

LAW OF TORTS, MEDICAL NEGLIGENCE AND CONSUMER PROTECTION

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**Centre for Consumer Studies
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FOREWORD

Economic liberalization in India has led to a palpably growing realization among citizens of their entitlement to high quality service from service providers. The enactment of social welfare legislation like the Consumer Protection Act, 1986 and the Right to Information Act, 2005 has further enhanced aspirations for improved service delivery and good governance. Prior to these developments the only remedy available for protection of consumers' rights and interests was under the Law of Torts. In case of negligence on part of the service provider, the only remedy available to the aggrieved party was to file a civil suit for damages, which was expensive and time consuming.

The Consumer Protection Act is a benevolent piece of social welfare legislation providing for a simple, speedy and less expensive remedy for the redressal of consumer grievances in relation to defective goods and deficient services. The Act is a weapon in the hands of consumers to fight against exploitation by traders, manufacturers and sellers on the one hand and providers of services on the other.

Though the consumers are confronted with deficiency in services with respect to a number of services, the medical service is most technical and complicated of all. The medical profession, though one of the noblest of its kind, is not immune from negligence which, at times, leads to death of the patient or physical impairment. Due to the technical nature of the problem the consumers do not know what to do and find it difficult to get relief. This monograph is an attempt to highlight the problems of consumers in the service sector and the need of accountability for better services with particular reference to the medical sector.

It is against this backdrop that the Centre for Consumer Studies, Indian Institute of Public Administration, New Delhi, in collaboration with NLIU, Bhopal, has brought out the present monograph on "Law of Torts, Medical Negligence and Consumer Protection". I would like to thank the author, Dr Rajiv Kumar Khare for bringing out this monograph in its present form. It's an important contribution to the literature on consumer protection and will help the readers understand the concept of negligence and its applicability to the medical profession.

Place: New Delhi
Date: August 5, 2010

B.S. Baswan

Preface

The development of consumer protection regime is fairly young. At the domestic front, the consumer movement started with enactment of the Consumer Protection Act, 1986. The Act aims to provide for better protection of interest of the consumers and for the establishment of the quasi-judicial authorities for the settlement of the consumer disputes. This Act has primarily given statutory recognition to the rights of the consumers in India. However, prior to these developments, the concern for protection of consumers' rights and interests may be located under the Law of Torts which is even now equally effective and enforceable. The term 'tort' is derived from the Latin term '*tortum*' and is judge-made or court-developed law which can redress any violation of legal right if the same is not already covered under any statute time being in force. Every unjustified harm is a tort and as such actionable, unless there is a legal policy leaving certain harms unrecognized. This ever expansive branch of law, the law of torts, has given recognition to several new types of wrongs including the wrongs inflicted on the consumers.

In the monograph attempt has been made to throw light on the relationship of Law of Torts vis-à-vis Consumer Protection with special emphasis on Medical Negligence cases. Consumer protection regime primarily aims to protect against deficiency in services and defect in goods. Often the deficiency in service or defect in goods is the outcome of negligence of the service providers or the manufacturers, suppliers, producers of the goods. Thus the essentials of the tort of negligence remain important in consumer disputes. As the scope of this monograph is limited to the tort of negligence and consumer protection, a few important sectors wherein the problems faced by the consumers have been discussed. Thus the discussion shall primarily be around these aspects under the torts law and consumer laws, with sector-specific treatment of consumer cases. The sectors specifically included in this monograph are insurance, transport, banking and finance, medical etc.

The Centre for Consumer Studies, IIPA has been bringing out a number of publications on issues that affect the consumers. This monograph will help the

readers to understand the rationale of tortious liability and its applicability to the consumer disputes.

I would like to thank Prof. S. S. Singh, Director, NLIU and Mr. B. S. Baswan, Director, IIPA for his encouragement and support. I am also thankful to the Department of Consumer Affairs, Government of India for their help. I would like to thank the Centre for Consumer Studies, IIPA for bringing out this publication.

Date: August 1, 2010
Place: Bhopal

Rajiv Kumar Khare

INTRODUCTION

The word 'tort' has been derived from the Latin term '*tortum*', which implies a crooked or twisted or not straight and lawful conduct. It is equivalent to the English term 'wrong'. Since the social opinion concerning crooked or deviant conduct is influenced by the ruling ideologies and the material conditions, the notion of tort keeps on changing with time and place. It is this dynamic nature of tort law, which creates civil liability and leads to non-penal consequences, has led to ensuring justice to all. Generally, every unjustified harm is a tort and as such actionable, unless there is a legal policy leaving certain harms unrecognized. This ever expansive branch of law, the law of torts, has given recognition to several newer types of wrongs including the wrongs inflicted on the consumers.

The development of consumer protection regime is fairly young and may be traced to the **Bill of Consumers' Rights** wherein the recognition of consumer rights commenced at the international level.¹ This Bill recognized **four** important rights of the consumers, viz. (i) the right to safety; (ii) right to be informed; (iii) right to choose; and (iv) the right to be heard.² These rights of the consumers were further strengthened by passing of resolution by **UN General Assembly on April 9, 1985**, wherein general guidelines were issued by the United Nation General Assembly which included: (i) physical safety, (ii) protection and promotion of consumer economic rights, (iii) standards for the safety and quality of consumers goods and services , (iv) measures enabling consumers to obtain redress, (v) masures relating to specific areas like, food, water and pharmaceuticals; and (vi) consumer education and information programmes.

At the domestic front, the consumer movement started with enactment of the **Consumer Protection Act, 1986** (hereinafter referred as CPA) which aims to provide *'for better protection of interest of the consumers and for the establishment of the quasi-judicial authorities for the settlement of the*

¹ Bill of Rights of the Consumers on March 15, 1962.

² Other four rights added in the document are the ; (i) right to satisfaction of basic needs ; (ii) right to to redress ; (iii) right to to education ; and (iv) the right to healthy environment .

consumer disputes'.³ This Act has primarily given statutory recognition to the rights of the consumers in India. These rights, given in the Act, include:

- (i) the right to be protected against the marketing of goods and services which are hazardous to life and property;
- (ii) the right to be informed about the quality, quantity, potency, purity, standard and price of goods or the services as the case may be so as to protect the consumer against unfair trade practices;
- (iii) the right to access to variety of goods and services at competitive prices;
- (iv) the right to be heard and be assured that consumer interest will receive due consideration at appropriate flora;
- (v) the right to seek redress against unfair trade practices or unscrupulous exploitation of consumers; and
- (vi) the right to consumer education.⁴

However, prior to these developments, the concern for protection of consumers' rights and interests may be located under the Law of Torts which is even now equally effective and enforceable. This monograph, therefore, attempts to throw light on the relationship of Law of Torts vis-à-vis Consumer Protection with special emphasis on Medical Negligence cases. Consumer protection regime primarily aims to protect against deficiency in services and defect in goods. Thus the discussion shall primarily be around these aspects under the torts law and consumer laws, with sector-specific treatment of consumer cases. The sectors specifically included in this monograph are insurance, transport, banking and finance, medical etc.

The Law of Torts

As stated earlier the term '**tort**' is derived from the Latin term '*tortum*' and is judge-made or court-developed law which can redress any violation of legal right if the same is not already covered under any statute time being in force. Defining any term is a tough task yet there are certain advantages which flow from an attempt to define any term. Attempts have been made by scholars to

³ See, the Object and Reasons clause of the Consumer Protection Act, 1986

⁴ See, Section 6 of the CPA

define the term 'tort'. According to Dr. Winfield, "*tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.*"⁵ Sir **Salmond** stated that, "*It (tort) is a civil wrong for which the remedy is a common law action for unliquidated damages and which is not exclusively the breach of a contract or the breach of trust or other merely equitable obligation.*" Another definition given by **Fraser** provides that, "*it is an infringement of a right in rem of a private individual giving a right of compensation at the suit of the injured party.*"⁶ The term 'tort' has also been defined in the Limitation Act, 1963 which reads that, "*Tort means civil wrong which is not exclusively a breach of contract or breach of trust*".⁷ Thus from the above definitions following essentials of the torts emerge:

- That it is a civil wrong⁸
- That it is other than a mere breach of contract or breach of trust⁹
- That the wrong is redressible by an action for unliquidated damages.¹⁰

Tortious Liability: A Historical Perspective

Initially no one was allowed to bring an action in the King's Common Law Courts without the King's writ being issued from the Chancery which was not a Court of Law, but a Government Department, one of whose function was the creation and issue of writs. The Chancery Division came to be known as the "writ shop" because a plaintiff could not get a writ without paying for it. The number of writs was limited. Every aggrieved party (the Plaintiff) had to bring

⁵ Dr. Winfield cited in WHV Rogers, 'Winfield And Jolowicz on Tort', Sweet & Maxwell, International Student Edition, 1998, p. 4.

⁶ See, Winfield, *Provinces of Law of Tort* (1931), Chap XII; Williams and Hepple, *Foundations of the Law of Tort*, 2nd ed, Chap 1.

⁷ Section 2 (m) of the Limitation Act, 1963

⁸ The basic nature of civil wrong is different from a criminal wrong. In case of a civil wrong the injured part, i.e. the plaintiff institutes civil proceedings against the wrongdoer; main remedy in such cases is the damages (compensation); in case of civil wrong the suit is adjudicated by balancing of the probabilities.

⁹ The tort is that civil wrong which is not exclusively any other kind of civil wrong. If we find that a wrong is a mere breach of contract or breach of trust, e.g. where a person agrees to buy a computer does not fulfill his part of obligation, the wrong would be mere breach of contract and not the tort.

