

Medical Negligence: The Limit and Limitations

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Abstract

In the modern days of market economy, many services and service providers have been brought under the purview of the Consumer Protection Act, 1986. Consequently, the medical professionals have been interpreted to be covered under the law on consumer protection in India. While bringing the medical services and medical professionals under the Consumer Protection Act, there has to be some limitations as this trend may lead to unhealthy and unethical practices. One may find instances of medical negligence resulting in irreparable damage to the victim's patients or their relatives. These cases may have to be definitely brought under the scanner of law. In the olden days these were treated as cases of tort and the victims were compensated. Subsequently, the law of crimes considered some of the instances of medical negligence under the criminal law, which insisted on a very high standard for proving negligence as rash and negligent acts. The consumer Protection Act treats the instances of medical negligence cases as civil actions and the law provides for compensation to the victims. No doubt, many victims have taken the benefit of this law. However, it must be remembered that the approach of law in the case of medical negligence cases has to be with care and caution. The consumer dispute redressal authorities are quasi judicial authorities and hence it may not be appropriate for them to deal with intricacies of the procedural laws. Criminal Law treats a person as innocent till proven guilty or negligent. A trend which is visible now-a-days is the publicity or rather adverse publicity that is given to such 'news' of medical negligence. This might lead to irreparable damage to the medical institutions and the professionals.

Introduction

Anyone who lives in a society is duty bound not to harm other fellow beings. The duty of care may be understood as a legal obligation which is imposed on an individual requiring adherence to a standard of reasonable care while doing any act, particularly when lack of care could cause harm to someone else. Under the Law of Torts, a victim who sustains some injury due to the negligent act of another is eligible to claim compensation from him for the harm caused by way of unliquidated damages. This Common Law remedy is available against careless and negligent acts. The duty of care may be regarded as a formalisation of the theory of social contract¹. It implies the responsibilities of individuals towards others within society. It was not a requirement that this duty of care

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1 Typically, the theory of social contract postulates that individuals either explicitly or impliedly give consent to surrender some of their freedoms and submit to the authority of the majority that is the legislative, executive or judicial, in exchange for protection of their remaining rights.

be defined by a specific law. Over a period of time, this requirement started developing through common law. In India such careless acts were initially treated either under an action in tort or punished as a crime. With the development of consumer law which contain provisions for handling such actions or inactions as deficiency in services became popular with respect to some categories.

Earlier a consumer who suffered at the hands of a service provider or a seller of goods had to depend only on the judicial wisdom and creativity² for relief under the law of tort. Mostly the remedy was at the discretion of the judge concerned³. However, as time progressed several areas where the law of un-codified, law of tort operated came to be recognized by specific statutory laws and the Consumer Protection Act is one among them⁴. With some initial difficulties in bringing into the field of consumer protection law, deficiencies in the medical services were also recognized within its jurisdiction. Medical Profession initially was one of the learned professions and later on considered to be a noble profession. The noble profession has its nobility and respectability and responsibility. This necessarily involves a duty of care on such professionals.

During the recent times medical negligence cases are growing and the legal system need to keep a balance between the medical professionals and innocent victims in view of the sensitivity of the issue and its impact on the profession and the society at large.

Medical Professional

A professional in common parlance may be understood as a member of a profession or any person who earns their living from a specific activity like lawyer, engineer or a doctor. The term also describes the standards of education and training that prepare such members of the profession with the particular knowledge and skills necessary to perform the role of that profession. Hence, any reasonable man entering into a profession impliedly assures another person dealing with such professional that the skill which he professes shall be exercised with reasonable degree of care and caution. He may not assure his client of the ultimate result. A physician would not assure the patient full recovery in every case. A surgeon cannot and does not guarantee that the result of a surgery would invariably be beneficial or successful, much less to the extent of cent percent for the person operated up on. While undertaking the performance of the task entrusted to him a medical professional would be duty bound in exercising his skill with reasonable competence.

Duties of a Professional Medical Practitioner

The duties of a medical professional are generally understood to cover:

1. Duty of care in deciding what treatment is to be given
2. Duty to take care in administering of the treatment identified

2 See *Donoghue v. Stevenson*, (1932) AC 562.

3 Probably identified as one of the defects of the law of tort.

4 The Consumer Protection Act, 1986 was enacted to protect the interest of consumers in India.

Breach of any of these duties may lead to an action for negligence by the patient. There are three possibilities to fix the responsibility and taking action against the defaulter:

1. Under Common Law – Tort
2. Under Criminal Law for Gross Negligence or Rash and Negligent act
3. Under the Consumer Protection Act for deficiency in service

In medical negligence cases, the Adjudicatory Fora, cannot adopt a mechanical approach. It has to appreciate the case in a different way. How to determine Medical Negligence? Which branch of law has to be adopted in determining the liability for a medical professional?

In the olden days any liability including criminal liability was handled by the judiciary under the law of tort. For all misdeeds including crimes, damages was awarded by the judiciary to compensate the loss sustained by victims.⁵ Later, criminal law entered the field with imposing punishment on a person guilty of an offence. As time progressed, the laws to protect the interest of consumers came to be recognized, particularly to cater to the cases where there is no motive or *mens rea* to attract criminal law, but the victim has sustained some injury.

Initial approach to Medical Negligence

*Bolam v. Friern Hospital Management Committee*⁶, a landmark case on medical negligence, laid down the principle that “A Doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...”

The Court also opined that, in the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and a doctor is not negligent merely because his conclusion differed from that of other professional men. It was also made clear that 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

5 For instance, *Weregild* known as “man price” which was a murder fine based on a victim's worth, was intended to prevent blood feuds. So also, torts and crimes at common law originated in the Germanic system of compensatory fines for wrongs with no clear distinction between crimes and other wrongs. See, Malone WS, “*Ruminations on the Role of Fault in the History of the Common Law of Torts*”, *Louisiana Law Review* (1970) available at <https://en.wikipedia.org/wiki/Tort#cite_note-Malone-3> (visited on July 12, 2013).

6 [1957] 1 W.L.R. 582.”In this case Bolam was suffering from mental illness. He was advised to undergo electro-convulsive therapy. However, he was not warned of the risk of fracture involved in this treatment. Even though the risk was very small and on the first occasion when the treatment was given Bolam did not sustain any fracture but when the treatment was repeated for the second time he sustained fractures. No relaxant drugs or manual control were used except that a male nurse stood on each side of the treatment couch throughout the treatment. About this treatment there were two opinions, one which favoured the use of relaxant drugs or manual control as a general practice, and the other which favoured the use of a drug that was attended by mortality risks and confined the use of relaxant drugs only to cases where there are particular reasons for their use and Bolam’s case was not under that category. The expert opinion of the consultant psychiatrist was taken before administering the treatment. Ultimately the Court held the Doctors were not negligent.

would be guilty if acting with ordinary care. However, it may be significant to note that in the country of its origin, the test was questioned on various grounds. Even though Bolam test 'has not been uprooted' it has come under some criticism. The basis of this criticism was Article 2 of the Human Rights Act, 1998 which reads:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law".

There is an argument to the effect that Bolam test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision for medical care. There was a need to reconsider the parameters laid down in Bolam test as a guide to decide cases on medical negligence. In England, Bolam test is now considered merely a rule of practice or of evidence. It is not a rule of law. This is all the more true in India, especially in view of Article 21 of our Constitution which encompasses within its guarantee, a right to medical treatment and medical care.

Negligent Acts by Medical Professionals under the Criminal Law

In *Juggankhan v. State of Madhya Pradesh*⁷ the Supreme Court highlighted the criminal liability of a medical practitioner. The Court held that it was a rash and negligent act to prescribe poisonous medicines without studying their probable effect. The Court also held that though it was true, as ruled in *John Oni v. King*⁸, that care should be taken before imputing criminal negligence to a professional man acting in the course of his profession, even then it was clear that the appellant was guilty of a rash and negligent act and hence liable for conviction under s. 304A, IPC.

