# Law of Medical Negligence in India

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## Abstract

The law of negligence has been debated perhaps since the codification of law, if not before. However, it is such a fluid concept that still defies strict definition. The subject's various facets continue to be developed and its dynamics are still being interpreted by jurists, treatises and judgments. In India, the law of negligence developed on both the civil and criminal fronts. There are three essential components of negligence under civil law: "duty," "breach" and "resulting damage." For a negligence claim to be actionable specific elements must be met: neglect of use of ordinary care or skill towards a person to whom a duty to observe such ordinary care and skill is owed; and because of the neglect plaintiff suffers injury to his person or property. Even though criminal law's the proof of negligence follows the same principles laid under civil law, it applies them at a higher degree. Essentially, two additional prongs must be satisfied for a criminal case of negligence--a rash or negligent act and *causa causans* (or "proximate cause"). By its very nature, a professional's work requires competence in a particular skill. All the aforesaid elements of negligence per se are also applied in the context of professionals, but with consideration of the unique services that each professional renders and their unique role in the society. The determinative guidelines of negligence for professionals lay the broad guidelines which are more clearly defined when applied to a particular field. In Indian jurisprudence, the defining aspects of negligence for medical practitioners are further developed and defined given their special role in our society. This article explores how jurisprudence in the context of medical negligence is developing in India.

# Ⅰ. Introduction

Negligence has been the subject of debate since the foundation of law was laid. However, it still defies an exact definition. Its framework continues to be in a fluid state and subject to interpretations. In India, the law of negligence developed on both civil and criminal fronts. Indian jurisprudence on negligence is rooted in the tradition of English common law and closely linked to English court decisions.

Under civil law, the three essential components of negligence are: "duty," "breach" and "resulting damage." In order to be actionable, negligence requires neglect of ordinary care or skill towards a person to whom a duty to observe such ordinary care and skill is owed, and by such neglect the plaintiff suffers injury to his person or property.

Under criminal law, the proof of negligence follows the principles laid under civil law, but applies them at a higher degree. Essentially, two additional prongs must be satisfied for a criminal case of negligence: a rash or negligent act and *causa causans* (or "proximate cause").

It is pertinent to note that negligence per se is different from professional negligence. By its very nature, a professional's work requires competence in a particular skill. All the aforesaid elements of negligence per se are applied in the context of professionals as well, but with refinement considering the unique service that professionals render and their role in society. The guidelines determinative of negligence of professionals lie in broad specifications, which are further determined when applied to a particular field as with medical practitioners. This article explores how jurisprudence in the context of medical negligence is developing in India.

# Ⅱ. Negligence: Civil and Criminal

Although negligence is the subject of considerable litigation, it had not been statutorily defined. Instead, negligence jurisprudence has been laid down over time by various jurists, treatises and judgments. Under civil law, there are two different approaches to a claim of negligence: one under tort law and the other under consumer protection law, and both approaches essentially follow the same principles of law. However, negligence under criminal law is quite distinct on the other hand.

## A. Negligence under Civil Law

In Indian jurisprudence, the claim of negligence under torts finds its roots in the common law tradition. The most recent developments of consumer protection and redress also adhere to the same principles. In this context, BLACK'S LAW DICTIONARY defines negligence as:

> The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of other's rights.[1]

This definition sets forth two explanations and an exception of what constitutes negligence. The criteria established in the first explanation are: (1) standard of care, by the measure of (2) a reasonably prudent person, in (3) a similar situation and (4) failure to exercise the same.[2] The second explanation describes negligence as: (1) an established legal standard (2) that sets the threshold of risk of harm at reasonableness, and (3) the conduct which (4) fails to meet such threshold. The second explanation also provides an exception: (1) the existence of a *mens rea* (i.e. an "intention" or "wantonness" or "willfulness") to (2) disregard another's rights and (3) an *actus reus* (i.e. an "act" or "conduct") emanating from the same.

Futhermore, the concept of negligence provides three meanings: (i) in referring to a state of mind, when negligence is distinguished in particular from intention; (ii) in describing conduct of a careless type; and (iii) as the breach of a duty to take the care imposed by either common law or statute; in other words:

> First, negligence as a state of mind can be contrasted with intention. An act is intentional when it is purposeful and done with the desire or object of producing a particular result. In contrast, negligence in the present sense arises where someone either fails to consider a risk of particular action, or having considered it, fails to give the risk appropriate weight;
> Second, negligence can also be used to characterize conduct, although such use may lead to an imprecision when considering negligence as a tort.

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1. BLACK'S LAW DICTIONARY 1133 (9th ed. 2009).
2. *See* Sushil Ansal v. State Through CBI, (2014) 6 S.C.C. 173 (India).

