PROFESSIONAL SERVICES : CIVIL LIABILITY FOR DEFICIENCY

THESIS SUBMITTED BY
Sri. VENUGOPALA B.S.
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY
IN LAW

Under the Supervision and Guidance of
Dr. A.M. VARKEY
M.A. LL.M. Ph.D.
Reader, School of Legal Studies.
Cochin University of Science and Technology
Cochin - 682022.

SCHOOL OF LEGAL STUDIES
COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY
COCHIN - 682022
APRIL - 1999.

DECLARATION

I do hereby declare that my thesis "Professional Services: Civil Liability for Deficiency" is the record of the original work carried out by me under the guidance and supervision of Dr. A.M. Varkey, Reader, School of Legal Studies, Cochin University of Science and Technology, Cochin. This work has not been submitted either in whole or in part for any degree at any University.

Cochin - 682022
21st April 1999

Sri. Venugopala B.S.
Part- time Research Scholar
Reg.No. AC.B2/ 7369/Ren./94-95
School of Legal Studies
Cochin University of Science &
Technology
Cochin - 22.

CERTIFICATE

This is to certify that this thesis "Professional Services : Civil Liability for Deficiency" submitted by Sri. Venugopala B.S., for the degree of Doctor of Philosophy is the record of bonafide research work carried out by him as part-time research scholar of School of Legal Studies, Cochin University of Science & Technology, under my guidance and supervision. This thesis or any part there of has not been submitted elsewhere for any other degree.

Varkey 21/4/99

Cochin – 682022
21st April 1999.

Dr. A.M. Varkey
Guide.

CERTIFICATE

Certified that the important research findings in this thesis have been presented in a research seminar at the school of Legal Studies, Cochin University of Science & Technology, on 28th october, 1998.

Cochin – 682022
21st April 1999.

Signature of the Candidate

Counter Signed
Director
School of Legal Studies,
Cochin University of
Science & Technology,
Cochin – 22.

PREFACE

This is a study on "Professional Services: Civil Liability for Deficiency". This study is made with special reference to medical profession. The importance of qualitative professional services does not require any emphasis. It is a matter of great concern for the people as they are consumers.

Professional men are persons specialized in a particular department of learning. Accordingly by virtue of their learning they assume a dominating position. But consumers as layman are at loss to understand the intricacies of professional services. Consequently professional men may misuse their superior position. They may expose the consumers to hardship. They attract liability for such misuse. Decisions under the Consumer Protection Act, 1986 clarified the legal position in this regard. Professional men do not enjoy any special claim for exemption from legal accountability.

Professional men operate in a sphere beset with various constraints and uncertainties. This warranted certain amount of professional discretion. Such discretion will enable them to discharge their obligations confidently. But legal accountability is inevitable to ensure consumer safety. Therefore a balance must be struck between professional discretion and legal accountability. Accordingly an attempt is made here to examine how for the present legal control mechanism ensures such balance.

This study is divided into 12 chapters. The introductory chapter deals with characteristics of profession, basis of professional liability and international efforts to check abuse of position by professional men. It further examines the historical evolution of legal controls on professional services. The second chapter deals with the liability of doctors for negligence under tort law. It deals with the standard of care expected of a doctor and controversy surrounding, who should determine the standard. The judicial decisions relating to various instances of medical negligence are examined here. In chapter 3 exceptions to liability for medical negligence are critically evaluated. Chapter 4 deals with consent to medical treatment. It examines issues relating to validity of consent and proxy consent. A non-consensual medical treatment may attract liability. Therefore an attempt is made here to examine how far non-consensual medical intervention can be allowed. Liability based on lack of informed consent is discussed in chapter 5. A doctor is under an obligation to disclose risk connected with the medical procedures to the patient. That enables a patient to arrive at a rational decision whether to submit for medical procedure or not. Strict insistence of informed consent exposes both doctor and patient to hardship. Therefore the circumstances under which such requirements is dispensed with are examined in this chapter.

Liability of doctors under contract law forms the subject matter of chapter 6. It deals with doctors' liability for breach of express, implied and inferred

contractual obligations. The obligation of a doctor to enter into a contractual relation is critically analysed. In addition to that it deals with issues like exclusion and avoidance of liability.

Remedies for deficient medical services constitute the subject matter of chapter 7. It contains a critical analysis of remedies through civil courts, consumer forae and professional bodies. Remedies under public law and the concept of burden of proof in medical negligence cases are also examined here. A patient cannot prove the negligence of a doctor unless he has an access to medical records. Chapter 8 is a critical and comparative analysis of the law relating to access to medical records. The opinions and suggestions of doctors relating to their legal accountability collected through an empirical study are analysed in chapter 9.

The liability of lawyers for deficiency in service is dealt with in chapter 10. The liability under contract law & tort law and avoidance and exclusion of liability are considered in this chapter. Similarly the liability of architects and engineers for deficiency in service is the subject matter of chapter 11.

The major conclusions and suggestions of the study are given in chapter 12.

I express my sincere gratitude to my guide Dr. A.M. Varkey, Reader, School of Legal Studies, Cochin University of Science & Technology, Cochin, as this thesis is a fruit of his able guidance and supervision. I also express my heartfelt thanks to the Director, teachers and library staff of the School of Legal

Studies, Cochin University of Science & Technology, Cochin, for their kind co-operation.

I acknowledge with gratitude the co-operation extended by Prof. M.M. Nadig, Principal, V.B. College of Law, Udupi and the assistance rendered by Mr. Raghunath S., Mr. Shripathi G.U. and Mrs. Nirmala Kumari, Lecturers, V.B. College of Law, Udupi for assisting to check the citations. I gratefully thank library staff of V.B. College of law, Udupi, for providing me necessary study materials.

I am very much grateful to Mr. Prakash Rao, Physical Director, V.B. College of Law and Mrs. Meera Prakash Rao, Kasturbha Medical College, Manipal, for their assistance in conducting the empirical study.

I sincerely thank Mrs. Shalini and Mr. Bhushan, non-teaching staff of V.B. College of Law, Udupi, for their painstaking effort to type the preliminary draft of this thesis. I also express my gratitude to Mrs. Amitha Shetty, Proprietor, Ashmi Computers, Udupi, for neatly bringing out the final print out of this thesis.

Venugopala B.S.

Contents

TABLE OF CASES

Table of Statutes

1. Code of Civil Procedure, 1908.
2. The Access to Health Records Act (English), 1990.
3. The Advocates Act, 1961.
4. The Architects Act, 1972.
5. The Architects (Registration) Act (English), 1931.
6. The Chartered Accountants Act, 1949.
7. The Consumer Protection Act, 1986.
8. The Consumer Protection Central Rules, 1987.
9. The Contributory Negligence Act (English), 1945.
10. The County Council Act (English), 1984.
11. The Data Protection Act (English), 1984.
12. The Data Protection (Subject Access Modification (Health)) Order (English), 1987.
13. The Defective Premises Act. (English), 1972.
14. The Dentist Act (English), 1984
15. The Indian Contract Act, 1872.
16. The Indian Evidence Act, 1872.
17. The Indian Medical Council Act, 1956.
18. The Indian Panel Code, 1861.
19. The Latent Damage Act (English), 1986.

20. The Madras Public Health Act, 1930.

21. The Medical Act (English), 1983.

22. The Medical Reports Act (English), 1988.

23. The Medical Termination of Pregnancy Act, 1971.

24. The Mental Health Act, 1987.

25. The Mental Health Act (English), 1983.

26. The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

27. The Solicitors Act (English), 1974.

28. The Supreme Court Act (English), 1981.

29. The Supply of Goods and Services Act (English), 1982.

30. The Transplantation of Human Organs Act, 1994.

31. The Unfair Contract Terms Act (English), 1977.

32. The Veterinary Surgeons Act (English), 1966.

Table of International Conventions & Declarations

Table of Codes

1. Code of Manu.
2. Code of Medical Ethics (India).
3. Code of the American Medical Association.
4. Hammurabi's Code.
5. International Code Of Medical Ethics.

Table of Abbreviations

1. A.C. = Appeal Cases
2. A.I. R. = All India Reporter
3. A.L.J. = Australian Law Journal
4. A.L.J.R. = Australian Law Journal Reports
5. A.L.R. = Australian Law Reports
6. All E.R. = All England Reporter
7. All E.R. Rep. = All England Reporter Reprinted
8. B.M.J. = British Medical Journal
9. Build. L.R. = Building Law Reports
10. C.A. = Court of Appeal
11. C.L.R. = Commonwealth Law Reports
12. C.P.J. = Consumer Protection Journal
13. C.P.R. = Consumer Protection Reports
14. C.T.J. = Consumer and Trade Practice Journal
15. C.U.L.R. = Cochin University Law Review
16. C.W.L.R. = California Western Law Review
17. Camb. L.J. = Cambridge Law Journal
18. Can. B.R. = Canadian Bar Review
19. Ch. D. = Chancery Division
20. Colum. L.R. = Columbia Law Review
21. Con. L.R. = Construction Law Reports
22. Cr. L.R. = Criminal Law Review
23. D.L.R. = Dominion Law Reports

24. Geo. W.L.R. = George Washington Law Review
25. I.B.R. = Indian Bar Review
26. J.I.L.I. = Journal of Indian Law Institute
27. J.T. = Judgement Today
28. K.B. = Kings Bench
29. K.L.T. = Kerala Law Times
30. L.Q.R. = Law Quarterly Review
31. M.L.J. = Madras Law Journal
32. M.L.R. = Modern Law Review
33. N.L.J. = New Law Journal
34. N.I.L.Q. = Northern Ireland Law Quarterly
35. N.Z.L.R. = Newzealand Law Reports
36. Northwestern L.R. = North western Law Review
37. P.C. = Privy Council
38. Q.B. = Queens Bench
39. S.C.C. = Supreme Court Cases
40. U.P.L.R. = University of Pennsylvania Law Review
41. U.N.S.W.L.J. = University of New South Wales Law Journal
42. V.U.W.L.R. = Victoria University of Wellington Law Review
43. Yale L.J. = Yale Law Journal

CHAPTER I

CHAPTER I

Historical Introduction

Services rendered by professional men like doctors, lawyers and engineers are indispensable for any society. Professional men exercise great skill and competence in rendering these services. At the same time they have to comply with prescribed legal standards. Often legal accountability and professional discretion may conflict. The result is that unrest is created among professional men. The recent upsurge of doctors against their inclusion under the Consumer Protection Act, 1986 is an indication of unrest. What is required is to give confidence to professionals that professional discretion exercised in good faith would not impose liability on them. In this context it is necessary to examine whether the Indian legal system provides such confidence to the professionals.

The peculiar features of professional service necessitate a certain amount of discretion for professional men for effective discharge of their duties. But abuse of discretion by professional men can expose the consumers to great hardship. Similarly excessive legal accountability may persuade professionals not to undertake innovations in the practice of their professions. Hence it is necessary to strike a balance between professional discretion and accountability to safeguard the community interest. Emphasis on discretion needs to be given only in cases where the peculiar characteristics of the services necessitate such conferment of discretion. Professions like medicine, law and engineering have

identical characteristics which make them distinct from other skilled services. A study of these characteristics is necessary for evolving common principles applicable to all professions.

Characteristics of profession :

Though various professions were practiced from time immemorial no attempt was made in the past to delineate the contours of profession. The existing literature on the subject suggests that the following characteristics are necessary to designate an occupation as professional service.[1]

(i) Prescribed educational qualification :

A professional man shall have basic learning in the field of his profession and knowledge of some department of science or learning.[2]

---

1. In wider sense 'profession' signifies any calling or occupation embraced by a person to earn his livelihood habitually. See Daulath Ram Prem (ed.), *"Prem's Judicial Dictionary"*, Jaipur, vol.2, p.1316 (1992); The term profession was originally applied only to theology, law and medicine. See *Aulen v Truimph Explosive D.C. M.D.*, 58 F. Supp. 4.8, as quoted in Henry Campell Black (ed.), *"Black's Law Dictionary"*, St. Paul Minn, fourth edition, p. 1375 (1951); But other vocations with professed attainments in special knowledge as distinguished from mere skill also qualify to receive the name profession.
2. See Jess Stein (ed.), *"The Random House Dictionary"*, unabridged edition, Newyork, p.1148; A.R.Biswas (ed.), *"Biswas On Encyclopaedia Law Dictionary"*, Calcutta, p. 593 (1979); J.A. Simpson and E.S.C. Weiner (ed.), *"Oxford Dictionary"*, Oxford, vol.12, second edition, p.573 (1991); see also *Sankaranarayana Pillai v. Executive Officer,* A.I.R. 1966 Mad.262.

To ensure this educational qualifications are prescribed to equip them with necessary theoretical knowledge.[3]

(ii) Practical training :

In addition to possession of theoretical knowledge satisfactory practice of any profession pre-supposes practical training for a period of time under the supervision of peers in the profession.[4]

The theoretical and practical knowledge acquired by the above process is intended to develop intellectual skill.[5]

---

3. For example, a person will not be allowed to practice medicine unless he gets his name enrolled on a state medical register. He must have acquired the prescribed medical qualifications included in first or second or part-first of third schedule to get his name so enrolled. See the Indian Medical Councils Act 1956, ss.11-15.
   To enroll as an advocate, one must obtain a degree in law after undergoing a three or five years course of study in any recognised University. See the Advocates Act 1961, s.24.
   Similarly to enroll as an architect a person shall hold a recognised qualification. See the Architects Act 1972, ss.14, 25 and the schedule. The Council of Architecture (Minimum Standard of Architecture Education) Regulation 1983, prescribes that the architecture course shall be of minimum duration of five academic years or ten Semesters consisting courses, periods of study and subjects of examinations as laid down.
   Likewise to practice the profession of accountancy a person shall obtain a certificate of practice from the council which requires the attainment of prescribed educational qualifications. See the Chartered Accountants Act 1949, ss. 4, 6; see also *Carr .v. Inland Revenue Commissioner,* [1921]2 K.B.332 at p.343.
4. Rupert M. Jackson and John L. Powell, *"Professional Negligence"*, London, second edition, p.1 (1987); It is a statutory requirement. (refer relevant provisions and rules of the above statutes). Accordingly a doctor, lawyer, architect, engineer and chartered accountant have to undergo practical training.
5. *Commissioner of Inland Revenue v. Maxse,* [1919] 2 K.B.647; *Sankaranarayana Pillai v. Executive Officer, supra* n.1; Bryan A. Garner (ed.), *" A Dictionary Of Modern Usage"*, Newyork, second edition, p.699 (1995). In certain cases the training may develop manual skill controlled by the intellectual skill.

The performance of service calls for application of skill and knowledge to the affairs of others in advising, guiding or serving their interest or welfare in the practice of profession founded on it.[6]

Another unique feature of professions is that the application of skill and knowledge is undertaken without giving any guarantee to achieve a particular result. Professional men cannot guarantee success in each and every case as they operate in an area of uncertainty.[7] Even where factors are within their control they are helpless as success is matter of great complexity and fine judgement.[8] The judicial attitude in this regard is reflected in the following observation of Tindal. J., in *Lanpier v. Phipos*.[9]

> "Every person who enters into a learned profession... does not undertake if he is an attorney that at all events you shall gain your case nor does a surgeon undertakes that he will perform a cure."

---

6. *Waliati Ram v. Ruper Municipality*, A.I.R. 1960 Punj. 669 at p. 671; see also *"Oxford Dictionary", supra* n. 2.
7. See *supra* n. 4 at p. 4. For example a doctor cannot ensure a cure as the body response to a treatment varies from patient to patient or in the same patient from time to time or success of a long surgical procedure may demand much stamina on the part of a patient to endure it; similarly a lawyer also cannot guarantee favourable result in a litigation . A judicial decision is a product of accidents of litigation. There are many factors which influence the judicial decisions and the fact finding process. For a better understanding of these factors, see R.W.P. Dias, *"Jurisprudence"*, New Delhi, fifth edition, pp.447-456 (1994).
8. See *supra* n. 4.
9. (1838) 8 C. & P. 475, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 291. See also *Greaves & Co. v. Baynham Meikle,* [1975]1 W.L.R. 1095 (C.A.).

The above observation is reflective of all professional services. The degree of success or failure varies from profession to profession. The obivous reason is that different professions generate different expectations and they may vary within the same profession in different branches.[10]

(iii) Supervision of practice by a professional body :

The third characteristic of professional service is that the members of the profession are subjected to control and supervision by a professional body consisting of peers in that profession.[11] Unethical practice and deviation from approved principles or violation of the code of conduct may confer disciplinary jurisdiction to this body.[12] Defiance to correction by such bodies can also lead to expulsion from practice of that profession.[13]

However members are free to practice the profession according to their individual skill and judgement. The standard and competence may vary from individual to individual. Only gross inadequacy or marked departure from accepted procedure may invite scrutiny of their conduct by judiciary or superior bodies. Liability for such deficiencies or inadequacies may be considered based on the nature and circumstances in which the service was rendered.

---

10. See *supra* n.4 at p.6.
11. Id. at p.2.
12. See *infra* chapter 7.
13. Ibid.

Basis of professional liability :

The above discussion reveals that professional men are placed in a dominating position. They may expose the consumer of their services to injuries as the latter lack the ability to understand the consequences of deficient services. To obviate misuse of position and discretion by professional men legal system provides a mechanism to make them accountable to the beneficiary of their service. The liability of a professional man can be considered under the following heads.

(i) Contractual liability :

The relation that exist between a professional man and his client is contractual in nature.[14] Any breach of the contractual terms, express or implied leads to liability.[15]

(ii) Tortious liability :

A professional man is also liable under tort for negligence[16] and violations of other common law obligations.[17] The tort of professional negligence will be complete, if the following ingredients exist.[18]

---

14. See *supra* n. 4 at p. 6.
15. For a detailed discussion, see *infra*.
16. Negligence means a breach of duty to take care resulting in damage to the plaintiff. See J. Charlesworth, *"Charlesworth on Negligence"*, London, third edition, p.6 (1956). It further implies the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do. *Blyth v. Birmingham Water Works Co.*, (1856) 11 Ex.781 at p. 784.
17. In the case of medical profession, the tort of trespass is also seen involved in some cases. For a discussion, see *infra* chapter 4.
18. For a detailed discussion, see *infra* chapter 2.

a) The professional man owes a duty to take care to the client.

b) He acts in such a way to break that duty

c) The client has sustained damage as a consequence of that breach

(iv) Statutory liability :

In addition to the above situations liability can arise for breach of statutory obligations as well.[19]

Considering the harm that may be caused to the humanity by unregulated practice of some important professions like medicine and engineering, international community has called upon every civilized nation to adopt national standards for practice of such professions.

International efforts to prevent professional abuses :

There are some international conventions and declarations, which aim at obviation of abuse of position by professional men. They have bearing on the legal control mechanism discuss above. In all these conventions the protection of interest of consumers of professional services has been the primary goal.

---

19. Instances of statutory liability are in legion. For example, a professional man is under an obligation not to render any deficient service and if he does so he attracts liability under the Consumer Protection Act 1986; a doctor who has undertaken the care of a patient suffering from contagious disease shall not expose that person to others to the risk of infection or permit that person to do so; similarly he is a under a duty to give necessary instructions to a patient suffering from venereal disease to prevent the spread of infection. See ss. 59(2) and 79 of the Madras Public Health Act 1930; a doctor shall not subject a mentally ill person during treatment to any indignity or cruelty. See s.81(1) of the Mental Health Act 1987.

The guidelines issued by the United Nations on consumer protection in 1985[20] enjoins every member state to take administrative and legal measures for easy, expeditious and inexpensive method for redressal of consumer grievances.[21] The devices suggested in the guidelines include deficiency in service of professional men also.[22] The consumer safety and protection of economic interests of consumers logically includes safe medical procedures and adoption of safe and acceptable engineering goods.[23]

Regarding the services rendered by doctors a series of conventions were held. The Geneva Declaration (as amended at Sydney) 1968, enjoins a duty on the doctors to discharge their professional duties carefully and deligently.[24] The Declaration of Tokyo, 1975 prohibits a doctor from indulging in torture and other cruel, inhuman or degrading treatment.[25] The Declaration of Oslo, 1970 regulates performance of therapeutic abortion.[26]

---

20. The guidelines were laid down in the resolution adopted by U.N. General Assembly on 9th April, 1985. For the text see *"International Legal Materials"*, vol. 24, pp. 914-921(1985).
21. See guideline 28. *Id.* at p. 918.
22. See guideline 3. *Id.* at p. 915. The guidelines intend to meet the legitimate needs of consumer's protection from hazards to their health and safety and promotion and protection of their economic interest. Emphasis is given to providing access to adequate information to enable them to make informed choices according to their individual wishes.
23. See guidelines on physical safety and promotion of protection of consumers' economic interest. *Id.* at pp. 916-918.
24. For the text of the declaration, see Mason and McCall Smith, *"Law And Medical Ethics"*, London, p. 252 (1983). The International Code of Medical Ethics, also enjoins duties on doctors in general and in particular to the sick. *Id.* at p. 253.
25. *Id.* at p. 255.
26. *Id.* at p. 257.

The Declaration of Helsinki 1975[27] and the European Convention on Human Rights and Biomedicine 1997, enjoins compliance of certain requirements before subjecting any person to therapeutic or non-therapeutic research.[28]

In the field of engineering international bodies like OECD and IOCU have evolved several guidelines for safety of engineering goods, motor vehicles and vessels intended for navigation.[29] The engineering profession is required to ensure safety of life and property in design and construction of engineering goods.[30]

In the case of legal profession it is accepted worldwide that lawyers are duty bound to promote civil and political rights of individuals.[31] So the promotion of human rights is recognised in international conventions for promotion of human dignity.[32]

---

27. *Id.* at p. 258.
28. For a discussion, see *infra.*
29. See John Joseph, *"Evolution Of Consumerism And It's Future Role"*, New Delhi, p. 133.
30. The various shipping safety conventions enjoin an obligation that vessels must be structurally sound and have all protective safeguards to ensure safe voyage of passengers and cargo. See the relevant provisions of *"Load Line Convention 1930*; *The Simla Rules 1931*; *International Convention For Safety Of Life At Sea 1960.* For the text of these conventions, see Nagendra Singh, *"International Conventions On Merchant Shipping"*, London, vol. 8, pp. 57-273 (1963).
31. See the Code of Conduct adopted by C.C.B.E. for lawyers in E.C. For the text see Alan Tyrrel and Zahd Yaqub (ed.), *"The Legal Profession In The New Europe"*, London, second edition, p.464 (1996). It also contains guidelines relating to the duties of an advocate towards his clients and also prohibits certain conduct on the part of an advocate.
32. See the *International Covenant On Civil And Political Rights 1966*; *the European Convention For The Protection Of Human Rights And Fundamental Freedom 1950.*

It can be seen that the various legal control devices and international conventions aim at the safety of consumers but not at the cost of professional discretion. Professional discretion safeguards the interest of both professionals and consumers. But for such discretion, they will not venture to take certain amount of risk in the interest of the consumers for the fear of legal accountability. At times they may refrain from rendering services which may assume fatal proportion. For example if a doctor refuses to conduct an emergency operation a patient may die. Hence how law has been successful to strike a balance between discretion and accountability needs a thorough examination. An analysis of developments in legal controls over professional services in the past will help to understand the present system of control in a better way.

Evolution of legal control on professional services :

Repressive conduct on the part of professionals resulting in injury was discouraged during ancient period.[33] The ancient Babylonian codes give a clear picture of these controls.

The ancient period :

The Hammurabi's Code was the first known law which contained

33. It is especially true of healing arts now styled as the medical profession. The obvious reason is that man in all ages is prone to ailments. The other professional services, *viz.* services of builders and lawyers have emerged with man embracing settled life paving the way for evolution of private property and emergence of disputes. The legal profession is not so ancient as other professions as it began with the administration of justice through courts.

several provisions for improving the quality of medical profession. It originated in 1900 B.C.[34] The code introduced a result oriented payment system with special reference to status of patients.[35] Negligence in treatment resulting in death of a patient or serious bodily injury attracted severe punishments varying with the status of the patient.[36] Though the stress was on punitive element the modern idea of damages was not lacking. Thus when a doctor had opened tumour of the slave of a plebian with a metal knife and destroyed his eyes he had to pay half the price of the slave.[37]

The code also contained special provisions pertaining to the responsibility of builders[38] to ensure that the structure was sound.[39] It imposed severe punishment on a builder for causing death of a person due to the collapse of the house as a result of faulty construction.[40] It also contained provisions relating to restitution and compensation of the wronged as a remedial measure.[41]

---

34. Mason and McCall Smith, *op. cit.* at p. 3.
35. See *The Advocate*, Jan.1995. vol.1 at p.153. If a doctor has treated a man with a metal knife for a severe wound and has cured the man he was entitled to receive ten sheckles of silver. If the patient happened to be a plebian, he could claim more. If a doctor has healed a man's broken bone or had restored health of the patients, he was entitled for five sheckles of sliver.
36. *Ibid.* Corporal punishment like cutting of the hands of the doctor was also allowed under the code. See *ibid.*
37. *Ibid.*
38. As per the modern terminology, the term builders include architects and engineers as their services are hired in construction of buildings.
39. Driver G.R. and John C.Miles, "*The Babylonian Laws*", Oxford, vol.1, first edition, p. 426 (1952).
40. *Ibid.*
41. If a wall of a house bulged or the house collapsed the builder was enjoined to put it right or rebuild it from his own sources. *Ibid.* If the collapse of the house resulted in injury to a person, pecuniary compensation was awarded. In case of destruction of furniture and other contents, the builder was liable to make good the loss also. *Id.* at p. 427.

The terms 'to be negligent' and 'substantive negligence' are found in the Babylonian laws.[42] But it is not clear whether the term was confined only to intentional acts or to careless actions.[43] The code enumerated certain acts which give rise to an obligation to pay compensation.[44] If any of these recognised injury was committed the professional was bound to compensate the victims. The manner in which the injury was caused was immaterial.[45] So if a person exercising common calling failed to perform the duty inherent in it, he was held liable absolutely without proof negligence.[46] The liability was based on breach of professional undertaking not on any negligence or recklessness.[47] On causing a recognised injury the irrebuttable presumption was that the wrongdoer had done his job badly and failed to conform to the standard prescribed in his calling.[48] The wrongdoer was not allowed to put forward the plea of exercise of reasonable care.[49] It follows that a professional man was held liable strictly for the recognised injury inspite of exercise of reasonable care. It can be seen that the Babylonian law was gradually grasping the modern concept of fault theory. But it did not endeavour to put it into safe practice.[50]

The ancient Indian law also contains similar provisions. For example the

---

42. *Id.* at p. 461.
43. *Id.* at p. 466.
44. *Ibid.*
45. *Ibid.*
46. *Id.* at p. 404.
47. *Id.* at p. 464. Negligence was assumed when any of the acts or omissions took place. *Id.* at p. 466.
48. *Ibid.*
49. *Id.* at p. 465.
50. *Id.* at p. 466.

Code of Manu provided that physicians who treated their patients wrongly were liable to pay fine.[51] The amount of fine varied depending on the status of patients and nature of the harm.[52] A physician who was ignorant of drugs and their effect and the nature of disease had no right to take money from the sick for treatment. If he undertook treatment, he was liable to pay fine or to undergo corporal punishment including death penalty.[53] If a person falsely posing himself as physician, undertook to treat he was punished with the middle most or the highest amercement.[54] It is obvious from the above provisions that the modern concepts of deficiency in service and deficiency in service per se were recognised by the ancient law. The basis of law of wrongs was to be found in dharma. Here paramount importance was given to duty.[55] This proposition is sufficient infer the existence of professional liability for breach of duty in ancient days.[56] Ancient literature like *Vyavahara Kalpatharu* and *Vivada Ratnakar* also speak about the law relating to negligence.[57]

---

51. The law that was applied in ancient India was the law laid down in the Code of Manu. See A.S. Diamond, *"Primitive Law"*, London, second edition, p. 122 (1950).
52. Manu IX 284, as quoted in M. Rama Jois, *"Legal and Constitutional System"*, Bombay, vol. 1, p.397 (1984).
53. *Ibid.* He was punished like a thief and punishment varied from fine to capital punishment. *Id.* at pp. 362-363.
54. See *supra* n. 52. Amercement means discretionary penalty or fine. See *"Random House Dictionary", op. cit.* at p. 47.
55. S.K. Purohith, *"Ancient Indian Legal History"*, New Delhi, p. 84 (1994).
56. Persons like goldsmiths, washermen and weavers who were rendering skilled services were also punished for any wrongful act committed in the course of rendering those services. See *supra* n. 52 at p. 398. It is common knowledge that in ancient times the king decided the cases according to Dharmashasthras. Legal services in the present form did not exist. See *Id.* at p.610.
57. K.P.S. Mahalwar, *" Medical Negligence And The Law"*, New Delhi, p.20 (1991).

Professional liability under common law :

The common law courts invoked contractual liability to exercise control over professional men.[58] There is consensus among the jurists that little or nothing similar to the modern idea of negligence is to be found before the evolution of 'case'.[59] The Modern notion of negligent act arising from status was known from medieval times.[60] Those who undertook common callings like surgeons and veterinarian were held liable to their customers for any damage that resulted from failure to do their job properly.[61] Non-feasance and mal-feasance were actionable under trespass and latter in case from which negligence originated.[62] From the moment judges entertained an 'action for case' for breach of voluntary undertaking, they opened their ears and minds to the language of negligence and non-feasance.[63] Action for mal-feasance was

---

58. P.S. Atiyah, *"The Rise And Fall Of Freedom Of Contract"*, Oxford, p.416 (1979).
59. C.H.S. Fifoot, *"History And Sources Of The Common Law"*, London, p.154 (1949, sixth impression, 1969).
60. Dereck Roebuck, *"The Background Of The Common Law"*, Oxford, second edition, p.86 (1990)
61. *Ibid.*
62. *Ibid.*
63. See *supra* n. 60 at p. 156. According to Rastell, 'action sur le case' signifies a writ brought against a person for some offence without force where the whole case is contained in the writ. *Id.* at p. 68. For a better a discussion, see P.A. London, ' The Action On The Case', 52 L.Q.R. 69 (1936). Prior to the action on the case law had little to say about negligence as a term but has grasped the idea underlying it. See Percy H. Winfield, "The History Of Negligence In The Law Of Torts", 42 L.Q.R. 184 at p. 185 (1926).

allowed as early as in 1370 against veterinary doctor.[64] Subsequently, it was allowed against a surgeon also.[65] It was extended to legal profession in *Russel v. Palmer.*[66] In this case the plaintiff engaged the defendant as his attorney. The allegation was that the defendant promising to discharge the duties deligently, behaved so negligently and inadvertently that it resulted in damage to the plaintiff. The Court held that even though the transaction was contractual, the duty was tortious and attorney was liable for negligence.[67]This led to the recognition of concurrent liability of a professional man both in contract and tort. The fact that the duty stems from contract does not prevent an action based on tort.[68] Justice Tindal examined this aspect in *Boorman* v. *Brown.*[69] He said,[70]

> "That there is a large class of cases in which the foundation of the action springs from privity of contract between the parties but in which nevertheless, the remedy for the breach

---

64. See *supra* n. 59 at p. 156. In 1370, a plaintiff complained of a defendant that the latter after undertaking to cure a horse had performed his work so carelessly that the horse died. This allegation was regarded as the very basis of his action.
65. *Ibid.*
66. (1767) 2 Wilson 325 as quoted in *supra* n. 59 at p. 157.
67. The duty of every artificer to exercise his art rightly and truly was laid down as early as in 1534. For a discussion on evolution this principle, see C.H.S. Fifoot, *op. cit.* at p.157.
68. Concurrent liability is advantageous from the point of view of a client. The liability under tort law is wider than that under contract. Moreover under tortious liability the defence of contributory negligence can be invoked. For a discussion, see, John L. Dwyer, "Solicitors Negligence: Tort Or Contract", 56 A.L.J. 524 at p. 539 (1982).
69. (1842)3 Q. B. 511.
70. *Id.* at pp. 525-526.

> or non-performance is indifferently either assumpsist or case upon tort is not disputed. Such are actions against attorneys, surgeons and other professional men for want of competent skill or proper care in the service they undertake to render... The principle in all these would seem to be that contract creates a duty and neglect to perform that duty or the non-feasance, is a ground of action in tort".

Nevertheless until mid 1970's the contractual nature of relation stood as a stumbling block to impose a liability in tort.[71] Gradually tortious liability made a headway and is well established in all jurisdictions including India.[72]

Professional liability under modern statutes :

Along with the developments in common law liability of professional men, many countries made legislation imposing criminal and civil liability for different aspects in rendering professional services.

In England there are statutes regulating the practice of various professions and contemplating disciplinary action for abuse of position by professional men.[73]

---

71. See *Jarvis v Moy, Davies, Smith, Vanderwell and Company* (stock brokers), [1936] 1. K.B. 399; *Groom v Crocker* (solicitors), [1939] 1K.B. 194; *Bagot v Stevens Scanlan and Co. Ltd.* (architects), [1966] 1 Q.B. 197.
72. See *Esso Petroleum Co. Ltd. v. Mardon,* [1976] 2 All E.R. 5 (C.A.); *Batty v. Metropoliton Property Realization Ltd.* (developers and builders), [1978] 2 All E.R. 445 (C.A.); *Midland Bank Trust Ltd. v. Hett Stubbs & Kemp,* [1978] 3 All E.R. 571 (Ch.D). The establishment of East India Company in 1600 giving rise to emergence of British empire paved the way for Indo-British jurisprudence in ushering gradually an era of common law in India. See M.C. Setalwad, *"The Common Law In India"*, Bombay, second edition, p. 4 (1970). Accordingly, a few professional negligence cases came before the civil courts in India also.
73. See the relevant provisions of the Medical Act 1983, the Dentist Act 1984, the Veterinary Surgeons Act 1966, the Architects (Registration) Act 1931, the Solicitors Act 1974 (it further contemplates sanctions for inadequate professional services.

The Mental Health Act 1983, regulates the admission of mentally retarded patients to the mental hospitals and their treatment.[74] Accordingly a medical man attracts penal liability for ill-treatment or willful neglect of a mentally retarded patient.[75] The Defective Premises Act 1972, enjoins a duty on the architects to exercise reasonable care and skill.[76] The Supply of Goods and Services Act 1982, logically enjoins an implied obligation on professional men to exercise reasonable care and skill in rendering services.[77]

Likewise in India also there are statutes regulating the practice of various professions and contemplating disciplinary action for abuse of position.[78] The Indian Penal Code 1861, imposes punishment on a doctor for causing miscarriage,[79] spreading infection of any disease,[80] hurt or grievous hurt by an act endangering life or personal safety[81] and death of a patient by negligence.[82] In addition to that there are various penal statutes regulating different aspects of professional services of a doctor.[83] The Consumer Protection Act 1986, imposes civil liability for deficiency in professional services.[84]

---

74. See the relevant provisions.
75. *Id.*, s. 127.
76. See s. 6 (2).
77. See s. 13.
78. For a discussion, see *infra.*
79. See s. 312.
80. See s. 269.
81. See ss. 337-338.
82. See s. 304 A ; see also *Juggankhan v. The State*, A.I.R. 1965 S.C. 831.
83. See the Transplantation Of Human Organs Act 1994; the Pre-natal Diagnostic Techniques (Regulation And Prevention Of Misuse) Act 1994; the Medical Termination Of Pregnancy Act 1971.
84. For a discussion, see *infra.*

Evolution of legal controls : A critical appraisal :

The judicial decisions and informed opinions depict certain characteristics that distinguish professional services from other services. But consumer forae have given widest interpretation to the term profession to include even services rendered by plumbers and tailors[85] who are not beset with any uncertainties and do not share the characteristics of learned profession. Hence conferment of discretion to them does not arise. Therefore it is submitted that the term profession shall be confined to learned professions like doctors, lawyers, architects, engineers, surveyors and accountants with respect to conferring discretion.

The above study of evolution of legal control throws flood light on the fact that legal accountability of professional men is of immemorial antiquity. In ancient times it was in it's crude form. The stress was more on the punitive element rather than compensatory aspect for which the Babylonian and Manu's Codes bear evidence. The Obvious reason is that the infancy of any society was marked by unrestricted violence. Consequently criminal laws loomed large in the eyes of legislators. The punishment inflicted was so diabolic that it certainly must have deterred any person from entering into the profession. Liability was strict and professional men were not allowed to raise the plea, that they had exercised reasonable care. The stress was on injury suffered and the primitive mind was oblivious to the question of how such injury occurred. Naturally they failed to perceive the uncertainties connected with professional services.

---

85. See *A.C. Modagi v. Crosswell Tailors,* (1991) 2 C.P.J. 586 (N.C.).

Hence the question of balancing professional accountability and discretion was not on the cards. But the civilized minds are very prompt to acknowledge the inexactitude connected with the professional services which is reflected in the modern statutes.

It is obvious that the interest of a consumer was fully taken cognizance of, under ancient codes. This was at the cost of draconian punishment inflicted on the professional men. It did not provide adequate compensation to a consumer suffering economic losses. Without this a consumer does not get any real remedy. The seeds of civil remedies like compensation and restitution could be seen in Hammurabi's code. The modern legal system has only elaborated this concept.

The above study on evolution of civil liability of professional men indicates that similar rules apply to all professions. The basic philosophy appears to be the same. The rules only vary in technical details. The emphasis is on the duty to take reasonable care and skill while rendering professional services. The object is to deter professionals from undertaking activities which are likely to cause injury or loss to the public.

Medical profession being a profession closely linked with the life of every human being there had been a lot of disputes relating to that profession. Considering the fact that every facet of professional service is reflected in legislative and judicial decision in this profession the present study gives emphasis to the principles of civil liability in connection with medical services. These principles with slight modifications can be applied to other professions as well.

CHAPTER II

CHAPTER II

Medical Negligence: Liability Under Tort Law

Services rendered by a doctor to his patient include diagnosis, prescribing treatment, administration of treatment and giving medical advice. A doctor in the course of rendering such services shall comply with certain requirements of law.[1] Failure to observe these requirements will generate a feeling in the mind of the patient that he has not been properly cared for or counseled. If the risks associated with the treatment results in deterioration of his health he may blame the doctor. But to succeed he should prove medical negligence against the doctor.[2]

Meaning of medical negligence :

Negligence signifies failure to exercise care and skill. In the medical field it means lack of care and skill in diagnosis or treatment that might be reasonably expected from a person holding out himself as a doctor.[3]

It is a form of professional liability imposed by law on every doctor.

---

1. These requirements include the duty to take reasonable care and skill and the need to obtain informed consent of the patient. For a discussion of these matters, see *infra*.
2. The liability of a doctor may arise for trespass also.
3. For a detailed account of the liability of physicians and surgeons, see Mahesh C. Bijwat, "Medical Negligence- Medical Malpractice- American Experience", 37 J.I.L.I. 390(1995).

It stems from negligently or wrongfully exposing a patient to injury.[4] The standard of care required may vary depending on the circumstances of each case. Inadequacy or shortcoming in this standard of care leads to medical negligence.

Standard of Care and skill :

A doctor undertakes to exercise reasonable care and a certain degree of skill. It may be different from the standard that shall be exercised by doctors with higher knowledge and greater advantages than him.[5] Neither the highest degree of care nor the lowest is expected.[6] A doctor is held liable for negligence when he falls short of the reasonably skillful medical man.[7] Reasonable care can not be put into a rigid mould, as every time it is a question of fact. Accordingly less will be expected of a doctor practicing in a remote village having no access to modern facilities and devices attached to a big hospital with all sophisticated facilities.[8]

---

4. *Ibid.* The term medical malpractice is also interchangeably used. It is a wider concept covering all liability stemming from the rendition of medical services. It includes liability for intentional misconduct, breaches of conduct guaranteeing a specific therapeutic result, defamation, invasion of privacy, unauthorised postmortem procedure, failure to prevent injuries to certain non- patients and negligent medical care. See Joseph H. King, "*The Law Of Medical Malpractice*", St.Paul Minn, West, p.2 (1977).
5. *Lanphier v. Phipos*, (1838) 8 C. & P. 475 as quoted in Rupert M. Jackson and John L. Powell, "*Professional Negligence*", London, second edition, p.291 (1987)
6. *Dr. T.T. Thomas v. Elisa,* A.I.R. 1987 Ker. 52. See also *R. v. Bateman*, [1925] All E.R. Rep. 45 at p. 48(C.C.A.).
7. *Bolam v. Friern Hospital Management Committee,* [1957]2 All E.R.118 at p.121(Q.B.).
8. J.P. Eddy, "*Professional Negligence*", London, second edition, p.83 (1955)

Standard of care must be determined with reference to the respective field of practice and the status of a doctor.[9] Hence the care that is expected, is that of a reasonably skilled doctor with the similar specialization and experience. A beginner can not be compared with an experienced doctor as what is expected of him is the care and skill of a comparative beginner.[10] Moreover regard must be had to the state of medical knowledge prevalent at the time of commission of the alleged negligent act and not to any subsequent advances.[11] The crucial question that needs an answer is who should determine and set the standard of care. There are two conflicting opinions, one entrusting the task to the profession itself as laid down in *Bolam* and the other entrusting the task to the courts.

The Bolam principle :

In *Bolam v. Friern Hospital Committee,*[12] House of Lords had to decide whether a doctor was negligent when he acted in accordance with the

---

9. In *Wilsher v. Essex A.H.A.*, [1986] 3 All E.R. 801(C.A.), the court held that the standard of care and skill expected of medical staff related to the posts they held rather than their experience. See also *Maynard v. West Midlands R.H.A.*, [1985) 1 All E.R. 635(H.L.). *Sidaway v. Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital*, [1985] 1 All E.R. 643(H.L.); *Hucks v. Cole,* [1968] 118 N.L.J 469; *Ashcroft v. Mersey Regional Health Authority,* [1983] 2 All E.R.245(Q.B.).
10. *Junor v. McNicol*, (1959), *Times,* 26 March, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 295.
11. *Roe v. Minister of Health,* [1954] 2All E.R. 131 (C.A.). *Chin Keow v. Government of Malaysia,* [1967] 1 W.L.R. 813 at p. 817(P.C.).
12. See *supra* n. 7.

practice followed by a section of medical men in similar situations. The court said,[13]

> "A doctor is not guilty of negligence, if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art."

The above observation led to the acceptance of the principle that professional practice should be taken as an yardstick to determine the standard of care. Historically professional practice has been interpreted in terms of customary or usual practice of the members of the profession.[14] Customary practice rule looks at the practices actually employed. It has garnered substantial judicial support, and helped to lay down the current state of professional standard.[15] It is quite possible that the members of the profession may practice irrational custom with immunity. Such immunity hinders the development of better practices and is detrimental to better health care. Accordingly some courts have refused to identify the standard of care with a mere custom.[16] They identify the standard of care with the accepted practice which is an embodiment of collective expectation and response

---

13. *Id.* at p. 122.
14. Joseph H. King, *op.cit.* at p. 43.
15. In *Downer v. Veilleux*, 322 A.2d 82, 88 (Me.1974), *ibid.*, the American district court said that the plaintiff alleging negligence must prove a departure from the general custom and practice of reasonably skilled in the profession. In *Bailey v. Williams* , 189 Neb. 484, 486, 203 N.W.2d 454,456 (1973), *ibid.*, the court held that physicians were required to exercise that level of care and skill that other physician would ordinarily exercise and devote to the benefit of their patients. See also Clarence Morris, 'Custom And Negligence', 42 Colum. L. Rev. 1147 at p. 1163(1942).
16. Many jurisdictions in the U.S.A. have taken this view, see *Darling* v.*Charleston Comm. Mem. Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965); *Morgan v. Sheppard,* 91 Ohio L.Abs 579, 188 N.E. 2d 808 (1963), *Incollingo v. Ewing,* 444, Pa. 263, 282 A.2d 206 (1971), cited *supra* n. 4. at p. 44.

of the profession as to the conduct of it's members.[17] It is based on the premise that what a reasonably competent member of the profession practicing the same speciality as the defendant, would be expected to do to conform with the approved practice.[18] A cause of action arises if a standard practice is deviated from, which an ordinarily skilled doctor would not have done. In *Clark v. MacLennan*,[19] the plaintiff was admitted to hospital for delivery. After the delivery it was found that she was suffering from acute stress incontinence. As the conventional treatment failed the doctor decided to perform an operation. The practice at that time indicated it should not be performed within three months of delivery as it involved the risk of hemorrhage. But the operation was conducted within four weeks of delivery which led to chronic incontinence. The court found the doctor negligent.

Similar view is taken under Indian law also. In *Force Society v. M. Ganeswara Rao*,[20] a patient was suffering from cancer of cervix. The surgeon performed an operation instead of normal practice of chemotherapy. There was expert medical opinion that had the latter treatment been administered, the patient would have been alive for 18 months. The Andra Pradesh State Commission held the surgeon negligent for deviating from the normal practice.

Inspite of conflicting judicial formulations, courts have accepted the

---

17. *Blair v. Eblen*, 461 S.W. 2d 370, 373 (Ky.1970), cited *ibid.*
18. See *supra* note 4 at p.44.
19. [1983] 1 All E.R. 416(Q.B.).
20. (1997) 3 C. P.J. 228 (Andra Pradesh S.C. D.R.C.).

conclusiveness of professional standards as the standard of care for negligence.[21] It follows that it is for the medical profession to determine the standard of care and not for the lay courts.[22]

The Indian view with respect to the liability of a doctor for negligence can be gathered from the following observation of the apex court in *Dr Laxman* Balakrishna Joshi *v. Dr. Trimbak Babu Godbole,*[23]

> " The duties which a doctor owes to his patients 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 the treatment. A breach of any of those duties gives a right of action for negligence to the patient."

---

21. See *supra* n. 4 at p. 54. It militates with the customary practice which is rarely conferred a conclusive weight, though regarded as a piece of evidence of due care. In *Helling v. Carey,* 83 Wash. 2d 514, 519 P.2d 981 (1974), as quoted, *id.* at p. 50, the opthalmologists failed to diagnose glaucoma in time. It resulted in serious impairment of plaintiff's vision. She sued them for negligently failing to conduct routine glaucoma test. There was consensus in the expert testimony that it was not required, as for persons under 40 years of age, the possibility of glaucoma was estimated at one in 25,000. The court rejecting the expert testimony, held them liable for negligence on it's perception of existence of inexpensive safety measures rather than to expose the patient to the grave consequences of untreated disease.
22. See *supra* n. 7.
23. A.I.R. 1969 S.C. 128 at p.132. In this case a doctor performed a surgical procedure on patient's fracture without giving anaesthesia. The patient died due to shock. The doctor was held liable for negligence.

The above observation makes it clear that Indian law does not make a departure from English law. Accordingly in India also courts have applied the *Bolam* prinicple in many cases to determine the negligence of doctors.[24]

While accepting *Bolam* in prinicple, courts have modified it to accommodate conflicting situations. The respectable minority rule, the best judgement rule and locality rule are instances of such modifications.

Respectable minority rule suggests that when contrary opinion exist regarding an accepted practice the principle should accommodate different medical views.[25] It implies that a doctor can not be held liable for taking recourse to one of the several established courses of treatment.[26]

In *Chumbler v. McClure*,[27] the court emphasized this principle in the following words.

---

24. See *Indian Medical Association v. V.P. Shantha*, (1995) 6 S.C.C. 651. *A.S. Mittal v. State of U.P.*, (1989) 3 S.C.C. 223; *Dr. T.T. Thomas v. Elisa*, see *supra* n. 5.
25. The pluralism of medicine has led the way for different schools of thought with different modes of treatment for a particular condition.
26. In *Bolam*, a patient suffering from mental illness was subjected to an electro convulsive therapy. There were two contrary bodies of medical opinion. One insisting for some manual or drug created control and the other against it, as one of potential harm to the patients. The doctors opted for the latter procedure. In the course of therapy, due to convulsive movements the patient sustained injury resulting from dislocation of both hip joints and fractures of pelvis. The court held that the procedure adopted by the doctors was accepted as proper by a responsible school of thought.
27. 505 F.2d 489, 492 (6th Cir.1974), as cited in *supra* n. 4 at p. 58.

> " The test for malpractice...is not to be determined solely by a plebiscite where two or more schools of thought exist among competent members of the medical profession concerning proper medical treatment for a given ailment each of which is supported by responsible medical authority, it is not malpractice to be among the minority in a given city." [28]

In India also consumer courts have invoked this principle. In *Gopinthan v. Eskeycee Medicial Foundation Private Ltd.*,[29] a patient met with an accident. He sustained leg injury. The doctor performed the operation and fixed the fracture following a particular method. Being not satisfied with the treatment his wife shifted him to another hospital. There a doctor removed the fixtures done earlier and fixed them in his own method. The patient brought an action against the former doctor for deficiency in service on the ground that the technique followed by him was defective one. The National Commission holding that there was no deficiency made the following observation:[30]

> "When there are two genuinely responsible school of thought about the management of a clinical situation, the courts could do no great disservice to the community or the advancement of medical science than to place the hall mark of legality upon one form of treatment."

---

28. *Ibid.* See also *Moore v. Lewisham Group Hospital Management Committee,* (1959), *Times*, 5 Feb., as quoted in Rodney Nelson-Jones and Frank Burton, "*Medical Negligence Case Law*", London, p. 460 (1995) .
29. (1994) 1 C.P.J. 147 (N.C.).
30. *Id.* at p. 152, see also *Vinitha Ashok v. Laxmy Hospital*, (1992)2 C.P.J. 372 (N.C.), *Rajkumar Agrawal v. Dr. B. Mukhupadhyay*, (1995)1 C.P.J. 260 (Bihar S.C.D.R.C.).

The expression respectable minority is ambiguous. It is not obvious whether it refers to the numerical strength of doctors following a particular technique or their professional standing. But obviously a doctor can not obstinately and pig-headedly carry on an old technique which is really and substantially contrary to the whole informed medical opinion.[31]

Another modification of the *Bolam* principle is error in judgement rule. It signifies an honest difference of opinion among competent physicians.[32] Accordingly a physician who makes use of his own best judgement can not be held liable for negligence provided he has followed applicable professional standards. This rule re-emphasizes the premise of fault based liability.[33] It is a reaffirmation of respectable minority rule.[34] It is applicable only when there is doubt regarding the physical condition of the patient or the proper course to be followed or where good judgements might differ.[35]

The judgements must be one which competent practitioners could at least have reasonably disagreed.[36]

Best judgement rule which is another variation of the *Bolam* principle requires a doctor to follow a different practice if in his best judgement the common

---

31. See *Supra* n. 7.
32. *Haase v. Garfinkel*, 418 S.W. 2d, 108, 114 (Mo.1967) as quoted in Joseph H. King, *op.cit.* at p. 59.
33. See *supra* n. 4 at p. 59; *Todd v. Eithel*, 237 N.W. 2d 357 (Minn.1975), as quoted *id.* at p. 60.
34. *Ibid.*
35. *Moulton v. Huckleberry,* 150 Or. 538, 546, 46 P.2d 589, 592 (1935), quoted *ibid.*
36. See *Supra* n. 4. at pp.62-63.

place medical practice is dangerous. In *Toth v. Common Hospital at Glen Cove,*[37] a pediatrician had prescribed reduced dosage of oxygen to a patient. He failed to ensure that the same would be administered. The patient sustained injury due to excessive dosage. The higher dosage was the professionally accepted standard. The pediatrician was held liable as he was personally aware that less dosage was preferable, even though higher one was the community practice.

Formulation of standard of care with reference to the locality where a doctor practices is also a variation of the *Bolam* principle.[38] Accordingly a doctor whose conduct falls below the standard set in the locality where he practices attracts liability for negligence. The necessity for locality rule arises because of geographical differences in access to medical information, modern facilities and concentration of certain diseases in specific areas giving rise to different medical practices.[39]

The test covers a vast spectrum of professional activity in medicine.[40] It has been applied to diverse aspects of professional duty of a doctor towards

---

37. 239 N.E. 2d 368 (1968), quoted *id.* at p. 65.
38. See *supra* n. 4 at p.72.
39. *Ibid.*
40. Michael Davies, "*Medical Law*", London, p.79(1996)

his patient.[41] But it has not provided any answers to certain questions like whether it speaks of a normative or descriptive analysis of professional legal standards or whether the courts have any dominant role in sifting the medical evidence or whether medical negligence is an ethical or sociological concept.[42] It was laid down in the backdrop of significance attached to the professional reputation of a doctor giving the opinion. The inability of medical profession to appreciate the problems of liability and the inability of judges to understand the anatomy and ignorance of jurisprudential aspects of expert evidence contributed to the evolution of this principle.[43] The subsequent progress in the aforesaid aspects, it is said, has made the test a myth.[44] In spite of it, it has still remained the main stay of medical law, as the doctors have inordinate power to influence the results.[45] But there are

---

41. See *Whitehouse v. Jordan* (question of treatment), [1981] 1 All E.R. 267(H.L.); *Maynard v. West Midland Regional Health Authority* (Diagnosis), *supra* n. 9; *Sidaway v. Governors of Bethlem Royal Hospital and Maudsley Hospital* (information and consent), *supra* n. 9 ; *F. v. West Berkshire Health Authority* (determination of best medical interest of a mentally incompetent patient), [1989] 2 All E.R 545(H.L.) ; *Airedale National Health Service Trust v. Bland,* [1993]1 All E.R. 821(H.L.) ; *Bolitho v. City and Hackney Health Authority* (Causation), [1993] 4 Med. L.R. 381(C.A.).
42. See *Supra* n. 40.
43. Ian S. Golderin, "Problems Arising Out Of "Ancestor" Worship", 144 N.L.J. 1237 at p. 1238 (1994).
44. *Ibid.* See also Ian S. Golderen, "The Interface Of Expert And Jury", 144 N.L.J. 1315 (1994); Ian S. Golderen, "Exploding The Bolam Myth", 144 N.L.J. 1415 (1994).
45. See *Supra* n 40 at p.89.

sporadic instances of departure. In *Hucks v. Cole,*[46] it was observed that a doctor was duty bound to resort to safety measures to prevent the risk to the health of the patient. This departure has led to a thinking that in medical negligence cases a court has to find out the magnitude of risk. The court has to balance the risk with the available precautions to avoid the risk.

Courts setting standard of medical practice :

Followers of this principle discard the professional standard test and insist that it is for the courts to determine the standard.[47] It is obvious from the *Bolam* principle that if a practice is not accepted by a responsible body of medical opinion, it results in a breach of duty.[48] The inference is that courts need to question the medical evidence.[49] The court must be satisfied that the standard contended on behalf of the medical men is one which is upheld by a respectable and responsible body of medical opinion and such body must be experienced one

---

46. See *supra* n. 9. The patient in this case was under the care of the defendant doctor, during and after her confinement. Her ring finger and later, toes got swollen with yellow spots on them. After bacteriological test for 5 days, the lesions did not fully heal. Doctor failed to begin a course of penicillin treatment. Later her voice got fully impaired. The doctor was held negligent..
47. *Rogers v. Whittakar,*[1992] 175 C.L.R. 479 (position taken in Australia).
48. See *supra* n. 7.
49. *Bolitho v. City and Hackney Health Authority,* see *supra* n. 41; *Hucks v. Cole,* see *supra* n. 9.

in particular area of medicine.[50] The court must judge the professional standard keeping in mind the reasonable expectation of a patient in terms of proper professional service from the medical men.

Breach of duty considered as actionable negligence :

Deficiency in medical service may arise from negligence in diagnosis, administration of treatment, improper use of therapeutic agents and delegation of duties to para-medical staff.

Negligence in diagnosis:

Treatment commences with diagnosis of a patient. A wrong diagnosis results in wrong treatment and the real condition of the patient remains untreated leading to injury to the patient. In *Edler v.Greenwich and Deptford Hospital Management Committee,*[51] a girl on 11 years had complained abdominal pain and vomiting. On being asked where she felt the pain, she winced on palpating the right side of the stomach. It was diagnosed as a condition of gastric upset and she was allowed to go home. After two days she was examined by another doctor, who performed an emergency operation. It revealed a perforated gangrenous appendix.

---

50. *Hills v. Potter* [1983] 3 All E.R. 716 at p. 728(Q.B.). But English courts are not serious about this stand. The decided cases show that conclusive weightage is given to professional standard.

51 (1953), *Times* 7 March, as quoted in Rodney Nelson-Jones and Frank Burton, *"Medical Negligence Case Law"*, London, p. 319 (1995); *Freeborn v. Leeming,* [1926]1 K.B.160. *Fraser v. Vancouver General Hospital,* [1952] 3 D. L. R. 785. See also, *Hotson v. East Berkshire Area Health Authority,* [1987] 2 All E.R. 909(H.L.).

The girl died after 36 hours of operation. The first doctor was held negligent as he failed to exercise reasonable care in giving an idea that nothing was wrong which was the result of a faulty diagnosis.

Negligence in diagnosis is considered as a deficiency in service under Indian law also. In *Jayendra Maganlal Padiya v. Dr. Lalith P. Trivedi*,[52] a minor boy had fever. On consultation the doctor prescribed medicine for three days. Fever did not subside. There were swellings in both the lips and lesions both in and outside the mouth. Rashes began to spread all over the body. The doctor wrongly diagnosed it as measles and prescribed medicine accordingly, even though he was told that the boy had been already vaccinated for the same. When the condition of the patient became too critical he was referred to a specialist. It was diagnosed that the patient was suffering from Stevens Johnson Syndrome, which is a very serious disease. As a result of the wrong treatment administered initially the patient lost his eye sight permanently. There was expert medical evidence to the effect that, no reasonable doctor would have initially diagnosed it as measles. Accordingly the doctor was held liable for wrong diagnosis.

