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# A Jural Study Of Medical Negligence In The Era Of Consumer Protection

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***Abstract***
***The field of medicine bridges the fractures between science and society. Due to the growing commercialization of everything, doctors are no longer concerned with their patients' health and safety but are just considering them as money-minting machines. As a consequence, doctors are failing to observe the due caution and standard of care. The law relating to Medical Negligence is well settled, and a remedy can be sought under Tort, Criminal, and Civil law. Apart from these, a patient is ipso facto a consumer, and thus a treatment under the consumer laws can also be sought. This work aims to analyze the concept of Medical negligence vis-à-vis the Consumer Protection Act, 1986 in its various dimensions. A patient being a consumer also possesses certain rights. This work also enumerates certain primary rights that every patient has as a consumer, in the author's opinion.***

***Keywords: Consumer Protection, consumerism, Medical Negligence, Rights of the Patient.***

## 1. INTRODUCTION

Medical practitioners occupy a very respectful position in society. Every time somebody faces any health problem, he immediately rushes to a doctor with an expectation to get treated and get healthy again. Doctors are regarded as visible Gods. They give solace and confidence to those who are suffering from a health problem. The most precious gift we have been offered is life, and it is the doctor that saves a life when it is in jeopardy. Earlier, there existed a warm and compassionate relationship between a doctor and a patient. Doctors were missionaries who took an oath to serve the oppressed humanity in exchange for a subsistence and satisfaction. But now the situations have changed. The noble service of the doctors has disappeared, and Hippocrates's noble professional oath also stands as commercialized as the profession itself. With the onslaught of mechanization and with the advent of commercialization, the noble traits of 'Medical Men' have been demolished. The health sector today has plummeted down to merely a money minting business. The trustworthy and homely atmosphere that the patient used to enjoy with his doctor hitherto is now completely vanished. The Medical profession today has changed from rendering humanitarian services to exploiting the unsuspecting patient. Due to this growing materialistic approach of this noble profession, the doctors have forgotten their actual duties and are now running in the rat race to earn more. Such a commercial mindset of the doctors is the primary cause of growing malpractices and instances of negligence.

Usually, when a patient visits a doctor or a hospital, he has two goals in mind. Firstly, the Doctor or the hospital shall employ their best skills to treat him, and secondly, the doctoror

the hospital shall not harm him. The failure in complying with these expectations gives rise to liability which may be either 'Tortious' or 'Criminal' depending upon the nature of the act. Doctors are visualized as God figures, but they are, in fact, Humans only. Erring is a fundamental tendency of humans. Thus many times, a doctor also commits errors. Trivial or minor mistakes can be ignored. However, there are cases where a doctor commits errors by being negligent. Such negligence on the part of doctors can even be life-threatening. For a long time, such unethical and deadly acts of the doctors have not been known to the public, and that was the primary cause of such practices being on the rise.

With the advent and emergence of The Consumer Protection Act, 1986, many people started coming forward and putting ahead their grievances. This immediately attracted protests by the doctors by challenging the constitutionality of the Act. But this step failed, and doctors were brought under the ambit of the Act. The Medical Council of India (now renamed as National Medical Commission) and the State Medical Councils are regulatory bodies with the authority to investigate allegations of suspected medical professional incompetence and neglect, as well as to impose penalties. If there were any disputes over doctors' negligence in government or private hospitals prior to 1986, the doctor could be tried under different sections of the Indian Penal Code, 1860, or a civil lawsuit could be filed in a civil court with jurisdiction. Such an operation, on the other hand, will take months, if not years, to complete in a discrete manner. With the passage of the Consumer Protection Act of 1986, a patient may file a lawsuit under the Act against a doctor for a service failure and obtain prompt relief. Medical negligence is considered a form of service failure under consumer protection laws. It's a lot like tort law's responsibility. However, since failure to practise the competence and care that is required of a medical practitioner is the test under consumer protection legislation, there is a tougher and wider liability in this case.

The Consumer Protection Act, 1986 was enacted to strengthen the Consumers by providing them with the right to seek a speedy, cheap, and productive remedy in case of any consumer grievance. In the landmark judgment of the *Indian Medical Association v. V.P. Santha*[1]**,** the doctors were brought under the ambit of the Consumer Protection Act, 1986 for their negligent acts. The number of instances of medical negligence was on the rise, and majorly, the people from lower strata were affected by these acts of negligence. Due to their ignorance or their incapacity to identify the same, many of the doctors or hospitals went unpunished.

