

Medical Negligence & Legal Defenses for Hospital Professionals

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Black's Law Dictionary says that negligence is "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation."

Negligence is the failure to exercise due care. There are mainly three ingredients of negligence. They are as follows:

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

In the case of Medical negligence, the aggrieved patient will be the Complainant and the doctor, hospital or any other medical men involved will be the Defendants.

The doctor and other medical professionals owe a duty of care towards the patient. If they breach this duty of their care that has caused the patient certain loss or injury with respect to health, it may then be considered to be a case of medical negligence.

When medical service is given to a patient for free of cost and any complications occur in patient's health, the doctor cannot be held negligent because the patient was not a 'consumer' according to the Consumer Protection Act, 1986. The Supreme Court, in *Indian Medical Association v. V.P. Shantha*² held the same principle and said that the plea for medical negligence will apply to those doctors or Hospitals only where the patients are treated free of cost.

If the complainant had by then filed a suit in another Court of appropriate jurisdiction, he cannot put another with the same complaint in another Court. This shall not be maintainable.

If the Consumer Forum does not have territorial jurisdiction or pecuniary jurisdiction, the compensation claimed is beyond the jurisdiction of the Court, the complaint does not continue to sustain.

There is 2 years of limitation period³ for medical negligence cases. In case the patient who feels the doctor has committed medical negligence does not want to file a complaint in the Court of law, the patient need to do it within the time span of two years. Even if the complaint is filed the code feels the complaint is frivolous and vexatious and liable to be dismissed under section 26⁴ of the Consumer Protection Act, the Court may dismiss the case.

If there is any indemnity insurance policy in existence, the doctor or the hospital should inform the insurance company in writing immediately on a complaint being lost by a patient. It should be done with the copy of the

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² *Indian Medical Association v. V.P. Shantha* 1995 (8) JT 119

³ Consumer Protection Act, 1986

Section 24A: Limitation period: (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

⁴ Section 26 in the Consumer Protection Act, 1986:

"Dismissal of frivolous or vexatious complaints. — Where a complaint instituted before the District Forum, the State Commission or, as the case may be, the National Commission is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, dismiss the complaint and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order."

complaint and notice received from the Court.

Factual defences are those defences that the doctor can use against allegations with regard to the circumstances that are factual in nature. The defences are the doctor's qualifications, training, experience and expertise. The doctor may present his certificates, appreciation certificates for awards, or for attendance at various updates conferences and workshops for his defence.

Written evidence of consent of the patient or relative to assumption of inherent and special risks in the treatment is a good defence. *Volenti non fit injuria* is the voluntary risk of treatment that the patient takes.

Another important defence is that of the circumstances of the case, that is emergency on lack of facilities or for the patients history of any illness was not given to the doctor.

The burden of proof of duty of care, breach of the duty, causation and damage is on the complainant. So it is the responsibility of the complainant to prove medical negligence before the Court.

General Defences

The General defences in Torts are as follows:

- i. Volenti non fit injuria, or the defence of 'Consent'
- ii. Plaintiff, the wrongdoer
- iii. Inevitable accident
- iv. Act of God
- v. Private defence
- vi. Mistake
- vii. Necessity
- viii. Statutory Authority

- i. VOLENTI NON FIT INJURIA, OR THE DEFENCE OF 'CONSENT'

According to the judgment given in *Chanchal Oswal v. Santokba Durlabhji Memorial Hospital*,⁵ at the point when an individual agrees to the curse of any mischief upon himself, he will have no solution for it in tort. In the event that, the offended party willfully consents to endure hurt, he isn't allowed to whine of it and his assent fills in as a safeguard against him. It's not possible for anyone to uphold a right which he has intentionally postponed or relinquished.

Consent may also be implied or inferred from the conduct of the parties⁶. In the case of *Hall v. Brooklands*, the offended party was an onlooker at an engine vehicle race being held at Brooklands on a track claimed by the litigant organization. At the point when the race was going on, there was an impact between two vehicles, one vehicle was tossed among the observers and it harmed the offended party. The Court held that the offended party impliedly went for broke of such damage accordingly risk is natural in the game which any onlooker could anticipate, the litigant was not liable.

