# MEDICAL NEGLIGENCE WITH RESPECT TO INDIAN LAWS - AN ANALYSIS

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**ABSTRACT:**

A comprehensive detailed analysis of Medical Negligence in India, its impact on the patients, remedies available are discussed with reference to decided Medico-legal cases in India. Prior to bringing the Medical Profession in to the ambit of Consumer Protection Act, 1986 by the Apex Court in a landmark judgment in Indian Medical Association Vs. VP Santha, the only remedy available to the affected party (patient) is either to go for a civil wrong for compensation or for criminal wrong for the punishment to the Doctor. However bringing Medical Professional service under Consumer Protection Act, 1986 changed the scenario a lot. In addition, awareness of the people regarding Medical Negligence and the rights of the patients, duty of the Doctor in attending cases a see saw change in medico-legal cases has arisen. This article has given ample proof with reference to Medical Negligence and the relief by quoting decided cases of the Apex Court which are binding on the entire nation.

***Keywords:*** *"Medical Negligence, compensation, criminal liability, Consumer Protection Act, 1986, Medical Profession, civil wrongs/criminal wrongs, torts.*

## I. History of Medical Negligence

History shows that the perception about Medical negligence has shifted from crime to Tort approach. In earlier civilization (code of Hammurabi developed by Babylon's King some20 Centuries before Christian era) doctor's hands were cut off if the patient died during operation; Likewise issue of Medical negligence could be found in Islamic law, Mosaic law, charaka samhita, sushnttha samhita, Manusmriti, Katrtirya's Arthashastre, yajnavllga,s smriti.) Medical negligence was considered more as a crime than as a tort. With the progress of civilization, medical negligence was increasingly treated as a tort by the judiciary so that the victim can be provided with damages. As common law evolved in England, the earliest recorded action against a medical man was mounted in 1374 when a surgeon, J Mort, was brought before the King's Bench considering his treatment of an injured hand. He was in fact held not liable, but the court said that if such a patient proved negligence, the court would provide a remedy.

## 2. Introduction to Medical Negligence

### What is medical negligence?

**Poonam Verma v. Ashwin Patel & Ors.[1]–** In this case, the Supreme Court delved into the issue of what is medical negligence. In the context, the Court held as under:

*Negligence has many manifestations —it may be 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."*

### Negligence per se is defined in Black's Law Dictionary as under (2)

*Negligence per se—Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.*

### What Is Medical Negligence? When and How to File a Case pertaining to Medical Negligence?

**Bhalchandra @ Bapu & Another v. State of Maharashtra**[3], the Supreme Court opined that while negligence is an 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; criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.

Nature of Medical Profession and Negligence in Medical profession

Jacob Mathew v. State of Punjab & Another (4)– In this case, the Supreme Court while dealing with the case of negligence by professionals also gave illustration of medical and legal profession and observed as under:

*"In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. 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. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised and exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of 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 necessary for every professional to possess the highest level of expertise in that branch which he practices.*

**Achutrao Haribhau Khodwa & Others v. State of Maharashtra & Others[**5], , this 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.

**Medical Negligence under Section 304A of IPC**

**Kurban Hussein Mohammedali Rangawalla v. State of Maharashtra[7**]– In this case, while dealing with Section 304A of IPC(death caused by negligence) , the statement of law by **Sir Lawrence Jenkins in Emperor v. Omkar Rampratap**[8], , was cited

*"To impose criminal liability under Section 304A, Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the causa causans; it is not enough that it may have been the causa sine qua non."*

Whether service rendered by medical practitioner "service" under Section 2(1) (o) of the Consumer Protection Act, 1986?

**Indian Medical Association v. V.P. Shantha & Others**[9], three-Judge Bench of Supreme Court held that service rendered to a patient by a medical practitioner by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Consumer Protection Act, 1986. Deficiency in service has to be judged by applying the test of reasonable skill and care which is applicable in action for damages for negligence.

With reference to difference between medical profession and other occupations, the Court made the following observations:

*"In the matter of professional liability professions differ from occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the Courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services".*

**C.P. Sreekumar (Dr.), MS (Ortho) v. S. Ramanujam** (6), this Court had an occasion to deal with the case of medical negligence in a case in which the respondent was hit by a motor-cycle while going on his bi-cycle sustained a hairline fracture of the neck of the right femur.

