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Review Article

Legal Aspect of Medical Negligence in India

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ABSTRACT

Nowadays, public awareness about medical negligence in India is growing rapidly, and thus hospital managements are increasingly facing complaints regarding the facilities, standards of professional competence, and the appropriateness of their therapeutic and diagnostic methods. After the Consumer Protection Act (CPA), 1986, has come into force some patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. As a result, a number of legal decisions have been made on what constitutes negligence and what is required to prove it. Against this background, aims of this work are to present a summary of legal decisions related to medical negligence and also focus that what constitutes negligence in civil and criminal law, and what is required to prove it.

Keywords: Medical negligence, Gross negligence, Rashness, Criminal law, Medical profession, Consumer protection act, Doctor–patient relationship

INTRODUCTION

Since time immemorial the medical profession has gained respect from all corners of the society. A physician, apart from being a healer, has been looked upon by the masses as a role model of grace personified, though of late this image has transformed to a mere service provider. This can partly be attributed to doctors themselves, owing to the increasing number of cases involving doctors engaging in unethical practices coming to light and, therefore, medical professionals have over the period lost the confidence of their patients and the society[1]. A landmark report by an Indian doctor from Harvard School of Public health (HSPH) has concluded that more than 43 million people are injured worldwide each year due to unsafe medical care. Approximately three million years of healthy life are lost in India each year due to these injuries[2]. However, the law does not aim to punish all acts of a doctor that caused injury to a patient. It is concerned only with those medical negligence acts which arise from an act or omission by a medical practitioner, which no reasonably competent and careful practitioner would have committed. What is expected of a medical practitioner is 'reasonably skillful behaviour' adopting the 'ordinary skills' and practices of the profession with 'ordinary care'. There is, however, room for ambiguity, and judicial interpretation as what is 'reasonable' and 'ordinary' is a question of fact[3]. Essentially, doctors are generally bound to exercise an ordinary degree of care and not the highest possible

[1]Hon'ble Apex Court in matter 'Dr. Balram Prasad Vs. Dr. Kunal Saha & Ors.' & other 2013 STPL(Web) 850 SC has recently awarded Rs 5.96 crore compensation for medical negligence . Such, historic verdict having a far reaching impact on medical negligence and standard of medical care in India.
[2]Kounteya Sinha, *India records 5.2 million medical injuries a year*. The Times of India, New Delhi Edition, September 21, 2013: 15.
[3]Kataria Mrityunjay and Kataria Prashant, *Medical negligence: criminal liability of the doctor and establishment.* Cri L J 2003; 11 (SC) Journal 1.

degree of care. If a medical practitioner has taken reasonable care, then he cannot be held liable. A mere difference in opinion is not a ground for fastening liability on a doctor[4].

In recent decades, Indian society is experiencing a growing awareness regarding a patient's rights. This trend is clearly discernible from the recent spurt in litigation concerning medical professional or establishment liability, claiming redressal for the suffering caused due to medical negligence. After the Consumer Protection Act (CPA), 1986, has come into force some patients have filed legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation.[5]With the introduction of CPA, followed by Supreme Court landmark judgment, increased numbers of litigation were made against doctors by dissatisfied relatives, as it is now easy to file a complaint under CPA. Today it is a common observation that medical practitioners and hospitals are being attacked by the relatives of the patient/deceased person for alleged medical negligence of the doctors. An attempt is made to introspect medical profession with regards to doctor patient relationship in the light of recent Honourable Supreme Court's landmark judgment[6] and to rejuvenate medical professionals to maintain the noble status of the profession.

Negligence

Negligence, in simple terms, is the breach of a legal duty to take due care and caution. It is a breach of a duty caused by the omission to do something, which a reasonable person guided by those considerations, which ordinarily regulate the conduct of human affairs, should have done.[7] It may also be doing something, which a prudent and reasonable person would not have done. The essential components of negligence are: 'duty', 'breach' and 'resulting damage'[8].