At the point when assent has been given to a specialist to play out an activity, the patient can't sue the specialist in the wake of submitting to a careful task since he would have explicitly agreed to the activity.

What is significant for this to be a barrier is that he assent must be free. For the resistance to be accessible to the specialist, it is important to demonstrate that the patient's agree to the activity done by the specialist was free assent. In the event that the assent of the patient had been gotten by extortion or under impulse or under some mixed up impression, such assent won't fill in as a resistance. Moreover, the surgery performed by the doctor must be the same for which the consent is given.

⁵ 1 (1995) CPJ 42 Rajasthan State Consumer Dispute Redressal Commission, Jaipur. *Chanchal Oswal v. Santokba Durlabhji Memorial Hospital & ANR*.

⁶ *Hall v. Brooklands Auto Racing Club* [(1932) All E.R Rep. 208]

For the maxim *volenti non fit injuria* to apply, two points have to be proved. They are:

1. The patient knew the risks
2. Patient consented to the surgery after knowing about the risk.

In the event that the first of these focuses is available i.e., there is just the information of the hazard, it's anything but a resistance on the grounds that the proverb is *volenti non fit injuria*. Just on the grounds that the offended party is aware of the mischief does not infer that he consents to endure it.

In *Smith v. Baker*⁷ the offended party was a laborer utilized by the respondents on dealing with a drill to cut a stone. Utilizing a crane, stones were being moved from one side to the next, and each time when the stones were moved, the crane ignored from the offended party's head. While the offended party was occupied in his work, a stone tumbled from the crane and harmed him. The workers did not caution him right now of a common peril and were careless about it, the offended party was additionally mindful of the hazard. It was held by the House of Lords that as there was minor learning of hazard without its presumption, the saying *volenti non fit injuria* did not matter and the litigants were liable.

i. WRONGDOER PLAINTIFF

Under the law of tort, the respondent will be excused when the act done by the plaintiff was itself illegal or wrong. This defence is inspired by the Latin maxim "*ex turpi causa non oritur actio*,"⁸ meaning no activity emerges from a corrupt reason. Subsequently, an unlawful demonstration of the offended party may itself lead to a substantial barrier to the respondent in torts. This proverb applies to tort law and furthermore to law of agreements, compensation, property, and trusts. At the point when the adage is effectively connected to a case, it goes about as a total bar on recuperation. This barrier is for the most part alluded to as the illegality protection. Eventhough, it reaches out past illegal lead to corrupt direct. In *Bird v Holbrook*,⁹ the offended party, trespasser over the respondent's property was qualified for case remuneration for damage brought about by a spring gun by the litigant, without notice, in his greenery enclosure.

On the off chance that the offended party accomplishes something incorrectly, his activity will come up short and then again, if the shielded is the miscreant, his unjust demonstration is the deciding reason for the mishap and not of the offended party, the protected will be liable. On the off chance that the offended party's being a miscreant is a demonstration which is autonomous of the mischief caused to him, the safeguard can't argue that the offended party is a transgressor.

Under this protection, the association between the offended party's unjust demonstration and the mischief endured by him must be referenced. In the event that the patient's own demonstration is the deciding reason for the mischief endured by him, he has no reason for activity against the specialist. Along these lines, the specialist may not be held liable for negligence.

ii. INEVITABLE ACCIDENT

Mishap is startling damage and if the circumstance couldn't have been predicted and dodged, regardless of sensible consideration with respect to the protector, it is called as the unavoidable mishap. It is, thus, a safeguard, if the guarded can demonstrate that he had not expected to harm the offended party and would he be able to dodge the

⁷ *Smith v. Baker* [(1891) A.C 325]

⁸ *Ex turpi causa non oritur actio* is a legal doctrine which states that a plaintiff will be unable to pursue legal remedy if it arises in connection with his own illegal act

⁹ *Bird v Holbrook* [(1828) 4 Bing. 628]

damage even subsequent to taking sensible consideration.

In the case of *Stanley v Powell*,¹⁰ the offended party was utilized to convey cartridge for a shooting party when they had gone shooting. An individual of the gathering discharged at a separation however the slug, in the wake of hitting a tree, bounced back into the offended party's eye. At that point, the offended party sued the individual who shot the projectile and it was held that the litigant was not liable in the light of the situation of unavoidable mishap.

