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ON THE TOPIC

STUDY ON THE MEDICAL NEGLIGENCE LIABILITY OF DOCTORS WITH SPECIAL REFERENCE TO THE CONSUMER PROTECTION ACT 2019

SUBMITTED BY

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CERTIFICATE

This is to certify that **Ms. NEELIMA K MANOJ, P Reg. No: LM0321004** has submitted her dissertation titled "STUDY ON THE MEDICAL NEGLIGENCE LIABILITY OF DOCTORS WITH SPECIAL REFERENCE TO THE CONSUMER PROTECTION ACT 2019" in partial fulfilment of the requirement for the award of Degree of Masters of Laws in Public Health Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that the dissertation submitted by her is original, bona fide and genuine.

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DECLARATION BY THE CANDIDATE

I declare that this dissertation titled " Study on the Medical Negligence liability of doctors with special reference to the Consumer Protection Act, 2019" submitted at the National University of Advanced Legal Studies, in partial fulfilment of the requirement for the award of Degree of Master of Laws in Public Health Law carried out under the supervision of Dr. Balakrishnan.K, Associate Professor (Law), National University of Advanced Legal Studies has been composed solely by myself and that it has not been submitted, in whole or in part, in any previous application for a degree, except where states otherwise by reference or acknowledgement, the work presented is entirely my own.

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NEELIMA K MANOJ

LIST OF ABBREVIATIONS

AD	Anno Domini
AIR	All India Reporter
ALL ER	ALL England Reporter
BC	Before Christ
CCJ	Consumer Claim Journal
CDRC	Consumer Disputes Redressal Commission
CLT	Cuttack Law Times
CPJ	Consumer Protection Journal
CPR	Consumer Protection Report
CPA	Consumer Protection Act
Cr. LJ	Civil Rules for Courts of Limited Jurisdiction
DC	District Commission
Dr.	Doctor
Edn.	Edition
Eg.	Example gratia
Etc.	Et. Cetera
Harv L. Rev.	Harvard Law Review
HC	High Court
i.e	Id est (That is)
Ibid	Ibidium (in the same place, work or page)
JMC	Journal of Medical Cases
LFT	Liver Function Test

MTP	Medical Termination of Pregnancy
MRTP	Monopolistic and Restrictive Trade Practices LegislatioN
NC	National Commission
NCDRC	National Consumer Disputes Redressal Commission
SC	Supreme Court
SCC	Supreme Court Cases
SCDRC	State Consumer Disputes Redressal Commission
SCJ	Supreme Court Journal
SCR	Supreme Court Report
Sec.	Section
Supra	Refer Above
V.	Versus
Vol.	Volume

FOREIGN TERMS

Ipso Facto	By reason of that fact
Mens Rea	Guilty mind
Suo moto	Own its own
Res Ipsa loquitur	The thing speaks for itself
Res Judicata	A thing adjudged

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CHAPTER - 1

INTRODUCTION

The doctor's profession is not limited to preserving human lives. As a doctor, you can help alleviate a patient’s discomfort or speed up their recovery from a disease or injury. Even if a patient cannot be treated, the opportunity to enjoy life to the fullest is extremely important to both the patient and their loved ones. As we can infer from the current social scenario, law and medical professions are considered the most honourable and well-educated of all professions because of the services they provide to the afflicted and the needy members of the human community. The field of medicine bridges the divide between science and society. Clinical practise relies heavily on the application of scientific knowledge to human health. Multiple health care providers have entered the market. There is a growing demand for a more equitable relationship between patients and professionals, as well as a rapid expansion of scientific knowledge in therapeutic practise. All of them exemplify the aim of medicine's uniting purpose and physicians' shared ideals. A good physician holds the admirable objective of medical professionalism close to his heart. Patients anticipate from their physicians a high level of morality and medical ethics. Medical professionalism is defined as a set of attitudes, behaviours, and relationships that inspire public confidence in physicians.In India, medical negligence is a major issue. Patient’s discontent with the quality of medical care will only grow as the public becomes more aware of the problem. The profession’s self-regulatory quality has deteriorated as a result of the growing influence of commercialization in the medical industry. In a medical context, questions of medical negligence arise. As a result, Medical Negligence is a point of contact between the legal system and the medical community. It is at this point medical judgement ceases to operate and legal criteria take effect.

As previously mentioned with the advancement of technology, white collar criminality has become a global phenomena. Even today, the vast majority of medical professionals automatically adhere to professional norms and social duty, rendering external compulsions unnecessary for the governance of their individual field. This fact must be recognized and accepted by all members of society, lest it seek solutions that are worse than the problem in terms

of professional discipline and accountability. However, in our complex societies that are continually advancing technologically and commercialising every element of existence, the professions could not remain unaffected. The great advances in modern medicine, diagnostic procedures, surgery, and health-care systems have prompted concerns about standards of treatment, the scope of human rights, protection, and the adequacy of accountability systems. In light of new knowledge and a greater understanding of health care, time-tested norms, customs, and practices have been called into question. Keeping the body running with respiration, the Pacemaker, intravenous nourishment, renal dialysis, and so on now raises a slew of legal difficulties involving homicide, negligent claims, insurance claims, and organ transplantation. Medical research and health-care technology advancements have unavoidably placed physicians and hospital workers in uncomfortable situations. When there are no hopes of recovery, the ill-patient should not be kept alive forever by costly life-sustaining equipment or medicine. It is unacceptable to allow a foetus with a birth defect to survive to adulthood. In order to maintain compliance with the new human rights standards, it is necessary for the attending physician to make the decision on his or her own in these kinds of cases. In light of the constantly shifting legal landscape in this area, he ought to solely rely on the informed consent of the patient as his primary point of reference. These are the challenging and convoluted questions, to which there is no simple response, neither in legal terms nor in terms of morality. Due to the unpredictability and difficulty of the circumstance, it is impossible to specify in advance the amount to which the law should intervene in the relationship between a doctor and a patient and how disagreements should be resolved through the adjudication process in courts. The problem is related to the obligations of care that are expected of professionals. It is challenging to agree with the viewpoint that these are fundamentally medical concerns and thus as a result, members of any other professions or fields of study should refrain from interfering in the discussion. Due to (the uneven level of medical education, the continuing decline of ethical standards, the commercialization of health care services, and the inadequate institutional framework within the profession), it is prudent to recognize the malady and respond both intelligently and creatively so that the doctor-patient relationship is not harmed while accountability systems are enhanced. Every profession has guiding concepts that require evaluation as well as critical investigation. Every professional organisation pursues whether professionals adhere to ethical ideals and procedures.The few revisions in the statute were deemed insufficient in response to the

advancement of scientific research and its application to medical practice. The Medical Council of India and other Associations have demonstrated a lack of initiative. The sole alternative is the 2019 Consumer Protection Act.

The Indian Parliament had passed the Consumer Protection Act in order to defend and protect the interests of consumers. A new order from the Consumer Protection Courts streamlines the process for patients and their families who have been injured as a result of medical malpractice. To put it another way, the Consumer Protection Act's primary goal is to safeguard patients from negligent doctors. Most medical errors result in patient harm or death because of the medical community's professional carelessness, which can take the form of an act or omission on the part of a healthcare provider. Since the beginning of human era, diagnosis and treatment for a disease has been a high-risk profession because of the inherent sickness and mortality of human beings. The professional danger that was related to physical punishment being taken against the physician has been replaced with the modern risk of financial reimbursement for the harm that has been caused. To be able to provide a level of excellence in one's work that commensurates with the standing and prestige of one's chosen field is one of the most essential components of any profession. It is not believed that every professional man would provide the service in the same area of competence, vocation, or a specific line of individualised and highly trained practice.

Negligence is the failure to do something that a prudent and reasonable person, guided by the principles that typically govern the conduct of human affairs, would do; or doing something that a prudent and reasonable person would not do. According to Winfield and Jolowicz, The breach of a legal duty of care by the plaintiff, which results in undesired injury to the plaintiff, is the act that is referred to as negligence. This definition of negligence was given in **Blyth v. Birmingham WaterWorks Co.**[1], which is a case relating to reasonableness in the law of negligence. It is renowned for its classic definition of negligence and the required standard of care.

[1] Blyth v. Birmingham WaterWorks Co., (1856) 11 Ex 781, Baron Alderson.

"The liability for negligence[2] ..... Is of no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief...the rule that you are to love your neighbour becomes in law, you must not injure your neighbour...(for the purpose of law your neighbour is)....persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."[3]

According to Winfield, Negligence is a tort in which the defendant suffers damages as a result of violating a legal duty to exercise care. The definition involves three constituents of the negligence :

1. A legal duty on the part of the complainant to exercise proper care towards the party complaining about the former's actions within the limits of the duty;
2. Breach of the aforementioned duty;
3. Consequential damage

The law does not define medical or professional negligence as a distinct category of conduct that should be distinguished from the conduct of other service-providing members of society. Legally speaking, there is no distinction between the negligence of a doctor, plumber, or window washer[4].As part of the CPA, consumer courts are established to safeguard and enforce consumer rights quickly. 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. A consumer also includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or under any system of deferred payment, when such services are availed with the approval of the first-mentioned person. This term is broad enough to cover a patient who simply makes a payment pledge.

[2] Donoghue v. Stevenson, 1932 AC 562: 1932 SC (HIL) 31: 101 LJPC 119, Lord.
[3] Id.
[4] Carrier John & Kendall Ian, "Medical Negligence Complaint & Compensation", 1990.

The establishment of these consumer courts raised the possibility of more litigation against dr. and hospitals by patients exercising their legally protected rights in the medical profession. As a result of the Consumer Protection Act's narrow scope of complaints that can be brought before the Consumer Court, consumers seeking redress will likely continue to rely on the common law for their remedies.

CONCEPT OF MEDICAL NEGLIGENCE

Essentially, Medical Negligence refers to negligence caused by a doctor's failure to operate in line with medical standards in practice, as practised by an ordinarily and fairly competent man in the name profession. There are potentially a great number of scenarios in which a medical professional might behave in an extremely irresponsible manner. In the event that a patient sustains an injury or passes away as a result of a lack of care and reasonable skill throughout the course of treatment, this is an example of negligence. Similarly , a medical practitioner who commits legal acts that fall outside the bounds of the scope of his duties may be found guilty of negligent behaviour. In the event of an abortion, irresponsibility might cause a significant amount of difficulties for the attending physician. When the effects of anaesthesia linger for too long, it may be hard to bring the patient back to life. This is another form of neglect.

Similarly, prescribing medications without first assessing the patient is negligent. The Madras HC stated in **C.J. Subramania v. Kumarasamy**[5] that medicine is an inexact science and that it is doubtful that a respectable doctor would intend to offer a guarantee to accomplish a certain result. Not every mistake or error of judgement can be prosecuted as carelessness in the legal sense, but only such an error can be committed by a reasonably competent professional man acting with ordinary care. An error in diagnosis that could only have been avoided with hindsight, an unavoidable complication regardless of how carefully and competently the procedure was carried out, infections that occurred as a result of circumstances that made it difficult to avoid them, and complications of drugs that were carried out in accordance with insufficient information are all examples of the myriad of ways in which treatment errors

[5] C.J. Subramania v. Kumarasamy, 1 (1994) CPJ 509: CCJ 475, Madras (HC).

manifest themselves. Other examples include an accidental medical injury that is a consequence of the progression of the disease that is being treated; an error in treatment. The authorities, which may be local authorities, the government, or any other corporation, i.e. who runs a hospital, are required by law to exercise reasonable care and skill in order ro care for a patient of his ailment, and they are obligated to act through the staff or the employ of the hospital. This obligation applies whether the hospital is public or private. They are equally responsible for the accident as anyone else who hires someone else to carry out their responsibilities on their behalf. This is also a case due to the fact that even if they are not servants, they are to be treated as agents.

NEGLIGENCE AND MALICE

Negligence does not imply malice. Malice exists for a reason that negligence does not. Malice is the result of bad motives or intentions. Negligence results from a lack of purpose, whereas malice results from a deficiency of the art and negligence from a defect of the intellect. Negligence is simply the failure to exhibit some level of care towards someone. It is not considered malfeasance. Medical negligence is merely a failure to provide some level of care that a doctor (defendant) ,is obligated to provide to his patient. Medical negligence is a subject of negligence, sometimes known as professional negligence. Specific competence is required by the wrongdoer in this sort of neglect, i.e. the professional is one who claims to have some special skill. In law, medical carelessness is no different from any other sort of negligence.
In general Medical Negligence has three meanings to its definition :
i) a state of mind that is contrary to intention
ii) careless action
iii) a breach of the duty to take care imposed by common or statute law.

NEGLIGENCE AS A STATE OF MIND

Negligence and wrongful intent may be considered explicitly as two forms of mens rea. One of these two alternative forms is fundamentally required by law as a necessary prerequisite for

establishing wrongdoer culpability. A purposeful or intentional offender is someone who wishes to cause harm. The negligent wrongdoer is one who lacks the desire to avoid doing wrong. [6]

According to Melville M Bigelow, " It should be made clear at the outset that negligence is a state of mind; a fact obscured by the circumstance that stated external standards are applied to the proof of it".[7] But on the contrary, according to Henry T Terry, "Negligence is conduct, not a state of mind."[8]

Therefore, being negligent as a mental state does not require intentionally doing something to bring about the consequences. On the other hand, it implies a lack of interest or concern over the monitoring of whether or not the act will take place.

NEGLIGENCE AS CARELESS BEHAVIOUR

Negligence and carelessness are the antithesis of diligence. A careless man is the one who does not care or is insufficiently concerned that his actions will bring harm to others. It does not entail a violation of duty of care, but rather carelessness on the part of the perpetrator.

It is claimed that in **Asit Baran Mondal v. Rita Sinha**[9] that the treating physician should have been well advised to request a LFT as that was absolutely necessary but the same was not done, which amounted to gross negligence, the petitioner argued that neither Union of India nor the Medical Council of India nor the State Governments are prescribing any guidelines for treatment of patients in Indian hospitals.

The bench of Honourable Justices Dipak Misra and U.U. Lalit issued notice to the Union of India, the Medical Council of India, and to all of the State Governments represented by the Health Secretaries and asked them to submit their response within six weeks of the date of this order. This was done in consideration of the Contention that was mentioned earlier, as well as the fact that the number of cases involving medical negligence is growing, particularly in private hospitals.

[6] Salmond John, Charlesworth on negligence, 21 (6th Edn.).
[7] Bigelow, Torts, 8 ed., 19.
[8] Henry T. Terry,"Negligence," 29.Harv L. Rev. 40
[9] Asit Baran Mondal v. Rita Sinha, (2016), 2 1524.

NEGLIGENCE AS THE BREACH OF DUTY TO TAKE CARE

Negligence as a violation of obligation to take care is simply a failure to exert some care that we are required by law to do toward someone. Professionals with unique skills, such as lawyers, doctors, architects, and others, are protected by negligence law. Any work that these specialists must complete requires a special talent. The blame for a medical accident or failure may or may not lay with the medical practitioner. Because there is so much neglect, it is unavoidable that it is treated differently.

Medical negligence is generally defined as failing to behave in accordance with the norms of a reasonably qualified medical personnel at the time. It is a breach of a doctor's obligation to his patient to use reasonable care and skill, which leads to physical, mental, or financial handicap.[10]

Negligence is defined as a lack of reasonable care and skill or purposeful negligence by doctors in regard to patient acceptance, history taking, examination, diagnosis and treatment (medical or surgical) that causes any injury or damage to the patient. Physical, mental or functional harm to the patient is referred to as damage.[11]

Any physician who has formed a professional relationship of attendance with a patient and who has promised to provide a fair degree of care to the patient's course of treatment is qualified to be called a professional attending physician. If he does not exercise the required level of care and expertise, then it is possible that he has demonstrated medical negligence.

The professional is the individual who claims to possess a particular competence. A professional implicitly promises the person with whom he deals:

a) That he possesses the professed skill; and

b) That skill will be utilised with reasonable care and caution.

These two criteria are used to evaluate the professional. Therefore, a professional can be held accountable for negligence if he lacked the skill he professed to possess and did not exercise it with reasonable care and caution.

When a Doctor holds himself up as ready to give medical advice or treatment, he owes the patient various duties, including:

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[10] H.M.V. Cox, Medical Jurisprudence and Toxicology, (1990) 77.

[11] Palo S.K, "Consumer Rights relating to Medical Negligence", Page 13, 2006, JMC.

i. a duty of care in deciding whether to take the case,
ii. a duty of care in deciding what treatment is to be given, and
iii. a duty of care in administering that treatment.

A breach of any of these duties will support the patient's claim for medical malpractice. Medical negligence is a disagreement between a doctor and a patient about the quality of medical care. A mistake made by a medical practitioner that no reasonably competent and careful practitioner would have made is considered negligent.[12]

In the case of **Indu Sharma v. Indraprasta Apollo Hospital and Others**,[13] the national consumer forum held that, given the peculiarities of the case, One mother lost her precious child, whereas the child had lost its entire existence since birth; therefore, taking into account the entirety of our discussion, the court partially allowed the complaint. In this case, the opposing parties were held liable for medical malpractice. Both parties were obligated to pay Rs. one crore in compensation.

NEGLIGENCE IN THE EYES OF THE LAW

Negligence is a mental state. It is the failure to do something that a prudent person would do or the act of doing something that a prudent person would not do. It includes both commission and omission sins. It rules out intent. In fact, lack of intent is the defining characteristic of negligence. Negligence has no element of intent. Both conditions are mutually exclusive. Negligence is distinguished from other torts by the lack of intent. The presence of intent transforms an action into one of violence, aggression, deception, or design. Good intentions provide justification for negligence. The accidental nature of an action or omission does not negate its negligent nature.

Negligence has no place before consultation. On the other hand, intention denotes a state of affair in which the doctor decides to cause a consequence through his or her own act of breach. One cannot be said to have aimed for a result that is completely beyond his control. Negligence and incompetence are not synonymous. Competent individuals can still be negligent. Incompetence constitutes negligence in and of itself. Incompetence is the lack of ability and skill appropriate to

[12] A.S. Mittal v. State of U.P., AIR 1989 SC 1570.
[13] Indu Sharma v. Indraprasta Apollo Hospital and Others, (2015) 2 CLT 454 (NC).

the task, whether based on natural qualities or experience; the lack of disposition to use one's ability and experience effectively; and the opposite of dependability. It encompasses more than physical and mental characteristics and a general lack of qualifications, such as habitual carelessness, disposition, and temperament. a) Existence of Negligence b) Breach of Legal carelessness, disposition, and temperament. a) Existence of Negligence b) Breach of Legal Obligation c) Damage Inflicted "Negligence is the failure to do something that a reasonable person guided by the considerations that ordinarily govern human affairs would do, or the doing of something that a sagacious person would not do".

DEFINITIONS

1. Consumer under Consumer Protection Act 2019, means any person who -

   (i) buys 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 promised 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 for any commercial purpose; or

   (ii) hires or avails any service for a consideration which has been paid or promised or partly paid and partly promised, under any system of deferred payment and includes any beneficiary of such service 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 service for any commercial purpose.

2. 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.

Negligence is inherent to the nature of humanity, and doctors are no exception. Doctors were, are and will continue to be held liable for professional misconduct and Medical Negligence. Parliament enacted the Consumer Protection Act, 1986, in response to the guidelines contained

in the Consumer Protection resolution passed by the United Nations General Assembly on 9 April 1985, in order to better protect the interests of consumers. This Act was enacted to better protect the consumer's interests and to provide swift relief in the event of conflict between the consumer and the merchant.

Consumers should receive goods of quality standard from sellers, quality service from agencies, and should not be subjected to harassment by employees of corporations, businesses, and the government. It is a quick, but effective, remedy provided to the people to protect them from unskilled, incompetent, and negligent service providers.[14]

In the early stages, medical practices were not included in the scope of this act; however, as a result of a landmark decision made by the Supreme Court in the case of **Indian Medical Association v. V.P. Shantha and others**[15] Medical practices, with a few minor exceptions, are now included in the scope of the Consumer Protection Act. People who are common and poor can easily approach the Consumer Dispute Redressal Forum and get justice for a very nominal cost and in a short amount of time. In this forum, the doctors may be required to pay a large amount as compensation depending on the degree of loss and the nature of negligence. The legal procedure that is followed by the law courts is complicated, lengthy, and expensive, which is beyond the reach of common and poor people.

REASON FOR RESEARCH

A rational degree of expertise and ability is anticipated from medical professionals, as well as a reasonable degree of caution when treating patients. Consumer Protection Act of 2019 holds doctors who provide services for money, including doctors, accountable when their services are found to be negligent. Medical professionals must adhere to a reasonable standard of care. As the field of medicine, like all other fields in the modern world, is expanding rapidly, it is critical for the general public to be aware of the services provided by hospitals, which are growing exponentially. The legal system on medical negligence is a powerful tool in the hands of a patient who has suffered the consequences of Medical Practitioners' negligent treatment. Medical professionals begin their careers in nice neighbourhoods and loving homes, well educated and

[14] Consumer Protection Act, 1986, published by R.P. Katarina.
[15] Indian Medical Association v. V. P. Shantha, 1996 AIR 550, 1995 SCC (6) 651.

with some ideology, and find themselves in unusual business situations where malfeasance is notably a regular way of life and social disorganisation in the society. However, I have chosen this topic to raise awareness of the concept of Medical Negligence among readers, legislators, judicial officials, doctors, and others as well as to understand what constitutes medical negligence. This study will mainly explore the provisions under Consumer Protection Act, 2019 with regard to the remedies available to consumers who suffered from medical negligence.

OBJECTIVE OF STUDY

The primary goal of this investigation is to look into the safety of medical service users. Specific research objectives include the following :

- ➔ To identify and evaluate the emerging trends in medical negligence law in India, as well as their impact.
- ➔ To focus on ensuring the prompt resolution of Medical Negligence cases heard in Indian courts.
- ➔ There will be an examination of cases and legal avenues in order to examine the legal framework over time.
- ➔ Further, efforts will be made to raise awareness of available remedies and potential ways to make the system more robust.
- ➔ To examine the Medical Negligence provisions of the Consumer Protection Act, 2019.

RESEARCH QUESTIONS

- What is the Doctor’s liability in the Context of Medical Negligence?
- Are the existing laws on these sectors sufficient to safeguard and respect the interests of all stakeholders?
- How well-defined are judicial viewpoints on medical negligence?

HYPOTHESIS

In India, there is a pressing need to codify the several laws on Medical Negligence and those who are guilty of medical negligence must be held liable.

RESEARCH METHODOLOGY

Research Methodology is the systematic study of a subject that yields new information. A doctrinal or non-empirical research is one that has been conducted on a legal notion or proposition by studying existing statutory provisions and instances through the use of reasoning power. The current study is conducted using the Doctrinal, traditional, or non-empirical legal research technique.

- The doctrinal legal research attempts to validate the hypothesis through a study of authoritative sources such as law libraries, judgments of various courts, law journals, and medical reporters, with the majority of the methodology concerned with the identification of authoritative sources and the techniques to find out. The issue is caused by the disparity between the policy goal and the current level of achievement.
- In terms of Medical Negligence Laws, doctrinal legal research technique is most suited. As mentioned above my research methodology is entirely doctrinal and does not include an empirical approach. My research is based on authoritative texts such as the Indian Penal Code of 1860, the Consumer Protection Act of 2019, the Dentists Act of 1948 (with amendments passed in 1984 and 1993), the Pharmacy Act of 1948, the MTP Act of 1971, the Indian Evidence Act of 1872, National Policies and Schemes, case Laws, newspaper articles, periodicals, and internet sites.
- Secondary materials, such as legal textbooks and commentary, lack the authority that original sources do. As a result, the quality of doctrinal research for the current study is dependent on the sources of material available from numerous texts, books, journals, court decisions, and internet sources on medical negligence.

REVIEW OF LITERATURE

The judgement varies from case to case, as stated by Grish Tyagi, the Registrar of the Delhi Medical Council. The length of time that a medical licence is suspended for could be anywhere from one week to one month. In exceptional circumstances, the wait may even be as long as three months. Does anyone know of a doctor who has ever had his/her licence to practise medicine revoked for good?.[16]

According to P. Rupup Singhe, insufficient skill, care, velocity, or focus can result in negligence. Professionals providing psychological care to people have the same obligation to provide adequate care. In the event of negligence, they may be imposed with medical negligence. Patients are permitted to receive high-quality medical facilities during their treatment. Consequently, negligence in this regard may also be charged.[17] Before being tried in court, medical professionals charged with medical negligence are frequently compared to those other medical practitioners of their team in terms of professional standards and expertise.

