**International Journal of Law**
**ISSN: 2455-2194**
**Impact Factor: RJIF 5.12**
**www.lawjournals.org**
**Volume 4; Issue 5; September 2018; Page No. 09-13**

# Medical negligence and its issues in India

**Amal Debnath**[1]
[1] Research Scholar, Department of Law Tripura University, Tripura, India

**Abstract**
Doctor owes a duty of care to his patient. This duty can either be a contractual duty or a duty arising out of tort law. In the tort of negligence, professionals such as lawyers, architects and doctors are included in the category of skilled persons who profess some special type of skill. Therefore, any person performing such duty should possess the requisite skill to do the work. Similarly, the patients, as soon as they step into the premises of the hospital, they equate the doctor to God and believe that he possess the requisite medical expertise. Here, the standard to be applied to adjudge the case at hand would be that of an ordinary competent person exercising ordinary skill in the profession. Negligence is the breach of a legal duty to care, carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence. Many legal cases against doctors, have established that the doctors were negligent in their medical service, and have claimed and received compensation. As a result, a number of legal decisions have been made on what constitutes negligence and what is required to prove it. There is no question of warranty, undertaking, or profession of a skill. The standard of care and skill to satisfy the duty in tort is that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. Hence once there exist a duty which has to be established by the patient, then the next step is to prove breach of such duty and the action.

**Keywords:** medical negligence; legal framework; role of apex court; need of expert evidence

## Introduction
Medical negligence is a branch of medical law and covers all medical activity on the view of carelessness and rashness. The conduct of physicians, nurses, hospitals and any permitted person who is engaged in medical service is very much important. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It is well known that a doctor owes a duty of care to his patient. This duty can either be a contractual duty or a duty arising out of tort law. In some cases, however, though a doctor-patient relationship is not established, the courts have imposed a duty upon the doctor. In the words of the Supreme Court every doctor, at the governmental hospital or elsewhere, has a professional obligation to extend his services with due expertise for protecting life. The duty owed by a doctor towards his patient, in the words of the Supreme Court is 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. He has to only ensure that he confers a reasonable degree of care and competence.

Negligence by doctors has to be determined by judges who are not trained in medical science. The judges trust on expert's opinion and decide on the basis of basic principles of rationality and prudence. This brings into a lot of subjectivity into the decision and the effort is to reduce it and have certain objective criteria. This may sound simple but is tremendously difficult as medical profession evolves and experimentation helps in its evolution. Physicians have a duty to act in their patients' best interest and can be charged in a court of law if they fail to do so. On the other hand, a physician may be required to act in the interest of third parties if his patient is a danger to others. Failure, lead to legal action against the physician. States have been known to ask physicians engage in torture of individuals or examine and identify individuals who can undergo suffering. In such circumstances, physicians must choose whether to disobey the authorities even at the risk of harm to themselves. Physicians assess injured individuals and the degree of injury they cause. This allows courts to determine and award damages. Of late, but Indian society is experiencing a growing awareness regarding patient's rights. This trend is clearly apparent from the recent squirt in litigation concerning medical professional or establishment liability, claiming redressal for the suffering caused due to medical negligence, vitiated consent, and breach of confidentiality arising out of the doctor-patient relationship. As of now, the adjudicating process with regard to medical professional liability, be it in a consumer forum or a regular civil or criminal court, considers common law principles relating to negligence, vitiated consent, and breach of privacy.

## Medical negligence
In legal sense Medical Negligence is a division of professional negligence which is a branch of the general concept of negligence that applies to the situation in which physician who represented himself or herself having special knowledge and art, breaches his or her duty to take care about his or her

patient. The general rules apply in establishing that the physician who owed the duty of care is in breach of that duty. Once the physician has accepted to treat the patient, the legal relationship between physician and patient is created, this means a medical relationship is established and this relationship resulted in duty to take care. The self-indulgent of this legal relationship is the rule of reasonable reliance by the claimant on the skills of the defendant. According to common law system of negligence, the medical practitioner has discretion in choosing the treatment which he proposes to give to the patient and such discretion is wider in cases of emergency, but, he must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care according to the circumstances of each case. Physician who holds himself out ready to give medical advice and treatment impliedly holds out that he is possessed of skill and knowledge for such purpose. Then, when he is 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.