The defence of the inevitable accident is available to the defendant only when the event is unforeseeable and its consequences are unavoidable in spite of having taken reasonable precautions. In the case of, *S. Vedantacharya v. Highways Department of South Arcot*,¹¹ the Supreme Court has given the view that regardless of whether the occasion resembles substantial downpour and flood however on the off chance that the equivalent can be foreseen and made preparations for and the outcomes can be maintained a strategic distance from by sensible safety measures, the guard of unavoidable mishap can't be argued in such case.

iii. *ACT OF GOD*

The act of God is also called as *Vis Major*¹² or *Force Majeure*. It might be characterized as conditions which no human foreknowledge can give against any of which human judiciousness will undoubtedly perceive the likelihood. In torts, the demonstration of God is a resistance utilized in situations when an occasion over which the litigant does not have any command over happens and the harm that happens is brought about by the powers of nature. In these circumstances, the respondent won't be viewed as liable in tort law for such coincidental harm.

This protection is a sort of unavoidable mishap with the distinction that on account of Act of God, the subsequent misfortune emerges out of the working of common powers like uncommonly substantial precipitation, storms, whirlwind, tides and volcanic ejections. In medical law, this can be applied to luck of the patient. A doctor may try his best to treat the patient. But, if any natural calamity occurs or the weather is not suitable for the patient's condition, the staff may try their best to ensure the comfort of their patient, but they may not always succeed. This may be considered as an Act of God.

Two significant basics are required for this resistance:

- There must work of characteristic powers
- The event must be exceptional and not one which could be foreseen and sensibly made preparations for.

iv. NATURAL FORCES

In the case of *Ramalinga Nadar v. Narayana Reddiar*,¹³ the offended party had booked products with the litigant for transportation. The horde plundered those merchandise. It was outside the ability to control of the litigant to keep this from occurring. The Court held that each occasion outside the ability to control of the respondent can't

¹⁰ *Stanley v Powell* [1891] 1 QB 86 (QBD)

¹¹ *S. Vedantacharya v. Highways Department of South Arcot* (1987 ACJ 783)

¹² Force majeure is generally intended to include occurrences beyond the reasonable control of a party

¹³ *Ramalinga Nadar v. Narayana Reddiar* (AIR 1971 Ker 197)

It was observed that: "Accidents may happen by reason of the play of natural forces or by the intervention of human agency or by both. It may be that be that in either of these cases, an accident may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be an aid to be acts of God."

be said Act of God.

v. EXTRAORDINARY OCCURRENCE

In the case of *Nichols v. Marshland*,¹⁴ the respondent had a great deal of artificial lakes on his territory. Exceptional substantial downpour showered along these lines making the banks of the lakes burst and the water that was streaming diverted four extensions having a place with the offended party. The Court held that the offended party's scaffolds were cleared by the demonstration of God and the litigant was not liable.

vi. PRIVATE DEFENCE

The law of tort enables the utilization of sensible power to ensure one's individual or property. On the off chance that the safeguard utilizes the power which is essential for self-protection, he won't be liable for the damage caused accordingly.

Three conditions should be fulfilled for this protection to be connected. They are:

1. Imminent risk ought to be there to the individual security or property.
2. The power that is utilized is completely important to repulse the attack ought to be utilized for.
3. The power utilized by the respondent ought to be in extent to the demonstration submitted and enough to avoid the inevitable threat. The power ought not be unnecessary and must not be out of the extent to the obvious criticalness of the event.

In the case of *Bird v. Holbrook*,¹⁵ it manages the barrier of assurance of property. The respondent set up a spring-weapon trap in his greenhouse so as to get an interloper who had been taking from his greenery enclosure however he didn't post any notice. The applicant pursued a got away winged animal into the greenhouse and set off the device, enduring genuine harm to his knee. The applicant sued respondent for harms. The Court held that while setting traps or "man traps" isn't culpable when see is likewise posted. Here, the respondent's aim was to harm somebody instead of frightening them away. Consequently the respondent was held liable.

vii. MISTAKE

Either slip-up of reality or of law is generally not a barrier to an activity for tort. On the off chance that an individual tenaciously meddles with the privileges of someone else, there is no safeguard to state that he had genuinely trusted that there was some support for the equivalent, however truthfully, no such legitimization existed entering the place where there is another reasoning that to be one's is trespass, believing that to be one's own and harming the notoriety of another with no aim to criticize is maligning in such circumstances the resistance of misstep can't be taken.