¹⁰ Monetary compensation is the most important remedy in tort, this compensation is not previously fixed between the parties, rather it is to be determined by the court. As the damages in tort are unliquidated, it also enables us to distinguish tort from other civil wrongs, like breach of contract or breach of trust.

his cause of action¹¹ within a recognized form of action. The writs that remedied the injuries, presently called “tort”, were at first: (a) Writ of trespass, and later (b) writ of trespass on the case, and (c) the writ on the case. Writ of trespass lay for injuries to land or goods or to the person limited to injuries which were direct and immediate. It did not extend to indirect or consequential injuries. The writ of trespass became common around the year 1250. Further it was probable that injuries not remediable by the ‘writ of trespass’ might be remedied by actions ‘upon the case’ issued by the Chancery Division. These ‘actions upon the case’ seem to have been of wider ambit, i.e. when a new kind of injury occurred, the person wronged by it could apply to the Chancery for a ‘writ of trespass upon the case’ or for a ‘writ upon the case’. If the injury bore some analogy to one already covered by an existing writ, the Chancery would issue a new writ. Armed with this, the plaintiff (the injured person) would then bring his action into the Royal Court. The judges may or may not hold that the writ expressed a good cause of action. Writ on the case provided for all injuries not amounting to trespasses, that is to say, for all injuries which were either not forcible or direct, but merely consequential. Thus most part of the law of torts grew out of the writs. In the early 14th Century success of an action depended on the availability of writ.¹² The law, therefore, was that where there is a remedy, there is a right, i.e. *Ubi remedium ibi jus*, i.e. in other words if there was no remedy by way of a writ, there was considered to be no right. However, this process of recognition or rejection of right continued for more than 500 years when the Common Law Procedure Act, 1852 was passed whereby writs were abolished.¹³ The position then was changed and is now that whenever the court is convinced that a lawful right of a person is violated, a remedy is provided for the same, i.e. the law being “*ibi jus ubi remedium*”, i.e. where there is a right there is a remedy. Further, recognition of newer torts, like. torts of harassment¹⁴, psychiatric sufferings¹⁵, etc, show that whenever there has been an unjustifiable interference with the rights of a person, the courts have provided a remedy for the same.

¹¹ A cause of action meant a factual situation which entitles one person to obtain a remedy from another in the court of law.

¹² See, *Supra* n-4, at pp.47-48

¹³ For details, see, R.K. Bangia, “*Law of Torts*”, Allahabad Law Agency, 1st Edn, Reprint 2001, chap.1

¹⁴ *Khorasandjian v. Bush*, [1993] 3 All ER 669

¹⁵ *Wilkinson v. Downton*, [1897] 2 QB 57

Conditions of Tortious Liability

The hallmark of tortious remedy is the existence of a legal right and its protection against infringement, i.e. it prevents people from hurting one another. The fundamental principle of the tortious remedy is *'to hurt nobody by word or deed'*, explained properly by the Latin maxim called, *"alterum non laedere"*. However, it may be noted that this general principle preventing hurt (harm) by a wrongful act or wrongful omission must be recognized by law, i.e. it must be a legal damage and if it is not legally recognized, no remedy may be provided. The legal damage is explained by a Latin maxim, called, *Injuria sine damno*; wherein *Injuria* means infringement of a legal right conferred by law on the plaintiff and any unauthorized interference, howsoever trivial it may be, with the plaintiff's right would be actionable *per se*. *Damnum* means substantial harm, loss or damage in respect of money, comfort, health etc. Thus it is quite possible that there has been merely infringement of a legal right with or without any physical loss or damage, the person so wronged could still approach the court and seek redressal of the alleged wrong.¹⁶ Opposed to the above, there may be a situation where there has been no infringement of any legal right but there has been substantive harm/damage caused. This situation may be explained through another Latin maxim, called, *"Damnum sine injuria"*, which means damage caused without infringement of any legal right. This situation does not give any right to bring an action before any court of law. For example, the harm done may be caused by some person who is merely exercising his own legal right.¹⁷

¹⁶ In *Ashby v. White*, (1703) 2 Ld. Raym.938 case, the Plaintiff was a qualified voter at a parliamentary election, but the defendant, a returning officer, wrongfully refused to take plaintiff's vote. No loss was suffered by such refusal because the candidate for whom he wanted to vote won in spite of that. It was held that the Defendant is liable. Mr. Holt, C.J. said, *"if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal... every injury imports a damage, though it does not cost the party one farthing."*

¹⁷ In a famous *Gloucester Grammar School* case the defendant, a schoolmaster, set up a rival school adjacent to that of the plaintiff's school. Because of the competition, the plaintiffs had to reduce their fees from 40 pence to 12 pence per student per quarter which resulted loss to the plaintiffs. It was held by the House of Lords that the plaintiff has no remedy for the loss thus suffered by them. Hankford, J. said; *"Damnum may be abseque injuria, as if I have a mill and my neighbour builds another mill whereby the profit of my mill is diminished, I shall have no action against him, although I am damaged, but if a miller disturbs the water from going to my mill, or does any nuisance of the like sort, I shall have such action as the law gives."*

Types of Liability in Torts:

A natural query arises whether the mental state of the *tortfeasor* (the wrongdoer) is a relevant factor in judging his liability under the law of torts? In the area of law of torts the state of mind of a person is relevant to ascertain his liability in number of torts like, assault, battery, false imprisonment, conspiracy etc. Whereas in certain cases like, conversion, negligence, defamation etc liability arises even without any wrongful intention on part of the defendant, the wrongdoer. Thus liability in torts may arise in two ways: (i) ***fault based liability***, where mental element is a relevant factor; and (ii) ***no fault liability or strict liability***. Generally the second type of liability, i.e. no fault liability, is pressed into action when it comes to protection of consumers' rights and interests wherein damage/loss or infringement of consumers' right may take place owing to negligence on part of the service provider/manufacturer (or retailer) of goods. Negligence may be a mode of causing harm or it may be an independent tort, for example, a solicitor who forgets about the limitation period or a doctor who forgets that the patient is allergic to a treatment. The question here arises that do we call it negligence as a state of mind or a tort so as to fix the accountability of the wrongdoer? In fact the word 'negligence' has twin meanings in law of torts: (i) negligence as a mode of committing certain torts, e.g., negligently or carelessly committing trespass, nuisance or defamation. In this context, it denotes the mental element; and (ii) negligence is considered as a separate tort which means a conduct which creates a risk of causing damage, rather than a state of mind.

It is impossible for the law to do more than to infer person's intention, or indeed any other mental state of his, from his conduct. The law may frequently attribute to him an intention which a metaphysician would at most consider very doubtful. Centuries ago, Brian C.J. said: "it is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man."¹⁸ On the other hand, Brown L.J., in 1885, had no doubt that

¹⁸ Year Book Pasch, 17 Edw, 4 Vol 2, Pt. 2 cited in W.H.V. Rogers, M.A., "*Winfield and Jolowicz on Tort*" International Student Edition, Sweet & Maxwell, 1998 p. 49

“the state of a man’s mind is as much a fact as the state of his digestion.”¹⁹ There is no contradiction in these dicta. All that Brian C.J. meant was that no one can be perfectly certain what passes in the mind of another. But Brian would certainly not have dissented from the proposition that in law what a person thinks must be deduced from what he says and does; and that all that Brown L.J. meant.²⁰ Thus if an act is done deliberately and with knowledge of its consequences, the wrongdoer cannot sensibly say that he did not intend the consequences or that the act was not aimed at the person who, it is known, will suffer them. The House of Lords in *Donoghue v. Stevenson*²¹, treated negligence actionable where there was a duty to take care by the defendant, as a specific tort itself, and not simply as an element in some more complex relationship or in some specialized breach of duty. An 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 person or property.²²

Negligence—A Tort and Consumer Protection

As stated before, the negligence may be of three types: (i) the state of mind; (ii) mode of committing tort; and (iii) an independent tort incurring liability of the tortfeasor. Negligence, as state of mind, may not incur any liability as it cannot be measured unless exhibited through a deed or an act. The *second type* of negligence encompasses a mental element in tortious liability which may entail liability, e.g. trespass to person through the infliction of assault or battery, or nuisance²³ or defamation²⁴. However, in case of *negligence as an independent tort*, the wrongdoer clearly cannot escape liability owing to his advertence to the risk or a conduct which creates risk of causing damage to

¹⁹ *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459 at p. 483

²⁰ Write W.H.V. Rogers, M.A., “*Winfield and Jolowicz on Tort*” International Student Edition, Sweet & Maxwell, 1998 p. 49

²¹ (1932) AC 562

²² (1883) 11 Q B D 503

²³ Nuisance as a tort means an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it. See, *Bhanwarlal v. Dhanraj*, AIR 1973 Raj 212 at 216. Also see, *Read v. Lyons & Co.* (1945) K.B. 216 at 236.

²⁴ Defamation as a tort is “*the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him.*” See, W.H.V. Rogers, M.A., “*Winfield and Jolowicz on Tort*” International Student Edition, Sweet & Maxwell, 1998 p. 391

any innocent person, the consumer. Dr. Winfield has defined the tort of negligence as:

“Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.”²⁵

Yet another classic definition of negligence is:

“The omission to 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.”²⁶

Further the Black’s Law Dictionary defines negligence per se as under:

“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.”

Thus, the above definitions clearly bring in three important essential elements of the tort of negligence: (i) that a duty of care is owed to the plaintiff; (ii) there has been a breach of the duty; and (iii) damage has resulted from that breach or necessarily has causal linkage to the breach of duty besides infusing an element of the concept of *reasonable man’s* conduct in determining the duty of care. The American approach recognizes four components of the tort: (i) a duty of care, requiring the actor to conform to a certain standard of conduct; (ii) failure to conform to the standard; (iii) a reasonably close causal connection between the conduct and the resulting injury or proximity cause; and (iv) actual loss or damage to the plaintiff. It may further be pointed out here that all these four essentials are also generally applicable under English

²⁵ *Supra* N-23 at p. 90 (In context of consumer protection the defendant would be the persons engaged in manufacturing, sale or supply of goods or the service providers and the plaintiff is a sufferer of such activities of the traders, manufacturers and service providers).