Negligence is simply failure to exercise due care. The three ingredients of negligence are;-The defendant owes a duty of care to the plaintiff; the defendant has breached this duty of care and the plaintiff has suffered an injury due to his breach. And in case of medical negligence mostly the doctor is the defendant. Negligence is predominantly a theory of liability concerning allegations of medical malpractice, making this type of litigation part of the Tort Law. A doctor may be liable in a civil case for negligence but mere carelessness or want of due attention and skill cannot be described as so reckless or grossly negligent as to make him or her criminally liable. Hence the complaint against the doctor must show negligence or rashness of such a degree as to indicate a mental state that can be described as totally apathetic towards the patient. Such gross negligence alone is punishable. An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant allows to have, and acting with ordinary care, would not have made the same error. Doctors must exercise an ordinary degree of skill. However, they cannot give a warranty of the perfection of their skill or a guarantee of cure. If the doctor has adopted the right course of treatment, is skilled and has worked with a method and manner best suited to the patient, cannot be blamed for negligence if the patient is not totally cured. Failure of an operation and side effects are not negligence. 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.

**Legal framework in India**

Medical law is the branch of law which concerns the prerogatives and responsibilities of medical professionals and the rights of the patient. It should not be confused with medical jurisprudence, which is a branch of medicine, rather than a branch of law. The main branches of medical law are the law on confident-iality, negligence and torts in relation to medical treatment viz. medical malpractice, and criminal law & contract law in the field of medical practice and treatment. Ethics and medical practice is a growing field. The legal framework in India that actually affects the medical profession and its working, and also prevents malpractices; holds an important place. Article 21 & Article 32 of the Fundamental Rights; Article 41, Article 42 and Article 47 of the Directive Principle of State Policies; and Section 52, Section 80, Section 81, Section 88, Section 90, Section 92, Section 304-A and Section 337 of the Indian Penal Code (IPC) in this context are relevant. Medical negligence generally comes under 3 categories

1. Criminal negligence.
2. Civil negligence and
3. Negligence under Consumer Protection Act.

Different provisions regarding the remedy in the form of punishment and compensation in India are there in these three laws. The following is an analytical comparison of the laws mentioned above about medical negligence.

**Civil law and medical negligence**

The situation regarding negligence under civil law is very important as it incorporates many features within itself. Under the law of torts or civil law, this principle is applicable even if medical professionals provide free services. It can be asserted that where Consumer Protection Act (CPA) ends, the tort law starts. In cases where the services offered by the doctor or the hospital do not fall within the meaning of 'services' as defined under CPA, patients can take remedy to tort law under negligence and claim compensation. Here, the burden of proof is on the patient, and has to prove that because of doctor's or the hospital's negligence, he suffered injury. Such cases of negligence may include transfusion of blood of incorrect blood groups, leaving a mop in patient's abdomen after the operation, removal of organs without consent and administering wrong medicine resulting in injury. Persons who deal medical advice and treatment indirectly state that they have the skill and knowledge to do so, and have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an implied undertaking on the part of a medical professional. Certain conditions must be satisfied before liability that can be considered. The person who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty, and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting an expert opinion. The question of degree has always been relevant for distinguishing negligence under the civil and criminal law. Doctors in India may be held liable for their services individually or vicariously unless they come within the exceptions. Doctors are not liable for their services individually or vicariously if they do not charge fees. However, no human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. A doctor can be held liable for negligence only if one can prove that he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care. If the doctor has adopted the right course of treatment, if he is skilled and has worked with a method and manner best suited to the patient, cannot be

blamed for negligence if the patient is not totally cured. In some situations the complainant can invoke the principle of res ispa loquitur or the thing speaks for itself. In certain circumstances no proof of negligence is required beyond the accident itself. The National Consumer Disputes Redressal Commission applied this principle in *Dr. Janak Kantimathi Nathan vs. Murlidhar Eknath Masane*. The principle of res ipsa loquitur comes into operation only when there is proof that the occurrence was unexpected, that the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor and not any other person was negligent.

