Page 4224 - 4236 **DOI:** *https://doij.org/10.10000/IJLMH.11992*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

Conceptual Analysis on Medical Liability in India

KARUN ROY[1], PARVATHY GIRISH [2]AND R.GOWRI PARVATHY[3]

ABSTRACT

Medical negligence has nowadays become one of the serious issues in India. Our experience tells us that medical profession is one of the noblest professions. Patients usually see the doctors as God as it is them who are going to treat their illness, health issues and in the end they will be cured and healed by them and we at least expect them to be careful while discharging their duties toward their patients. Courts, particularly the Indian Supreme Court, have often tilted the balance in favour of the patient and his family. This may have serious impact on the morale of the medical profession, as well as the quality of healthcare, provided to the citizen. The paper seeks to analyse the liability of medical professionals, and practice on medical negligence in India, by studying the judicial pronouncements by the courts of record. However, with time, we can see the emergence of medical liability under various aspects of law like under the Consumer Protection law. Judiciary treated it more of a civil wrong than a crime with a reluctance to implicate physicians with any reckless behaviour or for deviation from the normal practice standards because of an underlying presumption that a sensible practitioner on good faith intends to extend best possible care and intends to cure. The evolution of common law on professional negligence dates back to the landmark case of Donoghue v. Stevenson. Medical negligence is a subset of professional negligence, requiring an additional perspective through the Bolam's test which was accepted and reiterated in the landmark judgment of Jacob Mathew v. State of Punjab and as put by Bingham L.J. could mean that, "professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field.

The law does not prescribe the limits of high standards that can be adopted but only the minimum standard below which the patients cannot be dealt with. Judicial forums have also signalled an increased need of the doctors to engage with the patients during treatment, especially when the line of treatment is contested, has serious side effects and

[1] Author is a student at School of Legal Studies, CUSAT, India.
[2] Author is a student at School of Legal Studies, CUSAT, India.
[3] Author is a student at Bharata Mata School of Legal Studies, India.

 [ISSN 2581-5369]

alternative treatments exist. Study of decided cases of medical negligence can provide an insight into the reasons for medical negligence cases, factors mainly responsible for medical negligence and impact of doctor-patient relationship, etc. This paper extensively deals with the basic aspect of medical negligence and as well reiterates the remedies provided under Indian law for the same.

Keywords: *Medical Liability, Negligence, Judiciary.*

I. INTRODUCTION

Negligence is the breach of a legal duty to care. Thus legal duty of a person means the duty the law gives to every person to respect the legal rights of the other. Therefore the legal right of a person can be defined as the provisions provided by law to protect the interests of its citizen. We must remember then that where there is a legal right, there is a legal remedy for it. This is inferred from the maxim "ubi jus ibi remedium".

Negligence is simply the failure to exercise due care. The three ingredients of negligence are as follows:

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

In the Tort of Negligence, professionals such as lawyers, architects and doctors are included in the category of persons who profess some special type of skill or are skilled persons. Therefore, the person performing should possess the requisite skill to do the work. Similarly, the patients, as soon as they step into the premises of the hospital, they equate the doctor to God and believe that he possess the requisite medical expertise.[4] Here, the standard to be applied to adjudge the case at hand would be that of an ordinary competent person exercising ordinary skill in the profession.

Practice of medicine is as old as existence of human race. Originally, the priest functioned as preacher, teacher, judge as well as healer. He was the first physician and his relationship with his patients was unique and unquestioned. With the passage of time not only has practice of medicine graduated to become independent and noble profession, but his relationship has slowly shifted from 'Next to God' to 'Friend, Philosopher and Guide', to 'respected professional' and, today, to service provider. With increased consumer awareness, rising expectation,

[4] D.K. Sharma, Hospital Administration and Human Resource Management, Ed 6, PHI Learning Pvt. Ltd 2003.

 [ISSN 2581-5369]

western trend of medical liability litigation, Consumer Protection Act, and judicial activism, increasing number of complaints are being filed by dissatisfied patients resulting in growing distrust between patients and doctors and increased cost of medical treatment.

Medical negligence can be seen in various fields like when reasonable care is not taken during operations, during the diagnosis, during delivery of the child, with issues dealing with anesthesia etc. Since this field is very vast we will limit ourselves in understanding the basic concepts which are essential for the negligence to be committed. We shall also look into the remedies that the law provides to these patients and on whom the burden of proof lies and when this burden of proof shifts to the other party. We would also be discussing in the following pages the defences used by doctors to rescue themselves from the liability and also compare all these things with the English law and also look into the similarities that the Indian law and English law share.