A doctor like any other human being is fallible and learns by experience. Even the most specialist doctor may fail to detect the deteriorated condition of a patient. Hence he shall not be subjected to liability unless, he is palpably wrong

52. (1997) 1 C.P.J. 11 (Gujarath S.C.D.R.C.).

falling short of reasonable care and skill expected of a similarly placed doctor.[53] A doctor will be palpably wrong if he fails to subject the patient to a careful examination . In *Maben v. Rankin,*[54] a woman's husband told a psychiatrist that she was in need of commitment. He came to her house to treat her and gave an injection without examining her. She was totally ignorant that he was a psychiatrist. When she gained consciousness she found herself in the mental hospital. In spite of her objection, she was given electroshock treatment. The Court held him liable for misdiagnosis as there was evidence to show that she had never been mentally ill and the doctor administered treatment without proper examination.

Similarly a doctor shall avail himself the scientific means and facilities open to him to secure an adequate factual basis to arrive at his diagnosis.[55] In *Re Johnson's Estate,*[56] an unmarried woman had a fibroid tumour. The doctor diagnosed it as pregnancy without any tests. He was held liable for negligent misdiagnosis. The fact that the woman was unmarried, at least, was sufficient for the doctor to be on the alert to conduct necessary test. The incidence of liability

---

53. *Mitchel v. Dixon,* [1914] App. D.519, a South African case, quoted in Nathan, "*Medical Negligence*", London, p. 44(1957).
54. 358 P. 2d 681, Cal. 1961; See also *Smith v. Shankman,* 25 Cal. Rptr. 195, Cal. 1962, as quoted in Angela Roddey Holder, "*Medical Malpractice Law*", Newyork, second edition, p. 75.
55. *Clark v. United States,* 402 F.2d 950, C.C.A. 4, 1968, quoted *id.* at p. 77.
56. 16. N.W. 2d 506, Neb. 1944, as quoted in Angela Roddey Holder,*op.cit.* at p.78.

does not depend upon the status of being married or unmarried, but on failure to conduct necessary tests.

Similar view was taken by the Bihar State Commission in *K.N. Lal v. R.K. Akhaury.*[57] In that case a patient was suffering from diminishing vision of right eye. The doctor performed a cataract operation. After the operation the patient became totally blind. It was found that the doctor had not conducted the intra ocular pressure and vision test which would have suggested the proper step to be taken. It was held that there was gross negligence on the part of the doctor in failing to conduct necessary test which would have avoided the calamity.

Radiological examination is one of the diagnostic devices to ascertain the physical condition of a patient. The obligation on the part of a doctor to go for it depends on the particular circumstances, the condition of patient and accessibility to the apparatus.[58] A doctor shall insist for such examination, if the case history suggests the possibility of a fracture or dislocation or foreign body in the wound.[59] In *McCormack v. Redpath,*[60] a workman sustained a head injury in the course of

---

57. (1998) 3 C.P.J. 112 (Bihar S.C.D.R.C.).
58. *Sabapathy v. Huntley*, [1938]1 W.W.R. 817, as quoted in Rodney Nelson Jones and Frank Burton, *op.cit.* at p. 540; see also *Braisher v. Harefield & Northwood Hospital Group Management Committee,* [1966]2 Lancet 235, *id.* at p. 58.
59. A.Keith Mant (ed.), "*Taylors Principles And Practice Of Medical Jurisprudence*", London, thirteenth edition, p.46 (1957).
60. (1961), *Times*, 24 March, as quoted in Rodney Nelson – Jones and Frank Burton, *op.cit.* at p.445.

employment. The wound was sutured without taking any X-ray. Later when discomfort developed, it was found that he had a depressed fracture of skull and piece of bone protruding in the brain tissue. He subsequently suffered from epileptic fits. The doctor was held negligent for his lapse to advice for X-ray.

A doctor diagnoses a patient on the basis of the information tendered by a patient. But even though the information is concealed the condition of a patient, if presents observable symptoms, he shall make proper diagnosis.

In *Rewis v. United States,*[61] a fifteen months old child and it's mother were suffering from flue. The child had eaten aspirin. This fact was not revealed to the doctor. The latter concluded that like the mother the child had flue. It died. It was hyperventilating and showing the objective symptoms of aspirin poisoning, at the time when it was brought to the hospital. It was held that the doctor should have taken note of these symptoms to arrive at a conclusion as to the presence of some problem. Past history of a patient is relevant for the diagnosis where he is suffering from chronic disease and had been already subjected to treatment. He may be allergic to certain drugs. So a doctor is always under an obligation to make necessary enquiry . In *Chin Keow v. Government of Mayasia,*[62] a woman was

---

61. 536 F. 2d 594, C.C.A. 5, 1976 as quoted in Angela Roddey Holder, *op.cit.* at pp. 71-72
62. See *supra* n. 11

suffering from an ulcer on her right ankle and swollen glands in her thigh. The doctor gave penicillin injection from which she died. On a previous occasion, she had suffered from adverse reactions. The out-patient card contained a warning that she was allergic to penicillin. The court held the doctor liable for negligence for failing to enquire her medical history before causing the administration of penicillin injection.

The obligation of enquiry is imposed under Indian law also. In *Christian Medical Centre v. Shajahan*,[63] the patient was a diabetic. The doctor conducted a cataract operation on his left eye. But he failed to enquire before performing the operation whether patient was suffering from diabetes. So he could not take the precautions that had to be taken before subjecting a patient to an operation. The patient developed complication which necessitated a second operation for the removal of the eye. It was found that the second operation could have been avoided, if there was necessary enquiry on the part of the doctor. The Andra Pradesh State Commission held that failure to make such enquiry would result in negligence on the part of the doctor.

Failing to attend the patients :

Once a doctor undertakes to treat a patient, he has a legal obligation to attend him.[64] Liability arises if failure to attend results in deterioration of patient's

63. (1998) 3 C.P.J. 242 (Andra Pradesh S.C.D.R.C.).
64. The duty to attend patients in the other circumstances is discussed in chapter 6, *infra.*

health condition . In *Farquar v. Murray,*[65] a doctor went on holiday without informing the place of his stay. During that time one of his patient's finger remained poulticed for a long time and eventually resulted in amputation. It was held that the failure to attend the patient in the circumstances was an act of negligence.

Similar view is taken under Indian law also by the Maharastra State Commission in *Muralidhar Eknath Masane v. Sushrusha Co-operative Hospital Ltd.*[66] In that case a boy fell three to four times while playing. The doctor suspected it as a case of epilepsy and kept changing the medicine. There after he advised the patient to be admitted in a nursing home. He did not attend the patient. Latter he advised to shift the patient to a hospital where he was the visiting doctor. He did not give any instruction to the hospital staff to attend the patient at an interval of 24 hours with full knowledge of critical condition. The patient ultimately died. It was held that both the hospital and doctor were negligent. It should be noted that law does not compel a doctor to treat a patient. But once the doctor accepts a patient it is his duty to do the needful. Failure results in deficiency by non-feasance.

A critical condition of a patient warrants continuous presence of a doctor.

---

65. (1901) 3 F.(Ct. of Sess.) 859, as quoted in Nathan, *op.cit.* at p. 42.
66. (1995) 1 C.P.R. 606 (Maharastra S.C.D.R.C.).

In *Dr. Sr. Louie & Anr. v. Kannolil Puthuma*,[67] a patient was admitted in a nursing home for a delivery. She had complaints in the previous delivery, which was known to the hospital staff. To induce labour pain she was given glucose drip with syntocinon. The examination revealed that labour was progressive. Dr. Sr. Louie performed artificial rupture of membrane at about 4.15 p.m. Thereafter she went to attend other deliveries, living only nurses. She attended the patient again at 4.30 p.m. After catheterisation she applied vaccum extractor finding both the mother and child in danger. In ten minutes the baby which was in asphyxiated condition was taken out and the patient had sever bleeding after the delivery. Eventually the episode ended in the death of both the child and mother. It was held that the doctor was negligent. The National Commission rightly observed that when complication was expected at the time of delivery some qualified medical attendant ought to have remained with the patient.[68] It follows that a doctor must know that critical condition of a patient might give rise to some unexpected complex response. It calls for the presence of a qualified doctor to monitor the treatment process.

---

67. (1993) 1 C.P.J. 30 (N.C.)
68. *Id.* at p. 36. The National Commission relied on a passage from Dr. A.C. Mudaliyar and Dr. Krishna Menon's clinical obstetrics which reads as follows.

> "When patients is in syntocinon a medical officer stays with the patient watching contractions, adjusting the rate of drip and recording the foetal heart every half an hour".

But the hospital record did not show that such observations had been recorded except foetal heart.

The obligation of attention is not confined to the treatment. But it is extended to the follow up and post operative care, unless there is an agreement for the same by another doctor.[69] It is co-extensive with the prior responsibilities. In *Arvindkumar Himmatlal Shah v. Bomaby Hospital Trust*,[70] a patient was admitted in the dependent hospital for operation of his left hip. The doctor operated the patient who did not regain consciousness. Due to continuous bleeding from the operation wound the patient died. There was nothing on record to show that an effort was made to control the bleeding. It was held that failure to render post-operative care attracted liability.

Re-iterating the duty of post-operative care the Maharstra State omission in *B.S. Hegde v. Dr. Sudhanshu Bhattacharya*,[71] made the following observation:[72]

> "... The fees paid to a medical practitioner includes post-operative care. No separate fees, under the heading post-operative care can be imagined. It is not the normal practice. The fees for operation by a medical practitioner should normally be inclusive of fees of post-operative care. A medical practitioner can not claim that the moment he performs an operation his responsibility comes to an end and he owns no duty to take care the fastidious for any post-operative responsibility. In fact the medical practitioner is

---

69. James R. Richardson, *"Doctors, Lawyers And The Courts"*, Cincinnati, p.29 (1965); see also Dr. Bernad Knight (rd.), H.W.V. Cox, *"Medical Jurisprudence And Toxicology"*, Allahabad, sixth edition, p.429(1994).
70. (1992) 2 C.P.R. 154 (Maharastra S.C.D.R.C.).
71. (1992) 2 C.P.J. 449 (Maharastra S.C.D.R.C.).
72. *Id.* at p. 456.

> under ethical and moral obligation to take care of a patient after he has been operated upon. It is the same doctor who performs the operation who might be expected to know the requirements of a patient after the performance of the operation."

But a different proposition was laid down by the National Commission on appeal.[73] In that case a patient underwent coronary by-pass surgery. Later complications developed. Puss started to ooze out from the chest. But the doctor failed to render post-operative care. It was held that since the doctor did not undertake to render post-operative care, he was not liable. It is submitted that this proposition does not reflect the correct position of law. A treatment or performance of an operation includes acts incidental to it. The post-operative care of an operated patient is the legal responsibility of a doctor who conducts the operation,[74] unless necessary care by another doctor is arranged.[75]

The duty of follow-up is recognised in American jurisidiction. In *Lee v. Andrews*,[76] a patient had a hemorrhoidectomy. The next day he developed urinal retention. A medical student catheterised him. He complained of pain around the scrotum and his condition became critical soon. It was transpired that he died as a result of septocema caused by careless catheterisation. The surgeon did not give him antibiotics and had ordered only an ice bag. The court found the surgeon

---

73. *B. S. Hegde v. Dr. Sudhanshu Bhattacharya,* (1993) 3 C.P.J. 388 (N.C.).
74. See *supra* n. 69.
75. *Ibid.*
76. 545 S.W. 2d 238, Tex. 1977, as quoted, see *supra* n. 54 at p. 126.

negligent as he failed to call an urologist as soon as the patient began to complain. A duty is imposed on a doctor to attend the patient with regularity and promptitude.[77] Breach of duty depends on factors like intimation in advance, urgency of appointment. Hence without venturing a generalised formulation, what can be suggested is that at all times a doctor must act reasonably.[78]

Undertaking treatment beyond one's competence :

If a doctor lacks care and skill to deal with a particular case, he shall commit the patient to the care of one who is competent to deal the case. He shall not undertake recklessly a case which he knows or ought to have known to be beyond his competency.[79] In *Payne v. St. Helier Group Hospital Management Committee*,[80] the plaintiff was kicked by a horse in the abdomen. The casualty officer who examined him concluded that there was no internal injury. Subsequently the condition of patient became critical and he was operated twice. It was revealed that he had general peritonitis. Eventually the plaintiff died. It was held that the casualty officer was negligent in not getting him examined by a physician of consultant rank.

---

77. If the absence of the doctor is so inevitable he shall make alternative arrangement (providing a substitute) or leave proper instructions to the patient if sufficient.
78. *Smith v. Rae,* [1920]50 D.L.R.323.
79. *R. v. Bateman,* see *supra* n. 6.
80. (1952), *Times,* 12 November, as quoted in Rodney Nelson - Jones, *op.cit.* at p. 493.

A competent doctor may suffer from a disability arising from intoxication or sickness which might make him unable to exercise reasonable care and skill.[81] Accordingly if it is proved that a doctor was unfit to treat, because of his sickness, his conduct would amount to negligence.[82]

Failing to inform the truth :

The patient may sustain injury as a result of treatment arising from inevitable accident or negligence of a doctor. There is an obvious duty on the doctor to inform the injury at the earliest so that the patient is given an opportunity to do the needful to avoid serious consequences. In *Gerber v. Pines,*[83] in the course of administering a hypodermic injection a patient developed sudden muscular spasm, as a result of which the needle broke. A part of the needle was left in his buttock. This was not informed to him. Though the injury was a result of inevitable accident, the doctor was held negligent for failing to inform the injury.

---

81. If inability is a result of intoxication which results in serious injury or death, it would attract criminal liability. For a discussion on criminal liability of doctors for negligence, see Sadasivan Nair, "Criminial Liability For Doctors For Professional Negligence", [1994] C.U.L.R. 147.
82. In *Nickolls v. Minister of Health and Another,* (1955), *Times,* 4 Feb., as quoted in Rodney Nelson-Jones and Frank Burton, *op.cit.* at p. 480, a surgeon who performed the operation was suffering from cancer. The operation resulted in damage to the patient who alleged that the surgeon was not fit to perform the same. The court held that he was fit as there was no contrary evidence to disprove it.
83. (1934) 79 S.J. 13 as quoted in J.P. Eddy, *op.cit.* at p. 84.

Similar view was taken by the Bihar State Commission in *K.N. Lal v. Akhaury*.[84] In that case a patient after cataract operation lost his eye sight. The doctor did not reveal it to the patient. After three months the patient learnt it through another doctor. In this regard the Commission observed,[85]

> "It can be appreciated that a doctor may not be expected to succeed in all his ventures and cure all his patients, but is certainly expected of him as a part of his duty he would keep no secret from his patient and explain to him the real position so that he could seek redressal elsewhere."

Under some circumstances, a doctor is under obligation to reveal the truth if treatment does not serve any fruitful purpose. In *Dr. S.B. Jain v. Smt. Munnidevi*,[86] a doctor performed a cataract operation on the eye of an old woman with the full knowledge that it was not a fit case for operation. After the operation she lost her eye sight. The Haryana State Commission held that there was deficiency in service as the doctor should not have conducted operation with the knowledge that no desired result could be attained.

Negligence in delegation of duties to the patient :

A doctor has to delegate certain duties to the patient as he relies on the latter for the symptoms, his condition or further progress. He is under an

---

84. See *supra* n. 57.
85. *Id.* at p. 117.
86. (1998) 2 C.P.J. 239 (Haryana S.C.D.R.C.).

obligation to give instructions in explicit terms and explain to the patient in intelligible terms as to what is expected of him.[87] If a circumstance requires warning, it shall be given. In *Clarke v. Adams,*[88] a patient was suffering from fibrostic condition of the left heel. As a result of the electric treatment, his knee was burnt and had to be amputated. The warning given by the doctor read, "when I turn on the machine I want you to experience comfortable warmth and nothing more; if you do, I want you to tell me". The Court held that the doctor was negligent in not communicating the danger and the above warning was not a warning of danger.

It follows that where there is a known danger, there is an obligation to inform it in unambiguous terms. The doctor shall take necessary precautions to avoid it rather than relying on the patient. This is certainly not an over imposing duty, as it does not go beyond the matter of reasonable care and skill.

Negligence in administration of treatment :

A doctor must give proper advice. Any lapse on his part to do so will attract liability for negligence. In *Shibu v. St. Joseph,*[89] a patient sustained a fracture on ankle of his right leg. He was treated by the doctors in the hospital. The leg was put in plaster. He was advised to come after 56 days. He complained severe pain.

---

87. Nathan, *"Medical Negligence"*, London, p. 47 (1957).
88. [1950] 94 S.J. 599, as quoted in J.P. Eddy,*op.cit.* at p. 85.
89. (1995) 3 C.P.R. 177 (Kerala S.C.D.R.C.).

The doctor gave pain killer. But pain did not subside. Eventually plaster was removed. On removal the leg was found turned to left. The doctor suggested physiotherapy. He did not suggest any operation or a shift to another hospital with better facilities. It was held that it amounted to deficiency. It is evident from the decision that if the condition of a patient can not be competently handled by a doctor or if the existing facilities are insufficient a doctor is under an obligation to suggest the proper course to be adopted.

A doctor prescribes drug to be administered for a particular period of time, taking into consideration the physical condition of a patient. An over hasty withdrawal from drugs, unless there is a genuine cause will give rise to liability. In *Hatwell v. South-West Metropolitan Regional Hospital Board,*[90] a general practitioner prescribed seconal and valium drugs to a patient. When latter was on those drugs, he was admitted to a hospital. On admission the psychiatrist withdrew those drugs. As a result she suffered violent tremors and epileptic fit. She sustained a fractured jaw, resulting from a fall caused by the fit. The court found the psychiatrist negligent in withdrawing the drugs hastily having regard to the nature and extent of drugs prescribed by the general practitioner.

---

90. (1976) Nov. 5 (C.A.), as quoted in Rodney Nelson Jones & Frank Burton, *op.cit.* at p. 372. But in *Airedale National Health Service Trust v. Bland*, see *supra* n. 41, the court allowed the withdrawal of life sustaining treatment of a patient who was in a permanent vegetative state.

The doctors generally use needles, injections, drugs, anaesthesia, blood and blood products and necessary instruments for operation. These agents may cause injury to a patient due to their inappropriateness or improper administration. Given the frequency of suturing and administration of injections, mishaps are bound to occur.[91] If such mishaps are the result of failure to exercise reasonable care and skill, a doctor is held liable . In *Henderson v. Henderson,*[92] a surgeon subsequent to a tonsil operation took steps to control the bleeding by stitching. The needle broke and part of it remained in patient's throat. He made a blind unsuccessful search, in the course of which he made an incision, as he thought that he felt the needle and it was stitched. It resulted in scarring of her throat. Later the broken piece was removed in another hospital. The court found the surgeon negligent, as he ought to have abstained from the blind search, foreseeing the serious consequences. To administer an injection to a wrong place constitutes negligence. In *Kharaithi Lal v. Kewal Krishnan,*[93] a patient was suffering from abdominal pain. The doctor administered injection in the artery instead of vein. As a result of it gangrene set in and his three fingers had to be amputated. The Punjab State Commission held that the doctor was negligent as the expert opinion suggested that administration of injection to artery could cause an injury.

---

91. They do not constitute negligence per se. See *Mitchel v. Dixon*, *supra* n. 53.
92. [1955] 1 B.M.J. 672, as quoted in Rodney Nelson -Jones and Frank Burton, *op.cit.* at p. 376.
93. (1998) 1 C.P.J. 181 (Punjab S.C.D.R.C.).

Similarly a doctor should not move away from the safe area. In *Caldeira v Gray,*[94] a doctor in the course of administering an injection to a malaria patient, inserted the needle close to sciatic nerve. The patient suffered a dropped right foot as a result of injury to the nerve. The court found the doctor negligent for moving away from the safe area.

An obligation is imposed on a doctor to conduct necessary test before administering injection. In *Dr. Ashok Dhawan v. Surjeet Singh,*[95] a doctor gave an injection to patient's right arm without proper test. As a result patient's arm became motionless and he was unable to make use of it. The National commission held that the doctor was negligent for failing to conduct necessary test before administering injection.

Likewise injection of a wrong solution also attracts liability for negligence. In *Harjoth Ahluwalia v. M/s. Spring Meadows Hospital,*[96] a minor was suffering from typhoid. The attending doctor prescribed an intravenous injection. The nurse gave a wrong injection. As a result of wrong injection the patient immediately collapsed. Appropriate step was not taken to keep the patient in ventilator. In consequence the child was thrown into a vegetative state. It was held that the doctor, nurse and hospital were negligent.

---

94. [1936] 1 All E.R. 540 (P.C.).
95. (1997) 1 C.P.J. 82 (N.C.).
96. (1997) 2 C.P.J. 98 (N.C.).

Similarly wrong timing if there are contra indications and absence of conducive circumstance will result in negligent conduct on the part of a doctor.[97]

Negligence in administration of drugs :

A doctor will be held liable for administration of wrong drugs due to failure to exercise reasonable care.[98] Every doctor must satisfy himself that the drug is harmless, before administering it. The duty of personal inspection cannot be delegated.

In *A.S. Mittal v. State of U.P.*,[99] a voluntary organization conducted an eye camp with permission from the state government for the benefit of poor patients who were suffering from diminished vision. A band of expert govt. doctors

---

97. *King v. King,* [1987] 1 Lancet 991, as quoted in Rodney Nelson –Jones and Frank Burton, *op.cit.* at p. 415 ; *Robinson v. The Post office,* [1974]2 All E.R. 737(C.A.).
98. Very often such an eventuality arises because of prescription of wrong substance for correct one. It usually arises because of confusion as to container, for eg. giving of carbon dioxide instead of oxygen owing to wrong marking of cylinders, instelling wrong solution to the eye, the intravenous injection of methylated instead of a contrast medium for pyelography. See D. Har Court Kitchin, "*Law For The Medical Practitioners*", London, p. 44 (1941); It arises also due to an error from illegible prescription. In *Pendergast v. Sam and Dee Ltd.,* [1989]1 Med. L.R. 36 (C.A.), as quoted in Rodney Nelson-Jones and Frank Burton, *op.cit.* at p. 497. an illegible prescription caused supply of daonil as amoxil, due to misreading by a chemist. The patient after Consuming six tablets suffered hypoglycaemia, which led to unconsciousness and irreparable brain damage. The court found the doctor negligent on the ground that a prescription, which was written in such a tenor reasonably permitting misreading, fell below the necessary standard. Liability was apportioned in the ratio of 75:25 between drug company & chemist and doctor respectively.
99. (1989) 3 S.C.C. 223.

performed the necessary operation. After the operation the patients developed post-operative complications. As a result most of the patients who could have gained vision, lost their sight totally. It was found that the purity of saline used to irrigate the eyes to maintain turgitity of operational surface was not tested to ensure safety. The Supreme Court held that the lapse on the part of the doctors to check the solution amounted to negligence.

In *Harjoth Ahluwalia v. M/s. Spring Meadows Hospital,*[100] the doctor failed to check personally the injection administered to the patient. Even though correct dosage was administered as the injection was wrong one, the dosage became lathel. The National Commission held that the duty of personal inspection could not be deligated. On appeal the Supreme Court,[101] made the following observation: [102]

> "... A consultant could be negligent where he delegated the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly..."

Similar position is undertaken under In English law also. In *Collins v. Hertfordshire County Council,*[103] a junior surgeon misunderstanding the consultant's prescription ordered the pharmacist cocaine instead of procaine

---

100. (1997) 2 C.P.J. 98 (N.C.).
101. *M/s. Spring Meadowa Hospital v. Harjoth Ahluwalia,* (1998) 1 C.P.J. 1 (S.C.).
102. *Id.* at p. 8.
103. [1947]1 All E.R. 633(K.B.) ; *Strangways v. Clayton,* [1936] 2 K.B. 11.

without any written prescription. The surgeon also did not check the solution. The patient was administered a lethal dose. The court held him negligent.

The magnitude of risk in administration of anaesthesia is very high.[104] So the standard of care and skill expected of a specialist is very high in undertaking such a dangerous duty.[105] In *R. v. Adomako*,[106] an anaesthetist failed to notice the disconnection of tube from the ventilator supplying oxygen to the patient's mouth. It remained disconnected for six minutes. Latter it was re-connected. But the patient had already suffered a cardiac arrest causing sever brain damage. Later he died of hypoxia. The House of Lords held that the anaesthetist was grossly negligent as any competent anaesthetist watching the patient should have soon realised the disconnection.

Indian law has also taken similar view. In *Dr. Pinnamaneni Narasimha Roa v. Gundavarapu Jayaprakasu*,[107] the anaesthestist administered anaesthetics for performance of tonsellectomy operation on a patient. He removed the tube from the mouth of the patient without giving fresh breaths of oxygen. There was respiratory arrest. The anaesthestist failed to notice that. Eventually it led to

---

104. Any error may result in brain damage, death or injury to nerves due to poor positioning. Occurrence of awareness due to anaesthetic failure and injury to teeth while using the laryngoscope during intubation are also common. See Rodney Nelson -Jones & Frank Burton, *op.cit.* at p.122.
105. See Har Court Kitchin, *op.cit.* at p. 285.
106. [1994] 3 All E.R. 79 (H.L.).
107. A.I.R. 1990 A.P. 207.

cardiac arrest and the patient suffered severe brain damage. The High Court of Andra Pradesh held that the conduct of anaesthestist amounted to negligence.

In western countries it is well established that a general practitioner shall not administer it except in emergency. Otherwise any mishap will attract liability.[108] However the National Commission in *Sethuraman Subramaniam Iyer v. Triveni Nursing Home*,[109] took the view that administration of anaesthestics by a general practitioner ipso facto would not amount to negligence. Therefore it follows that a general practitioner can administer anaesthetics provided he exercises reasonable care and skill.

There is an obligation on the part of a doctor to ensure the existence of adequate facilities for the administration of anaesthesia. In *State of M.P. v. Dr. Barthi Patidar*,[110] spinal anaesthesia was administered to a patient. He developed respiratory problems. The nursing home was devoid of basic facilities. It was held that administration of anaesthesia without basic facilities causing injury to the patient would amount to negligence.

Where anaesthesia is used, unless satisfactory account of the consequence is given the court presumes negligence. In *Whitefield v. Whittaker Memorial Hospital*,[111] a patient died after a tonsillectomy. The likelihood of death after

---

108. See *supra* n. 105.
109. (1998)1 C.P.J. 10 (N.C.).
110. (1995) Cr. L.R. 243(M.P.).
111. 169 S.E. 2d 563, Va.1969, as quoted in Dr. Jagdish Singh, "*Medical Profession And Consumer Protection Act*", Jaipur, p. 75 (1994).

having one's tonsils removed is very rare. The indication of evidence was that probably the cause of death was the way in which anaesthesia was administered. The court presumed a causal connection between negligence and death irrespective of absence of specific proof. An anaesthetist shall make necessary enquiry regarding the physical conditions of a patient as some situations do not permit safe administration of anaesthesia.[112] In *Sanzari v. Rosenfield,*[113] a dental patient had severe hypertention for which she was undergoing treatment. A dentist without enquiring her physical condition and the medicine she was taking injected a local anaesthesia in order to fill the teeth. It was clearly stated that the substance he used should not be used for hypersensitive patients. She got up from her chair, after her teeth was filled and collapsed on the floor with a stroke. The dentist was held liable for failing to make necessary enquiry.

A doctor will be held liable for causing anaesthetic accidents due to failure to check the pulse, breathing pattern and defective technique.[114] Overdose

---

112. Under some circumstances such enquiry is not essential. For example, when a patient is suffering from cold, administration of aneasthesia can easily result in death or cardiac arrest. Accordingly in many cases anaethetists were held liable for administering aneasthesia in non-emergency elective surgery inspite of cold as the symptoms were visible to bare eyes. See Angela Roddey Holder, *op.cit.* at p. 153.
113. 167 A. 2d 625, N.J. 1961, *id.* at p. 153.
114. See Nelson Rodney -Jones and Frank Burton, *op.cit.* at pp. 122-123.

resulting in fatal consequences[115] and under dose resulting in anaesthetic awareness in the course of operation which may cause excruciating pain to the patient are also actionable.[116] Hence failure to take necessary precautions and failure to the administer the right dosage will result in breach of duty.

Negligence in using instruments and other surgical products:

A doctor must exercise reasonable care and skill to avert any danger to a patient while using instruments and other surgical products. Accordingly a doctor is under a duty to avoid over dosage of x-ray while using it as diagnostic or curative agent. In *Ahern v. Veteran Administration,*[117] a patient with rectal cancer was given pre-operative radiation in far excess of normal dosage. The radiologists sought to justify the departure from normal practice relying on an article written by a physician. The excessive dosage resulted in permanent disability. The court held that the radiologist was negligent.

Similarly a radiologist is under an obligation to enquire the physical condition of a patient to avoid adverse consequences. Exposure of a pregnant woman to x-rays will result in injury to her and doctor will be held liable. In *Salinetro v. Nystrom,*[118] a pregnant woman who sustained abdominal injuries in a

---

115. See *Connolly v. Camden and Islington Area Health Authority*, [1981] 3 All E.R. 250 (Q.B.).
116. See *supra* n. 114.
117. 537 F.2d 1098, C.C.A. 10, 1976, as quoted in Angela Roddey Holder, *op.cit.* at p. 150.
118. 341 So. 2d 1059, Fla. 1977, id. at p. 151.

wreck was x-rayed. The radiologist did not make any enquiry as to pregnancy. Later through her obstetrician, she discovered that she was 4 to 6 weeks pregnant. On being told about X-ray, he suggested for abortion. She sued the radiologist. The court held that the radiologist was not negligent. Even if he had asked she would have told no, as she herself was not aware of it. It follows that, if she had the knowledge of pregnancy the lapse on the part of the radiologist would have amounted to negligence.

A radiologist shall carefully handle the instrument. In *Curley v. McDonald,*[119] during dental x-ray, a patient came in contact with wires from the machine. As a result of the contact she was thrown from the chair. The court held the dentist liable for negligent use of the machine.

Similarly a doctor shall carefully handle the instruments used in the course of an operation to avoid injury to the patient. In *Crysler v. Pearse,*[120] the defendant surgeon was performing an operation to remove a urethral corucle by diathermy and before the actual operation applied a quantity of some alcohol for sterilisation operation. Some alcohol dripped down to the indifferent electrode of the diathermy instrument. The application of electrode to the patient's body created ignition. The court held the surgeon negligent in applying an excessive

---

119. 160 N.E. 796, Mass. 1928, *ibid.*
120. [1943] 4 D.L.R. 738; see also *Gold v. Essex County Council,* [1942] 2 All E.R. 237(C.A.); *Hall v. Lees,* [1904] 2 K.B. 602; *Jones v. Manchester Corporation,* [1952] 2 All E. R. 125(C.A.).

quantity of alcohol. It is obvious that doctors must take reasonable precautions to avoid any meddling with the instrument by the patient. If the patient is a child, abnormal care must be taken, failing which the conduct becomes negligent.[121]

Similarly a surgeon shall exercise reasonable care to see that he does not leave any swab, mop, sponge, pack or forceps or any other objects in the body of a patient, as they cause health hazard to a patient. He is bound to make such search and take such precautions as are reasonable under the circumstances, which do not admit any generalization.

In *Achutrao Haribau Khodwa v. State of Maharastra,*[122] a doctor left a mop inside the patient's abdomen, while conducting sterilization operation. It caused puss formation and peritonitis. The mop was removed in subsequent operation but the patient died ultimately. The Supreme Court held that the doctor failed to exercise reasonable care and skill in leaving the mop inside patient's abdomen.

Similar position is taken in other jurisdiction. In *Anderson v.Chasney,*[123] a surgeon performed a tonsillectomy operation on a child, during which he used

---

121. *Harkies v. Lord Dufferin Hospital,* [1931] 66 O.L.R. 572; *Sinclair v. Victoria Hospital* [1943] 1 D.L.R. 302.
122. J.T. (1996) 2 S.C. 624; see also *Smt. Rohini Pritam Kabadi v. Dr. R.T. Kulkarni,* (1996) 3 C.P.J. 441(Karnataka S.C.D.R.C.) ; *Sau Madhuri v. Dr. Rajendra,* (1996) 3 C.P.J. 75 (N.C.); *P.P. Ismail v. Mrs. K.K. Radha,* (1991)1 C.P.J. 16 (N.C.); *Mahon v. Osborne,* [1939] 2 K.B. 14.
123. [1950] 4 D.L.R. 223; see also *Gloning v. Miller,* [1954] 1 D.L.R. 372, where a surgeon was held guilty of leaving a pair of forceps in abdomen. *Holt v. Nesbitt,* [1953] 1 D.L.R. 671, where a dentist happened to lodge a gauge swab in the wind pipe of a patient resulting in latter's death was held negligent.

sponges without any tape or strings attached to it. He proceeded to perform it, without having a nurse present to check the number of sponges used. He asked the anaesthetist whether all the sponges were removed and got a negative reply. He made vain attempt to find the sponge. After the operation the child stopped breathing. Later the nurse removed the sponge. But eventually the child died due to suffocation. The hospital had sponges with strings and would supply on request. Otherwise the nurses were provided to check and count the sponges. Either of these precautions was practiced in the locality. The court held the surgeon negligent for not taking resort to the precautions practiced in the locality.

A doctor is under an obligation to ensure that the products or materials used for rendering services are fit for the purpose. In *Ishwar Das v. Vinaya Kumar Gupta*,[124] the complainant got two dentures for himself and his wife from a dentist. They did not fit properly. As a result the recipients suffered pain and injury. The National Commission held the dentist liable.

Improper delegation of duties to para-medical staff :

Administration of treatment is a joint endeavour of medical and non-medical staff. A doctor cannot be enjoined with a duty to do everything connected with the treatment personally. Hence it is inevitable to delegate the duties to the members

---

124. (1992) 2 C.P.J. 118 (N.C.).

of para- medical staff, *viz.*, nurses, technicians, lab assistants, theatre assistants. A doctor is not generally liable for the negligence of para-medical staff, if a reasonably careful doctor would assume that they have discharged the duties properly. In *Aleyamma Vargheses v. Dewana Bahadur*,[125] the decision of Kerala State Commission rightly reflects the view that a reasonably competent doctor can assume that the nurses have discharged their duties properly with respect to counting of sponges. In that case a doctor performed a caesarian operation on a woman. A surgical sponge was left in her abdomen as a result of which she developed complications. The State Commission holding the hospital liable held that doctors could not be held negligent as normally the counting sponge was done by nursing staff and doctors could not be expected to count the sponge. But under some circumstances liability arises if a doctor fails to check whether his instructions are properly executed by the para-medical staff.[126]

***Negligence resulting in damage to third parties*:**

Along with the duty to take reasonable care in treating a patient there is an obligation on a doctor to take reasonable care to avoid injury to a third party also. In *Urbanski v. Patel*,[127] a doctor removed the only kidney of a patient believing it to be ovarian cyst. Patient's father gave one of his kidneys .But the patient could

---

125. (1997) 3 C.P.J. 165 (Kerala S.C.D.R.C.).
126. See *Harjoth Ahluwalia v. M/s. Spring Meadows Hospital*, *supra* n. 100; *M/s. Spring Meadows Hospital v. Harjoth Ahluwalia, supra* n. 101.
127. [1978] 84 D.L.R. 650.

not survive. The doctor was held liable to the father as he was deprived of a kidney which he would not have but for the negligence of the doctor. It is clear from the fact that the injury sustained by the petitioner was incidental to patient's injury. Even where the kidney is donated by a stranger, it attracts liability as per neighbourhood principle.[128]

A doctor must be very cautious in treating a patient with contagious disease to avoid any spreading to others. He owes a duty to all those persons whom he should foresee as likely to be infected. Similarly a doctor will be held liable if he carelessely issues medical report of a patient to third party or a medical report regarding sanity of a person who is not his patient.[129]

Doctors' negligence ; A critical evaluation :

No one is above law. Doctors can not be an exception to this rule. They are members of a profession who deal with human bodies and work in a most delicate area. Once a mistake is done, it is sometimes done for ever and can not be undone.

Law expects them to discharge their duty with reasonable care and skill, irrespective of any dichotomy between gratuitous and non-gratuitous service. The failure to exercise the obligation of reasonable care and skill attracts liability for negligence which in some limited spheres extends to third parties also. Negligence

---

128. For a discussion on this principle, see G. Robertson, "A New Application Of The Rescue Principle", 96 L.Q.R. 19 (1980).
129. See Rupert M. Jackson and John L. Powell, *op.cit.* at p. 290.

as a fluid concept is accommodative of the inexactitude and uncertainties with which the rendition of medical services is shrouded. Hence the negligence of a doctor by and large is a question of fact.

A crucial question that arises for consideration is who should determine the standard of care, profession or courts? In most of the jurisdictions, it is left to the profession to determine the standard of care as laid down under *Bolam* principle and it's further variations. The judicial approach is in favour of according conclusive weight to the professional practice as establishing the standard of care. The *Bolam* principle provides a complete shield to the members of profession, even if they follow any pernicious practice. Such practice if approved by a responsible body of medical opinion would be sufficient. There is no answer to the question what constitutes a responsible body and who should determine it? The legal position as stands now has conferred that function to the profession.

The rule of professional determination has created another controversy as to whether it should be considered as an accepted or customary practice. If it is treated as customary practice, *viz.*, actual practice employed by some members of the profession, it lags behind the accepted practice expected by the profession from it's member.

The accepted practice makes a doctor to adhere to it. A departure from this attracts liability. Such accepted practice may result in injury to particular patients.

Therefore a doctor shall not be subjected to liability, if exercising the best judgement in the interest of the patient he makes a departure.

The *Bolam* principle may lead to undue patronage of the members by the profession. Examined from the angle of subsequent development, wherever there is a genuine reason for departure it is advisable to depart from it. Accordingly as laid down in *Hucks*,[130] a balance must be struck between the magnitude of risk and preventive devices. If there are easy and inexpensive preventive devices the lapse on the part of a doctor to take resort to it, shall be deemed as an instance of negligence. This results in a partial drift from profession setting the standard to the court setting it.

In some jurisdictions the professional practice norm is discarded in favour of courts setting standard. Accordingly the courts without conferring conclusive weightage to the expert evidence ascertain by themselves whether a doctor has exercised reasonable care. Though it can be accepted that the doctors act in good faith for the benefit of the patients, they might put the patients' interest into oblivion. But law can not do so as it is bound to balance the interests of both doctors and patients.

The court shall keep in mind the rational of *Bolam* principle and it's variations. It should allow the profession discretion regarding administration of

---

130. See *supra* n. 46.

treatment. But the principle shall not be stretched too for to create unjustified medical paternalism which exposes the patient to hardship.

Locality rule is one of the variations of *Bolam*. It's significance in the Indian context does not require any stress. The standard of care of rural doctors is to be determined with reference to the prevailing practices in the particular area and existing facilities. However if a rural doctor is incompetent to treat the patient, he must not drain the patient's pocket till the last minute. He must direct the patient to a nearby hospital with required facilities. Irrespective of the speciality, what a doctor does reasonably and in good faith as an elementary treatment, shall not be questioned.

It can be seen from the above discussion that law imposes liability for negligence. But it is not absolute. There are many instances where a doctor can escape from liability. For that he may have to show that the circumstances justify avoidance of liability.

CHAPTER III

CHAPTER III

Exceptions to Liability for Medical Negligence

The nature of services rendered by doctors require them to exercise professional discretion in every sphere of activity. The success of the service very often depends on the co-operation of patient and proper rendering of services by persons involved in providing health services. The neglect of duty by any one of them may help the doctor to exclude or reduce his liability. Similarly a doctor can legitimately expect exemption from liability for actions taken in emergency situations and even in some cases where such action falls short of normal standards. Due allowance is generally given for any error in judgement of the doctor as well as for inevitable accident associated with medical services. However the circumstances and the condition subject to which these exceptions are recognised need critical analysis.

Contributory negligence :

The conduct on the part of the patient in failing to obey instructions intended for his own protection may contribute to the negligence of the doctor in bringing about harm to the patient.[1] The conduct of a patient shall conform to that of a reasonable man placed under similar circumstances.[2] The patient's want of

---

1. For the definition of contributory negligence, see, American Law Institute (comp.), *"Restatement Of The Law Of Torts"*, St. Pual Minn, vol.2, r. 463 (1956): See also, *Craze v. Meyer Dumore Bottlers Co .Ltd,* [1936] 2 All E.R. 1150 at p.1151 (C.A.). For a discussion, see also Nigel P. Gravels, "Three Heads Of Contributory Negligence", 93 L.Q.R. 581 (1977).
2. *Id.,* rule 464.

care contributing to the harm, if substantial can be a defence to the doctor.[3] The following circumstances amount to contributory negligence of a patient.

Negligence in selecting a doctor :

A patient shall exercise reasonable care in selecting a doctor for his treatment. Any lapse can be a defence to the doctor. In *Champs v..Stone*,[4] a doctor was drunk while giving injection to the patient. The patient was aware of it. Inspite of such knowledge the patient allowed the doctor to give the injection and he was injured. The Ohio State Court did not allow the patient to recover on the ground that both of them were at fault simultaneously. The court further observed that a reasonably prudent man would not have allowed such a doctor to administer injection unless there was an emergency.

It follows that concurrent fault of the patient and doctor exenorates the latter from liability. But it is obvious from the above decision that, if in an emergency situation the patient allows the doctor to administer treatment knowing that doctor is not physically fit to give the treatment, he is not guilty of contributory negligence. It safeguards the interests of a patient who is left with no option but to hire the services of an infirm doctor.

Generally a patient cannot be blamed as negligent in the selection of a doctor. He cannot ascertain the incompetency of a doctor. But where the infirmity

---

3. *Ibid.*
4. 58 N.E. 2d 803, Ohio 1944, as quoted in Angela Roddey Holder, "Medical *Malpractice Law*", Newyork, second edition, p. 302.

of a doctor is so glaring that no reasonable patient would have submitted himself to the care of the doctor, it can be allowed as a defence to the doctor subject to the exception of emergency as contemplated above.

Disregard of doctor's instructions and advise :

A doctor may give certain follow-up instructions which are essential to restore the health of a patient. Any lapse of the part of the latter to follow them which contributes to the injury will be a defence to a doctor. In *M.D. Aslam v. Ideal Nursing Home*,[5] a doctor performed an operation on a woman for removal of uterus. He advised her to avoid rich food and not to entertain large number of visitors. But she disregarded the instructions. As a result of it, there was soakage of wound. An emergency operation was performed to close the abdomen. After the operation she suffered cardiac arrest. A cardiac surgeon attended her. But eventually she died. The National Commission held that the rich food and the infection caused by large number of visitors were the causes which did not allow the wound to heal up. The doctor was exempted from liability.

In *Master Ashok Kumar v. Agadi Nursing Home*,[6] a minor boy sustained fracture in the left hand elbow. The surgeon reduced the fracture and set it. Thereafter a x-ray was taken. It revealed that the fracture was well set. The surgeon put the elbow in plaster and provided a sling. The boy was instructed not

---

5. (1997) 3 C.P.J. 81 (N.C.).
6. (1995) 3 C.P.J. 142 (Karnataka S.C.D.R.C.).

to move the hand and tamper with the plaster. Both the instructions were disregarded by the boy. As a result of which there was no improvement and there was deformity of the hand. The Karnataka State Commission held that the injury was due to the negligence of the boy in tampering with the plaster and causing movement to the fractured elbow before the removal of plaster. The doctor was not held liable.

Similarly a patient is under an obligation to follow doctor's instructions in the course of any treatment or performance of any procedure on him. That position was taken by the Connaticut State Supreme Court in *Page v. Brodaff.*[7] In this case a patient was under local anaesthesia for an esophagascopy. In advance he was instructed by the surgeon not to move. He moved without warning and died as a result of punctured esophagas. The court recorded a verdict in favour of the surgeon on the ground of patient's contributory negligence.

Generally a patient being a layman in medicine is only a passive participant the treatment. The above case shows that instances of a patient being careless in the course of treatment are not lacking.

There is an obligation on a patient to co-operate with the doctor. Accordingly he should abide by the advise of doctor. Any lapse in this regard is a good defence for a doctor. In *Dr. Jyothi Vivek v. Pradeep*,[8] the patient was a

---

7. 169 A. 2d 901, Conn. 1961, quoted in Angela Roddey Holder, *op.cit.* at p. 302.
8. (1998) 1 C.P.J. 191 (Kerala S.C.D.R.C.).

welder by profession. While working a small iron particle entered into his eye. As a result of it, he developed complications in his eye, that he could not look sun and light. He took treatment in different hospitals much against the advice of the doctors. He refused to submit himself to follow-up treatment. Finally a surgery was conducted. Thereafter he lost his vision. In an action for deficiency in service against all the doctors, the Kerala State Commission held that there was no deficiency in service, as the patient was non-cooperative throughout the course of treatment. The doctors were exempted from liability as the patient himself was responsible for his injury.

Failure to furnish material information :

In doctor-patient relationship the patient must be truthful and should furnish all material information essential for diagnosis and administration of treatment. He shall not give wrong information. If he does so, he is solely responsible for ensuing injury. A more interesting case is reported from an American state court. In *Rochester v. Katalan,*[9] two men were taken to the emergency room of a hospital by the police. They claimed that they were heroin addicts and asked for methadone. One of them with all the physical gestures of a drug addict gave the description of symptoms in a such way that it sounded legitimate to the examining doctor. He was given methadone more than the normal dosage, as he claimed that he was still in difficulties. Next day he was found dead. The cause of death was

9. 320 A. 2d 505, 704 Md. 1974, quoted in Angela Roddey Holder, *op.cit.* at p. 303.

methadone overdose. It later came to light that he was in fact not an addict, whereas the other was. The reason for his strange behaviour was not revealed. His family members sued the doctor. Dismissing the suit the court held that the patient had a duty to be truthful and a lapse on his part was the cause of his death.

The National Commission also took similar view in *Sethuraman Subramaniam Iyer v. Triveni Nursing Home,*[10] In that case a patient was suffering from repeated attacks of sinusitis. The doctor decided to perform an operation with her consent. He administered anaesthesia to conduct the operation. After that the patient developed complications and suffered a cardiac arrest. Eventually she died. It was found that she was suffering from fits. She had not revealed it to the doctor. It was held that she was contributorily negligent as she failed to reveal a material fact and the doctor was exempted from liability.

Refusal to submit for pathalogical tests :

A patient is under an obligation to submit him self for pathalogical tests and examinations as per the wish of doctor. If he refuses to do so, he does at his peril. In *Poonam Verma v. Dr. Ashwin Patel,*[11] a patient was suffering from fever. The

---

10. (1998) 1 C.P.J. 10 (N.C.). See also *Subhlatha v. Christian Medical Centre*, (1995) 1 C.P.J. 365 (Punjab S.C.D.R.C.). In this case a patient was suffering from urological complications. Inspite of reasonable treatment she died. But the evidence on record showed that she was suffering from tuberculosis, which was concealed from the doctor. The Punjab State Commission held that the complainant did not come with clean hands and the doctors was exempted from liability.
11. (1995) 1 C.P.J. 11 (N.C.). But on appeal to the Supreme Court the doctor was held liable on a different ground. For a discussion of the same, see *infra* chapter 7.

doctor prescribed various pathalogical tests. But the patient did not submit himself for the test. The National Commission found him negligent for failing to submit himself for such tests and the doctor was exonerated from liability.

A similar position was taken by an American state court also. In *Meachem v. Mcleay,*[12] a woman complained of feeling tired and weak. She was admitted in a hospital. But she left the hospital before the tests as directed by the doctor were conducted. Inspite of the direction of the doctor she did not turn up for 5 weeks for further tests. The eventual diagnosis was pernicious anaemia. She brought an action against the doctor for misdiagnosis. The court held that since the patient refused to undergo the necessary tests, there was no question of misdiagnosis and the doctor was not liable. Here the patient has to blame himself for his actions.

Conceptually all cases discussed above except *Champs v. Stone*,[13] do not fit into contributory negligence, as in those cases patients themselves were at absolute fault. In effect it is open to a doctor to plead his innocence and charge the patient with negligence for not complying with his instructions and advises.

Failure to mitigate the harm :

Failure to mitigate the harm by a patient may lead to contributory negligence. Therefore a patient being aware of the injury resulting from a negligent treatment, allows to compound it he does an act of contributory negligence. In *Chanchal Oswal v. Santhokba Durlabji Memorial Hospital*,[14] a

---

12. 227 N.W. 2d 829, Neb. 1975, quoted in Angela Roddey Holder, *op.cit.* at p. 303.
13. See Angela Roddey Holder *op.cit.* at p. 302.
14. (1995) 1 C.P.J. 42 (Rajasthan S.C.D.R.C.).

patient was suffering from chest pain and heart trouble. The doctor performed a heart operation. On same day she felt again pain in the chest. An x-ray was taken. It revealed a collection of fluid on the left side of the chest. She was advised to undergo a second operation for the removal of the same. The second operation would have been carried out free of charge as it was the usual practice with all post-operative cases. But she refused to undergo the operation. She brought an action against the doctor for deficiency in service. The Rajasthan State Commission held that the patient failed to mitigate the harm by refusing the operation.

In America similar view was taken in *Hanley v. Spencer.*[15] In that case a patient had a complaint of cement particles in his eyes. He was aware of the fact the physician did not remove all the particles. Inspite of it, he did not consult the same physician or any other physician for a period of three months. The Colorado state court held that the patient's contributory negligence deprived him, his right to bring an action against the physician.

The above rule is not absolute. It is not incumbent upon a patient to do so though immediate medical attendance might have set right the injury already caused by the negligence of a doctor. However the patient can terminate the professional relationship with the doctor with immunity of being held contributorily negligent.

In *Bird v. pritchard,*[16] a woman sustained severe injury to the ulner nerve of

15. 115 P 2d 399, Colo. 1941, see *supra* n. 13 at p. 306.
16. 291 N.E. 2d 769, Ohio. 1973, *id.* at p. 305.

right hand as a result of a fall. As the specific surgeon, asked for by her was not available, an osteopath treated her. He could not locate the damage and administered a wrong treatment. She did not consult him any more, even though he had asked her to meet him. A surgeon who treated her later, performed a surgery. He opined that a surgery performed within six hours of injury would have resulted in better results than a late repair. She sued the osteopath for negligence. The court held that there was no contributory negligence on her part. In this case the court held that the woman had the right to consult a physician of her choice.

Likewise, in an extreme situation, a patient's right to reject further medical treatment suggested by the negligent doctor was recognised in another decision also. In *Johnson v. United States,*[17] a patient underwent an operation on a nerve in his hand. The surgeon committed an error which was not revealed to the patient. It resulted in intensive pain. He advised the patient to go to another hospital, which was refused by the latter. In an action against the surgeon for negligent surgery, the patient was allowed to recover damages. The Court observed that even though it was incumbent upon him as a reasonable man to go for further treatment, the traumatic experience of hospitalization would make him to fear for further treatment.

The above American decisions can be distinguished from the Indian case discussed above. In both the cases there was negligence on the part of the doctor,

---

17. 271 F. Supp. 205, D.C. Ark. 1967, *ibid.*

whereas in the Indian case no negligence was proved. Still there appears to be no reason to compel an unwilling patient to undergo treatment under the same doctor or another person suggested by him.

The above approach of the American courts would properly safeguard the interests of the patient even though at the cost of the doctor. The patient has a justification and the doctor can be held liable for his negligence. In *Hanley,* the patient was aware of the error. The negligence of the doctor did not expose him to a traumatic experience. But in *Johnson,* the patient was not aware of the error committed by the doctor which exposed the former to intense pain. He had reason to believe that the intense pain was natural aggravation of the original injury. The negligent treatment exposed him to a very traumatic experience. Therefore there is justification for a patient in not attending further medical treatment when the negligence of the doctor leads to traumatic experience.

Limitation on the defence of contributory negligence :

The defence of Contributory negligence can be availed only against a conscious patient. The question of concealing any material information or giving wrong information or disobeying the instructions of a doctor on the part of an unconscious patient does not arise at all. However contributory negligence can be attributed to the person who looks after him. In the case of a child, capability of

contributory negligence depends on it's age and intellectual development.[18] Generally it is attributed against the person on whose care the child is placed.[19]

Under common law slightest contributory negligence on the part of the patient was a complete defence to the doctor.[20] The modern trend, where both patient and physician are negligent, is in favour of the application of the doctrine of comparative negligence.[21] Accordingly the liability is apportioned between doctors and patient. It has the effect of reducing the extent of liability of the doctor.[22]

Injury suffered by a patient with consent :

It is a generally accepted principle of tort law that no wrong is done to one who consents.[23] The consent obtained must be informed one.[24] Accordingly a doctor

---

18. In *Flynn v. Stearns,* 145 A. 2d 33, N.J. 1958, *id.* at p. 309. A 8 years old girl broke her arm. The physician set it improperly. She failed to perform some orthopaedic exercise prescribed by him and the arm got permanently crippled. The court found her not contributorily negligent as she had no capacity to understand the consequence of non-performance of exercise.
19. In *Puffin Barger v. Day,* 24 Cal. Rptr. 533, Cal. 1962, *ibid.*, a mother of two and half years child was held contributorily liable for failing to follow instructions of a physician.
20. R.W.M. Dias and Markesinis, *"Tort Law"*, Oxford, second edition, p. 491 (1992).
21. See supra n. 13.
22. For a discussion, see *infra*. See also kurt Granfors, *"Apportionment Of Damages In The Swedish Law Of Torts"*, Stockholm, (1956); the Contributory Negligence Act (English), 1945.
23. John G. Fleming, *"The Law Of Torts", New South Wales,* eighth edition, p.79 (1992). For a general discussion on the topic, see A.J.E. Jaffey, "Volenti Non Fit Injuria", Camb. L.J. 87 (1985). The essence of defence lies in volens. See *Ram Biharilal v. J.N. Srivatsava,* A.I.R. 1985 M.P.150.
24. For a discussion on informed consent, see chapter 5, *infra.*

can plead that a patient has voluntarily assumed the risks with the knowledge of it.[25] For example if the only available treatment for a disease is administration of drugs having narcotic influence and the regular consumption of such drugs might result in addiction there is no liability for doctor when the patient decides to undergo it voluntarily with the knowledge. But the doctor is not exempted from liability for negligence, if additional risk is caused by the negligence. For example radiation therapy may expose a patient to burns. The inherent risk must be informed to the patient, to enable him to decide whether to encounter it or not. On subjection to the therapy if he is burnt, the doctor may be liable with respect to the burn consequent of a negligent therapy.

In *G. Jayaprakash v. State*,[26] the Andrapradesh High Court took the above position. It observed:[27]

> " There are many occasions on which harm some times grievous harm may be inflicted on a person for which has no remedy in tort, because he consented or at least assented to the doing of the action which caused him harm. Simple examples are, the injuries received ... in a lawful surgical operation... a case of lawful surgical operation in general negatives the liability."

There are cases in which the defence is successfully invoked by physicians. A physician decides the treatment to be administered. A patient should not poke his nose in the administration of treatment. If he does it, he voluntarily assumes the risk. In *Gramn v. Boener,*[28] a patient suffered from fracture of his arm and the

25. The mere knowledge of it is not sufficient, for the maxim *is "volenti non-fit injuria not scientia".*
26. A.I.R. 1977 A.P. 20
27. *Id.* at p. 23.
28. 56 Ind. 497, 1877, as quoted supra n. 13 at p. 311.

defendant surgeon set it. Later it was found that the bones were slightly out of alignment. There was no negligence on the part of the surgeon in the original setting of the fracture. The patient asked the surgeon to operate on the arm, break and reset it. Initially the surgeon refused the suggestion as it was bad medical practice. Eventually he agreed to operate. The outcome of second operation was worst than the first. The court recorded a judgement in favour of the surgeon and observed,[29]

> " If a physician tells a patient that an operation is improper and advised against it and the patient still insits upon it, the patient assumes the risk because he relies upon his own judgement and not that of the surgeon".

Similarly in *Mainfort v. Giannestras*,[30] a diabetic patient was warned in advance the effect of a surgery as resulting in unavoidable infection. But he told the physician that he wished to proceed with the surgery. As a result of post-operative infection his leg had to be amputated. His action against the physician failed on the ground of assumption of risk.

The life of medicine has been experimentation. The emergence of new diseases has posed a serious challenge to the medical profession. Moreover for many diseases, medicine is in experimental stage. It necessitated the need for bio-medical research, both therapeutic and non-therapeutic research on human beings. Such research is beset with inherent risks. Therefore it is necessary to inform those risks to the patients before subjecting them to research. If the patient gives his

---

29. *Ibid.*
30. 111 N.E. 2d 692, Ohio. 1951, *id.* at p. 310.

consent with the knowledge of the risk, he assumes the risks voluntarily. Accordingly a doctor will be exempted from liability.[31]

Errors of clinical judgement :

A doctor is generally exempted from liability for any error in judgement.[32] The underlying idea can be readily discerned from the following observation of Denning, L.J., in *Roe v. Minister of Health,*[33]

> " It is easy to be wise after event and to condemn as negligence that which was only misadventure. We always to be on our guard against it, especially in cases against hospitals and doctors. Medical science has conferred great benefits on mankind but these benefits are attended by unavoidable risks. Every surgical operation is attended by risks. We can not take the benefits without taking the risks. Every advance in technique is also attended by risks. Doctors like the rest of us have to learn by experience and experience often teaches in a hard way."[34]

The above observation is indicative of the fact that a doctor may commit mistakes in treatment and operation, which can not be condemned as negligence, provided they are the result of a genuine error. Mistaken diagnosis is an inherent risk in a treatment . It will be an error of judgement provided the doctor has exercised reasonable care and skill.[35] In *Philips India Ltd. v. Kunju Punnu*,[36] a patient was suffering from small pox. The doctor diagnosed it as a case of venereal

---

31. For a discussion, see *infra*, chapter 5
32. Justification for this principle is discussed in chapter 2 *supra*.
33. [1954] 2 All E.R. 131 (C.A.).
34. *Id.* at p. 137.
35. For the meaning of the term reasonable care and skill, see supra, chapter 2. See also Harvey Teff, *"Reasonable Care"*, London, (1994).
36. A.I.R. 1975 Bomb. 306.

disease. Patient's condition started to grow worse and he suffered from high temperature. Later he was shifted to a hospital where he died. An action was initiated against the doctor. The court held that the doctor was not negligent, as at the time no diagnostic technique was developed to ascertain small pox. The court further continued that a mistaken diagnosis was not necessarily a negligent diagnosis and a practitioner could only be held liable, if his diagnosis was palpably wrong as to prove negligence provided his mistake was of such a nature as to imply an absence of reasonable skill and care on his part taking into consideration ordinary level of skill in the profession.