In *Martin F. D'Souza v. Mohd. Ishfaq*⁹ the Supreme Court quite explicitly addressed the concerns of medical professionals regarding the adjudicatory process that is to be adopted

7 (1965)1 SCR 14. The appellant in this case, a registered Homoeopathic medical practitioner under the Madhya Pradesh Homoeopathic and Bio-chemic Practitioners Act, 1951, issued a pamphlet advertising that he *inter alia* treated *Naru* (guinea worm). Believing this, one Smt. Deobi, aged about 20 year visited the appellant's clinic along with some member of her family, for treatment. The appellant administered 24 drops of mother tincture stramonium and a leaf of dhatura. However, soon after taking the medicine, Deobi felt restless and ill and despite administration of antidotes, she died the same evening. In the trial for murder under section 302 of the IPC, the appellant medical practitioner was convicted. When the matter reached the Supreme Court, the Court considered whether in view of the nature of the appellant's offence he was rightly convicted under s 302 of the Indian Penal Code or not. The Court agreed with the lower Courts that Deobi's death resulted from poisoning. However, after considering the material, the Court found it could not be established that the administered dose was fatal or that the appellant had administered stramonium drops and dhatura leaf with the knowledge that it was likely to cause death. But the Court observed that stramonium and dhatura leaf were poisonous and in Homoeopathy dhatura leaf was never administered as such. In fact, in no system of medicine, except perhaps Ayurveda, dhatura leaf was given as a cure for guinea worms and that the appellant prescribed the medicine without thoroughly studying the effect of giving 24 drops of stramonium and a leaf of dhatura.

8 AIR (1943) 30 PC 72.

9 (2009) 3 SCC 1.

by Courts and Fora in cases of alleged medical negligence against Doctors. The Court held that the degree of negligence sufficient to fasten liability under S. 304-A IPC is higher than that required to fasten liability in civil proceedings. Non-exercise of reasonable care on the part of the doctor may suffice to fasten on him civil liability. However, in order to fasten criminal liability on a doctor, gross negligence on his part amounting to recklessness has to be proved. The Court also reiterated the distinction between simple negligence and gross negligence as stated in *Jacob Mathew case*¹⁰.

In *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole & Another*¹¹, the Supreme Court observed that a person who held himself out ready to give medical advice and treatment impliedly undertook that he was possessed of the skill and knowledge for the purpose. Such a person owed to his patient certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in the administration of that treatment. A breach of any of these duties gave a right of action for negligence to the patient. The medical 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 was what the law required.¹² A doctor no doubt had discretion in choosing the treatment that he proposed to give to the patient and such discretion was relatively ampler in cases of emergency. But this question was not considered relevant by the Court in the present case in view of the factual finding. The surgeon's appeal was dismissed with costs.

The Apex Court considered the mishap in an 'Eye Camp' at Khurja, Uttar Pradesh in a public interest litigation filed under Article 32 of the Constitution, in *A.S. Mittal and*

10 *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1.

11 (1969) 1 SCR 206. In this case the son of respondent No. 1 met with an accident which resulted in the fracture of the femur of his left leg. After some nominal treatment by a local physician, the injured was taken to Pune and ultimately to the appellant's hospital. The appellant prescribed two injections of morphia and Hyoscine Hydrobromide at one hour interval, but only one injection was administered. After the x-ray, the boy was taken to the operation theatre where his injured leg was put in plaster splints and then he was moved to a room. Subsequently, the boy developed difficulty in breathing and cough and his condition deteriorated. In spite of the emergency treatment administered by the appellant the boy died the same night. The appellant issued a certificate stating that the cause of death was fat embolism¹¹. Respondent no.1 filed a case of tortious damage against the appellant surgeon *inter alia* alleging that his son's leg was put in plaster using manual traction and excessive force (with the help of three men) though such traction was never done under morphia alone but under proper general anesthesia. The appellant denied the allegation of excessive force and submitted that given the patient's condition, general anesthesia was not desirable and that he had, therefore, decided to delay the reduction of fracture and instead carried out only immobilization of the leg for the time being with light traction. The Trial Court and, in appeal, the Bombay High Court gave concurrent findings in favour of respondent no. 1 and held that the appellant had undertaken reduction of the fracture without caring to give anesthesia and that excessive force was used in the process which resulted in shock causing the patient's death and awarded damages. In appeal by special leave, the Supreme Court considered the evidence relied upon by the appellant and held that there was no ground for interference in the findings of the lower Courts. The Court also took into account that respondent no. 1 was himself a medical practitioner of standing though not an expert in surgery and would understand the treatment given, to which he was a witness.

12 See *Halsbury's Law of England*, 3rd ed. vol. 26 p. 17.

*another v. State of UP and Others*¹³, and observed that a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed was a negligent one. It also referred to the concept of reasonable man and that the law recognized the dangers which were inherent in surgical operations and also referred to the decision in the case of *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Babu Godbole & Another*¹⁴ amongst others. The Court considered the point whether the State Guidelines prescribing norms and conditions for the conduct of 'eye-camps' were sufficiently comprehensive to ensure protection of the patients who were generally drawn from the poorer sections of the society and the relief to those affected. The Court noted that during the pendency of the matter, the Central Government had brought out a revised Guideline which were found to be sufficient by the Court. However, the court emphasized the need to maintain sterile aseptic conditions in hospitals to prevent infections and prior testing of drugs and deprecated the deterioration of standards. On the question of relief, the court observed that though it would not entertain any plea for monetary claims based on state action in these PIL proceedings, on humanitarian grounds it directed the State Government to pay a further sum of Rs. 12,500/- to each of the victims in addition to Rs. 5,000/- already paid by the Government.

Liability of Medical professionals under the Consumer Protection Act

The Consumer Protection Act, 1986 takes into its fold instances of deficiency of service. There are several situations where alleged instances of professional negligence cases have been examined by the judiciary. However, all such cases may first fall into the category of negligence.

In the law of negligence, professionals including medical professionals as mentioned earlier, are persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. The only assurance which a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession

13 (1989) 3 SCC 223. In this case The camp was organised by the Lions Club with the permission of the State Government in which one Dr. R.M. Sahay of Sahay Hospital, Jaipur and his team of doctors performed ophthalmological surgeries. About 108 patients were operated upon of which 88 underwent cataract surgery. However, at least 84 persons suffered permanent damage to their operated eyes. It was said that in a similar camp conducted by the same team of doctors in Moradabad, there were 15 casualties. Two inquiries were conducted by the State Government and report produced before the Court. It was found that the mishap was due to a common contaminating source, viz., 'normal saline' used on the eyes at the time of Surgery. These were brought by Dr. Sahay who claimed to have purchased them from a Jaipur based firm. The Court observed that a criminal case had been registered against Dr. Sahay under section 338 IPC. It accepted the doctor's submission that the Court in the present proceeding need not comment on the question of culpable rashness or negligence on the part of doctors.

14 (1969) 1 SCR 206.

which he is practising and while undertaking the performance of the task he would be exercising his skill with reasonable competence. This is all what a person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of the following two findings. *One*, he was not possessed of the requisite skill which he professed to have possessed, or, *two*, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

How to find out whether the professional was negligent or not? The standard to be applied for judging, whether the person charged was negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.*¹⁵ Lord Justice Sedley observed that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.

An often quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in *Bolam's case*¹⁶, in the following words:

“... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill ... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”¹⁷

The *Bolam* test has ever since been cited and dealt with in several judicial pronouncements and has continued to be well received as neat, clean and a well-condensed one. After a review of various authorities Bingham, L.J. in his speech in *Eckersle v. Binnie*¹⁸ summarised the *Bolam* test in the following words:

“From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an

15 [2001] P.N.L.R. 233, CA,

16 [1957] 1 W.L.R. 582, at p. 586

17 Christopher Walton, *et. al.*, *Charlesworth & Percy on Negligence* (Tenth Edition, 2001), para 8.02. ‘The man on the Clapham omnibus’ is a hypothetical reasonable person, used by the English courts where it is necessary to decide whether a party has acted as a reasonable person or not. It is a description of a normal London man. Clapham, in South London, was at the time a nondescript commuter suburb seen to represent “ordinary” London.

