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Impact of Medical Mal-Practice in India

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Abstract: *The patients who joined in Hospitals or approaches medical professionals for treatment are faced with many problems and the said problems are identified as many as 25 in numbers as mentioned at page 3 of this article. Further through this article the research scholar is trying to find out solutions to eradicate this menace in order to see that the patients are given better treatment and restrict the medical professionals from swindling money from the patients. To cite for e.g., prescribing a particular item for replacement from a specified manufacturer so that there would be a trade of between the medical professional and the manufacturer.*

Key words
1. Medical Mal-practice
2. Health care
3. Misdiagnosis
4. Standard of care.
5. Duty to Take Care

I. Introduction

1.1 Medical Law is undergoing a massive change. Significantly our attitude towards our health, health services, and the medical professions is changing. There was time when doctors were given a 'GODLIKE' status and were held in the highest esteem; and patients were intended to be, well patient; passive and submissive. But this has changed and Doctors are no longer regarded as infallible and beyond questioning. Doctors especially general practitioners, regard their job as working with patients to find out what is the best treatment for them. The doctor-patient relationship, has, according to some, become closer to that of consumer and supplier. (1)

1.2 The doctor is not regarded as similar to 'family friend'. The relationship has become more formal and structured. Another change is that the hierarchy amongst medical professional is being challenged with nursing profession carrying out an increased range of tasks. Patient has ready access to health care information, via the internet especially. I have gathered information that many patients are checking up what the doctor says with information available on internet, all of these changes, have as we shall see, and had a significant impact on legal and ethical approaches to medicine.

Medical Law

1.3 Medical law is essentially concerned with the relationship between health care professional and patients. The medical law is made up on bits from a large number of Kearns, O, Mathuna, and Scott (2009) for a discussion of the ethical issues raised by such self diagnostic kits (Jonathan Herring – medical law and ethics 3rd edition at page (1)
Different branches of law: criminal law, human rights law, tort law, property law, family law, and public law. One commentator has suggested a medical lawyer needs to be a 'Jacqui of all trades'. (2)

1.4 The relationship between law and medicine is interesting. In the past it was characterized as one of mutual difference. Medical decisions were regarded as clinical matters best reached by the experts and nay one seeking to challenge a doctor's decision in the Court faced an uphill struggle. However, more recently the relationship has changed. Courts it seems are a little more willing to accept challenge to a decision of a doctor.

1.5 The law sets down minimally acceptable standards, while ethical approaches may include deciding what would be the real way for a person to behave. Similarly something may give rise to a legal sanction but not be unethical. Medical ethics mean the application of ethical reasoning to medical decision making.

II. What is health care?

2.1 Health care in the world is one of the important aspects, and while doctors don't like to admit it, this is in large part due to the scrutiny placed upon the medical field by medical malpractice lawyers pursuing medical malpractice legal claims against doctors, dentists, chiropractors and hospitals.

III. What is medical malpractice?

3.1 Medical malpractice is a wanton and intentional negligence committed by a professional health care provider, such as a doctor, nurse, dentist, technician, hospital worker or hospital, whose treatment of a patient departs from a standard of care met by those with similar training and experience, resulting in harm to a patient. (2)

(2) Sheldon and Thomson 1998:5 (Jonathan Herring – medical law and ethics 3rd edition at page (2)

3.2 Medical malpractice is a wanton and intentional treatment by any type of health care professional which does not meet the standard level of care and results in harm to the patient. This includes failing to take a necessary action or taking an inappropriate action. In order to qualify as malpractice three elements must be present

3.1.1 There must have been a professional relationship between you and the health care provider

3.1.2 The health care provider must have acted beneath the standard level of care that any other health care provider would have used in the same situation

3.1.3 This substandard care must have harmed you in some way.

3.3 The law of medical malpractice is an outgrowth of the general body of negligence law. It is the law applicable against medical professionals (doctors, nurses, nurse practitioners, dentists, hospitals, physical therapists, pharmacists, physician assistants, plastic surgeons, psychiatrists, etc.) alleging acts, intentionally and wantonly, in the performance of medical services to their patients. In medical malpractice law the fictional "reasonably prudent health care provider" standard has been created. In both instances the terminology of the attorneys revolves around the issue of whether the doctor, hospital or other health care provider was "negligent." In medical malpractice cases the plaintiff's medical malpractice lawyer must establish through expert testimony the standard of care required of doctors or other health care providers in the field of the defendant and that the defendant peached or failed to adhere to that standard of care, intentionally and wantonly, thereby causing the plaintiff's injury.

IV. What are some common types of medical malpractice?

4.1 Medical malpractice occurs where a medical practitioner acts in a negligent manner, intentionally and wantonly, when treating a medical condition. Malpractice can occur from an action taken by the medical practitioner, or by the failure to take a medically appropriate action. Details of some of the examples of medical malpractice are given below.

(i) Intentional or wanton failure to diagnose or misdiagnosis of a disease or medical condition; (ii) Intentional or wanton failure to provide appropriate treatment for a medical condition; (iii) Wanton and intentional unreasonable delay in treating a diagnosed medical condition; (iv) Intentional or wantonly continuing treatment though not strictly necessary; (v) Intentional or wanton **a**dmitting patients for one disease, however, treating them for different disease; (vi) Though not actually necessary in respect of pregnant woman by treating her prior to the delivery and to create a situation, intentional or wantonly, by putting fear, to have an operation instead of normal delivery and in those circumstances there is no choice to the patient or to her attendant; (vii) While undertaking operation to a patient on one organ, taking out other important organs from the body and selling them for making money; (viii) Treatment by non-professionals with fake professional documents; and (ix) Wanton and intentional prescription of costly drug and administer it on the first occasion and administering the drug with the same name but with low cost and charge at the higher rate through out; (x) Anesthesia malpractice; (xi) Birth injury and defects; (xii) Breast implant malpractice; (xiii) Cosmetic surgery mistakes; (xiv) Dental errors; (xv) Prescription drug malpractice; (xvi) Psychiatric malpractice; (xvii) Surgical errors; (xviii) Unnecessary surgery; (xix) Wrongful death; (xx) Wrong diagnosis and misdiagnosis; (xxi) Prescribing unnecessary clinical tests; (xxii) directing the patient to go and purchase medicines from a specific pharmacist (Medical shop); (xxiii) directing the patient to go to a particular clinical laboratory for clinical tests; (xxiv) Intentional, fraudulent and wanton dealing of cases where the patient is covered by insurance; and (xxv) accepting trade offers from manufacturers of orthopedic instruments (body implants) which may be used in surgical operations'.

V. Who can be held responsible for medical malpractice?

Any type of health care professional can be held responsible for medical malpractice. So can the facilities and companies that they work for. There can be multiple responsible parties in one malpractice lawsuit. Responsible parties may include: (a) Doctors; (b) Surgeons; (c) Emergency room staff; (d) Nurses; (e) Anesthesiologists; (f) Dentists; (g) Psychiatrists; (h) Hospitals; (i) Nursing homes; (j) Government institutions; and (k) Pharmaceutical companies.

5.1 Elements of the medical mal-practice

5.1.1 Four elements of the tortious act must be established for a successful medical malpractice claim. They are

(i) A duty was owed: a legal duty exists whenever a hospital or health care provider undertakes care or treatment of a patient.

(ii) A duty was breached: the provider failed to conform to the relevant standard of care. The standard of care is proved by expert testimony or by obvious errors (the doctrine of res ipsa loquitur or the thing speaks for itself).