Medical malpractice lawsuits are increasingly increasing, mirroring the thriving profit-driven health industry. About 90,000 cases of neglect were filed in consumer courts in 2009, according to the Union Minister for Health and Family Welfare, which was nearly 50 percent more than in 2004. The pharmaceutical industry, drug regulators, and medical professionals seem to have created a nexus to wreak havoc on patients' lives.[2]

*Doctor and Patient Relationship*

A doctor-patient relationship is one of the most fundamental relationships in this world. Even though a doctor cannot confer on making the man immortal, he can increase life's health and longevity. Probably that is the reason that the doctor is impersonated with the almighty itself. A doctor-patient relationship is a fiduciary relationship founded on mutual trust and understanding. From the legal point of view, this relationship is contractualin nature. This deals with the contractual obligations, liabilities, and standard of care expected of doctors. The contractual relationship arises when the patient approaches the doctor for medical examination, diagnosis, advice, check-up, etc. and the doctor undertakes to take these. It is important to remember that the contract between the doctor and the patient is usually

inferred. Although a doctor cannot be coerced to treat a patient, he does have obligations and responsibilities to those he accepts to treat. The doctor-patient contract requires the following:

*Continued treatment*

Once the doctor undertakes to treat a patient, an implied contract is formulated, and *among other things,* it requires continued treatment by the doctor till the patient is recovered. However, this does not mean that once accepted; a doctor cannot deny treating a patient. In certain circumstances, the doctor can refuse treatment even after undertaking the same in the following circumstances:

1) The patient / attendant does not pay the doctor's fees (if the doctor is a private practitioner);

2) The patient / attendant consults another doctor (of any branch) without the first attending doctor's knowledge;

3) The patient/attendant does not cooperate or obey the doctor's instructions;

4) The patient is under some other responsible care e.g., after admission to a hospital, the patient is under the supervision of senior doctors/unit heads;

5) The doctor has given adequate notice (oral or written) that care or treatment will be discontinued;

6) The doctor is persuaded that the condition or the illness is fictitious;

7) The patient has been referred to another provider for treatment.[3]

Apart from these situations, a doctor's liability is fixed under the contractual relationship to provide continuous treatment to the patient until he is recovered.

*Reasonable care and skill*

A doctor has the inherent obligation to employ reasonably required skills in treating the patient. Along with the skill, due care must be observed by the doctor while treating the patient. This means that experimentation on the patients should be avoided entirely. A doctor must use instruments that are both hygienic and necessary. If he dispenses his own medications, he must supply them to his patients in a proper and appropriate manner. He should write the prescriptions legibly and clearly, using common and acceptable abbreviations, and provide detailed instructions for the pharmacist to help him read the prescription. He should give his patients clear instructions about how to administer medications and other treatments. If the patient's condition necessitates it, he must suggest/demand a consultation with a specialist. A doctor must observe the reasonable standard of care while treating a patient. A reasonable standard of care means the level of care which a reasonably prudent doctor would have followed had he been in similar conditions.

*Professional Secrets*

A doctor is obligated not to disclose the crucial information he has obtained about the patient during the treatment. Such information comes to the doctor's knowledge only due to the confidence and trust of the patient in him. Breach of such confidence could be highly

detrimental to the patient. Thus, such professional secrets must not be revealed in any manner as they could prove to be detrimental for the patient.

Apart from these contractual obligations, a doctor has various obligations towards his patient. First and foremost is the commitment to observe the standard of care. This means applying principles of standard care that an average person must have observed in similar circumstances. Standard of care is the most prominent ingredient in dealing with medical negligence cases. Secondly, the doctor must provide information to the patient regarding the treatment in its totality. The patient must be informed about the necessity of the treatment, the risks involved, or the alternatives available, etc. Thirdly, the consent of the patient must be there before the treatment. If the patient is not in the situation to give consent, the parents/guardian of the patient must provide consent to such treatment. In emergencies involving children, where parents or guardians are not available, the person acting in *loco parentis* must consent for such treatment. Fourthly, a doctor must not involve in illegal practices or such acts which are against the law. A doctor must not violate professional ethics.
The violation of the obligations above and duties amounts to what is called Medical Negligence. Medical negligence, simply stating, is the omission to observe the due standard of care that a reasonably prudent man must have observed in a similar situation.

*Meaning of Negligence*
Simply put, negligence is the failure to do anything that a rational man, driven by the ordinary considerations that govern human relations, would do or the doing of anything that a reasonable and cautious man would not do.[4] Negligence, in general, does not necessarily imply total carelessness. It is, in reality, the lack of such treatment that is needed in specific circumstances. In the case of the Municipal Corporation of Greater Bombay v. Shri Laxman Iyer[5], it was held that negligence is described as the failure to exercise the degree of care, precaution, and diligence necessary to protect the interests of another person, which the circumstances justly require, and in the absence of which the person suffers injury. The concepts of negligence and duty are inextricably linked. Negligence is described as a reckless state of mind or objectively careless behavior. There is no absolute standard or mathematically exact formula that can be used to accurately measure negligence or carelessness in a given case.
The components of negligence vary depending on the circumstances and decide whether or not negligence occurs in a given situation. To determine whether a single act or course of conduct constitutes negligence, all relevant and surrounding facts and circumstances must be considered. To decide whether or not an action is negligent, it is necessary to determine whether or not any rational person can anticipate the action causing harm. If the response is yes, it is a negligent act. The failure to do what the law requires, or even the failure to do anything in the manner, mode, or method envisaged by law, would *per se* constitute negligence on the part of such individual.[6]