> Careless conduct does not necessarily give rise to breach of a duty of care, which is the defining characteristic of the tort of negligence. The extent of duty of care and the standard of care required to perform of that duty are both relevant in considering whether under specific facts a conduct which can be characterized as careless is actionable in law;
> Third, negligence … is a conduct, when objectively considered, amounts to a breach of duty of care.[3]

All three meanings above are applicable in different circumstances, but none of them necessarily excludes the others. There are three essential components of negligence: "duty," "breach" and "resulting damage." If a claimant proves these elements of negligence to the court, the defendant should be held liable.[4]

Similarly in Indian jurisprudence, negligence is seen as the breach of a duty caused by an omission to do something that a prudent and reasonable person in similar circumstances, would do, or not do.[5] Early judicial precedent recognizes negligence as the absence of specific standard of care that the defendant had a duty to use. That, the "ideas of negligence and duty are strictly correlative and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise towards somebody."[6] As the precedential English case of *Donoghue v. Stevenson* records:

> The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence … The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty.[7]

Indian jurisprudence similarly provides that actionable negligence requires

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3. *Id*. (citing Christopher Walton, Charlesworth & Percy on Negligence (12th ed. 2010)).
4. *See* Jacob Mathew v. Punjab, (2005) 6 S.C.C. 1, 15 (India).
5. *Id*.
6. Postgraduate Inst. of Med. Educ. & Research v. Jaspal Singh, (2009) 7 S.C.C. 330, 334 (India).
7. Donoghue v. Stevenson, [1932] UKHL 100.

failure to use ordinary care or skill towards a person to whom the defendant owes such duty to, by which neglect the plaintiff suffers injury to his person or property.[8] Thus, Indian jurisprudence has also developed towards three constituents of negligence: (1) A legal duty to exercise due care on the part of the defendant towards the plaintiff; (2) breach of said duty; and (3) consequential damage. A cause of action for negligence arises only when damage occurs.[9]

Negligence has evolved to have many manifestations, albeit with similar elements, *viz.* active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence or negligence per se.[10]

## B. Negligence under Criminal Law

Under criminal law, proof of negligence follows the same principles as provided under tort law, but applies those principles to a higher degree. The Indian Supreme Court defines criminal negligence as below:

> [C]riminal negligence is the gross and culpable neglect or failure to: [1] exercise that reasonable and proper care and precaution [2] to guard against injury [3] either to the public generally or to an individual in particular, [4] which having regard to all the circumstances out of which the charge has arisen, [5] it was the imperative duty of the accused person to have adopted.[11]

By statute, Section 304A of the Indian Penal Code, 1860 ("IPC") addresses death caused by negligence,[12] requiring either (1.a) a rash or (1.b) a negligent act that (2) causes death of (3) any person, where (4) such act does not amount to culpable homicide.

Essentially, proving criminal negligence requires satisfaction of two prongs: (1) a rash or negligent act; and (2) *causa causans* (or "proximate cause").

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8. *See* Jacob Mathew, *supra* note 4; Sushil Ansal, *supra* note 2; Jaspal Singh, *supra* note 6.
9. *Id*.
10. *See* Kusum Sharma v. Batra Hosp., (2010) 3 S.C.C. 480, 496 (India).
11. *Id.* (citing Bhalchandra alias Bapu & Anr v. Maharashtra, A.I.R. 1968 S.C. 1319).
12. Pen. Code § 304A (1860) (India).

## 1. Rash or Negligent Act: Mens Rea and Degree

Interestingly, the heading of Section 304A of the IPC mentions only negligence, but the language of the section also addresses rashness. However, neither rashness nor negligence is defined in the IPC, even though judicial pronouncements have extensively elaborated upon the code.

For rashness, the criminality lies in risk of doing an act with a high degree of recklessness or indifference as to its consequences.[13] To constitute criminal negligence, rashness has to be of such a degree amounting to taking a hazard knowing that under such degree of hazard, an injury was most likely to be imminen t.[14] In determining the presence of the requisite *mens rea* in criminal law, the Supreme Court warns against a simple subjective or objective test:

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognized that there was such risk, he nevertheless goes on to do it.[15]

Unlike rashness, where the imputability arises from acting despite the consciousness, negligence implies acting without such consciousness, but under circumstances which show that the actor failed to exercise the caution incumbent upon him, i.e. there is neglect of the civil duty of circumspection.[16]

In context of criminal negligence, the defining factor is gross and culpable neglect or the failure to exercise reasonable proper care and precaution to guard against injury. This duty could be owed either to an individual or to the public generally. It is a duty which a reasonable person in view of the circumstances

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13. Empress of India v. Idu Beg (1881) I.L.R 3 All 776 (India), *cited in* Sushil Ansal, *supra* note 2.
14. *See* Kusum Sharma, *supra* note 10.
15. *Id*. (citing Metro. Police Comm'r v. Caldwell, [1982] A.C. 341, (1981) 2 W.L.R. 509, (1981) 1 All E.R. 961 (H.L.)).
16. *See* Sushil Ansal, *supra* note 2.

would have done.[17] The concept of negligence in civil law differs from that in criminal law only in the degree of negligence required to be proved.[18] For negligence to amount to a criminal offense, *mens rea* must be shown to exist and the degree of negligence should be gross or of a very high degree.[19] Negligence which is neither gross nor of a high degree may provide a ground for action in civil law, but not a basis for criminal prosecution.[20] Illustratively, *Andrews v. Director of Public Prosecutions* states:

> Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established.[21]