(iii) The breach caused an injury: The breach of duty was a proximate cause of the injury.

(iv) Damages: Without damages (losses which may be pecuniary or emotional), there is no basis for a claim, regardless of whether the medical provider was negligent. Likewise, damages can occur without negligence, for example, when someone dies from a fatal disease.

5.2 How Medical Negligence becomes Medical malpractice

5.2.1 In short, medical negligence becomes medical malpractice when the doctor's intentional and wanton negligent treatment causes undue injury to her patient. This one sentence implies two additional legal concepts required for a medical malpractice case viz., injury and Causation. Medical malpractice is the failure of a medical professional to meet the standard of good medical practice in the field in which the medical professional practices. Medical malpractice occurs when a healthcare provider - doctor, hospital, HMO, nurse, other individual or entity licensed to provide medical care or treatment - does something that competent doctors would not have done, or fails to do what a competent doctor would have done, resulting in personal injury or wrongful death. Medical malpractice law is complex and, therefore, it is important to engage an experienced malpractice lawyer or attorney who understands the complex issues that apply.

Medical malpractice claims involve analysis of medical records and all tests and studies such as MRI, CAT scan, pathology studies, etc. to determine the viability of the claim. If one or a loved one has been a victim of medical malpractice, that person should act promptly to preserve your rights.

5.2.2 Relevant provisions available under Indian Penal Code to deal with certain Acts as offences.

5.2.3 Indian Penal Code 1860 was enacted as Act 45 of 1860 dealing with offenses which are punishable under the act. The said code consists of 511 sections out of which some of the sections specifically deal with health and injury.

5.2.4 In Chapter II containing general explanations which deal with the term 'offense', 'death', and 'good faith', the relevant Sections are: Sections 40, 44, 46, and 52. In Chapter IV which deals with general exceptions, the relevant Sections are: Sections 80, 81, 87, 89, 90, 92, and 93. In Chapter XIV which deals with offenses affecting the public health, safety, convenience, decency and morals, the relevant Sections are: Sections 269 and 284. In Chapter XVI which deals with offenses affecting the human body, the relevant Sections are: 304 A, 312, 314, 315, 319, 328, 337, and 338.

5.2.5 In addition to Indian Penal Code, there is another enactment entitled 'Consumer Protections Act of 1986' which controls medical mal-practice. It may be pointed out that the Consumer Protection Act 1986 was enacted by the Parliament of India to safeguard consumer interest, in compliance with the United Nations guidelines adopted on 9-4-1985. Consumer Courts were established for the settlement of consumers' disputes and related matters. The Act protects not only the interests of consumer when he purchases goods and services for daily use, but also protects his interests when he goes for treatment to a medical professional. Many medical associations lodged their protests against the application of the Act 1986 to the doctors on the ground that the relationship between a doctor and a patient is not that of a buyer and seller. However this contention was not accepted. In the initial period after the enactment of the Act, there was a lot of confusion in the judiciary as well as medical fraternity regarding the application of the Act to this profession. All the confusions regarding the scope of the Act of 1986 to adjudicate the claims against the medical profession were cleared by the Hon'ble Supreme Court in the landmark judgment in the case of Indian Medical Association –vs- V.P. Shantha. (3) With regard to the provisions of the Consumer Protection Act 1986 some relevant sections are necessary. They are the terms 'complainant'; 'complaint'; 'consumer'; 'deficiency'; and 'service'.

DEFINITIONS under Act 1986

5.3. Complainant means

5.3.1 Any allegation, in writing made by a complaint that the service hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

Consumer means

5.4 Any "person" who hires or ails of nay services for a consideration which has been paid or promised or partly paid and partly promised any include any beneficiary of such services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.

VI. Consideration

5.4.1 Consideration means fees/payment. Fees may have been fully paid in cash or cheques, or undertaking that it will be paid, which is accepted by the doctor/hospital. The fees may have been given partly (as advance) with the understanding that the remaining bill will be paid subsequently. The payment may

(3) (1995) 6 SCC 651.

Be done by the patient himself or by someone else for the patient, e.g. father for his child, husband for wife, any person for someone.

5.4.2 A person who receives medical treatment in Government or Charitable Hospital, which provides treatment to one and all free of cost, is not a consumer under the Act. A person who receives treatment in a Government or charitable hospital which provides treatment free of cost to some and on consideration to some would be a consumer, even if he has not paid any fees. In case of death of patient who is a consumer, legal heirs (representatives), of the decreased will be considered as "consumer". If the payment has been made by any person who is not a legal heir of the deceased he too will considered as 'consumer'. The three words used above (deficiency, person, service) explained under this act are as follows Deficiency means

5.4.3 Any fault, imperfection, short coming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed b y a person in pursuance of a contract or otherwise in relation to nay service.

5.4.4 Person include

1. A firm whether registered or not;
2. A Hindu undivided family;
3. A co-operative society;
4. Every other association of persons whether registered under the Societies Registration Act, 1860, or not.

Service means

5. Service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information but does not include the rendering of nay service free of charge or under a contract of personal services.

5.1 On the meaning of the word "service" in relation to medical profession, the Supreme Court in Indian Medical Association's case (supra) came to the following conclusions

- Service rendered to a patient by a medical practitioner (except) where the doctor rendered service free of charge to every patient or under a contract of personal service), by way consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of 'service' as defined in section 2(1) (o) of the Act.
- The expression 'contract of personal service' in section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in section 2(1) (o) of the Act.
- Service render at a Government hospital/health centre/dispensary or at non-government hospital/nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service- is outside the purview of the expression "service" as defined in section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.
- Service rendered at a non-government hospital/nursing home where charges are required to be paid by the person availing such services falls within the purview of the expression 'service' as defined in section 2(1) (o) of the Act.
- Service rendered at Government hospital/Health centre/ Dispensary or at a \n non-government Nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, by such doctors and hospitals would also be 'service' and the recipient a 'consumer' under the Act.
- Service rendered by a medical or hospital/nursing home cannot be regarded as service rendered free of charge, if the persons availing the service has taken an insurance policy for medical care where under the policy charges for consultation diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in section 2(1) (o) of the Act.

5.2 Similarly, where as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family member dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under section 2(1) (o) of the Act.

5.3 In addition to the aforementioned provisions of Statutes, there are some more statutes which are required to be applied in respect of the cases under medical mal-practice, which are given below for ready reference.

5.4 'Code of ethics formulated by state medical councils; (ii) The Employees' Compensation Act 1923; (iii) The Maternity Benefit Act,1961; (iv) The Personal Injuries (Compensation Insurance) Act, 1963; (v) The Indian Medicine Central Council Act, 1970; (vi) The Medical Termination of Pregnancy Act 1971; (vii) The Mental Health Act, 1987; (viii) The Transplantation of Human Organs Act, 1994; (ix) The Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994; (x) The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995; (xi) The Dentists (Code of Ethics) Regulations 1976; (xii) The Indian Medical Council (Professional Conduct, Eetiquette and Ethics) Regulations, 2002; (xiii) The Pharmacy Act 1948; (xiv) The Indian Nursing Council Act 1947; (xv) The Homoeopathy Central Council Act 1973.'