The House of Lords took similar view in *Whiteford v. Hunter.*[37] In that case a patient complained that the surgeon had been negligent in diagnosing a condition as cancer, which was in fact something different. The surgeon did not make use of cystoscope or biopsy which would have revealed the true condition of the patient. But at that time the instrument used for conducting such test was very rare in England. The House of Lords held that the doctor was not liable as his conduct conformed to the proper professional practice of the time.

At times all the diagnostic tests may fail to reveal the true condition of the patient. On such an eventuality, he may form his own opinion as to the condition of the patient. If later his judgement proves to be wrong he can not be

---

37. [1950] W.N. 553 (H.L.) as quoted in Rodney Nelson Jones and Frank Burton, "*Medical Negligence Case Law*", London, p. 603 (1995).

held liable. In *Biju Paul Joseph v. Dr. Kunhu Mohammed*,[38] a patient was suffering from fever and constipation. The doctors subjected him to various tests and accordingly medicine was administered. Later he was treated in another hospital, where he was diagnosed as suffering from viral fever. The Kerala State Commission held that the doctors were not negligent as they had conducted necessary tests.

Similar position was taken by the Washington state court in *Hoglin v. Brown*.[39] In that case a married woman had symptoms of fibroid tumour. The pregnancy tests revealed negative result. When the doctor made the incision for hysterectomy he discovered pregnancy. He disconitnued the operation immediately. She had a miscarriage. The court exempted the doctor from liability as he had conducted the necessary tests to arrive at his judgement.

In *Whitehouse v. Jordon,*[40] a woman was admitted to the hospital with labour pains for a considerable time before delivery. Identifying the pregnancy as difficult one the physician ventured for a trial of forceps delivery. He pulled the baby six times with forceps. Later finding no movements, he abandoned the procedure and resorted to caesarian section. A child was born with severe brain damage. The court held that the injury was a result of error of judgement. It further observed,[41]

---

38. (1997) 3 C.P.J. 316 (Kerala S.C.D.R.C.).
39. 481 P. 2d 458, Wash. 1971, see *supra* n. 13 at p. 78.
40. [1981] 1 All E.R. 267 (H.L.).
41. *Id.* at p. 276. "*Per Lord Edmund Davies*"

> "...To say that a surgeon committed an error of clinical judgement is wholly ambigous, for while some such errors may be completely consistent with the due exercise of professional skill, other acts or omission in the course of exercising clinical judgement may be so glaringly below proper standards as to make a finding of negligence inevitable."

It is obvious from the observation that a doctor cannot raise the plea of error, if it is a result of negligence.[42] This is an exception to the defence of error of judgement. So with both the defence and exception, law strikes a balance to protect the respective interests of doctors as well as patients. In *Achutrao Haribau Khodwa v. State of Maharastra*,[43] the Supreme Court observed,[44]

> "The skill of medical practitioners differ from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to best of his ability and with due care and caution."

It follows from the above observation that inspite of exercising best of his ability and caution, a particular mode of treatment selected by the doctor proves to

---

42. In *Clark v. United States,* 402 F. 2d 950, C.C.A. 4, 1968, quoted *supra* n.13 at p. 77, the court observed:
> "... If the physician as an aid to diagnosis does not avail himself the scientific means and facilities open to him for the collection best factual data of his diagnosis, the result is not an error of judgement, but negligence in failing to secure an adequate basis upon which to support his diagnosis".

43. J.T. (1996) 2 S.C. 624.
44. *Id.* at p. 634

be futile, a case for exemption from liability for error of judgement is made out.

The National Commission took the above view in *Dr. N.T. Subrahmanyam v. Dr. B. Krishna Rao.*[45] In that case a patient suffered blood vomiting. Eventually she died. The doctor who had treated her had adopted a method called sanstaken tube instead of selerotherapy. The complainant contended that other method was proper one. It was held that the doctor was not negligent and it was only an error of judgement.

But the court in *Achutrao Haribau Khodwa,*[46] has recognised an exception to the above proposition in the following words :

> "In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, in such a case an action in torts would be maintainable."

Inevitable accident :

It is the experience of doctors that sometimes in the course of treatment they get an unprecedented adverse response, which may be a result of an inevitable accident. It implies an accident the avoidance of which would demand a degree of care exceeding one prescribed by law.[47] It follows that inspite of reasonable care the eventuality is bound to occur. Therefore it is a good ground of exemption from liability. In *Premnath Hospital v. Smt. Poonam Mangala,*[48] a pregnant woman

---

45. (1996) 2 C.P.J. 233 (N.C.).
46. See *supra* n. 43 at p. 635.
47. P.J. Fitzerald, "*Salmond On Jurisprudence*", Bombay, twelth edition, p. 399 (1988).
48. (1998) 2 C.P.J. 205 (Haryana S.C.D.R.C.).

was suffering from high blood pressure. As per the advice of the doctor, she submitted herself for routine check-up. While she was carrying seven months pregnancy the doctor suggested pre-mature delivery as she had high blood pressure. She gave birth to a child suffering from respiratory problems. The child was shifted to another hospital. Inspite of the best treatment there, the child died. The Haryana State Commission observed that it was unfortunate that despite all the medical attention, care and treatment by the doctors who were well qualified the baby expired. Accordingly the doctors were exempted from liability on the ground that the eventuality was an inevitable accident.

Each and every treatment has it's inherent risks. As a result of the treatment, if a patient suffers such risks, a doctor can not be exposed to liability. In *Bhupendranath Das v. Maharaj Ramkrishna Mission S.P.*,[49] a patient sustained an eye injury. He underwent two successive operations. Subsequent to the operation, the patient developed serious after effects. It was found that the doctor had exercised reasonable care in treating the patient. The West Bengal State Commission exempted the doctor from liability on the ground that the after effects were the inherent risks associated with the procedures. Regarding this it observed: [50]

> "Every operation has it's accompanying risks. The risks may manifest at the time of operation or it may involve post-operation hazard ... the inherent risk is always there."

---

49. (1998) 1 C.P.J. 377 (West Bengal S.C.D.R.C.).
50. *Id.* at p. 380

Similar view was taken in England also. In *Gerber v. Pine,*[51] in the course of administering an injection to a patient, due to a sudden mascular spasm, the needle broke. In effect a piece of needle was left in her body. The court held that no amount of skill on his part could have avoided a piece of needle being drawn into patient's body.

Some treatments call for use of appliances and electric power Unexpectedly the appliance may break down or there may be a power failure consequent of breakdown of generator. All these mishaps may expose a patient to injury. But a doctor cannot be held liable as it is inevitable one. In *J.N. Shrivastava v. Rambiharilal,*[52] the court made the following observation with regard to that: [53]

> " It would be wrong and indeed, bad law to say that simply because a misadventure or mishap occurred the hospitals and the doctors are thereby liable."

Lack of skill in emergency situations :

Emergency signifies a situation which warrants immediate medical attention to preserve life, limb or health of a patient.[54] It must be examined in the light of circumstances prevailing and facilities available then, not before or after the occurrence. So what could be negligence in normal circumstances, will not answer the description of negligence during emergency.

---

51. [1934] 79 S.J. 13, as quoted in J.P. Eddy, "*Professional Negligence*", London, p. 84 (1955).
52. A.I.R. 1982 M.P.132.
53. *Id.* at p. 135
54. Nathan, "*Medcial Negligence*", London, p.162 (1957).

Emergency warrants more discretion to the doctors. Courts also have taken cognizance of this factor. In *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Babu Godbole*,[55] the Supreme Court observed,

> "The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

Even though ampler discretion is given to doctor, the requirement of reasonable care and skill is not dispensed with. Accordingly if the action of a doctor conforms to the action what a reasonable doctor would have taken under similar circumstances, he is exempted from liability inspite of injury to the patient. In *Vinitha Ashok v. Laxmy Hospital*,[56] the patient's first delivery was caesarian one. When the child was eight months old she became pregnant. As pregnancy immediately after a caesarian delivery is fatal, the doctor suggested termination. The doctor genuinely mistook it as a case of normal pregnancy. But later it was found that it was a case of cervical pregnancy. The patient was profusely bleeding. The doctor removed the uterus to stop bleeding, as it was the only alternative in the case of cervical pregnancy, to save the life of the patient. The National Commission held that removal of uterus was a result of emergency, which under any circumstances could not have been avoided. Accordingly the doctor was exempted from liability.

---

55. A.I.R. 1969 S.C. 128 at p. 132.
56. (1992) 2 C.P.J. 372 (N.C.).

Similar position was taken by the Privy Council in *Cooper v. Nevill,*[57] a patient underwent a difficult emergency operation. The whole team was engaged in a race against time. However a swab was left in her abdomen. Consequently with much suffering and mental distress she underwent another major operation. The court held that even though there was a mistake, it did not amount to negligence as the whole team was engaged in a race against time. Under normal circumstances a physician will be held liable for leaving foreign objects in the body. But during an emergency, search for the objects will prove fatal to the patient. If he does so, it will aggravate the situation further and his conduct falls short of what a reasonable doctor would have done under similar circumstances.

However a doctor shall not cause an emergency to arise. If he does so, he attracts liability for negligence. In an emergency situation a general practitioner in the absence of availability of anaesthetist can administer anesthesia.[58] It follows that the doctors not withstanding their specialization can move away from it reasonably to treat a patient who is placed in an emergency.

The omission to diagnose a condition properly, if it is a result of an emergency, is a good defence. In C*hristian v. Wilmington General Hospital Association,*[59] a 16 month old child cut her hand very severely. A doctor treated

---

57. [1961] E.A. 63 (P.C.), quoted in Rodney Nelson-Jones and Frank Burton, *op.cit.* at p. 287.
58. D. Har court Kitchin. *"Law For The Medical Practitioners"*, London, p. 285 (1941).
59. 135 A. 2d 727, Del. 1957, as quoted in Angela Roddy Holder, *op.cit.* at p. 313.

her under extremely difficult situation, including the necessity of forcibly restraining her, while the hand was being sutured. The child showed all possible resistance as a result of which the doctor failed to ascertain the severance of a tendon in her finger. The court held that the emergency and circumstance were such that the conduct of the doctor did not fall below the standard fixed by law.

> There may be a situation, where a surgeon sacrifies the child to save the mother or vice versa. Similarly in order to avoid a greater evil, a doctor may inflict a smaller evil for which he can claim exemption from liability on the ground of necessity.[60] In *Usha v. G.P. Nambiar*,[61] a minor girl fell from a moving bus. She sustained leg injury. The doctor administered necessary treatment and plastered the wound. Due to swelling the plaster became tight. Latter she was brought to another hospital where on removal of the plaster it was found that there was no pulsation and gangrene had set in. Eventually her leg was amputated in order to save her life. The court held that the plaster would get tight with swelling. It further continued that amputation of the leg in the circumstance was an act of necessity.[62] The doctor was exempted from liability.

It is obvious from the decision that in order to avoid a greater evil a doctor

---

60. In *Cope. v. Sharpe*, [1912] 1 K.B. 496, it was held that to burn a ship of heather to prevent a fire from spreading was justified.
61. 1985 K.L.T. 970 (D.B.); see also *Lekh Raj v. Bharaj Nursing Home*, (1998) 2 C.P.J. 335 (Punjab S.C.D.R.C.).
62. *Id.* at p. 972.

can resort to infliction of a smaller evil. It is evident from the above case that amputation was necessary to save the life of the patient.

In *Tomarino Marcel D' Cruz v. Management of St. Joseph's Higher Secondary School*,[63] the choice of a doctor was to elect between death of the patient and removal of a severely infected eye which would have caused danger to patient's life. The doctor removed the eye to save the life of the patient. The Tamilnadu State Commission held that there was no deficiency in service and the doctor was exempted from liability.

Similar position was taken in the United States also. In *Chapman v. Karlson,*[64] after a normal delivery a woman had a sudden massive hemorrhage. She went into shock. Packing her uterus with gauze proved to be ineffective. The doctor resorted to transfusion of blood through a vein in her ankle. As a result of blood infiltration, it became necessary to amputate the leg. Doctor's testimony revealed that he was put into a choice to opt between saving the life or the leg of the patient. The circumstance which warranted the speedy action could exempt him from liability for negligence. But in a less urgent case, the same would have amounted to negligence.

The defence of emergency is not available, if the situation falls below a grave emergency. In *Weintraub v. Rosen,*[65] a patient was a victim of an

---

63. (1998) 1 C.P.J. 340 (Tamilnadu S.C.D.R.C.).
64. 240 So. 2d 236, Miss. 1970, as quoted in Angela Roddy Holder, *op.cit.* at p. 312.
65. 93 F. 2d 544, C.C.A. 7, 1937, as quoted id. at p. 313.

automobile accident. He sustained severe head injury and a fractured hip. The injury to hip was not diagnosed for a period of one month. He recovered in the meantime from head injury. The doctor was not allowed to raise the plea of emergency and it was held that the lapse on his part amounted to negligence.

Involuntary acts :

An involuntary act of a doctor does not give rise to any liablity.[66] A doctor may be coerced[67] or he may be pressurised to treat a patient. Likewise, he may be asked to abstain from administering treatment to a patient. On such eventualities, even if a doctor happens to commit an error he shall not be held liable for the reason that the decision to treat or abstain from treating is the result of coercion or external imposition. Generally patients exert an amount of compulsion. But it must be of such a nature to overpower the will of the doctor to yield to the patient's pressure. Therefore the courts must be cautious to allow such a defence, as otherwise some unscrupulous doctors may take undue advantage to put across a fake claim.

Release of a joint tortfeasor :

A patient may sustain injury as a result of negligence of successive doctors.[68] On such an eventuality the doctors as joint tortfeasors will be held liable

---

66. Rathanlal & Dherajlal, "*The Law Of Torts*", Nagpur, twenty second edition, p. 24 (1996) ; Involuntary acts are those where the actor lacks ability to control his actions and involuntary omissions are those which makes a person unable to act for lack of ability to control his actions. *Ibid.*
67. For the meaning of coercion, see s.15 of the Indian Contract Act, 1872.
68. It must be a result of concurrent tort committed by the doctors But in the context of services of doctors it needs to be modified to mean as successive negligence. For a general discussion on concurrent tort, see John G. Flemming, *op.cit.* at p. 255.

jointly and severally.[69] Release of a doctor by deed or accord and satisfaction, discharges all.[70] Thus if one doctor is released from liability for negligence, it serves as a defence to the other to deny liability.

In general an original tortfeasor[71] is responsible for any subsequent malpractice in respect of the same injury, so long as the injured party exercises reasonable care in the selection of a physician.[72] The rationale is that there is only one injury, caused by the tortfeasor and the negligence of a doctor merely aggravates it. In effect the release of a tortfeasor from liability *ipso facto* releases a doctor also.

In *Cannon v. Pearson,*[73] a child was hit by a taxi cab and the doctor treated her negligently. Later the child was committed to the care of another doctor and she died. The driver was relieved from liability. The court relying on the above principle relieved the doctor also from liability. But this is not an invariable rule. In *Mazer v. Lipshutz,*[74] a patient had a cause of action against both hospital and surgeon. He settled the claim against hospital, but sued the surgeon for negligence. The surgeon was not allowed to deduct the sum settled against the hospital on the ground that there was no judgement for joint negligence against it. It follows that if the patient impliedly reserves the right to sue the physician,

---

69. Id. at p. 257.
70. *Cutler v. McPhail*,[1962] 2 Q.B. 292.
71. It signifies the original wrongdoer.
72. Angela Roddey Holder, *op.cit.* at p. 314.
73. 383 S.W. 2d 565, Tex. 1964, *ibid.*
74. 360 F. 2d 275, C.C.A. 3, 1966, *ibid.*

release of tortfeasor does not release the physician. The same principle applies in case of express reservation also. If the claim settled against original wrongdoer cover the compensation payable on account of physician's negligence the latter is released.

The release of a tortfeasor is not a bar for an action against the physician if the injury caused by latter's negligence is unrelated to the original injury. In *Anderson v. Martzke,*[75] a man met with an automobile accident. The physician administered a preliminary sensitivity test for tetanus antitoxin, which clearly revealed an allergy. Inspite of that he administered the injection which severely damaged the patient. The original wrongdoer was released from liability. The court refused to record a release in favour of the physician for the reason that the injury was independent of the original injury.

Sometimes the physician himself may be the original wrongdoer. Any decision in favour of the injured for original wrong does not deter him from initiating an action for subsequent negligent treatment. In *Parkell v. Fitzporter,*[76] a young man while riding motorcycle collided with a vehicle driven by a physician. On the spot of the accident the physician treated his injuries but negligently. Later he treated the injured in the hospital also. The young man won the case relating to negligent driving by the physician. Later he sued the physician for negligent treatment. The court held that the young man had a cause of action against the physician for negligent treatment also as the two wrongs were committed by two

---

75. 266 N.E. 2d 137, Ill. 1970, *id.* at p. 315.
76. 256 S.W. 239, Mo. 1923, *ibid.*

separate wrongdoers in the eye of law, even though they were caused by the same person. Thus the release of the physician as a tortfeasor did not relieve him from liability for his professional negligence.

Exemption from liability : A critical evaluation :

In the administration of treatment and surgical procedures the interests of physician and patient are at stake. The patient desires higher accountability on the physicians. The latter always venture to justify his alleged negligent acts to claim exoneration from liability. Such justifications are manifested in the defences available to a physician. Legal accountability of physicians who operate in an area of uncertainty without any defences will be suicidal. Law has taken cognizance of this factor.

The defences available to a doctor are demonstrative of the legal cognizance of professional discretion. Factors beyond the control of the members of the profession and lack of minimum responsibility by patients are considered as grounds for exoneration of doctors from liability.

The defences are not absolute. They are subject to many exceptions. These exceptions safeguard the interest of patients. For example even though error of clinical judgement is a defence, it ceases to be so, if it is negligently arrived at. If the patient is exclusively at fault, law does not allow him to make a windfall gain just for the reason that the doctor happened to treat him. Patient's contributory negligence was an absolute defence, under common law. But at present it only

reduces the liability of a doctor. This restores the balance as both the doctor and patient are held responsible for their respective negligence.

Indian law also does not impose absolute liability on doctors for medical negligence. It also allows avoidance of liability by doctors. The decided cases manifest that contributory negligence of patients, error of judgement, emergency, neccessity and inevitable accident are good defences to a doctor for avoiding liability. Indian law also confers ample discretion to a doctor in emergency situations. In addition to the above exceptions, all the other exceptions to negligence recognised under common law will apply in India also.[77]

It is true that under the general principles of tort law injury resulting from consensual acts are not actionable. This is accepted as a defence for doctors. But in doctor and patient relationship, consent of the patient deserves critical evaluation considering the disadvantageous position of patients.

---

77. Actions for negligence in India are to be determined according to the principles of English law. See *Amelea Flounders v. Dr. Clement Perreira,* (1947) O.C.J. Appeal No. 27 of 1947 (unreported) as quoted in R.K. Bag, "*Law Of Medical Negligence And Compensation*", Calcutta, first edition, p. 3 (1996).

CHAPTER IV

CHAPTER-IV

Consent to Medical Treatment

Medical treatment and procedures carry with them certain inherent risks to which a patient is exposed. In some procedures risk may outweigh the benefits. At times if these risks are informed to a patient, he may decide to continue to live with his suffering rather than submitting himself to the medical treatment. The necessity for consent to medical treatment is recognised as part of the patient's autonomy over his body. Accordingly a patient has an exclusive right of self-determination to decide whether to undergo the treatment or not. Hence a doctor before administering treatment shall obtain the consent of patient. Such consent should be obtained after the risks involved are divulged to the patient. A patient must have his share of participation in medical decision making.[1] Accordingly a doctor is under an obligation to obtain informed consent[2] of a patient based on disclosure of risks. Any lapse attracts liability unless the non-disclosure falls into any one of the legally established exceptions.

---

1. Brian Brom Berger, " Patient Participation In Medical Decision – Making: Are The Courts The Answer", U. N.S. W.L.J.1 (1983).
2. The roots of this doctrine are found in the principle of promotion of individual autonomy, truthfulness to the patients, obligation to treat the patients justly by supplying his due share of information, to do good to the patients and not to do any harm. See I. Kennedy and A. Grubb, "*Medical Law*", London, second edition, pp. 236-239 (1994). In short it is an ethical doctrine. See Mason and McCall Smith, "*Law And Medical Ethics*," London, p. 120 (1983). For a general discussion, see also Edger Borgenhammar, "Patient's Rights And Informed Consent: Swedish Experiences", 12 *Journal of Consumer policy (Holland)* 277 (1989).

Consent : Meaning :

Consent implies voluntary agreement on the part of a patient to or acquiescence in what a doctor purposes or desires to do with his body.[3] It follows that a consent to be valid must be voluntary resulting from patient's own freewill.[4] It can not be extracted from a patient. In *Re C,*[5] the patient was a prisoner in Broad Moor suffering from a gangrenous leg. The prison surgeon concluded that the amputation of leg below knee was inevitable, as otherwise it would be a threat to the patient's life. The patient persisted a repeated objection for the amputation accepting the possibility of death as a price for retaining his limb. The surgeon was not prepared to do the same without patient's consent. But the hospital authority refused the patient's request. He sought an injunction which was granted. However the court in this regard observed that generally when a prisoner patient gave consent to prison physician, the latter was in a position to overbear the will of the former.

It is obvious from the decision that a doctor cannot force a treatment on patient even though it is meant for saving latter's life. There must be clear manifestation of consent on the part of the patient.

The consent may be express or implied.

---

3. J A Simpson and E.S.C. Weiner (Pd.), The *Oxford English Dictionary,* Oxford, (Vol. 3- second edition) p.760.
4. *Id.* at p. 896.
5. [1994]1 W.L.R. 290. See also *Freeman v. Home office,* [1984] 1 All E.R. 1036 (C.A.), where it was held that a consent given under sedation was not voluntary one.

Express consent can be given either through words written or spoken.[6] The extent of a doctor's authority depends upon the interpretation of words written or spoken on the occasion.[7] Consent to an operation or administration of specific treatment extends to all acts, which are reasonably necessary for the same and meeting all conditions likely to arise thereof.[8] For example consent for performance of an operation extends to administration of anaesthesia. Such general consent dispenses the need for sectional consent whereby the doctors are relieved from the obligation of securing separate consent for all component part of a procedure such as injections, drugs or manipulations.[9]

Implied consent can be inferred from the actions of a patient. In *Dr. T.T. Thomas v. Elisa,*[10] the Kerala High Court took the view that consent was implicit when the patient submitted him to the doctor for medical advise and treatment. Similar position was taken in *O.Brian v. Cunnard S.S.Co.*[11] In this case the plaintiff among with others stood in line and stretched her hand for vaccination as a measure of protection from contracting small pox. Later she brought an action against the doctor for want of consent. The court held that there was implied

---

6. *M. Arunachala Vadivel v. Dr. N.Gopalkrishnan*, (1992) 2 C.P.J. 764 (Tamilnadu S.C.D.R.C.).
7. Nathan, "*Medical Negligence*", London, p. 159 (1957).
8. *Ibid.*
9. *Davis v. Barking Havering & Brenthood Health Authority,* [1993] 4 Med. L.R. 85; *Chatterton v. Gerson,* [1981] 1 All E.R. 257 (Q.B.).
10. A.I.R. 1987 Ker. 52.
11. 28 N.E. 266 (Mass. 1891), as quoted in I. Kennedy and A. Grubb, *op.cit.* at p. 102.

consent on her part which could be inferred from the fact of stretching the hand without protest. The court continued that in determining whether she consented, he could be guided only by her overt acts without any reference to the unexpressed feelings.

The question of implied consent on the part of a patient admitted to a teaching hospital arises in the context of he being used as an object of teaching by his doctor. It can be inferred, if the patient has knowledge of the fact that the hospital is a teaching hospital where the students are asked to examine the patients and do some minor tasks as a part of their curriculum. The treating doctor on his part has an obligation to inform the same. With such knowledge, if the patient without any protest submits himself for the treatment, consent can be inferred. But doctors shall not allow unwarranted intervention by the students. It must be strictly confined to the need in hand and a doctor shall delegate only such task, which can be reasonably delegated to students.

Consent whether express or implied should be an informed consent.

Meaning of informed consent :

It is a kind of consent based on disclosure of information.[12] It is this element of disclosure which enables the patient to take a rational decision.[13] The

12. Alan Meisel and Lorn H. Rath, "Towards A Discussion Of Informed Consent : A Review And Critique Of The Empirical Studies", 25 Arizona L.R. 268 at p. 271 (1983). Disclosure of information, competency(capacity to understand the information), voluntariness, decision to undergo the treatment or not after a full digestion of the information are the components of this doctrine.
13. *Id.* at p. 272.

doctor must disclose risks and benefits of treatment, alternative forms of treatment and nature of the treatment or at least so much information about these matters to enable the patients to arrive at a rational decision.[14]

Persons entitled to give consent :

An adult[15] patient is entitled to give consent for any medical procedure unless he is mentally incompetent or otherwise incapable of giving consent.[16] It is based on the presumption that he knows what shall be done with his body and capable of understanding what it is and it's consequences.[17]

The above discussion depicts that as a general rule minors are not competent to give consent because of their incapability to understand what the treatment is and it's consequences. In some circumstances consent may come from a minor himself. Accordingly if he has attained sufficient intelligence to understand the nature of proposed treatment[18] and where the next of kin cannot be

---

14. Joseph H. King, "*The Law Of Medical Malpractice*", St. Paul Minn, West, p. 136 (1977). See also Gerald Robertson, "Informed Consent To Medical Treatment", 97 L.Q.R. 102 (1981).
15. An adult is one who has completed the age of 18 years and if he is a ward of a court, it is extended to 21 years. But under the English law one who has completed the age of 16 years is competent to give consent.
16. An adult patient other than mentally incompetent, is incapable of consenting, if he is unconscious.
17. In *Gillick v. West Nortfolk and Wisbech Area Health Authority,* [1985] 3 All E.R. 402 (H.L.).
18. In *Gillick v. West Nortfolk and Wisbech Area Health Authority, Ibid.,* the Department of Health and Social Security, issued a circular that it was not unlawful for a doctor to prescribe contraceptive for a girl below the age of 16 years to protect her against the harmful effects of sexual intercourse, without parental consent in exceptional cases, if in his clinical judgement it was desirable to do so. The legal validity of the circular was challenged. The court held that a girl below age of 16 was incompetent to consent to contraceptive advice and treatment. The court held that it was within doctor's discretion to do so without parent's consent provided, she could understand the nature of the proposed treatment. See also, Joseph H. King, *op.cit.* at p. 138.

located the doctor can administer treatment. But the procedure should be for his benefit and it should be simple one.[19] In cases of emancipated[20] or married minor[21] or a minor entered in military service,[22] they can give consent for any medical intervention.

As a rule for any medical intervention, only a patient is entitled to give consent. But where the patient is not capable of giving consent, any parent or persons exercising parental authority or next of kins are entitled to give proxy consent. Accordingly the need for such proxy consent arises in case of adult unconscious and mentally incompetent patients[23] and minors barring

---

19. See Joseph h. King, *op.cit.* at p. 139. A number of states in the U.S.A. have enacted special statutes declaring a minor's consent valid for certain purposes like examination and treatment for venereal disease, drug and alcoholic dependency, treatment of minor's own children, examination following rape, blood donations and prescription of birth control devices. One statute allows a minor who has attained the age of 14 years to give consent to any legitimate treatment. *Id.* at p. 140. In *Planned Parenthood Of Control Mo v. Danforth,* 428 U.S. 52 (1976), parental consent before a minor female could obtain abortion was held to be unconstitutional.
20. The rule of emancipation requires that a minor has a separate home from his parental home and is responsible for his own financial position. Joseph H. King, *op.cit.* at p. 140.
21. *Ibid.*
22. *Ibid.*
23. See *Bolam v. Friern Hospital Management Committee,* [1957]2 All E.R. 118 (Q.B.). See also *Canterbury v. Spence,* 464 F.2d 772 (1972), as quoted in I Kennedy and A. Grubb, *"Medical Law"*, London, second edition, p.191 (1994). In this case the court observed that where the patient was unconscious or otherwise incapable of consenting, the physician should, as current law required should attempt to secure a relative's consent.

    A mentally incompetent patient can give his consent, if he understands the nature and consequence of the treatment. If a mentally incompetent patient fails to express his desire of seeking admission as an in-patient in a mental hospital, an application can be made on his behalf by a relative or friend. In India also similar provisions occur in the Mental Health Act 1987, ss. 15, 19.

circumstances under which law accepts their consent.[24] In *Krishnan v. G. Rajan*,[25] the Madras High Court took the view that for medical termination of pregnancy in the case of a minor a registered medical practitioner must take the consent of the guardian of minor in writing.

A doctor must be very cautious to screen the proxy consent. He must ascertain whether the proxy has real authority to give consent for medical intervention. In *Rishworth v. Moss*,[26] the parents of a child of eleven years sent her to spend 10 days holidays with her unmarried sisters, aged twenty two and twenty. The defendant surgeon operated on the infant for the removal of her tonsils and adenoids with her sisters' consent. The surgeon was aware of the existence and place of residence of the parents. But he believed that the sisters had authority to give consent. The parents bought an action against the surgeon for want of their consent. The court recorded a verdict in their favour on the ground that even though the sisters by implication had some limited power to submit the child to medical treatment it did not extend to authorize the operation for removal of tonsils and adenoids.

The above decision gives an indication that the sisters or any relative can give consent for minor ailments. On the other hand if for every procedure parental consent is insisted, it will expose both doctor and patient to hardship. A doctor has

---

24. See *supra*.
25. 1994 M.L.J. (Cr.) Mad. 731.
26. (1913)159 S.W. 122, quoted in Nathan, *op.cit.* at p. 178.

to make enquiry with each and every accompanying person about their position. If they are not parents, a doctor can refuse to treat, which exposes a patient to hardship.

According to Nathan, a doctor can successfully defend himself under the following circumstances.[27]

a) The person consenting has been placed by the guardian in such a position to create a belief that the authority had been given.

b) The person consenting other than the guardian has actual authority from the guardian given expressly or by implication.

c) The doctor erroneously believes the person consenting to be the guardian in an event of guardian's actions leading to such belief.

d) Where the proxy consent is given by a third person other than a patient or guardian or relative, a doctor shall ascertain the veracity of the authority so conferred on him and if there is any suspicion, he shall reject the consent.

In the case of spouses, if one of the spouses is unconscious, the other may give consent for a procedure of necessity. Under normal circumstance the spouse herself or himself can give consent. This is true as for as it does not affect the legal right of non-consenting spouse. But there may be a circumstance in which the medical procedure performed on a consenting spouse, for example a sterilization operation may infringe the legal right of a non-consenting spouse. The law relating to the right of an aggrieved spouse is little uncertain. It would not be unreasonable

27. Nathan, *op.cit., ibid.*

to reckon the legitimate interest of the other spouse who has a right to be consulted.[28] As a matter of sound medical ethics a doctor shall strive to obtain the consent of the other spouse also unless the intended procedure is necessary in the interests of patient's health.[29]

The guidelines issued by government of India regarding sterilization operation enjoins a duty on a doctor to obtain the consent of other spouse.[30] In addition to that the spouse to be subjected for sterilization operation shall declare that he or she has obtained the consent of the other.[31]

Hence it follows that both the spouses are entitled to consent concurrently.

Liability for non-consensual treatment :

All medical procedures such as injections, surgery or manipulations, done without the consent of the patient or person otherwise entitled to give consent will give rise to an action for battery against a doctor.[32] It will be so where there is no real consent. The underlying notion is that the unauthorized touching is an

---

28. *Id.* at p.180
29. *Ibid.*
30. See Dr. Jagadish Singh, "*Medical Profession And Consumer Protection Act*", Jaipur, appendix VI, (1994).
31. *Ibid.*
32. Rodney Nelson-Jones and Frank Burton, "*Medical Negligence Case Law*", London, p.1(1995): Battery generally signifies a hostile touching and can not be equated with ill-will or malevolence. See *Wilson v. Pringle,* [1986] 2 All E.R. 440 (C.A.); *Collins v. Wilcock,* [1984]3 All E.R. 374(Q.B.).

offensive act to a reasonable sense of dignity and honour of the patient.[33] The fundamental and incontestable principle is that every person's body is inviolate which is reflected not only in the notion of harm, but in consent also.[34] It is immaterial that touching is trivial and has not resulted in any harm to the patient.

Even if the treatment is beneficial to a patient, a doctor can not escape liability for unauthorized treatment.[35] An action for battery against a doctor is strict and difficulties connected with the proof of negligence is dispensed with.[36] Moreover proof of damage is not a *sine quo non* of battery based action.[37] Where harm really ensues exemplary and aggravated damages are recoverable.[38] The following are some of the instances where claim based on battery was recognised in western countries.

Unauthorised use of instrument :

At times use of instrument may be a part of administration of treatment. A doctor before the use of instrument shall obtain the consent of the patient. In *Slater v. Baker and Stapleton,*[39] it was complained that the defendant doctors had

---

33 John G. Fleming, *"The Law of Torts"*, New South Wales, eight edition, p. 24. (1992).
34. I. Kennedy & A. Grubb, *op.cit.* at p. 174.
35. *F. v. West Berkshire Health Authority,* [1989] 2 All E.R. 545(H.L.).
36. See *supra* n. 32.
37. *Ibid.*
38. *Ibid.*
39. (1767)2 Wills 359, as quoted in J.P.Eddy, *"Professional Negligence"*, London, p.86 (1955).

unskillfully disunited the collous of patient's leg after it was set. There was evidence to the effect that one of the defendants inserted a heavy steel thing that had teeth and would stretch or lengthen the leg and eventually leg was broken. There was no consent for the use of the steel instrument. The court awarded damages to the patient. It further observed that it was reasonable that a patient should be told what was about to be done to him so that he might take courage and put himself in such a situation to enable him to undergo the operation.

Lack of voluntary consent :

Involuntary consent attracts liability.[40] In *Beausoleil v. La Communaute des Soeurs de la charite de la providence et al,*[41] a patient complained back ache which necessitated performance of an operation. Before the operation she told the surgeon that she wanted a general anaesthetic and not spinal. He agreed to this and told her that he would so advise the anaesthetist. She was given sedation and taken to the operation room. Inspite of her persistence, the anaesthetist did not agree to do so. She became tired and said " you do as you wish". The operation was then performed with general anaesthesia. She suffered paralysis down the waist. The court observed, [42]

---

40. For a discussion on voluntariness of consent, see *supra.*
41. [1963] 53 D.L.R. 65.
42. *Per Casey J., ibid.*

> "When in cases in which there is no urgency the doctor for one reason or another is unwilling to render the services agreed upon by the patient the only course of action open to him is to withdraw. He may not overrule his patient and submit him to tasks that he is unwilling and in fact has refused to accept. And if he does so and damage results he will be responsible without proof of negligence or want of skill. In these circumstances it is not a defence to say that the technique employed was above reproach or that what happened was a pure accident."

The above observation makes it clear that when the wish of a patient is pronounced, doctor shall respect it. Any disregard will deprive a doctor all of his defences unless there is an urgency. Even if there is emergency departure from express instuction of a patient may make the doctor liable. In *Mulloy v. Hop Sang,*[43] a patient sustained hand injury as a result of car accident. He instructed the surgeon to fix up the hand but not to cut it off. The patient repeated the same instruction in the operation room. The surgeon replied that he would be governed by the ensuing condition after administration of anaesthesia, for which the patient gave no reply. Later he amputated the hand to avoid blood poisoning, as there was no possibility of saving the hand. The decision to amputate was supported by two other physicians. The court inspite of it's opinion that the operation was necessary and performed in a highly satisfactory manner awarded damages to the patient.

Doctor's failure to ascertain the wish of a patient :

The pronounced wish of a patient renders the task of a doctor easier to

---

43. [1935] 1 W.W.R.. 714, as quoted in Rodney Nelson-Jones and Frank Burton, *op.cit.* at p. 464.

proceed with the administration of treatment. In the absence of such pronouncement, he shall endeavour to ascertain the wish of the patient. In *Boase v. Paul,*[44] a dentist relying on a x-ray plate failed to ascertain the exact extent of the work the patient wished to have done. In consequence he extracted twelve teeth instead of the teeth the patient wished to have extracted. The dentist was held liable.

Intervention with a wrong organ without consent :

A patient may go to a doctor to seek treatment for a particular limb. A doctor shall not deviate from it to treat some other limb for which treatment is not asked for. In *Mohr v. Willams,*[45] a patient complained trouble in her right ear to a surgeon. She consented for an operation. While she was under anaesthesia, the surgeon examined both the ears and found left ear in a more serious condition. He performed the proposed operation on the left ear instead of the right ear. The U.S. court awarded damages to the patient declaring the act of surgeon as one of battery.

In the above case the limb operated without consent was not healthy one and was in a serious condition. The operation resulted in benefit to the patient. This factor ought to have been taken into account in awarding to reduce the damages only. Such an approach would result in balancing of patients right to self-

44. [1931] 1 D.L.R. 562.
45. [1905] 104 N.W. 12, quoted in Nathan, *op.cit.* at p. 163.

determination and medical paternalism. But British judges have adopted a lenient view of the situation where the procedure has resulted in benefit to the patient. In *Beatty v. Cullingworth,*[46] the plaintiff sued the defendant doctor for performing a bilateral overiectomy operation as she had consented only for a single operation. In the operation room she told the doctor that if both the ovaries were diseased, he should remove none. The doctor replied that she should give him a freehand, to do the best to protect her interest. The court recorded a verdict in favour of the doctor on the ground that if a medical man in the best interest of the patient performed an operation, he would have thought it humane to do so to avoid the mischief in the absence of definite instructions not to operate.

The above decision confers absolute exemption from liability. It is accepted as violation of patients right of self-determination. But if tacit consent can be inferred it would exempt a doctor from liability.

The performance of operation on a healthy limb or removal of a healthy limb gives rise to higher liability by way of aggravated damages. It is a serious form of battery as no patient would give consent for such acts.[47]

Non-consensual procedure of convenience :

A procedure performed for convenience in the absence of consent will amount to battery. In *Murray v. McMurchy,*[48] a doctor in the course of caesarian

46. (1896) 2 B.M.J. 1525 as quoted in Rodney Nelson-Jones and Frank Burton, *op.cit.* at p. 240.
47. In India such cases are considered as doctors negligence. For a discussion see *infra.*
48. [1949] 2 D.L.R. 442.

section discovered the malignant condition of the plaintiff's uterus that it was dangerous for her to go through another pregnancy. Even though there was no necessity for the fallopian tubes to be tied up, the doctor performed the procedure. She brought an action against the doctor for want of consent for the sterilization operation. The court held that the procedure though had the convenience of doing it on the spot, it's postponement until obtaining the consent was reasonable in the circumstances.

Convenience need not be a ground for exemption from liability. It should be a ground to reduce damages payable to the patient. It is possible that the patient would have consented if the danger was known to him. A malignant uterus may expose a female to danger. In such an eventuality she must take the pains of resorting to perpetual contraceptive devices or an operation for the removal of uterus. On such a factual situation, the operation though performed without consent, certainly warrants a liberal view of liability. The submission is not to relieve the doctor from liability but to consider the wrong as less serious. But procedures should not result in any health hazard to the patient.

Unlawful operations :

Law may forbid some operations.[49] Such operations if performed on

---

49. An abortion which is not justified by any medical necessity is unlawful under the Medical Termination of Pregnancy Act, 1971. Earlier under English law performance of sterilization operation was a crime. See *Bravery v. Bravery,* [1954]3 All E.R. 59 (C.A.).

patients *ipso facto* result in intervention with their body which is not authorized by law. But a patient may authorize the doctor to perform such an operation. The consent of a patient for it as a defence under civil law has become a controversial matter. The legal opinion and courts are equally divided in allowing it as a defence.[50] It is submitted that the better approach is to allow a doctor to raise the plea of consent in a petition by the consenting patient. But an unlawful operation in the absence of consent results in an aggravated form of battery warranting payment of exemplary or aggravated damages.

Indian courts have taken the view that any medical intervention without the consent of the patient gives rise to an action for deficiency in service.[51] In *Force Society v. M. Ganeswara Rao*,[52] the case sheet did not contain consent letter. The Andra Pradesh State Commission held that lack of consent would amount to deficiency in service.

Justification for non-consensual treatment :

The legal requirement of obtaining prior consent for medical intervention is not absolute one. Law has recognised a few exceptions. The paternalistic demand

---

50. See *supra* n. 7 at p.183. Consent is not a defence for any criminal wrong.
51. See *Indian Medical Association v. V.P. Shantha*, (1995) 6 S.C.C. 651. See also the definition of 'deficiency in service' under s.2(1)(g) of the Consumer Protection Act 1986.
52. (1997) 3 C.P.J. 228 (Andra Pradesh S.C.D.R.C.).

for total dispensation of consent is not accepted in any jurisdictions.[53] Law allows performance of a medical procedure if it is unreasonable to postpone it, until consent could be obtained.[54] It implies an emergency where the patient is not in a position to give consent or there is absolutely no time to obtain the proper proxy consent. Postponement of a treatment till obtaining the consent may expose a patient to danger. On such a situation a doctor can perform the procedure without waiting for the consent with immunity from liability. In *Tomarino Marcel D' Cruz v. Management of St. Joseph's Boys Higher Secondary School*,[55] a minor boy who was a boarder in the hostel was injured in his eye. He was brought to the hospital by the school authorities and the doctor decided to perform an operation for which school authorities gave consent. Accordingly the right eye which was totally damaged was removed. The parents of the boy alleged that the operation was conducted without their consent. They brought an action against the doctor for deficiency in service. The expert opinion suggested that such severe injury in an eye if left untreated for forty eight hours, it would have led to severe infection

---

53. The paternalistic justification put forward by the doctors is based on the premises that they always act in the best interest of the patients, which the latter fail to understand and good health and physical comfort are preferable to ill-health and physical discomfort. See Mason and McCall Smith, *op.cit.* at p. 111. The theory of illness as a social burden justifies dispensation of requirement of consent on the ground of avoiding social burden of supporting patient's family in case of his death resulting from his refusal to submit to the treatment.
54. Skegg, "A Justification For Medical Procedures Performed Without Consent", 90 L.Q.R. 512 (1977).
55. (1998) 1 C.P.J. 340 (Tamilnadu S.C.D.R.C.).

causing danger to plaintiff's life. The Tamil- Nadu State Commission held that there was no deficiency in service and consent could be dispensed with when there was a grave emergency.

The Kerala High Court went one step further in *Dr. T.T. Thomas v. Eliza.*[56] In that case a patient was diagnosed as suffering from acute appendicitis. The surgeon did not perform the operation on the patient on the day on which he was admitted to the hospital. The next day the patient died, as the condition deteriorated fast making the performance of operation impossible. There was expert medical evidence to the effect that early performance of operation would have avoided patient's death. The surgeon contended that the patient did not give consent to the performance of operation. The High Court rejecting the contention held that consent was implicit when the patient submitted him to the doctor. The court further held that consent could be dispensed with in emergency situations, where the patient was not in a fit state of mind to give or not give a conscious answer regarding consent. The court further continued that failure to perform an emergency operation would amount to negligence.

It follows that there must be an absolute necessity for medical intervention to dispense with consent. Similar position was taken in Canada also in *Marshall v.Curry.*[57] In that case a surgeon in the course of a hernia operation removed the

---

56. A.I.R. 1987 Ker. 52.
57. [1933] 3 D.L.R. 260.

testicle of a patient. He brought an action against the surgeon in battery. The latter's version was that the removal was essential to a successful operation and but for the removal, the life and health of the patient would have been at peril, as the testis was diseased. The court recorded a verdict in favour of the surgeon on the ground that it was necessary for the protection of patient's health and possibly his life, as the postponement of procedure until a later date was unreasonable. The court further observed, [58]

> "...to put consent altogether out of the case where a great emergency which could not be anticipated arises and ... it is the surgeon's duty to act in order to save the life or preserve the health of the patient and that in the honest execution of that duty he should not be exposed to legal liability."

The application of necessity principle would be limited to those instances of non-consensual treatment where a patient is not known to object the treatment in question.[59] The presumption is that a patient will not object a treatment which is essential to save his life or limb or preserve his health. But it cannot be applied to a conscious patient, as the principle of autonomy outweighs the value of enhancing his health or saving his life.[60]

It follows that the principle can be applied only to unconscious patients. Unconsciousness can not be a license to a doctor to perform a procedure not

---

58. *Ibid.*
59. Mason and McCall Smith, *op.cit.* at p. 114.
60. *Ibid.*

essential for the patient's survival. The treatment administered must be compatible with the exigencies of situation. If the treatment can be postponed reasonably till he gains consciousness, in a condition involving no danger to life, limb or health of the patient, a doctor attracts liability for non-consensual treatment. A doctor can not be considered as representative *pro-hac vice* of unconscious patient to do whatever he wishes except what is necessary in a situation contemplated above.[61]

Another situation were consent for medical procedures may be avoided is when a specific legislation is silent as to who shall give consent in cases of mental abnormality. For example, English Mental Health Act 1983, does not say who can give consent for sterilization of a mentally ill patient. In such cases a doctor is justified in taking proper steps supported by good medical practice.[62] This is an extreme situation where a doctor is exempted from liability for non-consensual

---

61. See *supra* n. 57.
62. *T.v.T.* [1988] 1 All E.R. 613. In this case a girl aged 19 was epileptic and severely mentally handicapped. She was totally dependent on her mother. She became pregnant. The medical advisers and doctors reached to the conclusion that she needed a protection from future pregnancies and sterilization would be the only effective method. But the doctors were reluctant to conduct the operation without protection order from court. The Mental Health Act (English)1983, is silent as to who can give consent for sterilization of a mentally incompetent. Her mother sought a declaration from the court that it would not be unlawful for the doctor to perform the procedure without consent. The court held that the doctor was justified in performing the operation without consent.

medical intervention in the best interest of the patient.[63] Indian consumer courts also have taken the view that the action taken by a doctor in the best interest of the patient in an emergency situation will not give rise to any liability.[64]

Consent for treatment : A critical appraisal :

The need for consent to medical intervention arises from the premise of bodily autonomy of the patient. The patient alone has the right to determine what shall be done with his body. Law recognizes proxy consent given by the parents or relatives in case of mentally incompetent persons, unconscious adult patients and minor patients. A doctor must be very circumspectious in screening the proxy consent to ascertain it's genuineness failing which he may attract liability.

Sterilization and abortion of mentally incompetent patients for non-therapeutic purpose require court order. But if in the best interest of a patient, a doctor exercising his clinical judgement performs the above procedures with parental or relatives' consent the courts seem to be reluctant to intervene.

The right of self-determination is extended to a minor also. English law has recognized 16 years as the age of a person to give consent for medical procedure. A child below the age of 16 years can give consent provided it is capable of understanding the nature and consequences of proposed treatment. It follows that

---

63. In a spate of cases the court had permitted medical intervention taking into consideration the best interest of patients. See In *Re L*, [1992] 3 Med. L.R 78: In *Re A*, [1992] 3 Med. L.R. 303: In *Re K and Public Trustee*, [1985] 19 D.L.R. 255: In *Re Eve*, [1981] 115 D.L.R. 283.
64. For a discussion see *supra*, chapter 3.

simple procedures for the benefit of minors may be performed with their consent In the U.S.A the principle of emancipation allows a minor to consent for even major treatments. These principles can not be transplanted in India. Here the minors do not enjoy financial independence. Moreover the age of majority under Indian law is 21. Therefore it is submitted that the legal age of consent shall be kept as such. Minors may be allowed to give consent for minor procedures provided they understand the nature of proposed treatment.

Absence of consent for medical intervention gives rise to liability. To claim damages it is necessary to prove negligence and causation. In effect strict liability is imposed for medical intervention without consent. Benefit of treatment is not a defence to the doctor. This position may cause hard shift to doctors. It is felt that when the patient has not sustained any injury and the treatment has resulted in benefit to him and it was done in justifiable circumstances damages awarded if any should only be nominal.

However Indian law makes a departure from the view taken in western jurisdictions. It considers an instance of non-consensual medical treatment as a ground of action in negligence rather than battery. So it follows that to recover compensation the patient has to prove injury. If he fails to do so the action will fail. In effect the lapse of a doctor to obtain consent escapes legal accountability. The respect for bodily autonomy which provides the conceptual foundation for consent requirement will be ignored. Therefore it is submitted that respecting bodily

autonomy of a patient, nominal damages may be awarded.

The absence of consent does not imply that the treatment is deficient. But if as a result of the treatment a patient sustains injury, a doctor is held liable strictly for all ill-consequences. The plea of reasonable care is not available to him. It is immaterial whether the same treatment given with consent would have resulted in similar consequences. Accordingly non-consensual treatment resulting injury to the patient warrants payment of aggravated damages.

Law does not insist consent under all circumstances. It is sensitive to grasp the delicate position in which doctors are placed. Accordingly it has recognized the duty to treat even without consent in emergency. But doctors are not free to do whatever they wish. It strikes a balance between patients right to self-determination and paternalistic claim for non-consensual treatment in the best interest of the patient.

However the trend of decisions in western countries like England and America is tilting in favour of patients. It is suggested there that consent where ever required should be informed consent based on sufficient disclosure of information. Failure to make sufficient disclosure may impose invite liability on the doctors.

CHAPTER V

CHAPTER V

Doctors' Liability Based on Lack of Informed Consent

Consent based on the recognition of bodily autonomy will be meaningful if it is given freely after understanding the benefits and risks attached to the proposed procedure. It may not be possible for a doctor to envisage all possible consequences in advance. Even when he is aware of the consequences, he may have to withhold certain information in the best interest of the patient. Moreover disclosure of information except to the patient may invite breach of confidentiality which is an essential ingredient of doctor-patient relationship.[1] Liability on this count can be avoided only in cases where such disclosure is for promoting public interest. Legal accountability for failure to obtain informed consent should take into account all these factors.

Liability for failure to obtain informed consent :

It is well established that failure to obtain informed consent[2] resulting in deficiency in service on the part of a doctor gives rise to liability in negligence.[3]

---

1. This study does not examine liability for breach of confidentiality by a doctor. For a detailed discussion, see I. Kennedy and A.Grubb, "*Medical Law*", London, second edition, pp. 637-673 (1994).
2. For the meaning of the term 'informed consent', see *supra* chapter 4.
3. See *Chatterton v.Gerson*, [1981] 1 All E.R. 257 (Q.B.); *Reibel v. Hughes*, [1980] 114 D.L.R. 1.

But the doctor need not ascertain whether the patient has actually comprehended the information divulged.[4] The duty is confined only to disclosure of sufficient information.[5] The following are some of the situations where courts in different countries have recognised a duty of disclosure.

(i) ***Disclosure regarding diagnosis*** :

A doctor shall inform precisely the condition what he has detected from the diagnosis he made. A serious condition may call for a drastic procedure. If the matter is disclosed to the patient, he may not submit himself for the treatment. But this is not a justification for non-disclosure.

For example in *Wall v. Brim,*[6] a doctor detected a minor cyst on the neck of a patient. It was deeper than he thought. He did not inform the patient who was completely conscious, that it needed a drastic procedure. After the performance of the procedure she sustained a nerve damage. The court found the doctor negligent as he failed to inform the real condition and ask her if she wanted him to continue.

---

4. In the United States a legal presumption is taken that a patient has the capacity to comprehend the disclosed information. See Alan Meisel and Loren H. Roth, "Towards A Discussion Of Informed Consent : A Review And Critique Of The Empirical Studies," 25 Arizona L.R. 265 at p. 272. (1983).
5. *Hopp v. Lepp,* [1980] 112 D.L.R. 67. In this case the court held that a doctor who was a new entrant to profession was not under an obligation to disclose the same to the patient.
6. 138 F. 2d 478, C.C.A. 5 1943 as quoted in Angela Roddey Holder, "*Medical Malpractice Law*", Newyork, second edition, p. 226.

(ii) Known risks of a procedure :

An obligation is imposed on a doctor to disclose any known inherent risks of a procedure.[7] In *Reibel v. Hughes,*[8] a patient underwent a surgery for removal of occlusion in the left internal carotid artery which had prevented more than 15% of blood through the vessel. The surgery involved risk of death (4%) and stroke (10%), which were not informed to the patient. As a consequence of the operation, he got paralysed and impotent. He was allowed to recover damages from the doctor on the ground that the latter failed to disclose the inherent material risks.

(iii) Existence of alternative methods of treatment :

Alternative methods of treatment may exist for a particular condition. A doctor may decide to treat the patient by a method that has some inherent risks, with the knowledge of alternative method. In that case doctor is under an obligation to inform the relative benefits and risks connected with such method so that a patient can make a rational choice. In *Jeffries v. McCague,*[9] a patient had a

---

7. *Mclean v. Weir* (Canadian case), [1980] C.A. 77C 785 as reproduced in [1980] 4 *Legal Medical Quarterly* 76. In this case a patient underwent an angiogram of the left forearm and fingers. In the course of performing the procedure a substantial quantity of neurotoxic contract medium escaped from the catheter to the spinal cord and the procedure was halted immediately. By then the damage had already caused. He brought an action against the doctor for not disclosing the risk. The court found it for the doctor on the ground that the risk was not known at that time and not recognised in the state of medical and radiological art at that time.
8. See *supra* n. 3. See also *Rogers v. Whittaker,* [1992]175 C.L.R. 479.
9. 363 A. 2d 1167, Pa. 1976, quoted in Angela Roddey Holder, *op.cit.* at pp. 226-227.

retropubic prostatectomy. As a result of the procedure he became incontinent. There were four alternative methods, which were not informed to him. He brought an action against the doctor for not disclosing them and risk of incontinence. The court found it for the patient and observed,[10]

> "Where a physician or surgeon can ascertain in advance of an operation alternative situations...a patient should be told of the alternative possibilities and given a chance to decide what should be done before the doctor proceeds with the operation. The rule preserves the patient's dignity in choosing his own course".

(iv) Duty to be aware of accepted alternatives :

A doctor must be aware of the available and accepted alternatives. If not he must ascertain. He can not raise the plea of ignorance. In *Morrison v. Mckillop,*[11] a woman consulted a doctor for an illness which he correctly diagnosed as Bell's palsy. He told that it would go off automatically without any treatment. It did not happen. Finally a professor of medicine performed decompression surgery. In spite of that she suffered permanent residual disability as already the condition had worsened due to delay in performing the procedure. The court recorded a verdict in favour of the patient. It observed that the duty of a general practitioner or a specialist to disclose was limited to matters which a reasonably knowledgeable general practitioner or specialist ought to know. Here the court found that the

---

10. *Ibid.*
11. 563 P. 2d 220, Wash. 1977, *id.* at pp. 227-228.

doctor failed to know the matters a reasonably knowledgeable practitioner ought to know.

Inspite of the general acceptance on the duty of disclosing information to patient, the rules laid down by courts in different jurisdictions vary.