The word 'gross' is not used in Section 304-A of the IPC, yet it is settled that "grossly" is implied in reference to the expression 'rash or negligent act.'[22] However, in addition it is settled that what is 'gross' is also not defined, but instead must be determined according to the specific facts of each case.[23]

## 2. Doctrine of Causa Causans (or "proximate cause")

Section 304-A of the IPC also necessitates that for an offence to be made, the actions of the accused must be the proximate, immediate or efficient cause of the death of the victim without the intervention of any other person's negligence, i.e. it be the *causa causans* (or "proximate cause"); it is not enough that it may have been the *causa sine qua non* (or "but for" or "factual cause").[24] BLACK'S LAW

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17. *Id*.
18. *Id.*; Jacob Mathew, *supra* note 4; A.S.V. Narayanan Rao v. Ratnamala, (2013) 10 S.C.C. 741 (India).
19. Sushil Ansal, *supra* note 2; Jacob Mathew, *supra* note 4; A.S.V. Narayanan Rao, *supra* note 18; Jaspal Singh, *supra* note 6.
20. *Id*.
21. Andrews v. Dir. of Pub. Prosecutions, (1937) 2 All E.R. 552, 583 (H.L.), *cited in* Kusum Sharma, *supra* note 10.
22. *See* Jacob Mathew, *supra* note 4; A.S.V. Narayanan Rao, *supra* note 18.
23. Sushil Ansal, *supra* note 2.
24. Emperor v. Omkar Rampratap, (1902) 4 B.L.R. 679, (1913) 19 Ind. Cas. 507, *cited in* Kurban Hussein Mohamedalli Rangawalla v. Maharashtra, A.I.R. 1965 S.C. 1616; *also cited in* Suleman Rahiman Mulani v. Maharashtra, A.I.R. 1968 S.C. 829.

DICTIONARY defines "immediate cause" as "the last link in the chain of causation,"[25] and the more complex expression of "proximate cause" as:

> That which in a natural and continuous sequence unbroken by any efficient, intervening cause, produces injury and without which the result would not have occurred…That which is nearest in the order of responsible causation. That which stands next in causation to the effect, not necessarily in time or space but in causal relation.[26]

## Ⅲ. Medical Negligence

Occupational negligence is different from professional negligence. Professionals are a specific class specialized to render a particular service. By their very nature, a professional's work requires competence in a unique skill. Professional negligence emanates from not maintaining the standard of care of competence that a particular profession requires. As a result, judging the standard of care is done by a different measure. Although all elements of negligence discussed above apply to professionals, they are refined to consider the unique service that each professional renders as well as their role in the society.

The mandate of a professional is that "any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task."[27] Hence, negligence of professionals is placed on a different pedestal as compared to others. A profession implies mastery over a particular skill. Thus, it is implied that a professional expresses competence in his particular skill and assures its exercise with a reasonable degree of care and caution. Therefore, a professional may be held liable for negligence based on either two criterias: first, that he did not possess the requisite skill which he professed; or second, he did not exercise that skill with reasonable competence and with due care and caution.[28]

However, the result of application of a professional's skill cannot be guarantee d.[29] The standard of an ordinary competent person in a particular profession—i.e.

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25. BLACK'S LAW DICTIONARY 675 (5th ed. 1981), *cited in* Sushil Ansal, *supra* note 2.
26. *Id*. at 1103.
27. Jacob Mathew, *supra* note 4.
28. *Id*. at 18; Jaspal Singh, *supra* note 6.
29. *Id*.

a level that is generally regarded as acceptable—is the proper scale to measure negligence therein, not the highest level of expertise possible in that profession.[30] *Bolam v. Friern Hospital Management Committee* futher explains this context:

> Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill … It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.[31]

Regarding professional negligence the *Bolam* test is widely accepted as a controlling test, even in India.[32] *Eckersley v. Binnie* summarizes the *Bolam* test in the following way:

> A 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 the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.[33]

The guidelines determining negligence of professionals lay the broad guidelines which are further clarified when applied to a particular field. Medical

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30. *Id*.
31. Bolam v. Friern Hosp. Mgmt. Comm., (1957) 1 W.L.R. 582, (1957) 2 All E.R. 118.
32. Jacob Mathew, *supra* note 4.
33. Eckersley v. Binnie & Partners, (1988) 18 Const. L.R. (A.C.) 1 (Eng.).

practitioners consist of professionals to whom the above-stated principles apply. In context, Indian jurisprudence has further clarified the applicable ambit with immense difficulty, because:

> To hold in favor of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.[34]

Moreover, the human factor leads to a compelling scenario that involves: medical professional, associated staff, patient, patient's family and other external factors. As the Hon'ble Supreme Court of India notes:

> There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish… the background to a mishap is frequently far more complex than may generally assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution.[35]

## 1. Medical Negligence under Civil Law

In cases of medical negligence, the court specifies:

> Negligence is the breach of a duty exercised by omission to do something which a reasonable man would do, guided by those considerations which ordinarily regulate the conduct of human affairs, or doing something which a prudent and reasonable man would not do.[36]

The service rendered by a medical practitioner is also recognized under the Consumer Protection Act of 1986.[37] The principles of civil and tort law converges so that in the specific context of a medical practitioner, the necessary degree of skill and care is stated in HALSBURY'S LAWS OF ENGLAND:

> The practitioner must bring to his task a reasonable degree of skill and

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34. Jacob Mathew, *supra* note 4, at 23.
35. *Id*.
36. Kusum Sharma, *supra* note 10.
37. Indian Med. Ass'n v. V.P. Shantha, (1995) 6 S.C.C. 651 (India).