5.5 Contextual frame work

5.5.1 The Indian system of medicine has a long history. It has received worldwide recognition especially in the area of Herbal, Unani, and Ayurvedic systems. Besides Kautilya's Arthasastra, there are a series of ancient authoritative publications, which give a glimpse of the ancient system of medicine. The accountability of the physicians may be traced from the work of Kautilya wherein it is stated that.

5.6 Health Care at the International Level

5.6.1 The quality of health services and medical negligence has been a matter of great concern at the international level. The General Assembly of the United Nations, has adopted various resolutions to safeguard the interest of patients Article 25 of the Universal Declaration of Human Rights states that

5.6.2 'Every one has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care, and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.

5.6.3 Article 12 of the International Covenant on Economic, Social, and Cultural Rights 1966, inter alia, states that: 'The State parties to the present convention recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

5.6.4 The aforesaid rights of 1966, the un declaration on elimination of all forms of discrimination against women 1967, the convention on the elimination of all forms of discrimination against women 1979 and the convention of the rights of the child provide, inter alia, for the protection of health care rights of persons including women, children and other disadvantaged sections of society. (4)

5.6.5 The world health organization, has also played a pioneering role for the last fifty years, in guiding health policy development, and action a the global and national levels, with an overall objective of ensuring and attaining the highest standards of health care to all the people around the world.

5.6.6 The preamble to the World Health Organization Constitution.

5.6.7 The World health Organization's Constitution came into force in 1948. Inter alia, provides

- The enjoyment of the highest standards of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic and social condition.
- The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and states.
- The achievement of any state in the promotion and protection of health is of value to all.
- Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, is a common danger.
- Healthy development of the child is of basic importance; the ability to live harmoniously in a totally changing environment is essential to such development.
- The extension to all people of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health.

(4) Legal framework for Health Care in India – LexisNexis – Butterworth's 2002 edition.

- Informed opinion and active co-operation on the part of the public are of the utmost importance in the improvement of the health of the people.

5.6.8 Governments have a responsibility for the health of their people, which can be fulfilled only by the provision of adequate health and social measures. (5)

5.6.9 The World Health Organization Constitution delineates several functions, which directly and indirectly require the application of legal principals, such as

- to act as the directing and coordinating authority on international health work;
- to propose 'Conventions, Agreements and Regulations', make recommendations with respect to international health matters, and to perform such duties as may be assigned thereby to the Organization and are consistent with its objective ; and
- to develop, establish and promote international standards with respect to food, biological, pharmaceutical and consumer products.
- Apart from the above, a number of international agencies have lent support to public participation in health care. To this end, the World Health Organization Alma Ata Declaration, clearly states that:

The people have the right and duty to participate individually and collectively in the planning and implementation of their health care'. (6)

5.6.10 Legal frame work for health care in India

In India, the right to health care means that the meaning of health as used in these provisions of the Constitution are defined in the Oxford Dictionary that soundness of body or mind, that condition in which its functions are duly and

(5) The World Health Organization's Constitution (came into force in 1948)

(6) Alma Ata Declaration adopted in 1978.

Efficiently discharged. Statutory laws including the Indian Penal Code 1860 and others also ensure the right to be protected against medical negligence and protection has been recognised since early times. India is a founder member of the United Nations, and has ratified various International Conventions promising to secure health care rights of individuals in society. In this context, art 51 of?

5.6.11 The Constitution of India provides for promotion of international peace and security. Article 51 states that, the State shall endeavour to: (a) promote international peace and security; (b) maintain just and honourable relations between nations, (c) foster respect for international law and treaty obligations in the dealing of organized people with one another; and (d) encourage settlement of international disputes by arbitration. The preamble to the Constitution of India, which strives to provide for a welfare state with socialistic patterns of society, guarantees the right to life and personal liberty. It states that:

5.6.12 'No one shall be deprived of his right to life and personal liberty except according to procedure established by law'. (7)

5.6.13 Thought it does not expressly contain the right to health, it has now been well settled through a series of cases that this includes the right to health Further, Articles 38, 48, 43, and 47 of the Constitution also provide for the promotion of health of individuals in society.

5.6.14 Complaints of medical negligence have been made in the past of late, such complaints have assumed a wider dimension as the incidents have increased due to the opening of thousands of nursing homes charitable hospitals, central government health services dispensaries, and employee state insurance hospitals etc. Though the Parliament has enacted the Indian Medical Council Act in 1956 and other corresponding legislation governing various branches of medicine such as

(7) Article 21 of the Constitution of India

the Indian System of Medicine, Dentists, Homoeopaths etc, they only provided for the registration and regulation of the conduct of doctors, hospitals and nursing homes, and have failed to protect the interests of persons who lave suffered on

account of negligence or deficiency on the part of medical professionals. Very few states such as Andhra Pradesh, Karnataka, Meghalaya and recently Delhi have enacted state legislations providing for constitution of state Medical Council.

5.6.15 This field left untouched by the Medical Council Acts is covered by the law of tort in general, and now by the Consumer Protection Act 1986. It is worthwhile to remember that the existence on the state book of the Indian Medical Council Act has not stood in the way of such grievances being agitated before the ordinary civil Courts, by the institution of civil suits claiming damages for negligence as against the concerned hospital or medical doctors. Before the enactment of the Consumer Protection Act 1986, the field of medical negligence was governed only by the law of tort. The base for a liability rested o the concept of negligence. It is not and cannot possibly be the province of this judgment, to enter the tangled thicket of the scope of negligence in tort jurisprudence. It is a field too large to be traversed. It would suffice to point out that prior to the entry of consumer jurisdiction in this field, medical accountability rested primarily on the concept of negligence as understood in the law of torts. That a precise legal definition of negligence is perhaps not possible, and would remain a somewhat slippery would. However, the classic attempted judicial definitions of negligence may be noticed from the authoritative treatise as under:

5.6.16 'It is negligence in the objective sense that is referred to in the well-known definition of Alderson B, Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. So also Lord Wright said in strict legal analysis, negligence means more that heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing'. (8) In India it is well settled that the general principle of law of tort is equally relevant and applicable within our country. The development of the Law of Torts is in the line and closely similar, if not identical with its parental concept. (9)

5.8 Accepted Health/Medical Standard of Care

5.8.1 The accepted medical standard of care can be thought of as the sum of medical knowledge that has been accumulated over hundreds of years of medical and scientific study and discovery, and how that knowledge has become the tools with which doctors can treat patients and make them well when ill or injured. Analogous to the rules to which a driver must adhere when operating a car on public roads, the medical standard of care provides a sort of *playbook*, which outlines rules for treating patients under different circumstances, and a medical professional is required to adhere to this *playbook* to ensure the safety of his or her patients.

5.8.2 Duty of a doctor when an injured person approaches him and Legal protection to doctors treating injured persons, and No legal bar on doctors from attending to the injured persons:

5.8.3 Whenever a man of the medical profession is approached by an injured person, and if he finds that whatever assistance he could give is not really sufficient to save the life of the person, but some better assistance is necessary, it is the duty of the man in the medical profession so approached to render all the help which he could, and also see that the person reaches the proper expert as early as possible.

- A doctor does not contravene the law of the land by proceeding to treat an injured victim on his appearance before him, either by himself or

(8) Treatise of Salmond on the Law of Torts 19th Edn.

(9) Dr. Ravinder Gupta & ors –vs- Ganga Devi & ors 1993 (3)CPR 259.

With others. Zonal regulations and classifications cannot operate as fetters in the discharge of the obligation, even if the victim is sent elsewhere under local rules, and regardless of the involvement of police. The 1985 decision of the Standing Committee on Forensic Medicine is the effective guideline.