**Criminal law and medical negligence**

Indian Criminal Law has placed the medical professional on a different footing as compared to an ordinary human. Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine or with both. Thus, when a person engaged in the commission of an offence within the meaning of Indian Penal Code and causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause that, he should be liable for the punishment of the offence which he was engaged in committing added to the ordinary punishment of involuntary culpable homicide. Criminal liability can also be imposed upon a doctor under particular situations wherein the patient dies during the time of administering anaesthesia in an operation; the death must also be due to malicious intention or gross negligence. Many a time the doctor will also be responsible vicariously, meaning thereby if his servant rashly causes the death of a patient. In that case, the employee as well the doctor will be liable due to the principle of 'Vicarious Liability' under Tort law. Despite the rights of a patient mentioned above, there are a few exceptions as well. Sections 52, 80, 81, 83, 88, 90, 91, 92 304-A, 337 and 338 of the Indian Penal Code (IPC), 1860 contain the law of medical malpractice in India. Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under Section 80 of accident in doing a lawful act; 'nothing is an offense that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.' According to Section 88, 'a person cannot be accused of an offense if performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.'

A physician can be charged with criminal negligence when a patient dies from the effects of anesthesia during, an operation or other kind of treatment, if it can be proved that the death was the result of malicious intention, or gross negligence. Before the administration of anesthesia or performance of an operation, the medical man is expected to follow the accepted precautions. In such cases, the physician should be able to prove that he used reasonable and ordinary care in the treatment of his patient to the best of his judgment. He is, however, not liable for an error judgment. The law expects a duly qualified physician to use that degree of skill and care which an average man of his qualifications ought to have, and does not expect him to bring the highest possible degree of skill in the treatment of his patients, or to be able to guarantee cures.

**Consumer protection act and criminal negligence**

Since 1990's there is a huge rumor and discussion on whether medical services are explicitly or categorically included in the definition of services as enshrined under Section 2(1)(o) of the Consumer Protection Act (CPA). 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 about any service. The question that arises is that where can a complaint be filed? The answer is that, a complaint can be filed in - (i). The District Forum if the value of services and compensation claimed is less than 20 lakh rupees; (ii). Before the State Commission, if the value of the goods or services and the compensation claimed does not exceed more than 1 crore rupees, and (iii). In the National Commission, if the value of the goods or services and the compensation exceeds more than 1 crore rupees. The good positive aspect about this is that there is a minimal fee for filing a complaint before the District Consumer Redressal Forums. The Supreme Court's decision in *Indian Medical Association vs. V.P.Shantha* brought the medical profession within the ambit of 'service' defined in the Consumer Protection Act, 1986. This defined the relationship between patients and medical professionals by giving contractual patients the power to sue doctors if they sustained injuries in the course of treatment in 'procedure free' consumer protection courts for compensation. Thus free treatment at a non-government hospital, governmental hospital, health centre, dispensary or nursing home would not be considered a 'service' as defined in Section 2(1) (0) of the Consumer Protection Act, 1986.

**Role of apex court in medical negligence**

In the case of the *State of Haryana vs. Smt Santra*, the Supreme Court of India has pointed out that liability in civil law is based upon the amount of damages incurred; in criminal law, the amount and degree of negligence is a factor in determining liability. However, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence, and the character of the offender. In *Poonam Verma vs. Ashwin Patel* the Supreme Court distinguished between negligence, rashness, and recklessness. A negligent person is one who inadvertently commits an act of omission and violates a positive duty. A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of his or her act. A reckless person knows the consequences but does not care whether or not they result from his or her act. Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability. In *Kunal Saha vs. AMRI* (Advanced Medical Research Institute), popularly known as Anuradha Saha case, the Supreme Court in the year 2013 has expanded the scope of medical negligence in India and took it to a whole new level

and also compensated the victim with 6.08 crore rupees. In the case of *V. Krishna Rao vs. Nikhil Super Speciality Hospital 2010*, Krishna Rao, an officer in malaria department was awarded a compensation of rupees 2 lakhs following the principle of res ipsa loquitor ie. the legal principle for a 'thing speak for itself'. In a popular case, *Achutrao Haribhau khodwa and Ors vs. the State of Maharashtra*, the Supreme Court noticed that in the very nature of the medical profession, skills differ from doctor to doctor, and there is more than one admissible course of operation. Therefore, negligence cannot be attributed to a doctor so long as he is performing his duty with due care, caution, and attention. Merely because the doctor chooses one course of action over other, he won't be liable. The judgment pronounced in *Martin F. D'Souza vs. Mohd. Ishfaq* by the Hon'ble Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the adjudicatory process that is to be adopted by Courts and Forums in cases of alleged medical negligence filed against Doctors. In *Kurban Hussein vs. the State of Maharashtra*, in the case concerning Section 304 (A) of I.P.C., 1860, it was stated that 'to impose criminal liability under Section 304-A, it is necessary that the death should have been the direct result of rash and negligent act of the accused, without other person's intervention.' In a key decision on this matter in the case of *Dr Laxman Balkrishna Joshi vs. Dr Trimbak Bapu Godbole*, the Supreme Court held that if a doctor has adopted a practice that is considered proper by a reasonable body of medical professionals who are skilled in that particular field, he or she will not be held negligent only because something went wrong.