In the landmark *Bolam case*[9], it was held that in the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action.

In the case *Kusum Sharma & Ors. vs Batra Hospital and Medical Research Centre & Ors,*[10] wherein the Honourable Apex Court has clearly ruled that 'As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. A 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 then merely because there is a body of opinion that takes a contrary view will not make him liable for negligence[11].

Under the civil law, victims of negligence can get relief in the form of compensation from a civil court or the consumer forum. Here, the applicant only needs to prove that an act took place that was wanting in due care and caution, and the victim consequently suffered damage. There is a difference between civil and criminal negligence. However, in certain circumstances, the same negligent act may also be seen as criminal if it constitutes an offence under any law of the land[12]. Section 304A of the Indian Penal Code (IPC) of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with

[4]*Santosh Kumar Sodhi v. Dr Vijay Maroo* I (2003) CPJ 344.
[5]*Indian Medical Association v VP Shantha* AIR 1996 SC 550
[6]*Jacob Mathew vs. State of Punjab* (2005) 6 SCC 1.
[7]Ratanlal & Dhirajlal, *The Law of Tort*, (Twenty-fourth edition 2002, edited by Justice G.P. Singh).
[8]*R. v. Lawrence*, [1981] 1 All ER 974 (HL)
[9]*Bolam vs. Friern Hospital Management Committee*, Queen's Bench Division, 195, All E.R. 118
[10]AIR 2010 SC 1052
[11]*Achutrao Haribhau Khodwa vs. State of Maharashtra & Ors.* (1996) 2 SCC 634
[12]*Sri UttamSarkar vs The Management of Tura Christian Hospital,* In the Meghalaya State Consumer Disputes Redressal Commission, Shillong, Complaint Case No. 1 of 2006.

imprisonment for a term of two years, or with a fine, or with both. Sections 80 and 88 of the IPC contain defences for doctors accused of criminal liability. Under Section 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. According to Section 88, a person cannot be accused of an offence if she/he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.

Criminal negligence is a form of negligence that arises when the doctor shows gross lack of competence, or gross inattention or inaction, gross recklessness, or gross negligence in the selection & application of remedies. It involves an extreme departure from the ordinary standard of care.[13] It involves an utter disregard for life and safety of patients and conduct deserving of strong punishment. Consequently, the degree of negligence is a material factor.[14] At the same time, since the medical profession renders a noble service, it must be shielded from frivolous or unjust prosecutions.

Proof of Negligence

In order to prosecute a medical practitioner one has to prove malicious intention or gross negligence, i.e. a high degree of negligent conduct. Moreover, to start a criminal proceeding against a medical practitioner there has to be a prima facie evidence in the form of a credible opinion from a competent doctor, preferably a government doctor in the same field of medicine supporting the charges of rash and negligent act. The liability of a doctor always depends on the circumstances of a particular case. A mere lack of necessary care, attention or skill cannot be a good enough reason to prosecute a doctor as those will not constitute gross negligence[15]. In English law this gross negligence has been defined as to show such disregard for life and the safety of others as to amount to a crime against the state and conduct deserving of punishment[16]. The use of medical science is not error free and there are varieties of treatment methods favoured by various practitioners so it is not possible to set a stringent set of reasonable process of treatment or degree of care. Risk of failure is always there and we cannot take the benefit without taking any risk.

Something more than a mere negligence has to be proved in order to prosecute a doctor. In order to establish criminal negligence in diagnosis or treatment on the part of the doctors he has to be proved guilty of such failure as no doctor of ordinary skill would have been guilty of, if he was acting with reasonable care. It is a matter beyond mere compensation. It involves an utter disregard to the life and safety of others and a conduct deserving of punishment where the degree of negligence is much higher than that of a civil negligence case[17]. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitute negligence varies under different conditions and in determining whether negligence exists in a particular case, all the attending and surrounding facts and circumstances have to be taken into account[18].