- There is no legal impediment for a medical professional, when he is called upon or requested to attend to an injured person needing his medical assistance immediately. The effort to save the person should be the top priority, not only of the medical professional, but even of the police or any other citizen who happens to be connected with the matter, or who happens to notice such an incident or a situation (10)

5.9 Definition of 'Professional'

5.9.1 The occupations that are regarded as professional have four characteristics, viz. (a) the nature of the work which is skilled and specialized and a substantial part is mental rather than manual; (b) commitment to moral principles which go beyond the general duty of honesty, and a wider duty to community which may transcend the duty to a particular client or patient; (c) professional association which regulates admission and seeks to uphold the standards of the profession, through professional codes on matters of conduct and ethics; and (d) high status in the community. (11)

5.9.2 The Supreme Court ruled that a charge of professional medical malpractice/negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was

(10) Pt Parmanand Katara v. Union of India & ors AIR 1989 SC 2039.
(11) Rupert M Jackson and John L. Powell. (Legal Framework for Health Care in India – LexisNexis – Butterworths 2002 edition page 35).

So grave, so should the proof be clear. With the best will in the world, things sometimes go amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong. He was not liable for mischance or misadventure; or for an error of judgment. He was not liable for taking one choice out of two or for favoring one school rather than another. He was only liable when he fell below the standard of a reasonably competent practitioner in his field, so much so that his conduct might be deserving of censure or be inexcusable.

5.10. Concept of Duty to Take Care.

5.10.1 The Supreme Court ruled that a person who is not qualified to practice allopathy was a quack or pretender to the medical knowledge and skill, or a charlatan. He is liable to be prosecuted under sub-section (3) of Section 15 the Medical Councils Act 1956 and is be prosecuted under sub-section (3) of Section 15 the Medical Councils Act 1956 and is guilty of negligence.

5.10.2 The Court further ruled 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, to exercise reasonable care in giving advice or performing services. Immunity from suit has been enjoyed by certain professions on the grounds of public interest. The trend now is the narrowing of such immunity. Medical practitioners do not enjoy any immunity and they can be sued in contract/Consumer Protection Act and also under the provisions of Indian Penal Code on the ground that they have failed to exercise reasonable skill and care. Thus medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of medical malpractice/negligence.

5.11 Standard of Care; Location Factor.

5.11.1 Treatment differs from doctor to doctor. The Supreme Court pointed out that the skill of medical practitioner varies from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment, which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability, and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession, and the Court finds that he has attended on the patient with due care, skill and diligence, and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence. (12)

5.12 Liability of a doctor for not advising the patient to approach a better hospital:

5.12.1 The operation theatre was under repair. There were no facilities for oxygen and blood transfusions, there was no anesthetist, and some life saving drugs were not available. Pipettes for testing blood were broken, the saline apparatus was not in order, and there were only two staff nurses for a 28-beded hospital. In these circumstances the Supreme Court ruled that the doctor should not have undertaken such a major operation in a hospital, which was lacking basic facilities. He should have advised plaintiff no 1, after he found that an operation was required, to take his wife to Rewa Medical College, which was not far off, which had all the facilities including specialists. The doctor, therefore, failed in his duty of care in undertaking the operation without taking necessary precautions. (13)

5.13 Difference in standard of care of doctors attached with companies/ factories from those of general doctors:

(12) Achutrao H Khodwa v state of Maharashtra AIR 1996 SC 2383.
(13) Ram Bihari Lal v JH Shrivastava AIR 1985 MP 150.

5.13.1 The Supreme Court ruled that the duty cast on the company's doctor in respect to the company's employees is not any higher or lower than the duty of an average doctor towards his patient. (14)

5.14 Duty to Take Reasonable Care in Accident Cases

5.14.1 The Supreme Court, ruled that every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained, and must therefore, given way. (15)

5.15. Role of Consent in Fixing Liability.

Oral consent admissibility:

5.15. The State Consumer Redressal Commission, Chennai, ruled that in all cases where a treatment consists of certain dangerous instruments, it is the duty of the medical authority to taken the consent of the patient, preferably in writing.

5.16 Medical Malpractice

5.16.1 The law of *medical malpractice* is an outgrowth of the general body of negligence law. It is the law applicable against medical professionals (doctors, nurses, nurse practitioners, dentists, hospitals, physical therapists, pharmacists, physician assistants, plastic surgeons, psychiatrists, etc.) alleging acts, intentionally and wantonly, in the performance of medical services to their patients. At common law, the duty of due care by medical professionals was deemed to have arisen out of the contractual obligations which are created when a

(14) Philips India Ltd, v Kunju Punnu & anr AIR 1975 Bom 306.
(15) Pt Parmanand Katara v Union of India & ors, AIR 1989 SC 2039.

Patient contracts with a health care provider to perform health care services. Even though some jurisdictions still retain common law contractual concepts in dealing with *medical malpractice* suits, *medical malpractice* is now generally considered by most attorneys, judges and legal scholars to be an independent action in tort, rather than in contract.

5.16.2 In the same sense that the ordinary body of negligence law defines negligence as the doing or the failure to do something that a person of ordinary prudence would or would not do under the same or similar circumstances, the law of medical malpractice defines wanton and intentional negligent medical conduct as the doing or the failure to do something that a reasonably prudent doctor or other health care professional in that field would or would not do under the same or similar circumstances. In negligence law the fictional "reasonable man" standard has been created to evaluate the conduct of the defendant alleged to have been negligent. In medical malpractice law the fictional "reasonably prudent health care provider" standard has been created. In both instances the terminology of the attorneys revolves around the issue of whether the doctor, hospital or other health care provider was "negligent." Some attorneys note that the "reasonable man" standard is objective, in the sense that it is a standard applicable to all human beings, whereas the "reasonably prudent health care provider" is more subjective, in that it allows the medical profession to define the standard by which its conduct will be judged. It is to point out that that standard may fluctuate over periods of time as short as months, depending on available technology. Other attorneys respond that the law holds even medical professionals to certain minimum requirements of care, and evidence presented in a medical malpractice that few people in a given medical field exercise caution in an area where caution should be exercised would not preclude a finding in the same law suit that a doctor, chiropractor or other health care provider was negligent. In medical malpractice cases the plaintiff's medical malpractice lawyer must establish through expert testimony the standard of care required of doctors or other health care providers in the field of the defendant and that the defendant peached or failed to adhere to that standard of care, intentionally and wantonly, thereby causing the plaintiff's injury. A negative result in medical treatment in and of itself does not mean that the doctor, hospital or other health care provider committed malpractice. Medical treatment carries with it no guarantee of a successful outcome. In many medical procedures there are risks which cannot be avoided even if the doctor exercises the greatest caution. These are called unavoidable risks. On the other hand, risks which are unavoidable even when the greatest care has been exercised, may in a particular case, be shown by an attorney to have resulted from lack of due care by the doctor or other health care professional.

5.16.3 Medical malpractice is committed by a professional health-care provider —a doctor, a nurse, a dentist, a technician, a hospital, or a nursing facility—, intentionally and wantonly, whose performance of duties wantonly departs from a standard of practice of those with similar training and experience, resulting in harm to a patient, and gain to the professional in any manner. Most medical malpractice actions are filed against doctors who have failed to use reasonable care to treat a patient. Though million-dollar verdicts make headlines, in fact the big juries award hear about are few and far between. Medical malpractice is the wanton and intentional failure of medical professionals to provide adequate treatment to patients resulting in a personal injury or substantial loss of income.