It is important to know what constitutes medical negligence. A doctor owes certain duties to the patient who consults him for illness. A deficiency in this duty results in negligence. A basic knowledge of how medical negligence is adjudicated in the various judicial courts of India will help a doctor to practice his profession without undue worry about facing litigation for alleged medical negligence.

According to Bolam's test, a doctor, who acts by a practice accepted as proper by a responsible body of medical men[5], is not negligent mainly because there is a body of opinion that takes a contrary view[6]. But the test came under a rough weather and was faced with a lot of criticism, and therefore, countries like Australia rejected it altogether.

As of the present, after the Bolitho case[7], recognition of a two-step procedure took place so as to determine the question of alleged medical negligence:

- Whether the doctor acted by a practice accepted as proper by an ordinarily competent doctor.
- If yes, whether the practice survived *Bolitho* judicial scrutiny as being responsible or logical.[8]

The liability of a doctor arises not when the patient has suffered any injury, but when the injury

[5] Warren Jones, *Law & Ethics*, British Dental Journal, 11 March 2000
[6] Sideway v Board of Governors of the Bethlem Royal Hospital [1985] 1 All Whitehouse v Jordan (1981) 1 WLR 246 and Maynard v West Midland Regional Health Authority (1984) 1 WLR 634.
[7] Bolitho v. City and Hackney Health Authority, [1996] 4 ALL ER 771.
[8] Mulheron, Rachael. "TRUMPING BOLAM: A CRITICAL LEGAL ANALYSIS OF BOLITHO'S "GLOSS."" The Cambridge Law Journal 69.03 (2010): 609-638.

has resulted due to the conduct of the doctor, which has fallen below that of reasonable care. In other words, the doctor is not liable for every injury suffered by a patient. He is liable for only those that are a consequence of a breach of his duty. Hence, once the existence of a duty has been established, the plaintiff must still prove the breach of duty and the causation. In case there is no breach or the breach did not cause the damage, the doctor will not be liable. In order to show the breach of duty, the burden on the plaintiff would be to first show what is considered as reasonable under those circumstances and then that the conduct of the doctor was below this degree. It must be noted that it is not sufficient to prove a breach, to merely show that there exists a body of opinion which goes against the practice/conduct of the doctor.

With regard to causation, the court has held that it must be shown that of all the possible reasons for the injury, the breach of duty of the doctor was the most probable cause. It is not sufficient to show that the breach of duty is merely one of the probable causes. Hence, if the possible causes of an injury are the negligence of a third party, an accident, or a breach of duty care of the doctor, then it must be established that the breach of duty of care of the doctor was the most probable cause of the injury to discharge the burden of proof on the plaintiff.

Normally, the liability arises only when the plaintiff is able to discharge the burden on him of proving negligence. However, in some cases like a swab left over the abdomen of a patient or the leg amputated instead of being put in a cast to treat the fracture, the principle of 'res ipsa loquitur' (meaning thereby 'the thing speaks for itself') might come into play.

Complete control rests with the doctor. It is the general experience of mankind that the accident in question does not happen without negligence. This principle is often misunderstood as a rule of evidence, which it is not. It is a principle in the law of torts. When this principle is applied, the burden is on the doctor/defendant to explain how the incident could have occurred without negligence. In the absence of any such explanation, liability of the doctor arises.

In the context of Indian law, medical negligence comes under 3 categories; Criminal negligence, civil negligence and negligence under Consumer Protection Act. Different provisions regarding the remedy in the form of punishment and compensation are there in 3 laws. The legal framework in India that affects the medical profession and its working, and which prevents malpractices holds an important place.

(A) Fundamental Rights

Article 21, Article 32

(B) Directive Principle of State Policy

 [ISSN 2581-5369]

Article 41, Article 42, Article 47

(C) Indian Penal Code (IPC)

Section 52, Section 80, Section 81, Section 88, Section 90, Section 92, Section 304-A, Section 337

II. CRIMINAL LAW AND MEDICAL NEGLIGENCE

Indian criminal Law has placed the medical professional on a different footing as compared to an ordinary human. Section 304A[9] of the Indian Penal Code of 1860 states that "whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine or with both."