²⁶ *Blyth v. Birmingham Water Works Co.* (1856) 11 Ex. 781 cited in W.H.V. Rogers, M.A., “*Winfield and Jolowicz on Tort*” International Student Edition, Sweet & Maxwell, 1998 p. 171

or Indian law so far as the proximity of relationship is concerned. As asked by the House of Lords, in *Donoghue v. Stevenson* case on the issue as to: Who is my neighbour? Lord Atkin answered that “*the persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*”.²⁷ Explaining the neighborhood principle, Lord Atkin observed that, “A manufacturer of products, which he sells in such a form as so to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.”²⁸ Thus the proximity rule is equally applicable in England and India as well.²⁹ The essentials of the tort of negligence are explained herein under:

The Existence of the Duty of Care:

It would be absurd to hold any person liable for his every careless act or even for every careless act that causes damage. He may only be liable in negligence if he is under a legal duty to take care. Legal duty is different from the moral, religious or social duty and therefore, the plaintiff (consumer) has to establish that the wrongdoer owed to him a specific legal duty to take care of which he has made a breach. A person is only required to meet the standard of care where he has an obligation or a duty to be careful. Thus it may be said that the “duty” is “the relation between individuals which imposes upon one a legal obligation for the benefit of other”. Put in other terms the duty is “an obligation, recognized by law, to avoid conduct fraught with unreasonable risk of danger to others.” Thus the existence of duty towards the plaintiff becomes

²⁷ *Donoghue v. Stevenson*, [1932] All E. R. p. 1

²⁸ *ibid.*

²⁹ See, for example, *Rural Transport Service v. Bezlum Bibi*, AIR 1980 Cal 165, wherein it was observed “that inviting passengers to travel precariously on the top of an overloaded bus is itself a rash and negligent act that apart when passengers were being made to travel on the roof, greater amount of care and caution on the part of the driver was called for so that his leaning the metallic truck by swerving on the right to close to a tree with over-hanging branch for overtaking a cart while on speed is also a rash and negligent act.”

important factor for fixation of the liability of the tortfeasor. The existence of legal duty depends upon several considerations borne in mind by the court while deciding the matter and is worked out on case to case basis. Some of the tests that have been developed by the courts include:

- (i) *Foresight*: whether the defendant owes a duty of care to the plaintiff or not depends on reasonable foreseeability of the injury to the plaintiff. If at the time of the act or omission the defendant could reasonably foresee injury to the plaintiff he would be deemed to owe a duty to prevent that injury and failure to do that shall make him liable.³⁰

- (ii) *Assumption of Responsibility*: the duty may arise by assumption of responsibility. For example, in *White v. Jones* case, the testator, who quarreled with the plaintiffs, his two daughters, executed a will cutting them out of his estate. Thereafter the testator reconciled with his daughters and sent a letter to his solicitors giving instructions that a new *Will* should be prepared so as to include gifts of 9,000 pounds each to the plaintiffs. The solicitors received the letter but did nothing for long and when he made arrangements to visit the testator, the testator died two days before the new dispositions to the plaintiffs were put into effect. The plaintiffs brought an action against the solicitors. The interesting fact in this case is the plaintiffs were strangers to the solicitors and the law as well because neither, they had any properly executed *Will* in their favour nor they had any communication with the solicitors so as to infuse an element of duty towards them. However, the House of Lords providing tortious solution to the case noted that “if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. However, in cases such as this,

³⁰ Supra n-28, wherein the conductor of an overcrowded bus allowed passengers to travel on the top of the bus and due to negligence of the bus driver, who knew the fact that the passengers are traveling on the roof top of the bus, were knocked down by an overhanging branch of a tree causing injury to the son of the plaintiff who ultimately died. The court held the driver and conductor liable in negligence.

the House should extend remedy to the beneficiary... by holding that *the assumption of responsibility by the solicitor towards his client should be held liable in law to extend to the intended beneficiary* who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor."³¹

(Emphasis Added)

- (iii) *Proximity*: The term apparently used by Lord Atkin³², indicates two situations: *one* that the geographical proximity between the parties is not of itself sufficient to establish liability, although it may be an important factor; and *two*, that the absence of proximity in time or space will not prevent the establishment of liability. A manufacturer of a poisonous tinned food is liable to the consumers of food although his product may be shipped to the other side of the world and be consumed months later.

- (iv) *Policy Considerations*: Of late, the courts in England, have started fixing liability of the wrongdoer by recognizing that the issue of duty depends upon "Policy"—using that word in a broad sense as comprehending what is fair, just and reasonable. In *Hill v. Chief Constable of West Yorkshire*³³, a 20 year old student was murdered by a miscreant who had committed number of similar offences in Yorkshire. An action was brought against the police alleging that they had been guilty of negligence in failing to catch the miscreant and thereby prevent her murder. It was held by the House of Lords that, "*it would be contrary to public policy for negligence in detection of crime to give rise to liability against the police*". In yet another case,³⁴ it was held that "while a doctor performing a vasectomy may owe the patient a duty to advise about

³¹ [1995] 2 A.C. 207

³² Supra n-26 **(Emphasis Supplied)**

³³ [1989] A.C. 53

³⁴ *Goodwill v. British Pregnancy Advisory Service* [1996] 1 W.L.R. 1397

the remote possibility of fathering a child even if the operation is carried out competently and that duty to advise may extend to the current spouse or partner of the patient, however, no duty of care is owed to a member of the indeterminately large class of women who might have sexual relations with the patient at some future time. Thus the claim was struck out as being manifestly unsustainable”.

(Emphasis Supplied)

Breach of Duty:

The second important essential to hold the tortfeasor liable in negligence is that the defendant must not only owe a duty of care to the plaintiff, but also he must be in breach of it. The test for deciding whether there has been a breach of duty was laid down in oft-cited dictum of Alderson B, in *Blyth v. Birmingham Waterworks Co.* case, wherein it was held that “*negligence is breach of duty caused by 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.*”³⁵

In the above definition of the breach of duty, the emphasis is on the conduct of a ‘*reasonable man*’ which is a mythical creature of law whose conduct is the standard by which the Courts measure the conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. The House of Lords, in *Arland v. Taylor* has summarized the characteristics of the ‘*reasonable man*’ according to which ‘he is not extraordinary, or unusual creature; he is not a superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight.’ Rather ‘he is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent person would do. He acts in accord with general and approved practice. His conduct is guided by considerations

³⁵ Supra n-25; Also see, *Laxman Balakrishna Joshi v. Trimbak Babu Godbole* (1969) 1 S.C.R. 206.

which ordinarily regulate the conduct of human affairs. His conduct is the standard adopted in the community by persons of ordinary intelligence and prudence.” Thus the standard of care to be in determining the breach of duty by the defendant, the courts are guided by an objective standard whose degree would vary from case to case, i.e. higher the magnitude of risk greater degree of standard of care would be needed. Further there are two factors in determining the magnitude of risk, i.e. (i) the seriousness or the gravity of the injury risked; and (ii) the likelihood of the injury being in fact caused. In *Nirmala v. Tamil Nadu Electricity Board* case, the plaintiff’s husband while at work in his farm was electrocuted and died instantaneously as he came in contact with a live wire that had snapped. Holding the defendants liable in negligence, the court noted that the defendants have failed to ensure proper maintenance as a result wires snapped and further that they had failed to provide a device whereby the snapped wire would have automatically become dead and harmless.³⁶ In *Bhagwat Sarup v. Himalaya Gas Co.*, the plaintiff booked replacement of a cooking gas cylinder with the defendant, who had the gas agency in Shimla. The Defendant’s delivery man took a cylinder into the plaintiff’s house. The cap of the cylinder being defective, he tried to open it by knocking at the same with the axe. This resulted in damage to the cylinder and leaking of gas therefrom. Some fire was already burning in the kitchen and the leaked gas caught fire. As a consequence of the fire, the plaintiff’s daughter died, some other family members received severe burn injuries and some property inside the house was destroyed by fire. It was held that the defendant’s servant was negligent in opening the cylinder and the defendant was held liable for consequences of such negligence. So far as the magnitude of risk is involved, it may be noted that it depends from case to case, for instance, in *Paris v. Stepney Borough Council*³⁷, the plaintiff who had only one healthy eye was blinded in the course of employment. The plaintiff contended that the employers omitted to provide him with goggles and thus were in breach of their duty to take reasonable care of his safety because, they must

³⁶ AIR 1984 Mad 201; See, also, *Kerala State Electricity Board v. Suresh Kumar*, 1986 ACJ 998 wherein a minor boy came in contact with overhead electric wire which had sagged to 3 feet above the ground, got electrocuted thereby and received burn injuries. The Electricity Board had a duty to keep the overhead wire 15 feet above the ground. The Board was held liable for breach of its statutory duty.

³⁷ [1951] AC 367

have known that the consequences of an accident to his good eye would be particularly disastrous. The court held the defendant liable.

Breach of Duty must have caused the Damage:

The third and last essential of negligence is that the plaintiff is required to prove the causal connection between the breach of duty and the damage, i.e. where some fault is attributed to the defendant, the plaintiff must prove that the defendant was negligent. The same may be seen in Madras High Court decision in *Pandian Roadways Corp. v. Karunanithi*³⁸. In this case, three immature boys were riding a bicycle. On seeing some dogs fighting ahead, they lost the balance and fell down. The driver of a bus saw the boys falling but did not immediately apply the breaks, as a result of which the bus ran over the right arm of one of those boys. The failure of the driver to stop the bus was held to be a clear case of negligence on his part. However, if the plaintiff fails to prove negligence on part of the defendant, the defendant would not be made liable. This situation may be explained by a case decided by the House of Lords, wherein the court observed that:

*“the party seeking to recover compensation for damage must make out that the party against whom he complains was in the wrong. The burden of proof is clearly upon him, and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end, he leaves the case in even scales, and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed.”*³⁹

(Emphasis Added)

The above observation lays emphasis on the neglect of the defendant and imposes a duty upon the plaintiff to prove the causal linkage between negligent act and the damage, i.e. to say that the burden of proof in such cases lies on the plaintiff. The initial burden of proof at least a *prima facie*

³⁸ AIR 1982 Mad 104

³⁹ *Morgan v. Sim*, (1857) 11 Moo P.C. 307 cited in R.K. Bangia, “*Law of Torts*” Allahabad Law Agency, 1st Ed, 1969, Reprint 2001 p. 283

case of negligence as against the defendant lies on the plaintiff. However, there are certain cases wherein the plaintiff need not prove that and the inference of negligence is drawn from the facts alleged by the plaintiff. There is a presumption of negligence according to the maxim “*Res Ipsa Loquitor*” which means that *‘thing speaks for itself’*. When the accident (defect in goods or deficiency in services) explains only one thing that the accident or such defect in goods/deficiency in service would not have occurred unless the defendant had been negligent, the law raises a presumption of negligence on the part of the defendant. The plaintiff, in order to claim benefit of the maxim *res ipsa loquitor*, has to meet three important requirements for its application:

- (i) That the “thing” causing the damage was in the control of the defendant or his servants, or agents;
- (ii) That accident must be such as would not in the ordinary course of things have happened without negligence; and
- (iii) That there is absence of explanation of the actual cause of the accident.