The test for establishing medical negligence was set out in case of *Bolam vs Friern Hospital Management Committee*. The doctor is required to exercise the ordinary skill of a competent doctor in his or her field. He or she must exercise this skill in accordance with a responsible body of medical opinion skilled in that area of medicine. A doctor is not negligent if there is another responsible body of medical opinion who would have acted in the same way as the treating clinician.

Generally, Judges are not experts in medical science, rather they are laymen. This is major hurdle for them to decide cases relating to medical negligence before them.

[13]Narayan Reddy, *The Essentials of Forensic Medicine & Toxicology.* 25th ed., Hyderabad
[14]Krishan Vij, *Textbook of Forensic Medicine & Toxicology Principles & Practice*, Fifth ed. New Delhi: Elsevier; 2011
[15]See http://www.legalera.in/news-deals-2/item/13368-criminal-negligence-a-matter-beyond-mere-compensation.html. Retrived on 24 Aug 2015
[16]*R vs Bateman* (1925) 19 Cr App R 8.
[17]Dr. D.S. Bhullar, and Dr. J Gargi, *Medical Negligence – Majesty of Law – Doctors,* JIAFM, 2005; 27(3). 0971-0973
[18]*New India Assurance Co. Ltd. v. Ashok Kumar Acharya*, 1994 (2) TAC 469 (Ori)

Thus, Judges have to rely on the testimonies of other expert doctors, which may not be objective in all cases. The learned Chief Justice of Supreme Court opined in the case of *V. Kishan Rao vs Nikhil Super Speciality Hospital*[19], that in cases of criminal negligence where a private complaint of negligence against a doctor is filed and before the investigating officer proceeds against the doctor accused of rash and negligent act, the investigating officer must obtain an independent and competent medical opinion preferably from a doctor in Government service, qualified in that branch of medical practice. Such a doctor is expected to give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. Honourable Chief Justice suggested that some statutory rules and statutory instructions incorporating certain guidelines should be issued by the Government of India or the State Government in consultation with the Medical Council of India in this regard.

Criminal Negligence

Criminal negligence applies to medical practitioner when he shows gross negligence in the treatment of patient leading to severe injury or death. The doctor should not be held criminally responsible for the patient's death unless his negligence or incompetence shows such disregard for the life and safety of the patient as to amount to a crime. The most important criterion is the degree of negligence required to prosecute medical practitioner under the charge of criminal negligence which should be gross one or of very high degree.

In *Mohanan vs Prabha G Nair and another*[20], it ruled that a doctor's negligence could be ascertained only by scanning the material and expert evidence that might be presented during a trial. In *Suresh Gupta's case*[21] the patient, a young man with no history of any heart ailment, was subjected to an operation performed by Dr. Suresh Gupta for nasal deformity. The operation was neither complicated nor serious. The patient died. On investigation, the cause of death was found to be 'not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage'. The Bench formed an opinion that this act attributed to the doctor, even if accepted to be true, could be described as an act of negligence as there was lack of due care and precaution. But, the Court categorically held 'for this act of negligence he may be liable in tort, his carelessness or want of due attention and skill cannot be described to be so reckless or grossly negligent as to make him criminally liable'. Bench of Justices YK Sabharwal and DM Dharmadhikari said, 'Where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable'. They further added, 'It is not merely lack of necessary care, attention and skill. When a patient agrees to go for medical treatment or surgery, every careless act of the medical man cannot be termed as 'criminal'. It could be termed 'criminal' only when the medical man exhibited gross lack of competence or inaction and want on indifference to his patient's safety and which is bound to have arisen from gross ignorance or gross negligence'

The Supreme Court in judgment *Jacob Mathew vs state of Punjab*[22] has provided safeguards for doctors. The Supreme Court states that the criminal prosecutions are filed by private complainants and sometimes by police on 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 professional 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 in his reputation cannot be compensated by any standards. In this case a patient died because of cancer. The relatives of the patient, highly influential in