A comparative analysis of the extent and standard of disclosure :

(i) Position in England :

English law has recognised a positive duty of warning risks which is equivalent to the doctrine of informed consent.[12] The extent and standard of disclosure is governed by the *Bolam*[13] principle.[14] The content of information to be divulged depends upon the practice accepted as proper by a responsible body of medical men.[15] It follows that a doctor will be held guilty of negligence for

---

12. *Chatterton v.Gerson*, see *supra* n. 3. In this case the plaintiff underwent hernia operation. Thereafter two operations were performed to relieve him from the chronic and intractable pain resulting from the first one. They resulted in permanent loss of sensation in the right thigh. The doctor could not recollect what he told even though it was his practice to warn about the risks. The plaintiff contended that the inherent risks were not informed. The action failed on the causation front. The court observed that if there was a real risk of misfortune inherent in the procedure, a doctor was under a duty to explain what he intended to do and it's implication in the way a careful and responsible doctor in similar circumstances would have done.
13. For a detailed discussion on the principle, see *supra* chapter 2.
14. *Sidaway v. Board of Governers of Bethlem Royal Hospital and the Maudsley Hospital,* [1985] 1 All E.R. 643(H.L.) In this case court refused to split the comprehensive duty of a doctor into different constituent parts for the application of different tests. But Lord Scarman making a departure from the above opinion observed that all material risks must be disclosed applying the prudent patient test. See *id.* at p.655.
15. *Id.* at pp. 658-659.

non-disclosure if a responsible body of medical men would have disclosed the same. In effect the standard of disclosure is left to be determined in accordance with the professional standard.[16] The court may in some circumstances come to the conclusion that disclosure of a risk is so much material to obtain the consent of patient. So a reasonable doctor disclose such risks not withstanding the fact that there is a contrary practice accepted as proper by a responsible body of medical opinion.[17]

It is doubtful whether a duty of disclosure exists even when interrogated by a patient of sound mind. In *Blyth v. Bloomsby Health Authority,*[18] the patient, a trained nurse, took a controversial contraceptive injection depo-provera. It had a number of side effects. She asked specific questions. She was not told of the risk of menstrual irregularity. As a result of the injection she suffered bleeding and menstrual irregularity. She brought an action against the doctor on the ground of non-disclosure of risk. Her claim failed. This decision suggests that even if interrogated by a patient it is not incumbent on a doctor to disclose the risks if a responsible body of medical opinion support non-disclosure. This is a departure from earlier decisions. In *O' Malley – Williams v. Governers of National Hospital for Nerous Diseases,*[19] the court had taken a contrary view. There the court took

16. The prudent patient test was discarded on grounds of dilution of doctor and patient relation and non practicability. *Sidaway v. Board of Governers of Bethlem Royal Hospital and the Maudsley Hospital, supra* n. 14.
17. *Hills v. Potter*, [1983] 3 All E.R. 716 at p. 728(Q.B.).
18. [1993] 4 Med. L.R. 151 (C.A.).
19. [1975] 1 B.M.J. 635, as quoted in Rodney Nelson -Jones and Frank Burton, "*Medical Negligence Case Law*" , London, p. 484 (1995), see also *Sidaway, supra* n. 14.

the view that a failure to disclose the risks, where the patient had not interrogated was not negligence. It indicated that where a patient had asked question pertaining to risks failure to disclose the same would amount to negligence.

ii) Position in the United States :

According to the U.S. law all material risks inherent in a treatment must be disclosed.[20] In *Canterbury v. Spence*,[21] the court observed,[22]

> "A risk is thus material when a reasonable person what the physician knows or should know be in the patient's position would be likely to attach significance to the risk or cluster of risks in determining whether or not to forgo the proposed therapy."

The above observation makes it obvious that the standard of disclosure is governed by the prudent patient test which adopts an objective yard stick to measure the materiality of risk. The test of materiality is whether a reasonable person in the position of a patient would have attached significance rather than the patient himself attaching significance. If a prudent patient would have attached significance to the risk such risks ought to be disclosed and vice versa. In effect though professional judgement test stands rejected,[23] statutes of many jurisdictions

---

20. Canterbury v. Spence, 464 F. 2d 772 (D.C. Cir. 1972) as quoted in I Kennedy and A. Grubb, *"Medical Law", op.cit.* at p. 191 (1994)
21. *Ibid.*
22. *Ibid.*
23. In *Canterbury, ibid.,* rejecting the professional judgement test the court observed,

    " respect for the patient's right to self-determination on a particular therapy demands a standard set by law for a physician rather than one which physicians may or may not impose upon themselves".

and judicial decisions[24] still uphold that test. Some courts have adopted the principle that the burden is on a doctor to prove that the non-disclosure is in accordance with the professional standard.[25] Many statutes have created a presumption of informed consent where a written consent form sets forth the nature, purposes and known risks of a proposed treatment with probability of each such risk, if determinable.[26] Yet there is judicial support for *canterbury* principle. Some cases recognise the relevancy of professional standard though it is not conclusive.[27] Expert evidence is not required to prove what risks are material. It is relevant to ascertain alternatives to and risks connected with the proposed therapy and materialization of such risks culminating in patient's injury.

A hybrid test was laid down in *Cobbs v. Grant,*[28] requiring a minimum disclosure of risks of death and serious bodily injury connected with the more dangerous procedures. The extent of physician's duty to disclose the above risks is neither defined nor limited by any professional standard. Professional standard was adopted for additional information.

The above decision assimilates prudent patient test and reasonable doctor test for disclosure of material risks and additional information respectively.

24. See Joseph H. King, *"The Law Of Medical Malpractice"*,St. Paul Minn, West, p. 155 (1977).
25. *Martin v. Bralliar*, 540 P. 2d 1118 (Colo. App. 1975), *ibid.*
26. Risks like death, brain damage, quadriplegia paraplegia, loss of function of any organ or limb or disfiguring scars. But Georgia statutes create a conclusive presumption of validity in case of written consent where the general terms of the treatment are disclosed. See Angela Roddey Holder, *op.cit.* at p. 234.
27. Joseph H. King, *op.cit.* at p.157.
28. 502 P.2d 1 (1972), quoted *id.* at p. 158.

iii) Position in Australia :

In Australia doctrine of informed consent is well established with a more radical approach. In *Rogers v. Whittakar,*[29] a patient had a scar tissue in one eye causing damage to the vision. She asked many questions relating to the risks to the good eye. But she did not ask whether the operation would cause the damage. There was a possibility of risk in the order of 1/1400. In her case the chances were slightly more as she had already sustained an injury to the eye. She was not informed of the risk. Operation was performed skillfully. But the risk materialized and she became blind within one year. There was evidence to the effect that the professional practice was against the disclosure unless specifically asked. Inspite of this and the remote chance of risk the court held that the failure to warn was a breach of doctor's duty to take care. The court explained the position in this regard in the following words,[30]

> "... the standard of care is not to be determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade...particularly in the field of non-disclosure of risk and provision of advice and information, the *Bolam* principle has been discarded and instead the courts have adopted the principle that it is for the courts to adjudicate on what is the appropriate standard of care".

The above observation makes it obvious that it is for the courts not for the profession, to decide the standard of care. The departure from *Bolam* principle

---

29. See *supra* n.8. For a discussion on informed consent, see also Desmond Manderson, "Following Doctors Orders: Informed consent In Australia", 62 A.L.J. 430 (1988).
30. *Id.* at p .487.

though laudable, care must be taken to ensure that law accommodates constraints of medical profession.

iv) Position in Canada :

In Canada doctrine of informed consent is rooted firmly[31] partaking the feature of the principle laid down in *Canterbury*. All material risks must be disclosed.[32] Even if certain risk is a mere possibility which ordinarily need not be divulged, if it results in serious consequences like paralysis or death, it must be considered as a material risk.[33] The materiality of risk must be determined with reference to a prudent patient placed in similar circumstances and not with reference to the particular patient who sustained the injury.[34] The breach of duty on the part of a doctor must be seen as a question of fact.[35] This provides sufficient flexibility which can avoid undue harassment to the doctors and injustice to the patient.

v) Position in India :

Indian courts are reluctant to extend the same degree of obligation on doctors. In *Vinitha Ashok v. Laxmy Hospital*,[36] a patient had cervical pregnancy. The doctor resorted to lamineria tent method for dilation of cervix. There is another method *viz.*, dilapan. The patient contended that the method adopted by

---

31. See *Mclean v. Weir, supra* n. 7. *Hopp v. Lepp, supra* n. 5. *Reibel v. Hughes, supra* n. 3.
32. *Reibel v. Hughes, supra* n. 3.
33. *Ibid.*
34. *Id.* at p. 225.
35. See *supra* n. 32.
36. (1992) 2 C.P.J. 372 (N.C.).

the doctor resulted in removal of her uterus. The National Commission rejected that contention and the doctor was not held liable.

The requirement of informed consent warrants disclosure of alternative methods of treatments and their relative merits and demerits. In the above case the patient did not invoke the plea of lack of informed consent, nor the court adverted it's mind to such requirements. If the case were to be decided in western countries, courts would have adopted a different approach. But the approach of the National Commission has to be justified in the Indian context. The infancy of medical malpractice law in India and the general inability of the patients to take rational decision make it imperative on the court to take a different approach in India.

Informed consent and causation :

Mere proof of breach of duty to disclose is not sufficient to recover damages unless the patient proves that the injury was caused by non-disclosure.[37] It consists two prongs *viz.* injury causation and decision causation.[38] The former signifies that patient's harm must be the result of an undisclosed risk. The latter means that had the patient been told of the risk he would have opted out from the treatment. A patient can recover if both the prongs co-exist. In *Natanson v. Kline,*[39] a patient was suffering from breast cancer. She was subjected to cobalt

---

37. See Joseph H. King, *op.cit.* at p.161.
38. See Peter M. Shuck, "Rethinking; Informed consent", 103 Yale L.J. 903 (1994).
39. 354 P.2d 670, Kans. 1960, as quoted in Angela Roddey Holder, *op.cit.* at p. 225.

therapy following a mastectomy to reduce the risk of it's spreading. As a result of the therapy she sustained injuries. She brought an action against the radiologist for failing to warn the inherent risk. The court allowed her to recover as there was evidence to the effect that if she were to be informed of the risk, she would not have undergone the treatment. In *McDermott v. Manhattan Eye, Ear Nose & Throat Hospital,*[40] a woman had corneal disease in both the eyes. The doctor who performed the operation on one eye told that there was no possibility of blindness. She became blind in that eye after the operation. She initiated an action for want of informed consent. Her claim failed because there was no evidence to show that had she been told of the risk, she would not have agreed to take the risk and go ahead with the operation.

If the inherent risk does not occur a patient will reap the benefit of the treatment. Courts must be cautious to ascertain whether a patient on disclosure of risk, would not have undergone the operation. A patient can be wise after the event. Though his testimony is admissible it is likely to be biased as it might be an after thought of adverse outcome of a treatment. There may be a situation where disclosure or non-disclosure of risk would not make any difference in the decision to undergo the treatment. On such an eventuality infliction of liability on a doctor becomes unjust.

Injury causation does not pose any problem as it can be established through

---

40. 228 N.Y.S. 2d 143, 203, N.E. 2d 469, N.Y. 1964 as quoted *id.* at p. 234.

medical evidence. But decision causation is problematic. There are three tests to establish decision causation.

The subjective test tries to ascertain whether the plaintiff seized of the knowledge of risk would have decided not to go ahead with the procedure.[41] Patient implies one subjected to the procedure. It has the demerit of the patient venturing to be wise after the event as discussed above.

The objective test enquires what decision a prudent patient would have taken with prior knowledge of the risk.[42] It is also not free from flaw. The particular patient may refuse the treatment, but a reasonable patient may take a positive decision in spite of risk. For example consider the case of a patient who sustains a leg injury and gangrene sets in necessitating amputation. Refusal to amputate may expose him to the risk of loss of life. He may prefer to accept the risk rather than to live without a leg. Here the courts may adopt this test as it has an objective yardstick.[43] It envisages a standard of disclosure in the light of requirements of a patient rather than a doctor.

An amalgamation of the above tests is also recognised. According to this test of causation whether a reasonable patient sharing the characteristics of the plaintiff, would have declined the operation with the advance knowledge of risk.[44]

---

41. Michael Davies, "*Medical Law*", London, p.160 (1996).
42. *Ibid.*
43. See *Canterbury v. Spence*, *supra* n. 20. *Reibel v. Hughes*, *supra* n. 3 *Rogers v. Whittakar*, *supra* n. 8.
44. See *supra* n. 41.

In *Smith v. Barking Havering and Brenthood Health Authority,*[45] the plaintiff suffered from a condition which eventually would have led to paralysis within one year, unless an operation was performed. The operation had a 25% risk of accelerating the paralysis. The doctor failed to disclose it. It was held that there was a strong possibility of the plaintiff undergoing the operation inspite of knowing the risk. The court awarded damages only for the depression and shock caused by paralysis which occurred at an early date.

The reasoning was that even though the particular plaintiff opted for the treatment, a prudent patient would not have, as either earlier or later the risk was sure to materialize. Thus the hybrid test attains the twin goals of objectivity in rendering personal justice both to the patient and doctor and respecting the bodily autonomy of a patient.

Exceptions to the duty of disclosure of risk :

The duty of disclosure imposed on a doctor is not absolute. Law has conceded certain exceptions like therapeutic privilege and waiver.

(i) Therapeutic privilege :

Law allows therapeutic privilege to a doctor to withhold the information pertaining to risks connected with any treatment in the best interest of a patient.[46]

---

45. [1994] 5 Med.L.R.285.
46. The doctors contemplate that as any treatment is for the benefit of a patient it is meaningless to feed him with the information which merely serves to expose him to distress or confusion. But law does not accept this reasoning.

He may exercise such privilege in cases of emergency or when the disclosure is detrimental to the patient.

In a situation where there is no sufficient time to disclose the risks, nature of proposed treatment and alternative treatments a doctor can exercise his privilege to withhold the information with immunity from liability. In *Crouch v. Most,*[47] the patient was a snake bite victim. The doctor did not discuss the possible consequences and procedures for pumping the venom from the body. The court dispensed the requirement of informed consent on the ground that the situation was one of emergency. The situation contemplated above is one where any waste of time by a doctor in disclosing the risk to a patient or his relatives will expose the latter to the calamity of death or loss of limb. Any stricter insistence for informed consent will place a patient in a precarious position as immediate treatment is the need of the hour.

In *Vinitha Ashok v. Laxmy Hospital,*[48] the National Commission took the above view. In that case a patient had cervical pregnancy. She was profusely bleeding which warranted an emergency treatment. There was no time for the doctor to inform the risks connected with the method used for dilation of cervix. The doctor was exempted from liability.

At times disclosure of risk may prove fatal rather than beneficial to a

---

47. 432 P. 2d 254, 1967, as quoted in Joseph H. King, *op.cit.* at p.164.
48. See *supra* n. 36.

patient. It may expose him to physical or psycological wreck.[49] Even if the risk is material the doctor will not be held liable if upon a reasonable assessment of his patient's condition he takes the view that a warning would be detrimental to patient's health.

Taking into consideration the aftermath ill-consequence of the disclosure a doctor can abstain from disclosing the risk.. In *Nishi v. Hartwell,*[50] a patient for a suspected aneurysm underwent a procedure. But he was not informed of the risks of paraplegea in that procedure. The court relieved the doctor from liability. It held that the reasonable minds could not be at variance with the physician's justification for withholding the information from the patient who was extremely fearsome and suffering from coronary and kidney disease.

The above case shows that at times disclosure will be worse than silence. It will aggravate the critical condition of a patient. Where a patient is suffering from other dangerous disease the disasterous consequence will reach the zenith. Hence in such a situation a balancing approach is desired. The situation must be one, where even if the risks are disclosed a patient may not be in a position to weigh it dispassionately to arrive at a conclusion of refusing treatment.[51] If there is no evidence to prove that a patient is emotionally taut or unable to accept the disclosure of grave risk to which he would be exposed, a doctor can not exercise

---

49. See *Sidaway v.Board of Governers of Bethlem Royal Hospital and the Maudsley Hospital*, supra n. 14.
50. 473 P. 2d 116 (1970), as quoted in Joseph H. King, *op.cit.* at p. 164.
51. *Cobbs v.Grant*, *supra* n. 28.

his therapeutic privilege.[52] Similarly he can not exercise the privilege in an unscrupulous way. It must be exercised only to the benefit of the patient but not to fulfill the disguised end of a doctor. In *Canterbury,* the court observed,[53]

> "The physician's privilege to withhold information for therapeutic reasons must be carefully circumscribed. However for otherwise, it might devour the disclosure rule itself. The privilege does not accept the paternalistic notion that the physician may remain silent simply because divulsions might prompt the patients to forgo therapy the physician feels the patient really needs".

(ii) Waiver :

A doctor may get the privilege of withholding the information if by express or implied waiver[54] the patient relinquishes his right to know. He may place trust on a doctor and request not to tender any information.

Express waiver is compatible with the principle of autonomy. The right of self-determination carries with it a negative right of not pressing for any

---

52. *Reibel v. Hughes*, *supra* n.3. The court allowed the patient to recover damages on the ground that there was no emergency, making surgery imperative.
53. See *supra* n. 20. Lawton L.J. speaking extra-judicially when he addressed the Royal society of medicine said,

    > " I suspect that some doctors say nothing about risks because they are confident that if they did their patients would not accept the treatment which they are sure is required. The law would not accept this as a good reason..."

    see Andrew Grubb, "The Emergence And Rise Of Medical Law And Ethics", 50 M.L.R. 241 at pp. 251 – 252 (1987).
54. Waiver signifies voluntary abandonment of a right.

information. But implied waiver can not be accepted as ground for withholding the information as it is difficult to prove.

Informed consent in elective treatments :

In non-elective treatment[55] a doctor can take the shelter of therapeutic privilege for non-disclosure on the ground that disclosure of risks will make the patient more panic. That privilege can not be applied to an elective treatment[56] or a non-life threatening treatment like sterilization operation. A sterilization operation carries with it an inherent risk of reversal by natural process, disclosure of which enables a patient to seek alternative contraceptive devices or at least to keep oneself alert of any mischance. Disclosure will not expose patient to any psycological or physical distress. Hence a need for strict insistence of informed consent arises. In *Thake v. Maurice,*[57] the plaintiff underwent an operation of vasectomy. The doctor failed to warn the risk of reversal specifically, but stated it in broad terms.[58] In that case the plaintiff had made it very clear that they did not want a child any more. As a consequence of reversal, Mrs. Thake conceived. It

---

55. A non-elective treatment is one which is essential from a therapeutic point of view, where there is no choice to the patient but to opt for it.
56. Elective treatment is one which a patient is free to choose.
57. [1986] 1 All E.R. 497(C.A .).
58. The doctor said,

> "...I am not a plumber. One is dealing with healing tissues. Despite, all the efforts one makes to separate the ends they have known occasionally to join up. Having said that just as there is a danger in being knocked down when one crosses the road one does not stop crossing the road because of that". *Id.* at p.502.

was too late for her to go for a legal abortion. She brought an action against the doctor for not disclosing the risk. The court held that the failure on the part of a doctor to warn the plaintiff of his re-fertility amounted to a breach of duty to take care which he owed to the plaintiff as the warning would have kept plaintiff's wife alert as to the risk of pregnancy and on such an eventuality it would have enabled her to go for termination at an early stage.

It follows that the duty to disclose is absolute one. In a situation of the above type, the pregnancy detected at an early date would enable one to go for termination. Even if there is failure to take positive step, that will not be a defence to the doctor. Performance of the operation skillfully, does not alter the liability situation.

But the House of Lords has taken a different position in *Gold v. Haringey Health Authority.*[59] Here the plaintiff who was pregnant with her third child after delivery was subjected to a sterilization operation. The operation did not succeed and she gave birth to a fourth child. She was not informed of failure rate which was about six per thousand if performed immediately after the child birth. She brought an action for non-disclosure of risk. The court held that a dichotomy between advice given in a therapeutic and non-therapeutic context could not be maintained. The *Bolam* test was applied without any distinction. The court found it for the defendant on the ground that at that time there was a body of responsible

---

59. [1987] 2 All E.R. 888 (C.A .).

medical opinion, which would not have given any warning as to the failure of female sterilization.

The peculiar position of elective treatment was ignored. Therefore it is submitted that a distinction must be maintained between therapeutic and non-therapeutic treatment. In the disclosure context, *Bolam* test is not the proper principle to be applied in an elective treatment.

Informed consent in bio-medical research :

There is an obligation on the part of a doctor to obtain informed consent before subjecting a patient or any other person for any medical research.[60] Process may be therapeutic or non therapeutic. In *Cobbs v. Grant*,[61] the court observed. [62]

> " The axiom of informed consent for experimentation means that patients must assess benefits and risks in the light of their own values and their judgement should the controlling one in beginning, continuing or ending treatment."

---

60. The European Convention on Human Rights and Bio-medicine 1997, makes informed consent of the subject mandatory before subjecting him to research.
    Art. 5 states that the subject of research shall give his free and informed consent which shall be given expressly specifically and documented. He shall be beforehand furnished with appropriate information as to the purpose and nature of intervention as well as consequences and risks. See also Declaration of Helsinki, 1975. It is a guide to the doctors through out the world and carries with it a warning that they are not immuned from civil or criminal or ethical responsibility under the law of their own countries.
    The requirement of consent is dispensed with in emergency situations where immediate medical intervention for the benefit of the health of the individual is carried out. See Art. 8 of the European Convention on Human Rights and Bio-medicine, 1997. For a general discussion, see also Erwin Deutch, *"Medical Experimentation: International Rules And Practice"*, 19 V.U.W.L.R. 1 (1989).
61. See *supra* n.28.
62. *Ibid.* The above passage is quoted in Kathleen J. Woody, "Legal And Ethical Concepts Involved In Informed Consent To Human Research", 18 C. W.L.R. 50 at p. 62 (1981).

The above observation is indicative of the fact that experimental medicine warrants informed consent of a higher degree.[63] There is an obvious reason for it that the intention of the doctor is not merely confined to the care of a patient, but further extends to acquisition of knowledge. In effect a patient might be exposed to more than a minimal risk consequent of the constraints with which the research is shrouded. The experimental medicine might expose a patient to unknown risks. If a patient is informed that the medicine is of experimental nature, he certainly gives a more serious thought before subjecting himself to it.

An innovative therapy must be distinguished from experimental medicine. It means a modified form of existing surgical procedure. Alternatively it may mean a new operation not undertaken as a part of formal research project. So requirement of informed consent does not become demanding than applied to any other therapeutic context. In *Zimmer v. Ringrose,*[64] the plaintiff underwent an ineffective silver nitrate sterilization operation which was not generally accepted by medical community. The fact of it's ineffectiveness was not disclosed to her. She subsequently became pregnant. The court held that physician was negligent. As a reasonable practitioner he would have made such a disclosure since such information would influence the patient's decision. However she could not recover damages, because she wanted not to be hospitalized and that other methods involved hospitalization. The court observed that a reasonable person in

63. For a discussion, see Alexander Morgan Capron, "Informed Consent In Catastrophic Disease Research And Treatment", U.P.L.R. 340 (1974).
64. [1981] 124 D.L.R. 215.

her position inspite of full disclosure would not have forgone the silver nitrate technique. So the court refused to apply a strict doctrine of informed consent.

A non-therapeutic research warrants a strict application of the doctrine without any legally permissible exceptions.[65] In *Haluska v. University of Saskatchewan,*[66] the court laid down the following principle,[67]

> "The subject of medical experimentation is entitled to a full and frank disclosure of all facts, probabilities and opinions which a reasonable man might be expected to consider before giving consent. The exemption based on therapeutic privilege is of no application in the context of research. The subject is simply a part of scientific investigation designed to enhance human knowledge."

Requirement of informed consent : A critical appraisal:

The above discussion shows that there shall be consent to medical intervention, which must be an informed one. Informed consent needs disclosure of risks, but for which the consent will not be real and free one and relegates it to a mere formality.

The legal requirement is confined only to disclosure of material risks inherent in a treatment and the availability of alternative therapies with their relative merits. This enables a patient to make a rational choice either to go ahead with therapy are opt out from it. The judicial opinion on the standard of

---

65. See *supra* n. 60, Art. 17(2). It should also be ensured that the research entails minimal risk and burden to the individual concerned and research has the potentiality of contributing significant benefit to the mankind.
66. [1965] 53 D.L.R 436. The defendants were held liable for trespass as there was no effective consent for a non-therapeutic research.
67. *Ibid.*

disclosure is divided. Some prefer professional standard test and other prudent patient test.

Professional judgement test is a legacy of *Bolam* principle which confers discretion to the profession to disclose the risks. The criteria is what risks a reasonable doctor would or would not disclose according to a responsible body of medical opinion. The majority opinion may favour disclosure . Yet a doctor may escape from liability, even if a negligible minority is against the disclosure. Moreover a doctor can raise the plea of error of clinical judgement to justify non-disclosure. In effect professional judgement test has a nullifying effect on the doctrine of informed consent, for which the paternalistic attitude of English courts bear evidence. English courts are reluctant to lay down a concrete doctrine.

Professional judgement criteria will be meaningful only when the profession discusses the issues involved and categorically lay down what risks ought to be disclosed. Unfortunately the profession has not done so.[68] There may not be any acceptable professional custom with regard to the standard of disclosure. The absence of such a custom may be used as a cloak for non-disclosure. If profession is given exclusive freedom to set the standard, it may evolve practices sanctioning non disclosure purely for self serving reasons and not for the benefit of the patients.[69] Alternatively profession may decline to evolve

---

68. Ian Kennedy. "The Patient On The Clapham omnibus", 47 M.L.R. 454 at p. 457 (1984).
69. *F.v.R.*, [1983] 33 S.A.S.R. 189 at p.194.

practices pertaining to disclosure for the apprehension that patients may refuse treatment.[70] It might venture to justify it's silence on the ground that whatever the doctors do is for the benefit of the patient. Acceptance of the above justification results in a blank cheque to doctors.

The professional judgement criteria is oblivious of the fact that materiality of risk quite often represents a non-medical judgement. A patient has to take into account various factors like emotional, social and economic to arrive at a decision to submit himself for the medical treatment. These factors play a dominant role, especially in more serious treatments like surgery. Accordingly court has an obligation to check the professional practices to ensure that they conform to the standard set by law to protect the interest of a patient. It has led to the premise of prudent patient test.

It is the discretion of a doctor to decide what treatment ought to be given. The decision to undergo the treatment, essentially, is patient's. He must be given a freehand to decide after appraising the material risk involved in it. Recovery of health is the primary aim of any medical treatment. The concern of doctor is to see that a patient recovers from illness. But the decision to undergo treatment on the part of patient is additionally influenced by non-health factors as discussed above. It is this factor which strongly suggests the rejection of reasonable doctor criteria and acceptance of prudent patient test.

---

70. Andrew Grubb, "The Emergence And Rise Of Medical Law And Ethics", 50 M.L.R 241 at p. 253 (1987).

The prudent patient test has invoked many objections. It is said that the test dilutes the existing doctor-patient relationship as a variety of factors enter into medical decision-making and patient as a layman cannot understand the intricacies of medicine.[71] But the disclosure of risks strengthens the relation to arrive at a rational decision. A patient wants to know the risks because he does not want to expose his body to the risks, unless it is inevitable. It is immaterial that he can not comprehend the information. As patient's comprehension and the doctor's duty of disclosure are two different issues, they can not be blended. Lack of comprehension on the part of a patient does not fall within the legally permissible exceptions of withholding the information. There is a legal presumption that patient understands the information. Another objection is that it is unrealistic to confine the medical evidence to some primary medical factors and discard it with respect to the practice of disclosure.[72] But medical evidence becomes irrelevant to appraise the non-medical factors involved in the medical decision making which warrants non-medical evidence. Extension of medical evidence to non-medical matters blurs the distinction between medical and non-medical matters in a grotesque manner. It needs to be maintained by virtue of their basic differences. It is criticized that the test makes the judges to enter into the shoes of a reasonable person in the position of patient to ascertain whether he would have attached

---

71. *Sidaway v. Board of Governers of Bethlem Royal Hospital and the Maudsley Hospital, supra* n. 14 at p. 662.
72. *Ibid.*

significance to the risk and outcome of the litigation.[73] It is submitted that the connection is absurd as the outcome of limitation is nothing to do with the duty of disclosure. As the decision to submit oneself for medical treatment involves non-medical consideration judges are the right persons to ascertain the materiality of risks rather than the doctors.

The prudent patient test though introduces objectivity into the standard of disclosure, puts the issue into oblivion from the point of view of concerned patient. Therefore it is submitted that a hybrid test blending particular and prudent patient criteria discussed above may be applied to accommodate patient's bodily autonomy and objective justice.

The burden of proving causation prong of the doctrine is a stumbling block on the way of a patient to recover. It is submitted that the synthesis of particular and prudent patient may relax the legal rigidity and allow recovery if injury causation is proved.

A doctor is not under any obligation to disclose every minute detail of the treatment including the unexpected after effects or unexplained events during surgery. Thus the burden of doctors is reduced to a very great extent. In addition to that the obligation of disclosure is dispensed with when therapeutic privilege is exercised by the doctors. But the doctors must apply the therapeutic privilege genuinely in the best interest of the patient. Such privilege confers doctors the

---

73. *Ibid.*

required discretion to meet the exigencies. A patient may waive the right to be informed. Waiver re-inforces faith on a doctor. Though these exceptions curtail the scope of the doctrine, strikes a balance between medical paternalism and patient's bodily autonomy.

The judicial decisions in England reflect a very generous support for medical paternalism which is more than warranted. Medical paternalism must be encouraged to protect both the interest of doctor and patient but not to expose a patient to hardship. The observation of Lord Denning in *Hatcher v. Black,*[74] is a classic evidence to this effect. He said, [75]

> "... he(doctor) told a lie ; but he did it because in the circumstances it was justifiable."

It follows from the above that even a decision to tender false information is a matter of reasonable medical judgement. It is submitted that false information strikes at the root of reasonableness.

In the U.S.A. where the doctrine was invented first, divergent opinions could be seen. A doctrine with precision has not been laid down. There are some jurisdictions in which full disclosure rule applies. In some other jurisdictions

---

74. (1954), *Times,* 29,30, June, 1, 2, July, as quoted in J.P. Eddy, "*Professional Negligence*", London, p. 109 (1955). The plaintiff in this case was a professional singer. As a result of an operation she suffered paralysis of vocal chord. The surgeon told that there was no inherent risk in the procedure. The plaintiff brought an action against the surgeon in negligence for telling that there was no possible damage to the voice. The court recorded a verdict in favour of the doctor on the ground that in doing so he did not fall below the standard of a reasonable doctor.
75. *Ibid.*

professional standard test is accepted. Some jurisdictions have accepted a hybrid test through a combination of prudent patient and professional standard criteria. There are statutes nullifying the doctrine. It has led to unwarranted medical negligence litigation.[76] It is submitted that the doctrine of informed consent must be encouraged as far as it is essential for a patient to arrive at a rational decision, not for undue harassment of a doctor.

How the requirements of an informed consent is complied with by doctors needs to be examined. It is found that informed consent in action is reduced to a signature securing to a consent letter entrusted to a junior doctor.[77] It is common knowledge that more often, the manner in which such informed consent is taken, is cursory, apathetic, half-hearted and unfair to the patient.[78] A substantial number of U.S. doctors polled by a presidential commission interpret the doctrine to mean that it is nothing more than informing the patients about their condition and treatment.[79] They have ignored the true spirit of the doctrine. It is indicative of the fact that there exists an informed consent gap, i.e., a gap between law laid

---

76. See *Truman v. Thomas*, 611 P.2d 902, Cal.1980, as quoted in Mason and McCall Smith, "*Law And Medical Ethics*", London, p. 125 (1983). In this case a reluctant patient was allowed to sue a doctor successfully for failing to convince the importance of screening test for cancer.
77. Dr. Amar Jesani and Dr.Anil Pilaokar, "Need For Asserting Patient's Rights; Legal And More", *The Consumer Voice, Keemath*, March,24 p.12 (1995).
78. Notes, "Medical Ethics - General Principles: Informed Consent", *Medical Ethics*, April-June p.27 (1995).
79. Morton Hunt, "Patient's rights. The right to choose their treatment", *Span*, p.4 (Feb.1990).

down by the courts and practiced by the physicians.[80] Such a gap is an indicator of deficiency in service. More the gap, higher will be the deficiency in service. Therefore it is submitted that there is a need to bridge the gap between the law in action and the law in courts.

Professional negligence of doctor has already assumed a menacing proportion in India as well. It may not be possible to transplant the doctrine developed in western countries to the Indian law. But total negation of the doctrine will tilt the balance in favour of the doctors. In the light of benefits it can offer to the patients, it must be allowed to a possible extent in India too. It must be applied judiciously to safeguard the interests of both patient and doctor. Law must have the final say and not the profession to strike an equilibrium.

The concept of consent and informed consent are material in deciding the liability of doctors based on contract. The contract whether express or implied is based on free consent, which underlies the need for real and informed consent of the patient.

---

80. See for a discussion on informed consent gap, Peter M. Shuck, "Rethinking, Informed Consent", 103 Yale L.J. 903 (1994).

CHAPTER VI

CHAPTER VI

Liability of Doctors under Contract Law

Deficiency in medical services is generally decided by courts based on tort of negligence. But the relationship between the doctor and patient emerges as a result of contract, express or implied. When the doctor undertakes to treat a patient he is impliedly entering into a contractual relation with the patient. The proposal for the contract comes when the patient submit himself before the doctor for treatment.[1] When the doctor undertakes treatment it is acceptance of the proposal.[2] At the commencement of the treatment the doctor may undertake certain express obligations which may not be presumed by court in a case under tort law.[3] The controversial questions like the obligation of a doctor to undertake treatment and the circumstances under which a contract can be inferred by a court are matters touching upon contract law. The scope of exclusion and limitation of liability by contract and the possibility of avoidance of liability under privity doctrine are problems requiring a detailed study.

Duty to enter into a contract :

It is doubtful whether a doctor is bound to enter into a contractual relation

---

1. See I. Kennedy & A. Grubb, "*Medical Law*", London, second edition, p.129 (1994).
2. *Ibid.*
3. For a discussion, see *supra* chapter 2.

with the patient. The generally accepted view is that a patient cannot compel a doctor to treat him. Under United State's law even an emergency is also not an exception to the discretion of a doctor in private practice to enter into a contract. In *Hurley v. Eddingfield*,[4] the patient was under the treatment of a defendant doctor earlier. Later the relation was terminated. In an emergent situation, he sent a messenger to the defendant with fee, with an information that no other physician was available. The patient died as the doctor refused to attend him. Probably the patient could have been saved, had the treatment been administered. The court held that the doctor had a right to refuse to treat the patient, as the contractual relation was one which depended on the assent of both the parties and a licence to practice medicine would not compel a physician to enter into a contract against his will.

In England also there is no compulsion on private doctors to treat every patient. Emergency also does not impose an obligation on a doctor to enter into a contract with the patient.[5] But the hospitals established under National Health Service Act and the general practitioners employed there in can not refuse to treat the patient in emergency cases.[6] Treatment under National Health Service Act, is statutory obligation.[7]

---

4. 59 N.E.1058, Ind.1901, as quoted in Angela Roddey Holder, "*Medical Malpractice Law*", Newyork, second edition, p.7.
5. See *supra* n. 1 at p.79.
6. *Ibid.*
7. *Pfizer Corporation v. Ministry of Health*, [1965] 1 All E.R. 450 (H.L.).

Very often doctors refuse to treat the patients for the fear of getting entangled in medical mal-practice litigation. It has far reaching consequences. Especially fatal accidents can place a patient in a dangerous position. In an attempt to induce the doctors to attend the accident victims, some jurisdictions in the United States enacted laws which prevent recovery of damages for negligence in the course of medical treatment at the scene of the accident.[8] The existing legal position does not impose any higher duty of care than that of an average practitioner under similar circumstances, unless parties mutually agree. Medical ethics also enjoins a duty on a doctor to treat a patient placed in an emergency situation to the best of his ability.[9] But ethics cannot be enforced in a court of law.

Indian courts also do not impose an obligation on private doctors to treat each and every patient approaching them. However the apex court had tried to remind the doctors of their duties under the code of medical ethics. In *Paramanand Katara v. Union of India*[10] the apex court considered this issue, but laid down only the following proposition.[11]

---

8. See Angela Roddey Holder, *op.cit.* at p. 8.
9. See s.5 of *Code Of The American Medical Association.* The position is not different in theory in India also. See *Code of Medical Ethics,* framed under the Indian Medical Councils Act, 1956.
10. A.I.R. 1989 S.C. 2039.
11. *Id.* at p. 2043.

> "...every doctor... has the professional obligation to extend his services with due expertise for protecting life. No law of state action can intervene to avoid delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of his obligation cannot be sustained and therefore must give way..."

The above observation is a mere re-iteration of medical ethics pertaining to professional obligation in an emergency situation. The efficacy of the decision as laying down a binding principle compelling the private doctors to treat emergency victims is doubtful. But the decision is laudable for the reason that it has relaxed the procedural shackles in medico legal cases, which may have a motivating effect on some doctors to treat the patients in accident case. Yet it is a grey area in the whole spectrum of law governing patient-doctor relation.

Th above decision does not impose any duty to treat every patient approaching a private doctor. However in the case of doctors employed in government hospitals a duty to treat every patient may be inferred. The right to health guaranteed under the constitution of India was interpreted by Supreme Court, as to mean the right to get reasonable facilities for medical treatment.[12] Moreover when a doctor enters a government service, he undertakes to treat the patients coming to the government hospitals for whose benefit they are employed. Hence the refusal to treat can be treated as a breach of contract between the doctor and government.

---

12. *Paschim Banga Khet Mazdoor Samity v. State of West Bengal,* A.I.R. 1996 S.C. 2426.

Apart from this any person undertaking a public avocation like common carriers and inkeepers are under a common law obligation to enter into a contract with any person desiring to do so.[13] Similarly an advocate can not refuse a brief unless there are circumstances which justify it. In *Gokul Prasad v. Emperor*,[14] the High Court of Allahabad in this regard made the following observation.[15]

> " It is very important that men at the Bar should understand that they are members of a public profession. That is by their very profession they engage and undertake to act for anybody who fulfills certain conditions.Therefore if a client comes to them with proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind, which they are accustomed to do and if they refuse ... should be punished as such."

Refusal to enter into a contract may be justified only on limited grounds.[16] In *Muraleedharan Nair v. N.J. Antony*,[17] the High Court of Kerala made the following observation regarding the right of an advocate to reject a brief.[18]

---

13. At common law, a common carrier is under an obligation to carry the goods offered to him for a reasonable reward provided he has room. See "*Halsbury's Statutes Of England & Wales*", London, vol.5 – 4th edition, p.771 (1993). See also Raoul Colinvaux (ed.), "*Carver's Carriage By Sea*", London, vol.1 – 13th edition, p.4. (1982).
14. A.I.R. 1930 All. 262.
15. *Id.* at p.263.
16. A common carrier can refuse the goods, if they are not of the class he carries or they are dangerous or of exceptional size or expose the carrier to undue risk or of value disproportionate to their safety measures or they are tendered at an unreasonable time or inadequately packed. See John Morris (ed.), "*Chitty On Contracts*", London, vol. 2. – 13th edition, p. 436 (1961). For a discussion on innkeepers' refusal to enter into a contract, see David Field, "*Hotel And Catering Law*", London, third edition, p. 194 (1978); See also *R. v. Higgins*, [1948] 1 K.B. 165; *R. v. Rymer*, (1877) 2 Q.B. 136; *Browne v. Brandt*, [1902] 1 K.B. 696; *Constantine v. Imperial London Hotels*, [1944] 2 All E.R. 171 (K.B.).
17. 1985 K.L.T. 1.
18. *Id.* at p. 6.

"... It may be possible for him to reject a brief in the following case

(i) when he is physically disabled from appearing for the client.

(ii) when he may not be available to present the case in court.
Where his training in a special branch limits his usefulness in other branches.

(iii) Where the client is not prepared and able to pay him his reasonable fees.

(iv) Where he confines his practice in some courts and in some places only.

(v) Where he is likely to be called as a witness in the same case.

(vi) When he has been consulted by the other side."

Doctors are also undertaking a public occupation. Therefore it is possible to infer a similar duty on doctors also as in the case of common carriers and innkeepers.

Abandonment of the patient :

Courts while reluctant to impose a duty to treat patients consider the abandonment of patients after commencement of doctor-patient relationship seriously. If a doctor terminates the contractual relation without any justification, it culminates in a breach of obligation. In *Gillette v. Tucker*,[19] a surgeon removed a woman's appendix and continued to treat her for several months. But there was no sign of incision healing. The woman remarked that something went wrong with the operation. Irated by this remark, the surgeon forcibly sent her from his office. She went to another surgeon, who operated her. The operation revealed that a guaze sponge was left in her incision. She sued the first surgeon. The court held that there was abandonment as he owed an obligation to continue to administer the needs until all the effects of the operation had subsided.

---

19. 65 N.E. 865, Ohio. 1902, as quoted in Angela Roddey Holder, *op.cit.* at p. 375.

There was no justification for the termination of relation in the above case. A doctor ought to know that a patient reposes confidence in him to regain normalcy of health and expects that the former would make all the possible attempts to cure him. Treatment is a continuous process till recovery. The implied obligation of a doctor extends to post-operative care till the effects of the operation subsides.

In India in *B.S.Hegde v. Sudhansu Bhattacharya*,[20] the Maharastra State Commission took similar view. It took view that abandoning a patient after surgery without providing post-operative care was a deficiency in service. But the National Commission reversed the decision.[21]

Therefore it follows that failure to render post-operative care to the patient does not amount to abandonment under Indian law.

A doctor need not be near his patient all the times. But he has a duty to remain in a place to which the patient has an access.[22] But a critical condition of a patient may demand continuous presence of a doctor. In *Young v. Jordon*,[23] a doctor was rendering pre-natal care to a woman. He gave the woman labour inducing medicine at about 8 p.m. and told her husband that the delivery might take place by midnight. By 11 p.m. she had intense labour pain. The doctor was

---

20. (1992) 2 C.P.J. 449 (Maharastra S.C.D.R.C.).
21. *B.S. Hegde v. Dr. Sudhanusu Bhattacharya,* (1993) 3 C.P.J. 388 (N.C.).
22. Angela Roddey Holder, *op.cit.* at p. 374.
23. 145 S.E. 41, WVa.1928, *id.* at p. 375.

called at his office. But there was no response. Shortly after 1 p.m. another doctor helped the delivery. The child died a few minutes after delivery. The first doctor had gone to attend another delivery case. When he came to her house of the woman it was 3 p.m. Finding another doctor, he did not step into the house. The court found him liable for abandonment on the ground that once the woman was medicated to induce labour, it was his duty to remain where he could be reached or when needed to provide a competent substitute and the fact that he was called to attend another patient was immaterial.

Examined from the view of the peculiar circumstances of the case, the decision lays down a correct proposition of law. A delivery case is a very delicate matter. After administering labour inducing medication no reasonable doctor would leave the patient. At any time a complication may develop. So the failure to render timely medical assistance can not be justified.

The National Commission in India also took similar view in *Dr. Sr. Louie v. Kannolil Puthuma.*[24] In that case after administering labour inducing medication the doctor was away from the patient. When complications developed there was no doctor to do the needful. Eventually both the mother and child died. It was held that there was abandonment of the patient.

---

24. (1993) 1 C.P.J. (N.C.), See also *Muralidhar Eknath Masane v. Sushrusha Co-operative Hospital Ltd.*, (1995) 1 C.P.R. 606 (Maharastra S.C.D.R.C.).

Sometimes the treatment requires the presence of many doctors with different specialization. The absence of any one of them will prove fatal to the patient. If the absence of doctor results in patient's injury, a cause of action arises for abandonment. In *Pederson v. Dumouchel,*[25] a child met with an automobile accident resulting in severe injuries and badly fractured jaw. A dentist was called to perform an oral surgery. As per the hospital regulation a surgeon was required to be present at all the times when a dentist performed an operation. But the surgeon went home A nurse who was narcotic addict, a alcoholic and having history of incredible professional responsibility administered anaesthesia. Cardiac arrest occurred. The dentist had neither experience of handling cardiac arrest nor had knowledge of general anaesthesia. The child was severely injured. The court held the surgeon liable for abandonment.

Similar position is taken under Indian law also. In *Nivruthi G. More v. Dr. Vinayak Deshmukh,*[26] a patient was diagnosed has having typhoid fever. The doctor left the place committing the boy into the care of a compounder. The later prescribed and administered an injection to the patient which ought to be done under supervision of a qualified doctor. As the compounder injected a lethal dose, the patient died. The Maharastra State Commission held the doctor negligent for

---

25. 431 P.2d 976, Wash.1967, as quoted in Angela Roddey Holder, *op.cit.* at p. 375.
26. (1994) 2 C.T.J. 614 (Gujarath S.C.D.R.C.).

leaving to far-off place ignoring the serious condition of the patient without making proper alternative arrangement.

Similarly a doctor commits a breach of obligation if he fails to do what he has agreed to do specifically and attracts liability for abandonment. In *Stohlman v. Davis,*[27] a patient underwent a veriacose vein operation performed by the defendant. Because of subsequent complications, gangrene set in and he was hospitalized. The second defendant came to see patient and suggested amputation of the foot. He told that he would perform the operation for which the patient consented. But he never turned up nor had any communication with the patient. The patient removed himself to another hospital where the operation was performed. The court held the second defendant liable for abandoning the patient.

The above discussion is indicative of the fact that a doctor shall do himself, what he has agreed to do. It implies an undertaking on the part of a doctor to bestow his personal attention to patient. It is sufficient to create a cause of action in favour of patient, if such duty is delegated to another doctor or para-medical staff. It attracts liability though the patient has not sustained any injury.[28] If the sub-contracting doctor commits any fault, the contracting doctor will be held

---

27. 220 N.W. 247, Neb. 1928, as quoted in Angela Roddey Holder, *op.cit.* at p.374.
28. Rodney Nelson - Jones and Frank Burton, "*Medical Negligence Case Law*", London, second edition, p. 29 (1995).

liable.[29] If a doctor does personally what he has undertaken to perform, the fact that patient is attended by some other doctors of the hospital in the course of their duties will not attract liability.[30] In a hospital set up where the consent forms do not specify the name of any doctor, the question of assurance that the operation will be performed by a particular doctor does not arise at all.

Contracts inferred by courts :

In many cases reported from the United States, not withstanding the absence of actual contract courts inferred a contractual relation. Such inference of an implied contract is of much importance in ascertaining the doctor's obligation to commence and continue treatment. If a doctor fails to discharge these obligations, he will be held liable for abandoning the patient. A telephone call to the doctor is sufficient to create such relationship to impose liability for non-feasance. In *Giallinza v. Sands,*[31] a physician was at home recovering from serious illness. He received telephone call from his friend that a director of a drug treatment centre reported that a critically ill-patient needed to be hospitalized soon which required authorization from a doctor. The doctor giving authorization to the

29. *Ibid.* A sub-contracting doctor performing any procedure or treating the patient without consent of the patient does it unlawfully.
30. In *Morris v. Winsbury White,* [1937] 4 All E.R. 494(K.B.), a surgeon contracted with the plaintiff to give his personal care. He personally performed the operation and attended the patient on number of visits. Other doctors of the hospital also attended him in course of their duties. The court found it for the surgeon on the ground that in the above circumstances, there was nothing to suggest a breach of contract.
31. 316 So.2d 77, Fla. 1975, as quoted in Angela Roddey Holder, *op.cit.* at p. 4.

hospital for admission made it clear that he could not treat her. Within a few days of admission she died of an undiagnosed brain abcess. She never saw her doctor before death. Her father sued the doctor. The court held the doctor liable on the ground that there existed a doctor-patient relation.

It can not be denied that with the establishment of doctor-patient relationship, the obligation of a doctor begins. But the court must be very cautious in inferring such a relationship. Otherwise it would expose a doctor to hardship. In the above case, there was no justification for inferring such a relation. Even if it were to be so, it was confined to give an authorization for hospitalization. Further he being seriously ill, made it very clear that he could not treat the patient. So the doctor did not intend to create a contractual relation with the patient. Moreover treatment by a seriously ill doctor may result in deficiency in service for which he may be held liable.

It is felt that Indian consumer courts have taken a realistic position. In *Digvijaya Singh A. Zala v. Dr. Narendra T. Vani*,[32] a pregnant woman had a consultation with the doctor. She developed fever. Her condition deteriorated. The doctor was contacted over phone. He advised the woman to be taken to a physician as it was not a case falling within his speciality. Accordingly she was committed to the care of another doctor. She died even before anything could be done to her.

---

32. (1995) 1 C.P.J. 186 (Gujarath S.C.D.R.C.).

The husband of the woman brought an action against the doctor for the deficiency in service on the ground that the latter adopted a casual approach to a serious problem. The Gujarath State Commission refused to infer a contract between the doctor and woman. So the Commission refused to give any remedy.

In the United States even the absence of consultation or even communication a contract is inferred. In *Variety Children's Hospital v. Osle,*[33] a woman had cysts on both the breasts. A surgeon removed them. They were sent to a pathalogist in one container. He dissected both without making enquires as to which specimen came from which breast. Only one was malignant. After dissection he could not ascertain the malignant one. Both breasts had to be removed. The court inferred a contractual relationship between the patient and pathologists also.

Similarly a radiologist may be negligent in reading the X-ray films of a patient. In *Capuono v. Jacobs,*[34] a patient had a complaint of backache and a cut on her neck. When the X-ray films were taken, a shadow in the film suggested the existence of kidney stone. The radiologist did not report it, as it was outside the scope of the information sought. Later after several months she went for the removal of stone. But the entire kidney had to be removed. She sued the hospital

---

33. 292 So.2d 382, Fla. 1974, as quoted in Angela Roddey Holder, *op.cit.* at p.6.
34. 305 N.Y.S. 2d 837, N.Y. 1969, quoted *ibid.*

where the radiologist was employed on the ground that earlier diagnosis of her problem would have prevented the eventuality. The court held the radiologist liable for breach of implied contractual obligation.

The above decisions giving liberal interpretations to the contractual duty of medical men gave better protection to patients. There appears to be no impediment if a radiologist or pathologist is obliged to disclose whatever comes to his knowledge by virtue of his professional work. It is compatible with the implied obligation of a doctor to exercise reasonable care and skill. In the above case had the radiologist informed the existence of stone, an earlier treatment could have averted the removal of kidney.

In medical colleges it is common practice that a few patients are selected to participate in lectures to the students. The concerned professors may examine any patient and make suggestions regarding the treatment. Such suggestions may also attract contractual obligations. In *Smart v. Kansas City,*[35] a professor in a medical school examined a few patients. A few of them were selected as object of lecture to be delivered to the students. In the course of such examination he saw the plaintiff's knee and suggested amputation of the leg. It was effected later. The professor never actually treated her. He never saw her after the momentary interlude. She sued the hospital and named the professor who suggested the amputation. The court inferred doctor-patient relationship in such situation also.

---

35. 105 S.W. 709, Mo.1907, quoted *id.* at p. 4.

It is evident from the above cases that under U.S. law a doctor need not actually treat the patient in order to create a doctor-patient relation. An examination of the patient with the knowledge and consent would be sufficient, provided the patient harbours a belief that the examination is meant for administration of treatment by the very same examining doctor. The purpose underlying the examination is immaterial. A patient has a right to assume that the physicians employed by the hospital are rightfully there, having right to examine and treat him. In the absence of any contrary evidence, the doctor can not be allowed to deny that they are not connected with the institution and have no authority either to examine or treat the patients.

Liability for breach of express obligations :

A contract that establishes a professional relationship between a doctor and patient may be express one.[36] It can be a specific agreement containing express terms relating to the administration of treatment which is comprehensive enough to comprise all steps taken to cure a patient of an injury or disease such as advice, examination, diagnosis and application of remedies.[37] In such cases the terms of the contract are exclusively left to the choice of doctor and patient within the recognised legal frame work.[38] Breach of obligations undertaken under such

36. See *Thake v. Maurice*, [1984] 2 All E.R. 513 (Q.B.).
37. *Ibid.*
38. But they are not liberty to do acts regarded as contrary to public policy or waive those obligations imposed by law. See I. Kennedy and A. Grubb, *op.cit.* at p.129.

terms, by the doctor gives rise to liability. Accordingly if a doctor promises a result, any failure to achieve it results in breach. In *Guilment v. Campbell,*[39] a patient was suffering from ulcer. On failure of conservative treatment he was subjected to surgery. The surgeon told him that the operation was simple one and all of his troubles would be taken care of. The patient was also told that he could resume working in 2-4 weeks. In the course of operation his esophagus was ruptured and three more surgical procedures were performed to set it right. He also contracted serum hepatitis from blood transfusion. He brought an action against the surgeon for breach of contract. The court held the surgeon liable.

Likewise a doctor may render a guarantee that the patient's condition will not deteriorate. If the patient's condition worsens an instance of breach of obligation arises. In *Noel v. Proud,*[40] a patient was suffering from partial loss of hearing in both the ears. The surgeon told him that he was the fit candidate for an operation called "staple mobilization". The surgeon had agreed to perform the operation on both the ears. The surgeon warranted that even if the operation might not have beneficial effects, it would not worsen his condition. As a result of the operation, he completely lost the hearing in his right ear. The court held that there was a breach of warranty.

---

39. 188 N.W. 2d 601, Mich. 1971, as quoted in Angela Roddey Holder, *op.cit.* at p. 3.
40. Kan. 367 P.2d 61, 1962, as quoted in James R. Richardson, *"Doctors, Lawyers And The Courts"*, Cincinnati, p. 13 (1965).

In *Doerr v. Villate,*[41] the plaintiff already having two children wished to avoid the third. A surgeon performed vasectomy on him and assured that he was sterile. But the third child was born with mental retardedness and physical handicaps. The court held the surgeon liable.

In normal circumstances law does not compel a doctor to achieve any positive result.[42] The above decision makes it obvious that nothing prevents a doctor from contracting to produce a particular result.

In *Thake v.Maurice,*[43] the Court of Queens Bench in England explained the position. The court said,[44]

> "...they would not deliberately guarantee any result which depends on human tissue; but, there is no reason in law why a surgeon should not contract to produce such a result..."

But the decision was reversed by the Court of Appeal. It held that there was no breach of contract on the ground that no reasonable person would have understood the physician giving a binding promise that the sterilization operation would achieve it's purpose, even though sterility was the anticipated result of

---

41. 220 N.E. 2d 767, Ill. 1966, as quoted in Angela Roddey Holder, *op.cit.* at pp.2-3.
42. *Tefft.v.Wilcox,* 6 Kan. 46 (1870), James R. Richardson, *op.cit.* at p. 12. In this case the court observed that a practicing physician was not considered as warranting a cure unless there was a special contract for the same.
43. See *supra* n. 36.
44. *Id.* at pp. 519-520.

operation. But the Court of Appeal did not rule out the possibility of a binding agreement between doctor and patient.[45]

It follows from the above discussion that a doctor and patient are at liberty to contract for a particular result. If the contemplated result is not attained, a cause of action arises in favour of the latter.[46] This cause of action is entirely distinct from negligence, even though both might arise from the same transaction. Under both the heads damages are recoverable.[47] The former is the result of a breach of promise while latter is the result of the failure of a doctor to exercise reasonable care and skill.[48]

Breach of implied contractual obligations :

When the doctor-patient relationship is established law presumes certain implied obligations on the doctor. He is under an obligation to treat the patient with a reasonable degree of care and skill.[49] Accordingly improper treatment, use

---

45. *Thake v. Maurice*, [1986] 1 All E.R. 497 (C.A.).
46. In *La Fleur v.Cornelis*, (1979) 28 N.B.R.(2d.) 569 New Brunswick, as quoted in I.Kennedy and A.Grubb, *"Medical Law"*, London, second edition, p. 72 (1994) a plastic surgeon entered into a contract to perform an elective operation on the plaintiff's nose. He made a representation that the plaintiff would be very happy with the outcome of operation. As a result of the operation the plaintiff was left with a scarred and misshapen nose. The court held that there was a warranty guaranteeing the operation successful.
47. *Colvin v. Smith*, 276 App. Div. 9, 92 N.Y.S.(2d) 794 (1949), as quoted in James R. Richardson, *op.cit.* at p. 12.
48. *Ibid.*
49. S.D.S. Grewal (ed.), *"Lyon's Medical Jurisprudence For India"*, Calcutta, tenth edition, p. 73(1953).

of undesirable therapeutic agents and some other related acts may impose liability for breach of contract.[50]

If a patient terminates the relationship at any time, the doctor has an obligation to draw the attention of the patient towards further medical care if required. He should divulge sufficient information of the treatment already administered to facilitate continuation of treatment without delay with any other doctor.[51]

If a doctor discharges the implied obligation he can not be held liable even though the results expected by the patient are not realized. In *Eyre v. Measday,*[52] the plaintiff and her husband decided to have no children. The defendant physician performed the laproscopic procedure on her. He failed to inform a small risk (1%) of occurrence of pregnancy after operation. The plaintiff believed that the impact of operation was to render her permanently sterile. But she became pregnant. In an action for breach of contract, the court held that his representation with regard to the irreversible nature of operation did not amount to an express warranty as to the achievement of desired result and the operation was performed with reasonable care and skill. The court further observed that the implied warranty in the context would mean nothing more than performance of operation with reasonable care and skill.

---

50. For a discussion on the implied obligations, see *supra* chapter 2.
51. See Angela Roddey Holder, *op.cit.* at p. 372.
52. [1986] 1 All E.R. 488 (C.A.).

Nature of contractual liability :

The breach of contractual obligations impose strict liability without necessity of proof of any damages. A doctor is not permitted to raise the plea of reasonable care and skill under all circumstances.[53] In *Samuels v. Davis,*[54] a dentist provided dentures. But the dentures could not be worn and were not fit for their purpose. The dentist claimed his fees. His claim failed on account of breach of contract. The court held that even though he was relieved of negligence, exercise of reasonable care and skill in choosing or supplying the article was immaterial in deciding a claim for fee.

Avoidance of liability for breach of contract :

A doctor can avoid liability based on several factors like absence of contractual relation, limitation on sphere of contract, contributory negligence and privity of contract.

(i) Absence of contractual relation :

The question of breach of contractual obligations arises only if there exists a contractual relation. A doctor can negate the existence of such relation and get exonerated from liability. In *Oliver v. Brock,*[55] a girl met with an automobile accident resulting in severe injuries. Her family physician treated her In the course of conversation with a specialist without disclosing the name of the girl, the family

53. Such plea may be invoked in an action for abandonment resulting from breach of implied obligations, but not express obligations.
54. [1943] 1 K.B. 526.
55. 342 So.2d 4, Ala. 1977, as quoted in Angela Roddey Holder, *op.cit.* at p. 5.

doctor narrated her injuries and treatment given to her. The specialist agreed that the treatment was proper one. The court held that there was no doctor and patient relationship between the girl and the specialist as he had never seen her nor consented to consult or treat her.