The term medical negligence may be defined as "the breach of duty owed by a doctor to his patient to exercise reasonable care and skill, which results in some physical, mental or a financial disability."[7] In the case of medical professionals, it is fair to assume that anyone who joins the field must exercise a reasonable level of care and expertise. Indeed, a doctor or surgeon cannot guarantee that he will use the highest level of expertise or that he can heal a patient, since there may be others more knowledgeable and skilled than him. Nonetheless, he promises to use a level of ability that is equal, professional, and practical.[8] This suggested undertaking is the true measure of negligence, as shown by a review and interpretation of the

decision in Bolam v. Friern Hospital Management Committee[9], in which McNair, J. summarized the rule to the Jury as follows:

*The skill level is that of a professional man who is training and pretending to have that unique ability. It is well-established law that a man does not need to have the highest expert ability; if he exercises the ordinary skill of an ordinary skilled man practicing that particular art, that is sufficient. When it comes to medical professionals, negligence is described as failing to act in accordance with the requirements of reasonably competent medical professionals at the time. There could be one or more absolutely proper expectations, and he is not negligent if he meets at least one of them. McNair, J. points out that the examination protects a doctor's responsibility for his diagnosis, his duty to alert the patient of the treatment's risks, and his liability for the treatment itself.*[10]

Medical Negligence, as it is known in the modern sense, is not of Indian origin. Its roots canbe traced in England, where negligence developed as a separate Tort. Negligence, simply stating, is the breach of a legal duty to care. One of the essentials to make negligence actionable is the existence of a legal duty of care in others who violated that duty by being careless, resulting in injury. A well-known English principle can be quoted here *viz. Imperitia culpae annumeratur,* which means ignorance and want of skill is reckoned as a fault.[11] A doctor's profession is not easy. It carries with it the requirement of minute precisions and carefulness in treating the patients. A doctor has to observe a standard of care while treating his patients. A certain amount of care has to be followed, which a reasonably prudent person would have observed if he were in the former's place.

To maintain an action for medical negligence, the following ingredients need to be satisfied:

1) existence of the duty to take care

2) a violation of the duty of care and

3) The violation of duty must result in the plaintiff's injury or damage.

On the fulfillment of these essentials, an action for medical negligence may arise. Accordingto Lord Wright, "no case of medical negligence would arise unless the duty to be careful exists between doctor and patients." Shelat, J. while delivering the Judgment in the matter of *Dr. Laxman Bai Krishnan Joshi v. Dr. Trimbak Bapu Godbole*[12] had propounded the criteria for determination of negligence in the professional duty of a doctor. The Judge observed that:

....a person who declares himself ready to provide medical advice and care implies that he has the necessary expertise and knowledge. When a patient consults with another, that person owes him specific duties, including a duty of care in the administration of that treatment, and a violation of those duties gives the patient a right of action for negligence.

It is a well-established legal principle that a person is guilty of negligence if he performs a role for which he knows or should know that he is unqualified to provide care or advice.[13]

The question of breach of duty is whether the defendant was reckless, in the sense of failing to meet the relevant standard of treatment. It is a legal issue to determine the standard's

degree.[14] The complainant must be injured (physically or mentally) as a result of the violation of duty, according to the third requirement.

*The Concept of Consumerism*

When the mindset of society got materialistic, and when morality and ethics were put at stake to earn more profits, it was the consumer who had to suffer. Throughout the market and in almost all the sectors, the producers and the seller began to employ unethical practices to cheat upon the consumer. Either by selling a low-quality product or charging more than the market price, a huge variety of unfair practices began to exploit the consumer. In such an atmosphere of 'Consumer injustice,' the public outcry was obvious enough, leading to development throughout the globe. 'Consumerism' signifies the consumer's welfare by defending or safeguarding their rights and keeping them safe or protecting from those goods or services that may be injurious to them and by giving them protection from restrictive trade practices or unfair trade practices. With the development of the concept of 'Consumerism,' the English principle of *Caveat Emptor* (Buyer beware) was discarded, and the principle of *Caveat-venditor* or consumerism began to flourish after the authority laid down in *Donoghue v. Stevenson*.[15]

The Consumer Protection Act came to a picture in December 1986 and is marked as a landmark in Indian Legal history. It provided six broad rights to the consumers. There are:

1) Right to Safety;

2) Right to know the Information;

3) Freedom to Choose;

4) Right to be heard;

5) Ability to demand redress;

6) Education as a right;

In India, consumer laws are in an advanced position than many other countries. Patients as customers are now insisting on receiving their money's worth in quality healthcare facilities as public understanding of their rights grows. On the historic day of April 27, 1992, Justice Balakrishna Eradi delivered the landmark judgment in the case of *Cosmopolitan Hospital v. Vasantha P. Nair,*[16] where it was decreed that the patient is always a consumer under Section 2 (1) (a) of the Consumer Protection Act, 1986. Hence, he is entitled to invoke the jurisdiction of redressal for an unlawful activity by the defendant party (hospitals and doctors) who constitute service as defined under section 2(1) (O) of the Act. It was also held that the legal heirs of the deceased are also considered consumers and are *ipso facto* covered under the Act.