[19]2010 (5)SCR 1
[20]*Mohanan vs Prabha G Nair and another* (2004) CPJ 21(SC), of 2004 Feb 4.)
[21]*Dr. Suresh Gupta vs Govt. of NCT of Delhi* (2004) 6 SCC 422
[22](2005) 6 SCC 1)

politics, brought criminal proceedings against the doctor who was working in CMC, Ludhiana. The bail petitions filed before the District Sessions Court and High Court were dismissed, thus paving way for his imminent arrest. While he filed a revision petition before the SC, it quashed the FIR and laid down principles to be followed while dealing with such cases against medical professionals by the State.

The Supreme Court has given the following guidelines for prosecuting medical professionals against the charge of criminal negligence:

1. A private complaint may not be entertained unless the complainant has produced 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 doctors.
2. The Investigating Officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion.
3. Unless the arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

The essence of Supreme Court judgment is that 'intention' and 'lack of proper care and caution' are important ingredients before which a criminal action can be launched against a medical practitioner under criminal law.

Similarly, bench of Justices Markandeya Katju and R M Lodha ruled in case of *Martin F. D'souza vs Mohd. Ishfaq*[23] that the police cannot arrest doctors over complaints of medical negligence without prima facie evidence. The apex court also restrained courts, including consumer forum, from issuing notices to doctors for alleged medical negligence without seeking an opinion from experts. Further, court said. 'While this court has no sympathy for doctors who are negligent, it must also be said that frivolous complaints against doctors have increased by leaps and bounds in our country particularly after the medical profession was placed within the purview of the Consumer Protection Act,'….courts must first refer complaints of medical negligence to a competent doctor or a panel of experts in the field before issuing notice to the allegedly negligent doctor. 'This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameter laid down in Jacob Mathew's case, otherwise the policemen will themselves have to face legal action'[24].

Res Ipsa Loquitur

The doctrine of *res Ipsa loquitur* means 'things speak for themselves'. The doctor is personally or vicariously liable for the negligent act. With this doctrine, negligence can be inferred in situations in which there is no direct evidence of negligence or wrongdoing. In a case, where negligence is evident, the principle of *res ipsa loquitur* operates and the complainant does not have to prove anything as the thing proves itself. In these cases burden of proof lies on doctors to prove they are not negligent, failing to do so negligence is proved against them. In case of operative deaths where relatives of patient do not know what happened inside operation theatre, so burden of proof lies on treating consultants to prove they have taken due care in performing surgery. In such a case, it is for the accused to prove that he has taken care and done his duty to repel the charge of negligence. *Res ipsa loquitur* is not a cause of action but a rule of evidence.[25] In the context of health care liability claims, a *res ipsa loquitur* allegation may cause a health care provider some degree

[23](2009) 3 SCC 1

[24](2009) 3 SCC 28 para 83.

[25]In case of *Ratcliffe-v-Pymouth and Torbay* [1998] Vol. 1 Medical Law Reports 162: court held that 'Res ipsa loquitur is not a principle of law and it does not relate to or raise any presumption. It is merely a guide to help identify when a prima facie case is being made out. Where expert and factual evidence is being called on both sides at trial its usefulness will normally have been long since exhausted,' also see, Haddock v. Arnspiger, 793 S.W. 2d 948, 950 (Tex. 1990).

of anxiety because expert testimony on the applicable standard of care and a breach of that standard of care is not necessary. In such cases, damage is so obvious that there is no need for any proof of negligence.

Res ipsa loquitur has been found to apply in circumstances in which a surgical sponge or other operative equipment has been left inside the patient, for example, operating on wrong eye[26], limb or patient; retained sponges or forceps after surgery;[27] and doing exchange transfusion on wrong baby[28]. In *Postgraduate Institute of Medial Education and Research, Chandigarh vs Jaspal Singh and others*[29], also the Court held that mismatch in transfusion of blood resulting in death of the patient, after 40 days, is a case of medical negligence. Though the learned Judges have not used the expression *res ipsa loquitur* but a case of mismatch blood transfusion is one of the illustrations given in various textbooks on medical negligence to indicate the application of *res ipsa loquitur*.