Pre-operative evaluation was made and the appellant Dr. Sreekumar, on considering the various options available, decided to perform a hemiarthroplasty instead of going in for the internal fixation procedure. The respondent consented for the choice of surgery after the various options have been explained to him. The surgery was performed the next day. The respondent filed a complaint against the appellant for medical negligence for not opting internal fixation procedure. The Supreme Court

in the case held that the appellant's decision for choosing hemiarthroplasty with respect to a patient of 42 years of age was not so palpably erroneous or unacceptable as to dub it as a case of professional negligence

**Medical Negligence with respect to Indian Laws**

Before making an analysis of medical negligence with respect to Indian Laws, it is customary to define negligence. However, there is no unanimity on the definition of negligence and it is a debatable topic in the jurisprudency of torts. In the case of Moni Vs. State of Kerala, it is observed that *"the case of medical man, negligence means failure to act by the standards of reasonably competent medical men at the time. There may be one or more perfectly proper standards, and if he confirms to one of these standards, then, he is not negligent*" Hence, negligence involves 3 constituents, viz.,

1) Legal duty of the party complained-of to exercise due care towards the party complaining the farmers conduct, within the scope of his duty

2) breach of that particular duty

3) consequential damage that follows.

After the Consumer Protection Act 1986 came into effect and Supreme Court decision of its applicability in medical negligence, treating patients who paid for their medical intervention on par with consumer, many patients started filing cases against doctors who are negligent in their duty.

In recent Supreme Court rulings before the case of Jacob Mathew Vs State of Punjab, the Apex Court delivered two different opinions on Doctors liability. In **Mohan Vs. Prabhaji Nair and another (2004) CPJ 21 (SC)** (10) of 2004 February 04, the Apex Court, ruled that a Doctor's negligence could be ascertained only by scanning the material and expert evidence during a trial. In Suresh Gupta's case, in August 2004, the Apex Court said "standard of negligence that had to be proved to fix a Doctor's or Surgeon's criminal liability, was set-at "gross negligence" or "recklessness". Also the Apex Court distinguished between error of Judgment and culpable negligence. It also held that criminal prosecution of medical personnel without sufficient medical opinion, pointing to their guilt, would do great harm to the medical community. A Doctor cannot be tried for culpable or criminal negligence in all cases of medical misfortunes. However, the liability of a Doctor/Surgeon medical negligence in civil cases if proved, the patient can get compensation as decided by the Court. However, mere carelessness or due attention and skill cannot be described as so wreckless or grossly negligent as to make her/him criminally liable. The Courts also held that this distinction was necessary for the medical professionals being exposed to civil liability in addition risk of imprisonment for medical negligence.

In the light of the above analysis, negligence is simply "failure to exercise due care". The ingredients to file a case for medical negligence are,

1. The Defendant, viz., the Doctor/Surgeon owes a duty of care to the Plaintiff (patient)

2. The Defendant, viz., the Doctor/Surgeon has breached this duty of care

3. The Plaintiff, i.e, the patient suffered an injury due to this breach

Persons, who offer medical advise/medical intervention take and undertake that they have the skill and knowledge to

1. undertake that particular medical intervention
2. whether to accept a case or not
3. to decide the medical intervention suitable to that particular situation
4. to administer or apply that particular medical intervention

**Criminal liability and negligence:**

A physician can be charged with criminal negligence when a patient dies from the affect of anesthesia during a surgery, if it can be proved that the death was the result of gross negligence because, the said standards must be followed before the administration of anesthesia or performance of a surgery. In such cases, it is the duty of the physician / surgeon to prove that he has taken reasonable and due diligence and care in the treatment of the patient to the best of his judgment. However, there will be no liability in the case of error of judgment. The law expects a duly qualified physician/surgeon to use that degree of skill and care which an average physician/surgeon of his qualification ought to have.

*"Gross lack of competency or gross inattention or wanton indifference to the patient safety, which may arise from gross ignorance of the science of medicine and surgery or through gross negligence, either in the application and selection of remedies, lack of proper skill in the use of instruments and failure to give proper attention to the patients"* **(Hampton Vs State: State Vs Lester) (11)**

The liability of a medical professional arises not when the patient suffers injury, but when the injury results due to the conduct of the medical person, which was below reasonable care. Hence, it is the duty of the patient (consumer) to establish that there exists such duty of the doctor and to prove that breach of such duty by the Doctor.

Normally, the liability arises only when the plaintiff (patient) is able to discharge the burden on him of proving negligence. In some cases, the principle of "res ipsa locuitor" means the things speaks for it, might come into action. In many of the cases, the doctor is liable only for his acts. However, in some cases, a Doctor can be made vicariously liable for the acts of another. For example, a junior doctor or an associate of the senior doctor commits a mistake during medical intervention, it becomes the duty of the senior to have supervised him. Hence, vicariously liable.

In many cases, the judgments delivered by the National Commission and the Apex Court, a charge of professional negligence against a Doctor/Surgeon stood on different footing from a charge of negligence against a driver of a vehicle. Sometimes, things can go wrong even in the best hands of a doctor. Hence it is the duty of the patient (consumer) to establish medical negligence of a doctor or physician beyond all reasonable doubts that his/her skill fell below reasonable care that he/she ought to have taken during medical intervention.