5.16.4 It is a professional act or omission by a health care provider in which care provided deviates from accepted standards of practice in the medical community and causes injury or death to the patient, with most cases involving medical error. Standards and regulations for medical malpractice vary by country and jurisdiction within countries. Medical professionals may obtain professional liability insurances to offset the risk and costs of lawsuits based on medical malpractice. A doctor would be liable for (depending on the circumstances) such things as prescribing experimental drugs and performing cosmetic surgery.

5.17 Elements of the medical mal-practice

5.17.1 Four elements of the tortious act must be established for a successful *medical malpractice* claim. They are:

- A duty was owed: a legal duty exists whenever a hospital or health care provider undertakes care or treatment of a patient.
- A duty was breached: the provider failed to conform to the relevant standard of care. The standard of care is proved by expert testimony or by obvious errors (the doctrine of res ipsa loquitur or *the thing speaks for itself*).
- The breach caused an injury: The breach of duty was a proximate cause of the injury.
- Damages: Without damages (losses which may be pecuniary or emotional), there is no basis for a claim, regardless of whether the medical provider was negligent. Likewise, damages can occur without negligence, for example, when someone dies from a fatal disease.

5.18 How Medical Negligence becomes Medical malpractice

5.18.1 In short, medical negligence becomes medical malpractice when the doctors intentional and wanton negligent treatment causes undue injury to her patient. This one sentence implies two additional legal concepts required for a medical malpractice case viz., injury and Causation.

5.18.2 Medical malpractice is the failure of a medical professional to meet the standard of good medical practice in the field in which the medical professional practices. Medical malpractice occurs when a healthcare provider - doctor, hospital, HMO, nurse, other individual or entity licensed to provide medical care or treatment - does something that competent doctors would not have done, or fails to do what a competent doctor would have done, resulting in personal injury or wrongful death. Medical malpractice law is complex and, therefore, it is important to engage an experienced malpractice lawyer or attorney who understands the complex issues that apply. Medical malpractice claims involve analysis of medical records and all tests and studies such as MRI, CAT scan, pathology studies, etc. to determine the viability of the claim. If one or a loved one has been a victim of medical malpractice, that person should act promptly to preserve your rights.

5.18.3 Quality medical care should be a guaranteed outcome when a person consult a physician or undergo surgery or other hospitalizations, and the claim of medical malpractice is a grave accusation. To be considered medical malpractice, you must first consider two criteria

- Did the doctor practice medicine in a way that his or her peers would not have done or would not have considered the correct "standard of care?"
- Did the patient suffer an outcome that left him/her with an injury that is lasting or at least substantial enough to pursue a claim?
- Contrary to popular media, abuse does sometimes occur in the field of medicine, but it is not always possible to take it to Court. Attorneys must work within what is called the "rules of evidence." Not everything that happens is necessarily admissible in a Court of law.

5.18.4 A person may have been injured by a doctor, a nurse, or some other practitioner in what is normally the "helping" profession.

5.19. Distinction between medical negligence and medical malpractice.

Medical negligence	**Medical Malpractice**
1. Medical negligence means that you failed to do something that you should have done.	**1.** Medical malpractice means that you DID something wrong that you should have known was wrong.
2. Medical negligence is when you failed to do something that you should have done. Say, if a doctor should have treated or diagnosed a patient but failed to do so which led to a permanent disability of a patient. So, medical negligence occurs when you do something that is below the standard of care you are responsible to provide. Common complaints about doctors who commit medical negligence include but are not limited to the following: (i) failure to revise an initial diagnosis; (ii) failure to explain medical treatment and warn the patient of the risks of this treatment; (iii) failure to remove a surgical instrument from the patient's body following an operation; (iv) failure to attend or treat a patient; (v) incompetence; (vi) failure to refer a patient to another doctor who is a specialist in the relevant disease or injury; (vii) failure to advise on the options for medical treatment; (viii) failure to arrange a follow-up session or further tests for the patient; and (ix) wrongful diagnosis.	**2.** Medical malpractice means that you DID something wrong that you should have known was wrong. This is if you did something that is beyond your job description. Say, for example, if a nurse prescribes medicine in which it is the duty of a doctor to prescribe medicine and not of the nurse. Another example is when a Certified Nursing Accountant (CNA) administers an intravenous drug.
3. Medical negligence occurs when a physician, hospital, pharmacist, or any other health care professional fails to perform the expected duties of their respective jobs. Once a medical professional or medical facility has agreed to treat a patient, there is already the duty to treat such patient with reasonable skill, prudence, and customary care based on a standard of medical care. The standard of medical care is defined by Webster's Medical Dictionary as the manner a reputable medical provider with the same qualifications would manage a patient's treatment under equivalent conditions.	**3.** Medical malpractice occurs when a patient suffers complications, injury, or death because of a health care professional's or health care facility's medical intentional or wanton negligence, and provided there is proof of harm and loss.
4. Medical negligence occurs when a medical professional does not comply with the standard of medical care, whether by performing flawed or irresponsible procedures or by failing to take the necessary actions to prevent harm. Medical negligence can result in injury or harm to the patient, but not	**4.** Proof in medical malpractice covers four areas: (i) Physicians, health care professionals or providers had a duty to provide health care to a specific patient or patients; (ii) The health care professionals or facilities failed to provide the standard of medical care; (iii) This failure to

in all cases. Medical negligence is a part of medical malpractice.	provide the standard of medical care resulted in harming the patient or patients; (iv) A patient must be able to prove there were damages, such as a loss of eyesight, loss of use of limbs, or a loss of the ability to work. If any one of these four points is missing, it does not constitute medical malpractice.
5. Medical negligence is the act or omission in treatment of a patient by a medical professional, which deviates from the accepted medical standard of care.	**5.** Medical malpractice is by and act or omission by a health care provider in which care provided deviates from accepted standards of practice in the medical community and causes injury or death to the patient, with most cases involving medical error. Standards and regulations for medical malpractice vary by country and jurisdiction within countries.
6. Medical Negligence does not imply Injury.	**6.** Most (73%) settled malpractice claims involve medical error**.**
7. Negligence is the generic identify for a tort wherever an individual has a duty to an additional man or woman, breaches that duty, which is lead to in truth and proximate trigger of damages.	**7.** Malpractice has both direct and indirect costs, including "defensive medicine." In Medical malpractice cases, the doctor has the duty to act as a sensible physician (or specialist, if required) would act.
8. If a doctor is found to be negligent he has neglected to do something he should have. It is basically careless. May be he should have suggested a test and didn't. Like when you forget to clean the candy wrapper out from under your bed and now your room is full of bugs.	**8.** Medical malpractice indicates that when the doctor's negligent treatment causes undue injury to the patient. This one sentence implies two additional legal concepts required for a medical malpractice case: Injury and Causation.
9. Medical negligence are the types of cases which often require attorneys for the plaintiff (those bringing the complaint) to prove four necessary elements against a defendant (those against whom the complaint is brought). Medical negligence cases can also go on for prolonged periods of time.	**9.** Any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from defects in blood, tissue, transplants, drugs and medicines, or from defects in or failures of prosthetic devices, implanted in or used on or in the person of a patient.
	10. Six factors to be considered in determining whether malpractice is present: First, was the wrong treatment related? Was it caused by a failure in professional skill? Second, is expert medical evidence needed to determine whether the appropriate standard of care was breached? Third, did the wrong involve assessment of the patient's condition? Fourth, did the wrong occur in the context of a physician-patient relationship? Was it within the scope of an activity the hospital is licensed to perform? Fifth**,** would the injury have occurred if the patient did not seek treatment? And Sixth, was the alleged wrong intentional?
	11. Medical malpractice is just the title of a lead to of action for a healthcare practitioner's negligent overall performance of his responsibilities (though, technically, medical malpractice could most likely contain reckless or intentional acts completed in the program of a health care practitioner's duties).
	12. Medical malpractice is the omission by an act by a health care provider in which the care or treatment provided deviates from standards of practice in the medical community resulting in injury or death to the patient.