18 [1988] 18 Con.L.R. 1, at p. 79.

ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.”

So also, the degree of skill and care required by a medical practitioner is stated in *Halsbury's Laws of England*¹⁹ thus:

“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 the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men killed in that particular art, even though a body of adverse opinion also existed among medical men.”

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted ordinary is one no professional man of ordinary skill would have taken had he been acting with ordinary care²⁰.

In the opinion of Lord Denning,²¹ a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment²² in choosing one reasonable course of treatment in preference to another. A medical practitioner would be liable only where his conduct fell below that of the standard of a reasonably competent practitioner in his field.

19 4th Edn., Vol. 30, para 35.

20 The abovesaid three tests have also been stated as determinative of negligence in professional practice by *Charlesworth & Percy on Negligence*.

21 As expressed in *Hucks v. Cole* [1968] 118 New LJ 469.

22 A doctor is not necessarily liable in all cases where a patient has suffered an injury. This may either be due to the fact that he has a valid defense or that he has not breached the duty of care. Error of judgment can either be a mere error of judgment or error of judgment due to negligence. Only in the case of the former, it has been recognized by the courts as not being a breach of the duty of care. It can be described as the recognition in law of the human fallibility in all spheres of life. A mere error of judgment occurs when a doctor makes a decision that turns out to be wrong. It is situation in which only in retrospect can we say there was an error. At the time when the decision was made, it did not seem wrong. If, however, due consideration of all the factors was not taken, then it would amount to an error of judgment due to negligence.

Subsequently, in *Martin D'Souza* case²³ the Supreme Court of India also accepted the above view that a medical practitioner would not 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 the conduct fall below that of the standards of a reasonably competent practitioner in his field²⁴. For instance, a medical practitioner would be liable if he leaves surgical gauze inside the patient after an operation²⁵ or operates on the wrong part of the body²⁶ and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

Further, the standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. So also, where the charge of negligence is of failure to use some particular equipment, the charge would fall if the equipment was not generally available at that time²⁷. Earlier the Supreme Court of India observed that it is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent as reasonable in the circumstances²⁸.

The Supreme Court directed that whenever a complaint is received against a doctor or hospital by the Consumer Fora or Criminal Courts, before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed and only after that doctor or committee reports that there is a *prima facie* case of medical negligence should notice be issued to the concerned doctor or hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. The Court further warned the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in *Jacob Mathew's case*²⁹, otherwise the policemen will themselves have to face legal action³⁰. The Supreme Court in this case considered the alleged offence of a doctor under Section 304-A of Indian Penal Code. Chief Justice Lahoti accepted Bolam test as correctly laying down the standards for judging cases of medical negligence. The Court made a clear distinction between degree of negligence in criminal law and civil law where normally liability for damages is fastened. The Court held that to constitute negligence in criminal law the essential

23 AIR 2009 SC 2049.

24 See *id.* p. 2054.

25 See *Achutrao Haribhau Khodwa v. State of Maharashtra*, AIR 1996 SC 2377.

26 Unthinkable errors by doctors and surgeons - such as amputating the wrong leg or removing organs from the wrong patient - occur more frequently than previously believed, a new study suggests. See <<http://edition.cnn.com/2010/HEALTH/10/18/health.surgery.mixups.common/>> (visited on October 25, 2014).

27 AIR 2009 SC 2049, p. 2055.

28 *Id.* at pp. 2054, 2055.

29 AIR 2005 SC 3180.

30 AIR 2009 SC 2049, at p. 2066.

ingredient of '*mens rea*' cannot be excluded and in doing so, the Court relied on the speech of Lord Diplock in *R. v. Lawrence*³¹. Further, the Court accepted the view of Lord Atkin in *Andrews v. Director of Public Prosecutions*³², wherein the judge delineated the concept of negligence in civil and criminal law differently³³. The Judge observed:

“Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established.”

Hence, a higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability.³⁴

The learned Chief Justice further opined that in order to pronounce on criminal negligence it has to be established that the rashness was of such a degree as to amount to taking a hazard in which injury was most likely imminent. The Court summed up that negligence generally is the failure to exercise due care and the ingredients of negligence are:

1. The defendant owes a duty of care to the plaintiff.
2. The defendant has committed a breach of this duty of care.
3. The plaintiff has suffered an injury due to this breach.

Theoretically, the ingredients of medical negligence are also the same but, in medical negligence cases, most often, the doctor would be the defendant. As a practical suggestion, the Court wanted 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 a 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.

It was expected that such a doctor would give an impartial and unbiased opinion applying the primary test to the facts collected in the course of investigation. The Hon'ble 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. Till that is done, the Court wanted the aforesaid course should be followed.

It is also significant that those directions in *Jacob Mathew* were not given in respect of complaints filed before the Consumer Fora under the Consumer Protection Act where medical negligence is treated as civil liability for payment of damages.

Consumer under the Consumer Protection Act

31 (1981) 1 All ER 974.

32 (1937) 2 All ER 552 (HL).

33 *Id.* at page 556.

34 See Lord Porter in *Riddell v. Reid*, (1943) AC 1 (HL).

A consumer is a person who hires or avails of any services for a consideration that has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person hires or avails of the services for consideration paid or promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person. This definition is wide enough to include a patient who merely promises to pay.

The Consumer Protection Act, 1986, Section 2 (i) (d) defines 'Consumer' thus:

“Unless the context otherwise requires ,consumer means any person who-

- (1) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or any commercial purpose, or ,
- (2) hires or avails of any services for a consideration which has been paid or promised or partly paid or partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised or under any system of deferred payment , when such services are availed of with the approval of the first-mentioned person but does not include a person who avails of such services for any commercial purpose;
- (3) *Explanation—For the purposes of sub-clause (i) 'commercial purposes' does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self-employment.*”

The meaning of the word 'consumer' was explained by the Supreme Court in *Morgan Stanley Mutual Fund v. Kartick Das*³⁵ in the following words:

“The consumer as the term implies is one who consumes. As per definition, the consumer is the one who purchases goods for private use or consumption. The meaning of the word 'consumer' is broadly stated in the definition as to include anyone who consumes goods or services at the end of the chain of production. The comprehensive definition aims at covering every man who pays money as the price or cost of goods and services. The consumer deserves to get what he pays for in real quality and true quality. In every society, consumer remains the centre of gravity of all business and industrial activity. He needs protection from the manufacturer, producer supplier, wholesaler and retailer.”

The definition of consumer also includes one who hires or avails of any service for a consideration. The ordinary, plain and grammatical meaning of 'hire' is to acquire the temporary use of a thing or the services for a consideration and it is in this sense

35 (1994) 4SCC 225.

that the word has been used in Section 2(1)(d)(ii) of the Consumer Protection Act.³⁶ The definition of ‘consumer’ in Section 2(1)(d)(ii) is very wide. It includes not only one who ‘hires or avails of any service for a consideration’ but also includes ‘any beneficiary of such services, other than the one who hires or avails of the services for consideration’. Thus where a child was admitted in a hospital for treatment then both the child and his parents would be ‘consumers’. If injury is caused to any one of these two it would be proper to award compensation to both. This approach was taken by the Supreme Court in *M/s. Spring Meadows Hospital v. Harjol Ahluwalia*³⁷. The Supreme Court held:

“If the parents of the child having hired the services of the hospital are consumer within the meaning of Section 2 (i) (d) (ii) and the child also is consumer being a beneficiary of such services hired by his parents in the inclusive definition in Section 2 (1) (a) of the Act, the Commission will be fully justified in awarding compensation to both of them for the injury each of them has sustained. In the case in hand the Commission has awarded compensation in favour of the minor child taking into account the cost of equipments and the recurring expenses that would be necessary for the said minor child who is merely having a vegetative life. The compensation awarded in favour of the parents of the minor child is for their acute mental agony and the lifelong care and attention which the parents would have to bestow on the minor child.”³⁸