In the case of *Consolidated Co. v. Curtis*,¹⁶ a salesperson was approached to sell certain products by his client really trusting that the merchandise had a place with the client he sold them and he paid the deal continues to the client. Be that as it may, those merchandise had a place with the other individual. The Court held the salesperson was held liable for a tort of change. The safeguard might most likely avoid this liability by demonstrating that he acted under a genuine yet mixed up conviction is a special case to this standard.

viii. NECESSITY

On the off chance that a demonstration causing harm is done under an aim to anticipate a more noteworthy wickedness isn't significant despite the fact that hurt was caused purposefully. Need is not the same as the private

¹⁴ *Nichols v. Marshland* [(1876) 2 EXD 1]

¹⁵ *Bird v. Holbrook* [(1823) 4 Bing. 628, 130 E.R. 91

¹⁶ *Consolidated Co. v. Curtis* [(1894) 1 Q.B. 495]

safeguard. If there should arise an occurrence of need, there is a punishment of damage on an honest individual and in private protection mischief would have been caused to an offended party who is the miscreant. Need is additionally not the same as the inescapable mishap such that, need in need, hurt is proposed, be that as it may, in the unavoidable mishap, hurt is caused regardless of whether the best exertion is done to dodge it. Tossing products over the edge of a ship to help it for sparing the ship or individual on board the ship, or dismantling down a house to stop a further spread of flame is a typical case of need.

In the case of *Cope v. Sharpe*,¹⁷ the litigant entered the offended party's property so as to avert the spread of flame to the bordering land over which the respondent's lord had the shooting rights. Since the respondent's demonstration was sensible and important to spare the diversion from genuine and inevitable risk, the Court held that the litigant was not liable for trespass.

If, the interference is not reasonable and necessary, the defender will be held liable. In *Carter v. Thomas*,¹⁸ the defender, entered the offended party's premises in compliance with common decency with a goal to smother a fire at which the fire fighter had just been working, so the respondent was held liable for trespass.

ix. STATUTORY AUTHORITY

At the point when a demonstration would be finished by the litigant, under the specialist of any resolution or law or Act, it is a safeguard for the respondent and the harmed party would not have any cure other than for guaranteeing such remuneration as may have been given by the rule. The harm coming about because of a governing body approved act, isn't significant despite the fact that it would somehow or another be a tort, similar to the train is run, causing some accidental damage because of commotion, vibration, smoke, emanation of flashes however there nothing that the general population around can do about the disturbance. No activity will be there that may exist either for obstruction with the land or for coincidental mischief, aside from the installment of such pay which the Act itself may have given, as the development and the utilization of the railroad are approved under a resolution. Anyway, this does not give the specialists the permit to do what they need pointlessly; they should act in a sensible way.

In the case of *Smith v. London and South Western Railway Co.*,¹⁹ the workers of a Railway Co. furthermore, left the cutting of grass and supports carelessly close to a railroad line. Sparkles from one motor set the whole material ablaze and by an overwhelming breeze, the flame was conveyed to the offended party's bungalow which was 200 yards from the railroad line. The offended party's bungalow was scorched. The Court held that it was an instance of negligence with respect to the Railways Co, and they were liable.

Special Defences for Professionals

Professionals can be classified into the following categories:

- Doctors
- Nurses
- Technical staff
- Administrative staff

At the point when a legitimate notice is gotten or a buyer case claiming insufficiency in administration is recorded against a specialist, it makes a ton of passionate unsettling influence as the notoriety of medical professionals is worked over years through sheer diligent work, ability, and expertise obtained by strenuous preparing and speculation throughout the years. All things considered, emergency clinics and specialists need to remember that according to the choice of Supreme Court in a catena of cases, the medical profession is at long last held to be

¹⁷ *Cope v. Sharpe* [(1891) 1 K.B. 496.]