As per K.K.S.R. Murthy, Negligence is the breach of a legal duty of care. A breach of this duty gives the patient the right to sue for negligence.[18]

According to Sweta S. Agarwal and Swapnil S. Agarwal, all medical professionals, including doctors, nurses, and other health care providers, are accountable for the health & welfare of their patients and are presumed to provide care of the highest standard. Unfortunately, medical practitioners and healthcare workers can fail in their duty to their patients by failing to provide them with adequate care and attention, by acting dishonestly, or by providing low quality care, resulting in severe complications such as individual injuries and even death.[19]

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[16] Vidya Krishnan, A cure of Medical Malpractice, 26 May 2018, www.thehindu.com

[17] P Rupasinghe, Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka, Proceedings of 8th International Research Conference, KDU, Published November 2015.

[18] K.K.S.R. Murthy, Medical Negligence and the law, Indian Journal of medical ethics, Vol - 3, No-4 (2007) 116.

[19] Sweta S. Agarwal & Swapnil S. Agarwal, Medical negligence – Hospital's responsibility, Journal of Indian Academy of Forensic Medicine, Vol-31,No-2, April 2009, p-164.

CHAPTERISATION

This research is organised into the following chapters:

CHAPTER - 1 INTRODUCTION

This chapter deals with Introduction, Concept of medical negligence, Negligence and malice, Negligence as a state of mind, Negligence as a careless behaviour, Negligence as the breach of duty to take care, Negligence in the eye of law, Definition of consumer and deficiency, Reason for research, Objective of study, Research questions, Hypothesis, Research methodology adopted, Review of literature and ends with Chapterisation.

CHAPTER - 2 HISTORICAL EVOLUTION OF MEDICAL NEGLIGENCE

This chapter includes a historical overview of Medical Negligence and Consumer Protection statutes as well as the current position of the Medical Negligence and Consumer Protection Act of 2019. The chapter also deals with the origin of consumer protection laws in India where it looks upon the formation of Consumer Protection Act, 1986.

CHAPTER - 3 NEGLIGENCE IN ITS VARIOUS FORMS AND MANIFESTATIONS

This chapter covers Components and Forms of Negligence, including Professional Negligence, Essentials of Negligence, Kinds of Negligence, Vicarious liability, Common categories of Medical Negligence, Regulatory principles governing Medical Negligence, The Doctrine of Res-Ipsa- Loquitur, Damages and defences against Negligence.

CHAPTER - 4 LIABILITIES OF DOCTOR FOR MEDICAL NEGLIGENCE AND MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION LAW

This chapter covers Medical negligence under The Consumer Protection Act of 1986, and the 2019 Consumer Protection Act, including the Scope of Medical Negligence and the Applicability of the Consumer Protection Act to the Medical Profession. Who are the Consumers? Rights of consumer, who is not a consumer, System with three levels, Jurisdiction, Consumer Protection Act 2019- major objectives and changes incorporated, liabilities of doctor, Patient’s rights,

Duties of doctor, Informed consent, Responsibilities of expert witness and Punishments and disciplinary action under Indian Medical Council Regulations.

CHAPTER 6 - CONCLUSION AND SUGGESTIONS

This chapter attempts to draw conclusions from the present study and also provides the tests of the hypothesis, summarises the findings (research), restates the goals of the research, relevance of the findings (research contributions), pointers and recommendations for the future study.

CHAPTER - 2

HISTORICAL EVOLUTION OF MEDICAL NEGLIGENCE

INTRODUCTION

MEDICAL PRACTICE has been around since the beginning of time. Ayurveda is the name given to a centuries-old Indian medical system. Pre-vedic times in India are credited with the invention of this system. On health and disease, the Rigveda and the Atharva-veda are referenced. In the world of traditional medicine, the Unani or Yunani system is a subdivision. Greece was the birthplace of the Unani system of traditional medicine. The Unani medical system was brought to India by Arabs. The Siddha School is a smaller group of Indian traditional practitioners. Southern Indian Tamil culture is where it originated. The Agasthyar system is another name for this type of medicine. The first medical officer to arrive in India with the British East India Company's first fleet as ship's surgeon arrived in 1600. In Bengal, a medical department was established in 1764 to provide medical care to the company's soldiers and servants. In India, the modern system of medicine was born out of this system.[20] In **R. Gopinathan v. Eskeycee Medical Foundation Private Ltd.**[21], it was decided that the hospital was responsible for the patient's injuries as a result of the doctors', surgeons', nurses', anaesthetists', and other hospital staff members' carelessness in performing their duties.

Before very recently, patients did not have access to any kind of effective adjudicative body that could hear and rule on their complaints. Section 20A of the Indian Medical Council Act of 1956, as modified in 1964, stipulates that regulations adopted by the Council may define which violations shall be considered to constitute misconduct. This provision was added in 1964. If a doctor is found to have engaged in such egregious professional misconduct, the disciplinary action that can be taken against them includes suspension or even expulsion from the rolls of the medical community. Because Council members have a tendency to be accommodating with their conferees, this arrangement does not have the effect on behaviour that was intended to serve as a

[20] Thakur Shweta and Jaswal Vikram Singh, Medical Negligence in India, (2013) 7.
[21] R. Gopinathan v. Eskeycee Medical Foundation Private Ltd., 1993 (1) CPR 456 (Maharashtra).

deterrent. Second, the Council was only available at the State Headquarters, making it extremely difficult for the vast majority of patients to visit them there. In any case, the Council does not have the authority to provide financial compensation to patients for the harm they have endured.

There are, of course, provisions in both civil law and criminal law that allow patients for redressal who have been wronged. However, the application of criminal law was limited to situations involving deaths, and even in those circumstances, the prosecution was not always vigilant. Because any lower court might be petitioned in order ro get damages, the civil law remedy was, in theory, one of the options available. However, the patients are responsible for paying the court fees. Also the trials were lengthy due to the detailed rules of procedure and exacting norms of proof that were applied before those courts. This resulted in delays and significant costs, both of which discouraged the already stressed-out patients. The end result was that the doctors were in a position where they were effectively guaranteed immunity in the event of wrongdoing. On the other hand, it must be acknowledged that, as a whole, their society exhibited significantly better behaviour than that of other crops.[22]

The patient, Gold, sued the Haringey Health Authority for negligence after she gave birth to her fourth child following an unsuccessful attempt at sterilisation. In the case of **Gold v. Haringey Health Authority**[23]The court established a thesis that runs counter to the general consensus. In this particular case, the plaintiff was expecting her third child at the time. Following the delivery of her baby, she went through the process of being sterilised. The procedure was unsuccessful. A baby boy was born to the couple for the fourth time. She was not told the failure rate for the procedure, which was approximately six out of every thousand times if it was performed promptly after delivery. She claimed that she had not been informed of the risk of a sterilisation operation failing, in addition, she claimed that she had not been informed of the possibility that a vasectomy could be performed on her husband. Therefore, She filed a lawsuit for failure to disclose the risk. It was decided that the traditional contradiction between counsel given in a therapeutic context and advice given in a non-therapeutic context could not be upheld, and the

[22] David Annoussamy, Medical Profession and The Consumer Protection Act, Journal of the Indian Law Institute, Vol. 41 No. 3/4 (July-December 1999) 460. Visit at http:// www.jastor.org/stable.
[23] Gold v. Haringey Health Authority, 14 April 1987., United Kingdom. Court of Appeal. Annu Rev Popul Law. 1987;14:30. PMID: 12346677.

Bolam test was applied without making any distinctions. The Bolam test creates an objective standard of carelessness that is not dependent on the surrounding circumstances but rather on a person's level of skill or competency. In contrast to the lower court, which differentiated between advice given in a therapeutic context and that given in a nontherapeutic one, the Court of Appeal, Civil Division, found that the doctor's duty of care in diagnostic test, treatment, and advice is not to be dissected into component parts using the Bolam test. This was the conclusion reached by the court. The appeal that was filed by the defendant health authority was upheld by the court on the grounds that a significant number of medical professionals would not have recommended a different course of action to the patient. Because there was at the time a body of responsible medical opinion that considered the practice of non-disclosure of risk related female sterilisation as appropriate, the defendant was not held guilty for the practice of not disclosing the danger associated with female sterilisation. It is argued that the court has neglected the fundamental characteristics of treatment that is voluntary. It is essential to differentiate between treatment that is elective and treatment that is not elective. In the context of the disclosure, the Bolam test is not a suitable standard to apply, regardless of whether the therapy in question is elective or non-elective.

A physician commits medical malpractice, which is also known as medical negligence, when they provide poor treatment to a medical issue, which in turn results in the development of a new health condition or a worsening of the existing health condition. Although the primary health condition of the patient which he disclosed for consultation is not the commitment of the medical practitioner, subsequent problems resulting from improper approach in curing the medical issue are the sole responsibility of the medical practitioner.

It is important to have a general understanding of the notion of carelessness before moving on to talk about negligent medical care. A simple definition of negligence is the breach of the legal duty to exercise reasonable care. It is carelessness in a matter in which careful consideration is required by the law; therefore, it is carelessness. A more succinct definition of negligence as a law of torts would be the breach of a legal duty to exercise reasonable care that leads to damage that the defendant did not intend to cause to the plaintiff.

The failure or delay in diagnosing the illness, an accident that occurred while the patient was under anaesthesia or undergoing surgery, or if the practitioner fails to get the patient's agreement by providing insufficient information about when a surgery or operation is to be performed are all examples of situations that could lead to medical malpractice. Even when the disease was correctly diagnosed, medical negligence can still occur if the patient is not properly treated for the ailment after it has been discovered. Inappropriate use of medical procedures, equipment, or medication prescribed by a doctor is also considered medical malpractice.

The statute of limitations applies to cases involving malpractice in the medical field. Even if the patient has a legitimate claim, it will be invalidated if they wait for a longer amount of time than required. Within the first two years after the malpractices have occurred, a claim needs to be submitted. Due to the fact that medical malpractices include complex exclusions and procedures, it is conceivable to still launch a lawsuit even after two years have passed since the incident in question. It is not the patient's responsibility to examine the claim on his own or to negotiate a settlement with the attending physician or the medical facility (hospital or clinic). In matters pertaining to medical malpractice, a determination is made by the insurance company that was responsible for the medical practitioner's insurance, and this organisation has the ultimate and decisive voice in the matter.

In the case of **Roe v. Ministry of Health**[24]**,** which occurred in England, two of the claimants had undergone procedures that did not require general anaesthesia. It appeared that the anaesthetic had been tainted with the disinfecting solution, i.e. allowed the phenol in which they had been stored to seep through. As a direct result of receiving injections of the substance, both of the claimants ended up getting spastic paraplegia. During the course of storage, the anaesthetic had acquired contamination. Ampoules made of glass were used to contain the anaesthetic, and these ampoules were submerged in the sterile fluid. It was discovered that the ampoules included very small cracks that were undetectable by the naked human eye. It was not known at the time that the anaesthetic could become contaminated in this way, and the hospital followed a typical protocol in storing them in this manner because it was considered to be acceptable practice. The court reached the conclusion that, taking into account the level of medical knowledge that

[24] Roe v. Ministry of Health, (1954) 2 QB 66: (1954) 2 All ER 131: (1954) 2 WLR 915.

existed at the time in question, the anaesthetist had not acted negligently by failing to take any safeguards to protect against the possibility of such a risk.

In the same vein, the case of **Whiteford v. Hunter**[25]**,** which is another case from the jurisdiction of England and Wales, a surgeon was found not to be accountable for an incorrect diagnosis that he had given because he had failed to use an instrument that was extremely uncommon in England at the time the incident occurred. It has been made very apparent by the court that there is an element of risk involved in medical practice, and this is something that needs to be taken into account when determining whether or not medical negligence has occurred. The attorney in question has the responsibility of determining as promptly and effectively as possible whether or not there is a case that can be pursued legally. Cases involving medical malpractice are notoriously difficult to win, not only because they are convoluted and fraught with potential for financial loss, but also because they typically involve the emotional investment of the client. Prior to the filing of a medical malpractices lawsuit, the attorney should acquire a comprehensive medical history including the hospitals and physicians who provided the treatment. This information should include any relevant dates. It is necessary to have a written summary that details the symptoms, talks with medical professionals, and the type of treatment that was provided. This review should highlight all of the medical treatment that was received. As evidence of medical negligence, the attorney will begin the process of obtaining all of the pertinent data from the hospitals or the doctors. These records can be obtained through several means.

In most cases, the attorney will select a qualified medical professional to serve as an expert witness in order to determine the scope of the medical negligence. Since the expert is required to testify as a witness and answer questions as well as provide an expert opinion, the relevant medical board ought to have granted him certification in the pertinent medical field. After conducting a complete investigation of the procedures, the qualified medical professional should reach the conclusion with a level of certainty that is consistent with reasonable expectations that the cause of the damage that was caused to the patient was due to the action or inaction of the physician.

[25] Whiteford v. Hunter, [1950] W.N. 553 (H.L.).

MEDICAL NEGLIGENCE IN ANCIENT INDIA'S MEDICAL SYSTEMS

Since the beginning of human history, the activities of individuals have always been susceptible to error, carelessness, or negligence in virtually every sphere of human endeavour. Ancient literature like Vyavaharakalpataru, Vivada Ratnkar touches on law connected to negligence. Several older written sources contain laws or regulations that are relevant to the practice of medical negligence.

MANU SMRITI (800 BC - 600 BC)

It includes passages that speak directly to the issue of medical neglect. Every doctor who provides substandard care to a patient should expect to be held financially responsible for their actions. The maximum fine that can be imposed for mistreating a human being is three times the amount of the maximum fine that can be imposed for mistreating an animal.

KAUTILYA ARTHASASTRA (400 BC - 300 BC)

In this book, the regulations that regulate the practice of Ayurvedic medicine and the application of medical knowledge to legal concerns are discussed. The book also provides a clear definition of penal laws. According to kautilya, in order to practice medicine, doctors needed permission from the monarch (something comparable to today's requirement to register), and they ran the risk of facing legal repercussions if they were negligent in the care that they provided to their patients.[26] It was a violation of the law for any doctor to treat a patient without first telling the administrative authority, which was known as gopa or sthanika. As a result, it was the responsibility of the physician to provide the administrative officer with information regarding the treatment of an accident, an injury, or an emergency case. The fine for a physician who undertakes treatment involving a danger to life without informing (the authorities) is the highest possible fine in the event that the patient dies as a result of a mistake in treatment, but it is the lowest possible fine in the event that the patient dies as a result of violence. In the event that a vital organ is damaged or a deformity is produced as a result of the harm, the magistrate is required to investigate the incident as a case of bodily injury.

[26] Dikshi P.C., HMV Cox’s, Medical Jurisprudence and Toxicology, (2002) 11.

YAJNAVALIKA SMRITI (300 AD-100 AD)

This text governs the many types of medical misconduct. A number of passages from the Yanjnavalika smiti have direct relevance to the legislation of medical negligence, including the following:

When treating lower animals, a person who falsely acts as a physician will be fined the first amercement; when treating men, they will be fined the middle amercement; and when treating royal personages, they will be penalised the highest amercement. Whoever adulterates medicine, oil, salt, perfumes, grain, sugar, and the like and keeps them for sale must be punished 16 panas. This includes anyone who does this while keeping the items for sale.

NARDA SMRITI (100 AD-200 AD)

In the narda smriti it is stated that, breach of stipulated obedience is the term used to describe the situation in which a man makes a promise to do some kind of service but then fails to carry out that performance. This might lead to a dispute.

BRIHASPATI SMRITI (200 AD-200 AD)

In the Brihaspati smriti, a comprehensive analysis of both civil and criminal law is provided. It makes very clear notice of the offences, and it also makes reference to the punishments. The following is how the law on medical negligence is stated in Brihaspati smriti:A physician who collects money from patients (for treatment) despite being unfamiliar with drugs and their effects or with the nature of diseases will be penalised in the same manner as a thief. This is because both of these areas are considered to be domains dealt with punishment.

Numerous passages in the Sushruta Samhita and the Charaka Samhita provide evidence that, in ancient Indian society, there existed certain legal principles that were responsible for the regulation of the medical profession. These legal principles regulated the medical profession by limiting the freedom of practice and imposing certain restrictions.

A physician needs to have a command of the scriptures, experience, moral rectitude, and intelligence. A scholar may become a physician after completing a certain amount of training over a predetermined amount of time and studying the science of medicine as well as its practical application; however, before beginning his practice, he was obliged to obtain permission from the emperor.

Before beginning the practice, it is recommended that the physician receive authorization from the king, as it is written in both the Sushruta Samhita and the Charaka Samhita. A practitioner who lacked sufficient hands-on experience could not be considered qualified. The scholar was not allowed to perform experiments on living people, thus the practical training was to be carried out on a variety of different things for the purpose of learning.

In addition to the requirements for becoming a physician, ancient literature discusses the responsibilities of doctors and the legal consequences they face if their patients are harmed. Because the physician could not begin the therapy with his skills and common sense until the disease had been correctly identified, the accurate diagnosis of the patient's condition was the most important responsibility that he or she was tasked with. There were restrictions on the patients that physicians (Vaidyas) may treat. They were constrained in how they may interact with those who were considered sinners, outcasts, hunters, or fowlers. When discussing the responsibilities of a physician, the Sustruta Samhita states that the doctor should take a seat and conduct a thorough examination of the patient by sight, touch, and question. If he was capable of curing the illness, he needed to make an accurate diagnosis and start the treatment right away.

In the ancient literature, the word mithya, which means incorrectly, mistakenly, and inappropriately in relation with treatment, has been used extremely frequently. Mithya means "erroneously, inaccurately, and improperly." This was the interpretation that Charaka Samitha gave to the word. In the context of Sushruta Samitha, the word mithyopachara refers to behaviour that is not appropriate. It is mentioned that physicians who behave in an inappropriate manner are subject to disciplinary action. The severity of the punishment varied according to the status of the victim.

Therefore, the duty of care that a physician had changed depending on the state of the victim. Therefore, a physician's responsibility to care changed depending on the social standing of the patient, but the severity of the punishment did not correspond to the level of wrongdoing committed by the physician. The regulations that concern the legal liability of medical professionals in the event that they provide substandard medical care to a patient were not merely enacted for the sake of the patient's protection; rather, they were enacted in order to

improve the efficiency of the administration of the state. The Dharamshastra and the Arthashstras do not make any direct reference to the patient's claim to indemnification anywhere in their texts. The state was responsible for imposing the penalty, and it was paid to the state (king).

Therefore, the legislation that was in effect in ancient India attempted to impose fines, which were then paid into the state's treasury; nevertheless, there was to be no recompense offered to the individual who had been wronged (the victim).

MEDIAEVAL PERIOD

The Unani medical practice was initially developed by Arabs. This was the golden age of unani medicine, and the Delhi Sultans, the Khilijis, the Tuglaqs, and the Mughal Emperors all extended governmental patronage to scholars during this time. There was a well-established system of examinations and registration of medical professionals in place during the Arabic period. It was necessary to obtain permission before practising medicine. There was an inspectorate that checked for drug adulteration and maintained control over the selling of fake drugs. During the reign of Abbasi, the most famous Army General Afsheen instituted a ban on the sale of certain medications, and an independent officer by the name of Ehtisaab was chosen to be in charge of monitoring public health and ensuring that the standard of tibbi (medicine) was kept up. In his work Kita-Al-Ahkamus Sultania, Ammavardi (1058 CE) devoted an entire chapter to Ehtisaab. He writes that the aforementioned officer Ehtisaab or auditor maintains vigilance over paper prescriptions written by physicians and their use. He used to check for errors in disease diagnosis and medication prescribing. His responsibility was to ensure that no one received substandard treatment owing to carelessness. When the Abbasi Caliph Mukhtadir Billah (10th century) learned that a patient had died owing to the neglect of a Hakim, he ordered all Hakims to pass examinations and only those who passed were allowed to practise. The same statute governing the medical profession and the position of Ehtisaab persisted even throughout the reign of the Mughals. There is a Hadith which states that anyone who cures a patient without understanding the knowledge of medicine is also obligated to pay compensation.

MODERN PERIOD

PRE-INDEPENDENCE

At the beginning of the British colonial period, there were very few practitioners of western medicine, and they served a very limited number of Indian patients. But over the course of time, and particularly after the construction of hospitals, they were able to acquire a position of dominance over practitioners of indigenous systems. Legislation against anyone who falsely claims to be able to practice western medicine despite lacking the required training and skills has become important in light of recent events.[27] The (British) Medical Act of 1858 permitted admission to the British medical register of individuals holding diplomas granted in any part of the empire, if they were permitted to practice by local law and if the British generating medical council recognized their diplomas as sufficient evidence of their competence. With the passage of the Bombay Medical Act, 1912, registration of qualified Western medical practitioners began in Bombay. After an investigation, the Bombay Council may remove a practitioner's name from the register if he or she is convicted of a crime involving sinful misconduct or infamous professional misconduct. Then, in 1933, the Indian Medical Councils Act was passed, establishing a Central Medical Council for India. The Medical Degree Act of 1916 restricted the power to issue Western medical degrees and certificates. Any institution or individual that falsely claims to be authorised to practice western medicine is subject to a fine or imprisonment. The Bengal Dentists Act of 1939, which has since been abolished, was the first of its kind and was modelled after medical Acts. Elsewhere, there were no requirements for dentist training and no restrictions on the practice of untrained dentists.

In 1912, the Central Government enabled provincial governments to appoint their own sanitary Commissioners and sanctioned eight Deputy Commissioner and Health officer positions for provinces, based on qualifications. 34 The province government was responsible for medical and public health under the Government of India Act of 1914. Under the Government of India Act of 1935, ministers were given legislative responsibility for medical aid and sanitation. Tort law

[27] Dikshi P.C., HMV Cox’s, Medical Jurisprudence and Toxicology, 11,(2002) .

encompassed the liability for professional misconduct or carelessness. The notion of carelessness derives from English law.

With the onset of the Second World War in 1939, Congress ministers resigned, resulting in a severe reduction of medical and health services. In **Morris v. Winsbury-White**[28] The defendant surgeon agreed to perform surgery on the plaintiff and provide subsequent care support. It was determined that a surgeon's promise to do anything does not alter the nature of his commitment. Even if not, the surgeon must conduct the operation and provide the necessary monitoring until the patient is discharged.

Negligence is the failure to do something that a reasonable person, influenced by those considerations that typically govern the conduct of human affairs, would do, or the commission of an act that a wise and reasonable person would not do.[29]

INDIA AFTER INDEPENDENCE

The departure of the British in 1947 marks the start of good medical aid operations in India. The interim government convened a meeting of the Central and State Health Ministers soon after taking office. The discussion provided the government with a picture of the country's health requirements as well as the type of organisation needed to satisfy them. The Second Health Conference was convened in 1948, and it proposed steps for training medical and ancillary professionals, as well as the upkeep of the All India Medical Register. By Presidential order in 1952, a central Council of Health was established, with the Central Health Minister as Chairman and the State Health Ministers as members. The Indian Medical Councils Act of 1933 was abolished by the Act of 1956, which established the Central Council of Health and specified a doctor's duty *not to neglect the patient*.[30] The Medical Council of Great Britain is the organisation that the Medical Council of India is a direct descendant of. The Bombay Homoeopathic and Biochemical Practitioners Act, which was passed in 1959, had provisions for a board that might exert disciplinary powers over practitioners of these systems. This board made

[28] Morris v. Winsbury-White (1937) (4) ALL ER 494.
[29] Supra Note. 1
[30] Code of Medical Ethics, Para 13.

provisions for examiners to be able to prescribe textbooks and courses of study, administer exams, and ensure that the application of these systems is carried out in an effective manner. In addition, the Act includes provisions for registration. A number of state jurisdictions have passed laws that require practitioners of other medical systems to be registered and demonstrate that they are competent. The Maharashtra Medical Practitioners Act of 1961 provides for the registration of practitioners of the Ayurvedic and Unani systems, as well as the establishment of a faculty with the authority to regulate courses of study, examinations, and standards. The Consumer Protection Act of 2019 is another major law that safeguards the rights of medical care consumers. In its 1995 judgement[31]The Supreme Court of India ruled that services provided by a doctor for a fee to potential patients fall under the definition of services.