In *Municipal Corporation of Delhi v. Subhagwanti & Ors*⁴⁰, the Clock Tower at Chandani Chowk in Delhi, collapsed causing death of the plaintiff’s husband, was found to be *‘exclusive by under the ownership and control of the appellant or its servants’*. The Chief Engineer stated that the collapse of the Clock Tower was due to thrust of the arches on the top portion and the mortar had deteriorated to such an extent that it was without any cementing properties. The court, on the basis of evidence came to a conclusion that ‘the mere fact that there was a fall of the Clock Tower tells its own story in raising an inference of negligence so as to establish a prima facie case against the appellants (the defendants). Similarly in *Acchuttrao Haribhau Khodwa v. State of Maharashtra*,⁴¹ the plaintiff’s wife was hospitalized in a government hospital and was operated. The doctors while performing a sterilization operation left the mop in the body of the patient which resulted in formation of puss and eventually leading to death subsequently. It was held that negligence was writ

⁴⁰ (1974) 1 S C C 690

⁴¹ AIR 1996 SC 2377

large and the surgeon performing that operation and the government were liable as *res ipsa loquitor* could be attracted.

Thus from the above it is clear that in order to make a successful claim in tort of negligence, the plaintiff has to prove three broad essentials. These essentials are equally significant while deciding consumer grievances either alleging deficiency in services or defects in goods. The duty of care may accrue through various modes discussed above. However, it may be noted that existence of duty of care does not pose any serious difficulty in consumer cases as the cases are directly related to the service provided/or defective goods supplied. But a beneficiary of services or user of a product may have to prove existence of duty towards him. As discussed above, it may be kept in mind that the standard of care is to be judged from the view of a reasonable man. The reasonable man is not a super-human, or a perfectionist but is a mythical creature which helps the courts in determining the want of standard of care on part of the defendant. Further that the alleged breach of duty must be legal and not moral, social etc. This duty may arise by a negligent act in manufacture, supply or sale of defective goods or deficient services resulting in damage to the consumers. Further that the plaintiff consumer will have to prove a causal linkage between the breach of duty and the damage suffered by him. Unless the damage is causally related to the breach of duty of the defendant, the plaintiff may not succeed in his action for damages. The following paragraphs bring the sector-specific cases of negligence under Consumer Protection Act, 1986.

Salient Feature of Consumer Protection Act, 1986

The Consumer Protection Act, 1986 is one of the most important socio-economic legislations for the protection of consumers.⁴² It is said to be one of the most benevolent piece of legislation intended to protect a large body of consumers from exploitation.⁴³ In the Act was amended in 1991, 1993 and

⁴² The Consumer Protection Act was enacted by Parliament in December 1986 and came into force on April 15, 1987. further that by July 1987, all the provisions of the Act came into force.

⁴³ See, *Charan Singh v. Healing Touch Hospital* (2000) 7 SCC 668

2002 to extend its coverage and scope and to enhance the powers of the redressal machinery. The Act applies to all goods and services unless specifically exempted by the Central Government.⁴⁴ Section 2 (1)(d) defines consumer in the following words:

“Consumer of Goods—A consumer is one who buys or agrees to buy any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment. It includes any user of such goods other than the person who actually buys goods and such use is made with the approval of the purchaser. A person is not a consumer if he purchases goods for commercial or resale purposes. However, the word ‘commercial’ does not include use by consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self employment.

Consumer of Services—One who hires or avails of any service or services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment. It includes any beneficiary of such service other than the one who actually hires or avails of the service for consideration and such services are availed with approval of such person.”

So far as the buyer of goods for consideration is concerned, the Act does not define ‘goods’ rather it imports the definition of “*goods*” as defined under the Sale of Goods Act, 1930. However, it does define the term “*Service*” under section 2 (1) (o) which is as under:

“*Service*” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement or the purveying a news or other information, but does not include the

⁴⁴ Section 2 (d) of the Act. So far no goods or services have been exempted from the purview of this Act.

rendering of any service free of charge or under a contract of personal service.”

Since deficiency in service gives rise to a right to the consumer to bring an action against the service provider, it is important to understand the meaning of the term “*deficiency*” which has been defined under section 2(1) (g) to the following effect:

“Deficiency” means any fault, imperfection, shortcoming 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 undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.”

The above definition of *deficiency in service* includes fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance of service. Any or all of the above situations would entitle a consumer to claim relief against the service provider. However, from the above definitions it is clear that services availed free of charge do not come under the purview of this Act. The purchaser of goods for commercial or business purposes is also kept away from the purview of the Act.

Sector Specific Cases of Negligence

Often the deficiency in service or defect in goods is the outcome of negligence of the service providers or the manufacturers, suppliers, producers of the goods. Thus the essentials of the tort of negligence remain important in consumer disputes. As the scope of this paper is limited to the tort of negligence and consumer protection, a few important sectors wherein the problems are faced by the consumers have been discussed in the succeeding paragraphs.

(i) The Telecom Sector

Telephone sector has been included within the ambit of the Consumer Protection Act, 1986 and the telephone service has been held to be ‘service’

for the purpose of application of the provisions of this Act. Thus if a consumer suffered loss in business due to non-shifting of the external extension of his telephone **due to the negligence** of the telecommunication department he would be awarded compensation for the same,⁴⁵ or if there is undue delay in installation of telephone it would also amount to be the deficiency in service.⁴⁶ In *Mahanagar Telephone Nigam v. Vinod Karkare*⁴⁷, it has been held that if a telephone complaint remains unattended for an unreasonable period (sic six months) that amounts to deficiency in service. In such a situation the telephone department has been held liable to pay compensation of Rs. 6,600/- for the same and also to give rebate in the telephone charges. It may be considered as a very progressive decision, as the claim was allowed in favour of the user of telephone although he was not a subscriber of the telephone. It was also held that the remedy provided by the Commission is under the Consumer Protection Act, 1986 and not under section 9 of the Indian Telegraph Act. Billing of telephone during the process of shifting of the telephone due to delay in disconnection of telephone after submission of application was considered to be deficiency in service.⁴⁸ Negligently disconnecting telephone even though the telephone bill was paid was held to be deficiency in service.⁴⁹ Also giving average bill or inflated bill⁵⁰ due to negligence would attract the provisions of the Consumer Protection Act, 1986. The National Consumer Disputes Redressal Commission in *Telecom District Manager, Panaji v. Mrs. Liberate Fernandes*⁵¹, has held that the adjudicating authorities under the C.P.A. cannot adopt the formula of average calls of the previous bills for determining whether the disputed bill was excessive or not. From the above decisions, it is noted that complaint of any nature relating to telecommunication due to negligence of the telecommunication department is redressible under the Consumer Protection Act, 1986.

⁴⁵ See, for Example; *Mahaveer Electricals v. the District Manager, Telecommunications*, II (1991) CPJ 296. the plaintiff was awarded compensation for the loss suffered by him due to non-shifting of external extension of his telephone due to the negligence of the telecommunication department.

⁴⁶ *Telephone Jalandhar v. Om Prakash*, III (1996) CPJ 479 (Punjab S.C.D.R.C.)

⁴⁷ III (1991) CPJ 655

⁴⁸ See, for details, *Punjab State Corp. Milk Producers Federation v. Deptt. of Telephone*, III (1996) CPJ 552 (Punjab S.C.D.R.C.)

⁴⁹ *Distt. Engineer Telecom v. The District Manager, Telecommunications*, II (1991) C.P.J. 296

⁵⁰ *Bhoj Raj Dalmia v. G.M. Telephones, Calcutta*, II (1997)C.P.J. 146 (W.B. S.C.D.R.C.)

⁵¹ III (1995) C.P.J. 35 (NC); Also see, *District Manager, Telephones v. Niti Saran I* (1991) C.P.J. 48 (NC)

(ii) Banking/Financing Sector

In this era of liberalization, privatization and globalization, (the LPG), there is a paradigm shift in the nature and scope of banking and financing sector. The free market economy has led to institution of multinational private banking institutions and other financing institutions. Easy loans and electronic banking on one hand has improved the life of the customers but on the other hand has put them in various kinds of difficulties due to deficiency in service provided by these sectors. The traditional mode of banking has changed. The customers (consumers) are often cheated by various attractive offers floated by these banks while advancing loans to the customers, for example, loans can be advanced quickly, cheaply and at much lesser interest rates with no processing fee. However, the hidden charges are taken from the consumers when the repayment of loans is made. Besides, the customers' cheques are dishonoured negligently or honoured when asked to stop payment of a cheque issued by the customer, or the locker hired by the customer was found open and ornaments were found to be missing⁵². Under these circumstances, the customers are taken aback and have no option but to knock at the doors of the Consumer Forums using the benevolent piece of legislation, i.e. the Consumer Protection Act, 1986. Some of these situations are explained with the help of the decided cases. In *Sankar v. Branch Manager, Vijaya Bank*, the negligent dishonour of a cheque issued by the complainant was held to be deficiency in service and the compensation was awarded to the complainant.⁵³ A complainant alleged that he had issued stop payment orders to the bank with respect to a cheque issued by him for a sum of Rs. 1,00,000/- in favour of a Co-Operative Society but the same was cleared by the bank. This was considered to be a *deficiency in service* and the complainant was held *entitled to compensation of Rupees. one lakh with interest @ 18% per annum from the bank.*⁵⁴

⁵² See, *Punjab National Bank v. K.B. Shetty*, II (1991) CPJ 639

⁵³ II (1996) C.P.J. 137 (Kant SCDRC); Also see, *Mr. N. Raveendran Reddy v. Branch Manager, State Bank of India*, II (1991) C.P.J. 648 wherein a bank draft for Rs. 50,000/- was dishonoured on the ground that it does not bear the signatures of two officials of the issuing bank and it was held to be a deficiency in service.

⁵⁴ *Harjivandas v. Manager, Dena Bank*, II (1997) C.P.J. 186 (Guj SCDRC); Also see, *Balakrishnan v. Canara Bank*, III (1995) C.P.J. 218.

