INTRODUCTION

Practice of medicine is rendering great service to the society. The word doctor is derived from the Latin word ‘docere’ which means to teach. The doctor is a teacher who guides his patients about how to maintain health and prevent disease. Doctor has been defined as a qualified practitioner of medicine or surgery in any of its branches and patient means a person undergoing treatment for disease or injury.¹

Doctors need scientific knowledge, technical skill and understanding. Those who use these with courage, with humility, with wisdom and in accordance with medical ethics provide a unique service to their fellow men and women, and build an enduring edifice of character within themselves.²

It is, therefore a noble profession. Traditionally, the family doctor was considered to be a friend, philosopher and guide for the sick. The relationship between the patient and the doctor was considered as very sacred; it is based on mutual trust and faith, and it is not mercenary. According to Voluntary Health Association of India, the present state of medical profession mirrors the rot which seems to have set into our system.³ Increased mechanisation and commercialisation of the profession has brought an element of dehumanization in medical practice.⁴ Health care has now been reduced to a business which determines the patient-doctor relationship.⁵

1 The New International Webster’s Comprehensive Dictionary of the English Language. op. ci, p. 374.
2 The relevant parts of “Code of Medical Ethics”; as propounded by the Medical Council of India, have been given in Appendix –I.
Today it has almost diminished its fiduciary character. ‘Services’ of medical establishments are purchasable commodities and the ‘business’ mind has given an impetus to more and more malpractices and instance of negligence. It is not surprising that most of the nursing homes are not even owned by doctors, but by businessmen and promoters. There are so many stringent legislations which can check malpractice but the procedures are long and of general apathy.

The consumers are a very powerful group and the legislature has enacted the Consumer Protection Act, 1986 to arm each and every consumer and/or consumer associations with rights to seek speedy, cheap and efficacious remedies which is proving to be very popular and effective as well, leaving behind a trail of rulings and findings where under, so many of us, have benefited.

Doctors are considered as visible gods. They give life to the persons who are suffering from various diseases and injuries. They are the trustworthy persons and the patient who approaching a doctor with an ailment thinks that he is the right and capable person to cure him. They approach him with that confidence. At the same time, there is a duty on the part of the doctor to materialise such obligation with proper care.

At present, the medical profession has become commercialised. Practitioners are adopting deceitful methods to attract the innocent patients and thereby procure money. Some doctors suggest their patients to undergo various tests, that too in a particular laboratory which are, in fact unnecessary. There may be unethical collusion between that laboratory and the doctor. And some other doctors prescribe more medicines than necessary on the letter pad of a particular medical shop. There may also exist some understanding between doctor and pharmaceutical companies for prescribing their product. The medical profession is a noble profession and it should not be brought down to the level of a simple business. Today in India, many doctors (though not all) have become totally money-minded, and have forgotten their Hippocratic Oath. Since most people in India are poor, medical treatment is beyond their reach.
The main cause of negligence in Government Hospital is due to insufficiency of doctors. The doctor’s ratio is as low as 1:1,722. The shortage exists at all levels, including specialist doctors, nurses and paramedics. The Medical Council of India (MCI) the agency that was set up to regulate medical education and practice has failed on many fronts—despite good intentions.\(^6\)

Medical Colleges are under the control and supervision of Medical Council of India, many of them are profit oriented medical colleges. This often results in narrowed perspective. Consumer complaints are growing at a fast rate of 15-20%. This is bad news in an era of increasing incidence of lifestyle-related disease. The irony is that medical insurance has never been so much in demand. The market for new policies is growing at 20-25 per cent annually. People invested in India Rs 3 crore as health insurance in last year which constituted three per cent of the total insurance. But around 25 million people now have health cover, this market has attracted over 20 general and health insurance companies.\(^7\)

The negligence at the time of treating the patient, is not excusable. The doctors were brought under the Consumer Protection Act, 1986 for their negligent acts. The number of medical negligence cases has been increasing over the years. Several patients are affected, particularly those belonging to the lower income groups. Due to their poor economic background, they were unable to get proper care for the injury caused by negligence. Doctors often get away with their act of negligence because of the patient’s ignorance in medical knowledge and inaccessibility to evidence. Further, reported incidences are very low. All these situations are favourable to the doctors and corporate medical firms.