**Legal position in India :**

The legal frame work in India that attracts the medical profession and its working and which prevents medical negligence/malpractices holds an important place.

1. **Fundamental Rights**
   a. Article 21
   b. Article 32 of the constitution

2. **Directive principles of state policy**
   a. Article 41,
   b. Article 42
   c. Article 47

3. **Indian Penal Code (IPC)**

   Sections 52, 80, 82, 88, 90, 92, 304A and 337

   According to Indian Law, medical negligence can be categorized in three ways.

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

Different provisions are available regarding the remedy to the patient (consumer) in the form of punishment, compensation and both.

4. **Indian Penal Code (IPC)** has placed medical personnel on a different footing compared to others. Sec. 304A of IPC states that "whoever causes the death of a person by 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".

It means, a person commits an offence within the meaning of IPC and causes death by rash and negligence; but without the intention to cause death or thinking that act shall cause death, should be liable for the punishment of the offence which he engaged in committing added to the ordinary punishment of involuntary culpable homicide (**Shivaram Vs the State, AIR 1965, All 196)** (12)

**Patient's rights**

*"Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said duty; and (3) consequential damage. Cause of action for negligence arises only when damage occurs; for, damage is a necessary"*

**ingredient of the tort**

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 (Jacob Mathew vs State Of Punjab & Anr on 5 August, 2005 ) were taken which the ordinary experience of men has found 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. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

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. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

To prosecute a medical professional for negligence under criminal law it must show 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.

Res ipsa loquitur is only a rule of evidence and operates in the domain of civil law specially 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.

The Apex Court bench presided by Justices Markendeya Katzu and RM Lodha in **Martin D Souza Vs Mohammad Isfaq (2009) 2 SCC 40** (13) held that "Courts must first refer complaints of a medical negligence to a competent doctor or a panel of experts in the field before issuing notice to the allegedly negligent doctor. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass the doctors unless the facts clearly come within the parameter laid down in Jacob Mathews case, otherwise the policemen themselves have to face legal action.

**Doctors can be arrested like any other citizen of the country for the various acts under the provisions of IPC or CPC**

1. Illegal organ trading

2. Unlawful sex determination etc., which are non bailable offences.

The medical aid or assistance to any person should be instantaneous and it is the duty of the medical practitioner to attend the injured and render medical aid or treatment without waiting for procedural formalities. The top priority of the medical professional is to save the person and preserve the life. This obligation of protecting the life of injured is to every doctor and the obligation is total absolute and paramount.

In Dr. Deepak Kumar Satsangi & Anr. vs Sanjeevan Medical Research, NCDR punished the doctor for negligence. In this case, the father of the deceased boy himself a doctor informed the doctor treating the boy about the condition of the patient that the boy was allergic to certain anti biotic medicines. The xray and other reports show that the boy was not suffering from pneumonia. Even then, the doctor treated the boy for pneumonia and prescribed prohibited antibiotic medicines to which the boy was allergetic. Due to this, the boy suffered severe allergy. It was found that the ICU of the hospital was not equipped with life saving equipment and medicines and no doctor was available to deal with emergency. The circumstances proved beyond doubt that the doctor and the hospital were guilty of negligence and find by NRDC it observed that the facts of the case and the circumstances speak for themselves with a greedy motive, the respondents swallowed the precious life of the patient by misrepresenting that he is suffering from pneumonia, which was totally false. It is nothing but to get the patient hospitalized and earn money by showing that the patient is critical.

When a patient who pays a doctor or hospital for medical intervention has every right to get attention and care. It is the duty of the doctor and hospital to provide services of qualified and trained staff. In addition, the patient and the family members have every right to know the details of the treatment and tests conducted and the results thereof. In the present case, wrong medical negligence by giving medicines that are allegoric to the patient even after the father of the patient informed the doctor. Here, in addition to medical negligence, carelessness of the doctor who was not present when emergency requires his presence shows the hospital and doctors carelessness in their duty.

On the other hand, the Apex Court in Indian Medical Associations Vs Santa AIR 1966 SC 550 has held that doctors who render service free of charge in a hospital are not covered by the provisions of consumer protection act as defined U/s.1(o) of the Act. Only such doctors and hospitals who receives money for their services comes under this act.

**Test to determine medical negligence**

The Apex Court in **Vijay Sinha Roy) by LR Vs. Biswanath Das** (14) and others clearly mentioned tests for determining medical negligence which are continue to hold till date.