(iii) Insurance Sector

Insurance sector also has grown leaps and bounds in the wake of free market economy and increasing awareness amongst the consumers, the customers. As the insurance sector has launched different types of insurance schemes to the individuals, right from the life insurance, medi-claims, housing and household insurance schemes, cattle and livestock, children insurance, educational insurance schemes etc. As the number of schemes has grown, so have the cases of deficiency in service erupted on the part of insurance companies. The customers often face problems in realizing their insurance claims in case of loss covered under the schemes. Also there is undue delay in settlement of claims, or frauds committed by the company, or negligent breach of terms and conditions of insurance, or rejecting the claims of nominees, etc. Some of these situations may be explained with the help of decided case laws. For example, the complainant alleged that the discharge voucher was obtained by the opposite party from the complainant by fraud and thus he cannot be denied of the benefits of the insurance cover. During the proceedings before the consumer authorities it was established that the discharge voucher was obtained by fraud, misrepresentation, undue influence, coercive bargaining or compelled by circumstances and thus the opposite party was held liable and relief was awarded to the complainant by holding that 'mere execution of discharge voucher would not deprive the consumer of his claim for deficiency of service'.⁵⁵ The consumer forums would award relief under the provisions of the Consumer Protection Act, 1986 in case of a default or negligence in settlement of an insurance claim. The insured persons can claim compensation or any other appropriate remedy from the Consumer Forum for deficiency in service promised by the Insurance Company.⁵⁶ Delay in settlement of insurance claims amounts to deficiency in service as held by the National Consumer Commission in *Delkon (India) Pvt. Ltd. v. The Oriental Insurance Co. Ltd.*⁵⁷ It was held by the National Commission that, 'it was

⁵⁵ *United India Insurance v. Ajmer Singh Cotton & General Mills*, (1995) 6 SCC 400

⁵⁶ *Ummedilal Aggrawal v. United India Assurance Co. Ltd.*, I (1991) CPJ 3 (NC)

⁵⁷ III (1993) CPJ 313 (NC); Also see, *J Sarveshwar Rao v. National Insurance Company*, II (1991)CPJ 523 (A.P. SCDRC)

deficiency of service to have delayed the claim by two years on the ground that the final police report was not forthcoming'. (Emphasis Supplied)

In one of the cases, in order to deny the claim of the assured person, it was pleaded by the insurance company that there was a breach of the terms and conditions of the insurance contract and thus the assured cannot claim the benefit of insurance cover taken by him. The argument of the insurance company was rejected by the National Commission and it was held that 'as there was no such fundamental breach of terms that the owner should in all events be denied indemnification'.⁵⁸ In *Jagdish Prasad Dagar v. Life Insurance Corporation*,⁵⁹ it was held that a nominee under a policy of life insurance will be a 'consumer' within the meaning of section 2(1) (d) of the Consumer Protection Act, 1986. In this case, the insurer decided to repudiate the liability which was communicated to the nominee without stating any reasons. The Commission held that the nominee could legitimately maintain an action against deficiency in service raised by an arbitrary decision of the insurer. Thus it may be said that the provisions of the Consumer Protection Act have really made a difference and saved the consumers from becoming prey to insurance companies.

(iv) Transport Sector

Yet another very important sector is the transport sector which includes; the railways, road transport and airlines within its ambit. Any deficiency in service provided by these sectors would attract the provisions of the Consumer Protection Act, 1986. For example, in case of railways, if a train is scheduled to depart at 10:30 p.m. actually leaves the other day at 09:00 a.m. without any satisfactory explanation as to delay in departure would amount to deficiency in service.⁶⁰ However, if there is negligence on part of the consumer it would

⁵⁸ See, *B.V. Nagraju v. Oriental Insurance Co. Ltd.*, II (1996) C.P.J. 28 (NC), wherein the terms of insurance contract permitted the insured vehicle to carry six workmen, excluding the driver. As there were one or two more workers in vehicle at the time of accident. According to the Commission, simply because there were one or two members of workmen present in the vehicle it cannot be assumed that the risk of occurrence of accident has been increased. It was further held that merely adding one or two persons by the driver or the cleaner of the vehicle without knowledge of the driver, cannot be said such a fundamental breach that the owner should in all events be denied indemnification." (Emphasis Added)

⁵⁹ II (1992) CPJ 493

⁶⁰ *Union of India v. Kedarnath Jena & Ors.*, III (1997) C.P.J. 198 (Orissa SCDRC)

frustrate his claim under the Consumer Protection Act, 1986.⁶¹ In *Sumathi Devi M. Dhanwanty v. Union of India*,⁶² the complainant alleged that unauthorized persons entered the compartment, assaulted the passengers and took away the valuable forcibly. It was found to be the deficiency in service on the part of the Opposite Parties.

The Airlines may be liable for deficiency in service due to negligence by not informing about the cancellation of flights to the passengers or change in timing of the scheduled departure but not in cases of delay in operation. These may be explained with the help of important case laws. In *Chief Commercial Officer, Indian Airlines v. P. Lalchand* case⁶³, the complainant purchased ticket for flight in Indian Airlines the time of departure was mentioned as 10.45 a.m. However, the plane left at 9.20 a.m. and the complainant who reached the airport 9.45 a.m. missed his flight. The opposite parties were held liable by the District Consumer Forum. However, in *Chander Shekhar v. Chairman, Indian Airlines*,⁶⁴ there was cancellation of flight from Bangalore to Mangalore on 20.11.89 due to unavoidable reasons i.e. due to the strike called by technical and engineering staff of the opposite parties. As they were not negligent, no deficiency in service was found on their part, accordingly the complaint was dismissed. But, in *Express Travels v. M.R. Shah*⁶⁵, cancellation of flight without notice and refusal to refund the amount was considered to be the deficiency in service. In *Indian Airlines v. S.N. Sinha*,⁶⁶ a metallic wire was found in the food served by the Airlines. In the process of chewing the food the passenger's gum was injured. He was held entitled to a compensation of Rs. 2000/- for the negligence on part of the opposite parties. In *Geetha Jethani v. Airport Authority of India*,⁶⁷ death of a child due to negligence of the airport authorities by improperly maintaining the

⁶¹ *Union of India v. Ashok Kumar Singh*, III (1995) C.P.J. 13 (NC); Also see, *G.M. Southern Railways v. M.G. Nath*, III (1997) C.P.J. 233 (Orissa SCDRC) wherein the State Commission refused to award any remedy to a passenger whose train was announced to be running late by one hour but subsequently arrived in time, as a result the complainant missed his train. The State Commission was of the view that the complainant has no cause of action as there is no deficiency in service in such a case.

⁶² II (2004) CPJ 27 (NC)

⁶³ III (1995)C.P.J. 134

⁶⁴ III (1995)C.P.J. 95

⁶⁵ III (2002) CPJ 158

⁶⁶ I (1992) CPJ 62 (NC)

⁶⁷ (2004) 3 CPR 61 (NC)

escalator at the airport was held to be deficiency in service. Also in *R.P. Jain v. Sahara India Airlines*, a passenger who was vegetarian was served with chicken curry due to negligence of the staff. Although there was no complaint of vomiting or food poisoning, but the complainant alleged that his religious sentiments have been hurt. The opposite party tendered unconditional apology and as the mistake committed was not malicious or had resulted in any physical injury to the complainant, no compensation was allowed to the passenger.⁶⁸

Transport of goods by road has also attracted number of consumer cases wherein the complainants have successfully claimed negligence on part of the carriage authorities. In *P.K. Kalasami Nadar v. K. Muniaswami Mudaliar & Ors*⁶⁹ it was held that “*where loss has occurred to cotton bales in transit... the liability of the common carrier is not limited by a special contract, the owner of goods in a suit against common carrier for loss, damage or non-delivery of articles or goods entrusted to the carrier, is not required to prove negligence; the liability of the carrier is that of an insurer.*” In other Madras decision in *Messers Konda Rm. Eswara Iyer & Sons, Madurai v. Messers Madras-Bangalore Transport Co., Madurai & Ors.*⁷⁰, it was held that the liability of a common carrier is not limited to negligence. In case of loss or damage he cannot plead that he has exercised all reasonable diligence and care. He must be liable inspite of taking all due care and precautions. “Because a common carrier is not a mere bailee of goods entrusted to him, he is an insurer of goods.” Thus the liability of the common carrier will be absolute in nature which is subject to two exceptions: *one*, there may be special contract that the carrier may choose to enter into with the customer and the other is an ‘Act of God’.⁷¹ In *Associated Traders & Engineers Pvt. Ltd. v. Delhi Cloth & General Mills Ltd. & Ors.*⁷² a fire which broke out in a ponded warehouse where the goods were kept was held not to be an Act God and, therefore, the carrier was held liable. In case of *Nath Brothers Exim International Ltd v. Best*

⁶⁸ See, III (1995) C.P.J. 212 (Del DCDRC)

⁶⁹ AIR 1962 Mad 44

⁷⁰ AIR 1964 Mad 516

⁷¹ For details, see, *Kerala Transport Co. v. Kunnath Textiles*, 1983, K.L.T. 480

⁷² ILR Delhi 1974 (1) 790

*Roadways Ltd.*⁷³, it was pleaded that the goods were booked at “Owner’s Risk” but it was clarified by the Hon’ble Supreme Court that, “Owner’s Risk” *in the realm of commerce has a positive meaning. It is understood in the sense that the carrier would not be liable for damage or loss to the goods if it were not caused on account of carrier’s own negligence or the negligence of its servants and agents.* Although in this case, the National Commission had held that the respondent’s would not be liable as he had taken all possible care which was expected of him as carrier. But the same was considered to be *an incorrect approach* by the Hon’ble apex court. Thus it may be said that while handling the cases of loss or damage caused to the goods booked by the consumers through a common carrier, a consumer-friendly approach is taken by the courts and the common carrier’s liability has been in absolute terms even though he would have taken all possible steps to prevent the loss or damage being caused.

(v) Electricity Sector

Electricity sector attracts more number of consumer grievances than any other sector as it relates to consumers of every description. The consumers may face deficiency in services by electricity sector in numerous ways, i.e. not changing transformer for number of days resulting in loss of livestock, food stuff and beverages etc. or due to defective electricity meter or by installing a totally unserviceable electric meter, or fluctuation in voltage or by not maintaining properly the electric cables resulting in swapping /breakage causing death of human beings and animals. For example, in *Haryana State Electricity Board v. T.R. Poultry Farm*, the complainant was having an electricity connection for his poultry farm. The electric transformer providing supply to the complainants’ poultry farm got burnt and the same was not replaced for 25 days. As a consequence of the disrupted electricity supply to the poultry farm, 3080 birds died. Instead of installing or replacing the damaged transformer an unjustifiable demand of Rs. 12,560/- was made from the complainant, which was paid to the Opposite Party but under protest. The

⁷³ 1 (2000) C.P.J. 25 (SC), para 29; Also see, *Burton v. English*, (1883) 12 Q.B.D. 218; *Exercise Shipping Co. Ltd. v. Bay Maritime Lines Ltd. (The Fantasy)*, (1991) 2 Lloyd’s Report 391 (Q.B.D.)