> 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, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he 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, even though a body of adverse opinion also existed among medical men.[38]

As a result, in the context of medical professionals, a practitioner is expected to use a reasonable degree of skill and knowledge and exercise a reasonable degree of care. It is sufficient that the standard of care and skill attained is that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill, as long as the medical professional follows an acceptable practice.[39] Moreover, degree of care and competence to which the professional is held need not be the highest or the lowest. A medical practitioner would be liable only if his conduct falls below the standards of a reasonably competent practitioner in the same field.[40] Courts have accepted the *Bolam* test by its particular application in the context of medical negligence. While a highly skilled professional may possess better qualities, but that cannot be the yardstick to judge professionals.[41]

Given the fluid circumstances presented in each case, courts determine degree of care and competence based on individual fact scenarios. A strait-jacket formula cannot be laid. Some of the principles used in the context of such fact scenarios are discussed here. However, the general framework still has to be applied based on the specific facts, resulting in differences in opinion. Many differences arise from multiple factors in the field such as varied treatment options, deviations from normal practice, the current state of knowledge, and the availability of equipment. These factors have to be seen in the light of the risks involved but distinguished from errors of judgment and mere accidents.

Medical profession involves a high degree of risk and requires instant decisions to be made while involving a multitude of choices. Negligence cannot be attributed to a medical practitioner as long as the practitioner performs the

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38. 30 Lord Hailsham of Marylebone, Halsbury's Laws of England, ¶ 35. (4th ed. 1998).
39. Jacob Mathew, *supra* note 4, at 21.
40. Kusum Sharma, *supra* note 10, at 506.
41. Jacob Mathew, *supra* note 4.

requisite medical duties with reasonable skill and competence. Merely because the practitioner chooses one course of action in preference to another available option, he would not be liable if the course of action chosen was acceptable to the medical profession.[42] The decision of the House of Lords in *Maynard v. West Midlands Regional Health Authority*[43] settled the law on this point by holding that it is not sufficient enough to show that one body of competent professional opinion considers that the decision of the defendant professional was incorrect, if there also exists another equally competent body of professional opinion that supports the decision as reasonable under the circumstances.[44] Citing the language from *Hunter v. Hanley*, the court states:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one is not negligent just merely because his conclusion differs from that of other professional men.[45]

Similarly, as deviation from normal practice, a mere accident is not necessarily evidence of negligence, nor does an error of judgment by a professional constitute negligence per se. This is so because the greater the patient's complications and the higher the acuteness of emergency, the doctor's judgment call requires the allowance for more scope of action, which may in hindsight eventually be perceived as in error. Moreover, some medical decisions made during desperate situations may involve choosing the lesser evil.[46]

As long as the medical professional follows an appropriate practice, deviations are acceptable.[47] HALSBURY'S LAWS OF ENGLAND records:

> Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (*1*) that there is a usual and normal practice; (*2*) that the defendant has not adopted it; and (*3*) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.[48]

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42. Kusum Sharma, *supra* note 10, at 506.
43. Maynard v. W. Midlands Reg'l Health Auth., (1985) 1 All E.R. 635, (1984) 1 W.L.R. 634 (H.L.).
44. *See* Jacob Mathew, *supra* note 4, at 20; Kusum Sharma, *supra* note 10.
45. Hunter v. Hanley, [1955] S.L.T. 213.
46. Jacob Mathew, *supra* note 4, at 21; Kusum Sharma, *supra* note 10, at 494.
47. *Id*.
48. HAILSHAM, *supra* note 38.

Similarly, in *Hucks v. Cole*[49] the court finds that a medical practitioner was not liable simply because things went wrong from mischance or misadventure, or through an error of judgment in choosing one reasonable course of treatment in preference of another.[50] Also, the court in *Roe v. Minister of Health* states:

> It is so easy to be wise after the event and to condemn as negligence that which was only a misadventure. We ought 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] [**Ed.**: The words in the original are "considerable risks".] risks. Every surgical operation is attended by risks. We cannot 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.[51]

One crucial factor in judging competence is the medical practitioner being up to date with current knowledge. In this context, the standard of care to assess the practice adopted is judged in the light of knowledge available at the time of the incident, and not at the date of trial.[52] Here, current knowledge and equipment must be assessed according to that which was generally available at that point of time on which its use was relied.[53]

The various types of correlated negligence, especially contributory negligence, are often brought as a defense in medical negligence cases. Blame game arises as each participant tries to shift liability onto other entities involved. However, courts are reluctant to allow medical practitioners to shrink their individual responsibilities.[54] This rationale is described futhter in ERRORS, MEDICINE AND THE LAW, which states that many incidents involve a contribution from more than one person and there is a tendency to blame the last identifiable element in the claim of causation- "the person holding the 'smoking gun'.[55] The treatise