Thus, when a person engaged in the commission of an offence within the meaning of IPC and causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause that, he should be liable for the punishment of the offence which he was engaged in committing added to the ordinary punishment of involuntary culpable homicide.[10]

Criminal liability can also be imposed upon a doctor under particular situations wherein the patient dies during the time of administering anaesthesia in an operation; the death must also be due to malicious intention or gross negligence. Many a time the doctor will also be responsible vicariously, meaning thereby if his employee/servant rashly causes the death of a patient. In that case, the employee as well the doctor will be liable due to the principle of 'Vicarious Liability' under Tort law.

Despite the rights of a patient mentioned above, there are a few exceptions as well. Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under Section 80(Accident in doing a lawful act) 'nothing is an offense that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.' According to Section 88, 'a person cannot be accused of an offense if she/ he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.'

III. CONSUMER PROTECTION ACT AND CRIMINAL NEGLIGENCE

Since 1990's there is a huge speculation and debate on whether medical services are explicitly

[9] Section 304-A, Indian Penal Code, 1860
[10] *Shiva Ram v. The State*, AIR 1965 ALL 196

or categorically included in the definition of "Services" as enshrined under Section 2(1)(o) of the Consumer Protection Act (CPA). Deficiency of service[11] means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise about any service. The Court held that even though services rendered by medical practitioners are of a personal nature they cannot be treated as contracts of personal service (which are excluded from the Consumer Protection Act). They are contracts for service, under which a doctor too can be sued under Consumer Protection Act.

A 'contract for service' implies a contract whereby one party undertakes to render services (such as professional or technical services) to another, in which the service provider is not subjected to a detailed direction and control. The provider exercises professional or technical skill and uses his or her own knowledge and discretion. A 'contract of service' implies a relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The 'contract of service' is beyond the ambit of the Consumer Protection Act, 1986, under Section 2(1)(o) of the Act. The Consumer Protection Act will not come to the rescue of patients if the service is rendered free of charge, or if they have paid only a nominal registration fee. However, if patients' charges are waived because of their incapacity to pay, they are considered to be consumers and can sue under the Consumer Protection Act.

The question that comes to mind is that where can a complaint be filed; the answer is that, a complaint can be filed in[12]-:

1) The District Forum if the value of services and compensation claimed is less than 20 lakh rupees,

2) Before the State Commission, if the value of the goods or services and the compensation claimed does not exceed more than 1 crore rupees, or

3) In the National Commission, if the value of the goods or services and the compensation exceeds more than 1 crore rupees.

The good positive aspect about this is that there is a minimal fee for filing a complaint before the District Consumer Redressal Forums.

[11] Section 2(1), Consumer Protection Act, 1986
[12] Available at http://www.delhistatecommission.nic.in/filing_procedure.htm

 [ISSN 2581-5369]

In 1995, the Supreme Court decision in *Indian Medical Association v. VP Shantha*[13] brought the medical profession within the ambit of 'service' defined in the Consumer Protection Act, 1986. This defined the relationship between patients and medical professionals by giving contractual patients the power to sue doctors if they sustained injuries in the course of treatment in 'procedure free' consumer protection courts for compensation.

IV. CIVIL LAW AND MEDICAL NEGLIGENCE

The position regarding negligence under civil law is very important as it encompasses many elements within itself. Under the torts law or civil law, this principle is applicable even if medical professionals provide free services.[14] It can be asserted that where Consumer Protection Act ends, tort law begins.

In cases where the services offered by the doctor or the hospital do not fall within the meaning of 'services' as defined under CPA, patients can take recourse to tort law under negligence and claim compensation. Here, the onus (burden) of proof is on the patient, and he has to prove that because of doctor's or the hospital's negligent act, he suffered injury thereby.

Such cases of negligence may include transfusion of blood of incorrect blood groups, leaving a mop in patient's abdomen after the operation, removal of organs without consent and administering wrong medicine resulting in injury. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional.

Medical negligence is no different. It is only that in a medical negligence case, most often, the doctor is the defendant.

The position regarding negligence under civil law is very important as it encompasses many elements within itself. It can be asserted that where Consumer Protection Act ends, tort law begins.

In *Juggankhan v. The State of Madhya Pradesh*[15], the accused, a registered Homoeopath, administered 24 drops of stramonium and a leaf of dhatura to the patient suffering from guinea worm. The accused had not studied the effect of such substances being administered to a human being. The poisonous contents of the leaf of dhatura were not satisfactorily established by the prosecution. The Supreme Court exonerated the accused of the charge under Section 302 IPC.

