would be entitled to hold that the body of opinion is not reasonable or responsible. But the present case does not warrant such a conclusion since it is implicit in the courts view that the course adopted by Dr. Santha Warrier is reasonable and responsible. So the court dismissed the appeal. This decision was followed by another classic decision in which the court established the principle of vicarious liability.  

I. Vicarious Liability

Vicarious liability is also imported for providing maximum justice. Medical Negligence plays its game in strange ways. Sometimes it plays with life, sometimes it gifts an “unwanted child” as in the case like State of Haryana v. Santra where the respondent, a poor labourer woman, who already had many children had opted for sterilization, developed pregnancy, and ultimately gave birth to a female child.

Smt. Santra, the victim of the medical negligence, filed a suit for recovery of Rs. 2lakhs as damages for medical negligence, which was decreed for a sum of Rs.54,000 with interest at the rate of 12 percent per annum. Two appeals were filed against this decree in the court of District Judge, Gurgaon, which were disposed by the Additional District Judge. Both the appeals one filed by the State of Haryana and the other by Smt. Santra were dismissed. The second appeal filed by the State of Haryana was summarily dismissed by the Punjab & Haryana High Court. It was in these circumstances that the Special leave petition was filed before the Supreme Court.

104  Ibid.

105  (2000) 5 SCC
One of the contention of the Respondent is that she already had seven children and birth of a new child put her to unnecessary burden of rearing up the child as also all the expenses involved in the maintenance of that child, including the expenses towards the clothes and education. She defended by the saying that there was negligence from the part of the doctor who performed the operation. The appellant further pleaded that Smt. Santra had herself put her thumb impression on a paper containing a recital that in case the operation was not successful, she would not claim any damages. It was pleaded that she was stopped from raising the plea of negligence or from claiming damages for an unsuccessful sterilisation operation from the State.

Many allegations were made against the doctors. They had offered complete sterilization so both the fallopian tubes should have been operated upon. The doctor who performed the operation acted in a most negligent manner and the possibility of conception by Smt. Snatra was not completely ruled out as her left fallopian tube was not touched. So she conceived again and gave birth to an unwanted child. The lower court decided the case in favour of Respondent.

In Appeal, court, another contention raised by Appellant was that claiming damage for the child is totally opposite to public policy. They got pleasure through the rearing of child. But the appeal court held that, in a country like India, population is increasing by the flick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it had created various devices including sterilization operation. The doctor as also the state must be held responsible in damages if the sterilization operation performed by him was a failure on account of his negligence, which was directly responsible for another birth in the family, creating additional economic burden on the person. This decision also created vicarious liability on account of medical negligence of a doctor in a government hospital. Through this decision Supreme Court contributed a positive view for protecting the rights of patient under the care of Government Hospitals. Another important legal principle derived by the court is relating to Informed consent.

J. Informed Consent

Another relevant principle of negligence is “informed Consent”. The principles of informed consent developed through the recent decision named as *Samira Kohli v. Dr. Prabha Menchanda*. In this case the court discussed the principle of medical negligence in detail. Here appellant is an unmarried woman, aged 44 years, visited the clinic of the respondent complaining of prolonged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test. After examining the report, the respondent had a discussion with the appellant and advised her to undergo a laparoscopy test under general anesthesia for making the affirmative diagnosis. Accordingly, on the next day, the appellant went to the respondent’s clinic with her mother. On admission, the appellant’s signatures were taken on (i) admission and discharge card (ii) consent for hospital admission and medical treatment, and (iii) consent form for surgery. The admission card showed that admission was “for diagnostic and operative laparoscopy” on the date specified. The consent form for surgery, filled by Dr. L (the respondent’s assistant) described the procedure to be undergone by the appellant as “diagnostic and operative laparoscopy” and added that laparotomy might be needed. Thereafter, the appellant was put under general anesthesia and subjected to a laparoscopic examination. When the appellant was still unconscious.