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49. Hucks v. Cole, (1993) 4 Med. L. Rev. 393 (U.K.).
50. *See* Jacob Mathew, *supra* note 4, at 20; Jaspal Singh, *supra* note 6, at 336.
51. Roe v. Minister of Health, (1954) 2 Q.B. 66; (1954) 2 W.L.R. 915; (1954) 2 All E.R. 131, *cited in* Kusum Sharma, *supra* note 10, at 495.
52. Jacob Mathew, *supra* note 4, at 21.
53. *Id*.
54. Malay Kumar Ganguly v. Dr. Sukumar Mukherjee, (2009) 9 S.C.C. 221, 284 (India).

therefore advises that a "more comprehensive approach would identify the relative contributions of the other failures in the system, including failures in the conduct of other individuals."[56]

In such instances courts examine whether the act of each person had an individual effect or cumulative effect.[57] Moreover, this in no manner diminishes the primary responsibility if there is any fault on the part of the medical practitioner.

A negligence action often invoves resolution of the issue of patient consent to the alleged act. Consent is a particular aspect of a medical professional-patient relationship that requires consideration. "Consent in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure."[58] Consent can be express or implied. It is pertinent to note that even implied consent is treated as express where it is clearly, obviously and unequivocally implied. However, there is a significant difference between real and informed consent.

In India, the Supreme Court has held: for medical professionals, where there is consultation with and consent of the patient for a specific diagnostic procedure and surgery, such consent cannot be considered as blanket authorization or permission to perform a more complex surgery (except in life-threatening or emergent situations). Similarly, where the patient consents for a particular operative surgery, it cannot be treated as a consent for unauthorized additional procedures such as removal of organs, except when such removal is beneficial to the patient or is likely to prevent some danger developing in future, and there is no imminent danger to the life or health of the patient.[59]

As in the discussion above, the *Bolam* test is still developing and evolving. The test has been developing worldwide and leading commentators state that a New Bolam Test, which advocates a hard look at the evidence, has been evolving.[60] Many cases increasingly focus on elaborate treatment of the medical

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55. *Id*. (citing Alan Merry & Alexander McCall Smith, Errors, Medicine and the Law 14 (Cambridge Univ. Press, 2001).
56. *Id*.
57. Malay Kumar Ganguly, *supra* note 54, at 284 (also stating that the doctrine of cumulative effect is not available in criminal law).
58. Samira Kohli v. Dr. Prabha Manchanda, (2008) 2 S.C.C. 1 (India).
59. *Id*.
60. *See* Harvey Teff, *The Standard of Care in Medical Negligence — Moving on from Bolam?*, 18 O.J.L.S. 473, 473-84 (1998).

issues, coupled with signs of more independent and critical judicial appraisal of expert evidence on the requisite standard of care.[61] However in his article despite an extensive discussion on this subject, the author concludes that:

> Although there remains a strong argument for jettisoning Bolam, in whatever form, it is unclear whether such a move would substantially alter outcomes. Causation would continue to play a decisive role in many cases, and the various considerations which have prompted judicial reluctance to set standards for doctors could still be accommodated within the open-textured and elusive nature of current negligence criteria.[62]

## 2. Medical Negligence under Criminal Law

In order for medical negligence to meet the standards of criminal law, it must rise to a considerably higher degree reaching gross and culpable neglect or failure to exercise reasonable and proper care. Criminal prosecution of a medical professional for negligence requires a showing that the medical professional did or failed to do something which, under the given facts and circumstances, no medical professional in his ordinary senses and prudence would have done or failed to do.[63] The hazard taken by the accused should be of such a nature so as to most likely result in an imminent injury.[64]

One of the earliest decisions which examined the issue of criminal negligence of a medical professional in England was *R. v. Bateman,*[65] where the court summarized the applicable test:

> A doctor is not criminally responsible for a patient's death unless his negligence or incompetence passed beyond a mere matter of compensation and showed such disregard for life and safety as to amount to a crime against the State.[66]

Nearly two decades later in *John Oni Akerele v. The King* the Privy Council reiterated the law where there have been allegations of criminal medical negligence.[67] The Privy Council decision was presented in an appeal before the

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61. *Id*.
62. *Id*. at 184.
63. Jacob Mathew, *supra* note 4, at 34.
64. *Id*.
65. R. v. Bateman, (1925) 94 L.J.K.B. 791 (Eng.).
66. *Id*.

House of Lords, which firmly established the following guidelines in the context of criminal medical negligence:

> (*i*) That a doctor is not criminally responsible for a patient's death unless his negligence or incompetence went beyond a mere matter of compensation between subjects and showed such disregard for life and safety of others as to amount to a crime against the State.
>
> (*ii*) That the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. … There is a difference in kind between the negligence which gives a right to compensation and the negligence which is a crime.
>
> (*iii*) It is impossible to define culpable or criminal negligence, and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial opinions.***
>
> The most favourable view of the conduct of an accused medical man has to be taken, for it would be most fatal to the efficiency of the medical profession if no one could administer medicine without a halter round his neck.[68]

The legal position in England remains the same, which is evident from a recent decision of the House of Lords in *R. v. Adomako* which articulates the legal principle of negligence in cases involving manslaughter by criminal negligence as follows:

> [T]he ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider

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67. John Oni Akerele v. The King, (1943) A.I.R. 30 P.C. 72.