Any patient who pays or promises to pay in the future, the consideration for the treatment can avail the protection of the Consumer Protection Act, 1986. The decision mentioned above gave rise to a nationwide controversy. The matter finally knocked the doors of the Hon'ble apex court in the case of *Indian Medical Association v. V.P. Shantha.*[17] The Hon'ble Supreme court put a full stop to the entire controversy by affirming that the services rendered to the

patient by the doctors or the hospitals are covered under the ambit of the Consumer Protection Act, 1986. The apex court laid down the following guidelines to ascertain which services should be covered or excluded, as the case may be, under the Act:

(1) Service provided to a patient by a medical practitioner in the form of consultation, diagnosis, and treatment, both medicinal and surgical, will fall within the ambit of 'service' as specified in section 2(1) (o) of the Act (except where the doctor renders service free of charge to any patient or under a contract of personal service).

(2) The fact that medical practitioners are members of the medical profession and are subject to the Medical Council of India and/or State Medical Councils formed under the Indian Medical Council Act does not imply that the services they provide are beyond the scope of the Act.

(3) It's important to differentiate between a 'contract of personal service' and a 'contract for personal services.' The service given by a medical practitioner to a patient cannot be considered as service rendered under a 'contract of personal service' if there is no master-servant relationship between the patient and the medical practitioner. Such service is provided under a 'contract for personal services,' which is not protected by the exclusionary clause of section 2(1) (o) of the Act's meaning of 'service.'

(4) The term "contract of personal service" as specified in section 2(1)(o) of the Act cannot be limited to contracts for the employment of domestic servants alone. It would include the employment of a medical officer to provide medical services to the employer. A medical officer's service to his employer under the terms of his employment contract would fall beyond the definition of "service" as specified in section 2(1) (o) of the Act.

(5) A medical officer or a medical practitioner who works in a hospital or nursing home where such services are provided free of charge to anyone will not be considered "service" under section 2(1)(o) of the Act. The charging of a token sum at the hospital/nursing home for the sole purpose of registration does not change the situation.

(6) Service provided at a private hospital/nursing home where there is no charge to anyone who uses the service, and all patients (rich and poor) receive free care falls beyond the definition of "service" as specified in section2(1) (o) of the Act. The payment of a token sum for the sole purpose of registration at the hospital/nursing home will have little effect on the situation.

(7) The expression 'service' as described in section 2(1) (o) of the Act encompasses services provided at a non-government hospital/nursing home where charges are required to be paid by the persons receiving such services.

(8) Service rendered to all the persons including those who can afford to pay and to those persons who cannot afford to pay falls within the scope of the expression 'service' as defined in section 2(1) (o) of the Act, regardless of whether the service is rendered free of charge to persons who are not in a position to pay. Free service qualifies as a 'service,' and the recipient qualifies as a 'user,' according to the Act.

(9) The term "service" as described in section 2(1) (o) of the Act does not include services provided at a government hospital, health center, or pharmacy where no payment is made to anyone who uses the services, and all patients (rich and poor) receive free care. The charging of a token sum at the hospital/nursing home for the

sole purpose of registration does not change the situation.

(10) Service is given at a Government hospital/health center/dispensary where services are provided for a fee and also provided free of charge to other people will come under the definition of 'service' as specified in section 2(1) (o) of the Act, regardless of whether or not the service is provided free of charge to people who do not pay for it. Under the Act, free service qualifies as 'service,' and the beneficiary qualifies as a 'user.'
(11) A medical practitioner's or a hospital's/nursing home's service cannot be deemed free. If the person receiving the service has purchased a medical insurance policy, the insurance company bears the costs of consultation, diagnosis, and medical treatment. Such service will fall under the definition of'service' as specified in section 2(1) (o).

(12) Similarly, where an employer covers the costs of medical care for an employee and his dependent family members as part of the terms of employment, the service provided by a medical practitioner or a hospital/nursing home to such an employee and his dependent family members will not be free of charge and would be considered "service" under section 2(1) (o) of the Act.[18]

(13) The claim for damages in the cases relating to medical negligence before the enactment of the Consumer Protection Act, 1986 was maintainable only in the civil courts or under the provisions of Law of Torts. With the Act's enactment, a more appropriate and effective forum was set up that could handle such cases speedily and efficaciously.

*Liability of Medical Professionals for Negligence under the ConsumerProtection Act, 1986*
The historical decision of the Supreme Court in the Indian Medical Association's case is being analyzed in the following paragraphs in which various incidents of applicability of the Consumer Protection Act, 1986 to the Medical Professionals are being discussed in the light of the said decision:

Section 2(l) (d) of the Consumer Protection Act defines 'consumer, which is explained as under:

'Consumer' means any person who—
(i) buys any goods 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 consumer of such goods who is not the person who buys such goods for a consideration that has been paid or promised, or an individual who obtains such goods for resale or for any commercial purpose, or hires or avails of any services for a consideration that has been paid or promised, or an individual who engages or avails of any services for a consideration that has been paid or promised, or partly paid and partly promised, but does not include a person who obtains such goods for resale or for any commercial purpose; or
(ii) hires or avails of any services for a consideration that has been paid or 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 partlypaid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person; however, it does not involve someone who uses such facilities for commercial gain.;
*Explanation*.— For the purposes of this section, "commercial purpose" does not include a person's use of products purchased and used by him, as well as services obtained solely for