By the 1970s, scrubs had evolved into what they are today: a blouse with short sleeves and green cotton drawstring pants. However, not all medical scrubs are green. Numerous hospitals colour-code their uniforms by department. For instance, the employees in the Emergency Room would wear pink, the staff in Surgery would wear green, and the crew in Labour and Delivery would wear blue. Or, in university hospitals, staff members may wear colours that match the school's colours. In the US, the case of **Johnson & Johnson**[32], in which the corporation agreed to pay $ 2.5 billion (about Rs 15,000 crore) in compensation to approximately 8,000 U.S. residents who sued the business after being placed with its defective hip implants. It was discovered that cobalt and chromium implant metals were leaving debris in the body, leading to fluid accumulation in joints and muscles, which caused pain or discomfort and increased the risk of metal poisoning. However, the US situation contrasts starkly with India. In India, approximately 4,500 patients had got the implant, and only one consumer court complaint has been registered against the corporation. Regarding the dangers the implant brings and the global outcry against it, the patients are unaware and have remained in the dark. Unaware of the implant's effects, a significant percentage of patients continued to experience pain or underwent additional procedures. This is the current situation regarding medical device liability. While a US litigant stands to receive an average of Rs 15.6 crore in compensation in addition to legal fees under the proposal, the compensation question has not even arisen in India. The corporation has

[31] Supra Note. 16.
[32] Editorial, J&J to pay $ 2.5b for faulty implants, Times of India, Dec.4, 2013, https://www.reuters.com/article/us-jj-hips-settlement-idUSBRE9AI1A820131120

only mentioned bearing the costs of testing and treatment for recall-related causes, such as revision surgery.

In **Vinitha Ashok v. Lakshmy Hospital**[33], a patient was pregnant from the cervix. The physician employed the laminaria tent approach for cervical dilatation. There is another technique, namely dilapan. The patient asserted that the doctor's procedure led to the removal of her uterus. The national commission dismissed the argument. The court concluded that the physician was not negligent. The notion of informed consent necessitates that a physician discuss the benefits and hazards of alternative treatment techniques. Neither the patient nor the court considered the requirement of informed consent in the preceding case. If the case had been decided in western nations, the result would have been drastically different. The methodology of the national commission must be justified in the Indian context. The law regarding medical malpractice is in the launch phase. In addition, sufferers are typically incapable of making sensible decisions. These circumstances require that the courts in India adopt a distinct perspective.

CONSUMER PROTECTION

Consumer protection has its origins in the fertile soil of ancient Indian culture, which dates back to 320 BCE. In ancient India, human values and ethical practices were seen as of the utmost significance. In ancient India, all segments of society adhered to dharma sastras derived from the Vedas, India's core legal texts.[34]

Man was close to nature and fully dependent on natural resources and products for his needs during the early stages of human society's growth. The consumption ratio increased dramatically as the population increased and people's aspirations for a better or more comfortable existence increased. There is always a scarcity of products on the market, resulting in massive price increases for critical commodities that are out of reach for the average person. The combination of mass manufacturing and severe rivalry has created a fundamental imbalance in the market, leaving consumers perplexed. Consumers are subject to unfair business practices by suppliers of goods and services. Unaware customers are paying the price for the industry's irresponsible behaviour and the government's short-sighted regulations. These conditions led to the formation

[33] Vinitha Ashok v. Lakshmy Hospital, (1992) 2 CPJ 372 NC.
[34] Dr. Myneni S.R., Consumer Protection Law,1, (2010) .

of voluntary organisations. Consumers were compelled to band together in order to seek redress for their concerns, fight for their rights, and demand a degree of accountability from the government and the business community. The majority of consumer groups, notably in India and overseas, began as a collection of individuals organising to solve regional and local concerns; nevertheless, these groups are now highly forceful and focus on wider issues. In India, consumer protection is not a new issue. Historically speaking, however, the problem of consumer protection is not a new phenomena. This legal mechanism was created to safeguard naïve consumers from unethical merchants.

India's largest concern is continuous shortages of consumer goods and services. High population pressure. A big portion of the population is poor, while the rest is far from wealthy. The consumer is unaware of his legal rights. The consumers have not yet organised into a significant movement. Consequently, market scenarios for sellers of diverse items develop regularly. Consumer organisations have not been appropriately acknowledged. All of these factors have produced a very safe refuge for merchants and a frustrating and uncertain environment for consumers. In **Indian Medical Association v. V.P. Shantha and others**[35] The Supreme Court determined, after a thorough examination of the Consumer Protection Act's provisions, that the lawmaker's language was sufficiently broad to encompass doctors' services. According to Section 1(4) of the Act, all services, with the exception of those specifically excluded by notification from the Central Government, would be subject to the Act. According to Section 3 of the Act, the existence of other remedies is not a bar to filing a claim to the adjudicative agencies available under the Consumer Protection Act. The situations of exclusion are those specified in section 2(1)(o), namely service under a contract of personal service and free service. The Supreme Court determined that the contract between the doctor and the patient was a contract for services rather than a contract for personal service, which would have entailed a master-servant relationship. Consequently, any complaint over a paid-for medical service may be addressed before the agencies authorised by the Act. The Supreme Court ruled, however, that a token payment would not constitute 'consideration,' and that the service should therefore be regarded as gratuitous and outside the jurisdiction of the agencies under the Act. The Supreme Court went a step further by determining that those who were offered free care in a clinic where the majority of patients were

[35] Supra Note. 16.

obliged to pay would also be covered under the Act. This raised many eyebrows because, properly speaking, these groups of individuals do not fall within the definition of "consumer" in the Act as beneficiaries, as they do not use the services supplied to them with the consent of those who have paid for services rendered to them exclusively. A medical clinic's service may have a charity motivation. Nonetheless, there are arguments in favour of the Supreme Court's position. The clinic may also consider those disadvantaged patients in order to boost its clientele, and it may even use them in clinical research. It should be highlighted that if a physician refuses a request for assistance, the matter cannot be brought before the agencies under the Act, as the physician would not have received a fee. In such instances, redress is only available under criminal law or before the Medical Council.

The question arose as to whether an issue involving complex questions of law and facts necessitating in-depth investigations might also be brought before the agencies under the Act. In **R. Gopinathan v. Eskeycee Medical Foundation Private Ltd.**[36]**,** the National Commission affirmed that they must be heard. In the aforementioned decision, the Supreme Court noted that in situations involving complex matters requiring expert testimony, the complainant may be directed to the civil court. It should be noted that the Supreme Court did not rule that in such circumstances consumer agencies lost their authority; rather, it just identified a possibility in the patient's best interest. Once an adjudicative authority has been granted jurisdiction, it must deal with the subject regardless of its complexity. Moreover, because the Consumer Dispute Redressal Agencies are not subject to the intricate norms of process and evidence mandated for civil courts, and because the problems before them are rather straightforward, there cannot be truly complex cases. If advocates' attempts to derail the discussion are resisted, all issues could be resolved successfully in a short period of time. It should also be noted that the agencies established by the Act have been given all of the authority of a civil court in order to investigate the situation. Furthermore, institutions presided over by at least a District Judge would be well-versed in gathering and analysing evidence. Of course, if the patient decides to litigate his case in civil court, that is an entirely different matter, but a patient cannot resort to multiple options for the same cause of action, either concurrently or successively. According to Section 14(1)(c) of the Act, the doctor who fails to defend himself must pay the complainant's costs. However, there is

[36] Supra Note. 21.

no provision directing the complainant to pay the costs if he fails. However, if the consumer makes frivolous or vexatious demands, he may be forced to pay the opposing party costs up to Rs. 10,000/-. This provision was invoked in **K. Jayaraman v. Poona Hospital and Research Centre**[37]**.**

CONSUMER PROTECTION IN MODERN PERIOD

PRE - INDEPENDENCE

In contemporary times, the British system supplanted India's ancient conventional legal system. However, one of the greatest accomplishments of British administration in India was the establishment of a uniform, contemporary, countrywide legal system. During the British government (1765-1947), often known as the colonial period, the Indian legal system was completely overhauled and the English legal system was implemented to administer justice. The Indian Contract Act of 1872, the Sale of Goods Act of 1930, the Indian Penal Code of 1860, the Drugs and Cosmetics Act of 1940, the Usurious loans Act of 1918, and the Agricultural Procedure (Grading and Marketing) Act of 1937 were enacted during the British era. These statutes provided consumers with certain legal protections. **Barnett v. Chelsea and Kensington HMC**[38]**,** is an English tort law based on causation in medical negligence. In this particular case, the court determined that there had been a clear case of negligence because the loss or harm was uncontested. Despite the fact that both negligence and loss are part of a short chain of related events, it was determined that negligence was not the cause of loss. In order for a plaintiff's action to be successful, the court must not only be convinced that the balance of probabilities shows a duty of care, a case of negligence, and a loss or damage, but also that all three may be linked in a direct causal relationship. The Indian criminal justice system also included consumer protection. Several provisions of the Indian Penal Code of 1860 address crimes against customers. It addresses violations associated with the use of false weights and measures, the sale of adulterated food and drink, the sale of noxious food and drink, and the sale of adulterated drugs. The Indian Contract Act, 1872 comprises many sections that, among other things, regulate

[37] K. Jayaraman v. Poona Hospital and Research Centre, 1994 (2) CPR 31 (W.C).

[38] Barnett v. Chelsea and Kensington HMC, (1996) 1 All ER 1068-74.

the rights and obligations of contracting parties and safeguard the interests of consumers. The sale of Goods Act became effective on July 1, 1930. This statute safeguards the rights and interests of consumers.

INDIA AFTER INDEPENDENCE

Independent India adopted a socialist social structure and chose for planned industrialisation and development, particularly through a five-year plan. In the post-independence period, the Indian government played an active part in the country's socioeconomic development. The Preamble of the Constitution emphasises socio economic equality, among other things. Some of the Articles are designed to protect the life and property of consumers. In order to protect the interests of consumers, the Indian government enacted a multitude of laws. Following are the laws that were enacted following independence.

i) Prevention of Food Adulteration Act, 1954.
ii) Essential Commodities Act, 1955.
iii) Drugs and Magic Remedies Act, 1955.
iv) Monopolies of Weights and Measures Act, 1976.
v) Standards of Weights and Measures Act, 1976.
vi) Consumer Protection Act, 2019.

CONSUMER PROTECTION ACT , 1986

The Consumer Protection Act of 1986 was enacted to solve several shortcomings in existing laws and their implementation mechanisms, as well as to comply with United Nations standards and satisfy the need for comprehensive legislation. Since our nation's independence, numerous laws have been enacted to safeguard consumers against such exploitations. These laws strive to regulate the manufacture, supply, distribution, quality, purity, and price of a variety of goods and services. Despite these safeguards, consumer interests were not adequately protected. There were numerous causes for this, but the two most important were as follows: first, consumers did not know to whom to direct their complaints. Second, to obtain remedy, they had to engage in costly and time-consuming legal action, therefore none of them were effective. As a result, it was

deemed necessary to draft a statute that allows rapid and inexpensive remedy to dissatisfied consumers. In order to protect the interests of Indian consumers and expedite the resolution of their disputes, the government in 1986 adopted the Consumer Protection Act, which was a boon for Indian consumers. The significance of the Act resides in its promotion of societal welfare by allowing consumers direct participation in the market economy. The Act applies to all commercial, public, and cooperative goods and services. Thus, a customer can file a claim under the Act for defective goods or inadequate services such as those provided by the railway, medical, telephone, airlines, banks, etc.

BASIC FEATURES OF THE CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act is the Magna Carta of consumer protection. The following are the principal characteristics of the Act:

1) It applies to all goods and services, excluding those that have been notified by the central government.
2) It encompasses the private, public, and cooperative sectors.
3) This Act's provisions are in addition to those of other Acts. This Act does not restrict the applicability of any other laws.
4) This Act addresses consumer complaints in a clear, economical, and dynamic manner within a time restriction.
5) This Act grants the consumer the following rights: (i) the right to safety; (ii) the right to choose; (iii) the right to be informed; (iv) the right to be heard; and (v) the right to seek redressal. (vi) the right to consumer education.
6) The Act also protects consumers from other sorts of exploitation, including adulteration, underweighting, excessive price, faulty goods, inadequate services, and unfair trading practices.
7) The Act authorises the Centre and State Governments to establish a Consumer Protection Council with the aim of promoting the interests of consumers, promoting their rights, and educating and protecting consumers.
8) The Act is founded on the principle of compensation, which provides reasonable compensation to the offended party. There is a mechanism for three-tiered quasi-judicial machinery to address complaints.

On March 31, 1993, the Consumer Protection (Amendment) Bill, 1993 was introduced in the Rajya Sabha. Nonetheless, while the bill was pending, on June 18, 1993, the President of India issued an ordinance to change the Consumer protection Act. The ordinance included all of the revisions made to the Acts by the 1993 Amendment Bill. The Consumer Protection (Amendment) Act of 1993 repealed and replaced with amendments the aforementioned ordinance. The Act's scope has been expanded to permit one or more customers to bring class action lawsuits on behalf of a group of consumers with similar interests. Despite the 1993 changes to the Act, the delay in case resolution by redressal bodies has been a major source of concern. As a result, the Consumer Protection (Amendment) Act, 2002[39], which came into effect on March 15, 2003, was amended once more to include several significant changes. The primary purpose of these revisions is to expedite the resolution of complaints by boosting the capacity of redressal institutions, giving them more authority, streamlining the procedures, and expanding the scope of the Act. The new law included provisions for the construction of National Commission and State Commission benches, as well as the holding of Circuit Commission benches. Another change was specifying the timeframe within which complaints must be accepted, notices must be sent to the opposing party, and complaints must be decided. Likewise, similar measures have been created for appeals.They also have provision for temporary orders to be issued by the Consumer Disputes Redressal Authorities, if deemed necessary by such agencies.

CONSUMER PROTECTION ASSOCIATION, INDIA (CPA India), AGARTALA

The Consumer Protection Association, India (CPA) was founded in 1984 and registered in 1987 to empower Indian and NRI consumers to protect the Rights of Investors and consumers, to work in cooperation with the government and civil society, and to promote consumer education. It is a leading Non-Government, Non-Profit Organisation of consumers in India and NRI Consumers locally and internationally.

[39] Consumer Protection Amendment Act, 2002 (62 of 2002)

CONSUMER PROTECTION ACT, 2019

In 2019, the new Consumer Protection Act was passed by the legislature. It became effective in July 2020, replacing the Consumer Protection Act of 1986. The Digital Age has introduced a new era of commerce, digital branding, and customer expectations. Digitization has facilitated quick access, a vast selection of options, convenient payment methods, enhanced services, and shopping according to convenience. However, there are issues involved with consumer protection. The Indian Parliament enacted the landmark Consumer Protection Bill, 2019, which intends to provide fast and effective administration and resolution of consumer complaints, in order to handle the new set of issues customers face in the digital age. The new legislation has expanded the concept of "Consumer". According to section 42(11) of the 2019 Consumer Protection Act, any instance of medical negligence on the part of the service provider is a failure. The Consumer Protection Act, 2019 was enacted to address e-commerce and online trade difficulties, product liability and safety, and the provision of consumer justice through alternative dispute resolution mechanisms. As evidenced by the explicit verbis exclusion of healthcare from the definition of "service", the amended law had a profound effect on the medical profession and health care system. This rule exempts doctors from accountability for substandard care, and the subject of negligence of duty is irrelevant. But in a recent ruling, the Kerala High Court determined that medical services fall under the Consumer Protection Act of 2019. Justice N. Nagaresh was hearing a petition filed by two doctors who sought a declaration that consumer forums under the Consumer Protection Act, 2019 do not have jurisdiction to take cognizance of complaints regarding medical negligence and deficiency in medical service, as medical profession and practise do not fall under the definition of "service" in Section 2(42) of the Consumer Protection Act, 2019. The Court went on to hold that Section 2(42) of the Consumer Protection Act is very clear, observing -

" A reading of the inclusive part in Section 2(42) would show that the Parliament intended to specifically underline that certain services like Banking, Financing, Insurance, Transport, etc., which are in the nature of public utility services, would come within the purview of 'services'. The definition is inclusive and not exhaustive. Therefore, all services which are made available

to potential users would fall under Section 2(42), except those services rendered free of charge or under a contract of personal service[40].”

DEFINITION

As per the Act, a person is called a “Consumer” who avails the services and buys any good for self-use. Worth to mention that if a person buys any goods or avails any service for resale or commercial purposes, he/she is not considered a consumer. This definition covers all types of transactions i.e. offline and online through teleshopping, direct selling or multi-level marketing.

CONSUMER DISPUTES REDRESSAL COMMISSION

- The Act stipulates the establishment of Consumer Disputes Redressal Commissions (CDRCs) at the national, state, and district levels in order to hear consumer complaints.
- In accordance with the declared rules, the State Commissions will provide the Central Government with quarterly updates on vacancies, disposals, pending cases, and other topics.

The CDRCs will accept complaints pertaining to:

1) Overcharging or misleading pricing
2) Unfair or restrictive business methods
3) Sale of hazardous goods and services that pose a risk to human life.
4) Sale of faulty products or services

- In accordance with the Consumer Disputes Redressal Commission Rules, there would be no filing cost for complaints up to 5 lakh rupees.

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https://www.onmanorama.com/news/kerala/2022/03/03/doctors--services-fall-within-ambit-of-consumer-protection-act--.html

CONCLUSION

Protection of consumers is always a major concern. In ancient India, robust procedures were implemented to safeguard consumers against market-related crimes. Ancient law ably described a variety of unethical business practices and set heavy penalties for offenders. Primarily, adulteration and incorrect weights and measures were dealt with seriously. In ancient India, the king was the highest authority for administering justice, but his authority was constrained by Dharma's laws. During the middle ages, a number of Muslim kings created well-organized market processes to monitor pricing and the supply of goods. During the British era, the modern legal system was brought to India, and numerous consumer protection statutes were adopted. Today's civil justice system is marred by flaws that dissuade consumers from pursuing legal remedies. However, the 2019 Consumer Protection Act, which promotes access to justice, has ushered in a legal revolution in India as a result of its cost-effective procedures and widespread support. Simultaneously, these processes provide a significant legal threat to established courts that conduct litigation in conventional ways. In this era of consumers, the Indian consumer law regime will unquestionably govern the Indian market and usher in a new era for the existing Indian legal framework, which is based on old legal principles.

Due to the aforementioned obstacles, the innocent patients were reluctant to seek redress while being the victim, resulting in the seller reverting to more and more unfair commercial practices. In light of this, the Consumer Protection Act of 2019 was enacted to provide an innocent patient with a remedy that was rapid, easy, affordable, effective, and compensatory.

CHAPTER - 3

NEGLIGENCE IN ITS VARIOUS FORMS AND MANIFESTATIONS

INTRODUCTION

Medical negligence or medical malpractice or clinical negligence is a common cause of mortality in hospitals, leading to medical negligence cases, which are then brought to court to punish the guilty parties for the harm they caused. We believe that life is God given. Thus, a physician figures into God's plan as he prepares to carry out His mandate. A patient typically chooses a physician or facility based on his or her reputation. A patient has two expectations of doctors and hospitals: first, that they will offer medical treatment with all the knowledge and expertise at their disposal, and second, that they will not do anything to hurt the patient via negligence, carelessness, or recklessness. Although a doctor may not always be able to save his patient's life, he is expected to apply his specialised knowledge and ability in the most appropriate manner while keeping the patient's best interests in mind. Hence, it is expected that a physician will do the appropriate investigation or ask the patient for a report. In addition, unless it is an emergency, he asks the patient's informed consent prior to any significant therapy, surgical procedure, or even invasive study. A doctor's and hospital's failure to fulfil this commitment constitutes a tortious liability. A tort is a civil wrong (right in REM) as opposed to a contractual obligation (right in personam) - a breach that invites court intervention in the form of monetary compensation. As a result, a patient's entitlement to medical care from doctors and hospitals is fundamentally a civic right. To some extent, the doctor-patient relationship takes the form of a contract due to informed consent, payment of fees, and performance of surgery/providing treatment, etc., while keeping fundamental components of the Tort.

A doctor owes specific duties to his patients, and any breach of such obligations gives rise to a negligence claim against the doctor. Before doing diagnostic tests or providing therapeutic care, the doctor must get prior informed consent from the patient. The services of doctors are governed by the Consumer Protection Act of 2019, and patients can seek redress of concerns through the Consumer Courts. Case laws are a significant source of legislation for adjudicating various negligence concerns stemming from medical treatment. In advising or rendering service, a professional man owes his client a duty in tort as well as in contract. Medical Negligence is a word used to describe criminal negligence in the field of Medical Science.

Winfield defines negligence as a tort, which is a breach of a legal duty to exercise reasonable care that causes harm to the plaintiff. A negligent conduct involves the aforementioned elements. Negligence consists[41] of 1) Existence of legal duty,
2)Breach of legal duty,
3) Damage caused by the breach.
One of the most significant features of every profession is the level of expertise possessed by its practitioners. It is not expected that every professional man will do the service with the same level of expertise. There are numerous aspects and factors that affect an individual's relative competency within a group. A vocation is a specialised and highly trained field of practice. Professional negligence, as opposed to medical negligence, is a word pertaining to the medical profession that refers to some abnormal acts on the part of the profession or associated service in the negligent performance of professional obligations by doctors.

DEFINITION OF NEGLIGENCE

Negligence[42] is described as "the violation of a duty caused by the omission to do something that a reasonable man, guided by those considerations that typically regulate the conduct of human affairs, would do, or the commission of an act that a wise and reasonable person would not do." Abbreviated definition: "Negligence as a tort is the breach of a legal duty to exercise reasonable care that causes injury to the plaintiff that the defendant did not intend". "Negligence is more than careless or thoughtless behaviour, whether in omission or commission; it likely connotes the complicated idea of duty, breach, and losses suffered by the person to whom the duty was owed".Negligence is defined[43] as 1) failing to perform an action that a reasonable person would perform. 2) Acting in a manner that a normal person would not. This negligence may encompass both acts of commission and omission. Medical negligence is defined as a lack of reasonable care and skill or intentional negligence on the part of a physician in relation to the acceptance of a patient, the taking of a medical history, the examination, the diagnosis, the investigation, the medical or surgical treatment, etc., resulting in an injury or harm to the patient. But negligence nee

In **Jacob Mathew v. State of Punjab and another**[44], in this historic decision, the supreme court of India established criteria for medical practitioners accused of negligence. The SC court in its judgement referred to the definition of negligence and its three constituents.
"Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom

[41] Dr Jagdish Singh & Vishwa Bhushan, "Medical Negligence Compensation", page.30, Chap.3, Third Edition 2007, (Bharat Law Publications).
[42] www.legalserviceindia.com/article/1388-Medical Negligence.
[43] Supra Note 41.
[44] Jacob Mathew v. State of Punjab and another, Criminal Appeal No. l44 - 145 of 2004 , SC August 5, 2005.

the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort". Another key concept that has arisen is legal accountability for inaction. Originally, persons who agreed to render a service and breach a promise to take care or skill in performing that service were held liable for failure to act. Gradually, the law began to indicate that some services would be performed with care or expertise. The origins of the modern concept of obligation can be traced back to this explicit or implicit vow to exercise care. Although there have been significant advances in negligence since the eighteenth century, the fundamental notions have stayed the same. Today, negligence is by far the most pervasive tort, including nearly all unintentional wrongdoing that causes harm to others. One of the most fundamental notions in negligence law is the concept of the reasonable person, which serves as the benchmark for judging a person's behaviour.

The acknowledged essential elements of negligence are "duty", "breach", and resulting "injury". i) the existence of a duty of care owed by the defendant to the plaintiff; ii) the defendant's failure to meet the legal standard of care, so committing a breach of that duty; and iii) the plaintiff's suffering of damages related to the breach and recognized by the law. No cause of action emerges unless all three of the aforementioned elements are present: a) lack of care does not give rise to a claim unless a duty to exercise care exists; b) breach of duty and lack of care are insufficient to bring a claim unless the act caused damage. If the claimant demonstrates to the court that the aforementioned three elements are present, the defendant should be held accountable for negligence. The damage may be physical or mental, recognized by the law, and produced by a reasonably foreseeable breach of duty. There exists no specific definition of negligence. There are various definitions of negligence. Subjectively, negligence is a careless state of mind; objectively, it is reckless behaviour. Another explanation of negligence was given in the case of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr.**[45], the HC held that "The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give, or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. 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 very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires."