68. *See* Jacob Mathew, *supra* note 4, at 26.

> whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.[69]

Thus, a medical professional requires and deserves heightened protection, for the "[i]ndiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to society."[70] Indeed, the IPC has made specific provisions focusing on protecting actions taken in good faith by medical professionals. The Chapter on General Exceptions of the IPC provides qualified exemption for acts not intended to cause death that were done in good faith; either with or without consent for a person's benefit.[71] Even certain communications made in good faith are saved from criminality.[72] The illustrations to the section showcase that this covers all types of communications between the medical practitioner and the patient including those about medical procedures. These sections also contain useful illustrations that are specifically directed at the medical profession and clarify instances where the professional will not be liable for a criminal action.[73]

The Supreme Court of India has emphasized the need for care and caution in the interest of society regarding criminal prosecution of a medical professional and has recommended the promulgation in consultation with the Medical Council of India of **s**tatutory rules or executive instructions. While the measures above were pending, the Court laid specific guidelines:

> (a) A private complaint may not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.
> (b) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying the *Bolam* test to the facts

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69. R. v. Adomako, (1994) 3 All E.R. 79 (H.L.).
70. Jacob Mathew, *supra* note 4, at 30.
71. Pen. Code, *supra* note 12, §§ 88, 92.
72. *Id*. § 93.
73. *Id*. §§ 88, 92- 93.

collected in the investigation.
(c) A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.[74]

## Ⅳ. Damages

In most medical negligence cases, the most common remedy is awarding damages. Therefore, corresponding to the evolution of the civil and criminal aspect of the law of medical negligence, there has been an increasing focus on and developments about the awarded damages. Once the plaintiff has discharged the burden of proof establishing that the cause of injury to be the defendant, the plaintiff also has to prove his entitlement to the damages he claims.

There are two types of damages: pecuniary or economic and non-pecunary or non-economic. The former focuses on the monetary losses that are actually and likely to be incurred; while the latter focus on non-monetary losses and injurie s.[75] Both concepts of economic and non-economic damages continue to evolve with no definitive or exhaustive guidelines to their type or method of measurement. The purpose behind the economic and non-economic damages is quite distinct from punitive or special damages; because they are made to compensate whereas the punitive or special damages are deisgned to penalize.

Similarly in India, like other jurisdictions, mechanism to determine damage requires a number of factors to be heeded before making a decision as to damages. However, even in such case it cannot simply be narrowed down to some kind of rigid mathematical formula. This results in various concepts being experimented with; therefore the law of damages is still considerably subjective.

The fundamental principle applied for the assessment of damages is that the

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74. Jacob Mathew, *supra* note 4, at 35 (citing Bolam, *supra* note 31).
75. Economic damages can include loss of prospective/future earning; loss of social security income/pension; payments for treatment; associated expenses during treatment; litigation costs, and funeral expenses. Non-economic damages can include loss of companionship and life amenities; emotional distress, pain and suffering, permanent impairment or loss of function, disfigurement, loss of the ability to enjoy life's pleasures.

claimant should be restored to the position that he would have been in, had the tort not been committed, insofar as this can be done by way of compensation. The analysis of judicial decisions reveal that there are three different methods to award damages: (1) lump-sum compensation; (2) just and fair compensation; and (3) multiplier method.[76]

All three methods to assess damages share the same issues in common: (a) there is no mathematical precision; (b) the concept of justice and adequacy is relative and discretionary; (c) the effectiveness of damages as a deterrent needs to be heeded; (d) inconsistent judicial precedents continue to exist. In medical negligence cases, the courts mainly look towards the factual scenario and occasionally end up applying a combination of various methods. In *Reshma Kumari* v. *Madan Mohan*, the Supreme Court highlighted that the compensation must be one that is just.[77] The compensation should be adequate for claimant's loss of dependency but at the same time should not be extravagant. At the same time it needs to be heeded that certain losses can never be compensated in monetray terms. The court however emphasized that the methodology to determine compensation for prospective loss of future earnings, should, as far as possible be based on certain principles. These principles would focus on future work prospects. However, the Court also admitted that:

> It is … difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guesswork may be inevitable.[78]

The Supreme Court of India similarly acknowledges the difficulties in assessing damages in *Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka.* [79] The Court opined that a rule of thumb measure would need to be resorted to for calculating compensation, and admitted that as a balance had to be

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76. This method, primarily, uses two numbers- the multiplicand and the multiplier-to arrive at the compensation. The multiplicand is the quantum of compensation determined for every year's loss of earning minus the amount the victim would have spent on himself. The multiplier is the difference between the average life, and the age of the deceased minus the number of years for which he would be unproductive, and also takes into account any other risk factors of bad health, accident, etc. which would have shortened the productive age.
77. Reshma Kumari v. Madan Mohan, (2009) 13 S.C.C. 422 (India).
78. *Id.*
79. Nizam's Inst. of Med. Scis. v. Prasanth S. Dhananka, (2009) 6 S.C.C. 1 (India).