It was argued on behalf of the hospital that not only the hospital authorities had immediately on their own taken the assistance of several specialists to treat the child but also even after the child was discharged from AIIMS, a humanitarian approach was taken by the hospital authorities and child was taken care of by the hospital even without charging any money for the services and consequently in such a situation

36 See *Consumer Unity and Trust Society v. State of Rajasthan*, (1991) 1 CPR 241 (NC).

37 A minor child was admitted to M/s. Spring Meadows Hospital where he was examined and the doctors of the hospital diagnosed that the child was suffering from typhoid. The doctor prescribed some medicines and injections and the nurse asked the father of the child to bring the injection from the market. The father of the child brought the said injection and gave it to the nurse. The nurse injected the same to child. The patient immediately on being injected collapsed. The resident doctor who attended the patient told the parents that the child had suffered a cardiac arrest and then by manually pumping the chest the doctor attempted to revive the heart beat. It was alleged by the father of the child that before inserting the injection the nurse had not made any tests. The child was put on oxygen and manual respirator. Though the child was kept alive his condition did not improve. Thereafter, the doctors of the hospital told the father of the child that hospital did not have adequate facilities for the treatment of the child and advised that the child should be admitted to the All India Institute of Medical Sciences. Thus, on their advice, the child was admitted to AIIMS. The Institute discharged the child by saying that though the child will remain alive, yet his condition will be that of vegetation because of an irreparable damage and it is not possible to improve his damaged organs. M/s. Spring Meadows hospital assured the father of the child that they would admit the child and would do their best to keep the condition of the child stable. The parents of the child filed the case, on behalf of the child against the Spring Meadows Hospital for claim of Rs. 28 lakhs as compensation on account of causing irreparable damage to the child. AIR 1998 SC 1801.

38 *Id.* At pp. 1807-1808.

the award of damages for mental agony to the parents, is wholly unjustified. Refusing this contention the Supreme Court said:

“We, however, fail to appreciate this argument advanced on behalf of the ... the appellants inasmuch as the mental agony of the parent will not be dismissed in any manner merely seeing the only child living a vegetative state on account of negligence of the hospital authorities on a hospital bed. The agony of the parents would remain so long as they remain alive and the so-called humanitarian approach of the hospital authorities in no way can be considered to be a factor in denying the compensation for mental agony suffered by the parents.”³⁹

As regards medical services received from a private doctor or a medical practitioner, or in a private nursing home there was controversy in the beginning of the 1990s. In *Dr. A.S. Chandra v. Union of India*⁴⁰, a Division Bench of the Andhra Pradesh High Court was of the view that service rendered for consideration by private medical practitioner, private hospitals and nursing homes, is service within the purview of Section 2(1)(o) of the Consumer Protection Act, 1986 and persons availing of such service are ‘consumers’ within the meaning of Section 2(1) (d) of the Act. But a contrary view was taken in *Dr. C.S. Subranianiam v. Kumaraswamy* by a Division Bench of the Madras High Court and held that services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment would not come within the definition of ‘service’ under the Act and a patient who undergoes treatment cannot be considered to be a ‘consumer’ within the meaning of Section 2(1) (d) of the Act.

This controversy was finally resolved by the Supreme Court in *Indian Medical Association v. V.P. Shanta*⁴¹. A three judges’ bench held that merely because medical practitioners belong to a profession, they are not outside the purview of the Consumer Protection Act and that the services rendered by the medical practitioners are covered by Section 2 (1) (o) of the Act⁴² and the medical practitioners cannot be excluded from the ambit of the Act. Thus, it was conclusively resolved that a patient receiving treatment in private nursing home or from a medical practitioner for a consideration is a ‘consumer’ within the meaning of Consumer Protection Act, 1986.

The Supreme Court in this case repelled the contention that the Consumer Fora were not equipped to appreciate complex issues which might arise in cases of medical negligence and observed that these Fora were presided over by Judges/retired Judge who were well versed in law and, combined with lay decision making by members with knowledge and experience in various fields, the constitution of the Fora was adequate to deal with cases of medical negligence. Further, the safeguard of appeal against the orders of the Fora was available. The Court also did not agree that the summary procedure provided for in the

39 *Id.* at p. 1808.

40 (1992) *Andhra Law Times* 713.

41 AIR 1996 SC 550.

42 *Id.* at p. 559.

Act was not sufficient to deal with such cases and observed that not every complaint would raise complicated questions. It also observed that in complaint involving issues requiring recording of expert evidence, the Fora could ask the complainants to approach the civil court. It also noted that very few cases of medical malpractice had been filed till 1985. One of the reasons for this was the court fee payable in an action for damages (before civil courts) but no court fee was required to be paid under the Consumer Law.

Holding medical practitioners, government hospitals / Nursing Homes and private hospitals / nursing homes fell into three categories:

- (I) where services are rendered free of charge to everybody;
- (II) where charges are required to be paid by everyone; and
- (III) where charges are required to be paid by persons availing of services but certain categories of persons who could not afford to pay were rendered service free of charge.

The Court also laid down the following criteria for the applicability of the Act to hospitals and medical practitioners.

- “(i) Service rendered to a patient by a medical practitioner (except where the doctor rendered service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of 'service' as defined in section 2(1)(o)
- (ii) Merely because medical practitioners belong to medical profession and are subject to the disciplinary control of the Medical Council of India and / or state Medical Councils would not exclude the services rendered by them from the ambit of the Act
- (iii) A 'contract of personal service' was to be distinguished from a 'contract for personal services' (as only contract of personal service are expressly excluded from definition of service in section 2(1)(0). In the absence of relationship of master and servant between the patient and the medical practitioner; the service rendered by a medical practitioner to the patient would be under a 'contract for personal services' and thus, is not outside section 2(1)(0),
- (iv) The expression 'contract of personal service' in section 2(1)(0) of the Act could not be confined to contract for employment of domestic servants only and the expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. However, such service would be outside the purview of section 2(1)(0).
- (v) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such service were rendered free of charge to everybody would not be 'service' as defined in section 2(1)(o). The payment of a token amount only for registration purpose at the hospital/nursing home would not alter the position.
- (vi) Similarly, service rendered at a non-Government hospital/nursing home where no charge whatsoever was made from any person availing of the service and all patients (rich and poor) were given free service was outside the purview of the

expression 'service.' The payment of a token amount only for registration purpose only at such a hospital/nursing home would not alter the position.

- (vii) Service rendered at a non-Government hospital/nursing home where charges were required to be paid by all persons availing of such services fell within the purview of the expression 'service' as defined in section 2(1)(o).
- (viii) Service rendered at a non-Government hospital/nursing home where charges were required to be paid by persons who were in a position to pay and persons who could not afford to pay were rendered service free of charge would fall within 'service' as defined in section 2(1)(o). Free service rendered to those who could not pay would also be 'service' and the recipient a 'consumer' under the Act. In arriving at this conclusion, the Court opined that:
 - (a) *the protection envisaged under the Act was for consumers as a class;*
 - (b) *otherwise, it would mean that the protection of the Act would be available to only those who could afford to pay and not to the poor, although the poor required the protection more; and*
 - (c) *Else the standard and quality of service rendered at and the establishment would cease to be uniform.*
- (ix) Service rendered at a government hospital/health centre/dispensary where no charge whatsoever was made from any person availing of the services and all patients (rich and poor) were given free service was outside the purview of the expression 'service' as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
- (x) Service rendered at a Government hospital/health centre/dispensary where services were rendered to some persons on payment of charges and also rendered free of charge to other persons would fall within 'service' as defined in section 2(1)(o). Free Service to those who could not pay would also be 'service' and the recipient a 'consumer' under the Act. Though Governmental hospitals may not be commercial in the sense of private doctors and hospitals, still Government hospitals could not be treated differently and in such a case the persons belonging to 'poor class' received free services would be the beneficiaries of the services hired/ availed of by the 'paying class.'
- (xi) Service rendered by a medical practitioner or hospital/nursing home could not be regarded a service rendered free of charge if the person availing of the service had taken an insurance policy for medical care where under the charge for consultation, diagnosis and medical treatment were borne by the insurance company. It would fall within 'services' as defined in section 2(1)(o).
- (xii) Similarly, where, a part of the condition of services, the employer bore the expenses of medical treatment of an employee and his family members dependent on him the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would constitute 'service' under the Act”.