In *PoonamVerma vs Ashwin Patel and Ors*[30] a doctor registered as medical practitioner and entitled to practice in Homoeopathy only prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence per se actionable in civil law.

Vicarious Liability

Vicarious liability is used in tort claims to hold the employer liable for the negligent acts of the employee if the actions took place during work and the employer benefited from that work. When used as part of a medical negligence claim, the plaintiff might assert that the hospital had control over the physician. If the physician is employed by the hospital, then this control may be clear. If the physician is considered an independent contractor, as many surgeons are, the notion of control is less obvious. This doctrine is very important to plaintiffs in medical negligence cases, because it helps ensure there will be a financially responsible party to compensate an injured plaintiff. In one judgment of the Madras High Court in *Aparna Dutta vs Apollo Hospitals Enterprises Ltd.*[31] it was held that it was the hospital that was offering the medical services. The terms under which the hospital employs the doctors and surgeons are between them but because of this it cannot be stated that the hospital cannot be held liable so far as third-party patients are concerned. The patients go and get themselves admitted in the hospital relying on the hospital to provide them the medical service for which they pay the necessary fee. It is expected from the hospital to provide such medical service and in case where there is deficiency of service or in cases like this, where the operation has been done negligently without bestowing normal care and caution, the hospital also must be held liable and it cannot be allowed to escape from the liability due to reason of non-existing master–servant relationship between the hospital and the surgeon.

There are many instances where a senior or super-specialist performs surgery in a centre where such expertise is not locally available. After the surgery, the post-operative care is left to the local competent doctor. Failure of the senior/super specialist to personally supervise the post-operative care may not constitute negligence provided the doctor to whom responsibility of the post-operative care lies is competent; same applying to a visiting physician. It has been held by the National Consumer Redressal Commission[32] that in case of the operation being performed in an institution, it is the duty of the institution to render post-operative treatment and care to the hospital's patients. Quite often foreign doctors

[26]*A.S. Mittal and Anr v. State of U.P. and Ors*. (AIR) 1989 SC 1570.
[27]*Achutrao Haribhau Khodwa and Others v. State of Maharashtra and Others* (AIR) 1996 SC 2377
[28]Supra, Note 23, SC held that doctor would be liable if he leaves surgical gauze inside the patient after an operation or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.
[29](2009) 7 SCC 330.
[30](1996), 4SCC332.
[31][2002 ACJ 954 (Mad. HC)].
[32][1993 (3) CPR 414 (NCDRC)].

undertake operations in India and it cannot be maintained that the post-operative care and treatment shall continue to be provided by the foreign doctor who may no longer be in the country. But the same may not be held in every case if the visiting surgeon never inquires about the condition of the patient and leaves the patient for post-operative care and follow up treatment to the competence of the other surgeon who was unable to properly treat and look after the patient and the patient dies. Here the treating doctor can also be made party to the negligence.

In many cases of negligence against government hospitals, it has been held that the State is vicariously liable for negligence of its doctors or staff or even primarily liable where there is lack of proper equipment or staff. In few cases, court has passed orders to the effect that the compensation paid to the complainant may be recovered from the government doctors whose negligence has been established In *R. P. Sharma vs State of Rajasthan*[33], where a woman died because of mismatched blood transfusion, the State was held vicariously responsible for the negligent act of its blood bank officer and the doctor who transfused the blood. It was further held that the State of Rajasthan is free to recover the amount from those doctors. In *Rukmani vs State of Tamil Nadu*[34], the Madras High Court observed that in India where the population is increasing each second and family planning is a national programme, the doctor as well as the State must be held responsible in damages on account of failure of a sterilisation operation which is directly responsible for an additional birth in the family, creating additional economic burden on the family.