[45] Laxman Balkrishna Joshi v. Trimbak Bapu Godbole And Anr, 1969 AIR 128, 1969 SCR (1) 206.

PROFESSIONAL NEGLIGENCE

The medical profession is one of the world's oldest and most humane professions. A code of conduct including the fundamental ethics that underpin the moral standards that govern professional work and are intended to protect its dignity is inherent to the concept of any profession. The values at the heart of the practitioner-patient relationship are supported by medical ethics. Medical malpractice and medical negligence were grey areas in health care where legal difficulties existed. Professional negligence, as opposed to medical negligence, is suggested by the phrase and pertains to the medical profession as a result of some irregular action on the part of the profession or a connected service in the performance of professional duties.

Professional negligence is the negligence done by an individual with greater training and expertise than the average person. If a person is well educated and skilled, it is assumed that they will perform the responsibilities competently. If the expert fails to do so, this is seen to be negligence on their behalf. Clients who have incurred losses can really file a lawsuit against the professional. The most prevalent discipline in which professional carelessness happens regularly is medicine. The experts owe an obligation to the people who hire them, as these individuals rely on their skills and competence. This is sometimes referred to as the duty of care. Numerous individuals do not comprehend the notion of responsibility of care. If a doctor or nurse fails to perform an expected obligation with reasonable care, this can constitute professional negligence. The public anticipates that professionals would do their duties with the utmost care. If they fail to do so, they may be charged with professional negligence. A professional negligence proceeding falls within the category of personal injury law. The claimant must provide evidence that the professional caused harm. This does not mean that all claimants must establish a connection between the negligence and their injuries.

Existence of legal duty - Whenever a person approaches a professional for a case who possesses a given skill on a taken case for service, the professional is under an implicit legal duty to exercise as is accepted to act at least as is acceptable in the regular course from his peers. This individual's failure to do something constitutes negligence. Every time a patient approaches a physician for treatment of his illness, he does not enter into a written contract, but there is a contract by implication, and any lack of sufficient care might make the negligent physician accountable for violation of professional duty.

Breach of legal duty - If the person using the skill fails to do something that an ordinary prudent person would have done in a similar scenario during the course of treatment. The injury caused by such carelessness is entitled to monetary and moral compensation. The courts apply the exact liquidated amount determination. In a lawsuit, it is the patient's responsibility to demonstrate that the doctor's carelessness caused the alleged injury for which compensation is sought. This will depend on the gravity of the defendant's breach of duty and the totality of the defendant's

circumstances at the time of the violation. The degree of quality achieved in a career is among the most important aspects of that profession. The principles of negligence apply to the defendant regardless of whether or not there was a violation of duty of care owed to the deceased victim in question. If such a breach of duty is shown, the next question that needs to be answered is whether or not such a violation of duty was the cause of the victim's death. If this is the case, the members of the jury need to decide whether or not the breach of duty in question should be considered an act of gross negligence and, consequently, a crime.

NECESSITIES OF NEGLIGENCE

The essential components of negligence, as recognized are three, ‘duty’, ‘breach’ and resulting ‘damage’. The presence of a duty of care which the defendant owes to the plaintiff; The failure to meet the legal standard of care, so constituting a breach of duty; and the complainant's resulting injury, which is tied to the violation and recognized by the law. The concept of negligence refers to a relationship between one person and another that places an obligation on one party to exercise reasonable care for the benefit of the other party regardless of the circumstances. There can be no action that results from a cause unless all three components are present. A claim for negligence cannot be brought unless there was an obligation to exercise reasonable care in the first place. If there was no actual damage caused by the act in question, then a claim for breach of duty or lack of care will not be successful.

If the complainant is successful in convincing the court on the basis of the evidence that all three of the aforementioned elements are present in the case, then the defendant should be held accountable for carelessness. Damage to a person's body or mind that is recognized by the law as being the result of a breach of duty and that was caused by a breach that was reasonably foreseeable might be considered legal compensation. For there to be negligence in the sense described above, there needs to be a professional level of care taken. A professional is someone who engages in one of the learned professions or an occupation requiring extensive training and skill. In providing advice or rendering services, a professional has an obligation to his client both in tort and under a contract[46]. Medical professionals have no immunity and can be sued in contract or tort on the basis that they did not exercise reasonable skill and care. As soon as a physician admits a patient, the act becomes applicable, regardless of whether the physician accepts fees, is a private practitioner or public worker, a general practitioner or a specialist. A person who provides medical advice or treatment implies that the doctor has the necessary skills and knowledge. The following are some of the specific obligations of care that are owed to the patient by the physician: 1) When determining whether or not the patient should be treated. 2) By giving the patient the necessary treatment, and 3) By reassuring the patient that the physician is able to cure the sickness.

[46] Jackson & Powell, Professional Negligence, 3rd Edn., Para 1-04 & 1-05 and 1-56, Sweet and Maxwell Publications.

Any violation of these responsibilities will be considered medical negligence, and the doctor will be held accountable. The most exhaustive explanation of culpability can be found in the case of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr.**[47], in which the judge stated, "The duties that a physician owes to the patient are apparent. A person who presents himself as able to provide medical advice and treatment implicitly guarantees that he possesses the necessary skills and expertise". The patient must demonstrate negligence in order to launch a valid claim for compensation against a physician in a forum or court. It may take the following forms: a) negligence in hearing a patient's complaint; b) failure to make an accurate diagnosis; c) inability to protect the patient from injection; d) negligence in surgery; e) failure to obtain the patient's permission; and f) lack of skilled supervision staff at a hospital. The result of a doctor's carelessness is frequently referred to as a "accident" because the term "accident" as used in judicial decisions refers to an unanticipated mishap or unfavourable event that was not anticipated or intended, but rather something fortuitous and inexpert at the liability even for a careless act becoming for a criminal if carelessness and mens rea[48] coincide. When the damage is somewhat attributable to the complainant's negligence and partially attributable to the doctor's fault, the court may reduce the amount of compensation awarded in proportion to the patient's share of culpability for the injury.

The trustworthiness of the relationship between a patient and their physician has almost completely been undermined. The mentality that comes with running a business, whether it be providing medical services or consumer goods, has contributed to an increase in the number of cases in which malpractice and neglect have occurred. The investigation of crimes and the administration of punishment received more focus. Heavy punishments and punitive actions designed to prevent future offences were authorised. In the context of this discussion, the terms "negligence," "wrong," and "mens rea," which refers to the criminal purpose, each have diverse meanings and connotations. The level of perfection is one of the most crucial characteristics of any career. It is not expected that every professional will provide services with the same level of knowledge. There are numerous features and factors that affect an individual's relative competency within a group. The extent to which the law should intervene in the doctor-patient relationship and resolve disagreements through court adjudication cannot be determined in advance due to the situation's uncertainty and complexity. The concept also applies to professional obligations of care. It is difficult to agree with the notion that these are fundamentally medical matters that should be left unaffected by other professions or fields. Medical education is characterised by the continuing deterioration of ethical norms, the commercialization of health care services, and the inadequacy of the profession's institutional framework. Recognizing malice and responding intelligently and creatively so that the doctor-patient relationship is not harmed and accountability systems are strengthened

[47] Supra Note 45.
[48] Dr Jagdish Singh & Vishwa Bhushan, "Medical Negligence Compensation", Page 5 8, Chap.4, (Third Edition 2007), (Bharat Law Publications).

demonstrates wisdom. Due to the nature of the services they provide to a suffering humanity, the legal and medical professions are regarded as honourable and intelligent. It is believed that the integrity of the professionals' oath and the code of ethics they put on themselves are sufficient to keep doctors on the straight road. The focus has been on professional ethics and justice among peers. Society was reasonably well-served by the profession for a considerable amount of time without recourse to regular law to rectify professional misconduct or negligent behaviour. Even today, the vast majority of medical professionals instinctively adhere to professional standards and social responsibility, rendering external mandates superfluous for the governance of their individual field. Everyone in society must recognise and value this fact, lest it seek solutions worse than the problem in the name of professional discipline and accountability.

Medical professionals have no immunity and may be sued in contract or tort (wrongful conduct committed by a person) for failing to exercise reasonable skill and care. Negligence is the failure to do anything that a cautious and reasonable person, influenced by the customary principles that ordinarily govern human affairs, would not do. Negligence may not always imply a total lack of care; rather, it refers to a lack of the degree of care required in particular situations. Medical negligence is the failure to observe, for the protection of another person's interests, the degree of care, prudence, and vigilance that the circumstances justly require, resulting in injury to that person. Negligence and obligation are strictly correlated. Subjectively, negligence is a careless state of mind; objectively, it is reckless behaviour. Negligence is a relative adjective; it is a comparative one, not an absolute one. In a given instance, neither an absolute standard nor a mathematically precise formula may be quantified infallibly. In evaluating whether negligence exists in a specific case or whether a single act or series of action constitutes carelessness, it is necessary to take into account all the surrounding facts and circumstances. To evaluate whether a conduct is negligent or not, it is necessary to determine whether a reasonable person would have anticipated that the act would cause harm. The failure to do what the law requires using the means envisioned by the law would automatically constitute carelessness on the part of such a person. If the answer is affirmative, the act is negligent. There exists no specific definition of negligence.There are various definitions of negligence. Subjectively, negligence is a careless state of mind; objectively, it is reckless behaviour. Negligence is both an absolute and relative term; it is a comparative term. A patient who visits a doctor anticipates receiving medical care utilising all of the doctor's knowledge and experience to alleviate his medical condition. A doctor owes his patient specific duties, and any breach of these duties gives rise to a negligence claim against the doctor.

TYPES OF NEGLIGENCE

Medical negligence is a violation of the generally accepted norms of health care practice. In a number of instances, these breaches have already resulted in many reports of personal injuries

and fatalities. Due to these cases, the government has approved the necessary loss to give the injured victim the right to recovery. Consequently, it is crucial to understand the fundamentals of medical negligence and how a patient can be injured, and to pursue legal action with the assistance of a realistic and dependable medical negligence attorney.

Medical negligence can occur in any medical circumstance, including visits to the dentist, emergency department situations, routine health examinations, and high-risk surgical procedures. There are various forms of medical carelessness, and no two instances are identical. Given the complexity of the medical profession, it is not surprising that even the smallest error can have life-altering (or even fatal) consequences for a patient. In the cases of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbark Babu Godbole and Anr.**[49] and **A. S. Mittal v. State of U.P.**[50], it was determined that when a patient consults a physician, the physician owes the patient the following duties:
(a) Duty of care in determining whether to undertake the case,
(b) Duty of care in determining what treatment to give, and
(c) A breach of any of the aforementioned duties may constitute carelessness, entitling the patient to collect damages from his physician.
In the aforementioned case, the supreme court noted, among other things, that negligence can take many forms, including active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal neglect, gross negligence, hazardous malfeasance, active and passive negligence, willful or reckless negligence, and negligence per se.

NEGLIGENCE AS A TORT

The vast majority of torts are based on negligence. Negligent torts are not intentional; they occur when a person fails to act as a reasonable person towards a person to whom he or she owes a responsibility, resulting in injury. The elements of negligence are that a person has a duty to the victim, that he or she breached that duty, that an injury results from that breach, and that the injury was reasonably foreseeable as a result of the person's acts. The injured party must prove these criteria by a preponderance of the evidence to prevail in a negligence action. The definition of negligence is the failure to take reasonable care. Auto accidents, slip-and-fall incidents, and the majority of medical malpractice lawsuits are examples of negligent torts. It has been defined in medical terms as a mistake made by a medical practitioner that no reasonably competent and careful practitioner would have made.

It has been observed in the case of **Dr. Ravindra Gupta v. Ganga Devi**[51], that prior to the implementation of the Consumer Protection Act of 1986, the field of medical negligence was unavoidably governed solely by the law of torts. This is something that was said in the

[49] Supra Note. 45.
[50] A.S.Mittal v. State of U.P., AIR 1989 SC 1570.
[51] Dr. Ravindra Guptha v. Ganga Devi, 1993 (3) CPR 255.

aforementioned case. The medical practitioner is required to provide a reasonable amount of competence and understanding to the task at hand, in addition to a reasonable amount of care and attention. The prescribing of drugs that are known to have harmful side effects by a physician without first informing the patient about the risk and the side effects, as well as without carrying out the recommended tests in order to discover whether side effects are happening, constitutes carelessness on the part of the physician, as it puts the patient at risk of experiencing the harmful side effects of the drugs.

NEGLIGENCE UNDER CONTRACT

The relationship between a doctor and a patient is based on trust and confidence, therefore it is a contract of personal service[52].

Contractual liability depends on the implied agreements agreed to by the patient and the physician. The patient's consent to treatment contingent on payment of fees can be viewed as an implied contract with the physician, who implicitly agrees to exercise proper care and skill by providing treatment contingent on payment of costs. Contractual obligations are typically more onerous than tort-based obligations. In the context of the workplace, tortuous responsibilities are confined to those that require reasonable care. They do not create a continual obligation for advice or action to be reviewed, as a contractual obligation can.

Professionals frequently take on the role of agents, and it is possible for a contractual connection to be formed through agency. A binding agreement[53] between two or more parties that imposes a duty on one or more of them to perform or abstain from a specific action. When it comes to contracts, whether a party is liable or not relies on whether the parties have agreed to either express or implied terms. When a patient gives their consent to treatment in exchange for payment of fees, this can be considered an implied contract between the patient and the doctor. The doctor, by undertaking treatment in exchange for acceptance of money, implicitly commits to exercise appropriate care and expertise. In most cases, the nature of the contractual obligations is more challenging than the nature of the tort obligations. In the context of the workplace, tortuous responsibilities are confined to those that require reasonable care. They do not impose any ongoing obligation requiring advice or action to be reviewed, as may be the case with contractual obligations - any service made accessible to potential users. The professional owes his client a duty of reasonable care in both tort and contract when providing advice or performing services.

[52] Supra Note. 49.
[53] Blacks' Law Dictionary 6th Edition 1990, U.S.A.

CONTRIBUTORY NEGLIGENCE

“The behaviour that contributes to one's own injury or loss and fails to meet the standard of prudence that one should observe for one's own good”[54]. In most cases, contributory negligence arises when a plaintiff accuses a defendant of negligence. The defendant may then accuse the plaintiff of contributing to the accident. If the defendant shows contributory negligence by a majority of the evidence, the plaintiff cannot obtain damages, even if the defendant was negligent, because contributory negligence breaks the causal link between the defendant's carelessness and the plaintiff's harm or loss. In English law since the Law Reform, if the plaintiff is found to have contributed to the injury, recovery may still be permitted, although damages may be reduced equitably.

Contributory negligence[55] should be distinguished from several other doctrines frequently applied in negligence cases: assumption of risk, which relieves the defendant of an obligation of due care toward the plaintiff when the latter voluntarily exposes himself to certain dangers; and last clear chance, which permits the plaintiff to recover even if contributorily negligent if the defendant had the last clear opportunity to avoid the mishap. Some authorities reject contributory negligence because it excuses one party (the defendant) even when both were negligent. In order to properly diagnose the problem and administer treatment, a medical practitioner requires assistance from the patient and any attendants present. Accurate information regarding the patient's symptoms as well as their medical history is required by the doctors.

When it comes to the delivery of the treatment, having the patient's cooperation is highly desirable. It is the responsibility of the doctor to provide the patient with instructions that are unmistakable, clear, and concise, and to explain everything in terms that the patient can grasp. It is possible to argue that the patient or the attendant had contributed to the harm or damage that the patient sustained if the patient did not follow the directions that were provided by the doctor, and if this was the cause of the patient's injury or damage. When diagnosing and treating a patient, a doctor will frequently require the participation of the patient and any attendants. The physician will require reasonably precise details about the patient's symptoms and medical history. Likewise, cooperation is typically required in delivering the treatment, such as taking medication at the correct dosage and intervals or returning for follow-up. However, it is the physician's responsibility to provide clear and unambiguous directions, to explain in understandable words what is required of the patient, and to issue any necessary warnings. If the patient fails to follow these directions and this is the source of his injuries, it will be feasible to establish that the patient/attendant was either contributorily negligent or, in the worst case scenario, that his actions were the sole cause of the damage. When an injury is partially

[54] Id.
[55] Dr Jagdish Singh & Vishwa Bhushan, “Medical Negligence Compensation”, Page 101, Chap.6, (Third Edition 2007), (Bharat Law Publications).

attributable to the complainant's fault (negligence) and partially attributable to the doctor's error, the court may reduce the amount of compensation awarded in proportion to the patient's share of responsibility for the injury.

The term "**professional negligence**""is preferred to "medical negligence" because it denotes and refers to the medical profession. Professional negligence is the outcome of some abnormal action on the part of the profession or associated service in the performance of professional duties. The trustworthiness of the relationship between a patient and their physician is almost entirely gone. The combination of services provided by a medical establishment and a commercial mentality has contributed to an increase in the number of incidents of malpractice and neglect. The investigation of crimes and the administration of punishment received more focus. Heavy punishments and punitive actions designed to prevent future offences were authorised.

The terms "negligence," "wrong," and "mens rea," or criminal intent, have distinct implications. It is a sub-branch of carelessness pertaining to medical malpractice. It addresses circumstances in which a physician, surgeon, or other medical professional may be required to pay compensation if he failed to exercise reasonable care. The level of care required varies on the specifics of each instance. In general, however, it can be claimed that the exam is the benchmark of the average skilled guy practising and claiming to have that particular skill. If a physician falls short of this requirement in any way, he has committed negligence and must compensate the person damaged by him.

NEGLIGENCE AS IF IT WERE A CRIME

Criminal Liability:- In tort law, liability is proportional to the amount of damages caused, whereas in criminal law, liability is proportional to the quantity and degree of negligence. The unliquidated damages granted in a tort action differ from the method of punishment applied in criminal culpability.

In **Hari Kishan and State of Haryana v. Sukhbir Singh**[56] The Supreme Court ordered the criminal courts to exercise in such a liberal manner that the victims or their legal heirs need not hurry to the civil court to seek compensation. By allowing criminal courts to award compensation based on the nature of the crime, the victim's claim, and the accused's ability to pay, the line between tort and crime has been diminished to the extent that the degree of negligence in criminal liability is greater than in tort liability.

[56] Hari kishan and State of Haryana v. Sukhbir Singh, AIR 1988 SC 2127; 1989 Cr.L.J. 116.

MENS REA IN NEGLIGENCE

MENS REA is a legal term that refers to the mental condition or tortious liability that is either explicitly or implicitly specified in the definition of the crime that is being prosecuted. A person is not guilty of a crime just because they committed an act; rather, guilt originates in the mind. Without having given any consideration to the likelihood of such a risk or having recognized that there was some risk involved. [Not having] recognized that there was some risk involved. In order to convict someone of the crime of criminal rashness or criminal negligence, it is necessary to discover that the rashness was of such a degree that it amounted to taking a risk while being aware that the risk was of such a degree that it was highly likely that the risk would result in injury. Criminality consists of taking the risk or committing the conduct with recklessness and disregard for the consequences. Negligence of such a nature, or occurring under such circumstances, as to be punishable as a crime by statute, or such a deliberate and reckless disregard for the life and safety of others, or willful indifference to the injury likely to result, as to transform an otherwise lawful act into a crime against the state when it results in personal injury or death. In this case, the negligence exceeds the scope of mere recompense.

NEGLIGENCE BY ITSELF

Black's Law Dictionary defines negligence per se as “conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of statute or valid municipal ordinance or because it is so palpably contrary to the dictates of common sense that it can be said without hesitation or doubt that no prudent person would have been guilty of it”.

As a general rule, the violation of a public obligation required by law for the protection of person or property constitutes such conduct. “It is a legal word that describes a person who is prudent and has done an act of negligence, thereby causing injury to the peace, law & order, or someone's property, but is highly credible and it is not required to prove that it was due to negligence”. Conduct, whether of action or omission, that may be proclaimed and handled as negligence without any argument or proof as to the specific circumstances of the case, either because it is in violation of a statute or legitimate municipal ordinance or because it is so blatantly contrary to the dictates of common sense that it can be said without hesitation or doubt that no prudent person would have committed it. After describing the components and types of Negligence, one needs to understand the legal principles that regulate Medical Negligence. In the case of **Poonam Verma v. Ashwin Patel and Others**[57] The Supreme Court ruled that a person is considered to be a quack if they do not have knowledge of a particular system of medicine but still practice in that system. This decision was made while the court was considering whether or not a homoeopathic

[57] Poonam Verma v. Ashwin Patel and Others, (1996) 4 SCC 322.

doctor should be allowed to practice allopathic medicine. When someone is guilty of negligence in and of themselves, there is no need for any further proof.

Medical negligence as Deficiency in Service - In **Dr. Ravindra Gupta v. Ganga Devi**[58], the area of medical malpractice was governed only by the law of Torts before the implementation of The Consumer Protection Act, 1986. Medical Liability under consumer jurisdiction includes negligence under Torts law. A practitioner can be held accountable for negligence if his incorrect diagnosis is of such a kind that it demonstrates a lack of reasonable skill and care in comparison to the average degree of skill in the field. A physician who prescribes medications with serious side effects without telling the patient of the risk and side effects and without conducting the appropriate tests to determine whether side effects are occurring is negligent in exposing the patient to the risk of experiencing those adverse effects. "Negligence refers to reckless or irresponsible behaviour, whether in omission or commission; it likely connotes the complicated idea of obligation, breach, and losses sustained by the person to whom the duty was owed".

CRIMINAL NEGLIGENCE

For civil accountability, mere carelessness suffices, but in criminal law, a very high degree of negligence must be proven. According to Section 304A of the Indian Penal Code of 1860, anyone who causes the death of a person through a reckless or negligent act that does not constitute culpable homicide shall be punished with imprisonment for two years, a fine, or both. According to the Supreme Court, liability in civil law is determined by the amount of damages sustained, whereas in Criminal Law, liability is determined by the amount and degree of negligence. The SC distinguished between negligence, rashness, and recklessness when determining criminal responsibility in a specific case. These components include the reason for the crime, the severity of the crime, and the offender's character.

A person is negligent if they unintentionally commit an act of omission and violate a positive duty. A person who acts hastily is aware of the potential repercussions, but naively believes that they will not materialise. A reckless individual is aware of the repercussions of his or her actions, but does not care whether or not they occur. Any behaviour falling short of recklessness and intentional wrongdoing should not be punishable by law. Thus, a doctor cannot be held criminally liable for a patient's death unless it can be proven that she/he was careless or incompetent, with such disregard for his patient's life and safety that it constituted a crime against the State. The Indian Penal Code contains defences for doctors accused of criminal culpability in sections 80 and 88. In accordance with Section 80 (accident while performing a lawful act), nothing constitutes an offence if it was committed by accident or misfortune, without any criminal intent or knowledge, while performing a lawful act in a lawful way, using lawful means, and with due care and caution. According to Section 88, a person cannot be charged with

[58] Supra Note 51.

a crime if she or he undertakes an act in good faith for the other's benefit, does not intend to cause harm even if there is a danger, and the patient has provided express or implied consent.

VICARIOUS LIABILITY

Vicarious liability[59] refers to liability incurred on behalf of or in lieu of another. The liability stemming from the master-servant relationship is one type of vicarious liability. Qui facit per alium facit per se, the Latin phrase upon which vicarious liability is based, states that a person who commits an act through another commits the act himself. The second principle that determines a master's accountability is responder superior, or let the superior be liable. The main rule of vicarious liability is that a principal or employer is liable for an agent's representative activities committed on behalf of the principal's business. A master is responsible for any wrongdoings committed by a servant in the course of employment. When the wrong may be the natural outcome of something the servant did with ordinary care to carry out the master's particular command. The wrong may have been caused by the servant's lack of care or neglect in performing his duties. The servant's wrong may consist of excessive or erroneous execution of a lawful authority, but it must be shown that the servant intended to do, on behalf of his master, something he was, in fact, authorised to do, and that the act, had it been performed properly or under circumstances the servant mistakenly believed to exist, would have been lawful. The wrong may have been committed on behalf of the master and with the intention of serving his purposes. Typically, a doctor is responsible exclusively for his own actions (other than cases of vicarious liability). In certain instances, a physician may be held accountable for the actions of a third party that result in patient injury.