the purpose of making a living by self-employment;[19]
In this case, the Supreme Court has held that services rendered to a patient by a medical professional are 'service' within the meaning of the Consumer Protection Act, 1986 [S. 2(l) (o)], persons who hire or avail of such services are, therefore, 'consumers' as defined under the Act, with the exception that where the doctor/hospital renders service free of charge to every patient or under a contract of personal service. A patient availing of such free of charge services will not be a consumer. Secondly, A Negligence in treatment is a 'deficiency in service.' Section 2(1) (g) of the Act defines 'deficiency' as under "any fault, imperfection, shortcoming or inadequacy in the quality, nature, and manner of performance which is required to be the maintained under any law or undertaken to be performed by a person in pursuance of a contract to any service." Earlier to the Supreme Court's judgment in the *Indian Medical Association case*, 1996, the Haryana State Commission in *Dr. Ravindra Gupta v. Gangadevi*[20] had observed that there is a clear distinction between medical negligence in the law of tort and a deficiency in the medical services undertaken to be rendered within the consumer jurisdiction. The latter under the Act, undoubtedly, includes what is negligence in the law of tort but is somewhat broaderand more than strict liability under the former law.

However, the State Commission admitted that there would remain a grey penumbral area between the two until the matter crystallizes fully in the as-yet nascent consumer jurisdiction.

The Supreme Court now seems to have crystallized the definition of 'deficiency' as applicable to medical negligence in its judgment.[21]

While rejecting the contention that: under the said clause defining 'deficiency,' the deficiency concerning fault, imperfection, shortcoming or inadequacy in respect of a service has to be ascertained based on some norms regarding quality, nature, and manner of performance and that A medical practitioner's medical assistance cannot be measured based on any predetermined standards, and therefore a medical practitioner cannot be said to becovered by the expression of 'service' as defined in section 2(l)(o), the Supreme Court observed:

"We are unable to reach an agreement. While interpreting the breadth of the Act's provisions in the sense of deficiency in operation, it's important to remember the requirements set forth in section 14 of the Act, which define the types of relief that can be provided in response to a complaint lodged under the Act. The following reliefs may be given in the event of a "deficiency" in service:

(i) the complainant's charges are refunded; [clause (c)]

(ii) payment of any amount that may be awarded as compensation to the consumer for any damage or injury sustained as a result of the opposite party's negligence; [clause (d)]

(iii) the correction of any deficiencies in the facilities in question. [clause (e)].[22]

As a result, section l4 (l) (d) would mean that the compensation to be awarded is for harm or damage sustained by the consumer as a result of the opposite party's negligence. As a result, a finding of deficiency of operation for the purposes of section 2(l) (g) must be made using the same test as in a negligence action for damages.

It is now well settled that the services rendered by the medical professional do come under

the definition of 'service' as provided under section 2 (1) (o) of the Act, 1986. It must also be noted here that the Services rendered by the doctor are not under a 'Contract of personal Service.' The court was told that because the relationship between a medical practitioner and a patient is one of trust and confidence, it is in the essence of a personal service contract, and the services provided by the medical practitioner to the patient are not considered "service" under section 2 (1) (0) of the Act. The apex court dismissed the claim and ruled in the opposite direction.
In *Wood v. Thurston*[23], a drunken man who was run over by a motor lorry was brought to the hospital. The physician did not examine him as closely as the case demanded. In addition to this, he permitted the patient to return home, who consequently died after a few hours; the surgeon was held guilty of negligence for failing to make a proper diagnosis of the patient.

The courts have exercised a lot of caution in determining the liability of a doctor for medical negligence. Unless it is shown that he has fallen short of reasonable medical care, the courts do not impose civil liability on the doctor.[24] In *Ram Biharilal v. Shrivastava*[25], a hospital tookup a surgery even when the hospital was in a state of disrepair, and the operation theatre wasunder repair. The facilities for surgery were almost absent. The court decreed that the doctor should have advised the complainant to approach another hospital with all the facilities that the situation demanded. The doctor, therefore, failed in his duty of care in undertakingthe operation without employing the necessary precautions.

The plaintiff in Kidney Stone Center v. Khem Singh Alias Khem Chand,[26] was dealing with a stone in his prostatic urethra. The Kidney Stone Center in Chandigarh agreed to extract the stone without surgery if the complainant paid Rs. 10,000. The opposing party did not succeed in doing so. The District Forum ordered the refund of fees of Rs. 10,000/- plus interest, citing a lack of facilities by the opposing party as a reason.

The plaintiff, a married woman of about 40 years, found the growth of a painful lump in her breast in Laxmshmi Rajan v. Malar Hospital Ltd,27. She sought care and diagnosis at the hospital which is the opposite party in the case. The lump had little effect on her uterus, but the hospital had her uterus removed without explanation. As a result, the complainant's hopes for the child were dashed. It was determined that the doctor had failed to provide adequate care, and he was ordered to compensate the claimant in the sum of Rs. 2,00,000/-.
In another case of *Indrani Bhattacharjee v. Chief Medical Officer,*[28], the ECG of the patient was not found normal. However, the doctor did not take much interest in the same. His failure to advise the patient to consult a cardiologist and reduce smoking and drinking, instead of giving him medicines for gastric trouble, amounts to deficiency in service.