5.20. Constitution of India has provided provisions dealing with health in Part III, Part IV. They are: Article 25 in part IV, Articles 39(e), 42, 43 and 47 Article 25

5.21 The right to health is an inclusive right.

5.21.1 We frequently associate the right to health with access to health care and the building of hospitals. This is correct, but the right to health extends further. It includes a wide range of factors that can help us lead a healthy life. The Committee

on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these the "underlying determinants of health". They include:

- Safe drinking water and adequate sanitation;
- Safe food;
- Adequate nutrition and housing;
- Healthy working and environmental conditions;
- Health-related education and information;
- Gender equality.

5.22 Directive Principle of State Policy and Health

5.22.1 Article 38 of Indian Constitution imposes liability on State that states will secure a social order for the promotion of welfare of the people but without public health we cannot achieve it. It means without public health welfare of people is impossible. Article 39(e) related with workers to protect their health. Article 41 imposed duty on State to public assistance basically for those who are sick and disable. Article 42 makes provision to protect the health of infant and mother by maternity benefit.

5.22.2 In the India the Directive Principle of State Policy under the Article 47 considers it the primary duty of the state to improve public health, securing of justice, human condition of works, extension of sickness, old age, disablement and maternity benefits and also contemplated. Further, State's duty includes prohibition of consumption of intoxicating drinking and drugs are injurious to health. Article 48A ensures that State shall endeavour to protect and impose the pollution free environment for good health. Article 47 makes improvement of public health a primary duty of State. Hence, the Court should enforce this duty against a defaulting authority on pain of penalty prescribe by law, regardless of the financial resources of such authority. Under Article 47, the State shall regard the raising of the level of nutrition and standard of living of its people and improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling pollution inasmuch as our materialistic resources are limited and the claimants are many.

Panchayat, Municipality and Health

5.22.3 Not only the State also Panchayat, Municipalities liable to improve and protect public health. Article 243G says "State that the legislature of a state may endow the panchayats with necessary power and authority in relation to matters listed in the eleventh Schedule".

5.22.4 The entries in this schedule having direct relevance to health are as follows

11 -Drinking
23 -Health and sanitation including hospitals, primary health centers and dispensaries.
24 -Family welfare
25 -Women and Child development
26 -Social welfare including welfare of the handicapped and mentally retarded.

5.22.5 Article 243-W finds place in part IXA of the constitution titled "The Municipalities:

5 -Water supply for domestic industrial and commercial purpose.
6 -Public health, sanitation conservancy and solid waste management.
9 -Safeguarding the interest of weaker sections of society, including the handicapped and mentally retarded.
16 -Vital statistics including registration of births and deaths
17- Regulation of slaughter – houses and tanneries.

5.23 Fundamental Rights and Health: –

5.23.1 The DPSP are only the directives to the State. These are non-justifiable. No person can claim for non-fulfilling these directives. But the Supreme Court has brought the right to health under the preview of Article 21. The scope of this provision is very wide. It prescribes for the right of life and personal liberty. The concept of personal liberty comprehended many rights, related to indirectly to life or liberty of a person. And now a person can claim his right of health. Thus, the right to health, along with numerous other civil, political and economic rights, is afforded protection under the Indian Constitution.

5.23.2 The debate surrounding the implementation of the human right to health is fresh and full of possibility for the developing world. In fact, Indian has been able to create a legal mechanism whereby right to health can be protect and enforced. The early of 1970s, witnessed a watershed in human rights litigation with the ushering in an unprecedented period of progressive jurisprudence following the recognition fundamental rights. At the same time standing rules were relaxed in order to promote PIL and access to justice. So there were two developments in 1980s, which led to a marked increase in health related litigation. First was the establishment of consumer Courts that made it cheaper and speedier to sue doctors for medical negligence. Second, the growth of PIL and one of this offshoots being recognition of health care as a fundamental right. Through PIL the Supreme Court has allowed individual citizen to approach the Court directly for the protection of their Constitutional human rights.

5.23.3 The Constitution guarantees the some fundamental rights having a bearing on health care. Article 21deal with "No person shall be deprived of his life or personal liberty except according to procedure established by law." Right to live means something more, than more animal existence and includes the right to live consistently with human dignity and decency. In 1995, the Supreme Court held that right to health and medical care is a fundamental right covered by Article 21 since health is essential for making the life of workmen meaningful and purposeful and compatible with personal

dignity. The state has an obligation under Article 21 to safeguard the right to life of every person, preservation of human life being of paramount importance. The Supreme Court held that whether the patient be an innocent person or be a criminal liable to punishment under the law, it is the obligation of those who are in charge of the health of the community to preserve life so that innocent may be protected and the guilty may be punished. In addition to constitutional remedies sensitizing of the relevant ordering law towards later health for all adds to the content of right to health. Legal prohibition of commercialized transplantation of human organ and effective application of consumer protection act to deal with deficient medical services have animated right to health.

5.24 Right to Health Care as a Fundamental Right

5.24.1 The Supreme Court, (16) while widening the scope of art 21 and the government's responsibility to provide medical aid to every person in the country, held that in a welfare state, the primary duty of the government is to secure the welfare of the people. Providing adequate medical facilities for the people is an obligation undertaken by the government in a welfare state. The government discharges this obligation by providing medical care to the persons seeking to avail of those facilities. Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state are duty bound to extend medical assistance for preserving human life. Failure on the part of a Government hospital to provide timely medical treatment to a person in need of such treatment, results in violation of his right to life guaranteed under Article21. The Court made certain additional direction in respect of serious medical cases

- Adequate facilities be provided at the public health centers where the patient can be given basic treatment and his condition stabilized.

(16) Paschim Banga Khet Mazdoor Samity & ors –vs- State of West Bengal & ors, [1996) 4 SCC 37

- Hospitals at the district and sub divisional level should be upgraded so that serious cases be treated there.
- Facilities for given specialist treatment should be increased and having regard to the growing needs, it must be made available at the district and sub divisional level hospitals.
- In order to ensure availability of bed in any emergency at State level hospitals, there should be a centralized communication system so that the patient can be sent immediately to the hospital where bed is available in respect of the treatment, which is required.
- Proper arrangement of ambulance should be made for transport of a patient from the public health center to the State hospital.
- Ambulance should be adequately provided with necessary equipments and medical personnel.