struck, it would be difficult to satisfy all the parties concerned.[80] However, the Court specifically cautioned that "sympathy for the victim does not, and should not, come in the way of making a correct assessment."[81]

Importantly, like other jurisdictions, in India there are no caps on damages. However, there is an invisible ceiling as to the amount which is not usually crossed by the courts. This invisible ceiling creates similar effects and issues as having caps on damages. But, crossing this ceiling is comparatively easier since it does not require legislative changes but only judicial determinations. An important change in the medical negligence jurisprudence occurred by the case of *Balram Prasad v. Kunal Saha*,[82] where the court pushed the invisible ceiling as well as the assessment methods to be applied. This case marked the highest compensation ordered ever in a case of medical negligence in India. The court ordered a compensation of INR 608,00,550 (equivalent to 10531,00,000 KRW) with an interest of six percent per annum from the date of application untill the date of payment. The case was more significant because the Court held out the judgment as a deterrent and a reminder, and as a result highlighted a shift in judicial scrutiny. Particularly, the court criticized the doctors for attempting to shift blame to each other and held the doctors to be liable and the hospital to be vicariously liable as well. The Court also deviated from applying the usual multiplier method. Instead of applying the standard multiplier of 15 the court applied a multiplier of 30. The Court also considered the pendency of the litigation as well as inflation when calculating the damages.

## Ⅴ. Conclusion: Change in the Practice of Medicine

Medical profession involves a high degree of risk, and as medical practitioners they must make instantaneous decisions involving a multitude of choices. Negligence cannot be attributed to a doctor as long as he performs the requisite duties with reasonable skill and competence. In resolving cases of medical negligence, the courts have specified that negligence under civil law is the breach of a duty exercised 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. In contrast, for a medical negligence to be criminal, it must be of a considerably

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80. *Id.*

81. *Id.*

82. Balram Prasad v. Kunal Saha, (2014) 1 S.C.C. 384 (India).

higher degree which amounts to a gross and culpable neglect or failure to exercise reasonable and proper care. However, the key terms used in relevant court decisions often lack sufficient certainty since their definitions contain adjectives and other qualifiers that are difficult to quantify. This uncertainty allows courts to judge both the degree of care and competence in a subjective way based on individual scenarios. A strait-jacket formula cannot be laid. Various facets that exist and arise are due to the differences in professional opinion, availability of alternate treatment options, deviations from normal practice, current state of knowledge, and the availability of equipment. All of these factors must be measured in the light of the risks involved and distinguished from the errors of judgment as well as mere accidents.

Initially, medical practitioners in India were only covered under tort law; not under the Consumer Protection laws. However this changed when the Supreme Court of India rendered a judgment in Indian Medical Association v. V.P. Shantha[83] where they made a decision to include the medical profession under the purview of Consumer Protection Act.

Recently, criminal medical negligence has emerged as a cause of concern for the medical professionals as they face more criminal litigation. Things have reached such an anvil that the Supreme Court of India has laid specific guidelines for the criminal prosecution of medical professionals. Rather than awaiting statutory rules or executive instructions incorporating the guidelines, the Court has attempted to reform the legal system to ensure that most of the cases are confined to consumer disputes and the tort law.

The medical profession has seen considerable change over the last few years in India. India has become a hub of medical tourism. Also, medical treatment is not simply being conducted for health reasons but increasingly for cosmetic reasons as well. This has led to institutionalization of the medical profession and a consequent rise in healthcare costs. The Court has clearly established that commercialization of healthcare is not to hinder patient treatment in any manner. The Hon'ble Supreme Court specifically emphasized in *Balram Prasad v. Kunal Saha* that "patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which not only forms their fundamental right but also their human right."[84]

Correspondingly, patients have become more aware of their rights. Emperical studies reveal that medical negligence cases have been increasing over the years in India and especially grew more dramtically after 2010.[85] As a result, the medical

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83. V.P. Shantha, *supra* note 37.

84. Balram Prasad, *supra* note 82.

practitioners have also become weary of attempting any procedure which would involve any new innovation. Even though India is yet to arrive at the stage of a "medical malpractice crisis" like the United States, it still is undeniable that a considerable portion of doctors have shifted towards a defensive medical practice. Defensive medical practice however results in increased patient expenditure, and thus increase both the time and cost of healthcare. Due to this phenomenon, litigation insurance has recently emerged in the field of medical practitioners in India; but the cost of such insurance is ultimately covered by the patient.

Establishment of medical negligence screening panels comprised of medical professionals and associated with the Medical Council of India to review and give an opinion on cases are increasingly becoming a part of the adjudicatory process. These panels ensure to not entertain frivolous claims and that a proper form of negligence is ascertained. The increased risks of accusations of medical malpractice has also initiated a shift towards medical professionals being a part of multi-specialty medical centres, where there is an enhanced sense of security as compared to practice as a solo practitioner. The situation escalated to such an extent that in *Jacob Mathew vs State of Punjab*,[86] the court noticed that there is an increase in cases of medical practitioners being subjected to criminal prosecution; therefore they laid certain guidelines to safeguard the practitioners from undue pressure and harassment.