It follows that if a doctor has not seen a patient but gave suggestion to the treating doctor, it does not result in a contractual relation between him and the patient. In *Reiner v. Grossman,*[56] a woman was diagnosed as having ulcerative colitis. Her surgeon treated for a prolonged period of time. The surgeon attended a conference led by a gastro enterologist with a national reputation for expertise in treating ulceratives colitis. The surgeon placed the woman's case before the conference. The professor suggested surgery which was concurred by most of the surgeons. Subsequent to the operation the woman sued the surgeon and the professor on the ground that the operation could have been avoided, had the professor examined her. She alleged negligence against the professor for making recommendation without collecting information. The action was dismissed on the ground that no contractual relation existed between the professor and the patient as he never met, seen or treated her.[57] According to the court, the purpose of conference was not the treatment of patient, but exchange of information and the professor had no control over the action of other physician which entitled him to

56. 107 Cal. Rptr. 469, Cal. 1973, *id.* at pp. 4-5.
57. But under some circumstances, irrespective of a doctor seeing, treating or meeting a patient contractual relation is inferred.

presume that they would rely on their own decision. These cases should be distinguished from cases discussed earlier.[58] In those cases suggestion was made either to the patient or in his presence.

(ii) Avoidance based on the limitations on the sphere of contract :

A doctor has a right to confine himself to particular area of treatment. A patient cannot demand a treatment which is outside the sphere of a doctor's usual practice. In *Skodge v. Hardey,*[59] an internist treated a patient for bacterial colitis. As treatment did not result in any improvement, he sent the patient to a surgeon. The surgeon diagnosed it as appendicitis. The patient requested the internist to remove the appendix. The same surgeon later removed the appendix. The patient sued the internist. The court held that the internist was not under an obligation to remove appendix, as he had restricted his practice to internal medicine.

It follows that a doctor specialized in particular area of medicine can refuse to prescribe medicine for an ailment outside the area of specialization. For example, if a heart patient comes to a heart specialist with an eye infection also, the latter can refuse to treat the eye infection. Refusal to treat outside one's sphere of practice would not make him liable.

Similarly a doctor at his discretion can limit the place of treatment. If he refuses to treat the patient at home, no action lies against him. In *Vidrine v. Mayes,*[60] a pregnant woman requested an obstetrician to attend her at home. As he

---

58. See *Variety Children's Hospital v. Osle*, *supra* n. 33; *Capuono v. Jacobs*, *supra* n. 34.
59. 288 P.2d 471, Wash. 1955, as quoted in Angela Roddey Holder, *op.cit.* at p. 34.
60. 127 So.2d 809, La. 1961, as quoted in Angela Roddey Holder, *op.cit.* at pp. 34-35.

refused her proposal, she terminated the professional relationship. On developing complications, her husband called the doctor. Once again he refused and told him to bring her to the hospital. She was brought to the hospital after six hours of labour and delivered a dead baby. The court found the action for the doctor on the ground that the danger of home delivery to mother and the child was so serious that the doctor was justified in refusing to do so.

Logically it sounds that if there is an agreement to manage the confinement at home, in the best interest of the mother and child, he can shift the mother at any stage of labour or even in advance to a hospital. A delivery at times pushes a woman to the jaw of death. Complications may develop at any time in the course of labour. There must be proper facilities to handle the complications. It does not require any emphasis to say that hospital is the safest place to handle the situation. Treatment of a patient at home may expose him to hardship. Therefore, if a doctor does so, as no reasonable doctor would do so, he may incur liability for negligence. Generally a doctor confines the treatment to a particular town or within the town to a particular area. A patient can not insist the attendance of a doctor in all places where the former moves. Any agreement containing a term to that effect will be declared as void for impossibility of performance. Therefore a doctor is justified in refusing to fallow wherever the patient goes. For example, a patient may move from one town to another or from state to another state. Practically it is impossible for the doctor to follow the patient. The place of

treatment though agreed upon is always subject to a change in the light of exigencies of the situation.

A doctor has a right to refuse to make house calls if his usual practice does not permit it. In *Rogers v. Lawson,*[61] an obstetrician managed the confinement of a woman who delivered a baby. She was discharged from the hospital. Later having some complication she asked him to make an immediate house call. As his office was full of patients, he asked her to come to his office. She did not go to his office and went to another obstetrician. She sued the first one. The court upheld the right of the physician to refuse to make house calls and held that if she was well enough to visit another obstetrician, she could have visited the defendant also.

It is obvious that if his usual practice allows house calls, he may be liable if he refuses to do. In the absence of such a term it can not be inferred. Similarly it is a doctor's right to prescribe and determine the frequency of appointments.[62] He may leave it to the patient to determine.[63] But under both the circumstances, he can not be held liable if he does not render more appointments than prescribed. This proposition does not hold good in an emergency situation.

A patient cannot dictate a doctor any terms pertaining to the method of treatment. Even if a particular method of treatment is agreed upon, a doctor is free to choose the appropriate method in the best interest of patient. In *Suburban*

---

61. 170 F.2d 157, D.C.C.A., 1948, *id.* at p. 35.
62. See Angela Roddey Holder, *op.cit.* at p.34.
63. *Ibid.*

Hospital Association V. Mewhinney,[64] a laboratory technician at a hospital cut her hand severely on test tube. She told the doctor if the tendon was cut it should be repaired rather sutured. The doctor sutured the wound. Later it was found that the tendon was severed. She could not recover damages as there was medical evidence to prove that he had observed the proper method. But further it was observed that in case of a doctor seeking any other method, the same should be informed to the patient.

In a matter of professional discretion a doctor can make a departure from the agreed term with immunity from liability. This is subject to an exception that sufficient information shall be tendered to the patient regarding the nature of treatment.

(iii) Avoidance of liability based on contributory negligence :

There is an implied obligation on the patient to disclose all information essential for the administration of treatment.[65] The duty of a doctor with respect to treatment begins with the information tendered by a patient. So the latter shall not give any false information. Silence and false information exempt a doctor from liability.

A patient may disregard instructions of a doctor pertaining to treatment. It results in breach of contract by the patient.[66] In that case a doctor can terminate

---

64. 187 A.2d 671, Md.1963, quoted *id.* at p. 1.
65. See *supra* n..49.
66. For example a doctor may instruct not to take intoxicating liquor, which will make the treatment ineffective.

contractual relation and incurs no liability.[67] This principle was recognised in *Dashiell v. Griffith.*[68] In that case the court held that if a patient failed to come to the physician or surgeon for further treatment against instructions and in consequence he suffered injury, he is not entitled to maintain an action against the physician. According to the court injury was the result of patient's own fault and misfeasance.

But a patient is free to disregard the instructions if he has not received skillful and careful treatment.

Similarly a doctor can avoid liability on unjustifiable termination of contractual relation by the patient.[69]

(iv) Avoidance of liability based on privity of contract :

To sue a doctor the patient must prove the existence of contractual relation. Otherwise his action will be disposed for want of privity contract. In *Smith v. Rae,*[70] a doctor entered into a contract with plaintiff's husband to attend the plaintiff's confinement personally. He gave preference to other patients relying on the information that the birth was not imminent. It resulted in the death of the child which was still born. The plaintiff initiated an action under contract. The action failed because the plaintiff was not a party to the contract.

---

67. But he shall discharge his implied obligations. For discussion on these obligations, see *supra* chapter 2.
68. 35 All.1094 Md. 1896, quoted in Angela Roddey Holder, *op.cit.* at p. 372.
69. *Ibid.*
70. [1919] 51 D.L.R.323.

But the law has changed substantially. The Consumer Protection Act 1986, in India, permits complaint by the beneficiary of a contract.[71] In *Mumbai Grahak Panchayath v. Dr. Rashmi B. Fadnavis,*[72] the wife of complainant died due to negligence of doctors in performing an operation. It is the discretion of a patient to put an end to the contract at any time without attracting liability for breach. The Maharastra State Commission held the doctors liable but the anaethetist was not held liable on the ground that there was no privity of contract between him and the deceased. On appeal the National Commission reversed the decision and held that the requirement of privity of contract was irrelevant under the Consumer Protection Act, 1986. The Commission observed,[73]

> "'The words' in pursuance of a contract or otherwise ...
>
> make it amply clear that a privity of contract is not needed for a claim to be made under Consumer Protection Act, so long as there is hiring or availing of services for a consideration."

Similarly in an American case *viz. Sylvia v. Gobeille,*[74] a pregnant woman told the doctor that she had German measles. She was not given the necessary

---

71. See the definition of consumer under s. 2(1)(d) of the Consumer Protection Act, 1986. It states,
    > "... includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person."
72. (1998) 1 C.P.J. 49 (N.C.).
73. *Id.* at p. 51.
74. 220 A.2d 222, R.I. 1966, quoted in Angela Roddey Holder, *op.cit.* at p. 22.

treatment. As a result a baby was born with serious defects. This was attributed to the contracting of disease by the mother. The court directed the doctor to pay damages to the child even though no contract existed between the child and the doctor.

In addition to this in the following situations also the privity doctrine has no application.[75]

(i) The employers requiring medical examination of the employees or providing care for sick and injured employees.

(ii) The court appointing doctors to examine and treat the litigants in various type of cases.

(iii) The police requesting physicians to perform blood test or alcohol test on suspected drunken drivers or to treat an arrested person.

Apart from the above circumstances a doctor can also avoid liability on occurrence of a supervening impossibility.[76] Coercion, undue influence, misrepresentation or fraud on the part of a patient will be a defence to a doctor.[77]

Exclusion and limitation of contractual liability :

Under contract law it is possible to exclude or limit the liability by the

---

75. *Id.* at p. 20.
76. For discussion on supervening impossibility, see Cheshire, Fifoot & Furmston, "*Law Of Contract*", London, twelth edition, pp.569-593(1991).
77. The Indian Contract Act 1872, ss.15, 16, 17 and 18 deal with these situations.

doctor through express agreement.[78] But recent trend adopted by civilized legal systems is to discourage exclusion of liability. In India the Consumer Protection Act, 1986 does not allow exclusion.[79] Logically, it follows that in service contracts liability limiting clauses may be allowed.[80] But English law does not permit either to exclude or limit the liability in medical negligence cases.[81] In effect the interests of patients are better safe guarded.

Contract based liability of doctors : A critical appraisal :

The contractual nature of the relation enables a doctor and patient to incorporate mutually agreed terms with respect to the administration of treatment. Hence the scope of obligations and liability, essentially depend upon the terms of the contract which may be either express or implied.

The contract law also does not impose a duty on a doctor to achieve positive results. It incorporates into the contract only such implied obligations which are essential for giving effect to the purpose for which the relation is established.

---

78. For a general discussion on exclusion clauses, see David Yates, *"Exclusion Clauses In Contracts"*, London, (1978).
79. A complaint lies where there is deficiency in service. See Avtar Singh, *"Law Of Consumer Protection"*, Lucknow, second edition, p. 137 (1997).
80. See *Bharathi Knitting Company v. D.H.L. Worldwide Express Courier Division of Airfreight Ltd.*, A.I.R. 1996 S.C. 2508.
81. The specific statutes declaring exclusion clauses in consumer contracts invalid are enacted in many jurisdictions. See s. 2(1) of the Unfair Contract Terms Act (English) 1977, which reads as follows:

> "a person can not by reference to a contract term or a notice given to persons generally or to a particular persons exclude or restrict his liability for death or personal injury resulting from negligence."

Accordingly it creates an implied obligation on the part of a doctor, to exercise reasonable care and skill. On the patient the obligation is to comply with the instructions of doctor and to divulge all necessary information for effective treatment.

A doctor may agree to achieve a desired result. In that case failure will attract liability. The policy of law is to indict a doctor only when there exists a specific contract with respect to the result. Accordingly a term to achieve a positive result would not be gathered from the words spoken by the doctor to infuse confidence in him especially in case of non-elective treatment.

Contractual liability pre-supposes the existence of a contractual relation. Under some circumstances the courts infer contractual relation. Such contracts must be inferred only when substantial injustice would be caused to the patient unless such inference is made.

The contractual liability is also subject to exceptions. A doctor is allowed to raise certain defences. Professional discretion is sufficiently taken care of by these defences. A doctor is permitted to reduce the extent of his obligations as to the sphere, place and mode of treatment.

The requirement of privity of contract at times is a stumbling block for a patient to initiate an action against a doctor. The scope of the privity of contract is substantially whittled down as a result of a positive judicial attitude in favour of the patient.

It appears under Indian law a doctor can limit the liability. In effect doctors may expose the patients to hardship. Medical negligence cases generally result in personal injury or death. Though precise computation of damages is not possible, reasonable damages must be awarded to aggrieved patient.

CHAPTER VII

CHAPTER-VII

Remedies for Deficient Medical Services:

Medical professionals are accountable to the community for deficiency in their services. Different methods are provided to an aggrieved patient to redress his grievances in every legal system. Remedies include compensation for injury suffered by the patient, prohibitive orders restraining the professional from continuing deficient services, punitive action against the erring doctor and disciplinary control by professional body. In the case of compensation for injury the patient can approach either traditional courts or special forae like Consumer Dispute Redressal Forum. The comparative merits of the different available choices need a critical evaluation.

Remedies through Civil Courts :

A patient can approach civil courts either under tort law or contract law. The civil courts award damages to the patient for any breach of duty by a medical practitioner. A patient can recover damages only if he establishes a proximate connection between the injury and doctor's breach of duty. It signifies that a patient has to prove causation as well as foreseeability of injury.

Application of the doctrine of causation :

Causation signifies linking the injury to the breach of duty by a doctor.[1]

1. Rodney Nelson-Jones and Frank Burton, "*Medical Negligence CaseLaw*", London, p. 67 (1995).

Accordingly a patient needs to prove that on balance of probabilities his injury would not have occurred but for the doctor's breach of duty.[2] If he succeeds to prove this he can recover damages. In *Fish v. Kapur*,[3] the dentist in the course of extracting a wisdom tooth left a part of root of the patient's tooth in the jaw. In addition to that the jaw was fractured by some unexplained means. There was expert medical opinion to effect that without being negligent, a dentist might happen to leave a piece of tooth and cause fracture of jaw. Therefore the court held that the patient had failed to prove that it was dentist's negligence which resulted in injury to him and the patient was not allowed to recover damages.

It follows that where the injury was inevitable it can not be imputed to the breach of duty by doctor. In *Barnett v. Chelsea & Kensington Hospital Management Committee,*[4] a hospital casualty officer was negligent in failing to see and examine a patient who had a complaint of vomiting. On balance of probalilities it appeared that even if the patient was examined by the casualty officer, death was an inevitable eventuality. Accordingly the claim was dismissed on the ground that on balance of probabilities the plaintiff failed to prove that the casualty officer's negligence caused the eventuality.

It will not alter the legal equation even if the negligence is proved. In *Robinson v. Post Office,*[5] a patient in the course of descending an oily ladder at

---

2. Joseph H. King, "*The Law Of Medical Malpractice*", St. Paul Minn, West, p.193 (1977).
3. [1948]2 All E.R. 176 (K.B.).
4. [1968] 1 All E.R. 1068 (Q.B.).
5. [1974]2 All E.R. 737(C.A.).

work slipped and sustained a laceration. The doctor decided to administer an injection of anti-tetanus serum (ATS), which required a test dose. After the test dose, the doctor waited only for one minute instead of the required half an hour gape. The patient became delirious with brain damage and contracted encephalitis. The doctor knew that already the patient had taken ATS once. At that material time it was mandatory to wait for 1/2 an hour even in the case of immunized patient. It was held that the doctor was negligent in waiting for only one minute. But the action was dismissed because even if he had waited for 1/2 an hour no reaction would have appeared.

The principle contemplated above can not be applied to a situation of multiple causes resulting in the injury of a patient. In such a situation proof of causation depends on whether it was doctor's conduct which substantially or materially contributed to the patient's injury. In *Bonnington Castings Ltd. v. Wardlaw*,[6] the court observed,

> "what is material contribution must be a question of degree. A contribution which comes within the exception 'de minimis non curat lex' is not material, but ... any contribution which does not fall within that exception
> must be material".

---

6. [1956] 1 All E.R.615 at pp. 618-619 (H.L.).

In *Wilsher v. Essex Area Health Authority,*[7] a premature baby could not breath effectively and was in need of extra oxygen. The doctor inserted the catheter into a vein instead of an artery to read the blood level, which gave readings well below the true level. It has led to administration of increased level of oxygen. As a result of excessive dose of oxygen the baby became nearly blind. There was no dispute as to doctor's negligence in wrongly inserting the catheter. The court held that the mere fact that excess oxygen was one of the different causes which could have caused the blindness, raised no presumption that it was the material cause of the eventuality.

Accordingly causation can be proved where there are concurrent causes and the tortious act is proved to be one of the causes leading to injury, provided the degree of it's contribution is not too small to be ignored as being too minimal that the law should not take cognizance of it.[8] All that the patient has to prove is that the causative factor is material and not 'de minimis' to obtain a full recovery. If a patient sues in respect of a chance, he has to prove that there was a prospect of more than fifty percent of non-occurrence of injury but for the negligence of a

---

7. [1988]1 All E.R. 871(H.L.) ; See also *Kay Tutort v. Ayrshire and Arran Health Board*, [1987] 2 All E.R. 417(H.L.).
8. See Rodney Nelson – Jones, *op.cit.* at p.72.

doctor.[9] In *Mitchell v. Hounslow and Spelthorne Health Authority*,[10] a woman in labour was given an enema. While she was in the toilet, the membrane ruptured as a result of which the umbilical cord prolapsed and emerged beyond the introitus. No first-aid treatment was given to her until she was taken to the operation theatre. A caesarian section was performed and a girl child was born with brain damage. She was allowed to recover full damages on the ground that a first-aid treatment like application of pressure to foetus would have resulted in a sixty percent chance of avoiding the brain damage.

It is evident from the discussion in the above case that inspite of the negligence of a doctor if the chance of occurrence of eventuality is more than 50%, a patient cannot recover damages.[11] The remaining possibility of a chance of occurrence of eventuality which can be attributed to the negligence can not be

---

9. In *Kenyon v. Bell,* [1953] S.C. 125(Scotland case), quoted in Michael Davies, "*Medical Law*", London, p.94 (1996), a girl who suffered an eye injury underwent medical treatment. She alleged that as a result of negligent treatment, she lost the prospect of her eye sight being saved. The evidence indicated that, even with an effective medical treatment, the prospect was less than 50%. The court adopted the rule that she could recover full damages provided on balance of probabilities there existed more than 50% chances of saving the eye. Damages were not awarded as she failed to prove it.
10. [1984] 1 Lancet 579 as quoted in Rodney Nelson-Jones, op.cit. at p. 458.
11. In *Hotson v. East Berksihre Area Health Authority*, [1987]2 All E.R 909(H.L.), a boy had injured his hip in a fall. The initial examination was negligent in that no X-ray was taken which would have revealed the fracture. Finally correct diagnosis was made and appropriate treatment was given. The fracture was of a kind which could develop into a vascular necrosis. The evidence indicated that even if there had been a proper diagnosis, there was 75% chance of occurrence of the above eventuality. The Court of Appeal scaled down the damages by 75%and the boy was awarded 25% damages. On appeal the House of Lord set aside the award.

converted into damages.[12] It is said that in medical negligence cases it is not possible to quantify the damages with mathematical precision.[13]

Intervening conduct of patient may snap the chain of causation. But in some special circumstances, law does not take into consideration the intervening conduct of a patient. In *Emeh v. Kensington and Chelsea West Minister Area Health Authority,*[14] a married woman who already had three healthy children underwent an abortion and sterilization operation. Subsequently she became pregnant. When she was 18-20 weeks pregnant doctor suggested abortion. She declined. A baby was born with congenital abnormality. She sued the doctor for negligence. The doctor invoked the plea of '*novus actus interveniens*'. The court held that her refusal to undergo an abortion was not so unreasonable as to eclipse the surgeon's negligence unless there was evidence to the effect that there were medical or psychiatric grounds for terminating pregnancy. Hence the plea failed.

The decision suggests that if a procedure is necessary from medical point of view, any refusal to undergo will snap the causation. Similarly the real intention of the patient is sue the doctor, it will break the causation.

In India also consumer courts and civil courts grant relief to the patient' only if he is able to prove that negligence of the doctor resulted in injury.

---

12. *Ibid.* See also *Bagely v. North Herts Health Authority,* [1986] 136 N.L.J. 1014. In this case the court laid down the concept of discounting damages to the extent of occurrence of injury at any event irrespective of negligent treatment. This concept was not accepted by the House of Lords in *Hotson.*
13. See Michael Davies, *op.cit.* at p.95.
14. [1986] 2 W.L.R. 233.

In Dr. *Ashok Dhawan v. Surjeet Singh*,[15] the doctor administered an injection to a patient without proper test. As a result of it, patient's arm lost movement. The patient made a bald assertion that he had to spend a huge amount for further treatment. There was no direct evidence on the record to establish the loss suffered by him. The National Commission held that on balance of probabilities the patient proved his cause. The patient was awarded damages.

In *Suvarna Baljekar v. Rohit Bhatt*,[16] the National Commission refused remedy to a patient, as he failed to prove that the adverse effects of medicine prescribed by the doctor led to his ailments.

In *Devendra Kanthilal Nayak v. Dr. Kalyaniben Dhruv Shah*,[17] the doctor performed a caesarian operation on a woman. After the operation due to profuse bleeding the latter died. On such an eventuality removal of uterus is the only alternative to save the life of the patient. The doctor did not do that. The Gujarath State Commission held that failure to remove uterus was the proximate cause of death and compensation was awarded.

---

15. (1997) 1 C.P.J. 82 (N.C.).
16. (1996) 2 C.P.J. 75 (N.C.).
17. (1997) 1 C.P.J. 103 (Gujarath S.C.D.R.C.). See also *Force Society v. M. Ganeshwara Rao.*, (1997) 3 C.P.J. 228 (Andrapradesh S.C.D.R.C.); Dr. *S.B. Jain v. Smt. Munni Devi*, (1998) 2 C.P.J. 239 (Haryana S.C.D.R.C.).

In *Tapankumar Nayak v. State of Orissa*,[18] an infant was administered triple antigen injection and polio-drops. Subsequently the infant suffered severe reaction. It resulted in damage to the brain. No other children who were similarly vaccinated in the same batch had suffered any complication. The National Commission held that administration of injection was not the proximate cause of injury. Therefore remedy was refused.

Foreseeability of injury :

A patient to succeed under civil law should establish not only that the injury was the result of breach of duty on the part of a doctor, but also that it was foreseeable. If the claim is brought in contract it should be proved that at the time when the contract was made, the injury was reasonably foreseeable.[19] If it is brought in tort it should be established that at the time when the breach of duty occurred the injury was reasonably foreseeable.[20]

A patient's complaint includes allegations like continuation of the disease which ought to have been cured or aggravation of an existing injury or infliction of a new injury. A doctor by virtue of his professional knowledge is in a position to

---

18. (1997) 2 C.P.J. 14 (N.C.). See also *M.D. Aslam v. Ideal Nursing Home*, (1997) 3 C.P.J. 81 (N.C.); *Joseph @ Animon v. Dr. Elizabath Zacariah*, (1997) 1 C.P.J. 96 (Kerala S.C.D.R.C.).
19. *Victoria Laundry (Windsor) Ltd. V. New Man Industries Ltd.*, [1949] 2 K.B. 528.
20. For a discussion on foreseeability test, see John G. Fleming, "The Law Of Torts", New South Wales, eight edition, pp. 208-215 (1992). For a discussion on foreseeability of damages in contract, see A.G. Guest (ed.), "*Chitty On Contracts*", London, vol.1- 27th edition, pp. 1216-1223 (1994).

foresee most of the consequence of negligent treatment and his own mistakes. In *Smith v. Brighton and Lewes Hospital Management Committee,*[21] a patient had a severe attack of boils and was admitted to the hospital. The doctor prescribed 30 streptomycin injections. Because of the negligence of the ward sister, the patient received four more injections than prescribed. The very next day she experienced a sense of giddiness and suffered a permanent loss of balance. The court held that probably it was the last injection, which caused the injury. The ward sister ought to have foreseen that some injury might occur from the administration of more injections than ordered. It was not necessary that the quality and extent of damages ought to have been foreseen. Hence the patient was allowed to recover damages from the hospital authority.

If the injury is not foreseeable a patient can not recover damages. In *Roe V. Minister of Health,*[22] nupercaine was kept in glass ampoules, which were stored in phenol solution. The phenol solution entered into the ampoules through invisible cracks and contaminated the nupercaine. The two patients to whom nupercaine was injected, suffered permanent paralysis. The court held that what could be reasonably foreseeable was the loss of a quantity of nupercaine resulting from the cracks and not the occurrence of permanent paralysis. Accordingly they were not allowed to recover damages.

---

21. (1958), *Times*, 2 May, quoted in Rodney Nelson-Jones, *op.cit.* at p. 559.
22. [1954]2 All E.R. 131 (C.A.).

It is evident that if the damages are too remote that a proximate connection between doctor's breach of duty and injury is absent, a patient can not recover damages. The non-feasibility of foreseeability of risks will certainly amounts to remoteness of damage. But there are situations in medical negligence cases where the remoteness is viewed as something concerned with the negligence or breach of duty and not with the foreseeability of the consequence. In *Hothi v. Greenwich Health Authority,*[23] a patient had sustained severe head injury. He was given phenobarbitone. As a result of it he developed serious rashes and symptoms known as Stevens-Johnson Syndrome. He contended that the above drug should not have been given and/or sensitivity test should have been conducted.

The court held that as the patient had symptoms of epilepsy the above drug was a proper anti-convulsant. It further opined that the possibility of such a syndrome was too remote that no doctor could be negligent because there was a very slight risk that some hypersensitive patients might have had adverse reactions. Accordingly he was not allowed to recover damages.

It is obvious that in the absence of negligence the injury cannot be attributed to the doctor. Though the risk is known if it's possibility of occurrence is very slight a doctor cannot be held liable. But, if a doctor is aware that a patient is hypersensitive, then the question of foreseeability of consequence arises to avoid

---

23. [1982]2 Lancet 1474, quoted in Rodney Nelson-Jones, *op.cit.* at p. 389.

the contemplated risk. In *Dr. Rashmi B. Fadnavis v. Mumbai Grahak Panchayat*,[24] the patient was bleeding. She was an obese patient with a rare blood group. The doctors decided to perform a major surgery on her. They started the operation without stock of sufficient blood. The operation went beyond the estimated time. They failed to provide artificial respirator and adequately long needle for an inter-cardiac injection with the knowledge that the patient was obese. Eventually the patient died. The Maharastra State Commission held that there was deficiency in service on the part of the doctors. On appeal the National Commission affirmed the decision on the ground that the doctors had failed to foresee the potential risk which the condition of the patient itself suggested. They were held liable.

In the absence of any special circumstance a doctor is not required to foresee any third party's liability to his patient.[25]

Remedies through consumer forae :

A patient can avail remedies under the Consumer Protection Act provided he can be treated as a consumer and deficiency in service on the part of a doctor

---

24. (1998) 3 C.P.J. 21 (N.C.).
25. See *Stevens v. Bermondsey and Southwark Group Hospital Management Committee,* [1963] 107 S.J. 478, as reproduced in Rupert M. Jackson and John L. Powell, "*Professional Negligence*", London, second edition, p. 351 (1987). In this case the plaintiff sustained an injury by an accident caused by an employee of Borough Council. He was given treatment in the defendant's hospital. Relying on the medical advice, he settled the claim against the council for £ 125. Later he learnt that he had contracted spondylolisthesris. The plaintiff contended that because of defendent's negligance, he settled the claim for lesser sum. He was not allowed to recover.

can be established. A patient who receives services[26] of a medical practitioner by way of consultation, diagnosis and treatment for a consideration is a consumer of medical services.[27] Accordingly a patient paying for the services in a private hospital/or nursing home falls within the definition of consumer.[28] Even if he is a recipient of free service, in such hospitals where charges are required to be paid by persons who can afford to pay, he is a consumer.[29] Likewise the recipient of a free service in a government hospital or dispensary where charges are levied from any persons availing them, is a consumer.[30] The patient need not bear the service charges personally. It can be borne by an insurance company, employer or any other person.[31] However hospitals where all patients are rendered free service are outside purview of the consumer courts.

The decision of the Supreme Court in *Indian Medical Association case*,[32]

---

26. The Consumer Protection Act, 1986, s. 2 (1)(d) defines consumer as one who ... hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person 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.
27. *Indian Medical Association v. V.P.Shantha,* (1995) 6 S.C.C. 651 at p. 680.
28. *Id.* at p. 681.
29. *Ibid.*
30. *Ibid.*
31. *Id.* at p. 682.
32. *Id.* at p. 681. See also *Additional Director C.G.H.S. v. Dr. R.C. Bhutani*, (1996)1 C.P.J. 255 (N.C.) In this case it was held that a government employee contributing a token amount towards health scheme while in service was not patient.

has finally settled many controversies relating to jurisdiction of consumer courts to hear medical negligence cases. Prior to this decision some State Commissions[33] and High Courts[34] took the view that doctor-patient relationship is based on contract of personal service and hence outside the scope of Consumer Protection Act. Supreme Court preferred the view taken by the British court in *Simmons v. Health Laundry Co.*,[35] The court says that the patient does not have any power to supervise or control the service rendered by a doctor and hence the relationship is based on a contract for personal services.[36] However considering the fact that payment of consideration is a must for the purpose of definition of consumer under the Act, the court ruled that patient receiving services from a hospital rendering free services whether government or private are outside the jurisdiction of Consumer Protection Act.

The Supreme Court appears to have failed to reconcile the philosophy of consumer law with the requirement of 'hiring' in the Act. The effect is that patient who can not afford to pay if avails free service can not get the advantage of easy and inexpensive remedy provided under the Consumer Protection Act.[37] The

---

33. See *supra* n. 27.
34. *Consumer Education and Research Society v. Dr. Rathilal B. Patel*, (1991) 2 C.P.R. 204 (Gujarath S.C.D.R.C.); Madras High Court in *Dr. C.S. Subramaniam v. Kumaraswamy,* (1994) 1 C.P.J. 509 (Mad. D.B.).
35. [1910] 1 K.B. 543.
36. See *supra* n. 27 at p. 680.
37. *Id.* at p. 681.

recommendations of the National Working Group on Consumer Protection for inclusion of all doctors within the scope of Consumer Protection Act, remains a pious wish.[38] So to avail the remedies under the Act, a patient has to prove that he has availed the services of a doctor/ hospital for a consideration. This position requires reconsideration.

Deficiency in medical services :

Another aspect to be established by a patient is that there was deficiency in the services rendered by the doctor or hospital. The Consumer protection Act, defines 'deficiency in service' in a very broad manner. The Act states,[39] "deficiency means any fault, imperfection, short coming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service".

So the definition suggests that failure to observe any law, common law or statutory will render the service deficient. Hence all the grounds like failure to exercise reasonable care and skill, failure to obtain informed consent and failure to discharge contractual obligations would make the service deficient.[40] In addition to that failure to render promised service for which charges are collected and

---

38. D.N. Saraf, " *Law Of Consumer Protection*", Bombay, second edition, p. 495 (1995).
39. See the Consumer Protection Act 1986, s. 2 (1)(g).
40. For a discussion see *supra* chapter 2, 4, 5 and 6.

failure to verify the purity of substances used in treatment can also make the services deficient.

In *R.M.Joshi v. Dr. P.B.Thahilramani,*[41] the complainant was administered intravenous fluid for three days on a table, which ought to be done keeping the patient on a bed. There was no bed facility. The bill showed bed charges. It was held that recovery of fees for a treatment which was not rendered amounted to deficiency.

Similarly a doctor is under an obligation to check the medicine with the prescription and to be present at the time of administration of treatment, if it is delegated to para-medical staff. In *Harjoth Ahluwalia v. M/s. Spring Meadows Hospital,*[42] a minor was suffering from typhoid. The attending doctor prescribed an intravenous injection. The nurse gave a wrong injection. As a result of wrong injection the patient immediately collapsed. Appropriate step was not taken to keep the patient in ventilator. In consequence the child was thrown into a vegetative state. It was held that failure on the part of doctor to check the prescribed medicine amounted to negligence.

In *Bhavchandabhai Manjibhai Lakhani v. Dr. Bhupendra D. Sagar,*[43] a patient was admitted in the nursing home for fracture of left hip caused by an accident. The doctor operated him under general anaesthesia. The patient felt pain

41. (1993) 3 C.P.J. 1265 (Maharastra S.C.B.R.C.)
42. (1997) 2 C.P.J. 98 (N.C.).
43. (1994)1 C.P.J. 361 (Gujarath S.C.D.R.C.); see also Shivaji Gendeo Chavan v. *Wanless Hospital,* (1995) 3 C.P.J. 43 (Maharastra S.C.D.R.C.).

in the spot of operation. X-ray revealed that, as a bone was not properly fixed the left leg was shortened by 21/2". It was held that the operation was conducted in a negligent manner.

Quackery and medical misadventure are treated as deficiency in service. In *M.Jeeva v. Smt. Lalitha,*[44] the defendant was a registered nurse and midwife. She was running a hospital. The complainant was admitted to the hospital for a second caesarian operation. The nurse took herself the management of the situation, which ultimately led to the rupture of uterus, removal of it and the death of the male child. It was held that her act amounted to rash and reckless act and culpable negligence. It should be noted that even a qualified doctor could also be held liable under civil law and criminal law if the act is proved to be reckless.

Poonam Varma v. Dr. Ashwin Patel,[45] is a case of medical misadventure. In this case the appellant's husband complained fever. The doctor was a diploma holder in homeopathy medicine and surgery. He got registered as a medical practitioner under Bombay Homeopathic Practitioner Act. He initially administered allopathy medicine for viral fever and latter for typhoid fever to the patient in accordance with the practice prevalent in that locality. On deterioration of the condition, the patient was shifted to a nursing home where he died after 4 1/2 hours of admission. The Supreme Court held that a person who did not have

---

44. (1994) 2 C.P.J. 73 (N.C.).
45. (1996) 4 S.C.C. 332.

knowledge of a particular system of medicine, but practiced it, was a quack and a pretender to medical knowledge and allowed compensation to the victim.

The above decision can be justified on the ground that allopathic medicine has special characteristics. It may have side effects, which are known only to a person who is qualified in it. An unqualified person who practises medicine might expose a patient to danger. Experience in allopathic medicine without qualification is immaterial.

In addition to a claim for damages the Consumer Protection Act, 1986 allows a consumer to claim removal of deficiency in service.[46]

Removal of deficiency :

Logically a doctor can be directed to set right the adverse effects of his negligent treatment. But it is not expedient to do so for the reason that a patient will not once again submit himself to the care of a negligent doctor. Moreover the negligent treatment may result in permanent injury beyond reversal. So the better alternative is to award compensation.

Recovery of fee :

In the case of non-feasance on the part of a doctor, the patient may recover fee or charge paid by him.[47]

---

46. See the Consumer Protection Act 1986, s. 14.
47. *Ibid.*

In order to protect doctors against frivolous or vexatious allegations it is provided that the consumer forae are empowered to direct the patient to pay cost not exceeding Rs.10,000/= in such cases.[48]

Similarly Complaints barred by limitation are also dismissed.[49] If forseeability and causation are established civil courts would award damages to the patient.

Damages for deficient medical service :

The aggrieved patient may claim damages if he can prove any deficiency in service rendered by the medical men. The quantum may depend on various factors. When negligence of doctor cause physical pain and suffering to a patient or deprive him of certain amenities, he is entitled to claim damages for the same.[50] In quantifying the damages courts take into account many factors like the age of the patient, seriousness of the injury and expenses incurred for treatment. Loss of a leg to an young foot-ball player is great loss compared to a similar loss to an elderly man of 75 years. Naturally the younger one is entitled for a higher award

---

48. The Consumer Protection Act 1986, s. 24(a). See also *Brijmohan Kher v. Dr. H.N. Banka*,(1995) 1 C.P.J. 99 (N.C.); *A Narian Rao v. Dr. G. Ramkrishna Re*ddy, (1993) 1 C.P.J. 110 (N.C.).
49. *Id.* s. 24A.
50. Rupert M. Jackson and John L. Powel, *op.cit.*, at p. 347. For a genera discussion, see R.K. Bag, *"Law Of Medical Negligence And Compensation"*, Culcatta, first edition (1996); see also John Munkman, *"Damages For Personal Injuries And Death"*, London, fifth edition (1973); R.E. Carter, *"Assessment Of Damages For Personal Injuries Or Death In The Courts Of The Comman Law Provinces"*, 32 Can.B.R. 713 (1954).

of damages, than the elder one.[51] The court shall take into account factors like present and future pain, discomfort, sickness, anxiety, loss of function, mental anguish, embarassment, humiliation and disfigurement.[52] In case of loss of amenity, interference with or stoppage of leisure activities, recreation and hobbies must be given due consideration.[53] If a particular career can not be pursued loss of enjoyment of work may be considered.[54] Other losses include loss of enjoyment of family life, loss of prospects of marriage and losses through sexual malfunction.[55] The quantification of pain, suffering and amenity is an up-hill task. It involves value judgement. But it must be based on an objective yardstick.[56]

A patient may claim damages for loss of future earnings.[57] If his working capacity is reduced, he is entitled for an award reflecting the difference between pre-injury and post-injury working capacity, with an obligation of mitigating the losses by finding alternative employment.[58] Recovery is allowed for loss of earnings in the lost years resulting from reduction of life expectancy due to serious

---

51. *Nutbrown v. Sheffield Health Authority,* [1993] 4 Med. L.R. 187.
52. See Rodney Nelson-Jones, *op.cit.* at p. 153.
53. *Ibid.*
54. *Ibid.*
55. *Ibid.*
56. *Lim Poh Choo v. Camden and Islington Area Health Authority,* [1979]2 All E.R. 910 (H.L.).
57. See *supra* n. 1 at p.157.
58. *Id.* at p. 158.

injuries, what a patient, if alive would have earned in those years.[59] But while computing the damages inflation is not usually taken into account. A patient can also recover damages for cost of medical nursing care and other financial losses.[60]

The National Commission in India has introduced another factor also in the quantification of damages. In *Sau Madhuri v. Dr. Rajendra*, [61] the complainant underwent a caesarian operation. As a result of negligence of the doctor she sustained loss. The National Commission held the doctor negligent. With regard to quantification of losses the National Commission observed, [62]

> " One has also to see the financial status of the doctors as well as the patient in these cases apart from the factors of age, the earning status of the patient and any other relevant circumstance having a bearing on the case."

It is submitted that the financial status of neither doctor nor patient can be a valid criteria for quantification of losses. Recognition of this may lead to abuses. Instead of that there may be compulsory insurance for doctors.

In some circumstances court can award aggravated damages. In *M/s. Spring Medows Hospital v. Harjoth Ahluwalia*,[63] due to the negligence of doctor a child was thrown into a vegetative state. The Supreme Court awarded aggravated damages to the victim.

---

59. *Id.* at p. 159.
60. *Id.* at p. 157.
61. (1996) 3 C.P.J. 75 (N.C.).
62. *Id.* at p.77.
63. (1998)1 C.P.J. 1 (S.C.).

However contributory negligence of a patient has an effect of reducing the damages. In *Crossman v. Stewart,*[64] a patient having a facial skin disorder was referred to the defendant doctor. He prescribed a drug known as chloroquine or aralen. She continued to take the drugs with the prescription of the doctor. Later when she could not get the drug, she obtained it in an unorthodox manner without prescriptions. The doctor was not aware of it. He in the course of a medical conference came to know that the long consumption of the above drug would cause irreversible damage to eye. Immediately he referred her to an eye specialist. The examination revealed corneal changes and consumption of the drug for a long time. Subsequently inspite of eye specialist's report, he prescribed the same drug for a period of six months. The negligence of the doctor was proved, but he took the plea of contributory negligence on her part. The court held that the patient was contributorily negligent and the blame was apportioned in the ratio of 2:1 between the patient and doctor respectively. Accordingly she was allowed to claim only 1/3 of the compensation claimed.

Similarly an obligation is imposed on a patient to mitigate the damages[65] by submitting himself for future medical treatment to the same doctor or to some other doctor to set right the injury.[66] Failure to mitigate the damages will reduce

---

64. [1977] 5 C.C.L.T. 45, quoted in Rodney Nelson-Jones, *op.cit.* at p. 295.
65. For a discussion on mitigation of damages, see John G. Fleming, *op.cit.*, pp. 253- 254.
66. For a discussion see *supra* chapter 3.

the quantum of damages. This is not an invariable rule. An extreme circumstance exempts a patient from the obligation of mitigating the damages.[67]

Burden of proof in medical negligence cases :

The burden of proving that there is a breach of duty or negligence on the part of the doctor lies on the person alleging negligence.[68] Additionally he has to prove causation.[69] In *Kailashumar Sharma v. Dr. Haricharan Mathur,*[70] the doctor operated a patient for cataract and fitted intra-ocular lens into latter's eye. But there was no restoration of vision in the eye. He brought an action against the doctor for deficiency in service. He did not produce any evidence to establish the deficiency. The National Commission held that the patient failed to prove the deficiency and remedy was refused.

It is very difficult for a patient to prove the negligence of a doctor. The hope of a patient rests only in the application of the doctrine of *res ipsa locquitor.*[71] It can be applied where negligence is based on the common experience of layman, which dispenses the need for expert evidence to establish the prescribed standard of care.[72] It's common application can be found in cases involving allegations

---

67. *Ibid.*
68. See John G. Fleming, *op.cit.* at p. 312.
69. For a discussion on doctrine of causation, see *supra.*
70. (1997) 3 C.P.J. 41 (N.C.).
71. Res ipsa implies that the accident must be of such a kind which ordinarily would not happen but for negligence. For a general discussion on the doctrine, see Mark F. Grady, "Res Ipsa Loquitor And Compliance Error", 142 U.P.L.R. 887(1994).
72. Joseph H. King, "*The Law Of Medical Malpractice*", St. Paul Minn, West, p. 116 (1977).

of leaving foreign objects in body after operation,[73] involving burn or traumatic injury to that part of the body not within the vicinity of operation[74] and unnecessary removal of or injury to a healthy limb or operation performed on a wrong person. It can not be applied automatically where an unfavourable result ensues from a treatment or a desired result could not be achieved. The courts are reluctant to apply the principle in cases involving breaking of surgical instruments during operations.[75]

The Karnataka State Commission applied the doctrine of *res ipsa loquitor* to determine the negligence of doctor in *Master P.M. Ashwin v. Manipal Hospital, Bangalore.*[76] In this case a boy of five years underwent an operation for inguinal hernia. Warm water bag was put under the legs of the child after the operation. The child received severe burns to both the legs. Such burns would not have been caused, if the temperature was manually assessed. It was held that the doctrine of *res ipsa loquitor* would apply, as things themselves spoke the negligence.

If a doctor fails to give a satisfactory account of treatment, the burden falls on him to prove that he is not negligent. In *Aphraim Jayanand Rathod v. Dr. Shailesh Shah,*[77] a patient underwent an appendicitis operation. A second operation was performed without written consent in the guise of removing stitches. He did not give any explanation for second operation. It was held that the failure

73. *Mahon v. Osborne*, [1939] 2 K.B. 14.
74. See *supra* n. 72 at p. 121.
75. *Id.* at p. 120.
76. (1997) 1 C.P.J. 238 (Karnataka S.C.D.R.C.).
77. (1996) 1 C.P.J. 243 (Gujarath S.C.D.R.C.).

on the part of the doctor to tender explanation for second operation proved that the first operation was performed negligently. The Gujarath State Commission held that the operation was performed in the operation theatre where no one was allowed to enter. Moreover the patient was unconscious, being under the influence of anaesthesia. Hence it was the duty of doctor to prove that he was not negligent.[78] This decision has relaxed the rigid rule regarding burden of proof.

Remedies under public law :

A patient can invoke the writ jurisdiction against the state for violation of his right to life. In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal,*[79] a member of the samithy, met with a train accident, resulting in serious head and brain injuries. No treatment was given to him in various government hospitals within the city of Calcutta. Finally he was admitted in a private hospital, where he incurred an approximate expenditure of Rs.17,000/- for the treatment. The samity filed a writ petition expressing it's dissatisfaction over the callous attitude of various state run hospitals. The court directed state government to pay compensation of Rs.25,000/- to the patient for refusing to treat him. Rejecting the plea of non-availability of facilities the court observed,[80]

---

78. *Id.* at p. 247.
79. A.I.R. 1996 S.C. 2426.
80. *Id.* at p. 2429.

> " Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state and the medical officers employed there in are duty bound to extend medical attendance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21".

It can be seen that the Supreme Court tried to remind the state of it's constitutional obligation to provide reasonable medical facilities. The compensation awarded can be regarded as a token of court's displeasure regarding the irresponsible attitude of the state. It can not be treated as a common remedy that can be availed by aggrieved individuals against deficient medical services.

The prohibition on false and misleading claims by hospital and doctors under the M.R.T.P. Act, 1969 and remedies under criminal statutes like Indian Penal Code, Medical Termination of pregnancy Act, 1971 and Mental Health Act, 1987 can help to prohibit deficient medical services.[81]

Remedies through professional bodies :

The medical council is empowered to discipline the doctors for professional

---

81. The remedies under these statutes are not discussed in this study. For a discussion on these aspects, see S. Krishnamurthi, "*Principles Of Law Relating To M.R.T.P.*", New Delhi, third edition, 1991; Ratanlal and Dhirajlal, "*The Indian Penal Code*", Nagpur, twentyseventh edition, (1992).

misconduct. It can prohibit them from practicing medicine.[82] Professional misconduct means the conduct of such type which may be reasonably considered as disgraceful or dishonourable by doctors.[83] Whether the conduct disgraceful or not is to be decided by the council only.[84] Mere negligence does not amount to professional misconduct.[85] Even gross negligence is not suffice to find a charge of professional misconduct.[86] Moral delinquency is considered as the *sine qua non* of a professional misconduct.[87] Therefore a patient to avail remedy against a doctor not only shall prove negligence but also moral delinquency. Accordingly in

---

82. See the Indian Medical Council Act 1956, s.20A. See also the Preliminary Proceeding Committee and Professional Misconduct Committee (procedure) Rules 1980. *Dr. A. N. Mukherji v. State,* A.I.R.1969 All. 489. In this case a surgeon came in contact with a married woman in his capacity as a physician. Betraying the confidence of her husband he seduced her to tread the path of a long immoral co-habitation and finally renounced her. The trial court held that he must be debarred from practice as a medical practitioner for a period of 3 years. Setting aside the decision, the High court observed:
    > ".... Whether a person of such depraved morals should be allowed to continue in the noble profession of medicine is a matter however for the consideration of Indian Medical council and not for the court."
83. M.C. Agrawal (rd.), Sanjeev Row; "*The Advocates Act And The Legal Practitioners Act*", Allahabad, fifth edition, p.295 (1987), see also *Myers v. Elman*, [1939] 4 All E.R. 484 at p. 498 (H.L.).
84. *Dr. A.N. Mukherji v. State*, see *supra* n. 82.
85. In *Re Ram Chandra Prasad Sinha,* Advocate, A.I.R. 1963 Patna 233.
86. *Myers v. Elman,* supra n. 83 at p. 488.
87. In *Re Gondika Sathyanarayana Murthy, A Pleader*, A.I.R. 1938 Mad. 965; In *Re Prem Narain, Advocate, Agra*, A.I.R. 1940 All. 289; In *the matter of An Advocate,* A.I.R.1935 Cal. 484; In *Re B. Munnuswami Naidu*, A.I.R. 1926 Mad. 568.

an instance of criminal negligence a doctor may be subjected to disciplinary action as contemplated above.[88]

Remedies for deficient medical service : A critical appraisal :

The remedy of a patient for deficient medical services lies in an action for recovery of damages. In order to recover damages he shall prove causation and foreseeability of injury by a doctor. The judicial attitude is to take cognizance of only material contribution of doctor's negligence towards the patient's injury. Conversely it suggests that substantially if it is not the cause, but if it has contributed to the injury, a doctor need not pay damages. There is judicial reluctance for apportionment of damages. Therefore a patient is either entitled to get the whole award of damages only if he proves, on balance of probabilities the material contribution otherwise he has to forego the whole award. The central notion of causation lies in linking the doctor's conduct to damage. There is nothing contradictory in quantifying the damage to the extent a doctor's conduct becomes responsible for the damage. This approach accommodates the scaling down of an award of damages in the light of inherent risks connected with the treatment.

---

88. See *R. v. Bateman*, [1925] All E.Rep. 45 (C.C.A.). With respect to criminal negligence the court observed, *id.* at p. 48.

> "...in order to establish criminal liability the facts must be such that... the negligence of the accused went beyond a matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving of punishment."

Accordingly a fair balancing of the interests of doctor and patient can be made. What is required is not mathematical precision but a reasonable assessment of damages. Therefore, it is submitted that where negligence of a doctor is proved, but not causation in terms of material contribution the patient must be awarded damages.

Aggravated damages are rarely awarded. Any medical intervention without the consent of the patient calls for payment of aggravated damages without proof of negligence if it results in injury to the sense of dignity and feeling of a patient. But negligence alone generally does not give rise to such injuries.

In some jurisdictions exemplary damages are awarded in some circumstances.[89] They are punitive in nature. But damages under tort are compensatory in nature. For criminal negligence exemplary damages can be awarded. In one case[90] one Shakunthala Pai went to Sri Rama Krishna Nursing Home, Mangalore, for a minor surgery. A fully intoxicated doctor administered anaesthesia on her and she came out as a vegetable. She remained in coma for four years till her death. The principle civil judge of Mangalore held him liable and ordered him to pay Rs.1,50,000/- to the plaintiff. The surgeon who operated was ordered to pay Rs.50,000/-.

---

89. B.W. Collis, "Tort And Punishment: Exemplary Damages : The Australian Experience", 70 A.L.J.47 at p. 52 (1970).
90. For the report of the case, see *The Week,* Jan 8-14 (1989).

Medical negligence awards may at times involve huge amount of compensation to expose the health authority and doctors to hardship.[91] Therefore it is necessary to place a cap on the limits of liability. In addition to that a system of periodic payment of compensation can be introduced.[92] Alternatively a system with combination of lump sum and installment wise payment of compensation for a specified can also be considered.

The remedy of damages under contract or tort law by the civil courts will be meaningful only if an injured patient can avail it at the earliest. But speedy justice in civil courts has become a myth due to procedural shackles. At times a patient needs to combat a protracted battle for justice. For example, in *Achuta Rao Haribau Khodwa v. State of Maharastra,*[93] the plaintiff fought a legal battle for nearly 30 years from the lower court to the apex court. After such a long period, damages so awarded, is of no use. The remedy is worst than injury as justice delayed.

The Consumer Protection Act has changed the position. It gives a speedy remedy if the patient can be brought with in the ambit of the definition of consumer. The *Indian Medical Association case,*[94] held that medical

---

91. See *supra* n. 1 at p. 154.
92. For a discussion, see Roger C. Hinderson, "Designing A Responsible Periodic Payment System For Tort Awards; Arizona Enacts A Prototype", 32 Arizona L.R. 21 (1990).
93. J.T. (1996) 2 S.C. 624.
94. See *supra* n. 27.

practitioners would fall within the purview of the Act. By this no change is brought about in the substantive law governing claims for compensation on the ground of negligence and the principles which apply to determination of such a claim before the civil court.

It is obvious from the above observation that deficiency in service is equated with the concept of negligence. Accordingly all principles relating to negligence would apply *ipso facto*. If patient can not prove injury causation his claim fails. But deficiency in service is a wider term and includes other breaches of duties or statutory provisions also. But the requirement of proof places the patient in a difficult position. Therefore it is submitted that even though the injury causation is not proved, but breach of duty is proved, a patient may be allowed to recover reasonable damages. This proposition is compatible with the idea of concurrent liability which is implied in the concept of deficiency in service. Further it is accommodative of the concept of quantification of damages, which converts the extent of doctor's negligence causing the injury into damages, not withstanding that there is no material contribution.[95]

One serious lacuna of the Act is exclusion of government hospitals. Accordingly a patient has to move the civil court for deficiency in a government hospital.

---

95. For a discussion on material contribution, see *supra*.

The exclusion is further based on the ground that the attention of the hospital authorities would be diverted by a spate of spurious and avoidable litigation, likely to lead deterioration of medical facilities and services in government hospitals.[96] This reasoning cannot be accepted. If it is true of government hospital, then it is equally true of private hospitals. The government hospitals are known for all sorts of maladies.[97] The exemption will be used as a licence to perpetuate the maladies with immunity from legal liability . Accountability makes a doctor more responsible and goes on a long way to prevent negligence.

Moreover the Consumer Protection Act, contains provision to check frivolous allegations. The consumer forae can direct the patient to pay compensation to the doctor to a tune of Rs. 10,000/= in cases of vexatious litigations. This safeguards interest of doctors. Consumer forae may be empowered to direct the patients to pay higher quantum in appropriate cases to check the flow of frivolous cases to see that only genuine cases come before them. But when the patient could not prove the negligence due to absence of necessary information he shall not be asked to pay cost to the doctor. Otherwise it would frustrate the very object of the Act and deter the patients from approaching the courts.

---

96. *Consumer Unity and Trust Society v. The State of Rajasthan*, (1992) 1 C.P.J. 259 at p. 268 (N.C.).
97. For a critical discussion, see Consumer Education and Research Centre, Ahamedabad, "*What Ails Public Hospital*", Ahamedabad.

If the patient has reasonable access to medical records like case sheets, prescription and other computer data relating to clinical or radiological procedures, he may be able to prove deficiency against a doctor. But the question whether patients are allowed access to such records remains uncertain.

CHAPTER VIII

CHAPTER VIII

Access to Medical Records

The discussion in foregoing chapters reveals that a patient can obtain compensation for medical malpractice only if he is able to establish negligence of the doctor. He should also prove nexus between negligence and injury. A fair and feasible access to medical records enables the patient prove the deficiency in service. The Indian consumer courts have taken the view that a patient does not enjoy such a right. But such a right is recognised under some foreign jurisdictions. A comparative analysis of the law relating to access to medical records in different jurisdictions will help to identify the defects in Indian law.

The term "medical records" signifies documents consisting of information tendered by a patient to a doctor on consultation for any advice or treatment and opinion formed by the latter based on the information.[1] It is meant for the purpose of preservation and furnishing authentic evidence of the contents therein. They may contain history of diagnosis, advice and treatment given to the patient.

Under the common law access to medical records was mainly based on ownership. Ownership signifies a bundle of rights in relation to a property.[2]

---

1. The term 'record' signifies transcribing a document or entering the history of an act or series of acts in official volume, for the purpose of giving notice of the same or furnishing authentic evidence and for preservation. See Henry Campell Black(ed.), "*Black's Law Dictionary*", St.Paul Minn, fourth edition, p.1437 (1951).
2. P.J. Fitzerald "*Salmond On Jurisprudence*", Bombay, twelth edition, p.246 (1988).

Accessibility and use of that property are adjuncts of ownership. If it could be said that a patient is the owner of the records, not withstanding the fact that the possession lies with the hospital or doctor, in that case he has unfettered and absolute access to the records. This ownership is not recognised always. It depends upon the contract between doctor or hospital and the patient and the legal system subject to which contract is made.

Position in England :

In England the right of patients differ depending on whether the patients is a private patient or one covered by the National Health Service.[3]

When a patient goes to a hospital for any ailment, a contractual relation emerges between the hospital and patient, provided the latter agrees to render the former it's service. The ownership of documents depends upon an express term in the contract between the hospital or doctor and the patient.[4] Accordingly they may agree to transfer the ownership of documents to the patient. Alternatively a hospital can transfer ownership of the documents to the doctor who can further transfer it to the patient in pursuance of a contract between him and the latter.

---

3. I. Kennedy and A Grubb, "*Medical Law*", London, second edition, p.611 (1994).
4. *Id.* at pp. 610-611.

In case of an N.H.S. patient[5] access to records is a matter of contract between him and the health authority.[6]

Even in the absence of ownership, a patient's right of access to the information contained in medical record is recognised in *R.v. Mid Glamorgan Family Health Services Authority & Another, Exparte Martin.*[7] The applicant here suffered from psychaitric problems for which he received treatment in the hospital for a period of four years. After a lapse of twenty years, he wrote to the health authorities, seeking disclosure of his medical records regarding the incidents that took place in his childhood.[8] It denied the disclosure pleading lack of authority. The psychaitrist who treated him, agreed for a conditional disclosure on an assurance from the applicant that no litigation would be instituted in respect of the treatment. The applicant refusing to give such assurance, insisted for disclosure as a matter of right. Later refusing the offer of disclosure to a medical officer nominated by him the applicant applied for judicial review of respondent's

---

5. The majority of the patients are covered under the National Health Service. See Rodney Nelson- Jones and Frank Burton, *"Medical Negligence Case Law"*, London, p.26 (1995).
6. See *supra* n.3.
7. [1995] 1 All E.R. 356 (C.A.).
8. His case could not be dealt under any of the statutes now governing the right of access.

decision. The trial court recorded a verdict in favour of the health authority.[9] The Court of Appeal dismissed the appeal filed by the patient on the ground that the health authorities' offer of disclosure to a medical officer nominated by the applicant was reasonable. But the court opined that a health authority or doctor was under a common law duty to allow an individual access to medical records. This is subject to the exception that it need not be disclosed if it's disclosure is detrimental to patient's health. It further recognised the right of access to successor doctor for further treatment or legal advisers required in connection with a later claim.