5.25 Workers right to health care facilities

5.25.1 The Supreme Court has recognized the rights of the workers and their right to basic health facilities under the Constitution, as well as under the international conventions to which India is a party. In its path breaking judgment in Bandhua Mukti Morcha –vs-Union of India, the Court delineated the scope of art 21 of the Constitution, and held that it is the fundamental right of every one in this country, assured under the interpretation given to art 21 by this Court in Francis Mullin's Case to live with human dignity, free from exploitation. This right to live with human dignity enshrined in art 21 derives its life breath from the directive principles of state policy and particularly clause (e) and (f) of art 39 and arts 41 and 42. It must include protection of the health and strength of workers, men and women; and children of tender age against abuse; opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity; educational facilities; just and humane conditions of work and maternity relief. These are the minimum requirements, which must exist in order to enable a person to live with human dignity. No state, neither the central government nor any state government, has the right to take any action which will deprive a person of the enjoyment of these basic essentials. In (18) the Court held that**,** the health and strength of a worker is an integral facet of the right to life. The aim of fundamental rights is to create an egalitarian society to free all citizens from coercion or restrictions by society and to make liberty available for all. The Court, while reiterating its stand for providing health facilities, in (19) held that a healthy body is the very foundation for all human activities. That is why the adage 'Sariramadyam khalu dharma sadhanam'. In a welfare State, therefore, it is the obligation of the state to ensure the creation and the sustaining of conditions congenial to good health.

5.26 Right to Health is a Fundamental Right

5.26.1 In (20) the Supreme Court relied on international instruments and concluded that right to health is a fundamental right. It went further and observed that health is not merely absence of sickness: "The term health implies more than an absence of sickness. Medical care and health facilities not only protect against sickness but also ensure stable manpower for economic development. Facilities of health and medical care generate devotion and dedication to give the workers' best, physically as well as mentally, in productivity. It enables the worker to enjoy the fruit of his labour, to keep him physically fit and mentally alert for leading a successful economic, social and cultural life. The medical facilities are, therefore, part of social security and like gilt edged security, it would yield immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness, etc., that environmental, ecological, air and water pollution, etc., should be regarded as amounting to violation of right to health guaranteed by Article 21 of the Constitution. It is right to state that hygienic environment is an integral facet of the right to

(18) CESE Ltd –vs- Subhash Chandra Bose, *AIR 1992 SC 573 = 1991 (2) SCALE 996*

(19) Vincent –vs- Union of India A*IR 1987 SC 990*

(20) ESC Ltd. –vs-. Subhash Chandra Bose *AIR 1992 SC 573,*

Healthy life and it would not be possible to live with human dignity without a humane and healthy environment. In the cases of (21) *& (22)* the Supreme Court held that right to health and medical care is a fundamental fight under Article 21 read with Article 39(e), 41 and 43. In the case of (23) the Supreme Court held that right to pollution-free water and air is an enforceable fundamental right guaranteed under Article 21. Similarly in the case of (24) the Supreme Court opined that the right to decent environment is covered by the right guaranteed under Article 21. Further, in (25) & (26) the Supreme Court imposed a positive obligation upon the State to take steps for ensuring to the individual a better enjoyment of life and dignity and for elimination of water and air pollution. It is also relevant to notice as per the judgment of the Supreme Court in (27) & (28) the maintenance and improvement of public health is the duty of the State to fulfill its constitutional obligations cast on it under Article 21 of the Constitution. Our constitution makers was much aware about the public health or right to health that's why they imposed liability on Stat by some provision (Article 38, 39(e) 41, 42, 47, 48A) of DPSP.

5.26.2 Provisions in the Consumer Protection Act 1986 with land mark decisions under the said Act, 1986 with regard to health.

(21) Consumer Education and Research Centre –vs- Union of India *(1995) 3 SCC 42*
(22) Kirloskar Brothers Ltd. –vs- Employees' State Insurance Corporation *(1996) 2 SCC 682 = AIR 1996 SC 3261,*
(23) Subhash Kumar -vs- State of Bihar *AIR 1991 SC 420 = (1991) I SCC 598,*
(24) Shantistar Builders –vs- Narayan Khimalal Totame *(1990) 2 SCJ 10 = AIR 1990 SC 630 = (1990) 1 SCC 520,*
(25) M.C. Mehta –vs- Union of India *(1987) 4 SCC 463 = AIR 1988 SC 1037*
(26) Rural Litigation and Entitlement Kendra –vs- State of U.P. *AIR 1987 SC 359,*
(27) Vincent Panikurlangara –vs- Union of India, *AIR 1987 SC 990 = (1987) 2 SCC 165*
(28) Unnikrishnan, JP –vs- State of A.P *AIR 1993 SC 2178 = (1993) 1 SCC 645,*

5.27. Historical perspective of the consumer movement.

5.27.1 The Consumer movement had primarily started in the West. We can trace history of the consumer movement from the judgment of the leading case of (29) In this case, first time Manufacturers' liability for minimum quality standard for product was established. For the first time in 1856, a select committee recommended that a cheap and easy remedy, by a summary charge before a magistrate, should be afforded to consumers who received adulterated or falsely described food. This suggestion was taken up in the Merchandise Marks Act, 1887. Section 17 of the Act provides as follows: 'That a person applying a trade description to a product was deemed to warrant that it was true, so that a false trade description constituted breach of both criminal and civil law'. In leading English case (30) where the consumer claimed to have suffered injury as well as result of drinking from a bottle of ginger-beer containing a decomposed snail. Over a strong dissent the majority held that the manufacture would be liable. The case did not herald strict liability but it facilitated more claims than were provided under the nineteenth century approach. Lord Atkin enunciated the manufacturer's duty of care in the following words: 'The preparation or putting up of the products will result in an injury to the consumers' life or property, owes a duty to the consumer to take that reasonable care'.

5.28. How Consumer Protections Act of 1986 controls medical mal-practice?

5.28.1 The Consumer Protection Act 1986 was enacted by the Parliament of India to safeguard consumer interest, in compliance with the United Nations guidelines adopted on 9-4-1985. Consumer Courts were established for the settlement of consumers' disputes and related matters. The Act protects not only the interests of consumer when he purchases goods and services for daily use, but also protects his interests when he goes for treatment to a medical professional.

(29) Carlill v. Carbolic Smoke Ball Company 1893 (1) Q.B. 256.
(30) Donoghue v. Stevenson (1932) A.C. 562,

Many medical associations lodged their protests against the application of the Act 1986 to the doctors on the ground that the relationship between a doctor and a patient is not that of a buyer and seller. However this contention was not accepted. In the initial period after the enactment of the Act, there was a lot of confusion in the judiciary as well as medical fraternity regarding the application of the Act to this profession.

5.30. Medical Professionals under the Consumer Protection Act.

5.30.1 In (31) the Supreme Court observed 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. Immunity from suit was enjoyed by certain professions on the grounds of public interest. The trend now is narrowing of such immunity. Medical practitioners do not enjoy any immunity, and they can be sued in contract or tort on the grounds that they have failed to exercise reasonable skill and care. Thus medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. Despite the fact that they are governed by the Indian medical council Act and are subject to the disciplinary control of the Medical Council of India and/or State medical Councils, the Supreme Court ruled that they cannot be said to be outside the purview of the provisions of the Consumer Protection Act 1986.