The decision of the Supreme Court in *Indian Medical Association* case should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact, in the aforementioned decision, it has been observed that, "In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control."⁴³

Deficiency

"Deficiency" is defined under Section 2(1)(g) of the Act. Accordingly, "unless the context otherwise requires, deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service." So also, Section 2(1)(f) of the Act, defines "Defect" which means "any fault, imperfection, shortcoming in the quality, quantity potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatever in relation to any goods".

Definition of 'Service'

The word 'service' is defined in a wide sense under Section 2 (i) (o) of the Consumer Protection Act, 1986. The definition is in three parts. *One*, the main part of the definition giving the meaning, *two*, the inclusion part and *three*, exclusion. 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 other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service. Accordingly, 'service' means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, transport, processing, supply of electrical or other energy, boarding or lodging or both, housing construction, entertainment, amusement or the purveying a news or other information but *does not include* the rendering of any service free of charge or under a contract of personal service. Subsequently, the Consumer Protection (Amendment) Act, 2002 has made some change in this clause which widened the scope of the definition⁴⁴.

The implication of the definition of 'service' was subjected to judicial scrutiny by

43 *Vide* para 22.

44 In clause (o), for the words "users and includes the provision of", the words "users and includes, but not limited to, the provision of" were substituted.

the Supreme Court in *Lucknow Development Authority v. M.K. Gupta*⁴⁵. The Court observed that the definition applies to any service made available to potential users. Both the words ‘any’ and ‘potential’ are significant as they are of wide amplitude. The use of the word ‘any’ in the definition has been used which indicates that it has been used in a wider sense extending from one to all. So is the case with the expression “potential”. It indicates that service which is not only extended to actual users but those, who are capable of using it, are also encompassed in the definition. The clause is thus very wide and covers any or all actual or potential users. The approach of the Court was that any service except when it is free of charge or under a contract of personal service would fall under the definition.

The definition of ‘service’ was again considered by the Supreme Court in the *Indian Medical Association case*⁴⁶. This was in the context of the question whether medical service rendered by a medical practitioner or a private hospital or nursing home was a service within the meaning of Section 2(1)(o) or not.

After referring to *Lucknow Development Authority v. M.K. Gupta*⁴⁷ the court observed that the inclusive part of the definition of ‘service’ was not applicable and the court was required to deal with the question falling for consideration in the light of the main part and exclusionary part of the definition. The exclusionary part will require consideration only if it is found that in the matter of consultation, diagnosis and treatment a medical practitioner or a hospital or nursing home render a service falling within the main part of the definition. The court had to determine whether medical practitioners and hospital or nursing home could be regarded as rendering a ‘service’ as contemplated in the main part of Section 2(1)(o). After considering the different aspects, the Supreme Court concluded that medical practitioners are not outside the purview of the Consumer Protection Act and the services rendered by medical practitioners are covered by Section 2(1)(o).⁴⁸

In this case, the Indian Medical Association contended that having regard to the expression ‘which is made available to the potential users contained in the definition of ‘service’, medical practitioners are not contemplated by the legislature to be covered within the provisions of the Act. Further, the contention was that the said expression was “indicative of the kind of service the law contemplates”, viz., service of an instrumental type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, the appellant Association relied upon the word ‘hires’ in sub-clause (ii) of the definition of consumer contained in Section 2(1)(d) of the Act. The Supreme Court disagreed with this contention and observed that the word ‘hires’ in Section 2(1)(d)(ii) has been used in the sense as ‘avails’ of as would be evident from the words ‘when such services are availed of’ as would be evident from the words when such services are

45 AIR 1994 SC 787, at p. 793. In this case one of the main questions for consideration before the Apex Court was whether the housing construction or building activity was covered by the definition of ‘service’ as it stood even before inclusion of the expression ‘housing construction’, by the 1993 amendment.

46 *Indian Medical Association v. V.P. Shanta*, AIR 1996 SC 550.

47 AIR 1994 SC 787.

48 AIR 1996 SC 550, at p. 559.

availed of in the latter part of Section 2(1)(d)(ii) by the Amendment Act of 1993, the Parliament clearly indicated that the word 'hires' has been used in the same sense as 'avails'. The amendment, according to the Court, only clarified what was implicit earlier. The word 'user' also meant 'to avail oneself of' the word 'user' in the expression 'which is made available to the potential users' in the definition of service in Section 2(1)(o) to be construed having regard to the definition of 'consumer' in Section 2(1)(d)(ii) and if, so construed it means 'availing of services'. The Court further held that from the use of the word 'potential user' it cannot be inferred that the services rendered by the medical practitioners are not contemplated by the Parliament to be covered within the expression 'service' as contained in Section 2(1)(o) of the Act.⁴⁹ Thus, medical practitioners are not excluded from the purview of the definition of 'service' under the Act.

What is 'Deficiency of Service'?

Deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. This is the specific area where the medical persons and hospitals come into the area of consumer law. A few such deficiencies may now be examined.

The importance of obtaining informed consent

In *Samira Kohli v. Dr. Prabha Manchanda and Ors*⁵⁰, the apex court held that consent given for diagnostic and operative laparoscopy and "laporotomy if needed" does not amount to consent for a total hysterectomy with bilateral salpingo ophorectomy. The appellant was neither a minor nor mentally challenged or incapacitated. As the patient was a competent adult, there was no question of someone else giving consent on her behalf. The appellant was temporarily unconscious under anesthesia, and as there was no emergency. The respondent should have waited until the appellant regained consciousness and gave proper consent. The question of taking the patient's mother's consent does not arise in the absence of emergency. Consent given by her mother is not a valid or real consent. The question was not about the correctness of the decision to remove reproductive organs but failure to obtain consent for removal of the reproductive organs as performance of surgery without taking consent amounts to an unauthorized invasion and interference with the appellant's body. The respondent was denied the entire fee charged for the surgery and was directed to pay Rs. 25000/- as compensation for the unauthorized surgery.

Medical Ethics and the Treatment of Accident Victims

In *Pravat Kumar Mukherjee v. Ruby General Hospital and Ors*⁵¹, the National Commission delivered a landmark decision concerning treatment of an accident victim by

49 *Id.* at p. 567.

50 I (2008) CPJ 56 (SC).

51 II(2005)CPJ35(NC). In this case the complainants are the parents of the deceased boy. They approached the National Commission for compensation and adequate relief. The case involves the unfortunate death of a young boy, Shri Sumanta Mukherjee, a student of second year B. Tech.,

the hospital. The National Commission allowed the complaint and the Opponent Ruby Hospital was directed to pay Rs. 10 lakhs to the Complainant for mental pain agony. The Commission observed as follows:

“This may serve the purpose of bringing about a qualitative change in the attitude of the hospitals of providing service to human beings as human beings. A human touch is necessary; that is their code of conduct; that is their duty and that is what is required to be implemented. In emergency or critical cases, let them discharge their duty/social obligation of rendering service without waiting for fee or for consent”. However, it remains to be seen whether the above award has brought in any attitudinal change in the medical fraternity”.

What Constitutes Medical Negligence under the Consumer Law?