To ensure a streamline and progressive evolution of jurisprudence in context of medical negligence, especially in criminal law, it is essential that the government steps in and lay down specific guidelines applicable to various aspects of the medical profession. Indeed the Court has advised the government in *Balram Prasad v. Kunal Saha*, along thes lines.[87] There is an urgent need for these changes in the Indian healthcare sector since in recent years the nation has become a hub for medical transcription and medical tourism. In conclusion, to protect both the patients and medical professionals, a greater degree of certainty in medical negligence law is needed.

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85. *See* Zeeshan Mhaskar, *Are we heading towards US-esque broken Medical malpractice system which has resulted in unnecessary investigations, increased stay in hospitals & an overall increment in healthcare costs?*, (http://www.thedoc.in/2014/09/surge-medical-malpractice-lawsuits-india/(last visited Nov. 1, 2015).
86. Jacob Mathew, *supra* note 4.
87. Balram Prasad, *supra* note 82.

## Bibliography

**Books and Other Periodic Materials**

CHRISTOPHER WALTON, CHARLESWORTH & PERCY ON NEGLIGENCE (12th ed. 2010).

30 LORD HAILSHAM OF MARYLEBONE, HALSBURY'S LAWS OF ENGLAND (4th ed. 1998).

**Cases**

Andrews v. Dir. of Pub. Prosecutions, (1937) 2 All E.R. 552 (H.L.).

A.S.V. Narayanan Rao v. Ratnamala, (2013) 10 S.C.C. 741 (India).

Balram Prasad v. Kunal Saha, (2014) 1 S.C.C. 384 (India).

Bhalchandra alias Bapu & Anr v. Maharashtra, A.I.R. 1968 S.C. 1319.

Bolam v. Friern Hosp. Mgmt. Comm., (1957) 1 W.L.R. 582, (1957) 2 All E.R. 118.

Donoghue v. Stevenson, [1932] UKHL 100.

Eckersley v. Binnie & Partners, (1988) 18 Const. L.R. (A.C.) 1 (Eng.).

Emperor v. Omkar Rampratap, (1902) 4 B.L.R. 679, (1913) 19 Ind. Cas. 507

Empress of India v. Idu Beg (1881) I.L.R 3 All 776 (India).

Hucks v. Cole, (1993) 4 Med. L. Rev. 393 (U.K.).

Hunter v. Hanley, [1955] S.L.T. 213.

Indian Med. Ass'n v. V.P. Shantha, (1995) 6 S.C.C. 651 (India).

Jacob Mathew v. Punjab, (2005) 6 S.C.C. 1 (India).

John Oni Akerele v. The King, (1943) A.I.R. 30 P.C. 72.

Kurban Hussein Mohamedalli Rangawalla v. Maharashtra, A.I.R. 1965 S.C. 1616.

Kusum Sharma v. Batra Hosp., (2010) 3 S.C.C. 480 (India).

Malay Kumar Ganguly v. Dr. Sukumar Mukherjee, (2009) 9 S.C.C. 221 (India).

Maynard v. W. Midlands Reg'l Health Auth., (1985) 1 All E.R. 635, (1984) 1 W.L.R. 634 (H.L.).

Metro. Police Comm'r v. Caldwell, [1982] A.C. 341, (1981) 2 W.L.R. 509, (1981) 1 All E.R. 961 (H.L.).

Nizam's Inst. of Med. Scis. v. Prasanth S. Dhananka, (2009) 6 S.C.C. 1 (India).

Postgraduate Inst. of Med. Educ. & Research v. Jaspal Singh, (2009) 7 S.C.C. 330 (India).

R. v. Adomako, (1994) 3 All E.R. 79 (H.L.).

R. v. Bateman, (1925) 94 L.J.K.B. 791 (Eng.).

Reshma Kumari v. Madan Mohan, (2009) 13 S.C.C. 422 (India).

Roe v. Minister of Health, (1954) 2 Q.B. 66; (1954) 2 W.L.R. 915; (1954) 2 All E.R. 131.

Samira Kohli v. Dr. Prabha Manchanda, (2008) 2 S.C.C. 1 (India).

Suleman Rahiman Mulani v. Maharashtra, A.I.R. 1968 S.C. 829.

Sushil Ansal v. State Through CBI, (2014) 6 S.C.C. 173 (India).

**Dictionaries**

BLACK'S LAW DICTIONARY (5th ed. 1981).

BLACK'S LAW DICTIONARY (9th ed. 2009).

**Internet Sources**

Zeeshan Mhaskar, *Are we heading towards US-esque broken Medical malpractice system which has resulted in unnecessary investigations, increased stay in hospitals & an overall increment in healthcare*

*costs?*, (http://www.thedoc.in/2014/09/surge-medical-malpractice-lawsuits-india/ (last visited Nov. 1, 2015).

**Journals and Law Reviews**

Harvey Teff, *The Standard of Care in Medical Negligence — Moving on from Bolam?*, 18 O.J.L.S. 473 (1998).

**Statutes and Regulations**

INDIA PEN. CODE (1860).