Vicarious liability is a legal notion that assigns blame for an accident to a person who did not cause the injury but who has a specific legal relationship to the negligent actor. This is also known as imputed negligence. Parent-child, spouse-spouse, vehicle owner-driver, and employer-employee ties are examples of legal relationships that can lead to imputed carelessness.

Generally, one person's independent negligence cannot be imputed to another. "The master is accountable for the behaviour of his servants. Doctors frequently require the services of nurses" technicians, paramedical staff, ward boys, pharmacists, physiotherapists, etc., in the course of their professional activities. Vicarious liability rests with the doctor or hospital that engages the doctors and supportive services. Vicarious legal liability to pay the victim economically for loss or injury to the body or mind is founded on the idea that whomever assigns another person to perform an act on his behalf obligates that agent to act on behalf of the principal doctor or master. It is not required for an employee to pay for every accident caused by his or her actions. It should suffice if the act is related to or associated with the servant's duty or assignment.

[59] http:// www.ncbi.nlxn.nih.gov/pmc/articles

Medical institutions and nursing homes would be well-advised to have enough insurance coverage for medical negligence-related claims.

VICARIOUS LIABILITY OF A HOSPITAL

In general, private hospitals are judged by their track records, and patients expect only the best care from them. When hospitals charge for their services, it is the responsibility[60] of the hospital to provide the best possible care. If the hospital's services are not appropriate and the patient suffers as a result, the hospital must pay back the charges. In its judgement, the Supreme Court noted "It's the hospital's job to give the finest treatment after a patient is admitted. It is the hospital's responsibility to ensure that there was no lapse in due diligence or attention to detail". Vicarious responsibility for the actions of another, no matter how innocent a person may be, can be imposed by the law in certain circumstances liable for the lapse in judgement.

LIABILITY OF VISITING DOCTORS

In the case of **Savitha Garg v. The Director of National Heart**[61] The National Commission opined that the hospital was not liable because the patient was under the care of the attending physician, dismissed the complaint because he was not a party, and the Supreme Court disagreed. The Supreme Court further cited the decision in **Cassidy v. Ministry of Health**[62] (supra), in which it was noted: "The hospital authority is accountable for the carelessness of professional personnel hired under both contracts for service and contracts for service. The authority owes an obligation to provide sufficient medical, surgical, and nursing care, and although it may delegate the performance of this duty to non-employees, it remains liable if the delegated duty is incorrectly or inadequately executed." The hospital was found to be negligent.

RESPONSIBILITY FOR THE NEGLIGENT ACT OF CONSULTANT DOCTORS

It is not enough for a hospital to say that they just supply the infrastructure, the services of nursing staff, supporting staff, and technicians, and that they cannot sue the patient or recommend any procedure; the hospital is still responsible for any damages caused by the patient. The hospital was found vicariously accountable for the negligent actions of an unqualified nurse who administered the incorrect injection. "**M/s Spring Meadows Hospital**

[60] CTJ, April, 2008, vol..l6, 201v.
[61] Savitha Garg v. The Director of National Heart, 12-10-2004 www.indiankarmoooon.org./doc/15008811.
[62] Cassidy v. Ministry of Health, 1951 (2) KB 343.

and Another v. Harjol Ahluwalia via K.S. Ahluwalia and Another[63], The Apex Court has articulated the following guidelines for determining doctor negligence", A gross medical error will always result in a negligence finding. Using the incorrect medicine or gas during anaesthesia frequently results in the imposition of culpability, and in some instances even the res ipsa loquitur concept can be applied. In certain instances, even delegating responsibility to another can constitute negligence. A consultant may have acted negligently if he delegated responsibilities to a subordinate despite knowing that the subordinate was incapable of completing his tasks adequately. The hospital is accountable to the patient for injuries caused by the carelessness of doctors, surgeons, nurses, anaesthetists, and other hospital employees in the course of their duties. When hospital employees delivered an incorrect injection supplied by the hospital pharmacist without reading the prescription, the hospital was held accountable for the pharmacist's and staff's carelessness. The hospital is liable for the actions of resident doctors who are students in M.D., M.S., D.M.P., or D.P.S. programs and who were paid stipends; it cannot claim that they are students.

LIABILITY OF THE HOSPITAL EVEN IF THE DOCTOR IS NOT LIABLE : In a case in which a patient underwent surgery for a hip fracture and the removal of the salivary gland, but was left unattended by a doctor for approximately one hour during the postoperative period, the hospital was held liable for deficiency in service even though the surgeon was not found negligent.

VICARIOUS LIABILITY OF STATE FOR GOVERNMENT DOCTOR'S NEGLIGENCE

In **Achut Rao Haribhan Khodwa and Others v. State of Maharashtra and Others**[64], the Supreme Court determined that the state was vicariously liable for the carelessness of government doctors. "The proficiency of medical practitioners varies from physician to physician. Due to the very nature of the profession, there may be more than one recommended course of therapy for a given patient. It said, "The operation of a hospital is a welfare activity conducted by the government, but it is not an exclusive function or activity of the government that might be considered an exercise of its sovereign power. The State would be vicariously accountable for any losses incurred as a result of the carelessness of its physicians or other personnel".

Cassidy v. Ministry of Health[65], is an English tort law concerning the scope of vicarious liability. In this particular case a man sought treatment for two stiff fingers at Walton Hospital in Liverpool. A splint was placed on his hand. When the splint was removed, however, the hand became useless. Instead of having two stiff fingers, he had four. In his insightful ruling in this

[63] M/s Spring Meadows Hospital and Another vs. Harjol Ahluwalia via K.S. Ahluwalia and Another, AIR 1998 SC 1801.
[64] Achut Rao Haribhan Khodwa and Others v. State of Maharashtra and Others, 1996 (2) JT 624.
[65] Supra Note 62.

case, which has been the major authority on the matter, Lord Denning stated, “No one disputes that a doctor must exert reasonable care and skill in his treatment of illness, regardless of whether he is compensated for his services”.

The hospital cannot avoid culpability by claiming that it simply provides nurse staff, supporting employees, and technologists and cannot suo itself perform or recommend any operation. The hospital is responsible for the actions of resident doctors who are enrolled in M.D.,M.S.,or D.M.P.or D.P.S. courses and were paid a stipend; it cannot claim that they are students. One of the most significant characteristics of every profession is the level of perfection that its practitioners can achieve in their work. A vocation is a specialised and highly trained field of practice. The evolution of medical research and health care technologies has inevitably placed physicians and hospital employees in precarious circumstances. Patients with no possibility of recovery should not be kept alive forever by expensive life-sustaining equipment or medication. The malformed embryo should not be allowed to survive birth. In such circumstances, he should make his own decision about the contest of new human rights norms. He can be led solely by the patient's informed consent.

THE DOCTRINE OF RES IPSA - LOQUITUR

Res ipsa loquitur[66] in Latin meaning “the things speak for themselves”. If a doctor commits an act of negligence, he is vicariously accountable for the act. In such instances, the patient's harm is so clear that no proof of the doctor's negligence is required. The plaintiff must convince the court of the veracity of his charges before the burden transfers to the defendant, who must then demonstrate his innocence. For Res ipsa loquitur to be applicable, the following three principles are of the utmost importance. The opposing party must have been in command of the situation. Common beliefs suggest that the injury cannot occur without negligence.

The incident's cause must be unknown or indeterminable. This is a general rule of circumstantial evidence in negligence law. Generally, it is used where direct evidence is available. It applies where a person is wounded by an item wholly and solely within the control of the defendant doctors, the use of which, if the doctors in charge exercise reasonable care, would not typically cause injury. If the doctrine is applied to a particular case, it provides an inference that the defendant doctors were negligent. If the theory is to be applied to a particular case of medical negligence, four key elements must be met. The injury must be of an uncommon nature or variety. The tool that caused the injury must be exclusively in the control of the defendant physicians. The injury must occur in a region of the body that is outside of the area of operation or treatment. That the patient's negligence should not be contributing. Failure to look[67] when there is an obligation to do so constitutes negligence. Such a responsibility cannot be satisfied by

[66] Alan Richards Mortiz, “Handbook of Legal Medicine”, Page: 152.
[67] C Kameswara Rao, “Law of Negligence”, Page: 75, Law Book Company (1968).

merely gazing; one must see with seeing eyes. A person charged with a duty is negligent if he fails to observe what is readily visible and within his field of view, or what is plainly apparent or observable through the use of ordinary reasonable diligence. If he fails to see what he could have seen with the normal use of his senses, he is accountable for both what he really saw and what he should have seen. The defendants can only overcome the presumption of carelessness if they can provide a satisfactory and convincing explanation for the injury. If the general practitioner discovers or should discover that the patient's disease is beyond his knowledge, technical competence, or capacity to treat with a fair chance of success, he should refer the patient to a specialist. A person charged with a duty is negligent if he fails to observe what is readily visible and within his field of view, or what is plainly apparent or observable through the use of ordinary reasonable diligence. If someone fails to use his senses properly, he is accountable for what he should have seen in addition to what he really saw. When seeing a second general anaesthesia, one cannot assume a certain thing. The concept of duty of care is a formula articulated in terms of outcomes rather than logic. The obligation to exercise caution entails both affirmative and negative conduct - the affirmative duty[68] to take safeguards for safety and the negative duty to refrain from doing something that is dangerous (proceeding with the operation). The essence of an actionable error is the failure to adopt a particular course of action in order to prevent harm.
Negligence is not the absence of skill, but rather the undertaking of labour without such skill, such as treating the patient in the ENT ward following the operation without consulting a competent Neuro Surgeon or Mental expert. Care standard and care intensity are two distinct concepts. The standard is that of a fairly prudent man, whereas the degree of care relates to the implementation of this standard in any given situation. The degree of care fluctuates according to the circumstances, but the norm of prudence remains constant. The level of care must be proportional to the risk involved[69]. It depends on the severity of the risk; the bigger the risk, the more caution should be exercised. The level of care varies based on two variables: the severity of the injury and the likelihood that an accident may occur. If it is evident that damage is likely to occur under a certain set of circumstances, every effort must be made to take the reasonable precautions necessary to prevent it. The doctor assumes a duty of care the moment he begins treatment or an operation. The medical professionals are liable not only for negligent actions, but also for negligent inaction and faulty counsel. A specialist will inevitably be held to greater knowledge and skill requirements than a general practitioner. The act or omission in the allegedly improper action must be evaluated in the context of the surrounding circumstances. With the exception of specialists, the degree of care varies according to the circumstances, although the quality of skill remains constant.

Doctors are required to maintain current professional knowledge. A physician is deemed negligent if he conducts a task for which he knows or ought to know he is unqualified. If the doctor was not qualified to provide the treatment or advice he was required to provide, and he

[68] Kameswara Rao, “Law of Negligence”, Page: 75, Law Book Company (1968).
[69] Kameswara Rao - Law of Negligence Page: 96, Law Book Company (1968).

knew the patient's condition, he will be negligent if the undertaking causes harm. Undoubtedly, a good physician will recognize when a patient's condition is beyond his scope of practice and when it becomes his responsibility to call in a more trained individual or to recommend the patient be transferred to a hospital where professional care is available. If the consultant has assumed responsibility for the therapy, the doctor's justification is that he followed the consultant's exact instructions. If a physician accepts a patient's case, he will be accountable for both commission and omission. He is responsible for the harm caused by his actions or counsel. If a physician undertakes the medical care of a patient, he cannot leave his obligation at any stage of the treatment, unless he determines that the case is above his ability, in which case he must refer the patient to a hospital or recommend that he see a more qualified individual. Once he begins the treatment, he is unable to abandon it in the midst. The liability[70] of a physician arises not when a patient has an injury, but when the injury results from the physician's behaviour falling below that of reasonable care. If the doctor gives an incorrect diagnosis and consequently causes injury or damage to the patient, he is accountable for negligence. An erroneous diagnosis inevitably results in the use of improper treatment. A physician should not attempt to diagnose a patient if he is unsure of his ability to provide a conclusive opinion. It might be prudent to refer him to a specialist. Exceptions to this would be instances where the notion of res ipsa loquitur, Latin for "the facts speak for themselves," applies. Leaving foreign objects such as sponges, forceps, scissors, etc. in the abdominal cavity, operating on the wrong patient, or amputating the incorrect limb of a patient. In this case, the doctor's negligence cannot be refuted. In such circumstances, expert testimony is not required. The nature of the injury is such that even a layperson may recognize it. The technique causing harm is reversible under the direct direction of the physician, either directly or through a subordinate. The injured party is not liable for contributory negligence. These instances of neglect are omissions rather than commissions, as no one knowingly leaves a forceps in the abdomen or cuts a sponge in half. It only occurs accidently. However, there are documented cases in which even the presence of a foreign body in the patient's anatomy did not constitute actionable negligence because the operating surgeon had latitude in the face of an unexpected emergency in the form of a sudden drop in blood pressure in the patient, and he/she had to weigh the importance of searching for the missing sponge against the risk to the patient's life posed by prolonging the surgical procedure. During emergency situations in which the patient's health is acutely critical and his life is in jeopardy, the surgeon can choose the course of action based on his own expertise and knowledge.

DEFENCES AGAINST NEGLIGENCE

A doctor has the following defences against negligence: absolute denial of the facts reported by the patient; multiple doctors examining the patient.

[70] www.ncbi.nlm.nih.gov/pmc/articles

DENIAL OF THE FACTS : The initial defence may consist of a complete rejection of the facts reported by the patient. The injury may not have been caused by the doctor. This is only achievable if the physician is completely confident in his decision and has kept reliable case records.

DELEGATION OF DUTY : In the instance of non-medical staff negligence, the hospital assumes entire liability, whereas in the case of medical staff negligence, the doctor and the institution share responsibility. Even the junior medical professionals are burdened by the chief of the involved medical team. In private and/or general practice, the doctor is liable for the carelessness of his technical and non-technical employees, as well as his assistants and, in partnership practice, his partners. Therefore, it would be prudent for a general practitioner to have a separate agreement with his partners to compensate him for the loss in the event that they are deemed liable and litigation ensues.

CONTRIBUTORY NEGLIGENCE : A typical defence is to demonstrate that the defendant contributed to the injury by undertaking an act that should not have been committed. In the event that it is proven that the patient contributed to the injury, the damages are distributed according to the proportion of negligence each party contributed. The rule of contributory negligence104 stipulates that the patient's negligence must be concurrent with that of the physician. There are, however, uncommon instances in which patients who were negligent at the time of therapy administration have been permitted to recover damages. For instance, a doctor who is inebriated and administers an injection to a patient who suffers injury is negligent. The patient's claim for damages is denied on the grounds that he or she would have refused treatment from a doctor so intoxicated, or that the patient's injuries and death were caused by voluntary moves undertaken by the patient despite being told not to. Such a patient has been held solely accountable for negligence by the courts.

VOLENTI NON FIT INJURIA[71] : The principle of Volenti non fit injuria or "assumption of risk" says that the patient is aware of and consents to the risks associated with a particular therapeutic technique, risks that cannot be prevented and are harmful. A patient cannot sue a physician for radiation burns, for instance, because he or she was given the option to accept or reject radiation therapy. However, he or she will have a cause of action if overexposure results in blisters.

IN SITUATION OF EMERGENCY : In a life-or-death emergency, where the patient's death is imminent and treatment is of immediate importance, a doctor is not considered negligent if any damage is caused as a result, such as rib fractures during a cardiac massage, because the doctor has very little time to weigh the pros and cons of any procedure being adopted. In such a circumstance, the doctor bears the burden of establishing that he acted in an emergency.

[71] Dr Jagdish Singh & Vishwa Bhushan, "Medical Negligence Compensation", Page 209, Chap.10, (Third Edition 2007), (Bharat Law Publications).

However, this argument will not be valid if the emergency was caused by the doctor's own negligent procedures.

RELEASE OF "TORTFEASOR" : This is a technical legal defence employed when a patient is treated for injuries caused by a third party's negligence. The doctor will be relieved if a lawsuit against the third party results in the release of the defendant. However, if the doctor causes an entirely new harm during the therapy, he is subject to legal action. In such a circumstance, the person responsible for the initial harm is not held liable for the doctor's carelessness.

RES JUDICATA : This is the doctrine of finality, which states that once a case between two parties has been resolved, it cannot be tried again between the same parties. If a doctor sues a patient for non-payment of a bill, and the patient is aware of the doctor's carelessness but does not assert it during the trial, the patient cannot sue the doctor for damages again in the future. Or, if the initial wrongdoer paid the entire amount when the doctor is also sued for malpractice, the patient cannot sue the doctor for the same negligence a second time.

POSITION OF MEDICAL NEGLIGENCE LAW WITH RESPECT TO UK

The position of medical negligence under U.K consumer law had been diluted in the wake of consumer rights against deficient services of practitioners. In **Clark v. MacLennan**[72], an attempt was made to place the burden of proof on the defendants or negligent physicians. The British court stated, "When a damage is inflicted that should not have been caused, common sense and natural justice dictate that someone should pay compensation. To collect compensation under the current legal framework, an insured must allege carelessness against a person of the highest skill and renown.

The exercise of medical practitioner's skill must be reasonable. The phrase reasonably suggests that the precautionary standard for undergoing treatment must not be excessively high or low. It must be the most reasonable standard. In this instance, reasonableness must be of a person typically skilled in the field of medicine. This was stressed in **R. v. Bateman**[73], the Bolam case, as well as in later decisions.

Regarding the deviation from usual practice, consumer law stipulates that the doctor will not be held liable if the course he or she took was acknowledged as one of the available courses that would have been logically and reasonably pursued under the circumstances. The complainant's burden of proof is not met if the court is unable to accept the alternatives provided to it. In consumer law, responsibility is based on the existence of injury, not its severity.

[72] Clark v. MacLennan, (1903) 1 K.B. 155.
[73] R. v. Bateman, (1925) 94 LJKB 791.

The medical profession is held in the highest regard due to the nature of the service it provides to humanity. Before determining matters involving doctors, the judiciary has always adhered to this maxim. If a physician is ineffective in doing his duty, which is regarded as service to humanity, he should not disregard this rule. When correctly applying their talents, physicians receive adequate protection. For all other purposes and situations, they should be grouped with other professions, as noted in **Gregg (Fe) v. Scott**[74], in which it was determined that, in order to safeguard the dignity of the profession, careless doctors must not be permitted to walk free. Therefore, as a check on the professional conduct of doctors, tortious liability for consumers should be maintained.

CONCLUSION

From the extensive details hinted in this chapter, Negligence is defined as the violation of a duty caused by omitting to perform what a reasonable man would do or committing an act a wise and reasonable person would not do. Negligence is the failure of a legal obligation to exercise reasonable care that causes the patient unintended harm..Medical malpractice, also known as medical negligence, is when a patient receives incorrect, careless, improper, or negligent treatment from a doctor. Medical services were included in the definition of "service" under the Consumer Protection Act of 1986 in 1995. This outlined the interaction between consumers and medical professionals by granting contractual patients the right to sue physicians in 'procedure free' consumer protection tribunals for reimbursement if they suffered damage during treatment. There is a pressing need to stop the rising trend in medical malpractice lawsuits and the declining standard of healthcare in India. Studying determined cases of medical negligence can offer insight into the causes of such cases, the primary contributing elements, the effects of the doctor-patient interaction, etc.

Professional negligence is carelessness committed by someone with more education and experience than the typical person. It is considered that if a person has a good education and skill set, they would carry out the duties effectively. The failure to do so is viewed as carelessness on the part of the expert. There is an implied contract between the patient and the doctor every time the patient seeks treatment for his or her condition; any breach of that implied contract might subject the negligent doctor to liability for breach of professional duty.

The abstract of four types of Negligence is reckoned as;

[74] Gregg (Fe) v. Scott, All ER 2005 Vol.7.

Negligence as a Tort : When someone breaches an obligation, damage ensues. These negligent torts aren't intentional.
Negligence under Contract : The doctor owes his patient due care under tort and contract law while offering advice or performing services. The patient's consent to pay for treatment may be considered as an implied contract between the patient and the doctor, who implicitly agrees to exercise reasonable care and expertise.
Contributory Negligence : In negligence cases, assumption of risk absolves the defendant of its duty of care to the plaintiff when the latter voluntarily exposes himself to certain dangers. Last clear chance allows the plaintiff to recover even if the defendant was contributorily negligent if it had the last clear chance to prevent the accident.
Negligence as a crime : Carelessness reduces criminal liability. Criminal punishment and tort damages are distinct.

The above mentioned chapter explains Vicarious liability as, it is responsibility assumed for another. A master-servant relationship creates vicarious duty. Vicarious obligation falls on the hiring doctor or hospital under medical negligence.Vicarious legal liability is the legal requirement to compensate the victim monetarily for loss or harm to the body or mind. According to the premise that whoever chooses another person to act on his behalf is bound to have that agent act on behalf of the primary doctor or master. Res Ipsa Loquitur means "things speak by themselves" Any doctor's negligence is vicarious. In such circumstances, the patient's suffering makes the doctor's irresponsibility clear.The defences against negligence includes the Denial of facts, Delegation of duties, Contributory negligence, Volenti Non Fit Injuria, In situation of emergency, Release of Tortfeasor and Res Judicata.

CHAPTER 4

LIABILITIES OF DOCTOR FOR MEDICAL NEGLIGENCE AND MEDICAL NEGLIGENCE UNDER CONSUMER PROTECTION LAW

INTRODUCTION

The growing interdependence of the World economy and International Character of many business practices have contributed to the development of universal emphasis on consumer rights protection and promotion. Consumers, clients or customers world over, are demanding value for money in their form of quality goods and better services. Modern technological developments have no doubt made a great impact on the quality, availability and safety of goods and services. But the fact of life is that the consumers are still victims of unscrupulous and exploitative practices. In addition, as a result of the revolution in information technology, customers are faced with new types of difficulties, such as cybercrime and plastic money, which have a greater impact on them. “Consumer is sovereign” and “the customer is king” are myths in the current reality, especially in the developing cultures. However, it has been correctly recognized that consumer protection is a socioeconomic program that should be undertaken by both the government and business, since the contentment of customers is in both parties best interests. In this setting, however, it is the government's primary duty to defend the interests and rights of consumers through proper policy measures, legislative structure, and administrative framework. As a result of the Industrial Revolution and the growth of international trade and commerce, a multitude of consumer goods and services, including insurance, transportation, energy, banking, housing, entertainment, and finance, have come on the market to meet the requirements of consumers. Existence of a well-organised sector of manufacturers and merchants with superior market knowledge has altered the interaction between merchants and consumers, rendering the notion of consumer sovereignty nearly inapplicable. The misleading advertising of goods and services on television, in newspapers, and in magazines influences the demand for the same by consumers, even though there may be manufacturing defects, flaws, or deficiencies in the quality, quantity, and purity of the goods or in the services rendered, thereby defrauding the genuine consumers in the market. In addition, the production of the same goods by numerous companies has resulted in consumers being misled, since they have little time to make a choice and consider their options before purchasing the finest.

In spite of various provisions in the Indian Penal Code, 1860, the Code of Civil Procedure, 1908, the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Standards of Weights and Measures Act, 1976, the Motor Vehicle Act, 1988, and the MRTP Act, 1969, etc., very little has been accomplished in the field of consumer protection. Despite the fact that the Monopolies and Restrictive Trade Practices Act and the Prevention of Food Adulteration Act have given consumers relief, it has become vital to protect consumers from exploitation and deception and

to safeguard their rights. The Consumer Protection Act, 2019 became necessary as a result of some well-known issues with the country's current laws, which allow for legal action in cases of medical negligence under the Law of Tort and Indian Penal Code. They consist of the following: 1) Delay, which is more common in cases of medical negligence. 2) The expense of filing a lawsuit, which is notoriously high in comparison to the amount of damages recovered. 3) restricted court access. 4) Establishing both negligence and causation is necessary for success (which can be particularly difficult in cases of medical negligence). The Act establishes an alternative summary trial mechanism for consumer justice. Its purpose is to provide protection and relief to individuals who have incurred loss or harm due to an unfair or restrictive trade conduct.