[13] AIR 1996 SC 550: (1995) 6 SCC 651
[14] Smreeti Prakash, *'A Comparative Analysis of various Indian legal system regarding medical negligence.'*
[15] 1965 AIR 831

 [ISSN 2581-5369]

However, on a finding that stramonium and dhatura leaves are poisonous and in no system of medicine, except perhaps Ayurvedic system, the dhatura leaf is given as cure for guinea worm, the act of the accused who prescribed poisonous material without studying their probable effect was held to be a rash and negligent act. It would be seen that the profession of a Homoeopath which the accused claimed to profess did not permit use of the substance administered to the patient.

The accused had no knowledge of the effect of such substance being administered and yet he did so. In this background, the inference of the accused being guilty of rash and negligent act was drawn against him. Thus the principle which emerges is that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, possess that knowledge, he is prima facie acting with rashness or negligence.

In the case of the ***State of Haryana v. Smt Santra***[16], the Supreme Court held that every doctor "has a duty to act with a reasonable degree of care and skill." However, since no human is perfect and even the most renowned specialist can commit a mistake in diagnosing a disease, a doctor can be held liable for negligence only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care.[17] An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would *not* have made the same error.[18]

Certain conditions must be satisfied before liability can be considered. The person who is accused must have committed an act of omission or commission; this act must have been in breach of the person's duty, and this must have caused harm to the injured person. The complainant must prove the allegation against the doctor by citing the best evidence available in medical science and by presenting an expert opinion.[19] The question of degree has always been relevant for distinguishing negligence under the civil and criminal law. In ***Kurban Hussein v. the State of Maharashtra***[20], in the case concerning Section 304 (A) of I.P.C., 1860, it was stated that-

"To impose criminal liability under Section 304-A, it is necessary that the death should have been the direct result of rash and negligent act of the accused, without other person's

[16] AIR 2000 SC 3335
[17] Observations of Lord President Clyde in Hunter v. Hanley (1955) SLT 213
[18] Whitehouse v. Jordan, (1981) 1 ALL ER 267 the House of Lords
[19] Dr. Lakshman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, AIR 1969 (SC) 128.
[20] (1965) 2 SCR 622

intervention."[21]

V. LANDMARK JUDGEMENTS

The judgment that clicks our mind whenever we think about medical negligence is none other than the high-profile case in which the highest compensation till date was granted, in the case of *Kunal Saha v. AMRI* (Advanced Medical Research Institute)[22] which is popularly known as Anuradha Saha case,. The case was filed back in 1998 with the alleged medical negligence by 3 doctors of AMRI hospital; Dr. Sukumar Mukherjee, Dr. Baidyanath Haldar, and Dr. Balram Prasad as well as AMRI hospital.

The facts of the case, simply speaking, are that there was a drug allergy from which Mrs. Saha was suffering. When the duo approached the concerned hospitals, the three doctors prescribed such medicine which further aggravated the condition of the woman which led to her death. The Apex Court gave the final verdict of the case in the year 2013 and also compensated the victim with 6.08 crore. This particular case expanded the scope of medical negligence in India and took it to a whole new level.

In the case of *V. Krishna Rao v. Nikhil Super Speciality Hospital*, Krishna Rao, an officer in malaria department filed a complaint against the hospital for negligent conduct in treating his wife. His wife was wrongly treated for typhoid fever instead of malaria fever, due to the wrong medication provided by the hospital. Finally, the verdict was given, and Rao was awarded a compensation of Rs 2 lakhs. In this case, the principle of *res ipsa loquitor* (legal principle for a 'thing speak for itself') was applied, and the compensation was given to the plaintiff.

In a popular case, *Achutrao Haribhau khodwa and Ors v. the State of Maharashtra*[23], the Supreme Court noticed that in the very nature of the medical profession, skills differ from doctor to doctor, and there is more than 1 admissible course of operation. Therefore, negligence cannot be attributed to a doctor so long as he is performing his duty with due care, caution, and attention. Merely because the doctor chooses one course of action over other, he won't be liable.

Dr. *Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Anr*[24] was a case under Fatal Accidents Act, 1855. The duties which a doctor owes to his patients came up for consideration. The Supreme Court held that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for that purpose.

[21] Sir Lawrence Jenkins in *Emperor v. Omkar Rampratap,* 4 BOM LR 679
[22] (2006) CPJ 142 NC.
[23] (1996) 2 SCC 634.
[24] AIR 1969 (SC) 128.