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\(^6\) Reported in *The Hindu*, June 7\(^{th}\) 2010, p.14

\(^7\) Reported in *Out Look Magazine*, 16\(^{th}\) August, 2010, p.40
In this century, medical technology has advanced and the hospitals have evolved into modern, health-providing business centers. A profession as distinguished from trade is based on high ethical standards. Medicine has its own ethical parameters and code of conduct. This profession is rendering a noble service to humanity and has public trust. Any person or professional who serve the public has to do its duty, not as a matter of contract, not in consideration of the fee, but as an organized public service. The principle of public service is a major component of all profession, and medical profession cannot be an exception to it.

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

Therefore, if there is any delinquency, culpability, deviancy, rashness or negligence on the part of a doctor while treating a patient, should the law allow him to use the benefit of alibi of his professional status? Any person who deals with public owes a duty of care. Thus the medical profession owes to the community a greater degree of care, more vigilance and higher responsibility in the course of service or practice. Thus, it would be unfair for a doctor to claim immunity from liability or even criminal action, if rashness, grave negligence and turpitude are made out against him.

In India, majority of citizen requiring medical care and treatments belong to low income groups and most of them are illiterate or semi-literate. They do not even understand the functions of various organs or the consequences of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctor’s experience or intuition is acceptable
and welcome as long as it is free or cheap; and whatever the doctor decides as being in their interest, it is usually accepted. They are a passive, ignorant folk uninvolved in treatment procedures.

The poor and needy face a hostile medical environment—inequality in the number of hospitals or beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy. Many poor patients with serious ailments (e.g., heart patients and cancer patients) have to wait for months for their turn even for diagnosis, and due to limited treatment facilities, many die even before their turn comes for treatment. What choice do these poor patients have? Any treatment of whatever degree is a boon or a favour, for them. The stark reality is that for a vast majority in the country, the concept of informed consent or any form of consent, and choice in treatment, has no meaning or relevance.

On the other hand, we have doctors, hospitals, nursing homes and clinics in the commercial sector. There is a general perception among the middle class public that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicine, and subject them to unwanted surgical procedures for financial gain. The public feel that many doctors who have spent a crore or more for becoming a specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely commercial and not service motive, that such doctors and hospitals would advice extensive costly treatment procedures and surgeries, where conservative simple treatment may meet the need; and what used to be a noble service-oriented profession is slowly but steadily converting purely into a business. Every doctor wants to be a specialist. The proliferations of specialists and super specialists have exhausted many a patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide treatment. What used to be competent treatment by one general practitioner have now become multi-prolonged treatment by several specialists.
When law steps in, to provide remedy for negligence or deficiency in service by medical practitioner, it gives rise to twin adverse effects. More and more private doctors and hospital have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedure and test, to avoid any allegation of negligence, even though they might have already identified the ailment with reference to the symptoms and medical history with 90% certainty, by their knowledge and experience. Secondly, more and more doctors particularly surgeons in private practice are forced to cover themselves by taking out insurance, the cost, of which, is also ultimately passed onto the patient, by way of higher fee. The nature of doctor–patient relationship is on the basis of trust. The extent and nature of information required to be given by doctors should continue to be governed by the Bolam test rather than the “reasonably prudent patient” test evolved in Canterburry. It is for the doctors to decide, with reference to the condition of the patient, nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patient.