Liability under the CPA, 1986

The Supreme Court decision in *Indian Medical Association vs VP Shantha*[35] brought the medical profession within the ambit of a 'service' as defined in the CPA, 1986. This defined the relationship between patients and medical professionals as contractual. Patients who had sustained injuries in the course of treatment could now sue doctors in 'procedure-free' consumer protection courts for compensation. The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the CPA). They are contracts for service, under which a doctor too can be sued in Consumer Protection Courts.

A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The 'contract of service' is beyond the ambit of the CPA, 1986, under Section 2(1) (o) of the Act[36].

The CPA, 1986 will not come to the rescue of patients if the service is rendered free of charge, or if they have paid only a nominal registration fee. However, if patients' charges are waived because of their incapacity to pay, they are considered to be consumers and can sue under the CPA[37].

In case *Spring Meadows Hospital & another vs Harjol Ahluwalia* through *K.S. Ahluwalia & another*[38] a complaint of the minor child through his parents before the National Commission was brought up and it was contended that the child was admitted to the appellant hospital as in-patient with diagnosis of typhoid. When the nurse administered the injection, the child collapsed immediately. The resident doctor found that the child had suffered cardiac arrest and he attempted to resuscitate

[33]AIR 2002 Raj. HC (Jpr. Bench) 104.
[34]AIR 2003 Mad HC 352.
[35]*Indian Medical Association v. V P Shantha* AIR 1996 SC 550: (1995) 6 SCC 651.
[36]Talha Abdul Rahman, Medical negligence and doctors' liability, Journal of Medical Ethics, Vol. 2, No. 2 (2005)
[37]Hon'ble Supreme Court in the case of *Indian Medical Association v. V.P. Shantha & Ors. [III* (1995)CPJ1(SC)]has held that service rendered at a government hospital/health center/dispensary, where no charge whatsoever is made by any person availing the service and is given free treatment, is outside the purview of expression service as defined under Section 2(1)(o) of the Act.
[38][(1998) 4 SCC 39

the child by manual pumping. After half an hour, the anaesthetist also reached the scene and started the procedure of manual respiration and the Senior Paediatrician also followed but there was no improvement in the child' condition, then after child was shifted to the All India Institute of Medical Sciences (AIlMS). The doctors at the AIIMS informed the parents that the child was in a critical condition and even if he survived he would live only in a vegetative state having suffered irreparable damage to the brain. Sometime later, the child was discharged and again admitted to the appellant hospital. Based on the evidence, the commission concluded that the child had suffered cardiac arrest because of intravenous injection of an excessive dose of the injection and that due to considerable delay in measures to revive the heart, the child's brain had been damaged. The Commission found that there was clear dereliction of duty on the part of the nurse and that the hospital was negligent in having employed an unqualified person as nurse and entrusting the child to her care. It also held that the resident doctor was negligent since he failed to follow the instruction of the Senior Paediatrician that the injection should be administered by a doctor. The Commission held that since the resident doctor and nurse were employees of the appellant hospital, the latter was liable and awarded compensation of Rs 12.5 1akh to the child and of Rs 5 lakh to the parents for acute mental agony.

In the appeal of the hospital, the Supreme Court observed that because the CPA was a beneficial legislation intended to confer speedier remedy on consumers, its provisions should receive a liberal construction. The Court commented that the relationship between a doctor and the patient was not equally balanced as the patient's attitude towards a doctor was poised between trust in the learning of another and the general distress of one in a state of one in a state of uncertainty and further observed that it was difficult for a patient to successfully bring a medical negligence case against the doctor given the practical difficulties in linking the injury with the treatment and establishing the requisite standard of care. But it also noted that with the advent of the CPA, in a few cases patients had been able to establish the doctor's negligence.