Besides there are many more cases where the Apex Court has played a vital role to control and combat medical negligence in Indian perspective. In *Calcutta Medical Research Institute vs. Bimalesh Chatterjee* it was held that the onus of proving negligence and the resultant deficiency in service was clearly on the complainant. In *Kanhaiya Kumar Singh vs. Park Medicare & Research Centre*, it was held that negligence has to be established and cannot be presumed. Even after adopting all medical procedures as prescribed, a qualified doctor may commit an error. In *Jacob Mathew vs State of Punjab*, the Supreme Court of India delivered two different opinions on doctors' liability. Again in *Mohanan vs. Prabha G Nair and another*, it ruled that a doctor's negligence could be ascertained only by scanning the material and expert evidence.

**Burden of proof**

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish the claim against the doctor. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that with the best skill in the world, things sometimes went wrong in medical treatment or surgical operation. A doctor was not to be held negligent simply because something went wrong. The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in any treatment or diagnosis if has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the possibility of an accident leading to death cannot be ruled out. Certain conditions must be satisfied before liability can be considered. The person who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty; and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting expert opinion. It has held that criminal prosecution of doctors without adequate medical opinion pointing to their guilt would do great immoral to the community. A doctor cannot be tried for culpable or criminal negligence in all cases of medical misfortunes or hardships. On September 9, 2004, Justices Arijit Pasayat and CK Thakker referred the question of medical negligence to a larger Bench of the Supreme Court. They observed that words such as 'gross, reckless, competence, and indifference did not occur anywhere in the definition of 'negligence' under Section 304A of the Indian Penal Code.

The liability of a doctor arises not when the patient suffers injury but when the injury results due to the conduct of the doctor, which was below reasonable care. Hence once there exist a duty which has to be established by the patient, then the next step is to prove breach of such duty and the causation. Normally the liability arises only when the plaintiff is able to discharge the burden on him of proving negligence. However, in some cases the principle of res *i*psa loquitor which means the thing speaks for it might come into action. Mostly the doctor is liable only for his own acts. However in some cases a doctor can also be made vicariously liable for the acts of another. The example of such a situation is when a junior doctor assisting the senior doctor commits a mistake it becomes the duty of the senior to have supervised him hence vicariously liable. It has been held in different judgments by the National Commissi -on and the Hon'ble Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof correspondingly greater on the person who alleges negligence against a doctor. It is known fact that things can go wrong even with the best doctor. Thus the guilt or the negligence should be established beyond all reasonable doubts that his skill fell below reasonable care that he ought to take during the treatment or surgery.

**Conclusion**

There are a few criticisms staring in the face of the Indian laws on medical negligence. The foremost is the principle of 'Burden of Proof'. The burden of proof is on the plaintiff. So, if a patient alleges malpractice in medical, the law will require a higher standard of evidence to support it. For an ordinary human or a patient, it becomes very difficult to determine the exact damage and the causal relation between the injury and the fault of the doctor. As a result, the patient is not able to prove doctor's fault beyond a reasonable doubt, since, the field of medicine is unforeseen & irregular and anytime