In *Geeta Sapra v. Dr. B. L. Kapoor Memorial Hospital,*[29] the ventilator in the hospital was not functioning, due to which the patient died. The hospital was held liable to pay compensation for death. In this case, two separate claims of medical negligence and deficiency in service are maintainable.

In *Dr. Balram Prasad v. Dr. Kunal Shah,*[30], decided on October 24, 2013, the Supreme Court of India awarded the highest amount of compensation to the tune of Rs. 60000000/- along with interest. The case was pending for fifteen years, and even with a simple interest of 6% will amount to another Rs. 60000000/- i.e., total Rs. 120000000/- as the amount of compensation for medical negligence due to which petitioner's wife passed away. In this case, the hospital and four other doctors had been held to be guilty of medical negligence. This amount gives an alarm to all medical professionals, hospitals, and their staff that they

should be diligent and careful while treating patients

*Rights of the Patients as Consumers*

Any person who visits a doctor expects certain things from him. Firstly, a patient expects accurate information, including knowledge about the health problem, the diagnosis, the treatment, the estimated duration of treatment, the risks involved, the alternative treatment,etc. Secondly, a patient seeks the proper guidance of the doctor with the expectation of getting well soon. Thirdly and most importantly, a patient puts his trust and confidence in the doctor that the latter will not harm him while treating. A doctor omits to observe the due standard of care necessary in the treatment; the patient has every right to bring appropriate action against the negligent doctor. Even though Medical Negligence is actionable under various laws *viz.* Criminal Law, Law of Torts, or even under the Indian Medical Council Act, the most efficacious and expeditious remedy lies under the Consumer Laws. There is no longer *res integra* on the fact that a patient is, *ipso facto,* a consumer within the scope of section 2 (1) (d) of the Consumer Protection Act, 1986. Thus as a consumer, a patient possesses various rights.

*The Right to Adequate Information*

In the past, the doctors were under no obligation to provide any information to the patient about his prognoses, illness, treatment, etc. On the contrary, it was up to the doctor to exercisehis skill and care in deciding the best course of action for a patient.[31] Probably during that time, doctors were more concerned about the patient as any negative information could worsen the situation of an already vulnerable patient. This principle that the doctor should decide which treatment for the patient, keeping in view the best possibilities, has progressively beenreplaced by a 'Partnership model' of decision-making during the twentieth century. Under such a system, the doctor was the source of the information and the expert advice, but the ultimate decision is of the patient to take. The Patient Autonomy principle grabbed space and became a duty of the physician to provide adequate information to the patient.

As a consumer, the patient has this crucial right of being informed. This right covers all the essential aspects involved in the treatment. The patient must be informed about the nature ofthe illness. The courts in the United States had brought the doctor-patient relationship under the category of a fiduciary relationship, thus giving rise to a duty to inform.[32] No crucial fact relating to the patient's illness should be kept hidden from him unless his medical condition demands the contrary. A patient must be given information regarding the estimated time of recovery, the medicines or drugs that the doctor is prescribing, and similar information. Sometimes, some treatment involves certain risks. Such risks must be disclosed to the patient. Lord Steyn in *Chester v. Afshar*[33] observed the following in this regard:

A surgeon owes a legal obligation to a patient to advise him or her in general terms of the procedure's potential serious risks... Medical paternalism no longer reigns supreme in modern law. A patient has a prima facie right to be advised by a physician of a limited but well-known possibility of serious injury resulting from surgery.

In addition, if an alternative therapy is available, the patient should be told about it. This includes recommending a specialist doctor if the situation so demands. This right consists of all such information which is a must for the patient to know about. A patient's body is not a dummy for experimentation. The patient must be aware of everything happening with his person. This right also acts as a shield against misleading and objectionable advertisements.

Such information, by means of advertisements that may mislead the patients, is against medical ethics. In India, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 prohibits the advertisements of Drugs or Medicines that claim to have magical properties to safeguard the patients from falling into the trap of such luring advertisements.

*The Right to Safety*

One of the basic expectations that motivate a person to visit a doctor in illness is getting well again and enjoying a healthy life. A patient fundamentally believes that a doctor will not harm him; instead, he will treat him. Every person has the right to be free of harm caused by inefficient health-care systems, medical malpractice, and errors, as well as the right to obtain health-care facilities and treatments that meet rigorous safety standards.[34]

As a consumer, the patient has the right to safety. This right ensures that such medicines, tests, examinations, processes, etc., which are hazardous or harmful for the patient should not be administered to him. Doctors are the lifesavers, and they should not play with the safety of the patient. While conducting any procedure, the safety of the patient must be ensured. This right extends protection against negligent behavior by the doctor as well. If a doctor fails to observe a reasonable standard of care in the treatment, he violates the rights to the safety of the patient.

'Safety' means not only physical safety but also includes moral and emotional safety. A doctor, while treating a patient, must respect the emotions and feelings of the patient. Along with that, a doctor must respect the modesty of the patient.

*Right to Choose*

Every patient has the right to choose his or her own physician for treatment. In the early times, the number of doctors was less, and thus patients did not get the opportunity to choose a doctor. However, in this present era of commercialization of everything, there are many doctors at each place, and thus the patient as the consumer has every right to choose a doctor of his choice for his treatment. Even if the patient visits a particular doctor for mere advice or opinion, it is his right to decide whether he is willing to get treated by the same doctor or not. A doctor cannot force his treatment on any patient.