Dr. L came out of the operation theatre and took the consent of the appellant mother, who was waiting outside, for performing hysterectomy under general anesthesia. Thereafter, the respondent performed an abdominal hysterectomy (removal of uterus) and bilateral salpingo-oopterectomy (removal of ovaries and fallopian tubes). The appellant filed a complaint before the National Consumer Redressal Commission claiming a compensation of 25 lakhs from the respondent on the ground that the respondent was negligent in treating her; that the radical surgery by which her uterus, ovaries and fallapian tubes were removed were without her consent. The compensation claimed was for the loss of reproductive organs and consequential loss of opportunity to become a mother, for diminished matrimonial prospects, for physical injury resulting in the loss of vital
body organ and irreversible permanent damage for pain, suffering emotional stress and trauma, and for decline in the health and increasing vulnerability to health hazards. One of the main contentions of the appellant is that, firstly failure to take her consent, much less an informed consent, for the radical surgery involving removal of reproductive organ. Second was the failure to exhaust conservative treatment before resorting to radical surgery, particularly when such drastic irreversible surgical procedure was not warranted in her case. Surgery without her consent was also in violation of medical rules and ethics. Removal of her reproductive organs also resulted in a severe physical impairment and necessitated prolonged further treatment.

Respondent’s contention is that it was a typical case of endometriosis. If endometriosis is widespread in the pelvic causing adhesion, and if the woman is over 40 years of age, the best and safest form of cure was to remove the uterus and ovaries. As there is a decline in fertility for most women in the fourth decade and a further decline in women in their forties, hysterectomy is always considered as a reasonable and favoured option. Further endometriosis itself affected fertility adversely. All these were made known to the appellant before the removal of uterus and ovaries, if found necessary on laparoscopic examination. It was conducted with the consent of appellant’s mother. It was highly necessary for the betterment of appellant. So the court held that the doctor has acted in accordance with a practice accepted as proper by medical fraternity and cannot be said to have acted negligently.

Finally the court decided the matter in favour of appellant. By considering the interest of justice the respondent is denied the entire fee charged for the surgery and in addition, was directed to pay 25,000 as compensation for the “unauthorized AH, BSO surgery.” This is one of the latest decisions of apex court relating to informed consent. The court has also framed some guidelines regarding criminal liability of doctors.
Criminal Liability of Doctors

Criminal Liability of doctors is clearly explained by the Supreme Court through two cases. Through these decisions Indian Supreme declared their stand relating to criminal liability of doctors. The first decision is Dr. Suresh Gupta v. Govt of NCT of Delhi. In this case the possibility and extent of criminal liability is elaborately discussed by the court. They frame a fixed rule to demarcate tortious liability and consumer liability.

Regarding the factual situation, Appellant who was a doctor (plastic surgeon) was in the dock as an accused on the charge under section 304-A of the Indian Penal Code for causing death of his patient. The patient was operated by him for removing his nasal deformity. Patient was a young man of 38 years having no cardiac problem at all. They gave incision at wrong part due to which blood seeped into the respiratory passage and because of that, the patient immediately collapsed and died.

Through the expert opinion, the court came to the conclusion that the death was caused due to the negligence. One of the main contentions of the doctor on appeal was that, it does not amount to criminal negligence and the trial proceedings should be cancelled. But here the real question was whether the negligence was criminal negligence or civil negligence. For that purpose the court discussed the law in detail. 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. Court refered to R v. Adomako, where the court had held that, “ A doctor cannot be held criminally responsible for patient’s death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the state”.

109 (1994) 3 All ER 79 (HC)  R.v. Adomako
Thus, when a patient agrees to go for medical treatment or surgical operation, every careless act of the medical man cannot be termed as “criminal action”. 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 is found to have arisen 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 give rise to civil liability but would not suffice to hold him criminally liable.110

According to court for every mishap or death during medical treatment, the medical man cannot be proceeded against for punishment. Criminal prosecution of doctors without adequate medical opinion pointing to their guilt would be doing great disservice to the community at large because if the courts were to impose criminal liability on hospitals and doctors for everything that goes wrong, the doctors would be more worried about their own safety then giving all best treatment to their patients. This could lead to shaking the mutual confidence between the doctor and the patient. Every mishap or misfortune in the hospital or clinic of a doctor is not a gross act of negligence to try him for an offence of culpable negligence.111

In this case the court held that, patient was a young man with no history of any heart ailment. The operation to be performed was for nasal deformity. It was caused because of mere lack of proper care, precaution and attention or inadvertence from the doctor which creates civil liability but not criminal liability. So the court allowed the appeal filed by doctor and the court cancelled the criminal proceedings pending against the doctor.