anything can happen in a human body and so, it lapses to the plaintiff. Therefore, it is high time that the laws dictating upon the medical negligence get changed so as to suit patients first. And the patients should be sensitized regarding their rights against medical malpractices by civil societies through a proper education channel. All the concerned authorities whether i.e. the hospital, Government, Medical Council or any other institution working towards betterment of healthcare facilities should work together and take steps to provide quality healthcare, adequate healthcare and accessibility of basic health care. Till now, it is observed the duty of a doctor in so far as treating a patient is concerned or in diagnosing the ailment. Doctors are, however, imposed with a duty to take the consent of a person and patient before performing acts like surgical operations and in some cases treatment as well. To summarize, any act that requires contact with the patient has to be consented by the patient. A duty of care is imposed on the doctors in taking the patient's consent. Naturally, a question arises as to what is this duty of care. As per the judicial pronouncements, this duty is to disclose all such information as would be relevant or necessary for the patient to make a decision. Therefore, the duty does not extend to disclosing all possible information in this regard. Furthermore, this duty does not extend to warning a patient of all the normal attendant risks of an operation. The standard of care required of a doctor while obtaining consent is again that of a reasonable doctor, as in other cases. In order to decide whether negligence is established in any particular case, the alleged act, omission, or course of conduct that is the subject of the complaint must be judged not by ideal standards nor in the abstract but against the background of the circumstances in which the treatment in question was given. The true test for establishing negligence on the part of a doctor expert evidence is must.

**References**


1. Smreeti Prakash. A Comparative Analysis of various Indian legal system regarding medical negligence.
2. Section Consumer Protection Act, 1986, 2(1),
3. Talha Abdul Rahman. Medical Negligence & Doctor's Liability, Indian Journal of Medical Ethics, 2005.
4. Dr. Harkanwaljit Singh, Saini V. Gurbax Singh and Anr. 2003, (1)153.
5. Dr. Karkanwaljit Singh, Saini V. Gurbax Singh and another. 2003, 1 (153).
6. Ns Sahota v. New Ruby Hospital and Ors, 2000, 2(345).
7. KKSR Murthy. Medical Negligence and the Law' Indian Journal of Medical Ethics, 2007, 4(3).
8. Dr. Manjit Singh, Sandhu v. Uday Kant Thakur and others. 2002; 3(242).
9. Director, Rajiv Gandhi Cancer Institute and Research Centre and Ors Delhi. 2003, (1)305,
10. Marble City Hospital and Research Centre and Ors. v. V.R. Soni, MP, 2004, 102.
11. Inderjeet Singh V, Dr. Jagdeep Singh NC. 2004; 3(20).
12. Nirmalendu Paul v. Dr. P.K. Bakshi and anr CPJ, 2000, 3(79).
13. Surinder Kumar, (Laddi) ANR V, Dr. Santosh Menon, Ors CPJ, 2000, 5(17).
14. Rajinder Singh V. Batra Hospital and Medical Research Centre and Anr CPJ, 2000, 3(558).
15. Martin F. D'Souza V. Mohd. Ishfaq. Supreme Court, 2009, 2(40).
16. State of Haryana vs. Smt. Santra SCC, 2000, 5(182).
17. Indian Medical Association vs V P Santha. AIR, SC. 1996, 550.
18. Devi vs Union of India CPJ, 2003, 164.
19. Dr Devendra Madan, vs Shakuntala Devi I. CPJ 57 (NC).
20. Dr Laxman Balkrishna Joshi vs Dr Trimbak Bapu Godbole AIR, (SC). 1969, 128.
21. Poonam Verma vs, Ashwin Patel. SCC, 1996, 4(332).
22. Calcutta Medical Research Institute vs Bimalesh Chatterjee I CPJ 13 (NC), 1999.
23. Kanhaiya Kumar Singh, vs Park Medicare & Research Centre III CPJ 9 (NC), 1999.
24. Mohanan VS, Prabha G. Nair. Another CPJ 21(SC), 1996.
25. Indian Medical Association vs. V.P. Shantha AIR SC, 1996, 550.
26. Available at, https://indiankanoon.org/doc/34613760/
27. Sharma DK. Hospital Administration and Human Resource Management, Ed 6, PHI Learning Pvt. Ltd 2003.
28. Warren Jones, Law & Ethics, British Dental Journal, 2000.
29. Section 304-A, Indian Penal Code, 1860.
30. Available at http://lawcommissionofindia.nic.in/reports/rep196.pdf
31. OP Verma. Doctors Heave a Sigh of Relief" Deccan Herald, Sunday, 2004.
32. Section 80, Indian Penal Code, 1860.
33. AIR 1989 SC 2039. 34. Article of By Sylvine, 2016.
34. Article of SV Joga Rao.
35. Article of M. S. Pandit and Shobha Pandit.
36. AIR, SC. 1969, 128.