The above decision deserves credit for the reason that it could dilute the extremely limited access to the medical records. Prior to the decision a patient had either to find a willing doctor or institute a legal proceeding to obtain information through discovery.[10] From the facts of the above case, it is doubtful whether a patient enjoys personal access to the records. It is not obvious from the stand taken by the court in dismissing the appeal. Though one may easily find a willing doctor

---

9. Popplewell J. observed:
> "There is a distinction to be made between the information conveyed by a patient for the benefit of the doctor's consideration and the conclusion to which the doctor comes based on that information. The opinion of the doctor is wholly the property of the doctor. It does not seem ... that the fact that the patient provides the original information entitles him subject to exception to see the conclusion of doctors based on that information." See *R. v. Mid Glamorgan Health Services Authority,* [1993]1 Med. L.R. 378 at p. 379-81.

10. Dermot Feenan, "Common Law Access To Medical Records",59 M.L.R. 101 at p. 105 (1996).

to scan the records for the purpose of further medical treatment, it is doubtful whether a doctor will disclose the information if it is sought to initiate a legal action. This hardship can be mitigated by allowing an access to the records to the legal advisers.

The court has conferred discretion to a doctor to prohibit access in the best interest of the patient. It is based on the premise that a doctor obedient to high medical standards impliedly contracts at all times to act in the best interest of the patient.[11] Likewise he does not impliedly accept the obligation of disclosing all information at his disposal to a patient, as some information might confuse and some make a patient panic.[12] But what is not obvious is which information would confuse the patient, and what makes him panic. Any adverse remarks about the health of a patient would certainly perturb him. Accordingly the best interest theory would demand non-access to the records. A mere perturbation or harm should not be made a stumbling block to have an access to information. Therefore it is submitted that such harm must be of a fatal proportion, a kind contemplated in *Canterbury.*[13] With regard to the obligation to disclose information the court observed that a doctor was under no obligation to disclose if it was detrimental to patient's interest. The court said,[14]

---

11. *Sidaway v. Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital*, [1985]1 All E.R.643 at p. 665 (H.L.).
12. *Ibid.*
13. 464 F. 2d 772 (1972), as quoted in I. Kennedy and A. Grubb, *"Medical Law"*, London, p. 191 (1994).
14. *Ibid.*

> "... such a threat of detriment to the patient as to become unfeasible or contra indicated from a medical point of view. It is recognised that patients become so emotionally distraught on disclosure as to foreclose a rational decision or complicate or hinder the treatment or perhaps even pose psycological damage to the patient. Where that is, the cases have generally held that the physician is armed with a privilege to keep the information from the patient... portents of that type may justify the physician the action he deems medically warranted".

In *Exparte Martin*,[15] the court re-iterated medical paternalism by re-affirming the position of doctors as custodian of best interests of patients. This proposition can not accepted. Doctors prohibit access to medical records not only in the best interest of the patient but also when they contain detrimental information or for fear of legal action. The best interest weapon is used as a cloak to conceal some extraneous reason like discouraging the patient from instituting any legal action in respect of the treatment.[16] Therefore it is submitted that the best interest theory can not be pushed to the extreme so as to unduly favour doctors to facilitate the attainment of disguised ends.

Access to medical records under English statutes :

Under Supreme Court Act 1981, a patient has a right to apply for a court order requiring the doctor or hospital authorities to disclose the records likely to be

---

15. See *supra* n. 7.
16. In Martin's case it should be noted that initially the respondent doctors had asked an assurance from the applicant that records would not be used for initiating a legal action in respect of the treatment.

relevant in ensuing legal proceedings[17] On such an application, the court may order any party in possession of the documents to produce the same to a medical adviser or legal adviser.[18] Earlier under the Administration Justice Act 1970, the patient himself was entitled to see the documents.[19]

It is always advisable for a doctor or a health authority to disclose the documents voluntarily. Reluctance to disclose or disclosure made conditional on an assurance not to sue heightens the suspicion of a patient.[20] To avoid fishing expeditions by the aggrieved patients, a court will generally order for disclosure only if it is convinced of the intention to bring proceedings and a real likelihood of parties going ahead with the proceedings.[21]

The right of pre-trial discovery does not extend to any expert opinion prepared on the basis of contents of the records by a doctor or hospital sensing the possibility of a litigation.[22] But where both doctor or health authority and patient prepare expert evidence, a patient may file an application for disclosure. There is no fetter on the court restricting it from directing pre-trial disclosure of the same

---

17. The Supreme Court Act 1981,s.33(2).
18. S.34. See also ss. 52 and 53 of County Council Act 1984.
19. See *Mclvor v. Southern Health and Social Board,* [1978]2 All E.R. 625 (H.L.).
20. *Dunning v. Board of Governors of the United Liverpool Hospitals*, [1973]2 All E.R. 454 at p.458 (C.A.).
21. *Ibid:* Stamp L.J. observed:
    " The court is to be persuaded on the facts before it to find that the fisherman is likely to find a worthwhile and catchable fish"
22. *Lee v. Southwest Thames Regional Health Authority*, [1985]2 All E.R. 385 at p. 389 (C.A.).

as it would enhance the prospects of pre-trial settlement of actions.[23] But the above direction will not be given, if in the opinion of the court expert evidence is to a material extent based upon a version of facts in dispute or facts which generally can not be ascertained by the so called expert nor are within his professional knowledge and experience.[24]

In a pre-trial discovery action a doctor or hospital authority may raise the defence of limitation. The court is entitled to take into account the defence to exercise it's discretion of not ordering the disclosure, provided it is obvious beyond doubt that the proposed limitation defence would succeed.[25] Normally the courts shall not take into account the defence as at that stage it would not have sufficient material to come to a proper decision of the defence.[26]

During trial court can issue subpeona for production of medical records. But it pre-supposes a pendency of litigation between him and the doctor or health authority.

A patient who has reason to believe that information pertaining to his health care is electronically stored by a doctor or hospital he may apply to the latter for access to it on payment of a reasonable fee and the latter is bound to give an access.[27] But a mentally retarded patient may be unable to comply with the formal procedure contemplated in the Act to get an access to the information. On behalf

23. *Naylor v. Preston Area Health Authority*, [1987]2 All E.R. 353 at p. 360 (C.A.).
24. See R.S.C., Order 38.
25. *Harris v. New Castle Health Authority*, [1989]2 All E.R. 273 at p. 277 (Ch.D.).
26. *Ibid.*
27. The Data Protection Act 1984, ss. 21(1), 21(2).

of such a patient, any person having authority to manage his affairs may apply to the Secretary of the State.[28]

The information tendered shall be intelligible to the patient.[29] If it consists unintelligible terms an explanation for the same shall be given.[30] A patient may recover compensation for damage or distress arising from the inaccuracy of data.[31] But the holder of information is entitled to invoke the defence of reasonable care.[32]

A patient's access to information is barred if the information is likely to cause serious harm to his physical or mental health.[33] Then the logical inference is that the information supplied is the total information minus the detrimental information. This suggests existence of additional piece of information, which will not come to the notice of a patient by any stretch of imagination. If it is not disclosed a patient can not ascertain whether it falls into the fold of exempted information. There is no provision contemplating supply of such exempted information to any other doctor also. In effect the doctor has unfettered discretion to withhold the information. Moreover if the information is required for further treatment it will expose the patient to hardship.

If a patient is refused access, at the very outset it must be proved that the information is electronically stored. It is easy to destroy the data, as it is to store it.

---

28. *Id.*, s. 21(9).
29. *Id.*, s. 21.
30. *Ibid.*
31. *Id.*, s. 22(1).
32. *Ibid.*
33. The Data Protection [Subject Access Modification (Health)] Order 1987, Regulation 4(2).

Destruction of information, no doubt, raises a presumption of negligence on the part of a doctor. But destruction pre-supposes existence of information, which throws onerous burden on the patient to prove it. To safeguard the interest of the patient in this regard there is no provision.

Under the Access to Health Record Act 1990,[34] a patient[35] may apply to a health professional[36] for access to the health records. These records may consist information relating to his physical or mental health or any other information including the opinion of the health professional in connection with the care of the former.[37]

If follows that the term health record is very comprehensive which includes the information tendered by the patient and opinion formed by the doctor based on that information. Therefore access implies access to the whole record without any

---

34. This Act is wider in scope. The Access to Medical Reports Act 1988, provides for access to medical reports for the purpose of employment and insurance only. Accordingly it has only restricted application.
35. S. 3 of the Access to Health Records Act 1990, allows the following person to seek information.
    a) A patient.
    b) A person authorized in writing on behalf of that patient
    c) If the patient is a child, a person having the parental responsibility
    d) If the patient is a pupil, a parent or guardian
    e) Where the patient is incapable of managing his own affairs, a person appointed by a court.
36. *Id.*, s. 2(1) defines a "health professional". It includes a registered medical practitioner, dentist, optician, pharmaceutical chemist, nurses, midwife or health visitor, chiropodist, dietician, occupational therapist; orthopaedist or physiotherapist; a clinical psycologist, child psycologist, child psycotherapist or speech therapist; an art or music therapist employed by a health service body and scientist employed by such a body as head of department.
37. See *id.*, s.1(1) read with s. 3.

distinction between information and opinion. Accordingly a doctor is not allowed to block the access with a plea that the opinion is his own.

The access shall not be given to any part of a health record if it would disclose information likely to cause serious harm to the physical or mental health of a patient in the opinion of the health professional or holder. The words "in the opinion of the persons" contemplated above, introduces a subjective yardstick to weaken the purported commitment to patients access to health information. Moreover the hardship is further accentuated by the fact that if the information is likely to expose any person other than the patient to harm, access can be prohibited.[38] Therefore a doctor can successfully block the access on any one of the these counts. Hence it is submitted that there must be a provision incorporating access to the medical record to any other doctor or legal adviser nominated by the patient.

Access to medical records in Canada :

The right of access to medical records is authoritatively laid down as an adjunct of fiduciary relation between a doctor and patient.[39] In *McInerney v. Mac Donald,*[40] a patient was treated by many doctors over a period of years prior to the

---

38. *Id.*, s. 5(1).
39. For a discussion see, Andrew Grubb, "The Doctor As Fiduciary", in M.D.A. Freeman and R. Halson (ed.), "*Current Legal Problems*", Oxford, vol. 47 pp.311-340 (1994).
40. [1992]93 D.L.R. 415. See also *Parslow v. Masters,* [1993]6 W.W.R. 273 (Sask Q.B.), as quoted in Andrew Grubb, *supra.*

treatment by the appellant doctor. On the advice of the latter, she discontinued the consumption of thyroid pills prescribed by predecessor doctors. She concerned about her previous medical care wrote to the doctor asking for the contents of earlier medical reports. The doctor refused access to such medical reports on the ground that it would be unethical on her part to do so. Instead she suggested the patient to approach the earlier doctors for the release of the records. The patient could not get them. She brought an action against the doctor for an access to the records. The Supreme Court of Canada held that the fiduciary relation that existed between a doctor and patient would give right of access to the information relating to latter's health care.[41] La-Forest J., observed,[42]

> "The fiduciary duty to provide access to medical records is ultimately grounded in the patient's interest in his or her records... Information about oneself revealed to a doctor acting in a professional capacity remains in a fundamental sense one's own. The doctor's position is one of trust and confidence. The information conveyed is held in a fashion some what akin to a trust. While the doctor is the owner of the actual record, the information is to be used by the physician for the benefit of the patient. The confiding of the information to the physician for medical purposes gives rise to an expectation that the patient's interest in and control of the information will continue".

---

41. But the majority of the New Brunswick Court of Appeal held that there was an implied term in the contract between the doctor and patient giving the patient a right of access to materials in the records if related to the treatment or advice provided by the doctor, *MacDonald v. McInerney*, [1990] 66 D.L.R. 736.
42. See *McInerny v. MacDonald, supra* n.40 at p. 424.

The court further continued that a doctor enjoyed a discretionary power to withhold the information, if it was likely to cause substantial adverse effect on the physical, mental or emotional health of the patient or harm to a third party.[43]

The above observation shows that by a logical extension of trust and beneficiary relationship to a doctor and patient, the court recognised patient's right of access to the information contained in the medical reports. It should be noted that the court laid down this important right in the absence of any cause of action either based on tort or contract or property interests.

It is to be admitted that the reasoning of the court based on trust theory does not sound to be convincing one. A trust pre-supposes transfer of a property to the trustee, to be administered in good faith in the best interest of the beneficiary for whose benefit the property exists. In the strict sense information and opinion based on the same do not answer the description of property, though in a loose sense it will.[44]

A patient who reposes confidence in a doctor always expects the doctor to act in his best interest. If in the best interest of the patient the injurious information can be withheld, the same consideration equally applies to access to the information. Best interest of the patient gets frustrated if access to the information is blocked. Therefore it is submitted that the best interest theory itself can be an independent premise on which right of access to records can be based. Nothing can prevent the legislature from passing a statute conferring access to medical records based on such a theory as a matter of policy.

---

43. *Id.* at p. 430.
44. In the strict sense 'property' means proprietory rights in rem. In the loose sense it signifies, whatever that is his in law, see P.J. Fitzerald, *op.cit.* at pp. 411- 412.

Access to medical records in Australia :

In Australia a rigidly legalistic view is taken with respect to right of access to medical records. It is an accepted view there that the claim can not be carved from any of the established legal premises without distorting them. Accordingly some learned authors opine that it is a claim without any pigeonhole or a category.[45] In *Breen v. Williams,*[46] a woman underwent a surgery for insertion of silicone implants in her breasts. Complications occurred after the surgery. She consulted a plastic surgeon. He performed remedial surgery, but to witness only continuation of complications. A class action was instituted against the manufacturers in the U.S.A. on the ground that the implants were defective. She was allowed a conditional option for the settlement provided the medical records were produced. She claimed an independent access to the medical records. The surgeon offered to release the records on condition that she would release him from any claim, which might arise in relation to the treatment he performed. Declining the offer, she brought an action against the surgeon claiming an access to the records. The court held that the patients did not have common law right of access to medical records, which could not be deduced from the existing premises

45. Jane Swanton and Barbara McDonald, "Patients Right Of Access To Medical Records – A Claim Without A Category", 71 A.L.J. 413 at p. 416 (1997)
46. 186 C.L.R. 71.

of law of contract,[47] property[48] and fiduciary relation.[49]

But the court recognised existence of an implied obligation to divulge the information, subject to exclusion by express provision, if refusal to make the information available would prejudice patient's health.[50]

It can be inferred from the facts of the above case that the doctor was apprehensive of being dragged into the court in respect of the treatment. It was the reason for refusing an access to the records. Moreover it is evident from the facts that the information did not contain any material which would have exposed the patient to any detriment. The access would have certainly helped the patient to prove the liability of the manufacturers for supply of defective implants. It is submitted that the court had failed to take into account these facts.

The judicial attitude represents a classic exposition of judicial restraint in a very delicate area of medical law. Such attitude is the result of a notion that the right of access can not be accepted unless the existing legal principles are distorted. The court observed in a penchant language,[51]

---

47. According to the court a right of access could not be deduced from the premises of law of contract in the absence of a formal contract conferring such a right. The implied term in a contract and the doctor's duty to take reasonable care and the best interest theory do not go so far to encompass an obligation to enable a patient to have an access. *Id.* at pp. 78-79.
48. Similarly the court said that information was not a property in a strict sense. Even if it is, it is the property of a doctor who exclusively enjoys a copyright over it. The patient can be considered as the owner of the information only in the context of a doctor's duty of confidentiality. *Id.* at pp. 80-81.
49. Fiduciary duty prohibits securing an undue advantage from a relationship of ascendancy or influence by one party over the other. Refusal of access does not imply an act of undue advantage according to the court. *Id.* at pp. 82-83.
50 *Id.* at p. 79.
51. *Id.* at p. 115.

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine brought about by judicial creativity, must fit within the body of accepted rules and principles... It is a serious constitutional mistake to think that the common law courts have authority to provide a solvent for every social , political or economic problem. The role of common law courts is a for more modest one."

It is submitted that the above propositions do not help patients who are already placed in a precarious position. If the legislative lethargy allows the gap to remain, the judiciary must step to avoid perpetuation of injustice. The judges can do it by deducing a principle from the established premises or laying down a novel principle to cure the malady. Common law does not imply mere deductions from existing premises, but signifies creation of novel principles to cater with novel situation.[52]

The right to access is viewed as a claim good in policy, but not in principle. To consider every claim without a principle, as a matter of policy is nothing but pushing the matter to the extreme. Such a consideration reflects a bad policy choice. The English Court in *Ex--parte Martin* has adopted a pragmatic approach in recognising a common law right of access. But in Australia, a contradiction is struck by negating such a right. Unfortunately the court had refused to amplify the concept of fiduciary relationship beyond the traditional sphere of conflict between one's interest and duty.

A dubious dichotomy is created between access to information and access

---

52. See *supra* n. 44 at p.38.

to record.[53] It is a matter of semantics without any substance. A patient claims access to record in order to have an access to the information contained therein. The above view is based on the proposition that without giving an access to records a doctor can provide the information. It is submitted such an approach fails to check the manipulation of information by doctors for the fear of being dragged into the court.

The hardship is further aggravated by the observation that the fee paid for service or treatment does not cover the fee for furnishing information and therefore a doctor is entitled for a reasonable reward.[54] It is submitted that such an extreme view would prove suicidal. The doctors may extort money from the patients for providing information. It is a myth that doctor's fee does not cover overhead expenses connected with his professional service. With due respect to the charity oriented doctors, it is placed on record that the doctors like any other human being are the products of this commercialised world. There is contradiction in the view of the court in as much as it recognises an implied obligation to provide information. As per the above proposition a patient needs to pay reward. It is submitted that where there is an existing obligation to furnish information the idea of reward for the same becomes meaningless and this is nothing but distortion of existing principle.

Though an implied obligation to furnish the information is recognised it's ambit is very much limited. It extends for further medical treatment only. It is quite

53. See *supra* n. 46 at p. 79.
54. *Ibid.*

possible that if doctor has realized his mistake he may furnish manipulated information. Further the obligation can be excluded by a doctor by an express provision. It will jeopardises the patient's interest. In effect the limited right given is snatched away.

It was further observed that unless there was a formal contract, there was no right of access.[55] No doctor or hospital will agree to provide a right of access under contract with the patient. It should be noted that if a patient insists for a term conferring access, the doctor or hospital will refuse to treat him. In cases of emergency treatment, a patient's position will be more precarious.

Access to medical records under Europeon Convention on Human Rights:

Every person is guaranteed a right of respect for private and family life, his home and correspondence.[56] Public authority can intervene only in accordance with law, for the protection of health.[57] In *Gaskin v. United Kingdom*,[58] the applicant was committed into the care of Liverpool's City Council. He alleged ill-treatment in care. He unsuccessfully attempted to obtain the details of information in the records. As he was refused access to all the records, he instituted an action before the European Court of Human Rights. He contended before the court that the refusal was in breach of his right to respect for his private and family life. It was held that the records of his care were significant to him, as a part of what he

---

55. *Id.* at pp. 78-79.
56. See the European Convention on Human Rights 1995, Article 8(1).
57. *Id.*, Article 8(2).
58. [1989] 11 E.H.R.R. 402.

was and they stood as substituted for parental memory of children brought up within their own family. The court observed,[59]

> "... Respect for private life requires that every one should be able to establish details of their identity as individual human beings and that in principle they should not be obstructed by the authorities from obtaining such very basic information without specific justification".

The decision is most noteworthy, as it recognises the right of access to medical records as a part of human right. The health authority can refuse access to the records only if the same is necessary to protect the health of the applicant. The city council could not prove that it's refusal of access to records on that ground.

Access to medical records in India :

In India the consumer courts have taken the view that patients can not claim access to medical records as a matter of right. In *Poonam Medical Foundation Ruby Hall Clinic v. Maruti Rao L. Titkare,*[60] a patient was given a discharge card and also a case sheet which contained the particulars of the diagnosis and the treatment given to him. His grievance was that the hospital refused to part with medical records pertaining to his treatment and operation for deudenal ulcer and appendicitis. The National Commission held that there could be no question of deficiency in service by reason of such failure to furnish the documents to a patient, unless there was a legal duty cast upon the hospital to furnish the documents.[61] It was further observed that no law or convention to this effect had been placed on record enjoining a duty to furnish full particulars to the

---

59. *Id.* at p. 407.
60. (1995) 1 C.P.J. 232 (N.C.).
61. *Id.* at p. 233.

patient and there was no arrangement for hiring of services for furnishing all medical records pertaining to the patient.[62]

Declining access to medical records may fall within the ambit of deficiency in service. But the decision has created ripples, in so much as it holds that the patient has no right to access to medical records in the absence of any law or convention to this effect. In some of the common law jurisdictions, right of access is recognised.[63] Further any profession develops conventions only to safeguard it's interest. Accordingly the convention so developed by hospitals and doctors is one of non-access to medical records to safeguard their interest. Now since there is no express legal duty to furnish the documents, doctors and hospitals will certainly refuse to part with any information for the fear of getting entangled in the consumer forae.

The court has held that there is no duty to furnish full particulars. Logically it follows that there is a duty to disclose some particulars. It is not obvious what particulars must be divulged. So the doctors and hospitals will filter the information and furnish only such information, which can shield them.

In *T. Rama Rao v. Vijaya Hospitals,*[64] the hospital authorities refused to provide copies of the case sheets and other relevant documents relating to the

---

62. *Ibid.*
63. See *supra.*
64. (1997) 2 C.P.J. 177 (Tamilnadu S.C.D.R.C.).

treatment given to the deceased. Instead of case sheets the complainant was supplied with nurse's sheet. It was held that there was no undertaking on the part of the hospital under an agreement or otherwise to furnish the case sheets.

It is obvious from the ruling that if there was an agreement allowing access to the records a patient accordingly could claim a right of access. But a patient can not hope for such an undertaking on the part of doctors and hospitals.

Opinions are expressed to the effect that the case sheets are not the only devices through which deficiency in service could be proved. Even in their absence it can be proved.[65] But the detailed information is borne by the case sheets and other documents. A patient can not prove the deficiency in service with the help of nurse's sheets. The hospital authorities if do not even supply nurse's sheets, a patient may find it difficult to prove deficiency in such a situations. The problem is further aggravated by the fact that at times no doctors may come forward to adduce evidence against a fellow doctor. Therefore it is submitted that the right of access to medical records must be examined in the light of the above realities.

If the right of access is not recognised, the only alternative for a patient is to apply to the court[66] or consumer forae[67] as the case may be for production of documents during the pendency of any proceedings. Medical records are not

---

65. Skaria, "Consumer Notes", *The Indian Express*, Kochi, Oct. 15, 1997, p.7.
66. See O. 11 r 14 C.P.C. 1908, read with section 30.
67. See the Consumer Protection Act 1986, ss. 13, 17 and 22 read with rule 10(1) of the Consumer Protection (Central) Rules 1987.

privileged documents and accordingly the doctors can not refuse to produce them.[68] During the pendency of proceedings, if there is reason to believe that the records which may be required to be produced in the proceedings, may be destroyed, mutilated, altered, falsified or secreted the courts or consumer forae may authorize the seizure of such records.[69] Both production and seizure of documents pre-suppose filing of a suit or complaint as the case may be against a doctor or hospital and their denial of the charge of negligence.

Access to medical records ; A critical appraisal :

Patient's right of access to medical records is one of the most controversial area of medical law. Divergent stands have been taken in various jurisdictions.

The English law has recognised the right of access as a statutory as well as common law right. But access to the records can be blocked on the ground of best interest of patient. It will be a blank cheque to the doctors to block the access to information . An access to the records minus the detrimental information which falls into the ambit of therapeutic privilege of non-disclosure will be in the interest of a patient.

English law further confers a patient the right of pre-trial discovery of medical records. It has the merit of avoiding unnecessary litigation against the doctors and hospitals, in the absence of a genuine claim. But the courts have the onerous task of avoiding fishing expeditions by the patients.

---

68. They are not privileged documents under the Indian Evidence Act, 1872.
69. The Consumer Protection (Central) Rules 1987, rule 10 (2).

The Canadian court has blown the traditional sphere of fiduciary relation beyond the conflict between one's interest and duty, to find out a solution in it's zeal to achieve the ends of practical justice. Fiduciary relation implies utmost good faith. A patient in good faith tenders information regarding his health while seeking the opinion of the doctor. The confidence he reposes in a doctor in doing so makes him to expect the information tagged with opinion. It is wrong to say that the opinion exclusively belongs to the doctor and accordingly he has a copyright over it. But the truth is that the opinion does not fall from heaven. Opinion of a doctor is an off-spring of the information given by the patient.

The Australian law has taken the view that in the absence of a principle based access, to carve out a right from vacuum would result in perversion of law. Accordingly it does not confer any access to records but recognises the obligation of divulging information which otherwise will prejudice the patient's interest. But the obligation can be excluded by exclusion clauses. In effect no right of access is conferred to a patient.

A right of access can be carved from the premise of human rights which in it's radical approach signifies basic needs.[70] Health care is one of such basic needs concerning human body. The curiosity of human beings to know about the things concerning their body does not require any over-emphasis. A patient submits his body with information within his knowledge for the opinion of a doctor. An

---

70. Dr. N.K. Jayakumar, "Human Rights In India – An Overview", paper presented at the Seminar on Human Rights organized by the Centre for Human Rights, Legal Aid & Research, on 30th Sept. 1994, at Thiruvananthapuram.

inherent right to know the opinion of the doctor stems from the bodily autonomy of an individual. Such respect signifies respect for human right. It is in this context right of access to medical records needs to be perched on a higher pedestal.

Inspite of all scientific developments human beings have become vulnerable to incurable diseases. The medical science has witnessed development of unprecedented modern technologies in the sphere of administration of treatment. They have their adverse impact on the human body. This has led to the emergence of the doctrine on informed consent. A patient has a right to know the proposed treatment with it's inherent risks unless the non-disclosure is justified. But a patient has an implied right to know whether he was actually administered the contemplated treatment as per the consent letter.[71] That can be ascertained only through access to the records. In the absence of an instant access to the records, the only alternative for a patient is to initiate a legal action and then apply for production of documents. If in the mean time the records are cleverly manipulated and the manipulation can not be proved a patient is exposed to the charge of initiating a frivolous action. Therefore by a legislation granting a right of access to medical records can avoid unnecessary litigation.

The position of law relating to medical records in India presents a gloomy picture compared with the other jurisdictions. None of the premises recognised by those jurisdictions could catch the attention of National Commission. Accordingly

---

71. *Lee v. South Thames Regional Health Authority*, *supra* n. 22.

even though the Consumer Protection Act 1986, contemplates easy access to obtain justice for deficiency in service, the non-recognition of the right has rendered it futile.

CHAPTER IX

CHAPTER IX

Legal Accountability for Deficiency in Medical Service: An Empirical Study

Doctors face many practical difficulties. An understanding of the difficulties and constraints with which they work is necessary in fixing the contours of their legal liability. Accordingly an attempt was made to obtain their opinions with respect to their perception about legal accountability, amenability to consumer forae, informed consent, access to medical records and adequacy of controls by Medical Councils. For this purpose opinions were collected from 200 doctors. The selected doctors included junior and senior doctors employed in private and government hospitals, professors of medical colleges, private practitioners practicing in urban, semi-urban and rural areas. The study was confined to Dakshina Kanada and Udupi Districts of Karnataka. Opinions of some doctors from vadagara, Kanyakumari, Kottayam and Trivandrum were also collected. Questionnaire method and personal interviews were undertaken for collecting the information.

Legal Accountability :

Majority of doctors opined that no doctor could afford to be negligent. It would detrimentally affect their professional reputation. They did not argue for exemption from legal accountability as they apprehended that doctors might

develop a propensity to lean towards negligent conduct. A few doctors voted for exemption from legal action. Even those doctors who pleaded exemption were not against punishing a doctor for gross negligence. A few doctors expressed the view that legal accountability was a debatable concept. But there was unanimity of opinion that legal accountability would not make the doctors to quit the profession. In stead they would make use of all the defensive mechanism to shield themselves.[1]

Inclusion of medical profession under the Consumer Protection Act :

All most all the doctors condemned their inclusion. They expressed anguish and opined that it was a retrograde step. They cited the following reasons.

(i). Human body is an enigma. As such no one can predict precisely the body response to different treatments. Body response vary from patient to patient. A patient may exhibit different body response for the same treatment at different stages. Hence no one can guarantee success in the treatment. According to one senior doctor,[2] the Act demands not 100% but 150% success from a doctor.[3]

---

1. According to some doctors there is no way out but to continue in the profession with all it's hardship. New entrants also opined that they would stay in the profession.
2. This doctor refused to reveal his identity and fill the questionnaire. But he answered all the questions orally.
3. The discussion in the fore-going chapters show that law never compel success in medical treatment unless there is an express agreement by doctors to that effect.

This in effect will cause to repeat American medical negligence crisis in India. The American doctors refuse to treat pregnancy cases as the patients sue them for abnormalities in new-born babies and if this situation continues a day will come where all Americans will have to go to a country where law is soft for doctors. It will repeat in India also.

(ii) The application of the Act to doctors in a developing country like India is impracticable because of low doctor-patient ratio and per capita income. The doctors will be more defensive and may resort to all unnecessary investigations. This will increase the cost of treatment and result in an unbearable burden to an average Indian patient. It can be a progressive step in a country where there is a high public awareness regarding the inexact nature of medical science. In Indian conditions, the inclusion is a hasty step.

(iii). The Act kills the potentialities of a doctor. Even for minor fault, he will be dragged into the court. He is not prepared to take the risk in the interest of patient. This point is illustrated with the help of two live cases. In one case[4] a patient complained stomach ache. The surgeon suggested an operation. After administration of anaesthesia, even before the incision was made in the stomach, patient's heart beat stopped. The surgeon sensing calamity, even though not a heart specialist, opened the chest wall within 20 minutes deviating from the prescribed

---

4. It took place in Mysore Medical College 30 years ago.

mode and did the needful. The heart beating resumed. Later it took him nearly 2 1/2 hours to stitch the same as per the prescribed procedure. The patient survived and the proposed operation was cancelled. He somehow recovered from the stomach problem without any further treatment. Later finding an incision mark on the chest he questioned the surgeon. The surgeon without revealing the real fact, consoled him not to worry about that as he could recover from the stomach ache. The doctor who narrated the whole incident opined that if it were to happen now no doctor would take such a risk.

In another case[5] a boy swallowed an article which stuck in the throat and resulted in suffocation. The doctor to whom the boy was brought refused to remove the article for lack of facilities. He advised to take the boy to a hospital. He disclosed the fact that the condition was very serious. On the way to a hospital the boy died. The doctor said that he did not venture to do the needful for the fear of legal consequence, which made him to repent later. He recalled his memory of a similar incident, which happened in the past before the Consumer Protection Act came into force where he saved the patient.[6]

---

5. Personal experience narrated by Dr. Rammohan, a senior doctor with an experience of 30 years, Vittal, D.K. District, Karnataka.
6. In that incident a boy swallowed a coin which was stuck in the throat and caused suffocation. He was brought to the doctor. Much against the resistance of the parents, the doctor made an incision in the throat and removed the coin. Later the incision was stitched in a hospital. The boy survived.

(iii) The Act is materialistic in nature. It puts the concept of family physician into oblivion.

(iv) Much against the willingness of a doctor he is pressurised to treat the patients. Later on happening of any untoward eventuality for which a doctor can not be blamed, the patient along with relatives and instigators will proceed against the doctor. In this regard a doctor lamented that the Act opened a pandora box to gold diggers and ambulance chasers leading to a malpractice crisis of the kind witnessed in America which an average Indian can not withstand.[7]

(v) It will reduce the quality of service as the doctors are made to waste their time in consumer forae fighting baseless negligence cases.

(vi) The law makers have failed to understand that doctors have to work in a sphere which is full of constraints.

(vii) The concept of medical service is a relative concept, which demands an examination of factors like services rendered by the attendants and para-medical workers. Further the drug manufacturing companies may keep the doctors in ignorance as to the deleterious side effects of the drugs.

(viii) Doctors are not vegetable sellers and they do not sell any services over the counter. According to them, the Act is applicable only to traders.

---

7. A doctor with his American experience narrates that a lawyer always looks out for the release of a patient from the hospital to grab the opportunity or sometimes to instigate the patients to sue a doctor for medical malpractice.

However some doctors consider the applicability of the Act as a progressive step. According to them it will not affect responsible and good doctors. One senior doctor observed,[8]

> "The law has not changed since the introduction of Consumer Protection Act. A sincere doctor practicing medicine in good faith need not worry about any law. In life occasionally innocent people suffer in cross fire. As such doctors are not exception to this rule."

Some doctors suggested that the Act appeared to be progressive and had a philosophy, but lacked the insight.[9]

Exclusion of government doctors :

Private doctors categorically voiced their wrath for exclusion of government doctors from the purview of the Act. According to them the reason for such exclusion lies in the fact that negligence has assumed an unprecedented proportion in government hospitals. The government wants to avoid payment of compensation. One senior doctor said, "it is only with the help of private doctors government could achieve health to all, not with the help of government doctors. In return the government and patients are after the blood of private doctors".

---

8. Dr. K.M. Saralaya, Associate professor, K.M.C. Hospital, Manipal.
9. Dr. R.P. Pai, Medical Superintendent, Dr. T.M.A. Pai Health Centre, Udupi.

Quantum of compensation :

It is the majority opinion that the compensation awarded by the consumer forae is exhorbitant.[10] The reason is that consumer forae are incompetent to decide the medical negligence cases. They have no expertise in assessment of damages. A doctor complained that he operated a patient for a fee of Rs.3,000/. But in the alleged negligence action against him, the compensation claimed was Rs.30,000/- . He argued that if the negligence was proved, the doctor should be asked to repay the cost of operation only. Some doctors suggested that if the negligence was not proved, consumer forae should order the patients to pay the same quantum of compensation claimed against doctors.[11] Yet there are doctors who were not averse to the idea of reasonable compensation. They suggested that compensation would be of use to a patient only if the case was settled at the earliest.

Competency of civil courts :

Doctors considered civil courts as more competent than the consumer forae on the ground that the former adopted better procedure and the latter only a

---

10. A few expressed the opinion that they did not have any idea about the quantum. A few doctors acknowledge that compared to the U.S.A. and western countries it is very less.
11. Some suggested 50%. According to a few others 5 times of compensation claimed against them should be awarded to them.

summary procedure. On the contrary, a senior doctor suggested a via-media between consumer forae and civil courts. To strike a balance between easy access and procedural shackles, he suggested that only genuine cases of negligence should come for adjudication.

Self - regulation through medical councils :

Majority of doctors preferred self-regulation through Medical Councils. According to them adjudication by the council was better than decisions by consumer forae and civil courts. The reason stated by them was that only the former had real competence to deal with medical negligence cases. Some of them confessed that as the situation stood Medical Councils were not well-equipped to deliver patient justice. But it could be strengthened. A few doctors acknowledge that the Medical Councils were teethless bodies, meant for recognising and de-recognising medical degrees. They magnanimously admitted that only in two or three instances, professional misconduct by doctors was punished.

Informed Consent :

All the doctors are aware that they are bound by the doctrine of informed consent. An experienced doctor said that they observed the requirement of informed consent in it's true spirit. Even prior to the introduction of the doctrine, some of them considered it as their duty to divulge certain information. But it's utility in the Indian conditions was questioned on the ground that most of the

people were illeterate and psycologically weak. Further doctor-patient ration was very poor. Since there was a big queue of patients, it was not possible to disclose all the particulars. Accordingly it was expedient to disclose information only to such patients who demanded it.

Yet the following opinions were expressed.

(a) The consent based information varies from case to case and it is not possible to divulge the information in an emergency situation.

(b) All particulars like the nature of the disease and it's future course, treatment, it's side effects, and the risk to life or limb involved are to be divulged. They must be divulged to the relatives of the patients and not to the patients, since the patients will be under a psycological trauma if they doubt that the treatment might prove futile.

(c) Every book on medicine, points out one or the another side effect of a treatment. If these side effects are divulged, no patient would come forward to undergo the treatment. Hence it is a delicate area where a doctor needs to exercise high degree of wisdom in communicating the risks connected with the treatment.

(d) In big hospitals doctors may reveal all the information as they may not loose much patients. But private practitioners may not reveal the risks for the fear of loosing the patient. So observance of the doctrine varies with the set-up in which doctors are placed.

(e) It was suggested that even though decisions as to what treatment should be given was essentially doctors, there should be patient participation in the medical decision making process and this could be possible only by disclosure of information.

A few doctors suggested to abolish the doctrine on the ground that whatever a doctor did was in good faith. It should not be a matter for judicial scrutiny.

Discretion to doctors :

It was suggested that more discretion must be given to the doctors during emergencies and in surgical operations, administering anaesthesia, treatment and where all efforts to diagnose the disease had failed, to do any act in good faith in the interest of the patient.

One senior doctor suggested that more discretion was not required as already there was sufficient discretion to the doctors in all situations contemplated above.

Existing laws and doctors :

Majority of the doctors expressed the view that existing laws were harsh towards them and favourable to the patients. In their opinion that Consumer Protection Act titled the balance towards the patient. Accordingly existing laws minus the Consumer Protection Act would restore the status quo.[12]

12. A few doctors were of the opinion that laws could not favour any one. They expressed the view that laws were neither beneficial to doctors nor patients but only to the lawyers.

Medical records :

It was pointed out that most of the doctors did not maintain patients records which were beneficial to both to defend their respective interests. Some doctors maintained that there was practical difficulty in maintaining the records of each and every patient where they had to examine a number of patients per day. It was possible only in well established hospitals.

Rural doctors :

The rural doctors considerd the whole scenario of legal accountability as very much agonising and lamentable for them. They pointed out that they had to treat patients without diagnostic facilities. They revealed that some people would pressurise them to treat much against their will and they obliged on humanitarian grounds, as otherwise patients would have to be committed to big hospitals where the treatment was expensive. They opined that even though they were not specialized in all fields of medicine, because of their basic knowledge in the medicine, they might venture to take some risk for the benefit of patients. The fear of legal accountability stands as an obstacle on their way. One doctor revealed that some doctors extorted the patients and finally referred the patients to nearby big hospitals.

Criminal negligence :

There is consensus among the doctors for legal accountability for criminal

negligence.[13] On the question of punishment they differed. Most of the doctors stood for payment of punitive compensation rather than imprisonment, as it attached personal stigma. But a few suggested imprisonment, as doctors who are well off can easily get away by paying compensation. A suggestion was mooted by some doctors that dismissal from practice would be a better alternative to punitive compensation.

The doctors expressed much anguish over the torture by police officials in alleged negligence cases resulting in death.[14] Accordingly it was suggested that a doctor should not be arrested unless gross negligence was proved beyond doubt by the court. Moreover alleged instances of negligence would appear in big headlines in newspapers. But when the case was decided in favour of a doctor, either it would not appear in the newspaper or if appeared in small words in some unnoticeable portion of the newspaper. They suggested that such repressive acts which would tarnish the reputation of a doctor should be prohibited. Such cases should not be reported unless they were decided by courts.

---

13. It is doubtful whether the doctors are aware of the concept of criminal negligence. They opined that gross negligence of the doctors must be punished, citing the instance of deliberate inattention, injecting penicillin without dosage etc.
14. One doctor who was tortured in an instance expressed his dissatisfaction over the police officer's questions as to the treatment administered.

Action for negligence :

All most all doctors have answered the question, whether faced any negligence action negatively. One young doctor revealed that he faced a negligence action as a result of which he changed the institution. Some doctors stated that even though such situation arose, they did not land up in courts, as they could console the patients and settle the matter amicably. In one case[15] an American doctor administered a wrong treatment resulting in injury to the patient. The doctor realizing his mistake confessed that to the patient. The patient agreed not to sue him and asked the doctor to bear the cost of setting right the injury.

Doctors suggested that if negligence was proved against a doctor, it would not make him to quit the profession. Gradually people would forget the incident and he would be able to continue in the profession. But they opined that the possibility of relinquishing the job could not be ruled out in case of very sincere doctor.[16]

---

15. Narrated by an Indian doctor having association with the above doctor.
16. One senior doctor who was practising medicine in America left the profession when negligence was proved against him. He entered into real estate business.

Suggestions made by doctors :

The summary of suggestions made by doctors are

a) The Consumer Protection Act shall not be applied to doctors unless there is a panel of medical experts in the respective areas of medicine in the consumer forae.

(b) Doctors should be given more discretion.

(c) People should be educated about the enigma of medical professions so that they have better of understanding of "what" and "why" of a doctor's action. In that case they will not question any act of doctor done in good faith for the benefit of a patient.

(d) Legal accountability should be reduced to re-establish doctor-patient relation on humane condition.

(e) Doctor should commit a patient for second opinion in cases of doubt and should maintain proper medical records.

(f) Facilities given to a doctor employed in a hospital should be reduced when he repeats negligence after initial warning.

(g) Way-ward journalism, which tarnishes the reputation of doctors by giving undue publicity to an alleged case of negligence should be banned.

(h) Law relating to medical negligence should be included in the medical curriculum.

Doctors' opinion : A critical evaluation :

It is evident from the study that the wrath of medical profession is on Consumer Protection Act than on any other law relating to their accountability. They expressed much of their anguish over this Act. Most of the questions were answered keeping this Act, in mind.

Doctors harbour a misconceived notion of the Act. They are perhaps swept by the title of the Act and believe that the law aims only to protect patient and put their interests into oblivion. It is felt that ignorance of doctors about the real position and the cases in which liability was imposed created the trouble.

It is a notion strongly held by the doctors that the Consumer Protection Act, increased their duty to take care and expects to cure the patient always.

They have failed to understand that the law demands only a reasonable care and skill in attempting to bring about a cure. None of the consumer forae have directed doctors to pay compensation on the ground of their failure to cure the patients. No country in the world has a law insisting a doctor to cure a patient from any disease.

As rightly pointed out by some doctors the Act has a philosophy but lacks insight. The philosophy of speedy justice through easy access to consumer forae has resulted in a number of medical negligence cases coming before them. It has

certainly overcome some serious flaws of litigation in civil courts.[17] But serious thought must be given to the fact that out of thousands of cases filed only in a very few cases doctors were held negligent. Therefore there is a need to ensure that only cases where prima facie negligence is established are entertained by consumer courts.

In this context the suggestion made by doctors to establish Peer Review Committees consisting medical experts attached to consumer forae needs to be examined. According to them only those cases recommended by the committee where negligence is apparent on the face shall be tried by consumer forae. Such committees will be of much help to balance the interests of both doctors and patients. It avoids unnecessary harassment to doctors and save their precious time which could be used to render service to the needy. The patients can also avoid legal battle where success is doubtful. But the structure of the committee has to be decided based on several considerations. Accordingly it is submitted that along with medical experts the committee shall consist legal experts including the presiding officer of consumer court as the chairman. If there is any dead lock the chairman shall have the final say.

---

17. Because of procedural barriers cases relating to medical negligence rarely came before civil courts. They were only 3 in number between 1975 and 1985. See Upendra Baxi & Thomas Paul, *"Mass Disasters And Multinational Liability. The Bhopal Case,"* Bombay, pp. 216-218 (1986).

Doctors attack not only the competency of consumer forae but also civil courts to decide medical negligence cases. The reason is that there are no medical experts in both. To a certain extent it may be true. But judges are not totally incompetent to decide medical negligence cases. Cases are decided on the basis of expert evidence. The cases which fall into the category of *res ipsa loquitor* do not call for any expert evidence. The belief of doctors that civil courts are more competent than consumer forae is baseless. Both the civil courts and consumer forae are presided over by judges. Civil courts are preferred by doctors only because of their lengthy procedure. There is no hard and fast rule that consumer forae shall adopt summary procedure. If circumstance warrants discretion is given to the consumer forae to adopt lengthy procedure. Moreover consumer forae have taken the view that complicated cases can be committed to civil courts.

Doctors prefer adjudication by medical councils to that by civil courts and consumer forae. As rightly pointed out medical councils do not have teeth and they remain as bodies meant for recognising and derecognising medical degrees. Medical councils are not civil courts. They cannot decide questions touching liability of doctors.

Once the negligence of a doctor is proved with the help of expert evidence, it is possible to proceed with assessment of damages. The competency of consumer

forae to quantify damages can not be questioned. There are well defined rules to assess damages. The aggrieved doctors can appeal if exhorbitant damages are awarded.

In *Riaz Ahamad Sharifkhan v. Babu Mustafa Khan*,[18] the Maharastra State commission observed,[19]

> "...The guess work has no place in assessment of damages. The damages have to be computed on the basis of guidelines for assessment of damages, extent of injury etc., but not on certain visualised facts."

Doctors while not claiming exemption from legal accountability fear that existing laws are harsh towards them. Their opinion that the existing laws minus Consumer Protection Act will restore the equilibrium can not be accepted. The Act has not tilted the balance towards consumers. If medical services are removed from the ambit of consumer forae, it will further tilt the balance towards the doctors. Even in consumer forae, a patient has to prove deficiency in service against a doctor to get any remedy under the Act.

Doctors threat to practice defensive medicine is a serious matter. It should be treated as a deficiency in service. The test of reasonable doctor can be used to test the reasonableness of investigations ordered.

---

18. (1998) 3 C.P.J. 559 (Maharastra S.C.D.R.C.).
19. *Id.* at p. 564.

The doctors though aware of their obligation under the doctrine of informed consent do not know it's exact limitations. They fear that all particulars pertaining to treatment need to be disclosed. It is only material risks which need to be disclosed.[20] That requirement is also dispensed with under certain circumstances.[21] Doctors doubt regarding the feasibility of the doctrine in Indian conditions based on illiteracy of patients is misconceived. It is immaterial whether patients understand the information disclosed. The duty of the doctors is just to see that the necessary information is revealed. A patient considers various factors before submitting himself to the treatment.[22] Therefore illiteracy cannot be a ground to dispense with the requirement.

Doctors' claim for more discretion shows that they are not aware of their discretion under the existing laws. The rural doctors are not aware of the fact that the locality rule[23] provides the required answer to all of their doubts. They do not know that deficiency in service is a relative concept. Same yardstick is not applied to all the doctors or even to the same doctor at different times. What is done by a doctor reasonably will not invite legal accountability. But rural doctors should not entertain cases beyond their competency.

---

20. See *supra* chapter 5.
21. *Ibid.*
22. *Ibid.*
23. See supra chapter 2

It should be noted that most of the private doctors do not maintain medical records. They never give prescription or reveal the names of the medicine prescribed. There is no statute imposing a duty on them to maintain the records. But the duty to maintain records properly is implicit. A medical negligence case may come before the court after one or two years, from the day a doctor has last seen the patient. Passage of time makes a doctor to forget the patients totally. He may not remember the particulars regarding treatment. Properly maintained records come to his rescue to disprove the alleged negligence. If the required particulars are not there in the treatment reports, even though he is not at fault, he may be held liable. In *Stack v. Wapner,*[24] a woman gave birth to a child after labour was induced with pitocin. Profuse bleeding resulted in transfusion of a huge amount of blood. Finally hysteroctomy was performed. As a result of blood transfusion she developed hepatitis infection. She sued the physician on the ground that had he been there the bleeding could have been checked and the need for blood transfusion could have been avoided. The physician claimed that he was there. But the treatment chart did not contain the notations of monitoring. The court held that there was no monitoring.

Some times, a doctor realizing his negligence might destroy the records. If

---

24. 368 A. 2d 292, Pa.1976. See also *Patrick v. Sedwick,* 391 P. 2d 453, 413 P. 2d 169, Alaska (1964), as quoted in Angela Roddey Holder, *"Medical Malpractice Law",* Newyork, second edition, p. 299.

destruction is proved, courts will infer negligence. *In Carr v. St. Paul Fire and Marine Insurance Co.*,[25] a diabetic patient, with complaints of nausea and chest pains came to the emergency room of the hospital. The nurse on duty refused to call the physician. The patient died due to myocardial infraction, within a few minutes after leaving the hospital. His widow sued the hospital. Before her attorney sought the production of documents, the records of his visit had been destroyed. The court held that the destruction of records was an evidence of negligence. The position taken by the court is right because if the records do not expose the negligence of a doctor, no sane or reasonable doctor would destroy it. Logically it follows that where no records are maintained, it would give rise to a similar presumption. If the doctor fails to rebut it courts can presume his negligence. The same rule applies to alteration of records.[26]

The suggestion made by doctors to impose criminal liability for gross negligence appears to be good. With respect to punishment they suggest award of compensation and dismissal from practice rather than imprisonment. Imprisonment cannot be dispensed with as it strikes at the root of the administration of criminal justice. Where criminal negligence is proved, the courts in addition to imprisonment can award compensation. The compensation so

---

25. 384 F. Supp., 821 Dc Ark, 1974, quoted *id.* at p. 298.
26. *James v. Spear,* 338 P.2d, 22 Cal. 1959, quoted *id.* at p. 301.

awarded must be punitive one. Keeping in view that the fact that only in a few cases criminal liability is imposed on the doctors the courts can resort to imposition of fine and award of punitive compensation. In *Dr. Jacob Geroge v. State of Kerala,*[27] the patient was aborted by a homeopathy doctor. She fell unconscious. Soon after gaining consciousness, she breathed her last leaving a child. The High Court of Kerala convicted the doctor for 4 years rigorous imprisonment and imposed a fine of Rs. 5,000/- out of which Rs. 4,000/- was directed to be paid to the surviving child of the deceased. On appeal the Supreme Court reduced the punishment and increased the penalty to Rs.1 lakh.

The act of the doctor in the above case amounted to quackery and misadventure. The decision of the High Court must be appreciated for the reason that it imposed rigorous punishment. But it failed to render justice to the child of the deceased in directing a payment of meagre sum of compensation.

The decision of Supreme Court must deserve appreciation for the reason that it safeguarded the interest of child in awarding higher compensation. But it has ignored the very object of administration of criminal justice. Therefore it is submitted that in a case of above nature both rigorous imprisonment and punishment of paying punitive compensation may be imposed.

---

27. (1994) 3 S.C.C. 430.

It appears that the plea of doctors that journalist should not be allowed to publish an alleged negligence of doctors unless negligence is proved against them, is reasonable one. Wayward journalism needs to be prevented from making inroads into the professional reputation of doctors.

The study reveals that most of the doctors are not aware of the laws governing them. Only senior doctors have some knowledge about them. Hence the suggestion for prescribing law concerning doctors in the medical curriculum needs to be considered.

The doctors rightly pleaded the need for a better understanding on the part of patients and the people in general to appreciate the constraints and limitations of a doctor in the light of prevailing circumstances. Creation of general awareness in the people about the inexact nature of medical science can remove many unnecessary litigation and avoidable fears of doctors.

CHAPTER X

CHAPTER - X

Civil Liability of Lawyers for Deficiency in Service

Lawyers like doctors practice a learned profession. As one learned in the law, they render professional services to their clients with respect to both litigitious and non-litigitious matters. They ought to render services in conformity with prescribed standards. Failure in this regard gives rise to liability.

A lawyer when renders services with respect to litigitious matters owes a primary duty of assisting the court in the administration of justice. It supercedes the duty he owes to the client. Therefore his liability for deficiency in service must be determined without ignoring such primary duty. Apart from that a lawyer can invoke certain defences to claim exoneration from liability. Like doctors the liability of lawyers can be based either on contract or on tort law. However cases decided under civil law for negligence of lawyers are very few in India. In consumer courts also only limited number of complaints are filed. Hence the position of lawyers' liability is examined mainly in the light of cases decided by courts in other jurisdictions. Wherever Indian decisions are available, they are also incorporated in the study.

Contractual liability of lawyers :

The extent of lawyer's obligation towards his client for the breach of

contract depends upon the terms of the contract.[1] Generally a lawyer is retained to render services on legal matters. Obligation with respect to business matters can also arise if the lawyer accepts such unequivocal instructions by the client.[2] It follows that nothing prevents a lawyer from contracting to render advice on a business question.

Some obligations of lawyers have to be discharged within the strict time limits imposed by the circumstances of the client. It gives an inference that in such a situation time is the essence of the retainer. Any failure to discharge the contractual obligation within the stipulated time attracts liability. In *Stirling v. Poulgrain,*[3] the first plaintiff instructed the lawyers to transfer two farms to a trust with the object of reducing the estate duty on her death. The Inland Revenue Authority agreed for a particular valuation provided the transfers were effected before a specified date. But the lawyers failed to effect the transfer within the stipulated time. As a result the valuation increased. The court held that there was a breach of contract on the part of the lawyers.

---

1. *Midland Bank Trust Ltd. v. Hett, Stubbs & Kemp,* [1978] 3 All E.R. 571(Ch.D.) The employment of lawyer rests on a contract, resulting from execution of retainer by the client which may be express or implied. See 44 "*Halsbury's Laws Of England*", 4th edition, pp. 61-63 (1983).
2. *Yager v. Fishman & Co,* [1944] 1 All E.R. 552 (C.A.). In this case it was contended on behalf of the clients that the lawyers failed to advise them to determine the lease rather than to keep it in existence to find a suitable tenant. But this contention was not accepted by the Court of Appeal.
3. [1980] 2 N.Z.L.R. 402.

At times a client seeks advice of a lawyer on a future transaction in advance. If the advice is tendered, the duty ceases. No duty is imposed on a lawyer to remind the client's memory or repeat the advice, unless he is requested to do so and he has accepted it unqualifiedly.[4] There is an implied obligation on every lawyer to be skillful and careful.[5] Under the U.S. law this obligation is assessed through the negligence standard.[6]

A lawyer can terminate the retainer for justifiable causes. If he gives reasonable notice, he will not incur any liability.[7] But unjustifiable termination attracts liability.[8] A client can also terminate the retainer if a lawyer fails to discharge his obligations.[9] On such an eventuality a lawyer has to be blamed for the termination of the relation and accordingly he will be held liable.

Exclusion of lawyers liability by agreement :

A question arises whether a lawyer can exclude or restrict his liability through exclusion clauses. Divergent legal positions exist in various jurisdictions.[10] In some jurisdictions such agreements eliminating or limiting liability are declared as

---

4. *Yager v. Fishman & Co*, see *supra* n. 2 at p. 558.
5. *Nocton v. Ashburton,* [1914] A.C. 932 at p. 956 (H.L.). The duty to be careful and skillful gives rise to many obligations.
6. See second *Restatement of Torts* (1965) 229a.
7. Termination of retainer for causes like refusal of client to pay costs incurred or failure to pay the costs within a reasonable time are justifiable causes. See the Solicitors Act (English) 1974, s.65(2).
8. See the Indian Contract Act 1872, s. 73.
9. In *Re Wingfield and Blew,* [1904] 2 Ch. D. 665 at p.684.
10. Michael Gill, "Professional Liability And Protection Of Lawyers", 61 A.L.J. 552 at p. 560 (1987).

void.[11] Some jurisdictions allow exclusion of liability for minor negligence. But exclusion is not allowed for gross negligence or deliberate default.[12] Some countries allow reasonable limitations on liability up to the amount of insurance, though such agreement is seen as inconsistent with the professional duties of a solicitor.[13]

English law recognises exclusion clauses provided a lawyer ensures that (a) an express contractual term is incorporated into the retainer (b) if a notice is relied upon, client's attention is drawn to it before execution of the retainer (c) the words used are sufficiently clear.[14] But the reasonableness of such clauses are subjected to judicial scrutiny if any dispute arises.[15]

Tortious liability of lawyers :

The liability of a lawyer arises independent of a contract. In tort liability is mainly based on professional negligence.[16] A lawyer is bound to exercise such care and skill which is expected from a reasonably competent lawyer.[17] Accordingly a

---

11. In South Africa, Japan, the United States and Canada, this rule exists. *Ibid.*
12. *Ibid.*, for example, in South American countries.
13. *Ibid.* Austria is an example.
14. See Rupert M. Jackson & John L. Powell, "*Professional Negligence*", London, second edition, p. 27 (1987). See also the Unfair Contract Terms Act 1977, ss. 2 (2), 11. In India also the same position exists. See *Skypak Agency v. K.K. Pillai*, (1995) 1 C.P.J. 106 (Kerala S.C.D.R.C.).
15. Rupert M. Jackson and John L. Powell, *supra* p. 26.
16. R. A Percy (ed.), "*Charlsworth on Negligence*", London , para 1006 (1977).
17. *Ibid.*

lawyer is not under an obligation to know all the laws. In *Montriou v. Jefferies*, the court observed,[18]

> " No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the law".

But he is bound to know certain statutes and laws that a reasonably competent and knowledgeable lawyer ought to have known. In *Fletcher & Son v. Jubb Booth and Helliwell,*[19] a client instructed the lawyer to initiate an action against the local authority for personal injury. He omitted to do so within the period of limitation prescribed by the Public Authorities Protection Act, 1893. It was held that he was negligent for not initiating the action within the period of limitation and bound to pay compensation to the client.

It follows that a lawyer is held liable for the consequences of ignorance or non-observance of the procedural laws and rules of practice pertaining to his department of profession.[20] A lawyer may be in fact ignorant of a point of law. But he should take step to inform himself of it. He ought to know generally, where and how to find the law concerning his sphere of practice.[21] Unless it is shown that the circumstances are such that would have alerted a reasonably competent

---

18. (1895) 2 C. & P. 113 as quoted in J.P. Eddy, *"Professional Negligence"*, London, p. 28 (1955).
19. [1920]1 K.B. 275.
20. *Id.* at p. 280.
21. Rupert M. Jackson and John L. Powell, *op.cit.* at p. 207.

practitioner to make research on a particular point involved, his conduct can not be considered as one falling below the standard of a reasonably competent practitioner. In *Bannerman Brydone Folster & Co. v. Murray*,[22] lawyers failed to appreciate that an option was a clog on the equity of redemption . This topic was dealt in all the text books on real property. The court held that the facts of the case were such that they would not have alerted any average lawyer to the necessity of referring to a text book on that point.