¹⁸ *Carter v. Thomas* [(1891) Q.B. 673]

¹⁹ *Smith v. London and South Western Railway Co.* [(1870) L. R 6 C. P. 14.]

secured and that there is no simple break on specialized grounds. They need to deal with the legitimate prerequisites and face the circumstance head-on. One ought not overlook that it is imperative to answer to a legitimate notice in a careful way.

A decidedly ready answer will fill in as the premise of a Written Statement to be recorded in the event that a Consumer Complaint is founded against the specialist as well as medical clinic. Frequently a solid and steady notice answer drives home the way that the emergency clinic and specialist won't capitulate to weight and theoretical cases will be contended energetically. Our own experience is that in a decent number of cases a solid and steady notice answer accomplishes the ideal outcome. On the off chance that an unjustified, false, or theoretical buyer case is recorded claiming insufficiency in administration rendered by a medical clinic or a specialist, they need to deal with the prerequisites of the law, for example, the opportune documenting of a composed proclamation, testimony and so forth., and set up a decent protection at the season of the conference. Above all, case history, indoor case papers, clinical records, report of examination assuming any, testimony of managing specialists, X-beams, test results and so on., will be of monstrous assistance.

Exceptional consideration must be given to master proof of a certified and free medical professional. It is most critical to remember that the complainant needs to set up that the way and nature of treatment (counting pre-and post-employable consideration) was deficient to the point that it misses the mark concerning the expertise and/or standard anticipated from normal medical professionals and not that of a very qualified and uncommonly talented individual. While arriving at such a decision, a Consumer Forum needs to remember the capability, foundation, and offices accessible at such a spot.

The specialist or emergency clinic needs to notify the Consumer Forum about the acknowledged practice in treatment, negligence with respect to quiet in profiting treatment immediately, or following medical counsel and so forth. Unnecessary to make reference to medical professionals need to keep up a decent association with their siblings in the profession. Consideration must be given to supportive medical writing regarding the matter. Ultimately, important case law regarding the matter will likewise be useful. On the off chance that an emergency clinic or a specialist gets itself or himself in a circumstance where it is in all respects likely such a demonstration falls under the class of medical negligence, state *res ipsa loquitur* or careless in essence, e.g., a case wherein a wrong appendage or organ was dealt with, worked, removed, or contaminated blood was given or capability was wrongly composed and so on., such a case does not require any uncommon proof to build up and it is prudent that such a case is undermined in the wake of bringing the back up plan into certainty. Moreover, the specialist or potentially clinic are qualified for connect with the administrations of a lawyer to speak to them in the issue.

There is no denying the way that drawn out litigation unfavorably influences the notoriety of a specialist or emergency clinic despite the fact that he/it in the end wins the case. The medical brotherhood is worried about shields against theoretical and vexatious claims. While one can't deny the way that there are certified cases including medical negligence, the issue that irritates the medical crew is that frequently hopeless harm is caused to a specialist or a clinic because of countless complaints.

Doctor and hospital has various defences available against atrocities by patients.

The special defences are as follows.

- I. Reasonable care
- II. Consent
- III. Error of judgement
- IV. Expert evidence
- V. Medical Records

1.1. Reasonable degree of care

“Reasonable degree of care” means the “standard care” that every doctor needs to take while treating his patient. There is a distinction between the standard of care and the degree of care. The standard of care is constant in cases of all medical procedures and remains the same in all cases. Reasonable degree of care is the prerequisite that the lead of the specialist must be reasonable and the consideration need not really fit in with the most noteworthy

level of consideration or the least level of consideration conceivable. The level of consideration is a variable and it relies upon the condition of treatment. Level of consideration is utilized to allude to what really sums to reasonableness in a given circumstance.

Regardless of whether a similar standard of consideration is normal from a general doctor and a master, the level of consideration from the two would be unique. That is, both the specialists are required to take reasonable consideration yet what adds up to reasonable consideration with regards to the pro varies from what measure of reasonable consideration is standard for the general doctor. Actually, medical law anticipates that the master should practice the common ability of this strength and not of any standard specialist. The courts have additionally acknowledged the need to force a higher level of duty on an expert specialist, yet Court has would not bring down it on account of a fledgling.