Cases of medical negligence seem to be rising in the same proportion as the flourishing of profit-motivated health industry. The Union Minister for Health and Family Welfare, himself admitted as much when he said that in 2009, over 90,000 cases of negligence were filed in consumer court, which are almost 50% more than those filed in 2004. The pharmaceutical company, drug controller, and medical practitioners seem to have formed a nexus to play havoc with the life of patient. In the period 2004 to 2009 in Kerala, 39204 illegal abortions were conducted by doctors, for money. This was revealed from the study conducted by the Achutha Menon Center for Health Science Studies. At the same time there are some

8 464 F 2d 772 (D.C. Cri. 1972)
9 Martin F.D’Souza v. Mohd Ishfaq 2009 (3) SCC (1)
10 Reported in The Hindu, June 7th 2009, p.7
reported cases in which doctors were directly involved in kidney racket business. The year 2009 witnessed an escalated number of medical negligence cases in the various consumer forums. As part of the study a survey was conducted regarding number of cases filed before consumer courts in Kerala. I selected five districts and examined the case registers of five consumer forums. From the case book of Thiruvananthapuram District Consumer Forum, it was found that 100 cases were filed between 2007 to 2010. In the same periods 80 cases filed in Ernakulam District Consumer Forum, 22 cases in Kottayam District Consumer Forum, 20 cases in Allapuzha District Consumer Forum, 18 cases in Idukki District Consumer Forum. The study itself reveals that medical negligence cases are increasing in number and emerging as a serious social issue which needs proper interference of law.

The judges in civil court and Consumer Forums are not experts in medical science, and they have to depend on specialist to formulate their own views. It is true that the medical profession has to a great extent commercialised and many doctors have departed from their Hippocratic Oath for making money. However, the entire medical fraternity cannot be blamed for losing its integrity and competence just because of some bad professionals. For instance, even after the best efforts of a surgeon if the patient dies it does not mean that the doctor or the surgeon is guilty of medical negligence unless there is some strong evidence against him.

In *Mukund Lal Gangaly v. Dr. Abhijit Gosh*\(^\text{14}\), it was held that, service rendered by doctors at a government hospital are without considerations and the patients are not consumers as defined in Consumer Protection Act, 1986. Hence a remedy to a patient in government hospital is denied by the Consumer courts in India.

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12 Reported in *The Hindu*, September 14\(^{th}\), 2009, p.14
13 Reference from the casebook of Thiruvananthapuram, Ernakulam, Kottayam, Allapuzha and Idukki District Consumer Forums
14 1995 (3) C.P R 391
A doctor shall abide by the oath throughout his profession. If a doctor fails to fulfill any of these promises, he will be liable for professional misconduct and liable for removal from the rolls. And they will also be liable for their medical negligence under the Consumer Protection Act, 1986.

The hospitals are equally liable for the acts of the para medical staff and/or its doctors. Nursing homes may also be held negligent if nurses fail to execute instruction delivered to them at the time of treatment. In *Achutrao Haribhau Khodwa. v. State of Maharashtra*¹⁵, the Supreme Court held that, the State is liable for acts of negligence committed by doctors in a government-run hospital.

Supreme Court of India in *Indian Medical Association v. V.P. Shantha*¹⁶ held that the medical profession is included within the meaning of service under consumer law. Protests against this decision arose from different corners but the courts confirmed their stand. No doubt, due to this decision, the doctors have become more cautious in treatments and a defensive medication slowly took over. In such cases, the patients would be advised to undergo several tests even before the preliminary diagnosis, so as to obviate any litigation against them. The ultimate sufferer is the patient himself as the treatment becomes expensive and also because of the delay caused in initiating the treatment.