Subsequent development of law took place through Jacob Mathew v. State of Punjab and others.112 In this case Jiutan Lal Sherma was admitted as a patient

110 Ibid.
111 Ibid.
112 (2005) 6 SCC 1
in a private ward of CMC Hospital Ludhiana. He felt difficulty in breathing. The complainants elder brother, Vijay Sharma who was present in the room contacted the duty nurse, who in turn called some doctor to attend to him. No doctor turned up for about 20 to 25 minutes. Then Dr. Jacob Mathew, the appellant came to the room of the patient. An oxygen cylinder was brought and connected to the mouth of the patient but the breathing problem increased further. The patient tried to get up but the medical staff asked him to remain in bed. The oxygen cylinder was found to be empty and there was no other gas cylinder available in that room. Vijay Sharma went to the adjoining room and brought a gas cylinder. However, there was no arrangement to make the gas cylinder functional and 5 to 7 minutes were wasted. By this time, another doctor who came in declared the patient dead, the doctor was prosecuted under section 304-A/34 IPC.

In this case the court specifically distinguished the law regarding criminal liability and civil liability. The court also declared guidelines regarding the steps necessary for prosecution of doctors or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient, a failure to use special or extra ordinary precautions which might have prevented the particular happening cannot be the standard of judging the alleged negligence. So also, the standard of care while assessing the practice as adopted, is also judged in the light of knowledge available at the time of the incident and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it was suggested it should have been used.

In this case, the court comprehensively derived some rules of medical negligence as

1. Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by 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
essential components of negligence are three “duty”, “breach” and “resulting damage”.

2. Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. As long as a doctor follows a practice acceptable to the medical professional of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice.

3. A professional may be held liable for negligence on one of the two findings; either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skill in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

4. The test for determining medical negligence as laid down in Bolam case holds good in its applicability in India.

5. The jurisprudential concept of negligence differs in civil law and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence that amounts to criminal negligence, the degree of negligence should be much higher i.e., gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.
6. The word “gross” has not been used in section 304-A IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be “gross”. The expression “rash or negligent act” as occurring in section 304-A IPC has to be read as qualified by the word “grossly”.

7. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstance no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

8. Res Ipsa Loquitur is only a rule of evidence and operates in the domain of civil law, specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed into service for determining per se the liability for negligence within the domain of criminal law. Res Ipsa Loquitor has, if at all a limited application in trial or a charge of criminal negligence.\textsuperscript{113}

In this case that court framed a policy for prosecuting doctors.

Instance of doctors (surgeon and physician) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by the police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical profession to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered to his reputation cannot be compensated by any standards.

\textsuperscript{113} \textit{Ibid.}
It is highly necessary to protect doctors from frivolous or unjust prosecutions. Many complainants prefer recourse to criminal process as a tool for pressurising the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

Statutory rules or executive instructions incorporating certain guidelines need to be framed and issued by the Government of India and / or State Government in consultation with the Medical Council of India. Until it is done it is done, the court can lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant produces prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer, should, before proceeding against the doctor accused of rash or negligent or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that breach of medical practice who can normally be expected to give an impartial and unbiased opinion applying the Bolam test to the facts collected in the investigation. A doctor accused of rashness or negligence may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.  

At last the court came to the conclusion that all the averments made in the complaint even if held to be proved, do not make out a case of criminal rashness or negligence on the part of the accused appellant. It is not the case of the complainant that the accused appellant was not a doctor qualified to treat the patient whom is he has agreed to treat. It is a case of non-availability of oxygen cylinder or because of the gas cylinder being found empty, so the hospital is liable in civil law but the accused appellant cannot be proceeded against under section

114 Paragraph 50, 51 and 52 of Jacob Mathew v. State of Punjab (2005) 6 SCCI
304- A IPC on the parameters of the bolam test. In this famous case the Supreme Court demarcated civil liability and Criminal Liability under Medical negligence offences. Here the court also pronounced some strict guidelines having the effect of law, for prosecuting doctors.

**Conclusion**

By evaluating all these case, the main inference is that Indian Court referred much to English cases. Medical negligence is a complicated area needing strict supervision of law. By considering all these decisions, it can be seen that the courts have taken a stand for protecting the reputation of doctors as the ultimate cause. The Rights of innocent patients are neglected here within the principles of “Accepted Practice.” So it is highly necessary to enact a law incorporating all the judicial findings inorder to balance the rights of patients and doctors.