CONSUMER PROTECTION ACT, 1986

The Consumer Protection Act of 1986 is a beneficent piece of social law that protects and promotes consumer rights. The consumer is the focal point of all activities; he is the very foundation that supports the superstructure of all societal processes. Prior to the implementation of the consumer protection act, customers used to spend so much time in court arguing consumer issues. The Consumer Movement was founded by Ralf Nadar in the United States, and President John F. Kennedy approved the Consumer Protection Statute in America on March 15, 1963, which is now celebrated as World Consumer's Day. The act has four rights. Right to Safety, Right to Information, Right to Choose, and Right to Have His Choices Considered. In the United Kingdom, The Sale of Goods Act, 1893, includes warranty merchantability as an exception to the "Caveat Emptor" rule. In Australia, the Australian Industries Prevention Act of 1906 was the first anti-trust legislation analogous to the United States' Sherman Act of 1890. After India's independence, more than thirty laws were enacted to protect consumer interests. General Assembly Resolution No. 39/248 of the United Nations, dated April 9, 1985, elevated Consumer Rights to the level of Human Rights. India is a signatory to the aforementioned resolutions, which provide a framework for nations to develop and improve consumer protection policies and legislation. The Consumer Protection Act, 1986 is a landmark welfare legislation enacted for the better protection of consumer rights, to provide speedy remedy, inexpensive and simple redressal to consumer disputes at the District, State, and Central levels with 6 Rights.

1) The right to be guarded from the marketing of dangerous goods and services.
2) Right to provide information regarding the quantity, quality, potency, purity, and pricing of a product or service. As decided in the case **Oil and Natural Gas Commission v. Natural Gas Consuming Industries[75] Gujarat**, a statutory corporation, even if it is not a public utility, must adhere to Article-39 of the Indian Constitution and charge only reasonable prices.
3) The right to be guaranteed of services and product variety.

[75] Oil and Natural Gas Commission v. Natural Gas Consuming Industries, Gujarat, AIR 1990 SC 1851.

4) Right to be heard and assurance that all consumer interests will be appropriately considered in relevant forums.
5) The right to seek redress against unfair or restrictive business practices.
6) The right to consumer education.

Under the Consumer Protection Act, 1986, any person who purchases things or hires services for payment is considered a consumer, and free services are expressly excluded from the definition of service. A doctor's provision of services for a fee to potential patients falls under the definition of service[76]. The provisions of the Act pertaining to the adjudication of consumer disputes and the awarding of relief under Section 14 of the Act apply in full to claims about deficiencies in hospital and medical/dental service[77].

In **Master Vaibhav Apurva Vohra v. Sunil J. Parikh**, the order issued by Honourable Justice Ajit Bharioke, S.M. Kantikar, for the case brought by the plaintiff (patient/minor) seeking compensation for alleged medical malpractice on the side of the treating physician. According to the charges, the plaintiff suffered from a serious illness, and his treatment was altered during the process of diagnosis, causing his health to deteriorate further. The case also included allegations of massive financial loss and mental anguish. Before we get into the compensation and consumer rights in greater depth, we must first comprehend the significance of the consumer protection act in the medical field.

THE CONSUMER PROTECTION ACT, 2019

The 2019 Act was notified on the 15th of July 2020 and went into effect on the 20th of July 2020. It established consumer councils, among other procedures, to resolve consumer complaints and related concerns. This law was enacted to reduce the backlog of consumer complaints in Consumer Forums and courts around the nation. The Act defined the Consumer Disputes Redressal Commission's jurisdiction (CDRCs).

MEANING OF CONSUMER UNDER THE ACT -

A consumer is an individual or group that purchases goods and services for their own personal consumption, as opposed to creating or reselling. Section 2(7) of the Consumer Protection Act of 2019 defines a consumer as any individual who purchases products or services for compensation and uses them for personal use as well as for the purpose of resale or commercial use. In the explanation of the definition of consumer, it is made clear that the terms "buys any goods" and "hires or avails any services" encompass all online transactions done by electronic means, direct selling, teleshopping, and multilevel marketing.

[76] Supra Note 16.
[77] Sachin Agarwal @ Vicky v. Ashok Arora, (1993) 1 CPJ 113 (HR. SDRC).

NEED FOR THE CONSUMER PROTECTION ACT, 2019

The Consumer Protection Act, 2019 was enacted by the Indian legislature to address violations of consumer rights, unfair business practices, deceptive advertising, and all other circumstances that are detrimental to consumer rights. Parliament's purpose in establishing the Act was to include measures for e-consumers, as the purchasing and selling of products and services online has expanded dramatically in recent years due to technological advancements.

The purpose of the Act is to better safeguard the rights and interests of consumers by establishing Consumer Protection Councils to resolve disputes and provide adequate compensation to consumers whose rights have been violated. In addition, it expedites and efficiently resolves consumer complaints through alternative dispute resolution procedures. The Act also encourages consumer education in order to inform consumers of their rights, duties, and recourse options.

MAJOR OBJECTIVES OF THE CONSUMER PROTECTION ACT, 2019.

The primary purpose of the Act is to protect consumer interests and develop a stable and effective framework for the resolution of consumer disputes.

- The purpose of the Act is to prevent the marketing of products that are dangerous to human health and property.
- Inform consumers on the quality, potency, amount, standard, and purity of goods in order to protect them from unfair commercial practices.
- Establish Consumer Protection Councils for the protection of consumer rights and interests.
- Ensure that there is, wherever it is practicable, access to a source of goods at prices that are competitive.
- Seek redressal against unfair trade practices or unscrupulous exploitation of customers.
- Protect consumers by selecting authorities responsible for the prompt and adequate administration and resolution of consumer issues.
- Establish the consequences for violations of the statute.
- In the event that an issue or dispute emerges, listen to and guarantee that the consumers' welfare is given proper consideration in the relevant forums.
- Provide consumer education in order for consumers to understand their rights.
- Provide prompt and efficient settlement of consumer complaints through alternative dispute processes.

MAJOR CHANGES INCORPORATED IN THE CONSUMER PROTECTION ACT, 2019

The changes that were incorporated with the enactment of the Consumer Protection Act, 2019 are:

1) If the total value of the goods, services, or products that were paid as consideration to the seller is less than fifty lakh rupees, then the District Commissions will have the authority to hear complaints about the transaction in question.

2) If the value of the commodities, services, or products paid as consideration to the seller is more than fifty lakh rupees but less than two crore rupees, then the State Commissions will have the jurisdiction to entertain complaints regarding the transaction in question.
3) If the value of the goods, services, or products that were paid as consideration to the seller is greater than two crore rupees, then the National Commission will have the authority to hear complaints against the transaction.
4) In addition, the Act stipulates that any complaint regarding a consumer issue must be resolved as quickly as practicable for all parties involved. A complaint that has been filed in accordance with this Act must be decided within a period of three months from the date that the opposing party has received notice of the complaint, in the event that the complaint does not require analysis or testing of the goods and services, and within a period of five months, in the event that the complaint does require analysis or testing of the goods and services.
5) The Consumer Protection Act of 2019 includes provisions that make it easier for customers to lodge complaints online. In this regard, the Central Government of India has established the E-Dakhil Portal, which offers a facility that is accessible, quick, and economical to the consumers all over India so that they may approach the appropriate consumer forums in the event that a dispute develops.
6) The Act establishes the parameters for online commerce as well as direct sales.
7) Provisions for mediation and other forms of alternative dispute resolution have been written into the Consumer Protection Act of 2019, making it possible for parties to settle their differences amicably rather than having to go through the difficulty and expense of going to court.
8) The Consumer Protection Act of 2019 has provisions for product liability, unfair contracts, and three additional unfair business practices. Additionally, the act contains provisions for product liability and unfair contracts. In contrast to this, the previous Act merely listed six different forms of unfair business practices.
9) The Advisory Committee on the Promotion and Protection of Consumer Rights Act of 2019 was established by the Act of 2019.

10) The Consumer Protection Act of 2019 does not include any provisions for selection committees. Instead, it gives the Central Government the authority to nominate all of the members of the board.

As a result, with the changes in the digital era, the Indian Parliament enacted and brought into force the Consumer Protection Act, 2019 to include the provisions for e-commerce. This is due to the fact that digitalization has enabled convenient payment mechanisms, a variety of choices, improved services, and other such things.

ESSENTIAL PROVISIONS OF THE CONSUMER PROTECTION ACT, 2019

The following is a list of the most important clauses included in the Consumer Protection Act of 2019:

CONSUMER PROTECTION COUNCILS

The Act would defend the rights of consumers on both the national and state levels by establishing consumer protection committees at both the national and state levels.

CENTRAL CONSUMER PROTECTION COUNCIL

The Central Consumer Protection Council, also referred to as the Central Council, is required to be established by the Central Government in accordance with Chapter 2 Section 3 of the Consumer Protection Act, 2019, which was passed in 2019. The Central Council is an advisory council, and its members are required to include the following individuals: The position of chairwoman of the council will be filled by the Minister-in-charge of the Central Government's Department of Consumer Affairs, while other members of the council will include: any number of members, official or non-official, representing the relevant interests in accordance with the Act.

The Central Council is allowed to organise meetings whenever they deem it essential; however, they are required to hold at least one meeting annually. The Central Council was established so that it could fulfil its mission of safeguarding and advancing the interests of consumers in accordance with the Act.

STATE CONSUMER PROTECTION COUNCILS

It is the responsibility of the government of each individual state to found a State Consumer Protection Council, often known as the State Council, which will have authority over that particular state. The State Council is a council that provides advice to the government. The following people are members of the State Council:

Any number of official or non-official members representing necessary interests under the Act, and The Central Government may also appoint not less than ten members for the purposes of this Act. The Minister-in-charge of the Consumer Affairs in the State Government will be appointed as the chairperson of the council, and Any number of official or non-official members representing necessary interests under the Act.

At least two meetings are required to be held by the State Councils each and every year.

DISTRICT CONSUMER PROTECTION COUNCIL

According to Section 8 of the Act, the state government is required to establish a District Consumer Protection Council for each district. This council will be referred to as the District Council. The following people are currently serving on the District Council:

The person in charge of collecting taxes in that district will be given the role of chairperson of the District Council, and any more members who adequately represent the relevant interests in accordance with the Act.

CENTRAL CONSUMER PROTECTION AUTHORITY

To regulate matters relating to violations of the rights of consumers, unfair trade practices, and false or misleading advertisements that are harmful to the interests of the public and consumers and to promote, protect, and enforce the rights of consumers, the Central Government is required to establish a Central Consumer Protection Authority, which will be known as the Central Authority under Section 10 of the Consumer Protection Act, 2019. This authority will be responsible for promoting, protecting, and enforcing the rights of consumers. In accordance with the provisions of the Act, the Central Government will be in charge of filling out the positions of Chief Commissioner and the other Commissioners of the Central Authority.

In order for the Central Authority to conduct an inquiry or investigation, Section 15 of the Act stipulates that the Central Authority must have a "Investigative Wing." To be able to fulfil their responsibilities under this Act, the investigative wing is required to have a Director-General, as

well as the necessary number of Additional Director-General, Director, Joint Director, Deputy Director, and Assistant Director positions filled with individuals who have the necessary level of experience and qualifications.

FUNCTIONS AND DUTIES OF THE CENTRAL AUTHORITY

Section 18 of the Act outlines the powers and responsibilities of the Central Authority, which include the following:

i) To safeguard and promote the rights of consumers as a group, as well as to prevent their violation,

ii) To prevent unfair trade practices, to ensure that no false or misleading advertising for any goods or services is promoted, and to ensure that no one engages in false or misleading advertising.

iii) In cases of violations of consumer rights or unfair trade practices, conduct an inquiry or investigation.

iv) File complaints with the appropriate National, State, or District Commission.

v) Examine issues pertaining to elements impeding the enjoyment of consumer rights.

vi) To promote the implementation of consumer rights international covenants and best international practices.

vii) Promote research and consumer rights awareness.

viii) Establish the required norms to avoid unfair trade practices and safeguard consumer interests.

In circumstances when consumer rights are violated or unfair trade practices are carried out, the Central Authority also has the authority to initiate an investigation in response to a complaint or directive from the Central Government or on its own initiative. Moreover, if the Central Authority determines that a violation of consumer rights or unfair business practices has occurred, it may:

1) Recall the products or services that are dangerous and harmful to users.
2) Reimburse the consumers for the cost of the goods and services, and
3) Stop engaging in practices that are detrimental and hurtful to consumers.

Under Section 21 of the Act, the Central Authority is authorised to impose fines of up to 10 lakh rupees for false and misleading advertisements. When deciding the penalty for the offence, the Central Authority must consider variables such as the population affected by the offence, the

frequency of the offence, and the product's gross sales revenue. For the purposes of this Act, the Central Authority may also order a search and seizure, in which case the provisions of the Criminal Procedure Code of 1973 will apply.

CONSUMER DISPUTES REDRESSAL COMMISSION

Under the Consumer Protection Act, 2019, the state government shall create a District Consumer Disputes Redressal Commission (DCDRC), also known as the District Commission, in each district of the state. The District Commission consists of a President and a minimum of two Central Government-designated members.

Section 34 of the Act authorises the District Commission to hear complaints where the value of the products or services provided in exchange for consideration does not exceed one crore rupees. A customer, a recognized consumer association, the Central Government, the Central Authority, the State Government, etc. may file a complaint regarding goods and services with the DC.

According to Section 36, all sessions before the District Panel must be conducted by the President and at least one other member of the commission.

As explained above, The majority of the provisions of the Consumer Protection Act of 2019 went into effect on June 20. Section 2(42) of the Act specifies the services covered by the Act. Perhaps for political considerations, the term “healthcare” has been removed from the definition that was included in prior bills presented to Parliament.

COMPENSATORY JURISDICTION IN MEDICAL NEGLIGENCE CASES

The term "compensation" refers to things offered as recompense. Physical, mental, and even emotional suffering may constitute actual or anticipated loss in the legal sense. The goal of compensation is to effect a restitutio in integrum, or to return to the plaintiff what he has lost as a result of the wrong, through monetary recompense. The evaluation of damage is a specialist task, and it is evaluated differently depending on whether the harm is a personal injury or a loss of property. There is a little distinction between the terms Damages and Compensation, however they must be calculated using the same standard. Damages may involve a component of punishment in the form of punitive damages. Damages are equal to the victim's loss. Both civil courts and the Consumer Forum have the authority to award punitive damages. In cases of Medical Negligence, damages for personal harm are assessed.

In **Rajesh and Ors. v. Rajvir Singh and Ors.,**[78], inconsistency in awarding compensation in situations of medical negligence is a problem plaguing the Indian health industry at now. Every case must be evaluated individually, as it would be inappropriate not to give the facts of each

[78] Rajesh and Ors. v. Rajvir Singh and Ors., (2013) 9 SCC 54.

circumstance their full weight. However, this increases the judge's discretion and the degree of unpredictability in such scenarios.

All injuries that do not harm property or reputation are considered personal injuries[79]. Damages that can be sustained in connection with a personal injury can be both specific and generic. According to the many features of the loss incurred, there are two distinct categories or heads of damage: i) Non-pecuniary loss and ii) Pecuniary loss.

Damages for bodily injury, pain and suffering, nervous shock, loss of life, and loss of amenity are all covered in non-pecuniary loss.

The loss of profits and future expenses are the two ways that money is lost, and the loss of earnings can be quantified with great precision and specifically claimed through special damages. Other costs are included in these profit losses.

Included in non-pecuniary loss are bodily injury, pain and suffering, nervous shock, loss of exception to life, and loss of amenity. The financial loss can arise in two ways: loss of wages and future expenses. Loss of earnings can be precisely assessed and claimed as special damages. Other expenses, such as medical bills or the cost of necessary transportation, are included in these losses of earnings.

RELEVANCE OF CONSUMER PROTECTION ACT IN MEDICAL PROFESSION

In its historic decision in **Indian Medical Association v. V.P. Shantha and others**[80], the Supreme Court of India affirmed that the Consumer Protection Act, 2019 covers both medical and surgical services supplied to a patient. Thus, the entire medical profession has been brought under the purview of the CPA, which has laid down the law relating to professional negligence under the Consumer Protection Act of 2019 and enunciated definite principles that Medical Practitioners, Government Hospitals, Private Hospitals, and Nursing Homes are also covered under the consumer law in the following categories:

- Where services are provided at no cost to anyone availing themselves of the service.
- Where service users are expected to pay fees, but certain groups of those who cannot afford to pay are provided with the service for free.

In this case, the SC had observed, defined, and thoroughly examined the two apparently contentious terms, “contract for service” and “contract of services”. A “contract for service”[81] denotes an agreement whereby one party commits to providing professional or technical services

[79] James, S. Philips and Brown D.J. Latham, “General Principles of Law of Torts”, Page 428, (1978), Fourth Edn.
[80] Supra Note 16.
[81] Section 2 (42) of The Consumer Protection Act, 2019.

to another party or parties, without being subject to detailed direction or control, and instead using his own knowledge and judgement. A 'contract of service' indicates a master-servant relationship and entails a responsibility to obey instructions regarding the work to be completed and its manner and mode of execution. Accordingly, the Supreme Court concluded that since the relationship between a medical practitioner and a patient involves a degree of mutual confidence and trust, the services rendered by the medical practitioner can be considered to be of a personal nature. However, since there is no master-servant relationship between the doctor and the patient, the contract between the doctor and the patient cannot be considered a contract of personal service but is a contract of services and the services rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of “service” contained in Sec. 2(42) of the CP Act , 2019. The debate about the applicability of the Consumer Protection Act to the medical profession in India appears to have been resolved with the Supreme Court's aforementioned ruling. Regardless of the opinions stated in favour of and against the ruling. In this significant decision, the Supreme Court provided explicit standards for determining which treatments are covered and which are prohibited. In general, however, medical services that are not provided free of charge are covered by the Act. The reaction to the Supreme Court's judgement has been varied. It has received praise as well as criticism. There may be benefits in the shape of swift judgements, inexpensive justice, straightforward procedures, victim alleviation in the form of compensation, enhanced patient care quality, and more cautious doctors. On the other side, the whole medical community has violently condemned it. The following ‘medical services’ are prohibited from CPA coverage: Under a contract of personal service, that is, when a medical practitioner, in his capacity as an employee, provides his employer with professional services. In other words, whenever a master-servant connection exists between the recipient of medical care and the doctor, the treatment would not fall under the definition of “service” under the Act. At a government or non-government hospital, health centre, or dispensary where no fees are collected from patients, whether they are wealthy or poor, the Act does not apply. The traditional concept of the doctor-patient relationship has changed drastically over time. In the past, when the doctor-patient relationship was founded on trust and confidence, it did not make sense to charge or sue a doctor for carelessness. In time, however, not only has there been an increase in instances of medical negligence on the part of doctors, resulting in the harm or death of patients, but there has also been a significant increase in legal actions against doctors. Consequently, doctors have also resorted to specific diagnostic and therapy mechanisms. The patient may sustain an injury or die as a result. The question is whether the doctor and hospital are always liable in such circumstances. What has the legal response been in such cases? Current judicial pronouncements on numerous aspects of medical malpractice. For convenience, all instances have been grouped under the title: When a medical service falls within the Consumer Protection Act of 1986 and when it does not. In government hospitals, there are distinct paying wards where wealthy people seek admittance and general wards where poor patients are treated for free. The Supreme Court found that the Consumer Protection Act protects both sorts of patients, those in a paying ward and those in a general ward.

In **Mohanan v. Prabha G. Nair and Others**[82] The Supreme Court ruled that the appellant did not have the right to present evidence to the Magistrate. The mere fact that a patient dies in a hospital is insufficient to presume that the death was caused by the doctors' carelessness and to hold a doctor criminally liable for the death of his patient. It must be shown that his negligence or incompetence went beyond ordinary recompense based on some civil culpability and that he acted with reckless disregard for the patient's life and safety. The Doctor's negligence could only be determined by scanning the material. The learned single judge was not justified in dismissing the initial complaint. Thus, the ruling of the High Court was overturned, and the Magistrate was instructed to evaluate the case in line with the law. "CONSUMER"[83] refers to any person who omits or hires or avails of any service for a consideration that has been paid or promised or partially paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires, when such services are availed with the approval of the first-mentioned person.

Explanation: For purposes of subclause (I), "Consideration" refers to fees or payment. Fees may have been paid in full with cash, check, or a written promise to pay that is acknowledged by the physician or hospital. The fees may be paid in part (in advance) with the understanding that the balance would be paid later. The payment may be made by the patient himself or by another person on the patient's behalf, such as the patient's father or mother, guardian, spouse, or vice versa.

A consumer is a patient who pays for doctor/hospital services. Anyone who pays for the patient's care. Patients' legal representatives or heirs. Patient's spouse, parents, and children. Payment in the form of a registration fee or a nominal administrative fee, as in the case of Government General Hospitals, does not constitute consideration, therefore patients receiving care in such hospitals are not entitled to reimbursement under the Consumer Protection Act as consumers. A person who obtains free medical care in a government or nonprofit hospital is not considered a consumer under the Act. In the event of the death of a patient who is a consumer, the deceased's legal heirs (representatives) shall be regarded as "consumers." If the payment was paid by a non-legal heir of the deceased, that individual will also be regarded a "consumer". A consumer is also someone who purchases services from others. Free services are therefore not covered by this Act.

The rights outlined by the International Organisation of Consumers' Union and section 6 of the Consumer Protection Act of 1986 are as follows: The Consumer Rights: **The Right to Safety and Protection:** The right to safety is the right to be safeguarded from products, industrial processes, and services that pose a risk to one's health or life. The right to safety has been expanded to cover consumers' long-term interests in addition to their immediate wants. **The right to be informed :** is the right to be given the information necessary to make an educated

[82] Mohanan v. Prabha G. Nair and Others, 1 (2004) CPJ 21 (SC).

[83] P.V.Rama Raju - The Consumer Protection Act, 1986,Latest Edition 2003, S.Gogia & Company Section 2(l)(d) of The Consumer Protection Act.

choice or decision. The right to be informed has expanded beyond the protection against deception and deceptive advertising, labelling, and other practices. Consumers should be provided with sufficient information to enable them to make prudent and responsible decisions. **Right to Choose:** The right to choice refers to the right to have access to a variety of products and services at competitive rates and, in the event of monopolies, to be assured of satisfactory quality and service at a reasonable price. The choice right has been redefined as the right to essential goods and services. This is because the unrestricted right to choose a minority might deprive the majority of its fair share. **The Right to be Heard:** The right to be heard is the right to be represented so that the consumer's interests are taken into account while formulating and implementing economic policy. This right is being expanded to encompass the right to be heard and represented in the development of products and services prior to their production or establishment; it entails representation not just in government policies, but also in the policies of other economic authorities. **The Right to Redress:** The right to redress is the right to a just resolution of legitimate claims. Since the early 1970s, this right has been broadly acknowledged. It entails the right to receive compensation for misrepresentation or substandard goods or services, and if necessary, free legal aid or an approved means of remedy for small claims should be accessible. **The Right to Consumer Education:** The right to consumer education is the right to acquire the knowledge and skills necessary for a lifetime of informed consumption. **The Right to a Healthy Environment:** The Right to a Healthy Environment means that the consumer has the absolute right to live in a healthy environment in order to live a healthy life. **The Right to Basic:** Requirements stipulates that the consumer has the right to satisfy his basic needs in society. The Indian government incorporated the aforementioned rights in its Twenty-Point Programme. The Consumer Protection Act of 1986 also includes the Consumer Rights number 1 to 6.

WHO IS NOT A CONSUMER ?