Right to choice also includes within its ambit the right to choose an alternative treatment if available. By no means can a doctor keep a patient bound under his treatment. Similarly, a patient also has the right to choose any pharmacy for the prescribed medicines. A patient cannot be forced to visit a particular laboratory only for the test prescribed by the doctor.[35] It must be the duty of every treating doctor to inform the patient that they are free to access prescribed medicines from any pharmacy of their choice. The decision of the patient to access the pharmacy of their choice must not in any way adversely influence the treatment being provided by the doctor.

*Right to Confidentiality*

The right to privacy is impliedly guaranteed under Article 21 of the Indian Constitution.[36] In medicine, a patient must share some of his personal information with the doctor in order to receive an accurate diagnosis and care, as well to prevent unfavorable drug prescriptions and further health complications. The doctor-patient relationship is formulated based on mutual trust and confidence. In the course of treatment, a doctor may know much crucial information about the patient, which could be detrimental to the patient. Clegg argues:

The doctor's office should be treated with the same reverence as the priest's confessional. The

entire art and science of medicine is built on the close personal relationship that exists between the patient and the doctor.

However, it always returns; however, scientific medicine becomes and whatever the tremendous and undeniable benefits society receives from the application of social and preventive medicine.[37]
Thus the patient has every right to ensure the confidentiality of his personal information. In such matters, the doctors have the moral and ethical duty to keep the professional secret relating to a patient confidential. Such information that could cause a detriment to the patient should not be disclosed without the latter's consent. In India, under the Indian Medical Council Regulations, 2002 every medical practitioner is under an obligation to maintain physician-patient confidentiality.[38]

There is still a debating scenario amongst the jurists around the globe that whether or not in every circumstance the confidentiality of some patient's personal information may be maintained. Even though the confidentiality of certain information may be beneficial for a patient, there may be some cases where the disclosure of some information would be necessary for general public welfare. For instance, an offender of Child Sexual Abuse may approach a doctor to treat his bruises. In that case, whether the doctor should inform the police or confine the information to himself only to respect the offender's fiduciary relationship. As a result, Emily Jackson correctly asserts that "determining whether disclosure is warranted in a particular case will often require a dynamic balancing exercise between competing interests".[39]

*Right to a Healthy and Safe Environment*
A healthy and safe environment ensures the wellbeing of everyone. A doctor or a hospital is obligated to provide a clean, healthy, and safe environment to the patient.[40] A doctor's clinic or the Hospitals must ensure a healthy environment. Piles biomedical waste, garbage, growing mosquitoes, and pest, smoke, extra-strong fragrances, mice, excessive dust, stingy smell, etc., should be avoided at any cost. Such things are a hindrance to a safe and healthy environment. Patients have the right to be treated in a clean area, have infection prevention measures in place, and provides safe drinking water following established standards and sanitation facilities. Many clinics and hospitals nowadays use phenol water mops to curb germs and bacteria. It would be really satirical if a patient is visiting a doctor but comes back, worsening his situation due to the unsafe environment. Thus it is the right of the patient to seek a healthy and safe atmosphere in and around the clinic or the hospital.

*Right to Equal Treatment*
Equality is the essence of our constitution. In earlier times, different treatments were given to people belonging to different *varnas* or Classes. The poor were taken carelessly and were given minor drugs or medicines, whereas the rich and the influential people were treated moreefficiently and cautiously. Another critical concern is that a poor person dying in front of a doctor can be ignored by the doctor for necessary formalities or paperwork. Still, the doctor himself visited a rich and influential person at the former's place, even in minor health issues. Such treatment is not only violative of medical ethics and human rights but is also against the right to equality guaranteed by the Indian Constitution. As a consumer, a patient has the right to seek equality in treatment without any basis. For a doctor, his patient must be above the social chains, and he should treat the patient efficiently without any discrimination.

*Right to Redressal*

Being a Consumer, a patient can take the necessary action against the doctor in the appropriate forum. The Consumer Protection Act, 1986 have formulated a three-tier system including The District Forum, The State Commission, and The National Commission for the redressal of the consumer grievances. Without a redressal mechanism, all the rights of the patients as the consumers would have been of no use and would have merely existed in the papers. With the formulation of the redressal authorities, a consumer can approach the appropriate forum to enforce his rights and seek compensation for the injury caused.

*Right to Education*

Many times the acts of Medical negligence go unpunished as the patients are unaware of their rights. Lack of awareness is a significant concern in every field of Law. The lawmakers formulate the laws, but the beneficiaries of those laws are primarily unaware of the same. As a consumer, apatient has the right to know his rights and responsibilities and the procedure to enforce them.Appropriate steps must be taken by the authorities to spread awareness amongst the masses to allow them to educate themselves. The most straightforward action in this regard can betaken in the following manner.

Every patient has to visit a doctor; thus, the awareness work must start from the doctor itself. Each and every clinic and hospital must be provided with flyers issued under the authority and supervision of the government, providing about various rights of the patients and the enforcement mechanism. The social volunteers amongst the masses can distribute such kinds of flyers. Local events like Rallies, Street Plays, and Awareness camps can be organized by the NGOs or, more prominently, by the Colleges. With such steps, many people would know about their rights and could safeguard themselves in various instances.