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

¹⁵ 1996 (2) SCC 634
difficult to understand, particularly in complicated medical aspects and to a layman in medical subject. A balance has to be maintained in such cases. The doctors who cause death or agony by medical negligence should certainly be punished, and also be remembered that like any other profession, the doctors too can make errors of judgment, and if they are punished for every error no doctor can practice his profession. Indiscriminate proceedings and decisions against doctors are counter productive and serve no good. They inhibit the free exercise of judgment by a professional in a particular situation.\textsuperscript{17}

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct falls below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable, if he leaves surgical gauze inside the patient after an operation.\textsuperscript{18}

There may be few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be liable? In such situation he should not be held liable. Science advances by experimentation, but experiments sometimes end in failure e.g. the operation on the Iranian Siamese twins or the first heart transplant by Dr. Barnad in South Africa. In such cases it is advisable for the doctor to explain the situation to the patient and take his written consent.\textsuperscript{19}

\textsuperscript{17} Supra, n. 9
\textsuperscript{18} Supra, n.15.
\textsuperscript{19} Reported in \textit{The Hindu}, March 23\textsuperscript{rd}, 2010
Health is considered to be man’s most valuable asset since all his activities depends on the state of his health. Health has been defined by the World Health Organization (WHO) as a state of complete physical, mental, and social well being and not merely the absence of disease or infirmity. Disease implies absence of ease or comfort. According to Chambers Twentieth Century Dictionary, the meaning of the word disease is “uneasiness or a disorder or want of health in mind or body or ailment.”

The word health is changing in its contents radically after the World Health Organisation defined the term positively as a state of complete physical, mental and social well being, and not just the absence of diseases and Illness. As per the Constitution of the World Health Organisation, every one has a right to have the highest standard of Health. Such a fundamental right shall be available to all without distinction of race, religion and political belief, economic or social condition that health of all people is fundamental to the attainment of peace and security. After the establishment of the World Health Organization, the right to health care was recognized internationally, and various international conventions recognized the importance of the right to health care. The objective of the organization is declared as the attainment by people, of the highest possible level of health.

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21 Preamble to the Constitution of the World Health Organisation
22 Ibid.
24 Article 1 of the Constitution of the World Health Organisation
Recognition of the right to life to live with dignity is the basic premises on which human rights law rests. Living with dignity calls for providing adequate opportunity to develop, to all the individuals, irrespective of the caste, creed, sex and place of birth. All the international conventions on human rights seeks to promote right to live with dignity, and the philosophy behind all human right laws will be meaningless, unless medical services are made available to all. It is conceivable that there could not be an absolute right to enjoy all the fruits of medical technology. The preamble to the constitution of the World Health Organisation makes this clear.

The term ‘deficiency’ in medical services should extend beyond the doctrinal definition of the term given under the Consumer Protection Act, 1986 for the purpose of promoting human rights. The foundation of this term in fact stems from the International Organisation For Consumer Unions (IOCU) and the United Nations Guidelines on Consumer Protection. If deficiency in the medical services is examined in the light of the principles it can be identified that the following circumstances are leading to deficiency in medical services. (1) Denial of access to health service which include access to basic medical services (2) Advanced medical treatments which may be life saving procedures, or procedures for satisfying desirable human needs. Failure to provide safety of products in health care services, experimental medicines and clinical trials on human beings and abuse of diagnostic and curative procedures may also lead to human right violations. Denial of health care records, commercial trade of human organs and researches involving human embryo or human cells also need to be evaluated in the context of human rights law principles.

25 See the International Convention on Civil and Political Rights.
26 For the definition of the term ‘deficiency’, Consumer Protection Act, 1986, Section 2.
27 The Montreal Convention of the IOCU adopted the principle that availability of essential services to all people by eliminating poverty is one of the important goals to be achieved by the consumer groups.
28 Right to get goods and services at reasonable cost is one of the rights recognized by the U.N. Guidelines for Consumer.
The profession of medicine has immensely benefited mankind. Medical service is defined as assistance or benefits pertaining to medicine or its practice offered to another, in the performance of healing disease for the purpose of cure. It should be clear, therefore, that medical services imply delivering quality medical care to the community (ie, service of mankind), in treating and curing.