"*Negligence is breach of duty caused by omission to do something which a reasonable man to do or doing something which a prudent and reasonable man would not do. Negligence in the context of medical profession calls for a treatment with a difference. Error of judgment or an accident is not a proof of negligence. So long as a doctor follows a practice acceptable to the medical profession of the day, he cannot be held liable for negligence merely because a better alternative course was available. A professional may be held liable for negligence if he does not possess the requisite skill which he claims or if he fails to exercise reasonable competence, every professional may not have highest skill. The test of skill expected is not of the highest skilled person. Concept of negligence differs in civil and criminal law. What may be negligence in civil law, may not be so in criminal law. In criminal law, element of mens ria may be required. Degree of negligence has to be much higher. "res ipsa locuitor" operates in domain of civil law but has limited application on a charge of criminal negligence. The apex court has also held that safe guards were necessary against initiation of criminal proceedings against medical professionals".*

**Remedies available to the patient**

Patient, who is the victim of a negligent act of a medical profession will have the following remedies.

Compensatory action involving complaint against doctors, staff or hospital - whether private or government - who committed negligence, seeking monetary compensation before civil court under law of torts or law of contract, High Court, under the constitutional law or consumer courts, under Consumer Protection Act (individual liability or institutional or hospital liability)unitive action involving criminal complaint under Indian Penal Code against the medical professional

Disciplinary action involving complaint seeking disciplinary action against the medical practitioner or the hospitals as the case may be before statutory bodies govering the medical practitioners, Indian Medical Council or State Council.

Recommendatory action involving lodging of complaint before the National/State Human Rights Commission, seeking compensation.

**The following are some of the major medical negligence cases in India.**

1. **A ruling by the Apex Court** holding 3 physicians responsible for the death of a woman in Calutta Hospital awarded a record compensation of Rs.5.96 Crores. It took 15 years for US based Kunal Saha to win this case on the death of his wife Anuradha Saha also a Doctor, US based child psychologist. The total amount including interest has come to Rs.11.00 Crores. **(Anuradha Saha Vs. AMRI Hospital) (15)**

2. **V.N.Shrikhande vs Anita Sena Fernandes [(2011) 1 SCC 5 (16) ]-** In this case, the Supreme Court had held that in cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative- complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.

3. **Haresh and Preeti Patil from Bhivande,** lost their baby during delivery at the Thane Civil hospital. The State Human Rights Commission has directed the Maharastra Government to initiate disciplinary action against 3 doctors for being negligent. In this case, the pregnant woman, aged 19, was left unattended for nearly 4 hours as the doctor (gynecologist) went to attend a patient in her private hospital. Due to this delay, the baby got struck during labour and chocked to death. Fortunately, the mother survived (**Bombai Mirror, Nov.22, 2016)** (17)

4. **4 month old baby given a pain killer - dies.**
In January 2018, a 4 months old baby died at the hospital in Delhi, after the Doctor gave a pain killer to provide Relief in the stichers in the upper lip. The family alleged negligence. The incidence took place in Jaipur Golden Hospital, Rohini, Delhi. (India Times)

5. **Bihar woman given acid to drink**
In a horrifying incident, a nurse gave a woman acid, when she asked for water. The woman swallowed the acid given by the staff as the patient asked water to take medicines. The 60 year old Syamala Devi, was a resident of a village in vysyali districts.

6. **Doctors left needle in boy's head**
The doctors while conducting an operation, left a needle in the head of a 6 year old boy in Madhura after surgery. The mater came to light when the boy felt extreme pain in his head. After pain did not go after medication, his father removed the bandage and saw a sharp objet in the boy's head

7. **AIIMS doctors did dialysis after woman complained stomach ache.**
AIIMS doctors did dialysis to a woman after she came with stock ache. The patient was identified as Rekha Devi and she was not found with any kidney related issue, yet, the doctors did her dialysis.

**Conclusion**

As mentioned above, Medical Profession is one of the noblest profession in the world. The patient (consumer) to satisfy its want need (Medical Intervention) approaches the Medical Professional with a confidence that the Doctor can release him/her of the pain and bring him/her to near normal living conditions. In such circumstances, a Doctor is negligent of his/her duty of care towards the patient in discharging his/her professional liability with negligence/carelessness he/she should be brought under Indian Laws. After the Apex Court Judgment bringing Medical Profession where fee is charged from the patient, that services come under Consumer Protection Act, 1986 for compensation to the patient. Hence, the patients are at liberty to chose which relief they can want/which relief they get and proceed against the Doctor. However, the burden of proof lies on the consumer (patient) regarding negligence of the Doctor. The Apex Court observed tht since the Hon'ble Judges are not proficient with the medical profession, in some deserving cases, it is customary to take opinion of experts in that field.

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