State Commission ordered the refund of Rs. 12,560 and allowed compensation of Rs. 75,000/- to the complainant for loss of livestock. The decision of the State Commission was upheld by the National Commission and in addition a cost of Rs. 2,000/- was awarded by the National Commission to the respondent complainant.⁷⁴ Similarly, illegally disconnecting electricity supply without prior notice to the complainant was held to be deficiency in service and the loss incurred to the complainant's mill due to non-supply of electricity was assessed at Rs. 50,000/- and the National Commission⁷⁵ directed the loss to be compensated. Also in *Gitarani case*⁷⁶ where the defective electricity meter was not replaced by the Opposite Party inspite of repeated reminders to them was held to be negligence and deficiency in service on the part of the Opposite Party. Compensation of Rs. 1,000/- was awarded to the complainant for harassment and mental pain caused to him. A totally defective unserviceable meter was installed in the premises of the complainant which remained unserviceable for more than three years. Considering it to be the deficiency in service, disciplinary action was recommended against the Assistant Engineer concerned and also it was held that a bill on the basis of average consumption could not be raised. Thus the scenario that emerges from this brief description is that the electricity sector, as service provider, whenever found to be negligent in providing services of any description, has been made liable under the dynamic consumer welfare legislation, the Consumer Protection Act, 1986.

(vi) Negligent Medical Services and Consumer Protection

Our experience tells us that medical profession, one of the noblest professions, is not immune to negligence which at times results in death of the patient or complete/partial impairment of limbs, or culminates into another misery. Thus the consumers are often found running pillar to post to get relief for no fault of theirs. There are instances wherein most incompetent or ill/under-educated doctors, on their own volition, have made prey the innocent

⁷⁴ II (1996) C.P.J. 15 (N.C.)

⁷⁵ See, *H.S.E.B v. Naresh Kumar*, II (1996) C.P.J. 303

⁷⁶ *Gita Rani Chakraborty v. S.S.B., W.B.S.E.B.*, II (1997) CPJ 450 (West Bengal SCDRC)

consumers patients. The magnitude of negligence or deliberate conduct of the medical professionals has many a times led to litigation. Although, needless to mention that a person engaged in some particular profession is supposed to have the requisite knowledge and expertise needed for the purpose and he has a duty to exercise reasonable degree of care in the conduct of his duties. The standard of care needed in a particular case depends on the professional skills expected from persons belonging to a particular class. Medical profession is considered to be the most pious profession wherein a doctor is placed only second to almighty God because he renders humanitarian service. Though its objective is improvement of life of the people but it is also a science of uncertainty and the art of possibility at the same time. The chief characteristics of any profession generally would include: that the nature of work is skilled & specialized, substantial part is mental rather than manual; and needs a commitment to moral principles beyond the general duty of honesty. Professionals are subject to professional code and standards on matters of conduct and ethics, enforced by professional regulatory authorities and they enjoy high status and respect in the society.

Professional Negligence

In 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. A professional may be held liable for negligence on one of the two findings: *one*, either he was not possessed of the requisite skill which he professed to have; or *two*, that he did not exercise, with reasonable competence in a given case, the skill which he did profess.⁷⁷ Doctors generally have certain duties towards their patients. Some of the important duties include: (i) to exercise a reasonable degree of skill and knowledge and a reasonable degree of care; (ii) to exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment; (iii) to extend his service with due expertise for protecting the life of the patient and to stabilize his condition in emergency situations; (iv) to attend to his patient when required and not to

⁷⁷ *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1

withdraw his services without giving him sufficient notice; (v) to study the symptoms and complaints of the patient carefully and to administer standard treatment; (vi) to carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis; (vii) to advise and assist the patient to get a second opinion and call a specialist if necessary; (viii) to obtain informed consent from the patient for procedures with inherent risks to life; (ix) to take appropriate precautionary measures before administering injections and medicines and to meet emergency situations; (x) to inform the patient or his relatives the relevant facts about his illness; (xi) to keep secret the confidential information received from the patient in the course of his professional engagement; and (xii) To notify the appropriate authorities of dangerous and communicable diseases.⁷⁸

Medical negligence: Legally Construed

Halsbury's Laws of England defines medical negligence as under:

“22. Negligence,--Duties owed to patient. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient.”⁷⁹

In a celebrated and oft-cited judgment in *Bolam v. Friern Hospital Management Committee*⁸⁰, Mc Nair, L.J. observed that:

“I must explain what in law we mean by ‘negligence’. In the ordinary case which does not involve any special skill, negligence in law means this: some failure to do some act which a reasonable man in the

⁷⁸ M.K. Balachandran, *Consumer Protection Act and Medical Profession*, Department of Consumer Affairs, Govt of India in association with I.I.P.A., New Delhi, 2006, reprint 2008, pp. 7-8.

⁷⁹ 4th Edn, Vol 26 pp. 17-18

⁸⁰ (1957) 2 All ER 118

circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action.”

Explaining further as to how to test whether the alleged act or failure is negligent and the answer given by the court is: “that in an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man in the street...But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this man exercising and professing to have that special skill. ...A man need not possess the highest expert skill at the risk of being found negligent. It is a well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.”⁸¹

(Emphasis Added)

The apex court while considering the question of medical negligence in context of treatment of patient observed that “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.”⁸² The sum and substance of above is that a medical professional is required to adhere to the standard of an ordinary skilled man exercising and professing to have that special skill and it would be a ‘disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong’.⁸³

⁸¹ Ibid

⁸² *Poonam Verma v. Ashwin Patel*, (1996) 4 SCC 332 at p. 348, para 42.

⁸³ See, *Roe v. Ministry of Health*, (1954) 2 All ER 131

Reasonable Degree of Care

In order to ascertain whether a reasonable degree of care has been taken or not by the doctor and accordingly hold him liable would largely depend upon the following considerations:

- That whether the degree of care and competence which an ordinary competent member of the profession who professes to have those skills would exercise in the circumstances in question have been exercised or not, that is to say the concept of reasonable man becomes relevant here;
- That the standard of care is constant while the degree of care is variable, i.e. the same standard of care is expected from a generalist and a specialist; but the degree of care would be different.
- The doctor would be guilty of negligence when he falls short of the standard of a reasonably skillful medical man.
- The law will condemn the doctor when he falls short of the accepted standards of a great profession.
- Generally a doctor is not guilty of negligence if he acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art.⁸⁴ A man need not possess the highest skill; it is sufficient if he exercises the ordinary competent man exercising that particular art. In the case of a medical professional, negligence means failure to act in accordance with the standards of competent reasonable man at the time. There may be one or more perfectly proper standards, and if it conforms with one of those proper standards then he is not negligent.

Thus a surgeon or a doctor will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong. However, in case of a specialist, a higher degree of skill is needed.⁸⁵

Medical Profession: Whether under Consumer Protection Act?

In one of the earliest significant ruling in *Vasantha P. Nair v. Smt. V.P. Nair*, the National Commission upholding the decision of Kerala State Commission had held that 'a patient is a "consumer" and the medical assistance was a 'service' and, therefore, in the event of any deficiency in the performance of medical service the consumer courts can have the jurisdiction. It was further

⁸⁴ *Bolam v. Friern Hospital Management Committee* (1957) 1 WLR 582

⁸⁵ *Dr. P Narasimha Rao v. G Jayaprakasu*, AIR 1980 AP 207

observed that the medical officer's service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act.⁸⁶ In *Laxman Balakrishna Joshi v. Trimbak Babu Godbole*, the apex court has stated that, "a person (doctor) who holds himself out ready to give medical advice and treatment impliedly undertake that: (i) he is possessed of skill and knowledge for that purpose; (ii) he owes a duty of care in deciding whether to undertake the case; (iii) a duty of care in deciding what treatment to give; or (iv) a duty of care in the administration of that treatment. Further a breach of any of these duties would give a right of action for negligence to the patient.⁸⁷ Ever since the Consumer Protection Act, 1986 has come into force, the medical professionals have been up in arms, although unsuccessfully, to exclude themselves from the purview of the Act. No other professional, like, lawyers, architects, engineers, accountants, has made such a hue and cry. The argument advanced by medical professionals against interference by the courts and consumer forums has been that on account of extensive judicial scrutiny, doctors would resort to defensive treatment which will escalate the medical costs and also make medical services inaccessible to many. However, the courts in India on one hand have vehemently rejected this argument but at the same time have also clearly stated that doctors are not the guarantors of life. In *Indian Medical Association v. V.P. Shantha and Ors.*⁸⁸, the apex court has put an end to this controversy and has held that patients aggrieved by any deficiency in treatment, from both private clinics and Government hospitals, are entitled to seek damages under the Consumer Protection Act, 1986. A few important principles laid down in this case include:

- 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 C.P. Act.*
- The fact that medical practitioners belong to medical profession and are subject to disciplinary control of the Medical Council of India and, or the State Medical Councils *would not exclude the service rendered by them from the ambit of C.P. Act.*

⁸⁶ 1 (1991) C.P.J. 1685 (***Emphasis Supplied***)

⁸⁷ (1969) 1 S.C.R. 206

⁸⁸ AIR 1996 SC 550; the apex court has laid down 12 important principles stating the law with definite terms in this case.

- The service rendered by a doctor was under a contract for personal service rather than a contract of personal service and was not covered by the exclusionary clause of the definition of service contained in the C.P. Act.
- A service rendered free of charge to everybody would not be service as defined in the Act.
- The hospitals and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service conditions.

From the above judgment two things are clear: *one* that medical service is a service within the ambit of the C.P. Act; and *two* that services rendered free of charge are excluded from the purview of the C.P. Act. However, there are a few other grey areas which need our attention at this juncture, viz. what legally constitutes medical negligence; whether medical negligence is a tort *per se* or a crime or both; significance of consent in fixation of liability; what is the criterion to determine medical negligence as a crime etc. These aspects are discussed in the succeeding paragraphs.

Negligence—a Civil Wrong or a Criminal Offence

The term negligence is used for the purpose of fastening the defendant with liability under civil law (the law of torts) and, at times, under the criminal law. But often it is alleged by the plaintiffs that negligence is negligence and that no distinction can be drawn between the two so far as it relates to breach of his duty and resultant damage. Explaining the difference between the two, Lord Atkin in his speech in *Andrews v. Director Public Prosecution*, stated:

“... Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law there are degrees of negligence; and **a very high degree of negligence is required to be proved** before the felony is established.”⁸⁹

Thus for negligence to be an offence, the element of *mens rea* (guilty mind) must be shown to exist and the negligence should be gross or of very high

⁸⁹ (1937) 2 All ER 552 (HL)

degree.⁹⁰ In Criminal law, negligence or recklessness must be of such a high degree as to be held 'gross'. The apex court in *Jacob Mathew v. State of Punjab*, has explained that; "the expression 'rash and negligent act' occurring in section 304-A of the I.P.C should be qualified by the word 'grossly'. To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which has resulted was most likely imminent."⁹¹ From the above it may be inferred that the distinction between civil and criminal liability in medical negligence lies in the conduct of the doctor which should be of gross or reckless or of a very high degree and that where two views are possible relating criminal liability of the offender (the doctor), the view which favors the accused shall be adopted because in criminal law, it is the duty of the prosecution to prove the guilt beyond reasonable doubt which is not the case in civil liability.