There is an exception to the above rule. If a lawyer holds himself out as a specialist in a particular field of law, a client can expect a higher standard than that of a reasonably competent lawyer.[23]

The general practice of the profession is an evidence of reasonable care and skill. In *Simmons v. Pennington,*[24] the lawyers were acting for a vendor in connection with the sale of premises which were subjected to a covenant restricting their use only as welling house. But the premises were continuously used for business purposes in breach of the covenant. The particulars of sale described the premises as valuable and commanding freehold corner shop premises. The purchaser made necessary enquiries with the lawyers who informed him of the existence of restrictive covenant. The purchaser refused to purchase the

---

22. [1972] N.Z.L.R. 411.
23. *Benson v. Thomas Eggar & Son,* Dec. 2, 1977 unreported, quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 212.
24. [1955] 1All E.R. 240 (C.A.).

premises on coming to know about this covenant. It was held that the reply of the lawyers was compatible with the general conveyancing practice which was in vogue for a long time even though the reply enabled the purchaser to decline to complete the contract.

Under some unusual circumstances the general practice will not be accepted as an evidence of the standard of care and skill. In *Edward Wong Finance Co.Ltd. v. Johnson Stokes and Masters,*[25] the plaintiffs agreed to lend $ 1,355000-00 to the purchasers of a part of a factory to be secured by a mortgage. Their lawyers handed over the money to vendor's lawyers on an undertaking that the latter would arrange for the repayment of existing mortgage on the property and would effect an assignment of the property from the vendors to purchasers within 10 days. Vendor's lawyer left to Hong Kong with the money. In effect the existing mortgage of the property remained undischarged and the plaintiff's intended charge over the property became worthless. There was evidence to prove that in vast majority of conveyancing transactions in Hong Kong the purchaser's or mortgagee's solicitor handed over the money to the vendor's solicitor on an undertaking that the latter would hand over the title deeds within the prescribed time. The rationale was to complete the sale as early as possible. But the Law Society had drawn the attention of the lawyers to the obvious risk of

---

25. [1984] A.C. 296 (P.C.).

embezzlement of money. The Privy Council held that the plaintiff's lawyers though acted in accordance with the prevailing practice, their standard of care and skill fell below the standard expected of a reasonably competent lawyer in the light of unusual circumstances of the case.

Breach of duty amounting to deficiency in service :

Breach of duty arises from violation of contractual or tortious obligations. In most of the situations this is measured in terms of a reasonably competent lawyer. The following are the instances where courts inferred breach of duty giving rise to liability.

Giving Wrong advice :

A lawyer is bound to give correct advice where the law is clear. In *Otter v. Church Adams Tatham & Co.*,[26] the plaintiff was the guardian of a minor aged 18 years. She engaged the defendant lawyer to advice her on the extent and nature of minor's interest in the property, which had fallen into his possession recently. She was advised that the boy on attaining majority would obtain an absolute right in the property. But in fact he had an equitable interest in tail and remainder in favour of the uncle. On attaining majority he was in active military service in India. The lawyer advised that the transfer of the settled property could be postponed till his return to England and that was the most convenient course to

---

26. [1953] 1 Ch.D. 280.

adopt. But the boy died. The piece of advice tendered by the defendants was wrong as only a disentailing assurance executed by the boy would have perfected his title. As a result of the wrong advice, he lost his interest in the property. The defendants were held negligent for not rendering the correct advice, as the law on that point was unambiguous. It is implied that if the law is ambiguous, the wrong advice would not have attracted liability.

Failing to give advice:

It is the duty of a lawyer to tender advice to his client. It implies a complete advice. Incomplete advice is as good as absence of advice. Claims arise in this regard both for misfeasance and non-feasance. In *Mathew v. Maughold Life Assurance Co. Ltd.*,[27] the lawyers advised on a scheme to reduce estate duty liability. They failed to inform her that she should exercise a particular option if her husband survived for seven years. As a result of it she could not exercise the option and estate duty liability could not be reduced. Lawyers were held liable for incomplete advise.

It is the duty of a lawyer to tender advice even when clients had not asked for it. In *Stronghold Investments Ltd. v. Renkema*,[28] the lawyers for a purchaser of property failed to advice on the formalities necessary to transfer the fire

---

27. [1985] 1 P.N. 142 as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 204.
28. [1984] 7 D.L.R. 427.

insurance policy. Fire occurred and he remained uninsured and sustained loss. The lawyers were held liable for their negligence in failing to give advice, even though it was not specifically asked by the client.

Failure to inform important matters which come to his notice :

A lawyer in the course of representing the client may gather a bulk of information which all are not relevant to his engagement. An obligation is imposed on a lawyer to locate matters, which are important to the client and to bring them to his notice. In *Lake v. Bushby,*[29] the defendant lawyer was acting on behalf of the vendor and purchaser of a property. He ascertained from the local search that there was no planning permission for the bunglow, which stood on the property. That information was not communicated to the purchaser. The purchase of property was completed, the purchaser being not aware of that fact at any time the local authority might require the building to be pulled down. The court held that it was the lawyer's duty to communicate the information to the prospective purchaser and not merely to see that the purchaser obtained good title. Accordingly the conduct of the solicitor was declared as negligent one.

A reasonably competent lawyer ought to know that if a building stands in a property without planning permission, the purchaser at a later stage may find it difficult to sell the property or it would diminish the value of the property. The

---

29. [1949] 2 All E.R. 964 (K.B.).

proper course of action lies in informing the risk to the client and allow him to assume the risk, if he so decides.

Failure to make necessary enquiries :

Generally the duty of a lawyer is confined to the express or implied instructions of the client. He need not move away from the instructions to make enqueries which are not expressly or impliedly requested for. At times law imposes a duty on him to make necessary enquiry. In *Goody v. Baring,*[30] a lawyer was acting on behalf of a purchaser of a residential property of which the first and third floors were let to the tenants. He ascertained from the vendor the rent that was charged. But he failed to ascertain the standard rent that could be charged under the Rent Restrictions Act. The rent charged was higher than the standard rent. Subsequently the tenants recovered from the purchaser the over payments so made. The court held that the solicitor was negligent in not making proper enquiries as to the standard rent and failing to give proper advice.

No hard and fast rules can be laid down as to what investigations have to be made in the absence of express or implied request by the client. A lawyer is the best judge to decide what enquiries are required to safeguard the interest of the client. He ought to make only such enquiries, that a reasonably skillful lawyer would have done. So the positive act depends upon the circumstances of a particular case.

---

30. [1956] 2 All E.R. 11 (Ch.D.) . See also *Hunt v. Luck,* [1902]1 Ch.D. 428.

Failure to inform the progress of the matter :

A lawyer is bound to inform the progress of the transactions, which he is handling on behalf of the client. In addition to informing the progress, wherever expedient, he shall seek further instructions from the client. In *Groom v. Crocker*,[31] the court observed,[32]

> " It is an incident of duty that the solicitor shall consult with his client in all questions of doubt which do not fall within express or implied discretion left to him and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria".

In *Stinchcombe & Cooper Ltd. v. Addison, Cooper, Jessen & Co.*,[33] the lawyers were acting for the purchasers of land from the local authority. The contract provided that the local authority was entitled to set aside the contract if the purchasers did not commence building on the land within twelve months. At the time of exchange of contracts the purchasers were not informed of this condition. On expiry of 12 months the local authority set aside the contract. The purchasers sustained loss. The lapse on the part of the lawyers was held to be negligent.

In *Riaz Ahmad Sharifkhan v. Babu Mustafa Khan*,[34] the complainant engaged the services of an advocate. The latter informed the result of the case after

---

31. [1939] 1 K.B. 194.
32. *Id.* at p. 222.
33. [1971] 115 S.J. 368, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 229.
34. (1998) 3 C.P.J. 559 (Maharastra S.C.D.R.C.).

one year. The complainant was deprived of his remedy as the period of limitation had expired. The Maharastra State Commission held that the conduct of advocate in not intimating the result of the case, amounted to deficiency in service. It observed,[35]

> "... If the client loses, the advocate is further duty bound to intimate the result of the proceedings to the client and the client should be left with adequate time to avail of further remedy. The client may engage that advocate or may not engage. But the duty of an advocate would only end after the intimation of the result of the proceedings handled by him to the client..."

Some times failure to inform the progress of the transaction may expose the client to criminal liability. In *Ashton v. Wainright,*[36] the lawyers were acting for the officers of a club. The officers were about to move to new premises. The lawyers applied to have the club shifted to new premises. The application was refused, which was not informed to the officer of the club. In ignorance of such refusal the club was moved to new premises. As a result of the refusal the club remained as an unregistered club. The officers were prosecuted for serving drinks in the club as it was unlawful to serve drinks in an unregistered club. Failure to communicate the refusal was held to be a negligent act.

Failure to warn against particular risks :

A lawyer has a duty to inform such risks to the client, which latter as a

---

35. *Id.* at p. 563.
36. [1936] 1 All E.R. 805 (K.B.).

layman is not in a position to appreciate, but obvious to the former. In *Boyce v. Rendells,* the court observed,[37]

> "...if a ...solicitor learns of facts which reveal to him as a professional man the existence of obvious risks then he should do more than merely advise within the strict limits of his retainer. He should call the attention to and advise upon the risks".

But the duty is not confined only to disclosure of risks, but extends to facts, legal rights and obligations of client.[38] In *Ramp v. St. Paul Fire and Marine Insurance,*[39] a lawyer was held liable for failing to closely scrutinize or fully inform the heirs consequences of signing contract compromising their suit.

Likewise for failing to warn the risks to a purchaser of a property in moving and carrying out works of repair before the exchange of contracts, failing to advise the client of danger involved in exchange of contracts before the purchase of new property and failing to inform numerous risks involved in the conveyancing transactions will result in breach of duty.[40]

Failure to explain legal documents property :

Guidance on explanation of legal documents is one of the consequential

---

37. [1983] 268 E.G. 268 at p. 272, quoted in Rupert M.Jackson and John L. Powell, *op.cit.* at 233.
38. Susan R. Martyn, "Informed Consent In The Practice Of Law", 48 Geo. W.L.R. 307 (1980).
39. 269 So. 2d 239, 244 (La.1972), quoted *id.* at p. 331.
40. Rupert M. Jackson and John L. Powell, *op.cit.* at p. 233.

area in the whole range of legal services, for which a client seeks the services of a lawyer. It is common knowledge that generally a client signs a legal document or allows it to be sent, with the advice of the lawyer. A client, as a layman can not understand the contents of a legal document. Therefore a duty is imposed on a lawyer to interpret the document properly. In *Sykes v. Midland Bank Executor & Trustee Co. Ltd.*,[41] the plaintiffs took lease of certain office premises. One of the provisions of the lease deed was in unusual form. It did not permit the sub-lessor to withhold the consent unreasonably for change of user. But the head-lessor could do so. The lawyers did not explain that unusual provision to the plaintiffs. It was held that they committed a breach of duty in not drawing the attention of the client to the unusual clauses of the lease deed, which the lawyers knew as might affect the interests of the client.

The decision makes it clear that a solicitor need not draw the attention of the client to each and every word used in the document.[42] Practically it is not possible to do so. Microscopic examination of the documents is not necessary. There must be a reasonable limit on a lawyer's duty of explaining legal documents.

Failure to advise on matters of business under some unusual circumstance :

Generally a lawyer is not under an obligation to advise on matters of business. But under some unusual circumstances, the conduct of lawyers failing to

---

41. [1971] 1 Q.B. 113.
42. *Walker v. Boyle*, [1982] 1All E.R. 634 at p. 645 (Ch.D.).

give such advice amounts to negligence. In *Neushul v. Mellish & Harkavy,*[43] the plaintiff, a widow proposed to lend a large sum of money to F, a trickster. The latter in order to induce the widow to lend money, told her that he intended to marry her without giving a firm commitment. The plaintiff consulted the lawyers for advice to raise money, which she intended to lend to F. The lawyers had knowledge of weak financial affairs of F. F failed to repay money. The court held the lawyers liable for failing to warn against making the loan which they knew to be an unwise adventure. Thus liability is attracted for silence when a state of affair is known to the lawyer, but not to the client, having a possibility of exposing the latter to loss.

Failing to protect the interest of a lender of money :

When a lawyer acts on behalf of a lendor of money, he is under a duty to take reasonable steps to safeguard the latter's interest. In *Wilson v. Tucker,*[44] the plaintiff proposed to lend money, on the security of a legacy under a will. The lawyer failed to detect that the legacy was void. Hence the security proved to be abortive. The court held the lawyer negligent for failing to ascertain that the legacy was void. A reasonably competent lawyer ought to detect whether the legacy is void and foresee the consequence of exposing the lender to hardship in the absence of security.

---

43. [1967] 111 S.J. 339, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 238.
44. (1822) 3 Stark 154, *id.* at p.248.

Failure to discharge the duties in connection with conveyancing transactions:

Clients are exposed to future risks. It is the duty of the lawyers to protect their clients from such hazards, which especially arise in conveyancing transaction. Any failure to make customary enquiries and searches will amount to negligence. In *G + K Ladenbau v. Crawley and De Reya,*[45] the plaintiffs instructed the defendant lawyers to act for them in purchasing a vacant land which they intended to develop and for which they had applied for planning permission. Both the conveyancing lawyers failed to check common register to ensure unencumbered title. The sale was completed. The plaintiffs wanted to effect resale. On search, it was detected that common rights have been registered, though by mistake, which had to be removed from the register. This lapse delayed the sale causing loss to the plaintiffs. They brought an action against the lawyers for negligence. Evidence was tendered on behalf of them as to the practice of not making common search. The court held them negligent on the ground that they were aware of the fact that the land was vacant and the plaintiffs intended to develop it for resale. As such they should have reasonably contemplated that if they failed to ensure an unencumbered title the latter could be exposed to loss.

But it does not mean that under each and every circumstance a lawyer has to make a search. The question of search is a question of fact. There is room for discretion where the land is densely built.[46]

---

45. [1978] 1 W.L.R. 266 (Q.B.).
46. *Id.* at p. 289.

Breach of duty and misconduct of litigation :

In adverserial system of administration of justice the parties disputing a cause are placed in rival camps attacking each other's weakness to win the claim. They hire the services of lawyers. A duty is imposed on the latter to conduct the litigation with reasonable care and skill. In the following circumstances their conduct amounts to breach of duty.

a) Filing a suit in a wrong court :

As the jurisdictions of various courts are clearly demarked, a duty is imposed on a lawyer to file the suit in a competent court having jurisdiction. Otherwise the suit will be dismissed at the threshold for want of jurisdiction. Such an eventuality involves unnecessary delay, loss of expenditure already incurred and expenses to be incurred for the institution of the suit in the proper court. Accordingly filing a suit in a wrong court results in negligence.[47]

b) Issuing proceedings in the wrong name :

There is a duty on a lawyer to take care in identifying proper parties. Otherwise it results in issue of summons in wrong names compelling them to appear before the courts unnecessarily. It results in a negligent conduct on the part of the lawyer. In *Losner v. Michael Cohen & Co.*,[48] the lawyers issued proceedings under the Dog Act (English) 1971, without identifying the owners of

---

47. *Gill v. Lougher,* (1830) 1 Car. & J. 170, quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at 240.
48. [1975] 119 S.J. 340, *ibid.*

the dogs. It resulted in issue of summons to wrong persons. The court held that their conduct amounted to negligence.

c) Failure to exercise reasonable care in matters of evidence :

A lawyer is expected to exercise reasonable care in chief-examination, cross-examination and re-examination of witnesses. How effectively a solicitor does that is not a matter of judicial scrutiny, as it is a matter of process which varies from lawyer to lawyer. It is felt that a lawyer could be held negligent if he does not take reasonable steps to trace the prospective witnesses. Some cases warrant the production of expert evidence. A lawyer must take reasonable step to see that a competent expert whose experience and qualifications suited for the task in hand is selected. For example, if a surveyor addicted to drinks is selected as expert in a case, the lawyer can not escape from liability.[49]

(d) Failing to initiate the action with in the period of limitation :

A lawyer is under a duty to initiate proceedings within the period of limitation. If he allows the claim to be barred by limitation, his conduct should be treated as negligence.

(e) Failing to pursue the proceedings :

After the institution of suit a lawyer is under an obligation to pursue the proceedings. Any lapse on his part to do so might result in an ex-parte judgement in favour of the opposite party. This can be considered as negligence.[50]

---

49. *Mercer v. King*, (1859) 1 F. & F. 490, *id.* at p. 241.
50. *Riaz Ahmad Sharifkhan v. Babu Mustafa Khan*, see *supra* n. 34.

In *Riaz Ahmad v. Sharifkhan v. Babu Mustafkhan*,[51] in the Maharastra State Commission observed,[52]

> "... Once the advocate is engaged by the client and he receives fees in part or in full, he is duty bound to attend the interest of his client. He must file the proceeding as asked for by the client fortwith. He must incorporate all the pleadings subject to law and rules and he must be deligent in filing the proceedings before the court or the tribunal. He cannot relax on this point... it is his duty to maximise the benefit and to minimise the loss to his client ... The client may loose or win..."

In *V.S. Shukla v. Brijesh Kumar Dwivedi*,[53] the Madhya Pradesh State Commission took the view that if an advocate failed to plead the case, the client was free to engage the service of another advocate.

The above view is contrary to the view taken in *Riaz Ahmad Sharifkhan*,[54] which enjoins a duty on an advocate to do the needful to safeguard the interest of the client.

(f) Failure to take reasonable care in settling the claims on behalf of the client :

A lawyer, if empowered under the retainer to settle any claim on behalf of the client, shall exercise reasonable care in doing so. If he with full knowledge of weak financial position of the latter, settles a claim against the latter at an unreasonably huge amount or advises to accept the claim at a low figure without any enquiries, his conduct amounts to negligence.[55]

---

51. *Ibid.*
52. *Id.* at p. 564.
53. (1997) 3 C.P.J. 334 (Madhya Pradesh S.C.D.R.C.).
54. See *supra* n. 34.
55. *McNamara v. Martin Mears & Co. Ltd.,* [1983] 126 S.J. 69, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 244.

Lawyer's liability to third parties :

Under the law of contract a lawyer owes duties only to his clients. The only exception is where the lawyer is acting as an officer of the court. In *Batten v. Wedgwood Coal and Iron Co.*,[56] a sale of property took place in pursuance of an order of the court. The plaintiff's lawyer in his capacity as an officer of the court failed to invest the proceeds. As a result of this no interest was earned. The defendants, who would have been otherwise entitled for the interest, were allowed to recover the loss from the lawyer.

But with the development of tort law relating to negligence, the third party liability also came to be recognised.[57] The question of lawyers liability for negligence to third parties arises frequently in carelessly drafted wills.[58] As a result of this the intended beneficiaries are deprived of their legacy. In *White v. Jones*,[59] the testator who had quarelled with his daughters made a will bequeathing certain properties from his estate. Subsequently being reconciled, gave instructions through a letter to the lawyer to prepare a new will including

---

56. (1886) 31 Ch. D. 346.
57. The decision in *Donoghue v. Stevenson,* [1932] All E.R. 1 (H.L.) and *Hedley Byrne Co Ltd. v. Heller & Parteners Ltd.*, [1963] 2 All E.R. 575(H.L.), led to the adoption of this principle of third party liability.
58. For a better discussion, see James C. Brady, "Solicitors Duty Of Care In The Drafting Of The Wills", 46 N.I.L.Q 434 (1975).
59. [1995]1 All E.R. 691(H.L.) ; See also *Whittingham v.Crease and Co.,* [1979] 88 D.L.R. 353, where owing to the defendant's negligence all the bequests made to the plaintiff under a will became void ; *Rose v. Caunters,* [1979] 3 All E.R. 580 (Ch.D.), where the defendant failed to warn that a will should not be attested either by the beneficiary or the spouse of the beneficiary.

further gifts of £ 9000 to each daughter. But the lawyer did nothing to give effect to these instructions before the death of the testator. As a result of the lapse the plaintiffs were deprived of the additional bequest. The House of Lords held the lawyer negligent for depriving an intended beneficiary of his legacy under the will.

A professional man who undertakes to exercise his skill in such a manner, which to his knowledge might cause loss to others, if carelessly performed might assume implicitely a legal responsibility towards them. Accordingly the assumption of responsibility by the lawyer towards his client must be extended to a disappointed beneficiary even under circumstances in which there is no fiduciary relationship. This is because neither the testator nor his estate has a remedy against the lawyer. Otherwise an injustice would be perpetrated because of a flaw in the law.

The liability of a lawyer to a disappointed beneficiary in the context of a carelessly drafted will was re-iterated in *Hill v.Van Erp*,[60] by the Australian courts also. In this case the court held that the duty towards the intended beneficiary would arise as the interests of a client who retained a lawyer to carry out the clients testamentary instructions and the interest of an intended beneficiary were coincident.[61] The lawyer's position of control is a significant factor in establishing a duty of care as he is in a position to avoid the undesired consequence.[62]

---

60. [1997] 71 A.L.J.R. 487.
61. *Id.* at p. 502.
62. *Id.* at p. 509.

In *Hawkins v. Clayton*,[63] a lawyer drafted wills but retained the custody of the will. He failed to locate the executors and notify in due time the death of the testatrix. In consequence the testator's testamentary dispositions failed. The court found a duty of care on the part of the lawyer to locate the executor. It was further observed that if the custody of the will would continue with the lawyer indefinitely it would frustrate the purpose for which it was accepted.

It is obvious from the above decision that a lawyer is considered as custodian of testamentary intentions. So it is his duty to see that the intentions are properly realized. But at the same time the duty of locating the executor is onerous and extends for many years as it requires him to learn about the death of the testator as well as whereabouts of the executor. What is expected of a lawyer is to take reasonable steps. The cost of extensive enquiries and the expected value of the estate are guiding considerations in determining what steps are reasonable. It follows that if the cost of the enquiries exceed the value of the estate, a lawyer need not make such enquiries. This proposition is compatible with the balancing approach where the intended beneficiary and the lawyer are not exposed to injustice.

In some jurisdictions, the courts have carved a principle to create a cause of action in favour of the disappointed beneficiary, from the law of contract itself. This is done by rejecting the requirement of privity and recognising those contracts

---

63. [1988] 62 A.L.J.R. 240.

as having protective effect for third parties.[64]

The above discussion shows that the circumstances in which a lawyer is liable to third parties are limited. The judicial approach reflects a narrow circumscription of such situations. Accordingly it does not include duty to the client's opponent, unless a lawyer moves away from his normal function of acting for his client[65] nor to the buyer when acting for the seller of the land.[66] It is so even in the case of a prospective beneficiary under a will with respect to collateral dispositions which could jeopardise his interest.[67] Some courts have declined to hold the lawyers liable to the disappointed beneficiaries for drafting a legacy in terms which renders it void for perpetuity.[68]

Avoidance of liability for negligence by lawyers :

The liability imposed on a lawyer is not absolute and strict. He is allowed to avoid the liability on several grounds.[69]

---

64. John G. Flemming, "The Solicitor And The Disappointed Beneficiary", 109 L.Q.R. 334 at p. 347 (1993). For example the German law which is more constrained by it's civil code than English law in safeguarding the economic interests against negligence in tort has adopted this principle.
65. *Al-Khandari v. J.R. Brown & Co.*, [1988] 1 All E.R. 833 (C.A.).
66. *Gran Gelato Ltd. v. Richcliff (Group) Ltd.*, [1992] 1 All E.R. 865 (Ch.D.).
67. *Clarke v. Bruce Lance & Co.*, [1988]1 All E.R. 364 (C.A.).
68. *Lucas v. Hamm,* 11 Cal. Rptr. 727 (1961), as quoted in 81 L.Q.R. 479 (1965).
69. The procedural defences are not discussed here. A lawyer, like a doctor can raise the defences contemplated under the Consumer Protection Act.

a) Contributory negligence :

Where the client's contributory negligence is the real cause of harm, a solicitor cannot be held liable. If the client is an educated person and is able to understand the contents of a settlement deed solicitor will not be held liable for negligence. But if an illeterate person relying on the advice of the attorney puts his thumb impression or an uneducated person signs the document the question of contributory negligence does not arise. If the document consists of legal technicalities, it is doubtful whether an educated person, even though he reads the document, he will understand the contents. There he relies more on the advice of his attorney. In this context the test of reasonable client shall be applied to ascertain whether he ought to have understood the contents. Accordingly the plea of contributory negligence becomes relevant.

b) Error of judgement :

Error of judgement either in matters of law or fact do not constitute negligence.[70] Thus a lawyer may err in interpreting doubtful and difficult areas of law inspite of reasonable care. In *Lucas v. Hamm*,[71] a lawyer drafted a will. The bequest made in the will became void, as it hit the rule against perpetuities and the intended beneficiary was deprived of the bequest. The court of first instance held the lawyer negligent on the ground that even though the law against perpetuities was difficult, a general practitioner in law could and should turn to the expert

70. See J.P. Eddy, *op.cit.* at p.28.
71. *Supra* n. 68.

when faced with a problem beyond his capabilities. On appeal the decision was set aside for the reason that a lawyer of ordinary skill acting under the same circumstances might failed to recognise the danger.

It is true that there are legal concepts which are most confusing and difficult. A general practitioner should make reasonable efforts to find out the law. If it is beyond his competency, he shall take advice of a specialist in that area, and consult texts and commentaries on the subject. So long as a practitioner does this the question of liability does not arise. Construction of a law and ignorance are two different concepts. A lawyer should be held liable only where the error is a result of negligence in not undertaking reasonable efforts.[72] The object of law in imposing civil liability is to improve the quality of legal services and to create professional competence.[73]

In addition to exercising reasonable care, a duty is imposed on a lawyer to inform the client the difficult and doubtful nature of law on a particular point. The concept of difficulty is a subjective concept. The test of a reasonably competent lawyer is the only guiding principle for a court to ascertain the position.

c) Practical advice :

Often a lawyer is called to give practical advice.[74] The nature of such advice is that legal considerations constitute only a part of such advice. In such a

---

72. *Ibid.* See also *Whitehouse v. Jordan*, [1981] 1 All E.R. 267 (H.L.).
73. See David L. Dranoff, "Attorney Professional Responsibility, Competence Through Malpractice Liability", 77 North Western L.R. 633 (1982).
74. Ruper M. Jackson and John L. Powell, *op.cit.* at p. 228.

situation the advice so tendered is not substantially of legal nature. Hence it is not likely to consider any mistake as negligence.[75] If the advice given is plainly wrong then the lawyer will be held liable. In *Bryant v. Goodrich*,[76] a lawyer was held liable for wrongly advising a client to leave the matrimonial home after her marriage broke down.

d) Investigation or advise on unasked matters:

Generally the obligation of a lawyer to advise or investigate is confined to matters on which a client solicites advice. He is not under an obligation to investigate or advise on an unasked matter. In *Hall v. Meyrick*,[77] the plaintiff, then a widow, and one Mr. Hall wishing to bequeath everything to the other consulted the defendant for drafting mutual wills. They did not inform the possibility of a marriage between them. The plaintiff's son who was present with her made a jocular reference to their marriage. The defendant failed to advice them that the marriage would result in automatic revocation of mutual wills unless made in contemplation of marriage. Later they married. Mr. Hall expired. The automatic revocation rendered his death intestate. The court observed that there was a duty on the part of a lawyer to inform the client, the impact of marriage on mutual will. It is immaterial whether the fact of marriage was brought to his notice directly or in a less direct way by the client. However the court held that the defendant was not negligent.

---

75. *Faithfull v. Kesteven,* [1910] 103 L.T. 56, *ibid.*
76. [1966] 110 S.J. 108, *ibid.*
77. [1957] 1 All E.R. 208 (Q.B.).

The existence of a duty depends upon the circumstances. In *Caaradine Properties Ltd. v. D.J.Freeman & Co.*, the court observed,[78]

> "An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client".

It follows that the more inexperienced a client is, there arises an obligation on the part of a lawyer to tender his advice on unasked matters. But if the client is an experienced one such obligation may not arise.

Some times the client may waive the advice either expressly or impliedly. In *Griffiths v. Evans,*[79] the plaintiff sustained an injury in the course of employment. Thereafter he received weekly payments under the Workmen's Compensation Act, 1906. Fearing reduction in the weekly payments, he approached the defendant lawyer. The latter advised his remedy under the above Act, but failed to advise the existence of common law remedy for damages. The court held that the failure to give such advice did not amount to negligence as it was not specially asked for. According to the court, as the plaintiff was receiving the payments under the Act for a long time it constituted an election of remedy under the Act to preclude a remedy under common law. Such an election amounts to waiver of advice on alternative remedies.

---

78. [1982] 126 S.J. 157 (C.A.), quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 232.
79. [1953] 2 All E.R. 1364 (C.A.).

e) Acting on client's instructions:

Generally a client has to act in accordance with the instructions of the lawyer. But he is at liberty to mismanage his affairs. He can instruct the latter to act in accordance with his instructions. In such a situation a lawyer can raise the plea of acting on client's instructions. But such a defence can not be availed, if the client's instructions are the result of lawyer's advice. It is obvious that the defence operates only when the lawyer has discharged his duty. He can not rely blindly the express instructions of a client. At the same time he has an option of either to abide by the instructions of the client or determine the retainer.[80]

f) Ignorance of remotely referred provision of law :

As there are innumerable number of statutes and legal principles, a lawyer cannot help but to be ignorant of some of them. It appears that in deciding the question whether he is negligent or not in omitting to refer to a statutory provision depends whether the statutory provision in question is one of constant and common occurrence or one unfamiliar and of remote occurrence. If it is of remote occurrence, which a reasonably competent lawyer would not have known, he may be able to escape liability.[81]

---

80. *Sutherland v. Public Trustee,* [1980] 2 N.Z.L.R. 536 at p. 548.
81. M.C. Agrawal (rd.), Sanjiva Row, "*The Advocates And The Legal Practitioners Act*", Allahabad, fifth edition, p. 207 (1987).

Remedies for deficiency in legal services :

A client aggrieved by any deficiency in service has legal as well as administrative remedy. To seek legal remedy he must either invoke the jurisdiction of civil courts under contract and tort law or the consumer forae under the Consumer Protection Act, 1986. In both, he can claim damages. Disciplinary jurisdiction of Bar Councils can also check abuse of position by lawyers.

A client can claim damages for injury arising from the negligent conduct of the lawyer. If the injury is only a remote consequence of negligence damages are not awarded. In *Simmons v. Pennington & Sons,*[82] the lawyer advised the plaintiff not to resell the property pending outcome of a litigation. During that period property caught fire and the latter sustained loss, as the fire insurance policy had lapsed. The plaintiff claimed damages. Held that damages were remote. The court held that it was not necessary to determine whether lawyer's advice was negligent. It follows that the damages must be foreseeable. In *Pilkington v. Wood,*[83] the sale of plaintiff's property was delayed as a result of lawyer's negligence. Due to such delay he had to travel from the place of his employment to the place of property in week ends. He was not allowed to recover the travelling expenses and interest on over draft caused by the delay in selling the property as they were not in reasonable contemplation of the parties when the lawyer was retained.

---

82. [1955] 1 All E.R. 240 (C.A.).
83. [1953] 2 All E.R. 810 (Ch.D.).

Foreseeability of damages does not pose any problem, as a lawyer in most of the circumstances is in a position to foresee them. But the burden to prove the negligence of the lawyer falls on the client. He shall prove the causation to claim damages. In *Sykes v. Midland Bank Executor & Trustee Co.*,[84] the plaintiffs failed to say in evidence whether or not they would have entered the under-lease, even if their attention was drawn towards the onerous clause relating to change of user. The court on balance of probabilities held that the plaintiffs would have entered the under-lease even if their attention was drawn towards that clause.

Measure of damages:

The fundamental principle governing the measure of damages is to place the client in the same position in which he would have been, had the lawyer discharged his duty.[85] The courts are called upon to speculate as to what would have happened had the lawyer discharged his duties properly.[86]

The measure of damages depends upon the nature of loss. The damages for loss of opportunity to acquire or renew an interest in the property is usually quantified by the difference between the value of the property which the client intended to purchase minus the price for which he would have bought it.[87] In the case of diminution in value of property the normal measure of damages is the difference between the price paid by the client and the actual value of the property

84. [1971] 1Q.B. 113.
85. Rupert M. Jackson and John L. Powell, *op.cit.* at pp. 254 –255.
86. *Id.* at p. 254.
87. *Stinchcombe & Cooper Ltd. v. Addison, Cooper. Jessen & Co., supra* n. 33.

on the date of purchase.[88] In the case of loss of opportunity due to failure to bring the suit with in the limitation period, it is difficult to decide whether the plaintiff would have won the case. Hence the courts allow recovery of actual loss only. In *Kitchen v. Royal Air Force Association*,[89] the plaintiffs' lawyers failed to initiate proceedings within the time contemplated by the Fatal Accident Act (English) 1846. The maximum sum that could have been recovered in the original action was L 3000. The court awarded L 2000 damages. Similarly in claim arising out of loss owing to dismissal of claim for want of prosecution, the plaintiff was allowed to recover the costs of the action and compensation for loss of his chances of recovering damages.[90] In cases relating to loss of opportunity to defend proceedings, the client will be awarded nominal damages only if there is no worthy defence or no defence at all. But if it is otherwise, the damages would represent the opportunity so lost. In *Cook v. Swinfen*,[91] the lawyer acting for a wife in a divorce proceeding failed to defend it . In effect the husband obtained a decree against her. The court held that had the lawyer performed his duty, there was a probability of both obtaining cross-decrees for adultery. There was an outright chance of wife winning the case. Accordingly the court awarded damages for losing a favourable outcome and opportunity of wife obtaining maintenance.

---

88. *Lake v. Bushby,* [1949]2 All E.R. 964 (K.B.).
89. [1958] 2 All E.R. 241(C.A.).
90. *Allen v. Sir Alfred McAlpine & Sons Ltd.,* [1968]1 All E.R. 543 (C.A.).
91. [1967] 1 All E.R. 299 (C.A.).

If due to the negligence of the lawyer, a client is unable to recoup a loan, he is allowed to recoup from the former.[92] Similarly if a client is forced to sell his property for a lesser price owing to the negligence of the lawyer, he is entitled to recover the difference between what he would have received under normal circumstances and what he has actually received. For loss of earning, a lawyer is not held liable generally. But an unusual case may attract liability. In *Malyon v. Lawrance, Messer & Co.,*[93] the plaintiff met with a road accident. His lawyer allowed the claim to be statute barred. In the meantime the plaintiff contracted neurosis which was not expected to clear up till the conclusion of the litigation. The court awarded damages for the value of the original claim and compensation for loss of earnings caused thereby.

The client is allowed to recover the cost of rectification where a lawyer's mistake can be rectified.[94]

At times the transaction of a client may become abortive as a result of his lawyer's negligence. In that case he is entitled to recover the whole of the expenditure except the anticipated gains from the transaction.[95] He has to opt

---

92. *Pretty v. Fowke,* [1887] 3 T.L.R. 845, quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at 264.
93. [1968] 2 Lloyd's Rep. 539 quoted *ibid.*
94. *G+K Laden Bau Ltd. v. Crawley & De Reya, supra* n. 45. The plaintiffs were allowed to recover the expenses they incurred to remove the right of common, which had been registered over their land.
95. *Anglia Television v. Reed,* [1972] 1 Q.B. 60.

either the wasted expenditure or anticipated gains to avoid double compensation.[96] He can also recover damages for the physical inconvenience, discomfort and distress caused by negligence of his lawyer. In *Bailey v. Bullock,*[97] the client instructed the lawyer to recover the possession of his house form the tenants. The latter kept silent for two years. In consequence the client and his family were forced to live with his wife's parents in a very inconvenient accommodation. The court awarded damages for discomfort and inconvenience, but refused to award damages for annoyance and mental distress. If mental distress is a direct consequence of the negligence recovery is allowed. In *Heywood v. Wellers,*[98] the client a woman instructed the lawyers to institute an action against a person to prevent him from molesting her. The clerk to whom the task was entrusted committed a number of mistakes. As a result of this the proceedings became ineffective. She sued the lawyer. The court awarded damages for anxiety, vexation and mental distress after deducting lawyer's cost, which she would have paid, had they performed their duty and prevented molestation. The court further distinguished between the mental distress, which was incidental and direct consequence of lawyer's negligence to allow recovery only in the latter case.

---

96. *Ibid.*
97. [1950]2 All E.R. 1167 (K.B.).
98. [1976] 1 All E.R. 300 (C.A.).

A client can not recover loss, which he could have avoided. But since the plea here proceeds from a guilty lawyer, the judicial attitude has been not to accept it.[99]

Remedies under the Consumer Protection Act :

There exists a contract for service between a lawyer and client. Hence the services rendered by the lawyer falls within the scope of the Consumer Protection Act. A client who hires the services of a lawyer for a consideration is a consumer.[100] But a litigant in a civil court is not a consumer of the judicial service and the state is not a provider of any service as administration of justice is a sovereign function.[101]

Any deficiency in service rendered by a lawyer attracts liability under the Consumer Protection Act. All the instances of breach of duty discussed above can be invoked before consumer courts also. There appears to be no change in the substantive law. In a claim for damages for deficiency in service all the principles governing damages discussed above would apply. The consumer forae are empowered to give other appropriate reliefs also.[102] Accordingly for deficiency in service, a client can recover the fee paid to the lawyer. If it is yet to be paid, the lawyer forfeits his right to recover the fee. In *C.S.Sarma v. P.Venkatswamy,*[103] the

---

99. *Pilkington v. Wood, supra* n. 83.
100. *Akhil Bharathiya Grahak Panchayat v. State of Gujarath,* (1994) 1 C.P.J. 114. (N.C.).
101. *Ibid.*
102. See the Consumer Protection Act 1986, s.14.
103. (1997) 1 C.P.J. 425 (Andhra Pradesh S.C.D.R.C.).

complainant had paid the fees for filing a suit to a lawyer. But the suit was not filed. The lawyer was directed to repay the fee with interest.

Similarly in *Veerabrahmachari v. B.Venkateswara Rao,*[104] a lawyer was directed to repay the fee and a compensation of Rs.250/- for failing to file a suit.

Remedies through professional body :

State bar councils are empowered to punish an erring lawyer for professional misconduct. They can suspend or remove the name of the lawyer from the rolls.[105] Accordingly cheating or allowing the clerks to cheat the clients or misleading them as to the progress of the case are considered as misconduct. Misappropriation of fund without filing a suit and allowing the cause to be barred by limitation would attract disciplinary action.[106] However efficacy of this remedy is disputed. There are serious complaints against functioning of the Bar Council Committees. Even in serious cases no proper action is taken.[107]

The position in the U.S.A. appears to be better than other jurisdictions. There even though mere negligence is not sufficient to warrant disbarment[108] disciplinary action can be taken against practitioners for gross negligence.[109]

---

104. (1997) 1C.P.J. 147 (Andhra Pradesh S.C.D.R.C.).
105. See the Advocates Act 1961, ss. 35, 36.
106. See Sanjiva Row, *op.cit.* at p.206.
107. V.R. Krishna Iyer, "Accountability Of Professions", 14 I.B.R. 650 (1987).
108. *Ill. People v. Chrone,* 123 N.E. 291, 288 App. Div.490, quoted *supra* n. 106 at p. 208.
109. See *supra* n. 106 at p. 208.

Liability for deficiency in legal services : A critical evaluation :

Lawyers render legal services to the needy. Because of the complexity of law a layman is not in a position to understand them. Since ignorance of law is not excused people hire legal services.

A lawyer like any other professional is accountable for deficient service. The contractual liability depends upon the terms of the contract, of which the obligation to exercise reasonable care and skill is implied one. The breach of such obligation or standard resulting in failure to discharge the duties specifically contemplated in the retainer attracts liability. The law does not expect a lawyer to give guarantee of success in a litigation. If he contracts so, not withstanding that he has exercised reasonable care, he attracts liability for breach of contract.

The liability of a lawyer arises independent of contract, under tort law. Here also the duty is to exercise reasonable care and skill. The standard of care expected is that of a reasonably competent lawyer. As legal profession is not stratified one, it does not set different standards on the basis of experience of a lawyers. It is immaterial whether a lawyer is a beginner or one having a very long experience in the bar. But it appears where a lawyer holds himself out as a specialist a higher standard is expected.

A lawyer is supposed to know the laws concerning his sphere of practice. He should know the legal provisions, which are frequently referred.

A lawyer who acts without consent of the client, attracts liability for fraud or misrepresentation as the case may be. It is an absolute requirement. In case of minors and mentally incompetent persons their guardians consent shall be obtained. Usually consent is inferred from the retainer.

The requirement of informed consent is recognised in the practice of law also. Such requirement is wider and strict. A lawyer is not exposed to any constraints and tension like a doctor. Accordingly he can not claim the exceptions contemplated in the case of a doctor. The information disclosed by him will not expose the client to any physical or psycological harm. It follows that a lawyer shall divulge all information that a prudent client would expect from him.

Generally lawyer is liable only to his clients. In certain cases persons who are directly injured by his acts or omissions can also bring an action against him. Many questions relating to third party liability frequently arise in connection with carelessly drafted wills. A lawyer's liability to the disappointed beneficiary is recognised in many jurisdictions.

Law does not allow a lawyer to contract out liability for negligence. The prohibition against contracting out protects the clients from unscrupulous lawyers. But a total prohibition is not needed to protect the interests of clients. Therefore it is submitted that the parties shall be given the freedom of limiting liability at a reasonable level. The courts can review the limitation clauses, to see that they are reasonable.

In addition to the traditional courts, a client can approach consumer forae when there is deficiency in legal services. They provide an alternative mechanism which is easy. There is no change in the substantive law regarding liability for negligence of a lawyer under the Consumer Protection Act.

The liability of a lawyer must be examined in the light of his primary duty towards the court. He is expected to assist the court in administering justice in an impartial way. If a lawyer does any act in pursuance of the above duty he can not be subjected to liability. The study reveals that the civil liability of lawyers and doctors is almost identical. The basis of obligation, nature of liability and duties to the client exhibit close similarity.

CHAPTER XI

CHAPTER - XI

Civil Liability of Architects and Engineers for Deficiency in Service

Architects[1] and engineers[2] are also considered as professional men from very early days. They are also liable for any deficiency in service. The aggrieved clients can enforce their remedies either through civil courts or through consumer forae. In addition to that they can approach the Council of Architects for misconduct by these professional men.

The architects and engineers render technical services beset with certain risks which the laymen can not perceive.[3] The question whether there is any defect is highly technical and injury occurs only years after they complete their service. The law regarding liability of architects is still in it's infancy in India. Very often

---

1. An 'architect' is one who possesses with due regard to aesthetic as well as practical consideration, adequate skill and knowledge to enable him to originate to design and plan to arrange for and superwise the erection of buildings or other works calling for skill in design and planing as might in the course of his business be reasonably asked to carry out or in respect of which he offers his service as a specialist. See *R.v. Architects Registration Tribunal, Ex. P. Jaggar*, [1945]2 All E.R. 131 at p.134 (K.B.).
2. An engineer is a person employed to perform functions under a contract for building construction that are analogous to the functions of an architect under a building contract or a person employed in connection with a building project for his more specialist skills than usually possessed by the architect *viz*, a civil engineer or structural engineer. See Rupert M. Jackson & John L. Powell, "*Professional Negligence*", London, second edition, p.47 (1987).
3. They render their services in connection with construction and mechanical and technical installations.

the liability is considered as part of the deficiency in housing services and product safety and product liability, when these professional men are engaged in the production of engineering goods. Hence the discussion on their liability is primarily based on the law laid down in other jurisdictions. Wherever the decisions of Indian courts on deficiency in housing services or defective product is based on the imperfection or short coming of the professional involved, those cases are also analysed in this connection. Just like the doctors and lawyers, the liability of engineers and architects may arise either out of contract or tort of negligence and breach of duty.

Liability based on contract :

The duties of an architect towards the client depends upon the terms of the contract either oral or written. Generally he is engaged for the purpose of advising, examining the site, preparing designs, drawings and plans and supervising and certifying constructions.[4] The liability for breach of duty in connection with these functions depend upon the terms of the contract. In *M.D. Bhoopathy v. Mrs. Sarada,*[5] the builders agreed to construct apartment and pent houses for the complainants. But they failed to construct the pent houses. The National Commission held that there was breach of contract. The builders were held liable.

---

4. For a discussion, see G.T. Gajria, "*Law Relating To Building And Engineering Contracts In India*", Bombay, second edition, p.66 (1979). See also M.A. Sujan, "*Law Relating To Building Contracts*", Delhi, second edition, pp. 35-40 (1996).
5. (1996) 1 C.P.J. 168 (N.C.).

An architect is under obligation to carry on the construction as per the specifications given by the client. Any lapse will attract liability for breach of contract. In *Deshbir Verma v. The Hamirpur Co-operative House building Society Ltd.*,[6] the builders did not construct the house according to the specifications given by the complainants. The National Commission held that it amounted to breach of contract.

An architect is under an obligation to use standard materials in constructions. In *Sealand of the pacific v. Robert C. McHaffie*,[7] the plaintiffs had retained the architects to carry out certain alterations to an underwater acquarium. The supplier of the concrete negligently recommended the use of a particular product in the construction. The product was not suitable for the purpose. The court held the architects liable for failing to undertake the contractual duty. The duty to enquire about the quality and fitness of the product by the engineer was considered as an implied term of the contract.

Similar view is taken under Indian law also. In *Dilbagh Rai v. Housing Board Haryana*,[8] the builders used sub-standard material in the construction of a house. It resulted in cracks in the roof. As a result of it there was water leakage. The National Commission held that there was deficiency in service.

---

6. (1996) 3 C.P.J. 165 (Himachal Pradesh S.C.D.R.C.).
7. [1974] 51 D.L.R. 702.
8. (1994) 3 C.P.J. 23 (N.C.). See also *Sanjaynagar Resindent's Welfare Association v. The Vice Chairman, G.D.A.*, (1995) 2 C.P.J. 58 (N.C.); *The General Consumer Protection and Welfare Association v. Gaziabad Development Authority*, (1995) 1 C.P.J. 158 (N.C.).

The contractual duties do not demand attainment of success on the part of an architect unless he guarantees success. If the purpose for which the building is required is made known to the architect, law enjoins an obligation on him to ensure that it is suitable for the purpose. In *Welfare Association 'E' Block, Gaziabad v. Gaziabad Development Authority*,[9] builders constructed houses without proper infrastructural facilities. The National Commission held that the lack of such facilities rendered the houses non –livable. The builders were held liable.

Similar view was taken under English law also. In *Greaves & Co. Contractors Ltd. v. Bayam Meikle & Partners*,[10] the plaintiff contractors undertook the task of designing and constructing a warehouse for storing heavy oil drums. The defendant engineers, who were entrusted with the task of structured design of the warehouse, were informed that the first floor must be capable of withstanding the weight of the loaded fork-lift trucks. The first floor began to crack due to heavy vibration resulting from the movement of the trucks. It was held that the failure of the engineers to design the floor with sufficient strength resulted in a breach of implied warranty that the floor would be fit for the purpose for which it was required. The court emphasized that in the special circumstance of the case, it was a compelling factor to imply such a term.

---

9. (1995) 2 C.P.J. 29 (N.C.). In addition to that there were numerous defects in the houses for which the opposite party was held liable. See also *V.L. Bhanu Kumar v. Dega Sundara Rama Reddy*, (1996) 1 C.P.J. 278 (N.C.).
10. [1975] 1 W.L.R. 1095 (C.A.).

The ratio of the above case as laying down a general rule is doubtful. In *I.B.A. v. E.M.I and B.I.C.C.*,[11] the sub-contractors who designed a television mast gave an assurance that it would not oscillate dangerously. But the mast collapsed. The House of Lords held them liable, without answering the question of the extent of contractual obligation.[12]

The suitability of application of the implied warranty rule, which is applied in the context of a product, to a design, is questionable, as a design cannot be treated as a product. It is suggested that there is no reason for not contemplating a warranty of fitness for the purpose in the context of a design.[13] Commercial reason demands that the contract should be interpreted in such a way that liability rests where it belongs.[14] But inference of such an obligation must be seen as a question of fact. Such an approach confers sufficient leeway to the courts not to burden architects with unwarranted obligation or place the client unjustifiably on a loosing end. Therefore it is suggested that to meet the ends of justice, a higher standard of care may be imposed.

Whatever may be the express terms there is always an implied term that an architect shall exercise reasonable care and skill in discharging his obligations. In

---

11. [1980]14 Build. L.R. 1 (H.L.).
12. The Court of Appeal had earlier held that the sub-contractors were not negligent. But it rejected the argument that no higher duty shall be imposed on a professional man, than a reasonable care and skill. *I.B.A. v. E.M.I. and B.I.C.C.*, [1979]11 Build. L.R.29 (C.A.).
13. *Ibid.*
14. *Ibid.*

the absence of any contrary provision in the contract, the service shall be rendered within a reasonable time.[15] Similarly there is a continuing duty to check that the design would work in practice. This includes a duty to correct any other flaw that might emerge[16] and review the design until the work is completed.[17]

Architect's liability under tort law :

Like any other professional man, an architect incurs liability for failure to take care. This duty is independent of contract. He shall exercise reasonable care, skill and deligence of an ordinarily competent and skilled architect.[18] In *S.P. Dhavaskar v. The Housing Commissioner, Karnataka Housing Board,*[19] the builders constructed houses which were not up to the expected level due to the use of low cost technology. Houses were constructed using soil stabilised mud blocks. But the soil stabilised mud blocks used for super structure could not withstand heavy rains. The National Commission held that there was gross deficiency as the builders failed to exercise reasonable care in not foreseeing in the risk involved in use of soil stabilised mud blocks. The builders were held liable.

---

15. The Supply of Goods & Services Act (English) 1982, s. 14(1).
16. *Brickfield Properties Ltd. v. Newton*, [1971] 3 All E.R. 328 at p. 336 (C.A.).
17. *Chelmsford D.C. v. Evers*, [1983] 25 Build. L.R. 99 at p.106.
18. *Voli v. Inglewood Shire Council*, [1963] A.L.R. 657.
19. (1996) 1 C.P.J. 65 (N.C.).

An architect is not required to have an extra-ordinary degree of skill or the highest professional attainments.[20] Breach of duty on his part must be ascertained in the light of standard of competent practitioner at the time of rendering the services rather than one prevailing at the time of the trial.[21] It does not mean that the standard is static. It should vary with new skills and technology to keep pace with the changing needs of the society.[22] Hence an architect shall equip himself with new skills and technology. He is not allowed to invoke the plea that the design is novel one. The fact of it's novelty manifests the handicaps in the backdrop of which he shall arrive at a practical decision.[23]

The general practice of building profession is evidential of the standard of care and skill.[24] It follows that breach of duty must be established through professional evidence. There is no need for it where the conduct of an architect is glaringly negligent. But in any other circumstance, where no professional evidence is forthcoming it is unfair to condemn an architect as negligent. Professional evidence should be treated as not conclusive of the standard. It should only act as a device of material assistance to the court. The court has to arrive at a decision on the standard taking into consideration the circumstances of a particular case.[25]

---

20. See *supra* n. 18.
21. *London Congregational Union Inc. v. Harriss & Harriss,* [1985] 1 All E.R. 335 at p. 341 (Q.B.).
22. *I.B.A. v.E.M.I and B.I.C.C., supra* n. 11.
23. *Ibid.*
24. *Ibid.*
25. *Florida Hotels Pvt. Ltd. v. Mayo*, [1965] 113 C.L.R. 588 at p. 593.

Any departure from the code of ethics need not be conclusive of breach of duty. If the design adopted by an architect is not compatible with the code, there arises the need for professional evidence to show that the design is capable of rational analysis in terms of it's safety and adequacy.[26] Strict proof rebuts negligence. In the mean time it must be noted that rigid adherence to the codes might stifle innovation. But such innovation must not be at the price of jeopardising the interests of the client. Experimental proposals must be encouraged with the consent of the client and should accord with sound engineering practice.[27]

The following are some of the instances where deficiency in service was found by courts.

(i) Failing to examine the site :

An architect shall carry out necessary examination of the site in terms of soil and other particulars before the inception of any building construction. In *Eames London Estates Ltd. v. North Hertfordshire D.C.*,[28] an industrial building was constructed in a made-up ground. The architect employed to design the building including the foundation failed to carry out the soil test. Even though he was aware of the fact that it was a made-up ground, he thought that it was an old railway embankment. The foundations proved to be inadequate warranting extensive repairs and possibility of re-construction. The court held the architect

---

26. *Bevan Investments Ltd. v. Blackhall and Struthers (No.2.)*, [1977] 2 N.Z.L.R. 45 (first instance).
27. *Ibid.*
28. [1980] 259 E.G. 491 quoted in *supra* n. 2 at p. 85.

negligent for failing to carry out the necessary test which would have revealed the proper steps to be taken to avert any eventuality.

The importance of examination of site does not require any stress. The precautionary steps to be taken or cost estimation, or abandoning any project in the light of risks involved depend upon such a test. The duty to carry out such test is imperative. In *Columbus v. Clowess,*[29] an architect failed to carry out necessary survey and examination of the site himself. Relying upon the information given by a third person, he drew plans and specification of smaller dimensions than the actual dimensions of the site. Inspite of the fact that the error was the result of inaccurate information given by the third party, the court held that he was under an obligation to ascertain it by himself.

Similar position can be inferred under Indian law also. In *Mohammad Ibrahim Mulla v. Hamid Aboobakar Memon,*[30] the National Commission held that if a builder gave an area to the client less than agreed upon that would amount to deficiency in service. It follows that if due to the fault of an architect the space in the building gets reduced, he attracts liability for deficiency in service.

(ii) Flaws in design :

An architect is bound to exercise reasonable care and skill in preparing a design. Some times a design may fall outside the ambit of his expertise. If so, he shall not take the risk of preparing it. He shall entrust the task to a specialist or

---

29. [1903]1 K.B. 247.
30. (1996) 1 C.P.J. 28 (N.C.).

instruct the employer to appoint a specialist. In *Young v. Tomlinson,*[31] the architects designed a wall. In preparing the design they moved a little out of their specialization. The design proved to be defective. The court found them negligent. However the approval of design by the employer with the full knowledge of defects can exonerate him from liability.

Similar position is taken under Indian law also. In *Chairman, Tamilnadu Housing Board v. N. Sivasailam,*[32] the National Commission held that cracks in the house due to defective design would amount to deficiency in service.

(iii) Failing to provide a proper estimate of the cost:

An architect is bound to exercise reasonable care in preparing an estimate of the cost. In *Moneypenny v. Hartland,*[33] an architect failed to examine the soil where foundation had to be laid down for a bridge. Accordingly he grossly underestimated the cost of the bridge. The court found him negligent on the ground that the deviation was not of a trifling nature.

It follows that where there is a substantial difference between the estimated cost and actual cost an architect cannot escape liability. A building construction calls for investment of huge amount. A properly prepared estimate showing a mammoth figure will certainly make the employer to abandon the project. It is the underestimated figure what makes him to embark upon the project. Mathematical

---

31. [1979] 2 N.Z.L.R. 441.
32. (1996) 1 C.P.J. 321 (N.C.).
33. (1826) 2 Car. & P. 378, quoted *supra* n. 2 at p. 85.

exactitude is not required. But the estimate must be reasonable one and it must help the employer to arrive at a rational decision either to abandon the project or to go ahead with it.

A gap is bound to occur between the actual cost and the estimated cost, as a result of inflation. Therefore a question arises whether an architect should provide for the increased cost. The legal opinion is divided in this regard.[34] It should be noted that an architect like others cannot predict the inflation. A client is also aware of it. Whether an estimate should provide for increased cost is a question of fact, which depends upon the circumstances of the case. No hard and fast rules can be laid down. To prepare an estimate with increased cost arises if an architect is specially asked to do so. He can accept it with necessary reservations.[35] In the absence of such specific instruction, an architect incurs liability only if the estimate is unreasonably wrong.

---

34. In *Savage v. Board of School Trustees,* [1951] 3 D.L.R. 39, the architect submitted an estimate of $ 1,10,000-00 where as the lowest quoted tender was $ 1,57,000-00. The court held him negligent on the ground that the substantial discrepancy was the result of inadequate checking and rechecking of the estimate. The defence of rising prices was negated on the ground that the architect being aware of it, should have proved for it in the estimate. But in *Aubrey Jacobus and Parteners v. Gerrad,* unreported, quoted in *supra* n. 2 at p. 90, the architects submitted an estimate of Ł 3,65,000 where as the lowest tenders was Ł 14,1700-00, The court refused to accept the plea that the estimate should represent the ultimate cost with due consideration of cost increase over a period of completion of work.
35. See *Aubrey, supra.*

If an architect is aware of the financial constraints of his employer, he shall exercise reasonable care to warn the latter the possibility of actual cost exceeding the estimate.[36] If the cost limit is not fixed, it is his duty to see that the work gets completed within a reasonable cost.[37]

(iv) ***Careless selection of contractors*** *:*

An employer may entrust the selection of contractors to an architect. Before recommending any contractor, he is bound to make reasonable enquiries as to the solvency and capabilities of the contractor as well as sub-contractor.[38] The successful completion of work depends upon the financial position of the contractors and their suitability for the same. Hence any lapse on the part of an architect, in rendering a careless recommendation exposes an employer to hardship. Accordingly an architect is under a duty to select competitive tenders[39] and examine the amounts of quotations to see that unreasonable ones are not accepted.[40]

An architect should advise the employer to reject contracts containing terms, which are detrimental to the interest of the latter. The terms incorporated into a contract have their own legal impact. If required architect shall consult a

---

36. *Flannagan v. Mate*, (1876) 2 Vict. L.R. (Law) 157, quoted *supra* n. 2 at p. 91.
37. *Supra* n. 2 at p. 92.
38. *Equitable Debenture Assets Corporation v. William Moss*,[1984]2 Con .L.R. 1 at p. 26.
39. *Hutchinson v. Harris*, [1978]10 Build. L.R. 19.
40. *Tyrer v. District Auditor of Monmouthshire*, [1974] 230 E.G. 973, quoted *supra* n.2 at p. 93.

legal adviser or advise the employer to do so to ascertain the same.[41] Any lapse on his part to scrutinise the contract to ensure that it conforms to the designs and specifications, results in negligence.[42]

(v) Failing to know the relevant laws :

The building profession must be undertaken in accordance with relevant building regulations and statutory provisions. Any departure from this imposes liability on an architect. In *Dilbagh Rai v. Housing Board, Haryana*,[43] the builders constructed a house deviating from the P.W.D. Manual of Designs and Specifications. The National Commission held that such deviation amounted to deficiency in service.