The term negligence is defined as the absence or lack of care that a reasonable person should have taken in the circumstances of the case. Failure of an operation and side effects may not amount to negligence *per se*. In the allegation of negligence the observations of the State Consumer Disputes Redressal Commission in *Dr. Dinesh Bhandari v. Smt. Kamla Devi and others*⁵² is significant. The State Commission noted that nothing was mentioned in the complaint or in the grounds of appeal about the type of care desired from the doctor in which he alleged to have been failed. It was not mentioned anywhere what type of negligence was done during the course of the operation and treatment. Nerves may be cut down at the time of operation and mere cutting of a nerve does not amount to negligence. It is not said that it has been deliberately done. To

Electrical Engineering. At Netaji Subhash Chandra Bose Engineering College on January 14, 2001 a bus from Calcutta Tramway Corporation crashed with the motorcycle driven by the deceased. Sumanta was conscious after the accident and was taken to the hospital about 1 km from the site of the accident. He was insured for Rs. 65,000/- under a Mediclaim Policy issued by the New India Assurance Co. Ltd. When he reached the hospital, the deceased was conscious and showed the Mediclaim certificate he was carrying in his wallet. He also assured that charges for treatment would be paid and treatment should be started. Acting on this promise, the hospital started treatment in its emergency room by giving moist oxygen, starting suction, and by administering injection Driphylline, Injection Lycotinx, and titanous toxoid. The respondents demanded an immediate payment of Rs. 15000/- and discontinued treatment as the amount was not deposited immediately though an assurance to pay the amount was made by the accompanying persons from the general public. Actually, the crowd collected Rs. 2000/- and the amount with the motorcycle of the patient and insurance receipt was offered. As the hospital was adamant and discontinued treatment after giving treatment for 45 minutes, the people from the crowd present were forced to take the patient to National Calcutta Medical College, which is about 7-8 km from the current hospital. The patient died on the way and was declared dead upon arrival at the National Calcutta Medical College.

- 52 2004;(I) CPJ 123 (Uttaranchal). In this case, the allegations set up in the complaint were that the complainant (Late Sh. Uttam Singh) got himself admitted in the hospital of Dr. Dinesh Bhandari on 14.03.1997 and continued to remain there in connection with his treatment for about five months, the claim itself could not have been taken to prove that the condition of the complainant got worse and ultimately after more than 1½ years, his left leg below knee had to be amputated on 19.05.1999 in the nursing home of one Dr. Mittal. The District Forum, Dehradun granted compensation to the complainant on account of medical negligence of Dr. Dinesh Bhandari in the treatment of the complainant who had died during the pendency of the complaint and who had sustained injuries in a motor vehicle accident on 13.03.1997.

the contrary it is also not said that the nerves were cut in the operation and it was not cut at the time of the accident. Expert evidence whatsoever was also not produced. Only the report of the Chief Medical Officer of Haridwar was produced wherein it said that 'the patient is a case of post-traumatic wrist drop'. It was not said that it was due to any operation or the negligence of the doctor. The *mere allegation will not make out a case of negligence, unless it is proved by reliable evidence and is supported by expert evidence*. It is true that the operation was been performed. It is also true that the Complainant had to meet several expenses but unless the negligence of the doctor is proved, the complainant is not entitled to any compensation.

What is the Standard of Care?

The question of the standard of care desired from a medical practitioner had been the subject matter of consumer disputes in India. An illustrative case is that of *Dr. Kamta Prasad Singh v. Nagina Prasad*⁵³. It is now a settled principle of law that a medical practitioner will bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor the very lowest degree of care and competence judged in the light of circumstances in each case is what the law requires. Judged from this yardstick, post-operative infection or shortening of the leg was not due to any negligence or deficiency in service on the part of the opposite party Appellant. Deficiency in service thus cannot be fastened on the opposite party. In *Laxman v. Trimback*⁵⁴ wherein the question of liability of a surgeon for alleged negligence towards his patient was examined. The Court explained this duty as one to "bring to his task a reasonable degree of skill and knowledge" and to exercise "a reasonable degree of care". The doctor, in other words, does not have to adhere to the highest or sink to the lowest degree of care and competence in the light of the circumstance. A doctor, therefore, does not have to ensure that every patient who comes to him is cured. A doctor has only to ensure that he exercises a reasonable degree of care and competence in the treatment. In this case, the Court long before the adoption of the Consumer Protection Act said that a person who holds himself out ready to give medical advice and treatment impliedly holds forth that he is possessed of the skill and knowledge for the Purpose. Such a person when consulted by a patient owes certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give and a duty of care in the administration of that treatment.

In another case that led to visual impairment as a side effect of the treatment, the literature with regard to the medicine 'lariago' clearly indicated that the side effect of this medicine, if taken for a longer duration can effect eyesight⁵⁵. However, there was no expert evidence on record in this case to show that use of this medicine caused damage to the patient's eyesight. The Court opined that even for arguments sake, if it is accepted that this medicine caused damage to the patient's eyesight, if the doctor is one who has advised his patient to use this medicine after an examination in which he found the patient to be suffering from malaria, in that case as well the doctor cannot be held guilty of negligence or deficient in his service. However, as stated above in this case the

⁵³ 2000;(III) CPJ 283 (WB).

⁵⁴ AIR 1969 SC 128.

⁵⁵ *Ajay Kumar v. Dr. Devendra Nath*, 2004; (II) CPJ 482.

medicine has been used by the patient in low doses for a few days and there was no expert evidence to show that the use of medicine has affected his eyesight. Therefore, the Commission held that the Complainant has failed to prove that the Respondent doctor was negligent and deficient in his duty as a doctor.

Res Ipsa Loquitur

Another case of medical negligence could be seen in *Achutrao Haribhau khodwa & others v. State of Maharashtra & others*⁵⁶. The suit in this was that after a simple sterilization operation performed by the respondent doctor, the patient developed high fever and acute pain and her condition deteriorated. On another surgeon reopening of the wound of the first operation, he found that a mop (towel) had been left inside which had led to formation of pus. Despite the second surgery, the patient died. The second surgeon was produced as the Appellants' witness. The trial Court decreed the suit. In Appeal by the State Government, the Bombay High Court dismissed the suit on the ground that in law the State could not be held liable for a tortuous act committed in a hospital maintained by it and that though the respondent doctor had been negligent in leaving the mop inside the patient's abdomen it could not be proved that this was the cause of the death. Relying upon *State of Rajasthan v. Vidhyawati*⁵⁷, *N Nagendra Rao and Co. v. State of A.P.*⁵⁸ and *State of Maharashtra v. Kanchanmala Vijaysing Shirke*,⁵⁹ and distinguishing *Kasturi Lal Ralia Ram Jain v State of UP*.⁶⁰, the Supreme Court held that running of hospitals by the Government was a welfare activity and not a function carried out in exercise of its sovereign power. The Court then referred to *Bolam v. Feiern Hospital Management Committee*⁶¹, where the English Court had laid down the test that a doctor was not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men, skilled in that particular art. The Court, however, observed that the Australian High Court had taken a somewhat different view in *Rogers v. Whitaker*⁶². The Court relied upon *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Babu Godbole and Another*⁶³, *A.S. Mittal and another v. State of UP and Others*⁶⁴, and *Indian Medical Association v. V P Shantaha & others*⁶⁵ and went on to observe that despite difference in medical opinions regarding the course of action to be adopted in a particular case, as long as a doctor acted in a manner acceptable to a responsible body of opinion in the medical profession and exercised due care, skill and diligence, he could not be held negligent irrespective of the result. The Court, however, held that in this case, the doctrine of *res ipsa loquitur* was applicable as admittedly, the death occurred due to peritonitis which could have been only because of leaving of be

56 (1996) 2SSC 634. It may be noted that the case was not filed under the Consumer Protection Act.

57 AIR J963 SC 933

58 (1994) 6 SCC 205.

59 (1995) 5 SCC 659

60 AIR 1965, C 1039.

61 (1957) 2 All ER 118, (followed by the House of Lords in *Sidaway v Board of governors of Bethlem Royal hospital*, (1985) 1 All ER 643.

62 (1992) 175 CLR 479.

63 (1969) 1 SCR 206.

64 (1989) 3 SCC 223.

65 (1995) 6 SCC 651.

mop in the patient's peritoneal cavity during the first surgery, an act of which no valid explanation had been given by the respondent doctors. The Court further observed that even if the peritonitis was considered to be due to the second surgery, still the second surgery had to be performed because of leaving the mop inside and that merely because it might not have been conclusively proved as to which of the doctors employed by the Government was negligent, it could not be a ground for denying the claim.⁶⁶

This principle of *res ipsa loquitur* is intended to assist a claimant who, for no fault of his own, is unable to adduce evidence as to how the accident occurred and where negligence is evident.