Medical service means the services rendered by the hospitals (both Government and Private), nursing homes, health centers, clinics, medical practitioners (physicians, surgeons, and those practicing Ayurvedic, Homeopathic or any other system of medicine or surgery), chemists, diagnostic centers, paramedical staff, nursing staff, and other allied staff.

The question of professional duty to take care of health has immense significance in the present day world. The WHO is committed to provide health for all. The Directive Principles of State Policy under the Constitution of India demands the State to make effective provision for public health, and for just and humane conditions of work. The Supreme Court has declared that right to medical aid as an integral part of the right to life. It is an obligation on the State to preserve life by extending required medical assistance. In fact, the Apex Court has held that right to health and medical care is a fundamental right under the Constitution of India. On jurisprudential analysis of this issue, it is clear that it has become a socio-legal problem.

This issue has created complicated problems in the society and health care system and hence this area was selected for the study. The study solely depends on secondary data available in the forms of reports, articles, studies and surveys.

29 Article 41 and 42 of the Constitution of India.
30 Article 47 of the Constitution of India.
conducted by the Government and non-Government agencies. Further, legislations, government reports etc have also been extensively referred.

For the purpose of understanding the evolution of medical negligence law, this thesis has been divided into 9 chapters. The 1st chapter is an introductory chapter. In this chapter, an attempt is made to define and analyze the need for an effective law for controlling medical negligence cases. This chapter provides an appropriate prelude to the entire thesis. It discusses the genuine problem behind this issue and its impact on the society. It also specifies the methodology used in this study.

The second chapter discusses the historical evolution of medical negligence law in India and under common law. Like any other topic medical negligence too has a historic evolution. It consists of five units. The first unit discusses the origin of medical negligence law from the concept of Indian Legal thought upto Constitutional developments. The law has been reformed through social changes. The position of medical negligence under Vedic period has been discussed here. The second unit consists of development of common law from the ancient period in England. Under common law this principle has been emanated from the conventional tort law and many settled principles have been derived from the judicial decisions. The third unit narrates the constitutional perspective of right to quality medical care and its evolution under medical law. Health care law developed in India through the Constitutional jurisprudence and through the interpretation of right to life under Article 21. The fourth unit discusses the evolution of right to medical care through International Documents. It elaborates the various international conventions and instruments adopted by the international community to establish and mould the right to health care.

The fifth unit explains the need for access to quality health care service, to advanced medical treatment and to medical records. It mentions the need for safety requirements of products used in health care service, use of experimental medicines, clinical trials, the law relating to abuse of diagnosis and curative procedures.
The third chapter provides information relating to various medical liabilities. This chapter is divided into four units. The first unit explains liability under penal law. Under this chapter penal liability in England, America and India are explained in detail and the chapter also analyses the penal aspect of medical negligence which constitutes the basic liability in India. The second unit specifies liability under contract law. In every medical undertaking there exist some fair dealings based on basic principles of contract law. The third unit describes the liability under tort law. Tortious liability is the basic liability in medical negligence cases. The legal principles like accepted practice, standard of care, duty of care, breach of duty, legal principles like law of consent and disclosure of information etc… are discussed in detail. The vicarious liability of Hospital, nurses and paramedical staff are explained in the chapter. The fourth unit concentrates on the corporate liability in medical negligence cases. This is a new and developing area of medical offences relating to corporate hospitals. In this chapter all the existing legal liabilities are explained to build a legal foundation for medical negligence jurisprudence.

The fourth chapter discusses medical liability in the light of medical ethics. This is sub-divided into 5 units. The first unit deals with the position of medical ethics law under U.K., American and Indian Medical Council Act. The second unit deals with various classic theories of medical ethics and provides a theoretical foundation. The basic theoretical principles like Moral relativism moral objectivism, moral pluralism, utilitarianism, right-based and duty based theories, virtue ethics and compromise positions are discussed in the unit.