Informed Consent: How Significant?

The fundamental principle, plain and incontestable, is that every person's body is inviolate. Interference, however slight with person's body constitutes trespass to the person. Trespass to the person may take three forms—(i) assault; (ii) battery; and (iii) false imprisonment. A battery is said to be committed when there is an actual infliction of an unlawful physical contact with the plaintiff (the patient).⁹² An act does not constitute trespass to person

⁹⁰ See, Charlesworth & Percy on *Negligence*, 10th Edn, 2001, para 1.13; A clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. Also there is a marked difference as to evidence, viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings the persuasion of guilt must amount to such a moral certainty as convinces the mind of the court, as a reasonable man beyond all reasonable doubt. (*Syed Akbar v. State of Karnataka*, (1980) 1 SCC 30, para 28 refers) **(Emphasis in Original)**

⁹¹ (2005) 6 SCC 1; Also see, *Dr. Suresh Gupta v. Govt. of N.C.T. of Delhi*, AIR 2004 SC 4091, wherein the court explaining distinction between civil and criminal liability held that 'for fixing criminal liability on a doctor or surgeon the standard of negligence required to be proved should be so high as can be described as gross negligence or recklessness. ...mere inadvertence or some degree of want of adequate care and caution might create a civil liability but would not suffice to hold him criminally liable.'
(Emphasis Added)

⁹² 'Assault' as a tort is committed where the plaintiff is caused to apprehend the immediate infliction of such a contact. Deprivation of liberty constitutes false imprisonment.

unless it is done deliberately or negligently. Thus failure to obtain consent from the patient for administering particular kind of treatment or investigation might incur liability in trespass to person. However, it may be pointed out that soon the patient visits a doctor, it is deemed that the patient has impliedly consented for being examined, investigated and treated. But at times, the patient may be required to undergo surgery or other investigations wherein his consent would be expressly needed. The law emphasizes on *informed consent* which signifies that the consent of the patient should be obtained after disclosure of information regarding the diagnosis, alternative methods of treatment with their relative risks and benefits and known material risks of procedure.

The doctrine of informed consent has developed in law as the primary means of protecting a patient's right to control his or her medical treatment. Under this doctrine, no medical procedure may be undertaken without patient's consent obtained after the patient has been provided with sufficient information to evaluate the risks and benefits of the proposed treatment and other available options. The doctrine presupposes the patient's capacity to make a subjective treatment decision based on his/her understanding of the necessary medical facts provided by the doctor and on his/her assessment of own personal circumstances. It may be further noted that the doctor who performs a medical procedure without having first furnished the patient with the information needed to obtain an informed consent *will have infringed the patient's right to control the course of his/her medical care, and will be liable in battery even though the procedure was performed with a high degree of skill and actually benefited the patient.*⁹³ In *M. Chinnaiyan v. Sri Gokulam Hospital & Anr.*⁹⁴, the complainant approached to the defendant hospital with abdominal pain and was advised to undergo hysterectomy for which the consent was obtained from the complainant. However, the complainant suffered from bleeding of uterus as a result two units of blood was transfused after the operation. The blood units, so transfused, were not tested for contamination. The patient suffered with HIV-AIDS after three and a half year

⁹³ See, *Malette v. Shulman*, 72 OR (2d) 417 in Ontario Court of Appeal

⁹⁴ III (2007) CPJ 228 (NC)

of the transfusion and died. The hospital was held liable. It was noted that the consent of the patient was required for transfusion of blood. It was clear from the records that the complainant had given consent only for hysterectomy operation and not for transfusion of blood. One of the most forward-looking decision of the National Commission in *Dr. Sathy M Pillai & Anr. v. S. Sharma & Anr.*, has further strengthened the necessity of informed consent. It was held that, 'where informed consent is taken on the printed form without any specific mention about the name of the surgery, or signatures are taken from patient/relative in mechanical fashion, much in advance of the date scheduled for surgery, *such forms cannot be considered as informed consent.*⁹⁵

(Emphasis Added)

However, there are certain exceptions to the requirement of informed consent. These are discussed below:

Therapeutic Privilege: A doctor can invoke protection of therapeutic privilege for non-disclosure in non elective treatment, i.e. one that is essential from a therapeutic point of view, where there is no choice to the patient but to opt for it, in such cases, if the doctor believes on a reasonable assessment of the patient's condition that the disclosure will be detrimental to the patient's health, the doctor may exercise this privilege. However, it cannot be extended to an elective treatment or a non-life threatening treatment like sterilization operation i.e. one that a patient is free to choose.

Emergency: In circumstances of great urgency warranting immediate treatment to save the life of a patient and there is no time to disclose the risks, the nature of proposed treatment and alternative methods of treatment and as such the doctor can withhold the information with immunity from liability.

Waiver: A patient may repose his confidence on a doctor and request him not to disclose any information to him, in which case the doctor may get a privilege of withholding information.⁹⁶

⁹⁵ IV (2007) CPJ 131 (NC) **(Emphasis Added)**

⁹⁶ M.K. Balachandran, *Consumer Protection Act and Medical Profession*, Department of Consumer Affairs, Govt of India in association with I.I.P.A., New Delhi, 2006, reprint 2008, p. 28.

The informed consent, even though mandatory legal necessity, is either expressly not taken or if taken, it is through a mechanical process, i.e. without informing the patient or his relatives about its necessity and even at times consent taken for different purposes and different treatment/tests are conducted making person of an individual a laboratory. However, as and when such cases are brought to the forums/courts, what has been the approach of the forums/courts is discussed below.

Recent Judicial Trends in Medical Negligence

In *A.S.Mittal v. State of UP*,⁹⁷ an irreparable damage was done to the eyes of some of the patients who were operated at an eye camp organized by the government of Uttar Pradesh. Some of the patients who underwent surgery could never see the light of the day, i.e. whatever little vision they had even that was lost. The apex court coming heavily on the erring doctors held that, “the law recognizes the dangers which are inherent in surgical operations and that will occur on occasions despite the exercise of reasonable skill and care but a mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one.” The compensation was awarded. Most important contribution of this decision is that even though service rendered free of charge does not come under the purview of the Consumer Protection Act yet the court went a step ahead in recognizing that although no direct charges were paid by the patients but the State had paid on behalf of the patients to the doctors engaged in the free eye camp. But the Punjab State Commission did not give relief to the complainant who has undergone sterilization operation in the Punjab Government Hospital free of charges and became pregnant subsequently and gave birth to a child. The State Commission was of the view that the complainant was not a consumer because services offered were free of charge.⁹⁸

(Emphasis in Original)

⁹⁷ AIR 1989 SC 1570

⁹⁸ See, *Paramjit Kaur v. State of Punjab*, III (1997) CPJ 394 (Punjab SCDRC)

Further, in *State of Haryana v. Santra*,⁹⁹ the court upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child due to failure of sterilization operation because it was found on facts that the doctor had operated only the right fallopian tube and had left the left fallopian tube untouched. The patient was informed that the operation was successful and was assured that she would not conceive a child in future. A case of medical negligence was found and a decree for compensation in tort was held justified. However, the apex court has explained in *State of Punjab v. Shiv Ram*¹⁰⁰, that “merely because a woman having undergone a sterilization operation becoming pregnant and delivering a child thereafter, the operating surgeon or his employer cannot be held liable on account of the unwarranted pregnancy or unwanted child. Failure due to natural causes, no method of sterilization being fool proof or guaranteeing 100% success, would not provide any ground for a claim of compensation.” The court after referring to several books on Gynecology and empirical researches concluded that ‘authoritative text books on gynecology and empirical researches recognize the failure rate of 0.3% to 7% depending on the technique chosen out of several recognized and accepted ones.’

Facts of *Achut Rao Hari Bhau Khodwa v. State of Maharashtra*¹⁰¹, bring a different kind of negligence exhibited by the doctors. In this case it was alleged that a mop was left in the body of the patient which resulted in the formation of pus and eventually leading to her death. The court held that the doctrine of *res ipsa loquitur* is clearly applicable and the State is liable to pay compensation for the negligence of the doctors. *Poonam Verma v. Ashwin Patel*¹⁰², reflects yet another reckless act on part of the doctor. In this case a doctor who was registered as a medical practitioner and was entitled to *practice in homoeopathy* was found to be guilty of negligence for prescribing allopathic medicines resulting in the death of the patient. The doctor was grossly negligent and in clear breach of duty as a doctor. He defied all sense of logic and forgot his ethics. It is submitted that it would have been better had

⁹⁹ (2000) 5 SCC 182

¹⁰⁰ (2005) 7 SC 1

¹⁰¹ AIR 1996 SC 2377

¹⁰² AIR 1996 SC 2111

the doctor been prosecuted under criminal negligence as he violated section 15(3) of the Medical Council Act, 1956. His conduct also amounts to actionable negligence for having failed to take due care as indicated in earlier Supreme Court decision in *Dr. Laxman Joshi* case¹⁰³. The claim of the appellant was decreed as against the defendant for Rs. 3,00,000/- . After more than a decade of the decision in *Poonam Verma* case,¹⁰⁴ another matter came before the National Commission in *Prof. P. N. Thakur & Anr. vs. Hans Charitable Hosp. & Ors.*¹⁰⁵ wherein allopathic treatment was given by non-medical practitioner *specialized in Unani System*. The patient suffered from fever and repeated bleeding from nose which resulted in rigors in patient as a result of which his condition deteriorated. A small nasal pack was placed anteriorly. The patient died due to choking of air passage. No efforts were made to clear blocked airways by the doctor as he did not appreciate properly the course of action to be followed in such case. The Opposite Party, i.e. the Hospital was held liable for allowing unqualified person treat complicated and emergency cases. **(Emphasis Added)**

In certain cases, it is seen that the complainants have requested the relief which is not given under the Consumer Protection Act, 1986. In such cases, the courts/forums have refrained to award remedies so claimed. For example, in *Parmod Grover & Ors. v. Manvinder Kaur (Dr.) & Ors.*,¹⁰⁶ complications during pregnancy resulted in death of the patient. The complainant alleged medical negligence and claimed *relief in the form of permanently restraining and debarring Opposite Parties from practicing medical profession and cancellation of their medical certificates*. The relief was denied to the complainant as, according to the court, it cannot be granted under section 14 of the Consumer Protection Act, 1986. Similarly direction regarding closure of OP nursing home was also not allowed under section 14 of CPA with a direction that the complainant is at liberty to approach civil court.