The consumer who did not utilise the physician's services is not a consumer. In the **Indian Medical Association v. V.P. Shantha and others**[84] case, the Supreme Court ruled as follows: services offered to a patient by a medical practitioner by way of consultation, diagnosis, and treatment, both medicinal and surgical, would fall under the ambit of service. Consumers as defined by the Act, with the exception of situations in which a doctor or hospital provides free services to every patient or under a personal contract. In accordance with the definition of “service” in the Act, consultation, diagnosis, and treatment, both medicinal and surgical, rendered to a patient free of charge or pursuant to a contract of personal service, by a medical practitioner (except where the doctor renders service) would be considered “service”. Under the concept of “service”, medical services are included. Doctors and hospitals are under the act's

[84] Supra Note 16.

summary jurisdiction for the grant of compensation and other reliefs envisioned by the act to a person who has suffered a loss as a result of negligence or substandard treatment. The service involves consultation, medical and surgical diagnosis and treatment.
Professional men must exhibit a particular basic level of competence and exercise reasonable care in carrying out their responsibilities. Medical professionals have no immunity and can be sued in contract or tort on the basis that they did not exercise reasonable skill and care. Excluded from the scope of the Act are services delivered at a government hospital, health centre, or dispensary where no fees are charged to patients and all patients get free care. In such instances, the registration fee will not constitute payment for the services. The Act does not apply to services provided for free by a medical negligence practitioner affiliated with a hospital or nursing home. The Act does not apply to services performed by a medical office employed in a hospital or nursing home where all services are provided free of charge. The Act does not apply to services delivered at a non-government hospital or nursing home where no fee is made to anyone receiving the service and all patients (rich and poor) receive free care. The Act applies to services rendered at a government hospital, health centre, or dispensary where some services are rendered for a fee and others are provided gratis. The provision of free services to non-paying individuals by such organisations is no longer a basis for seeking immunity from the scope of the Act, and even the recipient of a free service may bring an action against such institutions. The Act encompasses services performed at a non-government hospital or nursing home for which patients are compelled to pay. The Act applies to services performed at a private hospital or nursing home where those who can afford to pay are compelled to pay and those who cannot afford to pay are provided with free care. The provision of free services to non-paying individuals by such organisations is no longer a basis for seeking immunity from the scope of the Act, and even the recipient of a free service may bring an action against such institutions. The Act applies to medical services performed by a physician, hospital, or nursing home for which the patient is reimbursed and indemnified under the terms and circumstances of a medical insurance policy contract.

The Act applies to services performed by a physician, hospital, or nursing home for which the patient's employer reimburses and indemnifies medical expenses incurred by the patient and his family members. The Act does not apply to services performed by a medical practitioner, hospital, or nursing home for which the patient is reimbursed and indemnified pursuant to the provisions of a medical insurance policy contract. Under the concept of “service”, medical services are included. Doctors and hospitals are under the legislation's summary jurisdiction for the grant of compensation and other reliefs envisioned by the act to the person who has suffered a loss due to negligence or inadequacy in service. The service comprises the provision of medical and surgical consultation, diagnosis, and treatment. Professional men should possess a specific minimal level of competence and execute their responsibilities with reasonable care. Medical professionals have no immunity and can be sued in contract or tort on the basis that they did not exercise reasonable skill and care. The payment of a nominal registration fee at the hospital or

nursing home would have no effect on the situation. All patients (rich and poor) receive free care at a non-government hospital or nursing home where there is no price for receiving care. The payment is a nominal sum required just for registration. The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils established pursuant to the provisions of the Indian Medical Council Act does not exclude their services from the scope of the Act. The provisions of this Act shall be in addition to and not in substitution for those of any other legislation now in effect. To date, in all spheres of Indian society, the controversy surrounding the liability of medical negligence practitioners for the consequences of culpable cases of professional negligence and indemnification of the distressed parties has revolved around three phrases in the definition of service under the Consumer Protection Act of 1986: Service of any description, any service free of charge, and personal contact service. The apex court has put an end to the controversy on the aforementioned issues as follows: This entailed a breach of the responsibility to use reasonable skill and care or deviations from the established norms for "standard of care" and behaviour. The calculation of such variations is a challenging legal issue. A breach of duty is committed when the legal level of care is not met. The complainant has sustained harm as a result of this violation of duty. A physician is included in the definition of "service". Similar to this, even though it is a condition of employment that the employer pays for the employee's and his dependent family member's medical care, the services provided to the employee and his family by a doctor, a hospital, or a nursing home would not be provided for free and would instead qualify as "service".

THREE TIER SYSTEM

In accordance with the Act, there will be three levels of quasi-judicial machinery: District Consumer Disputes Redressal Forum at the district level, State Consumer Disputes Redressal Commission at the state level, and National Consumer Disputes Redressal Commission at the national level. Apex Court is the venue for the final appeal. The Consumer Protection Act of 1986 established agencies for the purpose of resolving consumer complaints. These agencies are responsible for delivering decisions on disputes at the District, State, and Federal levels. Every district of the state has a District Consumer Disputes Redressal Forum, also known as a District Forum, which is formed by the State Government. It is the highest-ranking Court in the system. The State Government also formed the State Consumer Disputes Redressal Commission, also known as the State Commission. The establishment of the National Consumer Disputes Redressal Commission by the Central Government. Notification is necessary for establishing the aforementioned assortment of agencies. It is important to note that The Consumer Protection Act requires consumer agencies to have one judicial member and others with adequate knowledge or experience or who have demonstrated the ability to deal with issues pertaining to economics, law, commerce, accountancy, industry, public affairs, or administration, one of whom must be a woman. To deal with issues of medical malpractice requires excessive scientific expertise. It is

recommended that the agencies have at least one medical expert to arbitrate such conflicts. The agencies have the same rights as a Civil Court of Capable jurisdiction under the code of civil procedure 1908 while trying a regular matter, including summoning and compelling the attendance of the opposing party's witnesses and questioning them under oath. Discover and produce any documents or other tangible objects that can be used as proof. Acceptance of proof of affidavits. To obtain an analysis or testing report from the applicable laboratory or any other pertinent source or expert. Issuing any examination commission for any witness.

NEXUS BETWEEN NEGLIGENCE AND LOSS OR INJURY IS NECESSARY

In **Consumer Unity and Trust Society, Jaipur v. Chairman and Managing Director, Bank of Baroda**[85]The Supreme Court of India ruled that compensation cannot be granted if negligence is not established as the cause of the loss or injury, or if negligence is established but loss or injury is not established. Moreover, even if loss or harm and carelessness are demonstrated, compensation cannot be granted unless a third element, namely a connection between the two needs, is also established. It is vital to demonstrate that the loss or damage was caused by the negligence of the opposing party.

In deciding compensation for loss or harm caused by negligence, the consumer forum applies the same rules as in the case of claims for any other sort of negligence. In a recent case, **Nizam Institute of Medical Sciences v. Prasanth S. Dhananka and Others**[86], the Supreme Court awarded Rs. 1 crore in compensation for medical malpractice, the biggest amount given by any Indian court to date. In this case, the complainant sought a total of 7.5 crores in compensation under the following categories:

i. future profits loss,

ii. Present financial hardship,

iii. Prospective financial hardship,

iv. Pain and suffering, the loss of comforts

v. life satisfaction and decreasing life expectancy, and

[85] Consumer Unity and Trust Society, Jaipur v. Chairman and Managing Director, Bank of Baroda, 1995 (2) SCC 150.
[86] Nizam Institute of Medical Sciences v. Prasanth S. Dhananka and Others, 2009 (2) CPJ 61 (SC).

vi. monetary compensation for the complainant's parents and younger brother as well as maternal uncle.

In this case, the Supreme Court imposed damages as follows:

The court observed that the complainant is a well educated, gainfully employed IT Engineer who earns Rs. 28 lacs annually. The nature of his job necessitates that he travel. Now he is confined to a wheelchair and unable to propel himself independently. He requires a driver-attendant. The court opined that 30 years from the date of the award of the commission would be a realistic length of time for him to require a driver-cum-attendant; Rs 2,000 per month for 30 years must be capitalised. Accordingly, it allocated Rs. 7.2 lakh under this heading[87].

In contrast to his claim of Rs. 49 lac for nursing care, etc., calculated on the basis of a nurse's monthly wage of Rs. 4375.00 for 600 months, the Supreme Court awarded Rs. 4000.00 per month for 30 years, for a total of Rs. 14,400,000.00. It granted Rs. 3000.00 per month for 30 years towards physiotherapy, etc., totaling Rs. 10,80,000.00 Keeping in mind the need for continuous medical aid involving expensive medicines and other materials and loss of future earnings, the Court awarded a lump sum of Rs. 25 lac under each of these two heads, totaling Rs. 50 lac. The Supreme Court granted the claimant ten lakh rupees for his agony and suffering. One crore and five thousand rupees were awarded in total.

In the event of the family breadwinner's demise, the Supreme Court[88] ruled that it would be safe to calculate compensation using the multiplier technique, which makes use of an appropriate number of years' purchase.

In **City Hospital v. Vijay Singh Pal & Another**[89], at issue is the compensation awarded by the District Forum due to the medical negligence of the attending physician; the complaint has lost his 24-year-old son. The deceased was a Photograph Reporter for the Dainik Jagran Press in Haridwar, thus he must have had a salary. Taking into account the young age of the patient and the fact that he was not suffering from a serious illness or condition, as well as his future prospects, we are of the opinion that the District Forum did not award excessive compensation. The District Forum properly accepted the consumer's complaint against the challenged order, which does not require intervention. The appeal's lack of merit justifies its dismissal.

[87] Ibid.
[88] Global Motors Service Ltd. v. R.M.K. Veluswamy, AIR 1962 SC 1.
[89] City Hospital v. Vijay Singh Pal & Another, First Appeal No. 465/2010 SCDRC U.K. Dehradun, 2018.

LIABILITIES OF DOCTORS FOR MEDICAL NEGLIGENCE

Medical Negligence or professional negligence relates to the irregular conduct of the doctors in discharging his/her professional duties. In the practice of the profession of medicine and surgery as such the inherent commercialization of various branches which are rendering negligence to the community. Duly qualified medical professional, i.e. a doctor has a right to practise medicine, surgery and dentistry by registering himself with the Medical council of the State of which he is a resident. The State Medical council has the power to warn, refuse to register /remove from register the name of the doctor who has been sentenced by any court for any non-bailable offence found to be guilty of infamous conduct in any professional misconduct which may be brought before the appropriate Medical Council State/Medical Council of India). If a registered practitioner is found guilty of significant professional misconduct, the relevant Medical Councils have the authority to impose whatever sanction is judged appropriate or to direct the permanent or temporary removal of his name from the register. No action may be taken against a medical practitioner until he has had the opportunity to be heard in person or through an advocate.

In its historic decision in **Indian Medical Association v. V.P. Shantha and others**[90], the Supreme Court ruled in favour of the plaintiffs. The legal situation regarding the applicability of The Consumer Protection Act to medical practitioners, hospitals/nursing homes, including government hospitals and charitable institutions, has been settled by the term Medical Negligence. The Act does not cover services performed in a non-government hospital or nursing home when all patients are not charged. Under the Act, the patient receiving free services is also a consumer. Several reports of personal injuries and deaths have already been attributed to medical lapses, which if accepted might be considered medical negligence. Due to these cases, the government has approved the necessary loss to give the injured victim the right to recover, and as a result, it is crucial to understand the fundamentals of medical negligence and how injured victims can pursue legal action with the assistance of a realistic and trustworthy medical negligence attorney.

A medical negligence claim often involves two competing Bolam Test applications. In **Bolam v. Frien Hospital Management**[91], three safety guidelines for medical professionals were established: - (1) the physician must possess appropriate skill in that field of medical practice; (2) the physician must exercise reasonable care in the performance of his or her skill. (3) Mere negligence is insufficient to establish a claim for compensation against him; the negligence must have a direct link to the harm caused to the complainant. If the injury has no direct link to negligence, there is no right to compensation.

[90] Supra note 16.
[91] Bolam v. Frien Hospital Management, (1957) 2 ALL ER.

According to Laxman Balkrishna Joshi[92], "the practitioner must bring a reasonable amount of competence and understanding to his work and exercise a reasonable amount of care." The law mandates neither the highest nor the lowest degree of care and competence, based on the individual circumstances of each case. The doctor has no option in selecting criminal punishment and is required to take action or refrain from action.

THE PATIENT'S RIGHT AS CONSUMER

In the interest of a healthy doctor-patient relationship, a patient should be aware of his consumer rights: Patient has the right to be told all the facts about his disease and to have his medical records explained. The patient has the right to be informed of all risks and adverse effects associated with the prescribed medication. The patient has the right to ask his physician about any of these elements without reservation. When undergoing a physical examination, he has the right to be treated with deference and respect for his modesty. The patient has the right to know his physician's credentials. If he is unable to assess them himself, he should not hesitate to consult a person who can explain. He has the right to absolute confidentiality regarding his disease. If he has doubts about the treatment provided, especially if a surgery is suggested, he has the right to consult with another doctor. He has the right to be informed in advance of an operation's purpose and potential hazards. If this is not possible due to his unconsciousness or other circumstances, his closest relatives must be informed prior to obtaining their agreement for the operation. If he must be released or transferred to a different hospital, he has the right to be informed in advance and to choose his own hospital or nursing home in consultation with his physician. He is entitled to receive his case documents upon request.

DOCTOR - PATIENT CONTRACT

As long as a patient's written informed consent is acquired, the doctor-patient contract is virtually entirely assumed. While a physician cannot be compelled to treat anyone, he assumes some duties for his patients. The definition of contract is an agreement between two or more parties. This pertains to duties to do or not do a certain action. Contracts can be implicit or explicit. An implied contract is one that is inferred from the behaviour of the parties and arises when one party offers services under conditions indicating that he expects to be compensated and the other party uses those services despite being aware of those circumstances. There are two types of express contracts: oral and written. Oral agreements are made by uttering or declaring its terms openly; written agreements are made by writing them down. A doctor's first-aid in an emergency does not constitute an implied contract. To get a job, he does a pre-employment physical for a

[92] 1969 SC 128.

potential employer. For life insurance purposes, he conducts an examination. The trial court appoints him to interrogate the accused for whatever reason they see fit. He conducts an investigation at the request of a lawyer for legal reasons. As stipulated in the doctor-patient agreement, the doctor must continue to treat the patient in question with reasonable care and skill, refrain from performing any procedures beyond the scope of his training, and only reveal personal information about the patient when mandated by law.

Discontinuity of treatment : The moment a doctor agrees to examine a case, he or she assumes responsibility for the patient. Because of this, he must never abandon his patient until he or she has recovered from the illness for which treatment was initiated; when the patient/attendant does not pay the doctor's fee (in case of a private practitioner); when patient/attendant consults another doctor (of any branch of medicine) without informing the first attending doctor; and when patients do not cooperate and follow the doctor's instructions. When the doctor has given adequate notice (orally or in writing) for ceasing treatment and the doctor is sure that the sickness is fictional, the patient is placed under the responsible care of others, such as a senior doctor or unit head. Treatment for the patient has been shifted to a different facility.

Reasonable Care : A doctor who dispenses his own medications must use clean and appropriate devices and supply his patients with appropriate and suitable medications. If not, he must write the prescriptions legibly, employ standard abbreviations, and include complete directions for the pharmacist. In the local written language, he should provide complete instructions for medicine administration to his patients. In the following instances, he must recommend or insist on a consultation with a specialist: (l) Which may be life-threatening, (2) when the case is concluded, (3) when the question of whether a surgery or amputation is necessary arises (4) operating on a patient who has been the victim of a violent crime, (5) undertaking a surgery that may harm a patient's intellectual or reproductive capabilities. (6) where there is a suspicion of poisoning or other criminal act; (7) when requested by the patient/attendants; and (8) when no one is available to provide informed consent. In accordance with Sections 88 and 90 of the Indian Penal Code, 1860, for the purposes of clinical examination, diagnosis, and treatment, agreement may be given by any individual who is cognizant, of sound mind, and at least 12 years old.

Reasonable Skill[93] : The level of reasonable talent possessed by is the average level of skill possessed by his professional peers of the same position as himself. When multiple options are available, the optimal mode of therapy may vary. When the patient is advised that “medicine is not an exact science”, an implied contract exists between the doctor and the patient. I will rely on my expertise and best judgement, while you assume the possibility that I am mistaken. I offer no assurances" The doctor must not do procedures beyond his ability level, which is determined by his credentials, training, and experience. Before starting any particular operation or therapy for a challenging illness, the physician must always confirm that he is adequately qualified. A

[93] Dr Jagdish Singh & Vishwa Bliushaii, “Medical Negligence Compensation”, Page7, chap.l ,Third Edition2007 Bharat Law Publications.

physician who is insufficiently trained or qualified should not administer anaesthesia or perform surgery on a patient, to provide an example.

DUTIES OF A DOCTOR [94]

The doctor will be judged based on the principles of good medical practice and the standards of competence, care, and conduct expected in all aspects of his professional work..If serious problems arise that call his conduct into question, they will be evaluated on the basis of the various codes of Ethics and Declarations.

The duties can be summed up as follows: Duties to the patient, to the public, to law enforcement, and to uphold professional ethics. The physician must not conceal criminal conduct, which includes substandard care. Patient education, informed consent for therapy, and emergency care. Doctors are obligated to warn patients of the risks associated with every recommended medical operation or therapy.

Duties to public : In addition to providing care in a nursing home, doctors should participate in health awareness programs such as health education, medical assistance during natural disasters and train accidents, and reporting of births, deaths, infections, diseases, and foodborne illnesses, among others.

Responsibility toward Law Enforcement, Police, Courts, etc., All cases of poisoning, bums, injury, unlawful abortion, suicide, homicide, manslaughter, grievous injury and its natural sequelae such as tetanus, gas-gangrene, etc. must be reported to the authorities by the doctor. This includes automobile collisions, fractures, etc.

Duty not to Violate Professional Ethics: The doctor should not associate with an unregistered medical practitioner or permit him to practice a specialty for which he is unqualified; not engage in self-promotion, not to issue false certificates and bills, not to write secret formulations, not to refuse professional service on the basis of religion, nationality, race, party politics, or social status, not to attend a patient while under the influence of alcohol; and should not operate a Medication Dispensing Business. No fee sharing (dichotomy); confidentiality of patient/attendant information; non-disclosure of colleague information. Not to be disclosed to the patient's employer, insurance company, or parents of a minor child without the patient's approval. Even in court, this information is only disclosed by court order. Recovering any money (in cash or kind) other than a proper professional fee for services supplied to a patient, even with the patient's knowledge.

[94] Available at www.nmc.org.in/rules-regulations/code-of-medical-ethics-regulations-2002/

Duty not to do anything Illegal or Hide Illegal Acts: It is the doctor's responsibility to refrain from performing unlawful abortions and sterilizations. provide death certificates when the reason of death is unknown, do not notify the police in the event of an accident, bums, poisoning, suicide, grievous injury, or gas gangrene, and do not contact the magistrate to record a dying declaration. Unauthorized, unneeded, and uninformed surgery or medical treatment; Sex determination (in certain states).

Duty to each other : A physician must pay his professors respect and demonstrate gratitude. He should treat his coworkers as he would like to be treated by them. Even if he has been brought in as a specialist, he should provide a case summary when referring a patient to another physician. The second physician should transmit his views directly to the first physician by letter/telephone/fax. Every physician must adhere to the guidelines established by the World Medical Association. Contrary viewpoints should not be made public. The physician must divulge any and all information that may be required for an accurate diagnosis and treatment. When a patient is transferred to another doctor for continued treatment, the doctor is required to report any violations including drugs, food, rest, exercise, or any other pertinent/necessary factor.

Duty of the hospital and doctor to obtain consent of a patient : For the purposes of diagnosis, treatment, organ transplant, research, disclosure of medical information, teaching, and medicolegal objectives, there exists a duty to get prior agreement from living patients. Regarding the deceased in terms of pathological post mortem, medico-legal post mortem, organ transplant (for legal heirs), and medical record disclosure, it is crucial to secure the patient's informed permission.

CONCEPT OF INFORMED CONSENT

In both medical and legal parlance, this is referred to as "informed consent." If a doctor fails to obtain informed permission from a patient and the patient is hurt, the patient may have grounds to file a medical negligence lawsuit against the doctor. What is Meaningful Consent?[95] The majority of medical procedures and treatments include risk. It is the doctor's obligation to inform the patient about a particular treatment or procedure so that the patient can make an informed decision about whether or not to undergo the treatment, procedure, or test. This process of providing the patient with pertinent information and obtaining consent for a particular medical operation or treatment is known as informed consent. Typically, doctors require patients to sign a permission document outlining the potential hazards of a particular therapy or operation. However, the mere act of signing a document does not necessarily indicate that the patient gave

[95] Dr Jagdish Singh & Vishwa Bhushan, "Medical Negligence Compensation", Page 9, Third Edition 2007, Bharat Law Publications Syn. 1-9 .

informed permission. The physician must describe the procedure and associated hazards with the patient. And the patient must, to the greatest extent feasible, comprehend the hazards he or she confronts. In the law of medical negligence, whether or not a patient gave his or her informed consent to a treatment is significant. If a doctor fails to obtain a patient's informed consent and the patient would not have chosen the treatment had he or she been aware of the dangers, the patient may be able to sue for medical negligence.

POSITION OF INFORMED CONSENT IN THE US

In the United States[96], the concept of informed consent had been identified earlier. Not until the 1972 landmark decision **Canterbury v. Spence** was the legal doctrine[97] of informed consent properly explained. The Canterbury cases are a landmark in the history and evolution of the pretreatment duty to reveal medical information, partly because they addressed a development that had taken root at the turn of the century but had begun to result in confusion and inconsistency among the states.

Robinson J. further concluded in **Canterbury v. Spence** that "the patient's right to self-determination determines the scope of the responsibility. In addition, it established the following aspects of the law of consent: In the unlikely event that the medical communities contain any meaningful "professional consensus on communication of option and risks information to patients is open to serious doubt., Physicians are now required to disclose information if it is reasonable to do so".

1) The fact that "the multitude of patient variables makes each case so unique that its omission can only be rationally justified by its distinct circumstances".
2) The danger that "no custom at all may be interpreted as an affirmative custom to be quiet".
3) The very serious threat that expects "many states to merely share their personal thoughts that they or others would (disclose) in particular circumstances" and
4) The inevitability that a professional norm would "confer exclusive authority over revelation to physicians".

Canterbury v. Spence was a rather obvious judicial response to malpractice developments that had tentatively taken root in the United States at the turn of the twentieth century but had proceeded in a chaotic and incoherent manner until that important decision. Judge Cardozo ruled in **Schloendorff v. Society of New York Hospital**[98] that "every human being of adult years and

[96] Rather ironically, the phrase informed consent was coined in an amicus curia (or friend-of- the-Court brief) submitted by the American College of Surgeons to the California Court of Appeal in Salgo v. Leland Stanford, Jr. University Board of Trustee 154 Cal.App.2d560, 317. p. 2d 170.
[97] Canterbury v. Spence, 464 F. 2d 772 (DC. Cir. 1972).
[98] Schloendorff v. Society of New York Hospital, 105 N.E. 92, 211 N.Y. 125.

sound mind has the right to select what will be done with his own body" and that a surgeon who conducts a surgery without his patient's consent is liable for damages. In **Wall v. Brim**[99], the U.S. Supreme Court ruled once more that "a surgeon may not execute a surgery of a different kind than the one consented to or one with risks and outcomes not anticipated". Some courts have construed mistakes or unintended deviation from consent terms as examples of unlawful treatments (resulting in liability for battery) without establishing the physician's intent to do so. Others viewed such situations as possibly or actually constituting either battery or negligence.

The Washington Court of Appeals ruled that the court does not require expert witness when the necessity of the information is clear to a layperson[100]. James, J., further acknowledged that the opinions of medical experts will be required when doctors attempt to justify non-disclosure on the basis of necessity (urgent circumstances) or therapeutic privilege, both of which acknowledge that "the patient's right to know is vastly outweighed by the material circumstances giving rise to the privilege". Numerous states have enacted legislation to ensure that patients receive specific information for defined therapies, such as sterilisation, electro convulsive therapy, and breast cancer treatments, as well as for the delivery of particular medications. These regulations did not address financial incentives, but rather targeted compliance by physicians, so that patients would only receive particular treatments with full knowledge of their benefit-risk ratios.