Situation of 'negligence per se'

Yet another case which speak volumes of negligence may be seen in *Poonam Verma v. Ashwin Patel & others*⁶⁷. Respondent 1 in this case, a doctor, had a Diploma in Homeopathic Medicine and Surgery. He administered allopathic drugs for viral fever and then typhoid fever to the patient who was subsequently shifted to a nursing home where he died. After the dismissal of the complaint, the complainant filed an appeal to the Supreme Court. The Court found that the first respondent was registered as a medical practitioner with the Gujarat Homeopathic Medical Council but not under the Allopathic system. Referring to the decision in the Case of the *India Medical Association v. V. P. Shantaha & others*⁶⁸, the Court noted that medical practitioners were covered under the Consumer Protection Act and that negligence as a tort was the breach of a duty caused by omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do. To determine medical negligence, the Court referred to *Bolam v. Feiern Hospital Management Committee*⁶⁹, that the standard was that of the ordinary medical man professing to have that special skill and exercising it and noted that this ruling had been approved by the House of Lords in *Whitehouse v. Jordan*⁷⁰ as well as the Supreme Court's decision in *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Babu Godbole & Another*⁷¹ and *A.S. Mittal and another v. State of UP and Others*⁷².

Reviewing the legal provisions⁷³ applicable to the situation, the Court concluded that in view of these statutory provisions, the doctor in this case was guilty of Negligence *per se*,

66 See also *Scott v. London & St. Katherine Docks Co.*, (1865) 3 H & C.

67 (1996)4SCC332.

68 (1995) 6 SCC 651.

69 (1957) 2 All ER 118.

70 (1981) 1 All ER 267. See also, *Maynard v. West Midlands Regional Health Authority*, (1985) J All ER 635; *Sidaway v. Board of governors of Bethlem Royal hospital*, (1985) 1 All ER 643 and *Chin Keow v. Government of Malaysia*, (1967) 1 WLR 813 PC.

71 (1969) 1 SCR 206.

72 (1989) 3 SCC 223.

73 (i) the provision of tile Bombay Homeopathic Practitioners' ACT 1959 defining 'homeopathy' as the homeopathy system of medicine and that a practitioner registered under that Act shall practice homeopathy only, i.e., such a practitioner was entitled to treat patient only according to the homeopathic system of medicine;

(ii) the allopathic system of medicine was regulated under the Indian Medical Council Act, 1956 which made practicing modern/allopathic system of medicine without the requisite qualification/enrolment punishable; and

violation of public duty enjoined by law for the protection of person or property⁷⁴. While awarding damages, the Court also observed that none of the prescriptions advised necessary pathological test for confirming/ruling out typhoid which was the usual practice of doctors dealing with selected cases of typhoid and concluded that the doctor had prescribed medicines for typhoid without requiring the patient to undergo pathological tests for typhoid fever and the plea of advising the said test orally was also contrary to the code of conduct of medical practitioner.

Death of a patient while undergoing treatment does not amount to medical negligence

In the case of *Dr. Ganesh Prasad and Anr. v. Lal Janamajay Nath Shahdeo*⁷⁵, the National Commission reiterated the principle that where proper treatment is given, death occurring due to process of disease and its complication, it cannot be held that doctors and hospitals are negligent and orders of lower fora do not uphold the claim and award a compensation.

Error of judgment in diagnosis

Error of judgment in diagnosis or failure to cure a disease does not necessarily mean medical negligence. In the case of *Dr. Kunal Saha v. Dr. Sukumar Mukherjee and Ors.*⁷⁶ the National Commission considered the question of whether the Opponent doctors and hospital acted negligently in diagnosis of the disease suffered by the patient who was the wife of the complainant doctor, of administration of medicine (it was alleged that an overdose of steroids was prescribed) and lack of facilities in the hospital (absence of burn unit in hospital was alleged). A compensation of Rs. 77,76,73,500/- was claimed. The National Commission held that an error in medical diagnosis does not amount to deficiency in service.

Another case of medical negligence was that of *Spring Meadows Hospital and another v. Harjol Ahluwalia through K.S. Ahluwalia & Another*⁷⁷ examined by the Supreme Court. In this complaint of the minor child through his parents before the National Commission it was contended that the child was admitted to the appellant hospital as inpatient with diagnosis of typhoid. The nurse asked the child's father to purchase the injection 'Inj. Lariago' recommended by the Senior Paediatrician to be administered intravenously. When the nurse administered the injection, the child collapsed immediately. The resident doctor found that the child suffered cardiac arrest and he attempted to resuscitate 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 here was no improvement in the child's condition. On advice, the child was shifted to the All India Institute of Medical Sciences (AIIMS). 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

(iii) the provisions of the Maharashtra Medical Council Act, 1965, which cast upon the respondent 1 doctor a statutory duty not to enter into any other field of medicine, breach of which made him liable for prosecution under the Indian Medical Council Act.

74 *Vide* definition in *Black's law Dictionary*.

75 I (2006) CPJ 117 (NC).

76 III (2006) CPJ 142 (NC).

77 (1998) 4 SCC 39.

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 12.51 lakh 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 as the Consumer Protection Act 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 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 Consumer Protection Act, in a few cases patients had been able to establish the doctor's negligence. Relying upon a decision of the House of Lords/English Courts in *Whitehouse v. Jordan*⁷⁸ the Court noted:

“The true position that an error of judgment may or may not be negligent. It depends on the nature of the error. If it is not one that would not have been made by a reasonable competent professional man professing to have the standards and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligence, if on the other hand, it is an error if such a man, acting with ordinary care, might have made, then it is not negligence.”

The Court also indicated that use of wrong drug or gas during anesthesia or delegation of responsibility knowing that the delegatee was incapable of performing his duties properly were some instances of tortious negligence. The Court also rejected the contention of the hospital that the child's parents were not covered within the definition of consumers in s. 2(1)(d) of the Act and could not be awarded compensation separately. The Court 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 or a 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 such a claim could be awarded compensation.

Supreme Court on Medical Negligence Liability

78 (1981) 1 All ER 267.

According to the Supreme Court, cases both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals complaining of medical negligence against doctors, hospitals, or nursing homes, hence the latter would naturally like to know about their liability. The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decisions of this Court in *Jacob Mathew v. State of Punjab and Another*⁷⁹. However, difficulties arise in the application of those general principles to specific cases. For instance, in paragraph 41 of the decision, it was observed that: “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 is what the law requires.” Now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care. To give another example, in paragraphs 12 to 16 of Jacob Mathew's case, it has been stated that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. For civil liability only, damages can be imposed by the Court but for criminal liability the Doctor can also be sent to jail apart from damages that may be imposed on him in a civil suit or by the Consumer Fora. However, what is simple negligence and what is gross negligence may be a matter of dispute even among experts.

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome in many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood. Before dealing with these principles two things have to be kept in mind:

1. Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. Since 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.
2. A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, 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 counter productive and are no good for society. They inhibit the free exercise of judgment by a professional in a particular situation.

A case subsequent to *Jacob Mathew* was *Martin F. D'souza v. Mohd. Ishfaq*⁸⁰. The fundamental distinction pointed out in *Jacob Mathew* was not unfortunately followed in this case by the Division Bench.

79 (2005) 6 SCC 1.

80 2009 (3) SCC 1.

In *D'souza*, a complaint was filed before the National Consumer Disputes Redressal Commission and not a criminal complaint. The Court presumably, equated a criminal complaint against a doctor or hospital with a complaint against a doctor before the Consumer Fora and gave its decision. In fact, the Court's decision was intended to cover both the situations.

The Court held:

"We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the criminal court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or the criminal court should first refer the matter to a competent doctor or committee of doctors, specialised in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the doctor/hospital concerned. 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 parameters laid down in *Jacob Mathew* case, otherwise the policemen will themselves have to face legal action."

The above approach does not seem to be in conformity or consistency with the larger Bench's decision.