The information that is normal from each specialist varies. Medical law must incorporate the most recent improvements in the medical field henceforth the law requires consistent refreshing. The Court has officially perceived by the courts that what adds up to reasonableness changes with time. The standard of consideration, as expressed necessitates that the specialist have reasonable learning. In this way, it is important that a specialist needs to continually refresh his insight to must satisfy the guideline expected of him. Further, the main reasonable information that is required, it may not be essential for him to know about every one of the improvements that have occurred.

Specialists are, be that as it may, forced with a duty to take the assent of an individual/understanding before performing acts like careful activities and now and again treatment also. To condense, any demonstration that requires contact with the patient must be agreed by the patient. Duty of consideration is forced on the specialists in taking the patient's assent. As per the legal proclamations, the duty is to unveil all such data as would be important or fundamental for the patient to settle on a choice. Subsequently, the duty of assent does not stretch out to uncovering all conceivable data in such manner. Besides, this duty does not reach out to notice a patient of all the ordinary chaperon dangers of a task. The standard of consideration that is expected of a specialist while acquiring assent is again that of a reasonable specialist.

The Supreme Court, in *Jacob Mathew v. State of Punjab*²⁰ case, noticed that a medical specialist looked with a crisis usually attempts his best to reclaim the patient out of his anguish. A specialist does not pick up anything by acting with negligence towards the patient or by discarding to complete a demonstration. Along these lines, it is dependent upon the complainant to unmistakably put forth a defense of negligence before charging a medical professional.

From the principles laid down in *Indian Medical Association v. V.P. Shantha*²¹ and decisions identifying with medical negligence, it is obvious that specialists and nursing homes/emergency clinics need not be unduly stressed over the presentation of their capacities. The law is a guard dog, and not a hound dog, and insofar as specialists perform their responsibility with reasonable consideration they won't be held liable regardless of whether their treatment was fruitless.

In the case of *Dr. Ganesh Prasad v. Lal Janamajay Nath Shahdeo*,²² the National Commission reiterated the principle that where legitimate treatment is given, demise happening because of ailment and its confusion, it can't be held that the specialists and emergency clinics are careless and requests of lower fora don't maintain the case and grant pay to the patient. For this situation, a 4 ½ year old youngster experiencing cerebral intestinal sickness was admitted to the clinic and a real existence sparing infusion was given. An assessment was given by a kid pro that portions were protected and the treatment was appropriate. Despite the fact that the demise of the youngster is deplorable, it can't be said that there was negligence with respect to the specialist.

In the case of *Achutrao Haribhau Khodwa v. State of Maharashtra*,²³ the Court held that a medical expert has

²⁰ *Jacob Mathew v. State of Punjab* 2005 SCCL.COM 456

²¹ *Indian Medical Association v. V.P. Shantha* SC/0836/1995: AIR 1996 SC 550

²² *Dr. Ganesh Prasad and Anr. V. Lal Janamajay Nath Shahdeo, I* (2006) CPJ 117 (NC)

²³ *Achutrao Haribhau Khodwa v. State of Maharashtra* AIR 1996 SC 2377

different obligations towards his patient. He should likewise act in a reasonable way. Medical suppositions may contrast from specialist to specialist, yet it doesn't mean one sentiment isn't right in any way. The treatment proposed by the specialist will be as per the patient's condition.

In *Martin F. D'Souza vs. Mohd. Ishfaq*,²⁴ the Supreme Court held that, on the off chance that a patient does not react to the treatment in a manner that was normal, it won't imply that the specialist has played out the treatment in an incorrect manner. Few out of every odd patient responds to a specific treatment with a certain goal in mind. As each individual and individual's body types are unique, their responses to the treatment may likewise contrast. In this way, the specialist can't be held careless for it.

In the case of *Rajesh Taneja vs. Kaiser Hospital*,²⁵ the Court held that no doctor can assure full recovery and no doctor can guarantee that the result of the surgery would lead to complete cure of the patient's ailment. Relying upon the medical texts and several previous judgments, the Supreme Court held that doctor may not always be held responsible for medical negligence.