In several North American states, informed consent's acceptability in other common law jurisdictions appears unaffected. In its seminal decision in **Reibl v. Hughes**[101], the Supreme Court of Canada presented a comprehensive analysis. Prior to this judgement, the law had mandated stringent disclosure requirements, the violation of which had resulted in a finding of violence. In **Reibl v. Hughes**[102], however, the Supreme Court of Canada linked itself with the negligence approach and distanced itself from informed consent as a legal concept since it tends to blur the legal distinctions between trespass and carelessness. Laskin C.J. proposed that "battery action should be restricted to cases where the defendant intervenes without a clarity beyond a patient's consent", and that "the duty to disclose medical information to patient more properly" arises as the breach of an anterior duty of care, comparable in legal obligation to the duty of due care in carrying out the specific treatment to which the patient has consented. The dissemination of information requires no particular skill[103]. According to Gaudron J., this is typically a question of "common sense" that does not require technical competence beyond the court's comprehension. In **Truman v. Thomas**[104], the California Supreme Court acknowledged a duty on the part of physicians to seek informed consent and held a gynaecologist accountable for the death of a woman who had declined a cervical smear that would have indicated late-stage cancer. Bird C.J. stressed the unequal nature of the doctor-patient relationship, the patient's

[99] Wall v. Brim, 138 U.S.R. (1943) at p.138.
[100] Hunter vs. Brown 4 Wash App 899, 900 U S R (1971) 1162 .
[101] Reibl vs. Hughes,(1980)114 U S R. p.1.
[102] Id.
[103] Kinny vs. Lockwood, (1931) 4 U S R. p.1.
[104] Truman vs. Thomas, (1980)USRp.611.

reliance on the physician for information and clarification, and the physician's consequent duty to ensure that clinical decisions are not made in isolation.

The American experience demonstrates that lawyers and doctors have overwhelmingly concluded that the primary function of consent is protection against liability.

THE DUTIES AND RESPONSIBILITIES OF AN EXPERT WITNESS

In cases of medical malpractice, expert opinion plays a vital role. Almost all medical negligence claims involve medical expert testimony. Without it, the judge will dismiss or quickly resolve the case. This is due to the fact that the courts have determined that the technical information a jury must consider in a medical negligence case is too difficult to decipher without assistance. The jury is not obligated to accept the expert's view, but it must take it into account while weighing the evidence. Finding an expert to testify on behalf of the patient is therefore a crucial initial step in the majority of medical negligence cases. In addition, it is essential to understand that medical specialists are often expensive and difficult to locate. A medical expert will address the two essential issues in any instance of medical negligence: The physician adheres to the standard of care for physicians in the same position. The patient is harmed by the physician's deviation from the standard of treatment. The medical expert will testify to what a typical, competent physician would have done in the contested situation. The expert will subsequently render a judgement as to whether the defendant doctor met the standard of care. There are no hard and fast rules governing the quality of care in any specific profession; therefore, the expert may rely on evidence such as medical publications or medical board guidelines. The jury is not required to base its conclusion solely on the publications or the expert opinion. An expert must also testify as to whether the patient was harmed by the doctor's breach of the standard of care. In any given medical condition, there are frequently other factors at play, and the doctor's inexperience may not have directly caused the negative outcome. Consequently, the expert must explain to the jury the likelihood that the doctor's ineptitude caused the damage. How quickly do you need a medical professional? Before the trial begins, both parties must retain experts and provide the substance of their testimony to the court. If either side fails to do so by the court's deadline, the court will rule in favour of the opposing party prior to the trial. The exception is if the issue falls into a category where an expert opinion is not required. Many states also require the plaintiff to obtain the opinion of a medical professional before filing a lawsuit. This opinion is typically expressed via an expert affidavit (written testimony) or by submitting the available facts to a panel of medical specialists.

WHO IS QUALIFIED TO BE A MEDICAL EXPERT ?

A physician practising medicine at the time he or she delivers testimony in the litigation, or a physician who was practising medicine at the time of the care or treatment upon which the claim

is based; and A physician qualified by training or experience. State regulations regarding who may testify as a medical expert vary. Typically, if the lawsuit involves medical misconduct within a particular field, the patient must hire a specialist as his expert witness. A specialist may be qualified by a mix of academic and practical experience or board certification. If the issue concerns general medicine, a greater variety of physicians will have the appropriate expertise and education to qualify as expert witnesses. Some states have unique restrictions aimed to discourage "career" expert witnesses, mandating that the vast majority of an expert's time be spent on medical practice. When an expert testified that no negligence had occurred, the complaint was dismissed.

DON'TS FOR DOCTORS

The first and foremost reason for a doctor is that, even if the patient is a close friend or relative, the doctor should not prescribe without first evaluating him. Doctors are prohibited from examining female patients without a female nurse or attendant present, especially during genital and breast examinations. The physician shall not insist that the patient provide a medical history or be evaluated in the presence of others. He has the right to privacy and discretion. The physician must not allow religion, nationality, race, party politics, or socioeconomic standing to come between him or her and the patient. It may not be fair for a physician to presume that a patient is telling the truth when the symptoms contradict what the patient or attendant is reporting. A physician cannot smoke while examining a patient. Doctors are prohibited from examining patients who are ill, fatigued, or under the influence of alcohol or other intoxicating substances. The physician should not be overconfident. The physician shall not administer a medication or perform a surgery if he cannot adequately explain its indication. The physician may not prescribe or administer a controlled substance, such as Anlagen, Oxyphenbutazone, etc. Doctors are prohibited from prescribing sulphonamides without first determining if the patient is allergic to sulfa medications; any such inquiry must be included in the prescription/hospital record. Must not over prescribe an excessively big dose for too long. The doctor neither underprescribes nor over prescribes the necessary medicine dose and treatment duration. The physician may not prescribe numerous medications. This prescription could be the result of an incorrect diagnosis or other factors. Polypharmacy increases the likelihood of medication interactions. Doctors are prohibited from writing instructions or ordering pathological tests on separate slips. The physician must not permit replacements. The physician must refrain from writing self-serving notes. A self-serving note is one in which the factual substance or overall tone suggests that the writer's primary objective was to shield himself against a subsequent complaint, rather than to provide an authentic record. The physician must not exceed his level of competence. Doctors' and nurses' competency is determined by their qualification, training, experience, and the hospital's competence. In addition to the competence of its doctors and nursing staff, a nursing home is defined by the availability of various equipments in working order and back-up support, such as the ability to handle cases of accident/emergency involving a severe reaction to drugs, anaesthesia, etc., and the availability of resuscitative equipment, etc.

The doctor may not participate in MTP if he or she lacks the required qualifications. The physician may not do MTP at a hospital that is not accredited for that purpose. If an equally effective oral medication is available, the physician should not prescribe injectables. Unless there is a genuine documented emergency, the doctor may not operate on both eyes simultaneously. In the case of elective surgery on both eyes at the same time, be particularly cautious and document all pre-operative tests. Doctors should not conduct radial keratotomy on adolescents or patients with unstable myopia. If the patient's general health state is poor, the doctor must not do surgery or a procedure. Document this feature. When unsure of what to do and why, he should counsel his superior / specialist / colleague. If the patients / attendants wish to depart against medical advice, the doctor shall not object. It is their privilege. Document this effectively. The doctor must not ignore a nighttime nurse's request for assistance. Almost certainly, a true emergency exists. The physician must not order an inquiry unless the outcome is likely to assist him in directing treatment or alter what he informs the patient. Modern diagnostic tests must not replace the physician's clinical judgement. They can only augment it at best. Always consider the cost-benefit ratio prior to rushing to do these tests. Before performing a test with a high rate of false positive or false negative results, inform the patient of this fact. The doctor may not diagnose a problem as "functional" until he has accurately ruled out all other potential causes. The doctor must not discuss any other topic with an angry patient until he learns the cause of his anger. Then, take the time and steps necessary to calm him down. Doctors are prohibited from reprimanding the caregivers of gravely or terminally sick patients. The physician may not challenge anyone. The physician cannot deny the patient's right to know about his illness's diagnosis and treatment. Doctors must not withhold information from terminally sick patients, regardless of how harsh or distressing it may be.If time permits, it must be communicated with compassion and gradually. The physicians and, in particular, their aides must practise the art of sensitive communication. It would be prudent to confide in family members, close relatives, and friends, since this would frequently facilitate acceptance. The doctor must withhold unpleasant news from the patient/attendant until he is as certain as feasible that the finding is accurate. The physician must not depart at the time of death. There is a propensity, particularly among senior physicians, to leave when their presence and expertise are most required. The physician must convey condolences and sympathy to the bereaved without hesitation. The doctor must not forget to provide genetic counselling to couples and parents with a known family history or children with genetic abnormalities, such as Thalassemia, Haemophilia, etc. The doctor must not issue a death certificate until he has personally confirmed the death. If the doctor discovers a secret in the course of his professional obligations, he must keep it confidential unless the Code of Medical Ethics specifies otherwise. There are a few exceptions to this rule of thumb. If the patient consents to safeguard a healthy individual from a communicable disease, the doctor's obligation to society takes precedence. The information is required by law, as in the case of communicable diseases. In a court of law on the court's order for the purposes of medical research, after receiving approval from the appropriate authority.

The physician must not refuse HIV/AIDS patients medical care and must take all required safeguards. The doctor is prohibited from informing the patient that he or she is HIV-positive unless confirmation test results are obtained. The physician may not issue a fraudulent medical certificate. The physician is prohibited from providing false, deceptive, or inappropriate reports, records, etc. The physician may not deny the patient's right to be examined and get an explanation of his bill, regardless of the source of payment, which may be the government or the patient's employer/insurance. The physician may not deny the patient's right to know about hospital restrictions. Medical negligence claims based on misdiagnosis or delayed diagnosis are proven by comparing the treating physician's actions (or inactions) to how other competent physicians in the same profession would have handled the situation. If a reasonably skilled and competent physician would not have made the diagnostic error under the identical circumstances, then the treating physician may be negligent. The physician should not purchase expensive, advanced equipment for the purpose of prestige alone. It may encourage engaging in malpractice. The doctor's primary responsibility is to deliver care commensurate with his degree of skill.

PUNISHMENT AND DISCIPLINARY ACTION UNDER INDIAN MEDICAL COUNCIL REGULATIONS

(Professional Conduct, Etiquette and Ethics) 2002 :

It must be understood that the above-mentioned examples of offences and professional misconduct do not constitute and are not intended to constitute an exhaustive list of acts that warrant disciplinary action, and that by issuing this notice, the Medical Council of India and/or State Medical Councils are not precluded from considering and dealing with any other form of professional misconduct by a registered practitioner. Circumstances may and do occasionally exist in which questions of professional misconduct may emerge that do not fall into any of the aforementioned categories. Every precaution must be taken to ensure that neither the letter nor the spirit of the die code is breached. In such cases, as in all others, the Medical Council of India and/or State Medical Councils must evaluate and make a determination based on the evidence presented to them. It is made clear that any complaint regarding professional misconduct may be taken to the relevant Medical Council for Disciplinary action. Upon receiving a charge of professional misconduct, the relevant Medical Council would conduct an investigation and afford the licensed medical practitioner the option to be heard in person or via pleader. If a medical practitioner is found guilty of professional misconduct, the appropriate Medical Council may impose the punishment judged suitable or direct the removal of the practitioner's name from the register, either permanently or for a specific term. The removal from the Register must be prominently reported in the local press and in the publications of other Medical Associations/ Societies/ Bodies. If the penalty of removal from the register is for a limited time, the relevant Council may additionally require that the deleted name be reinstated in the register upon

expiration of the term for which it was ordered to be removed. Within six months, a decision will be reached regarding the complaint against the physician.

During the pendency of the complaint, the relevant Council may prohibit the physician from practising the scrutinised procedure or practice. Professional incompetence shall be evaluated by a peer group in accordance with Medical Council of India-prescribed norms.

CONCLUSION

The Consumer Protection Act is crucial for both buyers and sellers. It strives to defend and advance the rights and interests of consumers. The consumer protection legislation of 1986 included gaps in information, making it necessary to update it and introduce a new act of consumer protection in 2019. A number of amendments were made to the new statute in 2019 to simplify and expedite the consumer dispute process. The new act of 2019 is crucial in the present era of digitalization since it expanded the definition of customers and incorporated the idea of e-commerce. Additionally, it offers distinct and comprehensive provisions for everything relating to consumers' interests. The government passed the law on August 9th, 2019 with the goal of rapidly and effectively resolving consumer complaints and providing high-level protection for consumer interests.

The Consumer Protection Act of 1986 didn't include internet transactions, teleshopping, etc. in its definition of a consumer. The "new act 2019" of Consumer Protection encompasses all products and services, including telecom and home construction, and all means of transactions (online, offline, teleshopping, direct marketing, etc.), but excludes free and personal assistance.Product Liability wasn't included in the former Act. The newer act offers consumers the power to sue manufacturers, service providers, and sellers for faulty goods and services.In 1986, there was no consumer complaints authority. Section 10(1) of Act 2019 created the Central Consumer Protection Authority. Before, District, State, and National Commissions had limited pecuniary jurisdiction. District commissions can spend up to Rs 20 lakh, state commissions between Rs 20 lakh and Rs 1 crore, and national commissions beyond Rs 1 crore. In a later statute, the Commissions' financial cap was raised. District commission limit is up to 1 crore, State Commission limit is 1-10 crore, and National commission limit is beyond 10 crore. Again in the before Act, there was no provision to help customers settle disputes faster. Part V of the 2019 Act added a provision to facilitate quick dispute resolution through mediation. Previously, a person who did not follow Commission directives may be imprisoned for one to three years or fined between 2,000 and 10,000 rupees. From 2019, he faces up to three years in jail, a fine of at least Rs 25,000 up to Rs 1 lakh, or both.In the 1986 legislation, there were no unfair contract restrictions, but the 2019 act established the notion, which changes consumer rights and contracts. Identifies six unfair contract clauses.

CHAPTER - 5

CONCLUSIONS AND SUGGESTIONS

Professional Negligence as opposed to Medical negligence, as the name implies, pertains to the medical profession and is the outcome of improper conduct on the part of a medical practitioner or associated service while performing professional duties. This study explains the reasons for the widespread use of The Consumer Protection Act, 2019 which is the best instrument to protect the interests of consumers and was enacted to provide a swift remedy, save them from a protracted legal process, and obtain compensation for medical negligence. The present analysis reveals that India is currently experiencing three fascinating revolutions in the delivery of healthcare. The first pertains to the establishment of medical facilities and the supply of medical services. The second relates to consumer knowledge, the right to seek quality care, and the right to seek justice. Whereas the third one addresses the government's attempts to enhance professionalisation and quality patient care through the enactment of legislation, strengthening of legal apparatus, and implementation of consumer redress procedures. There is no medical law to address medico-legal issues. The initial determination was to incorporate medical services inside the Consumer Protection Act of 1986 and now in the 2019 Act. The April 1991 decisions of the National Consumer Disputes Commission in the case of **Vasantha P. Nair v. Cosmopolitan Hospital**[105]and the Supreme Court decision in **Indian Medical Association v. V.P. Shantha and others**[106] were significant victories for consumers. The results of the inquiry indicate that the Indian government has passed numerous Acts in light of its constitutional commitment to equality, justice, and dignity. The significance of doctors' medical negligence towards the patient is reinforced by the current findings. In actuality, tremendous progress has been made in controlling public health issues, reducing newborn and maternal mortality, and enhancing the quality of life. There has been a great increase in the number of new hospitals in both urban and rural areas, as well as the adoption of modern technologies in health care. Consequently, health care has become a huge industry. Under the Act, about 450 District and state level Consumer Fora have been established to expedite the resolution of disputes. Under the Consumer Protection Act, civil proceedings that formerly took 10 to 12 years are now resolved within 90 days. Obviously, a few typical cases may take longer than the allotted 90 days due to the delay in obtaining expert testimony and laboratory reports. In practice, the Consumer Protection Act applies when there is a failure in service quality. In contrast to other industries, the healthcare industry does not view each patient as a separate product. In any profession or industry, quality management increases consumer satisfaction and decreases consumer complaints and litigation. The key to success is providing effective service.

[105] Vasantha P. Nair vs. Cosmopolitan Hospital,(1992) CPJ 302 (NC).
[106] Supra Note 16.

The verdict in the matter of **Jacob Mathew v. State of Punjab & Anr**[107] grants doctors three significant rights. First, the police will not press charges against a doctor accused of medical negligence without receiving an appropriate medical opinion, preferably from a government-employed physician. Second, criminal courts will also be required to obtain a medical opinion before hearing a private complaint against a physician. Third, police cannot routinely arrest a doctor accused of carelessness. As a result of the ruling, criminal procedures against doctors are no longer intimidating, and doctors should have no reason to fear the police in cases of medical negligence. This ruling may be presented to the police if they harass a doctor in a case of medical malpractice. If a police officer fails to comply with Supreme Court orders, he or she may be held in contempt. In fact, this ruling and its ramifications have been disseminated to police in the majority of Indian states by the respective state governments. Existing laws, such as the Law of Torts and the Indian Penal Code, which provide for legal action in the event of medical negligence have certain well-documented flaws.

SUMMARISING THE FINDINGS (RESEARCH)

1. The most evident conclusion that can be drawn from this study is that various concerns pertaining to medical practice and the Consumer Protection Act were examined.

2. These findings indicate that physicians have a number of ethical, moral, and legal obligations when doing their jobs. As medicine is a very respected and noble profession, it is crucial that every doctor understands the nature of his or her responsibilities and then fulfils them to the best of their ability.

3. The results of this study indicate that when a person's life is in jeopardy, the average individual views the doctor as his or her only hope.

4. Those who belong to the medical profession are doubly fortunate, as they earn a fair income and the eternal gratitude of those they have the honour to serve and care for.
   This is one of the most important conclusions of this study.

5. That the members of this noble profession recommend realistic and effective steps at their own level to curb malpractices, so that the Consumer Protection Act becomes appropriate and necessary.

6. In its landmark judgement in **Indian Medical Association v. V.P. Shantha and others**[108], The Supreme Court has, in a well-reasoned judgement, endorsed the applicability of the Consumer Protection Act to the members of the medical profession

[107] Supra Note 44.
[108] Supra Note 16.

and held that the services rendered to a patient by a medical professional by way of consultation, diagnosis, and treatment, both medical and surgical, would fall within the ambit of " services". This judgement was recently questioned by the incorporation of The Consumer Protection Act, 2019 but the Court in its recent judgement said that medical services fall under the definition of "Consumer" under the 2019 act.

IMPORTANCE OF THE RESULTS (RESEARCH CONTRIBUTION)

This topic can be further studied and at the same time offer some contributions to the existing body of knowledge.

1) The most obvious conclusion to be drawn from this study is that attorneys should post articles about medical negligence law on their websites, in newspapers, or in journals.
2) The Indian Medical Council is required to educate the public about medical negligence and their liability if doctors are irresponsible through seminars.
3) The Law pertaining to the medical negligence of doctors, standard literature on medical law must be published.
4) Future physicians are familiarised with the legal difficulties inherent to medical practice from the moment they are registered.
5) Through the media, press, platform, and other audio-visual aids, the public is made aware of incidences of medical malpractice.

SUGGESTIONS

This study was not intended to analyse factors linked to medical malpractice, as no doctor provides expert testimony on a fellow doctor and carelessness cannot be proven. Without expert testimony, the consumers do not receive compensation because the case cannot be proven. The present study indicates that government institutions would develop centres of medical law and ethics to give chances for teaching and conducting research on medical issues and situations involving legal and ethical considerations. Despite the fact that I am not an expert in the field, the following recommendations are made to the Policy Makers in light of the research conducted on the legislation of medical negligence in the present study. Collectively, the results propose the following recommendations that are given to policymakers regarding the law of medical negligence, which must be changed by the legislature in order to reduce the burden of proof on the complainant.

i) Before accepting a private complaint against a physician, criminal courts will also be required to obtain a medical opinion.

ii) The government should take unregistered clinics and hospitals with extreme severity.

iii) The government should offer seminars regarding medical malpractice.

DEFICIENCY IN LEGAL SYSTEM

Under the Consumer Protection Act of 2019, the definitions of terminology such as SERVICE, CONSUMER, etc. are ambiguous and have only a marginal bearing on medical negligence. It also lacks nomenclature, which might cause confusion during consumer forum trials. The composition of district, state, and national dispute Redressal commissions makes no mention of a general physician's participation. This can lead to unjust judgments, as the commission lacks a foundational understanding of medicine. The liberty afforded to physicians to refuse to treat a patient can be damaging in emergency situations. In general, no medical practitioner or physician will assert such rights, but there are rare instances in which doctors may do so, which is contradictory to article 21, which protects the right to life and personal liberty, which includes the right to healthcare.

It is reasonable to assume that in the year to come, the Consumer Protection Act of 2019's jurisdiction, powers, and apparatus will be widened and made more strict, as this bill is a stepping stone towards giving the law teeth. The absence of court fees in these procedures may have fostered frivolous litigation and ambulance chasing. Patients should remember that physicians are not always on the receiving end of bogus complaints. Also, physicians should practice their beautiful art without unwarranted fear of prosecution. Medical Negligence of doctors/Medical Practitioners is not that simple to show; the complaint must present sufficient proof in the form of recorded evidence before the court of law. Medical negligence is tough to show in court since it is extremely difficult for the complaint to provide sufficient evidence. Courts have always attempted their utmost when issuing judgements under this heading so that the plaintiff receives remedy.

In order to avoid delays in handling complaints within the stipulated time frame, the National Commission must adopt the following measures:

a) By exercising administrative control, it is possible to ensure that qualified individuals are appointed as members at all levels, so that the composition of the Forum or the Commission is not delayed due to a lack of members.
b) It would ensure that the prescribed time limit for filing defence versions and disposing of complaints is strictly adhered to; c) It would ensure that both the complaint and the defence version are accompanied by the documents and affidavits upon which the parties intend to rely; d)In cases where cross-examination of the persons who have filed

affidavits is necessary, suggested questions of cross-examination be given to the persons who have tendered their affidavits.

In circumstances when a commission believes it necessary to cross-examine a witness in person, a video conference or telephonic conference at the expense of the person who applies may be arranged, or a commission may conduct the cross-examination. This approach would be beneficial for cross-examining professionals such as physicians. There has been a great increase in the development of new hospitals in urban and rural areas, as well as the incorporation of current medical equipment. Consequently, healthcare has become a huge industry. Significant progress has been made in controlling public health issues, reducing newborn and maternal mortality, and improving quality of life. It is evident that the state is obligated to protect its citizens from evil, but it is not always the doctors who are at fault. Medical professions being the most noble of all occupations, doctors are always treated with the utmost respect, and they must never intend to kill or harm a patient.

The Consumer Protection Act of 2019 is a revised piece of legislation that provides customers with a wide range of protections and rights against unfair trade practices, deceptive advertising, etc. The Act enables consumers to seek alternate dispute resolution processes and mediation so that parties can settle consumer issues expeditiously and effectively. In the Act, the inclusion of e-filing of complaints and e-consumers demonstrates a forward-thinking attitude on the part of the government. In addition, the Act incorporated new phrases such as product responsibility, unfair contracts, etc., so expanding the scope of consumer rights protection and allowing consumers to file complaints when their rights under the Act have been violated.

According to the Consumer Protection Act of 2019, services that are provided for free per se are not considered consumers, and complaints about service deficiencies cannot be sustained in general. Even free services are not immune from judicial scrutiny if there is a serious miscarriage of consumer justice. According to this analogy, paid medical services to patients will fall under the purview of the Consumer Protection Act of 2019. The new law did not intend to make the lack of doctors-patient health services a deterrent to medical negligence or malpractice. The law focuses heavily on unfair trade practices, which will eventually allow private hospitals to undergo rigorous consumer auditing[109]. In addition, the Consumer courts must be reevaluated because they are inherently ill-equipped to judge complex medico-legal litigation, which frequently results in a grave miscarriage of consumer justice between doctor and patient. According to estimates, the high out-of-pocket expenses of more than three-quarters of the population impede access to health care services. This increases the financial burden of health care and contributes to approximately 39 million additional people falling into poverty each year. It raises the crucial issue of equity in the delivery of health care services and public health

[109] Ramesh B., "Regulating the Private Health Care Sector: The Case of the Indian Consumer Protection Act. Health Policy and Planning", P 265-279, 1996, 11(3).

systems. It would be a misnomer to refer to the Consumer Protection Act of 2019 as a medical negligence-blind law; rather, it establishes the tone for ethical, patient-focused medical professionalism in an effort to curb unfair medical practices and undue enrichment.

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STATUTES REFERRED

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3. Consumer Protection Amendment Act, 2002 (62 of 2002).
4. Indian Penal Code 1860.
5. Code of Criminal Procedure, 1973.
6. Constitution of India, 1949.
7. Indian Contract Act, 1872
8. Law of Tort