The reason why the larger Bench in *Jacob Mathew* did not equate the two, is obvious in view of the jurisprudential and conceptual difference between cases of negligence in civil and criminal matter. Further the directions in *D'souza* are also inconsistent with the principles laid down in *Indian Medical Association v. V. P. Shanta*, a three-Judge Bench of the Supreme Court, on an exhaustive analysis of the various provisions of the Act, held that the definition of 'service' under Section 2(1)(o) of the Act has to be understood on broad parameters and it cannot exclude service rendered by a medical practitioner. The Court made it clear in *Indian Medical Association* that before the Fora under the Act both simple and complicated cases may come. In complicated cases which require recording of evidence of expert, the complainant may be asked to approach the civil court for appropriate relief. The Supreme Court opined that Section 3 of the Act provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

Thus the Act preserves the right of the consumer to approach the civil court in complicated cases of medical negligence for necessary relief.

The Court held that cases in which complicated questions do not arise the Forum can give redressal to an aggrieved consumer on the basis of a summary trial on affidavits. The relevant observations of the Court was:

"...There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the

patient is allergic without looking into the out-patient card containing the warning [as in *Chin Keow v. Govt. of Malaysia*, 1967 (1) WLR 813(PC)] or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief...”

The principles laid down by the Court in *Indian Medical Association* makes the following position clear.

- (a) There may be simple cases of medical negligence where expert evidence is not required.
- (b) Those cases should be decided by the Fora under the said Act on the basis of the procedure which has been prescribed under the said Act.
- (c) In complicated cases where expert evidence is required the parties have a right to go to the Civil Court.
- (d) That right of the parties to go to Civil Court is preserved under Section 3 of the Act.

The decision in *Indian Medical Association* has been further explained and reiterated in *Dr. J. J. Merchant and others v. Shrinath Chaturvedi*⁸¹. It was made clear in this case that only in appropriate cases examination of expert may be made and the matter was left to the discretion of the Forum.

After treating the genesis and history of the Act, this Court in a number of cases has held that that it seeks to provide for greater protection of the interest of the consumers by providing a Forum for quick and speedy disposal of the grievances of the consumers.⁸²

It is clear from the statement of objects and reasons of the Act that it is to provide a forum for speedy and simple redressal of consumer disputes. If expert evidence is insisted up on, the efficacy of remedy under the Act will be substantially curtailed and in many cases the remedy will become illusory to the common man.

The Supreme Court in *V. Kishan Rao v. Nikhil Super Speciality Hospital*⁸³ made it clear that before the consumer Fora if any of the parties wants to adduce expert evidence, the

81 (2002) 6 SCC 635.

82 These aspects were also considered and highlighted by this Court in *Lucknow Development Authority v. M.K. Gupta*, (1994) 1 SCC 243, in *Charan Singh v. Healing Touch Hospital* (2000) 7 SCC 668 as also in the case of *Spring Meadows Hospital v. Harjol Ahluwalia* (1998) 4 SCC 39 and in the case of *India Photographic Co. Ltd. v. H.D. Shourie* (1999) 6 SCC 428.

members of the Fora by applying their mind to the facts and circumstances of the case and the materials on record can allow the parties to adduce such evidence if it is appropriate to do so in the facts of the case. The discretion in this matter was left to the members of the Fora especially when retired judges of Supreme Court and High Court are appointed to head National Commission and the State Commission respectively. Therefore, these questions are to be judged on the facts of each case and there cannot be a mechanical or strait jacket approach that each and every case must be referred to experts for evidence. When the Forum finds that expert evidence is required, the Forum must keep in mind that an expert witness in a given case normally discharges two functions. The first duty of the expert is to explain the technical issues as clearly as possible so that it can be understood by a common man. The other function is to assist the Forum in deciding whether the acts or omissions of the medical practitioners or the hospital constitute negligence. In doing so, the expert can throw considerable light on the current state of knowledge in medical science at the time when the patient was treated. In most of the cases the question whether a medical practitioner or the hospital is negligent or not is a mixed question of fact and law and the Fora is not bound in every case to accept the opinion of the expert witness. In many cases the opinion of the expert witness may assist the Fora to decide the controversy in one way or the other.

Conclusion

The evolving jurisprudence of medical negligence shows that the courts and the consumer fora are proactive in protecting the interest of the victims from the unscrupulous doctors' irresponsible attitude toward a noble profession. It is true that the medical profession has to an extent become commercialized and there may be some medical practitioners who depart from their Hippocratic Oath for their selfish ends. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some. It must be remembered that sometimes despite their best efforts the treatment of a doctor might fail. Several factors might have contributed to such results. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence the courts cannot fasten liability on them. The Courts and Consumer Fora are not experts in medical science and must not try to substitute their own views over that of medical specialists.

Indian society is experiencing a growing awareness regarding rights of consumers of medical services. This trend is clearly discernible from the litigation concerning medical professional or the establishment of liability, claiming redressal for the suffering due to medical negligence, vitiated consent, and breach of confidentiality arising out of the doctor-patient relationship. The patient-centered initiative of rights protection is required to be appreciated in the economic context of the rapid decline of State spending and massive private investment in the sphere of the health care system and the Supreme Court's efforts to Constitutionalize right to health as a fundamental right. The Government is under an obligation to protect the health of the people because there is a close nexus between health and the quality of life of a person. There are various provisions under the Constitution which deal with the health of the public at large. The

83 [2010] 5 SCR 1. Decided on March 8, 2010, G S Singhvi and A K Ganguli, JJ.

founding fathers of the Indian Constitution rightly inserted Directive Principles of State Policy with a view to protect the health of the public at large. As of now, the adjudicating process with regard to liability of medical professionals, be it in a consumer forum or a regular civil or criminal court, follows common law principles relating to negligence, vitiated consent and breach of confidentiality. However, it is equally essential to note that the protection of right of patients shall not be at the cost of professional integrity and autonomy. There is definitely a need for striking a delicate balance. Otherwise, the consequences would be inexplicable.

In the context of obtaining the redressal, there is a deserving need for a two-pronged approach. On the one hand, the desirable direction points towards identification of minimum reasonable standards in the light of the social, economical, and cultural context that would facilitate the adjudicators to decide issues of professional liability on an objective basis. On the other hand, such identification enables the medical professionals to internalize such standards in their day-to-day discharge of professional duties, which would hopefully prevent to a large extent the scenario of protection of patient's rights in a litigative atmosphere. In the long run, the present adversarial placement of doctor and the patient would have to undergo a transformation to the advantage of the patient, doctor, and society at large.

The sensitization of the public by circulating the important decisions of the Consumer Commission/Fora and Courts will help in bringing about a qualitative change in the attitude of the hospitals for rendering service to people with human dignity. The judgments of Courts make it very clear that there cannot be an assumption that doctors cannot be negligent while rendering care and treatment.

The judicial approach shows the nature of adjudication of medical negligence liability on the one hand and on the other, it does not clarify as to how *prima facie* medical negligence could be established? There is uncertainty regarding expert evidence before the Consumer Fora. It is necessary that some legislative intervention or guidelines issued by the Government, Central or the State in consultation with the Medical Council of India regarding expert evidence rather than leaving it with the adjudicatory fora.

Another important consideration which should be kept in mind is the possibility of getting adverse popularity and sometimes unfair criticism to the Hospital and a Medical Practitioner in case of an alleged complaint of medical negligence. In many situations, the allegation may be sporadic and without even ascertaining the reality. Much damage would have been done by the time a decision is arrived at by the adjudicating body. If it reaches the conclusion that there is no medical negligence, then what is the remedy to the aggrieved Medical Practitioner or the Hospital?

Hence, the media and publicity through media may be subject to some restriction. As in the case of the restrictions on publicity of the details of a victim in offences against women, there should be some legislative prohibition against giving publicity to the incident pointing fingers at a Hospital or a Doctor. In any case, it must be remembered that, probably with some rare exceptions, the Hospitals and/or Doctors are instrumentalities serving human society.