¹⁰³ AIR 1969 SC 128

¹⁰⁴ supra n-103

¹⁰⁵ II (2007) CPJ 340 (NC)

¹⁰⁶ II (2007) CPJ 63 (NC)

*Indian Medical Association v. V.P. Shantha*¹⁰⁷ is considered to be the landmark judgment as it has not only widened the ambit of the Consumer Protection Act by stating that the *Medical practitioners are not immune from a claim for damages on the ground of negligence* but also have issued several directions of immense significance for ensuring welfare of the consumers. In *Kishori Lal v. E.S.I Corporation*¹⁰⁸, the appellant was insured with the ESI Corporation and deductions were made from his salary by the employer and deposited with the ESI Corpn. The appellant's wife was admitted in ESI dispensary at Sonapat for treatment of diabetes, where her condition deteriorated and who later was examined in a private hospital. There it was found that she was wrongly diagnosed at ESI dispensary. The appellant alleging deficiency in service filed a complaint under CPA. The Supreme Court in revision petition held that 'services rendered by medical practitioners of hospitals / nursing homes run by ESI Corporation cannot be regarded as service rendered free of charge since sections 39 and 42 of the ESI Act contemplate contributions from both the employer and the employee, which can be deemed to be fee for the service. Thus wife of the complainant was considered to be the consumer under the CPA 1986.

¹⁰⁷ For details, see, Supra n-71; some of the directions include: (i) **a medical insurance policy - beneficiary of the service for which payment has been made by the insurance company - consumer.** (ii) **the relationship between the doctor and a patient carries with it certain degree of mutual confidence and trust and therefore the services of personal nature but no relationship of master and servant contract between them cannot be treated as a "contract of personal service" but a "contract for services."** (iii) **The three categories: (a) Where services are free of charge to everybody - Doctors and hospitals are outside the purview of "service" under Act; (b) Where charges are required to be paid by everybody- Doctors and hospitals would clearly fall within the ambit of "service". (c) Where charges are required to be paid by persons availing the services but certain categories of persons who cannot afford to pay are rendered service free of charge. Doctors and hospitals would fall within the ambit of the expression "service"; persons who are rendered free service are the "beneficiaries" and as such come within the definition of "Consumer". (iv) In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the Civil Court for appropriate relief as provided under Section 3 of the Act. (v) Where the deficiency in service is due to the obvious faults such as removal of the wrong limb or the performance of the operation on a wrong patient or giving injection of a drug to which the patient is allergic without looking into the outpatient card containing the warning or use of wrong gas during the course of an anesthetic or leaving inside the patient swabs or other items of operating equipment after the surgery, such cases can be disposed of by the consumer courts.**

¹⁰⁸ II (2007) CPJ 25 (SC)

In one of the most recent decision in *Kusum Sharma v. Batra Hospital*¹⁰⁹, the Hon'ble Supreme Court has settled the law relating medical negligence. Mr. Dalveer Bandari, J., scrutinizing the cases of medical negligence both in India and abroad specially that of the United Kingdom has laid down certain basic principles to be kept in view while deciding the cases of medical negligence. According to the court, 'while deciding whether the medical professional is guilty of medical negligence *'the following well-known principles must be kept in view*¹¹⁰:

- Negligence is the breach of a duty exercised by omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.
- Negligence is an essential ingredient of the offence. The negligence to be established by prosecution must be culpable or gross and not the negligence based upon the error of judgment.
- The medical professional is expected to bring a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.
- A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
- In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of the other professional doctor.
- The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.
- Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.
- It would not be conducive to the efficiency of the medical profession if no doctor could administer medicine without a halter round his neck.

¹⁰⁹ (2010) 3 SCC 480

¹¹⁰ *ibid* para 89

- It is our bounden duty and obligation of the civil society to ensure that medical professionals are not unnecessarily harassed or humiliated so that they can perform their professional duties without fear and apprehension.
- The medical practitioners at times have to be saved from such a class of complainants which use criminal process as a tool for pressurizing the medical professionals/hospitals, particularly private hospitals or clinics for extracting uncalled for compensation. Such malicious proceedings deserve to be discarded against the medical practitioners.
- The medical professionals are entitled to get protection so long as they perform their duties with reasonable skill and competence and in the interest of the patients. The interest and welfare of the patients have to be paramount for the medical professionals.

The court did not rest the case here, i.e. by laying down eleven principles for determining the breach of duty by medical professionals/hospitals, but went a step ahead by observing that, *“In our considered view, the aforementioned principles must be kept in view while deciding the cases of medical negligence.”* The court further adds a word of caution by stating that, *“We should not be understood to have held that doctors can never be prosecuted for medical negligence. As long as the doctors have performed their duties and exercised an ordinary degree of professional skill and competence, they cannot be held guilty of medical negligence. It is imperative that the doctors must be able to perform their professional duty with free mind.”*¹¹¹

(Emphasis in Original)

The above listing of ‘basic principles’ with a direction that ‘they must be kept in view while deciding the cases of medical negligence’ reflects the judicial attitude of the hon’ble apex court. It may be noted that any decision, judgment passed by the Supreme Court becomes law of the land and is automatically binding on all other lower courts in the country by virtue of Article 141 of the Constitution of India.¹¹² Thus the above principles must be taken as *‘law of the land on medical negligence’*. On one hand, these principles provide adequate protection to the doctors and hospitals provided they have exercised a ‘reasonable degree of care which is neither the highest nor a very low degree

¹¹¹ Supra n-94, para 90

¹¹² Article 141 reads: *“Law declared by the Supreme Court shall be binding on all courts within the territory of India”*.

of care and competence judged in the light of the particular circumstances of each case.’ They give free hand to the doctors to choose from various available alternate courses of treatment/diagnosis, the best course of action which is in the interest and well-being of the patient (consumer). On the other hand, they did provide that ‘the medical practitioner would be liable only where his conduct fell below of the standards of a reasonably competent practitioner’. Also the decision is progressive in nature as it provides a safety-net to the medical professionals against unnecessary harassment and humiliation which will allow them to perform their duties without fear and apprehensions and would save them from undue pressure for extracting uncalled for compensation. Ultimately the doctors are not the insurers of life. Error in judgment in prescribing treatment so long as it is within the prescribed medical standards should not incur unnecessary liability to the doctor/hospital. This decision would benefit both the parties, i.e. the doctors/hospitals shall not be put to unnecessary harassment and at the same time any casual, careless or negligent performance of professional duty on their part shall definitely hold them liable in negligence. The judgment is likely to ensure welfare of consumers.

Conclusions

Thus, the journey of writing of this paper has given several lessons of seminal importance. The law of torts, providing for a residuary remedy, i.e. when no other legal remedy is available under any law time being in force, the tortious remedies may be invoked. The law relating negligence as a tort is very well developed and is capable to meet newer kinds of cases because the emphasis of negligence as a tort is on *D.B.D* formula, i.e. Duty owed by the defendant to the plaintiff; Breach of duty by defendant; and the damage caused as a result of the breach of the duty. The courts have developed tests for determining the existence of duty of care. The breach of duty is determined on the basis of act or omission alleged against the defendant and at times, it becomes difficult for the plaintiff to prove the same. However, in certain cases, where the negligence is *prima facie* so blatant or apparent, the courts invoke the doctrine of ‘*res ipsa loquitur*’ and reduce the burden of the plaintiff. The

last essential of the tort of negligence is the 'damage'. It has been noted that 'damage' in context of the law of torts is expressed by the legal maxim, i.e. '*injuria sine damage*' which means violation of legal right without causing damage. Thus the damage, here in this context, means legal injury with or without any physical harm. Also in certain cases it becomes difficult for the plaintiff to prove that the damage has a causal linkage with the alleged breach of duty. In such cases, unless the consequences are too remote to be determined, the balance is struck by resorting to the principles of justice, equity and good conscious by the Hon'ble courts.

When it comes to the relation between Law of Torts and consumer protection, it may be pointed out that law of torts, a judge-made law or court developed law has always been responsive to the 'injuria' (legal injury) and moved on the principles on '*ibi jus ubi remedia*', meaning thereby where there is a right, there is a remedy. This maxim used in the context of consumer protection is self explanatory, i.e. when there was no Consumer Protection Act, 1986, the tortious remedies were available to the consumers. Although there were certain difficulties in seeking remedy from the regular civil courts, viz. the time taken by the courts, expenses incurred, etc. by the consumers for getting remedy. But ever since the implementation of the Consumer Protection Act, a most dynamic, progressive and welfare oriented law has brought sea-change in protecting consumers against deficiency in service; defect in goods and claiming quicker, easier and cheaper remedy. The provisions of this Act are in addition to and not in derogation of any other law time being in force which means that alternate remedy if available may also be claimed by the consumers under other law than the C.P. Act. This paper has examined certain sector-specific cases to take an account of the enforcement of the Consumer Protection Act vis-à-vis the tort of negligence. It has been found that most of the cases have resulted due to negligence, be it deficiency in service or defect in goods. In deciding such cases the essentials of the tort of negligence have predominantly occupied the minds of the courts. The types of difficulties faced in various sectors have been examined in detail and it is noted that tortious solutions of consumer grievances did not fade.

As the last part of this paper has been devoted to deal with the cases of medical negligence and consumer protection, it is noted that the professional negligence has been put on a higher pedestal, requiring thereby higher degree of skill and care to be exercised by the medical professionals. The journey of the law relating medical negligence has not been smooth. But for *V.P. Shantha*¹¹³, *Jacob Mathew*¹¹⁴ and *Kusum Sharma*¹¹⁵, cases, the approach adopted by the courts/forums has shown inconsistency. This inconsistency leads to uncertainty in the minds of the defrauded consumers and make them little complacent about exercising their rights owing to apprehensions of their success at doorsteps of consumer forums/courts. Thus it is submitted that as the law on medical negligence appears to have been settled by the Hon'ble apex court, there is a need to have a settled legal position in other sectors as well so far as it relates to the consumer protection in India.

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¹¹³ *Indian Medical Association v. V.P. Shantha*, AIR 1996 SC 550

¹¹⁴ *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1

¹¹⁵ *Kusum Sharma v. Batra Hospital*, (2010) 3 SCC 480

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