In the case of *Usha Devi vs. ESIC Model Hospital*,²⁶ the Court held that, in the instant case, it appears as a misconception of the patient and her relatives about two operations. It is pertinent to note that initially the complainant's grouse was that the Opposite Party 2 removed kidney but it was a false averment. The doctor treated the patient with reasonable standard of care. We do not find any flaw in the act of OPs. In our considered view, that decision of OP-2 for removal of infected gall bladder was correct and in the interest of patient. The histopathological study reported it as chronic cholecystitis. Both the operations are totally separate entity; no injury resulted to the patient. Therefore, we do not find any merit in this first appeal. Accordingly it is dismissed in limine. There shall be no order as to costs.

In the case of, *Deepa Sahai vs. The State of Bihar*,²⁷ Ashwani Kumar Singh, J held that if the doctor fails to take precautions which are usually taken in ordinary circumstances, that is sufficient. In case the doctor fails to use extraordinary precautions that might have prevented the side effect does not amount to negligence. The standard of knowledge must be tested according to what it was at the time of incident, not when the trial was going on.

In the case of *Zubedaben Bachubhai Desai vs. State of Gujarat*,²⁸ Biren Vaishnav, J. held that the medical

“A medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor. The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of the doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Courts find that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence. But, in case where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.”

²⁴ *Martin F. D'Souza vs. Mohd. Ishfaq* SC/0225/2009

“Simply because a patient has not favorably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of *res ipsa loquitur*. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.”

²⁵ *Rajesh Taneja vs. Kaiser Hospital and Ors.* (17.05.2016 - NCDRC): CF/0131/2016

²⁶ *Usha Devi vs. ESIC Model Hospital and Ors.* (04.05.2016 - NCDRC) CF/0523/2016

²⁷ *Deepa Sahai and Ors. vs. The State of Bihar and Ors.* (21.06.2017 - PATNAHC): BH/0503/2017

Ashwani Kumar Singh, J held that, “When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial.”

²⁸ *Zubedaben Bachubhai Desai and Ors. vs. State of Gujarat and Ors.*(GUJHC): GJ/1111/2017

Biren Vaishnav, J. held that “The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England:- The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person

practitioner must exercise reasonable degree of skill and knowledge and just because some other medical practitioner is better than him, doesn't mean he has taken less care or is negligent. In such a case, the doctor need not be held guilty.

It is in the fitness of things to observe that Supreme Court has observed that at the point when the medical expert is looked with a crisis normally he attempts his best to recover the patient out of his torment. He doesn't pick up anything by acting with negligence or by discarding to complete a demonstration. Clearly, in this way, it will be for the complainant to obviously present out a defense of negligence before a medical specialist is accused of or continued against criminally.

In *Sethuraman Subramaniam Iyer v. Triveni Nursing Home*,²⁹ the spouse of the complainant experienced sinusitis and the patient was prompted medical procedure by the specialist. The patient had endured a major heart attack while in the operation theatre. The State Commission saw that fundamental precautionary measures and compelling measures were taken to spare the perished patient and the Court rejected the complaint. The State Commission depended on the affirmations of four specialists who opined that there was no negligence. The complainant had not given any master proof to help his claim and in these conditions it was held that no body of evidence was made out against the specialist.

There are several issues that happen on a regular day in a Hospital. There will be several patients that need care and immediate assistance in the Hospital. If any patient does not get a bed in an Intensive Care Unit, it cannot be the Hospital's negligence as the doctor is the authority who can prioritise which patient needs to be given more importance.

In the case, *Sir Ganga Ram Hospital v. D.P. Bhandari*³⁰, the Court held that not shifting a patient to the ICU is not negligence if there is no vacant bed. It does not amount to deficiency of service of hospital.

is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men."

²⁹ *Sethuraman Subramaniam Iyer v. Triveni Nursing Home* (1998) CPJ 110,

³⁰ *Sir Ganga Ram Hospital v. D.P. Bhandari*, 1992 (2) CPJ 397; 1993 (1) CLT 78; 1993 CCJ 261 (NCDRC)