An architect is bound to know the laws concerning his sphere of activity. Here again the test is that of a reasonably competent practitioner. He should endeavour to carry out the work properly to safeguard the interests of his client and protect him from any danger or loss.[44] In *Smt. Rita Roy v. Shyamali Chug*,[45] the client had paid fee for registration of the flat. Though the possession of the flat was handed over to her, the builders refused to register the same. The West Bengal

---

41. *Supra* n. 2 at p. 93.
42. *Ibid.*
43. (1994) 3 C.P.J. 23 (N.C.).
44. *B.L. Holdings v. Wood,* [1978] 10 Build. L.R. 48.
45. (1998) 1 C.P.J. 438 (West Bengal S.C.D.R.C.).

State Commission held that refusal to register amounted to deficiency in service. It observed,[46]

> "... Registration of a flat which is constructed on the basis of an agreement for the construction and sale of the same is an essential part of the agreement for sale. An immovable property which is compulsorily registrable under the Registration Act cannot be conveyed ..."

Similarly in *M.D. Bhoopathy v. Mrs. Sarada*,[47] the clients executed a power of attorney in favour of the builders to sign plans and applications to obtained necessary permission for construction of apartment and pent houses. But the builders failed to obtain permission for construction of pent house. They contended that the clients had attempted to get the permission. But there was no evidence to substantiate that contention. The National Commission held that there was negligence on the part of the builders in failing to obtain the permission.

Similarly in *B.N. Venkatesh Murthy v. Bangalore Development Authority*,[48] the client was allotted a plot for house construction which was a subject matter of pending litigation. The complainant was not aware of it. He incurred considerable expenditure for construction. Eventually he had to abandon it. The National Commission held that there was gross deficiency in service. It follows that an architect ought to know that pending litigation with regard to a plot, no

---

46. *Id.* at p. 440.
47. (1996) 1 C.P.J. 168 (N.C.).
48. (1994) 3 C.P.J. 96 (N.C.).

construction work must be undertaken there. An architect can claim exemption from liability if the client had prior knowledge of pending litigation.

English law has also taken similar position. In *Strongman v. Sincock,*[49] it was held that as a universal practice it was the duty of an architect and not for the builder to obtain licenses required at the time of the work. In *Townsend (Builder) Ltd. v. Cinema News Property Management,*[50] an architect was held liable for negligence to the building contractors for delay in service of notices as required by the building bye-laws. Whether an architect is responsible for compliance with such requirements is a question of fact, which depends upon the scope of his contractual duty.

(vi.) Improper administration of building contract :

In larger building projects, an architect may have to depart from his normal functions.[51] He may have to undertake different tasks like seeking extension of time and issue of variation orders.[52] He must discharge all these functions with reasonable care and skill, as a part of his duty of care to the employer. Accordingly he should exercise care in allowing any claims for extra payment and extension of time to see that they are reasonable and justified as per the terms of the main

---

49. [1955] 3 All E.R. 90 (C.A.).
50. [1982] 20 Build. L.R. 118.
51. See G.T. Gajria, *op.cit.* at p.11.
52. *Ibid.*

building contract. Before ordering any extra work than one contemplated in the contract or in all matters contemplated above an architect is under a duty to obtain prior permission from the client.[53] But in trivial matters and in emergency situations he can take immediate action.

An architect is bound to see that the work completes within a reasonable time. Any unjustifiable delay will attract liability. In *V.L. Bhanu Kumar v. Dega Sundara Rama Reddy*,[54] the National Commission held that unreasonable delay in construction giving rise to delayed possession of building would result in deficiency in service. But if the delay is due to the fault of the client, no cause of action arises.[55]

(vi) Failing to exercise adequate supervision :

A client is entitled to expect the architect to supervise the work to see that, the work is compatible with the standard contemplated. An architect needs to exercise reasonable supervision.[56] In *Consumer Protection Council v. Rudradattu Amarkant Vyas*,[57] the builders constructed some tenements. There were many deficiencies and defects in the construction including plastering. Plastering was found to be of 10 m.m. Minimum requirement as per the Indian standard is 12m.m.

53. *Gordon v. Millar*, (1838) 1.D. (Ct. of Sess.) 832 quoted in G.T. Gajria, *op.cit.* at p.111.
54. (1996) 1 C.P.J. 278 (N.C.).
55. *Id.* at p. 284. See also *Venkatesan v. Fusion Constructions*, (1998) 1 C.P.J. 177 (Tamilnadu S.C.D.R.C.)
56. The nature of supervision depends upon the terms of contract between the architect and client and the main building contract.
57. (1996) 2 C.P.J. 97 (Gujarath S.C.D.R.C.).

The Gujarath State Commission held that there was deficiency in service. It follows that but for lack of supervision such deficiency would not have arisen.

Supervision does not mean continuous and constant supervision.[58] He must supervise the principal parts of the work.[59] In *Florida Hotels Pvt. Ltd. v. Mayo,*[60] the work included the construction of a swimming pool. As per the terms of the contract, the architect agreed to render periodical supervision and inspection to ensure that the works were executed as contemplated by the employer. Concrete around the pool got collapsed as a consequence of the removal of form work. It resulted in injury to an employee. The collapse was attributed to laying down the reinforcing mesh longitudinally rather than traversely which reduced it's strength. Laying of mesh and pouring concrete were done in between two visits of the architect. Expert evidence revealed that the architect should have been present at the time of pouring concrete and ensured that the work was properly done. The court relying on the expert evidence and the fact that employer had not engaged any contractor, held the architect negligent.

It follows that the extent and nature of supervision are questions of fact, which depend upon the circumstances of a case. The duty of supervision extends to

---

58. *Jameson v. Simon,* (1899) 1 F. (Ct. of Sess.) 1211, quoted in G.T. Gajria *op.cit.* at p. 106.
59. *Ibid.*
60. See *supra* n. 25.

his intervention to warn the contractors when they embark on an incredible act of folly and draw their attention to the necessary precautions to be taken without which damage to property is likely to arise.[61]

(vii) Incorrect certification :

An architect is bound to exercise reasonable care in issuing final or interim certificate with respect to the amount due to the contractor, failing which he attracts liability either for under-certification or over-certification as the case may be.[62] It is obvious that over-certification results in excess payment to the contractor.

(viii) Failing to disclose the risks:

Like any other professional man an architect or engineer shall obtain the informed consent of his client for any design or structure. As a part of his duty of care, he is required to inform the client all material facts, various designs and risk connected with that. By this the client can select a design which is relatively superior in terms of safety. In *Welfare Association 'E' Block, Gaziabad v. Gaziabad Development Authority,*[63] the builders failed to disclose that the housing colony was surrounded by railway tracks on three sides. The National Commission

---

61. *Oldschool v. Gleeson (Contractors Ltd.),* [1976]4 Build. L.R. 103.
62. In *Sutcliffe v. Thackrah*, [1974] 1 All E.R. 859 (H.L.), the court held that irrespective of whether the certificate was interim or final he could claim immunity only if an architect was appointed as an arbitrator or quasi-arbitrator. But in *Chamber v. Goldthorpe,* [1901]1 Q.B. 624 it was held that in issuing final certificate if an architect acted as an arbitrator or quasi arbitrator he could not be held liable for negligence.
63. (1995) 2 C.P.J. 29 (N.C.).

held that the builders failed to reveal the material facts. They were held liable for deficiency in service. It can be inferred that disclosure of material facts would have enabled the clients to insist for a strong design to withstand the vibrations caused by the movement of trains. Similarly if the material fact was disclosed, they would not have purchased the houses.

Canadian law has taken that position very obviously. In *City of Brantford v. Kemp and Wallace - Carruthers and Associates*,[64] the site for a fire hall and police station consisted an old rubbish tip. The safer design was one based on supporting the entire building on piles. The risky but cheaper design known as floor on earth method, called for supporting the main walls on piles but placing partition walls on floor laid on granular fill and suspended from the main walls. The examination of site would have revealed the need for the safer design. But the engineers had not carried out such examination either before or after the excavations. The internal walls and floors failed. The engineers were held liable. The court held that where a design involved an element of risk, an engineer was under a duty to inform it to the client. He should explain the superior safety of the alternative design.

Even though an architect is under a duty to inform the risk involved in a design, he is not under a duty to inform the risk of future abuse. In *Introvigne v. Common Wealth of Australia*,[65] the architects designed a flagpole. The plaintiff a

64. [1960]23 D.L.R. 641.
65. [1980] 32 A.L.R. 251.

school boy was swinging from the halyard of the same. He sustained injury as a result of collapse of the truck fastened to the top of the pole. The court found it for the architects on the ground that they were not under a duty to guard against such abuse by the school boys.

If the abuse is notorious and it could be reasonably he can not escape liability. In *Voli v. Inglewood Shire Council,*[66] the defendant architect designed a stage in a public hall. The specified joints were not strong enough to bear such burden. The stage collapsed and resulted in injury to the plaintiff. The court held that the architect owed a duty of care to design the stage in such a way that it could bear a reasonable weight. It follows that an architect is under an obligation to inform the capacity of any structure so that the client can take necessary precautions not to exceed the capacity to avoid any risk of collapse.

Duty to third parties :

An architect or engineer will be liable to third parties also for deficiency in service. But this is subject to condition that those third parties were within his reasonable contemplation. For example an architect may engage the services of a specialist engineer. Not withstanding the fact that, there exists no contractual relation between such engineer and architect's employer, the former will be liable to the employer for any breach of duty. In *Bevan Investments Ltd. v. Blacknall & Struthers,*[67] the plaintiff employer engaged the services of the defendant architects

66. See *supra* n. 18.
67. [1973] 2 N.Z.L.R. 45 (first instance).

for the design and construction of leisure centre. The architects employed a structural engineer to advise on the structural aspects of the design. The design provided for the construction of squash courts above a skating rink of 60 feet width, through lift slab method of construction. The engineer left to Australia in the course of construction even before the engineering aspects of the design were put into test. In his place another engineer was appointed. All the efforts to lift the first floor slab into position proved to be futile. So construction as per the original design was abandoned. It was held that he owed a duty of care to the employer, which was violated not only in being negligent to provide a safe and adequate design but also in not furnishing proper details and specifications to his successor. Similarly a duty of care towards the employees is also recognised.[68]

An architect stands in proximate relation with the contractors.[69] He would commit a breach of duty, if he fails to warn of any major mistake known to him to the contractors and subcontractors with respect to the work.[70] Likewise if he directs any work to be done in a way he knows or ought to know that it will be done in a dangerous way, a duty is imposed on him to warn the contractors and sub contractors.[71] Similarly an architect incurs liability for under-certification, as it

---

68. See *supra* n.60
69. *Victoria University of Manhester v. Hugh Wilson,*[1984] 2 Con. L.R.43 at p.86.
70. *Ibid.*
71. *Ibid.*

causes the contractor to receive lesser sum than what is actually due to him.[72]

A duty of care is also recognised towards the employees of contractors. In *Driver v. William Willet (Contractors) Ltd.*,[73] a labourer employed by the contractor sustained injury as he fell due to the collapse of a scaffold board from the hoist, which was not enclosed by a wire mesh. The building contractors had employed consulting safety and inspecting engineers. It was held that the engineers committed a breach of duty in not advising the contractors to enclose the hoist by a wire mesh. It was observed that the labourer fell within a class of persons whom the engineers should have reasonably contemplated as exposed to danger, if they failed to advise the pre-cautions to be taken to avoid any calamity.

In recent years an architect's duty of care to subsequent purchasers and users is also recognised.[74] Thus if he negligently designs a house or bridge, he will be held liable to all those who are injured as a result.[75] Similarly he will be

---

72. A contractor might have a claim against an architect in respect of any losses resulting from latter's failure to ascertain the amount of direct losses and expenses within a reasonable time. *F.G.Minter Ltd.v. Welsh Health Technical Services Organisation*,[1979]11 Build. L.R. 1 at p.13
73. [1969]1 All E .R. 665.
74. See *Dutton v. Bognor Regis United Building Co.Ltd.*, [1972]1 All E.R. 462 (C.A.). *Higgins v. Arfon Borough Council.*, [1975] 2 All E.R. 589 (Q.B.), *Sparham Souter v. Town and County Developments [Essex] Ltd.*, [1976] 2 All E.R. 65 (C.A.), *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), *Batty v. Metropolitan Property Realizations Ltd.*, [1978] 2 All E.R. 445 (C.A.), *Investors in Industry Commercial Properties Ltd. v. South Bedfordshire D.C.*, [1986] 1 All E.R. 787 (C.A.).
75. See *Dutton, op.cit.*

liable to the purchaser of a house from the original owner for any defective structure.[76]

The Latent Damage Act (English) 1986, makes special provisions for successive owners of a building which is affected by the latent damage.[77] A fresh cause of action accrues to subsequent owner of a property in respect of any negligence to which the damage to the property is attributable.[78] The Defective Premises Act (English) 1972, creates inter-alia a civil remedy against architects. They are potentially liable in the tort of negligence, which imposes on them a duty to act with reasonable care.[79]

Similar position can be inferred under Indian law also. *In Dilbagh Rai v. Housing Board, Haryana,*[80] the builders constructed a house. During the rainy season because of defect in the structure, water percolated from the ceiling and the walls. It resulted in cracks. By that time already one year was over after the client had taken possession of the house. At the time of taking position the client did not point out any defects in the house and had given satisfaction certificate. The National Commission held that latent defects amounted to deficiency in service. It observed,[81]

---

76. *Young v. Tomlinson,* [1979] 2 N.Z.L.R. 441.
77. See ss. 3(1)(b), 5 and 6.
78. See s. 3.
79. See s. 6 (2).
80. (1994) 3 C.P.J. 23 (N.C.).
81. *Id.* at p. 27.

> "... The allottee of the house is only responsible for noticing what are known as patent defects in construction. The latent defects would show up only in due course of time and especially in the case of buildings after rains. Consequently, the complainant was not estopped from raising the question of defective construction nearly after one year of taking position..."

It follows that a subsequent purchaser also when the defects come to light can make the architect liable for the same.

Avoidance of liability by an architect :

An architect can avoid his liability under various circumstances. Thus if he can show that he had relied upon specialists to whom duties were delegated he could escape liability.[82] In *London Borough of Merton v. Lowe*,[83] the defendant architect was appointed to design and supervise the construction of a swimming pool. His design included suspended ceiling surfaced with a product called pryrok supplied by a company. That company was nominated as sub-contractors to do the job of plastering the ceilings. It failed due to an imbalance of the mix of undercoats and pyrok finishing coat. The company alone had the knowledge of constituents of the coat. It was accepted that the mix was part of the design of the company, as specialist sub-contractors.

---

82. If it is inevitable an architect must seek the assistance of specialists. In *Equitable Debenture Assets Corp. v. William Moss*, [1984]2 Con. L.R.1, it was held that the architects must seek the assistance of the specialists when they reach the limits of their knowledge. See also *Investors in Industry Commercial Properties Ltd. v. South Bedfordshire D.C.*, *supra* n. 74.
83. [1981]18 Build. L.R. 130.

Accordingly an action for negligence against the architect failed on the ground that he was entitled to rely on the company to apply a proper mix, which was reasonable in terms of it's successful work elsewhere.

It is obvious that the defence can not be availed if the architect has knowledge of sub-standard work done by the specialists elsewhere. Further it can not be raised where it is not the practice of the profession to delegate the work to another.[84] Virtually an architect can not delegate the work unless it is warranted. Moreover actual delegation, is a question of fact, which must be ascertained having recourse to an objective assessment. Notwithstanding reliance on a specialist, if the work is actually done by the architect, there is no delegation, where as if the work is essentially done by the specialist there is delegation.

Another ground of avoidance of liability is trivial nature of errors.[85]

An architect can also avoid liability for deficiency in service when it is the result of factors beyond his control. In *Ajay Enterprises Ltd., v. Kamalesh Agarwal,*[86] the client entered into an agreement with builders for the purchase of office space in a commercial complex. The premises did not have necessary amenities like electric connection, water supply and sewerage facilities. It was found that the water and sewerage connection rested on the laying of the pipelines

---

84. *Moresk Cleaners Ltd. v. Hicks,* [1966]2 Llyod's Rep. 338. In this case the defendant architect was held negligent for delegating the design of reinforced concrete frame to the structural engineers.
85. See supra n. 2 at p. 77.
86. (1998) 1 C.P.J. 77 (N.C.).

by the concerned authorities. The National Commission held that the builders could not be held liable. It follows that where no fault lies with an architect he can not be held liable. But if he does not make any efforts to do the needful for benefit of the client he attracts liability.

An architect can claim immunity, for incorrect certification, provided he has discharged the function of certification in the capacity of an arbitrator.[87] Such immunity can be claimed only under limited circumstances.[88]

Exclusion of architect's liability :

An architect can exclude or limit liability for negligence by inserting exclusion clauses. But such exclusion is subject to strict legal scrutiny.[89] But if negligence results in personal injury or death, liability can not be either limited or excluded.[90]

Exclusion clauses will not operate against third parties as they are not parties to a contract between the architect and client. Thus an architect can not exclude liability for negligence to subsequent purchasers of a building which he designs. But under some circumstances through suitably worded disclaimer, he can do so.[91]

---

87. *Sutcliffe v. Thackrah*, *supra* n. 62.
88. *Arenson v. Arenson*, [1977] A.C. 405 at p. 425.
89. For a discussion on the scope of exclusion clauses, see *supra* chapter 6 and 10.
90. See the Unfair Contracts Terms Act [English] 1977, s. 2(1).
91. See *supra* n.2 at p. 27.

Remedies for deficiency in service :

An aggrieved client can claim remedies against an architect through civil courts or consumer forae. Even pure economic losses can also be recovered.

If the building suffers from defects as a result of architect's negligence with respect to site, design or supervision, cost of rectification can be recovered as damage. This is subject to the condition that it's completion to a modified design is possible.[92] It is obvious that if modification is not possible or there is no intention of completion, it is not the proper measure of damages.

Similarly the expenditure incurred on an abandoned project can also be recovered as damages. It is the proper measure when the completion of the building calls for substantial modification of the design or at a price far excessive than estimated cost. This situation arises when reasonable care and skill on the part of architect would have enabled the client not to take up project at all.[93] A client is allowed to recover the total expenditure minus the salvage value of the completed structure.[94]

Cost of rectification or wasted expenditure as a measure of damages

---

92. *Bevan Investments Ltd. v. Blackhall and Struthers (No.2),* [1973] 2 N.Z.L.R. 45. In this case owing to the negligent design of an engineer, construction of a leisure centre had to be abandoned. The court awarded damages representing costs of rectification of the building to a modified design.
93. *Auburn Muncipal Council v. A.R.C. Engineering Pvt. Ltd.*, [1973] N.S.W.L.R. 523 at p. 529, as quoted in Rupert M. Jackson and John L. Powell, *op.cit.* at p. 111.
94. *Ibid.*

depends upon the facts. The latter is beneficial from the point of view of a negligent architect. The courts must cautiously opt for the proper measure without injustice being caused either to the client or architect.[95] In an instance of negligent over-certification, a client is allowed to recover the excess expenditure, which can not be recovered from the contractor. A contractor is entitled to the difference between the sum actually due and paid to him due to architect's negligent under-certification.

Apart from direct losses, a client is allowed recover consequential losses arising from architect's negligence. In *Rajasthan Housing Board v. Dr. Veer Singh Mehta*,[96] the client was not allotted a house due to the negligence of the board in not including the former's name in the draw of lots. The house was allotted to another person. The National Commission held that the client was entitled to the rent what a willing tenant would have paid.

Similarly, In *Bevan Investments Ltd.*,[97] the plaintiffs were allowed to recover the loss of profits resulted from delay in completion of the leisure centre caused by the negligence of architects. Unlike other heads of damages, the judicial attitude is in favour of the architects, in liberally allowing them to raise the defence of remoteness or failure to mitigate the losses.[98] Accordingly a client cannot

---

95. In *Bevan, supra* n. 92. The court rejected architect's contention of wasted expenditure as the measure of damages.
96. (1997) 1 C.P.J. 66 (N.C.).
97. [1977] 2 N.Z.L.R. 45.
98. See *supra* n. 2 at p. 114.

recover remote consequential losses or unmitigated losses. In *Rajasthan Housing Board v. Dr. Veer Singh Mehta,*[99] the client contended that had the housing board recovered the price of the house from him in time, he would have obtained income tax rebate. The National Commission held that recovery was not allowed for any hypothetical claim. It observed,[100]

> "... The award of compensation to a consumer is to be determined on the basis of actual loss or injury suffered by the consumer ..."

Accordingly in *B.N. Venkatesh Murthy v. Bangalore Development authority,*[101] *the National* Commission directed the builders to pay a sum to the client towards interest, unnecessary expenditure incurred, fee paid to the architects and engineers, fee paid to the lawyer and cost of complaint.

General damages are allowed for inconvenience in appropriate cases depending upon facts of the case. The judicial attitude is not in favour of allowing recovery where the activity with reference to which the question of architect's negligence is raised is of a commercial nature.[102] On the other hand, if the building is a dwelling house the expenses to carry out repairs to remove defects resulting from architect's negligence can be recovered along with damages for frustration, discomfort and inconvenience.[103]

---

99. See *supra* n. 96. For the facts, see *supra.*
100. *Id.* at p. 68.
101. See *supra* n. 48.
102. *Hutchinson v. Harris,* [1978]10 Build. L.R. 19.
103. *Ibid.* See also *Young v. Tomlinson,* [1979] 2 N.Z.L.R. 441.

Recovery of pure economic loss :

The actual damages resulting from injury to person or property due to collapse of a defective structure are recoverable from the architects.[104] But a question arises whether one can recover pure economic loss resulting from anticipatory repairs to the defective structures to avert any future danger to person and property.[105] The decided cases in different jurisdictions present a great deal of controversy.

In *D. & F. Estates Ltd., v.Church Commissioners for England*,[106] the House of Lords in England made the following observation,[107]

> "... liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties would seem to be purely economic."

The core of the above observation is that except in situation of reliance[108] there is no tort recovery for economic loss. It follows that once the injury is

---

104. Anns v. Merton London Brough Council, see supra n. 74.
105. For a discussion, see Lauro C.H. Hoyano, "Dangerous Defects Revisited By Bold Spirits", 58 M.L.R. 887 (1995) In *Anns*, it was held that the amount of expenditure necessary to remove the defects in the structure where there was an imminint danger to the person or property was recoverable.
106. [1988] 2 All E.R. 992 (H.L.). In this case *Anns*, was overruled. See also *Murphy v. Brentwood D.C.*, [1990] 2 All E.R. 908 (H.L.).
107. *D. F. Estates Ltd., supra* at p. 1006.
108. See the rule in *Hedley Byrne& Co. Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (H.L.).

averted the claim dooms. The judicial attitude does not reflect a pragmatic approach. Rather it manifests a preference of logic to justice. It should be noted that the duty in tort aims at protecting bodily integrity and property interests of the building occupants.[109] If this principle is put into oblivion, the plaintiffs are discouraged to mitigate the losses. Only a positive approach paves the way for a professionally responsible behaviour.

In *Winnipeg Condominium Corporation No.36 v. Bird Construction,*[110] the Canadian court recognised a duty in tort with respect to defects posing a substantial danger to the health and safety of the occupants as distinct from defects which are merely safe but shoddy.[111]

---

109. See John G. Flemming, "Once More Tort Liability For Structural Ddefects", 111 L.Q.R.362 at p. 363 (1995).
110. [1995]121 D.L.R. 193. See also *Invercagril C.C. v. Hamlin,* [1994]3 N.Z.L.R. 513.
111. This discussion is based on the two prong test laid down in *Anns.* See *supra* n. 74 at p. 498, per Lord Wilberforce.
(i) The first question that is to be asked is whether as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that in the reasonable contemplation of the former carelessness on his part may be likely to cause damage to the latter in which a duty of prima facie care arises.
(ii) Secondly if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative or reduce or limit the scope of duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.

In *Bryan v. Maloney*,[112] the Australian court recognised a claim even though the defective foundations did not present an imminent danger of potential injury to occupants or others. The court observed that the English cases rested upon the narrower view of the modern law of negligence and a more rigid compartmentalization of contract and tort than was acceptable. The court further observed that if there was no 'indeterminate liability towards indeterminate plaintiffs,' a claim must be recognised, even though it was for a pure economic loss.

The decision of the court is laudable. It does not require any stress that if the structure is defective one, it's value in the eye of potential purchasers will diminish. The damage needs to be ascertained in terms of the loss of value which is reasonably foreseeable. Further the decision satisfies *Hedley Byrne*,[113] test of assumption of responsibility and reliance. But the English Courts seem to limit the liability of a professional for his negligence to any one with whom he has a contractual relationship.[114]

In India consumer courts have awarded damages for defective structures without any distinction of dangerous and non dangerous defects. Therefore pure

---

112. [1995] 69 A.L.J.R. 375. This case involved a claim by subsequent purchaser against a negligent builder for defective foundations.
113. See ***supra*** n. 106.
114. Richard O' Dair, "Professional Negligence: Some Further Limiting Factors", 55 M.L.R. 406 (1992).

economic laws can be recovered. In *Dilbagh Rai v. Housing Board Haryana*,[115] there were serious structural defects in the house allotted the complainant. The National Commission held that the client was entitled to all the expenditure that he had to incur or would incur for removing defects.

Consumer courts have directed the builders to remove the defects also. In *Sanjayanagar Resident's Welfare Association v. The Vice Chairman, G.D.A.*,[116] the builders constructed houses with numerous constructional and material defects. The National Commission directed the builders to remove the defects to the satisfaction of the clients by using materials complying with the standards prescribed by I.S.I.

There is an obligation on the part of the client to bring the defects to the notice of architect or builder before he incurs any expenditure to rectify the same. Any lapse will forfeit the right of recovery. In *Sushil Kumar Gupta v. Housing Board*,[117] the client contended that the house constructed by the builders was not in habitable state. He had accepted the possession of the house without any protest. Later without any notice of defects to the builders, on his own he incurred expenses to remove the defects. The Gujarath State Commission held that the client was not entitled to recover the expenses.

---

115. (1998) 2 C.P.J. 23 (N.C.).
116. (1995) 2 C.P.J. 58 (N.C.).
117. (1996) 2 C.P.J. 479 (Chandigarh S.C.D.R.C.).

For any deficiency in service amounting to professional misconduct a client can file a complaint before the Council of Architects.[118] The Council is empowered to suspend or remove the name of such architect from the register.[119]

Remedy under the Consumer Protection Act :

An architect can be made liable for deficiency in service to a client under the consumer protection act also.[120] The consumer can claim all the legal remedies discussed above. In *S. Ramaswamy v. Centre Point,*[121] the builders allotted a flat to the client. Thereafter the builders informed the latter that the project was scrapped. It was held that there was gross negligence on the part of the builders and compensation was awarded for mental agony and suffering.

In *National Consumer Protection Council v. Poorvadeep Corporation,*[122] a building constructed with estimated life span of 60 years collapsed just after 4 years. The Corporation was vicariously held liable.

In *Harbans Singh v. Lucknow Development Authority*,[123] defects were

---

118. For a discussion on professional misconduct see *supra* chapter 7 and 10.
119. The Architects Act 1972, s. 22 empowers the Council of Architects to specify the infamous conduct amounting to professional misconduct. S. 30 provides for punishment.
120. For a discussion on the meaning of 'deficiency in service', see *supra* chapter 7.
121. (1997) 1 C.P.J. 113 (Karnataka S.C.D.R.C.).
122. (1997) 1 C.P.J. 494 (Gujarath S.C.D.R.C.).
123. (1994)1 C.P.J. 130 (N.C.). See also *Orissa State Housing Board v. Chandrasekharpur Housing Board*, (1994) 1 C.P.J. 109 (N.C.).

found in the construction. As a result there was delay in handing over the possession of the flat. The Corporation was directed to remove the defects and pay interest from the date on which the possession had to be given.

Deficiency in architects' service : A critical evaluation :

The technological development in construction industry and other allied areas made it inevitable to hire the service of architects and engineers. They are persons with special knowledge and skill in these areas. They may misuse their position to expose a layman to hardship.

The legal controls so devised demands exercise of reasonable care and skill in rendering the service. The standard expected is that of a reasonably competent practitioner. If he wishes, he is free to incorporate a term imposing high standard in the contract with his client.

A specialist practitioner with profession possesses high degree of knowledge than an ordinarily competent practitioner. Accordingly the question whether he has exercised reasonable care must be answered with reference to his knowledge. But the available decisions seem to ignore his knowledge in determining the standard of care. Therefore it is submitted that where a practitioner holds himself out as a specialist, higher standard of care shall be demanded of him than the general practitioner. But within the area of his

speciality, the standard that is expected shall be of ordinarily competent specialist in that area of speciality.

Proof of negligence of an architect calls for professional evidence. Such evidence is not conclusive. Having regard to the circumstances courts should exercise their discretion in either accepting or rejecting it. It has merit of not leaving the determination of the standard of care to the professional men alone. Thus courts can safeguard the interest of clients by discarding pernicious practice. Only genuine professional practice should be accepted.

An architect or engineer shall obtain informed consent from his client. Such requirement is strict. An architect or engineer can not exercise discretion to withhold the information, unless it is expressly waived by the client. The obvious reason is that an architect does not find him in a precarious position in which a medical man is placed.

There is a need to distinguish between the services of commercial and non-commercial nature. The judicial attitude seems to be sensitive and vibrant in acknowledging the realities. Accordingly courts have declined to award damages for inconvenience discomfort and mental distress and insisted for mitigation of losses strictly where the negligent service in question is one connected with commercial work. But in case of non-commercial work like construction of dwelling houses damages are awarded.

One controversial area is the law relating to recovery of pure economic losses connected with defective structures. The English courts have adopted a very rigid approach in disallowing a claim to prohibit recovery of expenses incurred to rectify the defects to avert any future danger. It is obvious that they are swept by the allure of logic rather than justice. But the Australian and Indian approach acknowledge the needs of practical justice to allow recovery without maintaining a dichotomy between dangerous and non-dangerous defects and without waiting for the occurrence of physical damage. It is submitted that such an approach lays down the correct proposition of law, as any defect in the structure certainly diminishes the value of the property which but for the negligence of an architect will not happen.

In India suits against architects and engineers are decided mainly in connection with deficiency in housing services. By inclusion of housing services under the Consumer Protection Act, substantial number of cases relating to deficiency in construction services are coming before consumer forae. The consumer forae are empowered to render appropriate relief including the removal of defects and payment of damages for deficiency in service including economic losses. The discussion shows that the liability for deficiency in service of architects and engineers is very much similar in nature to that of other professionals like lawyers and doctors.

CHAPTER XII

CHAPTER – XII

Conclusions And Suggestions

Consumers as laymen can not perceive the intricacies of professional services. As a result professional men could misuse their superior position to expose consumers to hardship through deficient services. This is obvious from the fact that deficiency in professional services has assumed a menacing proportion. It is indicative of failure of internal control through self-regulation to check the abuse of position by the professional men. The professional bodies entrusted with the task of enforcing disciplinary measures show a very callous and indifferent attitude towards the repressive conduct of their members. These bodies are more concerned to protect the interest of their members. They are not free from institutional bias. They have put the interest of consumers into oblivion. In effect remedies through professional bodies has become a myth. All these factors make the external control of professional services mandatory to protect the consumers from the clutches of unscrupulous professional men, who abuse their superior position.

The professional men who abuse their position are exposed to liability. Their liability arises under contract, tort and statutory law.

The present study substantially concentrates on professional liability of medical men. The obvious reason is that of all professional services medical

services are the frequently availed services by the consumers. Medical negligence cases account for bulk of the professional negligence cases. In India also large number of cases are coming before consumer forae. The legal principles evolved in this sphere of professional service confers an insight into legal control of other professional services as well. The same principles are applied to other professions also, as by and large all the professions share common characteristics. Such principles are modified wherever necessary to make room for differential aspects of particular profession.

Obligation to render service:

Any person who undertakes a public avocation is bound to render his service, unless there is justification for refusal. The obligation of common carriers and innkeepers to render services with necessary exceptions is well established. But though professional men undertake a public profession law has not imposed such obligation on them. Accordingly a doctor is not under an obligation to treat a patient. Emergency is also not an exception to this rule. It is a very dangerous proposition. As a result patients are exposed to hardship especially in cases of fatal accidents. A doctor cannot be allowed to refuse to treat unless there are justifications like his incompetency, incapacity of the patient to pay or lack of facility. However in the context of legal profession courts have re-iterated the obligation of lawyers to render service unless there is justification for refusal. Therefore it is submitted that by an anological extension the obligation to render

services with necessary exceptions must be extended to other professional services also. This will help to obviate the hardship caused to consumers.

At times question of payment of fees regarding treatment of accident victims may arise. The patient may refuse to pay. In effect a doctor will be exposed to hardship. Therefore it is submitted that the state shall constitute a contingency fund from which such expenses can be defrayed.

Theoretical basis for professional liability:

A doctor can misuse his superior position by being negligent in rendering the service. All medical procedures are beset with risks. They are performed on human bodies. Therefore the magnitude of risk is relatively high compared to other professional services. By attaching liability for negligence on doctors with necessary exceptions, law ventures to check their conduct. The rational is to see that they exercise reasonable care and skill and give up careless attitude. Notwithstanding that if they adopt a callous attitude to expose the patients to injury law has an obligation to render remedy to the latter. This applies to all other professions as well. The ultimate object of law is attainment of professional competency through professional liability that the consumers receive qualitative service.

Diagnosis, administration of treatment and advice are matters of great complexity and fine judgement. A doctor cannot discharge these duties without sufficient discretion. Law has conferred sufficient discretion by exempting the

doctors from liability under some circumstances. Liability attaches only when a doctor differs from the conduct of a reasonable doctor and a practice which is held as proper by responsible body of medical opinion. This criteria has paved the way for the profession determining the standard of care rather than law. It is doubtful how far the profession safeguards the interest of consumers. Therefore it is submitted that the determination of standard of care must not be totally entrusted to the profession as it may not strike a balance of the interests of both doctors and patients.

Disclosure of risk:

As the law stands now disclosure and contents of risk connected with medical procedures are matters, which fall with in the ambit of professional practice. Professional practice attaches significance to medical considerations. It puts non-medical considerations into oblivion. Disclosure of risks is an area, which warrants reckoning of medical and non-medical considerations. Non-medical considerations gain importance from the point of view of a patient. A patient can not be kept away from the medical decision making process. The reasonable doctor test in the area of disclosure of risk militates with the prudent patient test. A reasonable doctor may come to the conclusion that certain risk must not be disclosed. On the contrary a prudent patient may demand disclosure warranted by non-medical considerations. Therefore it is submitted that the comprehensive duty of a doctor can be splitted for the application of different

standards. Accordingly the reasonable doctor test must be confined to diagnosis, administration of treatment and medical advice. The prudent patient test with it's objective and subjective element must be applied to disclosure of risks. If disclosure of risks remains entirely a matter of professional discretion, it has the danger of unfavourably tilting the balance towards the doctors.

Requirement of consent:

Rendition of professional service without consent attracts liability. Non-consensual medical intervention is legally justified under some circumstances. There is a gap in the law relating to consent for medical treatment. Medical intervention for a non-therapeutic purpose in the case of a patient who is not capable of giving consent presents a problem. The law is also silent. In western jurisdictions courts have given permission to do the needful in the best interest of the patient. Best interest implies a situation where the courts do not seem to object the non-consensual treatment. Accordingly the requirement of permission of the court becomes a mere superfluous formality. Therefore it is submitted that in such cases a doctor must be allowed to perform the necessary procedure in the best interest of the patient with immunity from liability.

Exclusion of government doctors from the ambit of the Consumer Protection Act:

One lacuna of the Consumer Protection Act is the exclusion of government doctors in the pretext of lack of consideration for treatment on the part of patients.

The current legal position in this regard presents a contradiction. Requirement of consideration is dispensed under tort law. Therefore for a non-gratuitous negligent medical service a patient has a cause of action. But lack of consideration deprives a patient his cause of action under the Consumer Protection Act. Therefore deficiency in paid services only will amount to negligence under the above Act. This proposition strikes at the root of the law relating to negligence. It is not compatible with the stand taken by the apex court that the Act has not changed the substantive law relating to negligence. The Act provides an alternative mechanism for expeditious and inexpensive redressal of grievances. The object of the Act is see that people shall not be deprived of justice because of poverty. It does not require any stress that the patients who avail the services in government hospitals are by and large poor. They are deprived of their remedy under consumer protection Act. They have to knock the door of civil courts where justice has become a mirage because of inordinate delay. The above factors make it necessary to have a rethinking on the requirement of consideration for the application of Consumer Protection Act. Therefore it is submitted that the Act must be suitably amended to include non- gratuitous services also. Such inclusion is certainly compatible with the philosophy and avowed object of the Consumer Protection Act.

Burden of proof in medical negligence cases:

The burden of proving negligence falls on the shoulders of a patient. Keep

apart strict proof, even on balance of probabilities, in most of the circumstances, he cannot prove negligence. Moreover the problem is further aggravated by the fact that most of the doctors do not maintain medical records and they do not furnish prescription to patients. As the situation stands now there is no law, which imposes a duty on the doctors to maintain medical records. Even where medical records are maintained a patient as a matter of right can not claim access to records. It is common now in hospitals that the patients are not allowed to see their charts and are totally kept away from their sight. If a patient is not given access to the records, it is certainly difficult for him to prove the deficiency in service. Therefore it is submitted that a comprehensive legislation insisting maintenance and access to medical records is the need of the hour.

A patient may sustain injury as a result of medical treatment. But proof of medical negligence has become a very tedious task. It has hindered a fair adjudication of such cases. Consequently an injured patient has become forlorn in the web of legal control mechanism of doctors. Therefore it is submitted a no fault compensation scheme may be introduced where treatment has resulted in injury but negligence cannot be proved. Such a measure can effectively eclipse the problem of evidence also.

Need for better awareness among doctors and patients:

The empirical study reveals that doctors are not aware of law concerning their sphere of activities. They are under a wrong notion that law especially the

Consumer Protection Act, expects them to cure every patient. They are further swept by the feeling that laws are harsh towards them. They cannot be convinced of the real legal position, unless the students of medicine are made to study law relating to medical negligence. Hence it is felt that there is a need to strengthen the confidence of doctors in legal control mechanism. An awareness must be created in them that the object of their legal accountability is attainment of professional competency. Therefore it is submitted that law relating to medical negligence may be prescribed as a subject of study in their curriculum.

It is felt that patients' expectations of their doctors are also very high. They must be made to realize that a doctor renders his services in a sphere beset with full of uncertainties and constraints. Medicine is not a perfect science. Human body is an enigma. It is not a machine, which can be dissembled and re-assembled. The nature of reaction of medicine on human bodies varies from person to person and at times with the same person at different times. Therefore it is submitted that there is a need to create an awareness in the people regarding the inexact nature of medicine and constraints of a doctor.

Need for higher standard of care on specialist lawyers and architects :

The standard of care expected from a lawyer and an architect is that of a reasonably competent practitioner. The lawyers and architects are not bifurcated as falling into different strata either on the basis of qualification or long experience. However in the case of medical profession law expects a higher standard of care

from a specialist than the other members of the profession. Therefore it is submitted that where a lawyer or an architect holds himself out as a specialist, a higher standard of care than that of a general practitioner shall be prescribed.

Need for better protection to medical profession:

Medical treatment is administered on human body. At times there may be unexpected adverse body response for a treatment, which even a specialist doctor cannot predict. Inspite of reasonable care and best efforts on the part of a doctor, a patient may sustain injury. No medicine is free from side effects. All medical procedures are beset with inherent risks. There is an obligation on a doctor to disclose the risks. At times disclosure may prove fatal to the patient. Moreover for some diseases medicine is in experimental stage. Lawyers and engineers are not beset with these kind of constraints and uncertainties. Obviously it is felt that medical men is beset with more constraints than any other professional men. Therefore it is submitted that law must have a relatively higher protective attitude towards medical profession than other professions.

The law relating to professional negligence is well developed in the common law jurisdictions. This study basically consists a critical analysis of principles evolved in those jurisdictions. However in India law on this sphere is in it's infancy. It is felt that the principles discussed in this study and suggestions made thereof will be of great help to develop law relating to professional negligence in India also on similar lines.

APPENDIX

QUESTIONNAIRE

CIVIL LIABILITY OF DOCTORS FOR DEFICIENCY IN SERVICE

1. Name

2. Qualification

3. Designation

4. Experience

5. Name of the hospital/Nursing Home/independent practice

6. Should the doctors be exempted from legal accountability ?

7. Do you think inclusion of doctors under Consumer Protection Act is a progressive step ?

8. If not, why ?

9. Whether Consumer Forae are competent to deal with medical negligence cases ?

10. Do you think compensation awarded by the Consumer Forae are exhorbitant ?

11. Should the adjudication of medical negligence cases be confined exclusively to civil courts ? :

12. If so, Why ?

13. Should the doctors be exempted from criminal liability for gross negligence

14. If not, do you suggest replacement of punitive compensation in the place of punishment (imprisonment) ?

15. Do you know that the doctors are bound by the doctrine of informed consent which warrants a doctor to disclose the material risks connected with the treatment ?

16. Should the doctors be exempted from the application of above doctrine ?

17. If not, according to you what information must be divulged to the patients in connection with the treatment ?

18. Who should make the treatment decision ? Doctor/patient

19. Do you think the existing Laws are harsh towards doctors ?

20. Should more discretion be given to doctors in all matters ?

21. If so, can you suggest some areas where more discretion need to be given to the doctors ?

22. To whom, existing laws are favourable ?
Doctors/Patients

23. Should the doctors be subjected to self-regulation through medical council to the exclusion of courts?

24. If so, do you think Medical Councils, are well-equipped for this purpose ?

25. Do you think legal accountability will result in defensive medicine ?

26. Have you ever faced any negligence action ? If so, what is the outcome ? :

Suggestions, if any

Signature

BIBLIOGRAPHY

BOOKS

1. A. Keith Mant, "Taylor's Principles Of Medical Jurispurdence", (13th edition, 1957), Butterworths & Co.(Publishers) Limited, London.

2. A.G. Guest(ed.), "Chitty on Contracts", vol. 2 (27th edition,1994), Sweet & Maxwell Ltd., London.

3. A.R. Biswas (ed.), "Biswas On Encyclopedia Law Dictionary", (1979), Eastern Law House, Calcutta.

4. A.S Diamond, "Primitive Law", (second edition, 1950), Watts & Co., London.

5. Alan Tyrrel and Tahd Yaqub (ed), "The Legal Profession In The New Europe", (second edition, 1996), Cavendish Publishing Ltd., London.

6. American Law Institute, "Restatement Of The Law Of Torts", vol. 2 (1934, Reprint 1956), American Law Institute Publishers, St. Paul, Washington.

7. American Law Institute, "Restatement Of The Law Of Torts", vol. 2 (1965), American Law Institute Publishers, St. Paul, Washington.

8. Angela Roddey Holder, "Medical Malpractice Law", second edition, John Wiley & Sons, New York.

9. Avatar Singh, " Law of Consumer Protection", (second edition, 1997), Eastern Book Company, Lucknow.

10. B. David Field, "Hotel And Catering Law", (third edition, 1978), Sweet & Maxwell Ltd., London.

11. B. John Morris, (ed.), "Chitty On Contracts", vol. 2 (13th edition,1961), Sweet & Maxwell Ltd., London.

12. Bryan A. Garner(ed.), "A Dictionary Of Modern Usage", (second edition, 1995),
Oxford University Press, Newyork.

13. C.H.S. Fifoot, "History And Sources Of The Common Law", (1949, Sixth impression, 1969),
Stevens & Sons Ltd., London.

14. Cheshire, Fifoot & Furmston, "Law Of Contract", (twelth edition, 1991),
Butterworths & Co. (Publishers) Limited, London.

15.Consumer Education And Research Centre, " What Ails Public Hospital",
Consumer Education and Research Centre, Ahmedabad.

16. D. Har Court Kitchin, "Law For The Medical Practitioners", (1941),
Eyre & Spottiswoode Publishers Ltd., London.

17. D.N. Saraf, "Law Of Consumer Protection", (second edition, 1995),
N.M. Tripathi Private Limited, Bombay.

18. Dr. Bernad Knight (rd), H.W.V. Cox, "Medical Jurispudence And Toxicology", (sixth edition, 1994),
The Law Book Company (P) Ltd., Allahabad.

19. Dr. Jagadish Singh, "Medical Profession And Consumer Protection Act", (1994),
Bharath Law Publications, Jaipur.

20. Daulath Ram Prem, "Prem's Judicial Dictionary", vol. 2 (1992),
Bharath Law Publications, Jaipur.

21. Dereck Roebuck, "The Backround Of The Common Law", (second edition, 1990),
Oxford University Press, Oxford.

22. Driver G.R. & John C Miles, "The Babylonian Laws", vol.1
(first edition, 1952),
Clarendon Press, Oxford.

23. G.H. Treitel "An Outline Of Contract", (fifth edition, 1995),
Butterworths & Co. (Publishers) Limited, London.

24. G.T. Gajria, "Law Relating To Building And Engineering Contracts In India", (second edition, 1979), N.M. Tripathi Private Ltd., Bombay.

25. "Halsbury's Laws of England", vol. 44 (4th edition, 1983), Butterworhts & Co. (Publishers) Limited, London.

26. Halsbury's Statutes Of England & Wales", vol.5 (4th edition, 1993), Butterworths & Co. (Publishers) Limited, London.

27. Harvey Teff, "Reasonable Care", (1994), Clarendon Press, Oxford.

28. Henry Campell Black (ed.), "Black's Law Dictionary", (fourth edition.1951), West Publishing Co., St. Paul Minn. Washington.

29. I . Kennedy and A. Grubb, "Medical Law", (second edition, 1994), Butter worths & Co. (Publishers) Limited, London.

30. J. Charlesworth, J.A. "Charlesworth On Negligence", (third edition, 1956), Sweet & Maxwell Limited, London.

31. J.A. Simpson and E.S.C. Weiner (ed.), "Oxford Dictionary", vol. 12 (second edition, 1991), The Clarendon Press, Oxford.

32. J.A. Simpson and E.S.C. Weiner (ed.), "Oxford Dictionary", vol. 3 (second edition, 1991), The Clarendon Press, Oxford.

33. Jess Stein (ed.), "The Randam House Dictionary", (unabridged edition), Randam House, Newyork.

34. J.P. Eddy, "Professional Negligence", (1955), Stevens & Sons Limited, London.

35. James R. Richardson, "Doctors, Lawyers And The Courts", (1965), The W.H. Anderson Company, Cincinnati.

36. John G. Flemming, " The Law of Torts", (eighth edition, 1992), The Law Book Company Ltd., New South Wales, Australia.

37. John Joseph, "Evolution Of Consumerism And It's Future Role",
The Education and Research Institute for Consumer affairs, New Delhi.

38. John Munkman, "Damages For Personal Injuries And Death",
(fifth edition, 1973),
Butterworths & Co. (Publishers) Limited, London.

39. Joseph H. King, "The Law of Medica Malpractice", (second edition, 1977),
West Hutshell Series, St. Paul Minn. West, Washington.

40. K.P.S. Mahalwar "Medical Negligence And The Law", (1991),
Deep & Deep Publications, New Delhi.

41. Krishna Moorthy, "Principles Of Law Relating To M.R.T.P",
(third edition, 1991),
Orient Law House, Delhi.

42. Kurt Granfors, "Apportionment Of Damages In The Swedish Law Of Torts",
(1956),
Almqvist & Wiksell, Stockholm, Sweden.

43. M. Rama Jois, "Legal And Constitutional System", vol.1 (1984),
N.M. Tripathi Private Ltd., Bombay.

44. M.A. Susan, "Law Relating To Building Contracts", (second edition, 1996),
Universal Law Publishing Co. Pvt. Ltd., Delhi.

45. M.C. Agrawal (rd.), Sanjeev Row, "The Advocates Act And The Legal
Practitioners Act" , (fifth edition, 1987),
The Law Book Company Limited, Allahabad.

46. M.C. Setalwad "The Common Law In India", (second edition, 1970),
N.M. Tripathi Private Ltd., Bombay.

47. Masan and McCall Smith, "The Law And Medical Ethics", (1983),
Butterworths & Co.(Publishers) Limited, London.

48. Michael Davies, "Medical Law", (1996),
Blackstone Press Limited, London.

49. N.E. Palmer, "Bailment", (1979),
The Law Book Company Ltd., Sydney.

50. Nagendra Singh, "International Conventions On Merchant Shipping", vol.8 (1963),
Steven & Sons, London.

51. Nathan, "Medical Negligence", (1957),
Butterworths & Co.(Publishers) Limited, London.

52. P.J. Fitzerald, "Salmond On Jurisprudence", (twelth edition, 1988),
N.M. Tripathi Private Ltd., Bombay.

53. P.S. Atiyah, "The Rise And Fall Of Freedom Of Contract", (1979),
Clarendon Press, Oxford.

54. R.A. Percy (ed.), "Charlesworth On Negligence", (sixth edition, 1977),
Sweet & Maxwell Ltd., London.

55. R.K. Bag, "Law Of Medical Negligence And Compensation",
(first edition, 1996),
Eastern Law House Pvt. Ltd., New Delhi.

56. R.W.P. Dias, "Jurisprudence", (fifth edition, 1994),
Aditya Books (Pvt.) Ltd., New Delhi.

57. R.W.M. Dias & Markesinis, "Tort Law", (second edition, 1992),
Ox ford University Press, Oxford.

58. Raoul Colinvoux (ed.), "Carver's Carriage By Sea", vol.1
(13th edition, 1982),
Steven & Sons Ltd., London.

59. RathanlLal & Dherajlal, "The Indian Penal Code",
(twenty seventh edition, 1992),
Wadhwa & Company, Nagpur.

60. Rathanlal & Dherajlal, "The Law Of Torts", (twenty second edition, 1996),
Wadhwa & Company, Nagpur.

61. Rodney Nelson – Jones & Frank Burton, "Medical Negligence Case Law",
(1995),
Butterworths & Co.(Publishers) Limited, London.

62. Rupert M. Jackson and John L. Powell, "Professional Negligence", (second edition, 1987), Sweet & Maxwell Ltd., London.

63. S.D.S. Grewal, "Lyons Medical Jurisprudence For India", (tenth edition, 1953), Thacker, Spink & Co Ltd., Calcutta.

64. S.K. Purohit, "Ancient Indian Legal History", (1994), Deep & Deep Publications, New Delhi.

65. Upendra Baxi & Thomas Paul, "Mass Disasters And Multinational Liability: The Bhopal Case", (1986), N.M. Tripathi Pvt. Ltd., Bombay.

Articles

1. A.J.E. Jaffey, "Volenti Non Fit Injuria", Camb.L.J. 87 (1985).

2. Alan Meisel and Lorn H. Rath, "Towards A Discussion Of Informed Consent. A Review And Critique Of The Empirical Studies", 25 Arizona L.R. 268 (1983).

3. Alexander Margan Capron, "Informed Consent In Catastrophic Disease Research And Treatment", U.P.L.R. 340 (1974).

4. Andrew Grubb, "The Doctors As Fiduciary", in M.D.A. Freeman and R. Halson (ed.), "Current Legal Problems", vol.47, p.311 (1994), Oxford University Press, Oxford.

5. Andrew Grubb, "The Emergence And Rise Of Medical Law And Ethics", 50 M.L.R. 241 (1987).

6. B.W. Collis, "Tort And Punishment : Exemplary Damages : The Australian Experience", 70 A.L.J. 47 (1970).

7. Brian Brom Berger, "Patient Participation In Medical Decision Making :Are The courts The Answer", U.N.S.W.L.J. 1 (1983).

8. Clarence Morris, " Custom And Negligence", 42 Column. L. Rev. 1147 (1942).

9. Dr. N.K. Jaya Kumar, "Human Rights In India - An Overview", paper presented at the seminar on human rights organised by the Centre for Human Rights, Legal Aid & Research, on 30th Sept. 1994, at Thiruvananthapuram.

10. Dr. Amar Jesani and Dr. Anil Pelaokar, " Need For Asserting Patients Rights, Legal And More," The Consumer voice, Keemath, March 24 p.12 (1995).

11. David L. Dranoff, "Attorney Professional Responsibility, Competence Through Malpractice Liability", 77 North Western L.R. 633 (1982).

12. Dermot Feenan, "Common Law Access To Medical Records", 59 M.L.R. 101(1996).

13. Desmond Manderson, "Following Doctors Orders : Informed Consent In Australia", 62 A.L.J. 430 (1988).

14. Edgar Borgenhammar, "Patients Rights And Informed Consent : Swedish Experiences", 12 Journal of Consumer policy (Holland) 277 (1989).

15. Erwin Deutch, "Medical Experimentation : International Rules And Practice", 19 V. U.W.L.R. 1 (1989).

16. G. Robertson, "A New Application Of The Rescue Principle", 96 L.Q.R. 19 (1980).

17. Gerald Robertson, "Informed Consent To Medical Treatment" 97 L.Q.R. 102 (1981).

18. Ian S. Golderen, "Exploding The Bolam Myth", 144 N.L.J. 1415 (1994).

19. Ian S. Golderen, "Problems Arising Out Of 'Ancestor Worship'", 144 N.L.J. 1237 (1994).

20. Ian S. Golderen, "The Interface Of Expert And Jury", 144 N.L.J 1315 (1994).

21. Ian Kennedy, "The Patient On The Clapham Omnibus", 47 M.L.R. 454 (1984).

22. James C. Brady, "Solicitors Duty Of Care In The Drafting Of The Wills", 46 N.I. L. Q. 434 (1975).

23. Jane Swanton and Barbara McDonald, "Patients Rights Of Access To Medical Records - A Claim Without A Category", 71 A.L.J. 413. (1997).

24. John G. Flemming, "Once More, Tort Liability For Structural Defects", 111 L.Q.R. 362 (1995).

25. John G. Flemming, "The Solicitor And The Disappointed Beneficiary ", 109 L.Q.R. 334 (1993).

26. John L. Dwyer, " Solicitors Negligence, Tort Or Contract", 56 A.L.J. 524 (1982).

27. Kathleen J. Woody, " Legal And Ethical Concepts Involved In Informed Consent To Human Research", 18 C.W.L.R. 50 (1981).

28. Lauro C.H. Hoyano, "Dangerous Defects Revisited By Bold Spirits", 58 M.L.R. 88 (1995).

29. Mahesh C. Bijwat, " Medical Negligence - Medical Malpractice- American Experience", 37 J.I.L. I. 390 (1995).

30. Mark F. Grady, "Res Ipsa Luquitor And Compliance Error", 142 U.P.L.R. 887 (1994)

31. Michael Gill, "Professional Liability And Protection Of Lawyers", 61 A.L.J. 552 (1987).

32. Morton Hunt, " Patients Rights. The rights To Choose Their Treatment", Span p.4 (Feb. 1990).

33. Nigel P. Gravels, "Three Heads Of Contributory Negligence", 93 L.Q.R. 581 (1977).

34. Notes, "Medical Ethics - General Principles: Informed consent", Medical Ethics, April - June, p.27 (1995).

35. P.A. London, "The Action On The Case" 52 L.Q.R. 69 (1936).

36. Percy H. Winfield, "The History Of Negligence In The Law of Torts", 42 L.Q.R. 184 (1926).

37. Peter M. Shuck, "Rethinking Informed Consent", 103 yale L.J. 903 (1994).

38. R.E. Carter, "Assessment of Damages For Personal Injuries Or Death In The Courts Of The Common Law Provinces", 32 Can. B.R. 713 (1954).

39. Richard O'Dair, "Professional Negligence : Some Further Limiting Factors", 55 M.L.R. 406 (1992).

40. Rozer C. Hinderson, "Designing A Responsible Periodic Payment System For Tort Awards : Arizona Enacts A Prototype" 32 Arizona L.R. 21 (1990).

41. Sadasivan Nair, "Criminal Liability For Doctors For Professional Negligence", [1994] C.U. L. R. 147.

42. Skaria, "Consumer Notes", The Indian Express, Kochi, Oct. 15, 1997 p. 7.

43. Skegg, "A Justification For Medical Procedures Performed Without Consent" 90 L.Q.R. 512 (1977).

44. Susan R. Martyn, " Informed Consent In The Practice Of Law", 48 Geo. W.L.R. 307 (1980).

45. V.R. Krishna Iyer, "Accountability Of Profession", 14 I.B.R. 650 (1987).