The third unit covers the law relating to informed consent and medical ethics. Informed consent and medical ethics are problematic areas and have been discussed in detail. The fourth unit discusses the legal principles relating to confidentiality, disclosure of information and medical ethics. These are highly complicated issues in the world of advanced medical technology and are therefore explained and analysed in this unit. The fifth unit deals with application of medical ethics law in negligence cases relating to abortion, control of fertility, sex-pre selection, sex-determination, female foeticide, infanticide, artificial insemination, assisted pregnancy / surrogated motherhood and organ transplantation. In all these areas there are controversies
relating to patient autonomy, ethic and law. The chapter concludes by discussing the possibility of a controlling mechanism through the Medical Councils with reference to England, America and India. All these concepts have been discussed in detail to formulate a practical solution for these issues.

The next chapter discusses the consumer liability in medical negligence case. This chapter is the core area of this thesis. Here the discussions are focused on consumer liability. The position of medical negligence in UK and America has been extensively discussed. The first unit deals with liability in UK, USA and in India. This unit provides a comprehensive picture of Indian Consumer Protection Act with reference to “deficiency of services”. The position of patient as consumer has been looked into. The second unit covers enterprise liability of medical negligence case. This liability is an integral part of consumer liability, discussions relating to this liability is highly necessary in the new corporate medical world. The third unit deals with agency liability. The fourth unit explains the importance of insurance coverage under medical negligence case. Medical insurance coverage and their liability in UK and America are highlighted. Finally the application of medical insurance in India is discussed in this chapter. Product liability has some direct application in medical negligence case and it is narrated in the fifth unit. The application of product liability in medical negligence cases which is very relevant area also been discussed with reference to UK, America and India.

Sixth chapter deals with enforcement mechanism under consumer law. This chapter is divided into four units. The first unit discusses enforcement through common law courts and second unit provides some information relating to enforcement through medical council. The third unit covers clearly the enforcement mechanism through Consumer Forums with a comparative study of enforcement mechanisms available in England and America. In India, consumer courts are relevant for rendering speedy, cheap and accessible remedy and the constitution and powers of consumer courts are specifically mentioned under this head. Last unit discusses the enforcement mechanism through writ petitions and provides exclusive informations relating to Consumer law.
The seventh chapter is exclusively dedicated to the development of law through judicial decisions. It is also divided into three units. The first unit deals with development of law in England through English classic decisions. The various principles like accepted practice, breach of duty, standard of care, informed consent, causation and but -for-test ect, which were developed by English court through the English classic decisions are referred. The second unit deals with development of law in America and also highlights the various principles like informed consent, proximate cause, locality rule which were developed through decisions of the American courts. The third unit covers the judicial law making in India and it’s contribution to the development of law. This chapter contains comprehensive descriptions of the entire case study. Relevant principle like law of informed consent, actionable negligence, deficiency in service, patient as a consumer, Res ipsa loquitur, vicarious liability of hospital authorities and criminal liabilities as developed by the Indian courts are discussed.

The eight chapter deals with evolution of medical jurisprudence through existing laws and judicial decisions. This chapter focuses on the outcome of the study from all the above chapters. The first unit deals with evolution of medical jurisprudence through the existing laws in India. This unit narrates the main outcome of studies relating to tort law, penal law and consumer law. The second unit focuses on evolution of medical jurisprudence through judicial decisions. This unit covers the entire developments of law through judicial decisions.

Ninth chapter contains the suggestions to overcome the existing legal issues. One of the most important suggestions is the need for an effective legislation by incorporating all the existing available legal principles relating to medical negligence. This legislation should contain a forum consisting of a competent judicial officer, an experienced doctor as expert and a social worker in the field of medical science for the speedy meritorious settlement of complicated medical negligence cases. Other important suggestions like, No fault compensation programme, patients-centered approach, medical screening board, appointment of medical auditor, and organization of quality control circle ect. are incorporated.