## 2. CONCLUSION

Medical Negligence is not a concept of recent origin. Its roots can be sketched back to ancient times. There is no fixed formula to determine the negligent act by a medical practitioner, but time and again, the judiciary has formulated various canons to determine the liability of the negligent doctor. The negligent act of the doctor can also make the hospital vicariously liable for the same. The action for medical negligence must be guided upon the principle of a reasonable standard of care, which simply means the observance of the degree of care which a reasonably prudent person would have observed had he been in similar circumstances. The profession of medicine is challenging, and it inherently requires a certain degree of skill and knowledge that raises the expectation level of standard of care observed by a practitioner while treating a patient. An action against negligence canonly be taken if the practitioner fails to observe the expected standard of care. In the world of medicine, the distinction between "accidents" and "negligence" is razor-thin. Accidents happen when the doctor has employed his complete skill and knowledge in the treatment of a patient. Still, due to some supernatural agency beyond human control, the patient suffers an injury or faces death in extreme cases.

On the other hand, negligence arises when a doctor, out of his personal beliefs and estimations, does not understand the gravity of the matter or gets negligent by not observing the due standard of care his position demands. Where Medical Negligence is actionable, Medical accidents are not actionable. Many times, a doctor escapes culpability taking the defense of Accident. The lack of proper legislation on Medical Negligence in India is a significant weapon that aids a negligent doctor in escaping his liability. Even though the concept of Medical Negligence may be recognized under various laws yet the need for specific legislation is a must. Such legislation must clearly lay down in substance as to what

constitutes medical negligence.

Suits against doctors and health-care facilities for medical negligence may be filed in civil courts of ordinary jurisdiction under the rule of contract or torts. However, such litigation in practice would face many difficulties in invoking the civil court's jurisdiction for getting justice as the more significant the damages claimed greaterwould be the court fee. Even if victims of medical malpractice can afford to pay, the petitioner's suffering will be exacerbated by the excessive delay and stringent proof of evidence. To tackle such a problem, the Consumer Protection Act came into the picture. With the inclusionof the Patient under the definition of consumer, the action for medical negligence could be maintained easily, and appropriate compensation could be awarded for the same. However, even under the Consumer Protection Act, a few lacunas can be observed.

Firstly, sections 10, 16, and 20 of the Consumer Protection Act, 1986 provide for the composition of the District Forum, State Commission, and The National Commission. However, the Act does not provide for the member of these Forums to have a basic understanding of medical matters. The Medical Field is a scientific field, and a lot of technicalities are involved in this field. There may be cases of utmost technicality which the members of the redressal authorities may not understand. Thus, there is a need for a comprehensive redressal mechanism to deal specifically with Medical Negligence cases.

Secondly, there may be certain cases that involve a lot of complexities and a comprehensive analysis of evidence and witness. Consumer courts formulated under the Consumer Protection Act, 1986 were formed for consumer matters' speedier and effective redressal. However, the cases involving a lot of complexity and evidence must be adjudicated by a more appropriate and effective forum. Practically stating Consumer redressal Authorities may be doing wonderful work throughout this country yet, to administer proper justice in the profoundly complex and technical matter, mainly dealing in medicine, must be adjudicated by a more appropriate and effective forum.

Thirdly, the burden of proof is on the complainant to show the negligence of the medical practitioner. The court ordinarily presumes that every doctor tries his level best to relieve the patient when he is approached. Even if surgery fails, it does not mean that there is any negligence on the doctor's part. To show negligence by the doctor, proper pieces of evidence and witnesses must be shown. Most importantly, proof by a medical expertis required to prove the guilt of the respondent doctor. However, there may be caseswhere the medical expert may intentionally formulate a wrong opinion or may turn hostile for professional reasons. Failure in surgery or a blunder of judgment does not constitute medical negligence in the absence of a substantial piece of evidence. Thus this protective attitude of the courts towards the Practitioners is one of the causes which aid the doctors to escape their liability.

In India, Medical Negligence is a serious concern. Where most people do not take action against the same even if some victims dare to seek redress, they have to face many difficulties in proving the same as the onus is on the complainant to prove the negligence by the doctor. The court needs the testimony of a medical expert to corroborate the allegation, but practically, the majority of medical practitioners do not come forward to depose against

someone of the same medical fraternity. Consequently, the negligent doctor escapes the long-arm of law, and the victim suffers incalculable sufferings. The need of the hour is to formulate comprehensive legislation on the subject of Medical Negligence. Even though the consumer laws are providing reasonable redress to a few victims, the future of such a system seems endangered. There is a need for some authority to take *Suo moto* cognizance of such an act rather than waiting for a complaint to be lodged. The courts must take a patient-centered approach, and medico-legal experts must be named to the adjudicating panel.

A comprehensive legislation must be formulated on the subject of Medical Negligence. The Judiciary must adopt a liberal perspective and must withdraw itself from the shackles of archaic thoughts. New strategies and new methods must be formulated to inflict justice upon the victims of Medical Negligence.

## 3. ENDNOTES

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