 [ISSN 2581-5369]

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 be given or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient.

The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires. The doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. In this case, the death of patient was caused due to shock resulting from reduction of the fracture attempted by doctor without taking the elementary caution of giving anaesthetic to the patient. The criminal negligence or liability under criminal law was not an issue before the Court as it did not arise and hence was not considered.

In *Poonam Verma v. Ashwin Patel and Ors*[25] a doctor registered as medical practitioner and entitled to practice in Homoeopathy only, prescribed an allopathic medicine to the patient. The patient died. The doctor was held to be negligent and liable to compensate the wife of the deceased for the death of her husband on the ground that the doctor who was entitled to practice in homoeopathy only, was under a statutory duty not to enter the field of any other system of medicine and since he trespassed into a prohibited field and prescribed the allopathic medicine to the patient causing the death, his conduct amounted to negligence per se actionable in civil law.

In *Achutrao Haribhau Khodwa and Ors. v State of Maharashtra and Ors*[26] the Supreme Court noticed that in the very nature of medical profession, skills differs from doctor to doctor and more than one alternative course of treatment are available, all admissible. Negligence cannot be attributed to a doctor so long as he is performing his duties to the best of his ability and with due care and caution. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession. It was a case where a mop was left inside the lady patient's abdomen during an operation. Peritonitis developed which led to a second surgery being performed on her, but she could not survive. Liability for negligence was fastened on the surgeon because no valid explanation was forthcoming for the mop having been left inside the

[25]

[26] (1996) 2 SCC 634.

 [ISSN 2581-5369]

abdomen of the lady. The doctrine of res ipsa loquitur was held applicable 'in a case like this'.

In *Dr. Suresh Gupta v. Govt. of NCT of Delhi and Anr*.[27] the legal decision is almost firmly established that where a patient dies due to negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and the same time, if the degree of negligence so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable to offence under Section 304-A IPC. "Thus a doctor cannot be held criminally responsible for patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient as to amount to a crime against the State".

In the case of *Jacob Mathew v. State of Punjab*, three Judge Bench of Supreme Court by order quashed prosecution of a medical professional under Section 304-A/34 IPC and disposed of all the interlocutory applications that doctors should not be held criminally responsible unless there is a prima-facie evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine supporting the charges of rash and negligent act.

The result of these decisions can be summed up as:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found

[27] 2004 6 SC 422

to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices.

(4) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(5) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(6) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(7) Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law especially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

In cases where the services offered by the doctor or the hospital do not fall within the meaning of ‘services’ as defined under CPA, patients can take recourse to tort law under negligence and claim compensation. Here, the onus (burden) of proof is on the patient, and he has to prove that because of doctor’s or the hospital’s negligent act, he suffered injury thereby.

 [ISSN 2581-5369]

Such cases of negligence may include transfusion of blood of incorrect blood groups, leaving a mop in patient's abdomen after the operation, removal of organs without consent and administering wrong medicine resulting in injury. Persons who offer medical advice and treatment implicitly state that they have the skill and knowledge to do so, that they have the skill to decide whether to take a case, to decide the treatment, and to administer that treatment. This is known as an "implied undertaking" on the part of a medical professional.

VI. CONCLUSION

There are a few criticisms staring in the face of the Indian laws on medical negligence. The foremost is the principle of 'Burden of Proof'. The burden of proof is on the plaintiff. So, if a patient alleges malpractice in medical, the law will require a higher standard of evidence to support it. Here, for an ordinary human or a patient, it becomes very difficult to determine the exact damage and the causal relation between the injury and the fault of the doctor.

Resultantly, the patient is not able to prove doctor's fault beyond a reasonable doubt, since, the field of medicine is unexpected and unpredictable and anytime anything can happen in a human body and so, it reverts to the plaintiff. Therefore, it is high time that the laws dictating upon the medical negligence get changed so as to suit patients first. And the patients should be sensitized regarding their rights against medical malpractices by civil societies through a proper education channel.

To quote *Mahatma Gandhi*, "It is health that is a person's real wealth and not pieces of gold and silver". So as a moral obligation All the concerned authorities whether it is the hospital, Government, Medical Council or any other institution working towards betterment of healthcare facilities should work together and take steps to provide:

- Quality healthcare
- Adequate healthcare
- Accessibility of basic health care

*****

 [ISSN 2581-5369]