The Court also rejected the contention of the hospital that the child's parents were not covered within the definition of consumers in Section 2(1)(D) of the Act and could not be awarded compensation separately. It held that when a child was taken to a hospital by his parents and the child was treated by a doctor, the parents would come within the definition of consumer having hired the services of the hospital/doctor and the child would also be a consumer under the inclusive part of the definition, being a beneficiary of such services. Therefore, both the parents and the child would be 'consumer' and could such claim and be awarded compensation.

A Landmark Turn in India's Medical Negligence Law

Recently, Apex Court in the matter of *'Dr. Balram Prasad vs Dr. Kunal Saha & Ors.'* & other connected cross appeals[39] has awarded a historic verdict having a major impact on medical negligence and standard of medical care in India. The Supreme Court vide its judgement enhanced the compensation amount of Rs 1.73 crore, which was awarded by the National Consumer Dispute Redressal Commission (NCDRC) in 2011 to the tune of Rs 5.96 crore and asked the Kolkata-based Advanced Medicare and Research Institute (AMRI) and the doctors to pay the amount and also asked to pay interest at the rate of 6 per cent from the date of filing of the complaint in 1999 till the actual date of payment to Kunal Saha, a US-based Indian-origin doctor for medical negligence, which led to the death of his wife in 1998. The landmark ruling is supposed to remind doctors, hospitals, and nursing homes that they will be dealt with strictly if they do not maintain their standard of care, the Supreme Court said:

'The patients, irrespective of their social, cultural and economic background, are entitled to be treated with dignity, which not only forms their fundamental right but also their human right.'

Similarly, in case of *Lalita Kumari vs Government of Uttar Pradesh and others*[40] Supreme Court after having forensically analysing the legal provisions relating to registration of FIRs, more particularly Section 154 of the

[39](2013 STPL(Web) 850 SC)
[40](2014) 2 SCC 1.

Code of Criminal Procedure, has issued certain directions which includes a direction regarding registration of a criminal case against doctors on the allegation of gross medical negligence. The Constitution Bench has affirmed the law laid down in Jacob Mathew's case[41] and hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint.

CONCLUSION

The majority of the Indian population profile is such that they depend on public health care system. The burden of disease is rapidly changing, with practitioners often having to decide who will receive this treatment, thus opening up a host of ethical and legal dimensions to the debate. Ultimately, the law is developed to protect the citizens of the country and its content should reflect this. Medical negligence will always be a part of medical practice, and just as our health services need to be regulated and policy driven, so should our legal system. Where they interlink, these policies must be jointly developed so that practitioners do not end up practicing defensive medicine, so that malpractice insurance does not cripple the profession, with cost often being passed onto the patients, and so that litigation is not viewed as a quick means of making money. The *res ipsa loquitur* principle has its merits in that it will protect the plaintiff by assisting to introduce the claim of negligence based solely on an inference, but on the other hand it could become another means of blocking the courts because of the demand that may be created. Its implementation in our legal system may be logistically more difficult than simply inferring negligence and therefore has to be considered cautiously.

Judges are not experts in medical science, rather they are laymen. This is major hurdle for them to decide cases relating to medical negligence. Thus, Judges have to rely on the testimonies of other expert 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 who are charged with medical negligence. The testimony may also be difficult to understand for a Judge, particularly in complicated medical matters and a balance has to be struck in such cases. The very nature of the medical profession makes it vulnerable to civil and criminal suits. Many suits are filed to harass doctors, or are filed to evade the payment of bills. In the post V P Shantha era it is difficult for doctors to shun responsibility. It is also easier for people to force negligent doctors to Consumer Protection forum. While doctors who cause death or agony due to medical negligence should certainly be penalised, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counterproductive and are no good for society. Recent decisions are a good step in the direction of making this murky area a bit tidy; however, a lot needs to be done by the courts in the shape of clearer judgments so that the layman can benefit. At the same time the courts must strike a perfect balance, that doctors are not harassed in the course of performance of such duty.

[41]Supra Note 17; Supreme court said that 'We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasise the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a 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'.