5.30.2 The Indian Medical Association case is an epoch making judgment of the Supreme Court on this subject. Here the Supreme Court ruled that

- Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), 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 Act.
- The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and / or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.
- A Contract of personal service has to be distinguished from a contract for personal service. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a contract of personal service. Such service is a service rendered under contract for personal services and is not covered by the exclusionary clause of the definition of service contained in section 2(1)(o) of the Act. The expression contract of personal service in section 2(1)(o) of the Act cannot be confined to the contract for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of service as defined in section 2(1)(o) of the Act.
- Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer

(31) Indian Medical Association –vs- V.P. Shantha reported in A.I.R. 1996 SC 550 = (1995) 6 SCC 651,

employed in a hospital/nursing home where such services are rendered free of charge to every body, would not be service as defined in section 2(1)(o) of the Act, the payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

- Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service-is outside the purview of the expression service as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purposes only at the hospital/ nursing home would not alter the position.
- Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing such service falls within the purview of the expression service as defined in section 2(1)(o) of the Act.
- Service rendered at a non-government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression service as defined in section 2(1)(o) of the act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free services would also be service and the recipient a consumer under the Act.
- Service rendered at a government hospital/health centre/dispensary where no charge whatsoever is made from any person availing of the services and all patients (rich and poor) are given free service as defined in section 2(1)(o) of the Act. The payment of a token amount for registration purposes only at the hospital/nursing home would not alter the position.
- Service rendered at a government/ hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to the ambit of the expression service as defined in section 2(1)(o) of the Act, irrespective of the fact that the service is rendered free of charges to persons who do not pay for such services. Free service would also be service and the recipient a consumer under the Act.
- Service rendered a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge of the person availing of the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of the term service as defined in section 2(1)(o) of the Act.
- Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or hospital/nursing home would not be free of charge and would constitute service under section 2(1)(o) of the Act.

5.30.3 The Supreme Court, while formulating the above guidelines, upheld the judgment of the National Commission in Cosmopolitan Hospitals v. Vasantha P. Nair. By holding that the activity of providing medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression service as defined in section 2(1)(o) of the Consumer Protection Act 1986. The Court, therefore, held that the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the Consumer Forum having jurisdiction.

5.30.4 From the principles laid down above by the Supreme Court it is evident that the medical practitioners, government hospitals/nursing homes broadly fall into the three broad categories

- Where services are rendered free of charge to every body availing the said services;
- Where charges are required to be paid by everybody availing the said service; and
- Where charges are required to be paid by persons availing services but certain categories of persons who cannot afford to pay are rendered service free of charge.

5.30.5 In respect of the first category the Court ruled that doctors and hospitals who rendered service without any charge whatsoever to every person availing services would not fall within the ambit of service under section 2(1)(o) of the 1986 Act. The payment of token amount for registration purposes only would not alter the position in respect of such doctors and hospitals. So far as the second category is concerned, since the service is rendered on payment basis to all persons, they would clearly fall within the ambit of section 2(1)(o) of the Act.

5.30.6 The third category of doctors and hospitals do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis. Expenses incurred for providing free services are met out of the income from the service rendered to the paying patients. The service by such doctors and hospitals to the paying patients undoubtedly falls within the ambit of section 2(1)(o) of the Act.

5.30.7 Thus, according to the Supreme Court, the word users in the phrase potential users in section 2(1)(o) of the 1986 Act gives an indication that the consumers as a class are contemplated. The definition of complainant contained in section 2(1)(b) of the Act which includes, under clause (ii) any voluntary consumer association and clauses (b) and (c) of section 12 which enable a complaint to be filed by any recognized consumer association or more consumers where there are numerous consumers, having the same interest, on behalf of or for the benefit of all consumers so interested, also lend support to the view that the 1986 Act seeks to protect the interests of consumers as a class. According to the court, to hold otherwise would mean that the protection of the Act would be available only to those who can afford to pay and such protection would be denied to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature had intended to achieve such a result.

5.30.8 From a reading of the foresaid matter, it is clear that at present, the cases against medical professional are being dealt with under the provisions of Indian Penal Code or Consumer protection Act read with other related Acts connected to medical profession. All these cases are dealt with for granting compensation to the aggrieved but for t he intentional act of the medical professions for monetary gain and for other obvious purposes. It is very much felt that there is no separate enactment to deal with medical malpractice. Hence, time has come now to think about enactment of Medical Malpractices Act to deal with the medical professionals and Hospitals.

5.30.9 Hope wisdom prevails on the legislators, either at States level or a comprehensive enactment at Centre level, to bring out an enactment on this subject to curb this menace.

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References

[1] Kearns, O, Mathuna, and Scott (2009) for a discussion of the ethical issues raised by such self diagnostic kits (Jonathan Herring – medical law and ethics 3rd edition at page
[2] Sheldon and Thomson 1998:5 (Jonathan Herring – medical law and ethics 3rd edition at page (2)
[3] (1995) 6 SCC 651.
[4] Legal framework for Health Care in India – LexisNexis – Butterworth's 2002 edition.
[5] The World Health Organization's Constitution (came into force in 1948)
[6] Alma Ata Declaration adopted in 1978.
[7] Article 21 of the Constitution of India
[8] Treatise of Salmond on the Law of Torts 19th Edn.
[9] Dr. Ravinder Gupta & ors –vs- Ganga Devi & ors 1993 (3)CPR 259.
[10] Pt Parmanand Katara v. Union of India & ors AIR 1989 SC 2039.
[11] Rupert M Jackson and John L. Powell. (Legal Framework for Health Care in India – LexisNexis – Butterworths 2002 edition page 35).
[12] Achutrao H Khodwa v state of Maharashtra AIR 1996 SC 2383.
[13] Ram Bihari Lal v JH Shrivastava AIR 1985 MP 150.
[14] Philips India Ltd, v Kunju Punnu & anr AIR 1975 Bom 306.
[15] Pt Parmanand Katara v Union of India & ors, AIR 1989 SC 2039.
[16] Arunachal Vadivel & ors v Dr. N Gopalkrishnan 53. (1992) 2 CPR 548.
[17] Paschim Banga Khet Mazdoor Samity & ors –vs- State of West Bengal & ors, [1996) 4 SCC 37
[18] CESE Ltd –vs- Subhash Chandra Bose, AIR 1992 SC 573 = 1991 (2) SCALE 996
[19] Vincent –vs- Union of India AIR 1987 SC 990
[20] ESC Ltd. –vs-. Subhash Chandra Bose AIR 1992 SC 573,
[21] Consumer Education and Research Centre –vs- Union of India (1995) 3 SCC 42
[22] Kirloskar Brothers Ltd. –vs- Employees' State Insurance Corporation (1996) 2 SCC 682 = AIR 1996 SC 3261,
[23] Subhash Kumar -vs- State of Bihar AIR 1991 SC 420 = (1991) I SCC 598,
[24] Shantistar Builders –vs- Narayan Khimalal Totame (1990) 2 SCJ 10 = AIR 1990 SC 630 = (1990) 1 SCC 520,
[25] M.C. Mehta –vs- Union of India (1987) 4 SCC 463 = AIR 1988 SC 1037
[26] Rural Litigation and Entitlement Kendra –vs- State of U.P. AIR 1987 SC 359,
[27] Vincent Panikurlangara –vs- Union of India, AIR 1987 SC 990 = (1987) 2 SCC 165
[28] Unnikrishnan, JP –vs- State of A.P AIR 1993 SC 2178 = (1993) 1 SCC 645,
[29] Carlill v. Carbolic Smoke Ball Company 1893 (1) Q.B. 256.
[30] Donoghue v. Stevenson (1932) A.C. 562,
[31] Indian Medical Association –vs- V.P. Shantha reported in A.I.R. 1996 SC 550 = (1995) 6 SCC 651,