**What is medical negligence?**

**COMPILED BY DR.VISHWAJEET SINGH PHAUGAT**

**PRESIDENT,N.I.M.A HARYANA STATE BRANCH**

***Poonam Verma v. Ashwin Patel & Ors.******[[1]](https://www.vakilno1.com/legalviews/medical-negligence-case-laws.html%22%20%5Cl%20%22_ftn1)–***In this case, the Supreme Court delved into the issue of what is medical negligence. In the context, the Court held as under:

*Negligence has many manifestations*—it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, willful or reckless negligence or Negligence *per se*.”

Negligence *per se* is defined in Black’s Law Dictionary as under:

*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.

***Kusum Sharma & Ors vs Batra Hospital &Medical Research******[[9]](https://www.vakilno1.com/legalviews/medical-negligence-case-laws.html%22%20%5Cl%20%22_ftn9)****–* In this case, the Supreme Court enumerated the following principles to be followed while deciding whether medical professional is guilty of medical negligence:

|  |  |
| --- | --- |
| I. | 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. |
| II. | Negligence is an essential ingredient of the offence. The negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment. |
| III. | The medical professional is expected to bring 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. |
| IV. | A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. |
| V. | 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 other professional doctor. |
| VI. | 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. |
| VII. | 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. |
| VIII. | It would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck. |
| IX. | It is our bounden duty and obligation of the civil society to ensure that the medical professionals are not unnecessary harassed or humiliated so that they can perform their professional duties without fear and apprehension. |
| X. | The medical practitioners at times also have to be saved from such a class of complainants who 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. |
| XI. | 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.**Medical negligence** is the legal theory on which most **medical malpractice** cases hinge. ... Here is one definition of **medical negligence**: An act or omission (failure to act) by a **medical** professional that deviates from the accepted **medical** standard of care.Medical Profession is one of the oldest profession and most humanitarian one. Doctors in India are treated as second life savers after God. The standard of care from doctors and hospital authority is expected to be more in comparison with other cases of  negligence. So proper care must be taken by the authorities and the doctors side to avoid medical negligence. The Black law dictionary definition of negligence “ 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  statue 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”.The basic elements of Negligence are (a) Duty of Care (b) Breach of Duty (c)Cause in fact  (d)Proximate Cause  and (e) Damage. These are the basic elements of negligence, to prove the case of negligence all these criteria must be satisfied and in cases of medical negligence in India, the ambit of  duty of care and proximate cause increases, as there are life involve in this situation.When there is civil wrong (right in rem) against a contractual obligation (right in persona), with a breach of duty which invites the intervention of judges to grant certain  remedy for the damages then the tortious liability arises but the standard of care is more in medical cases as compared to general cases.Principle of Standard of care was laid down by Supreme Court in the case of Dr. Laxman Balakrishna Joshi vs. Dr. Trimbark  Babu Godbole  AIR 1969,SC 128 and A.S Mittal .v. State of  U.P, AIR 1989 SC 1570 . In these cases, different kind of negligence were introduced which were further question of qualification for application in other cases.There is an exception for medical negligence that if a doctor does not charge fees for his act then he cannot be sued for medical negligence under Tort as per the definition of service which is mentioned in sec 2(1) of Consumer protection Act 1986.****Vicarious liability of hospitals****The principle of vicarious liability is based on a latin maxim “qui facit per alium facit per se” which describes that the one who acts through another act in his or her own interest. The patient only requires diligent and proper care, if any of the staff of the hospital is negligent in the performance of their prescribed work, the hospital will be held liable on the negligent conduct of even borrowed doctors for specific performance of certain operations. This principle was established in the case of Aparna Dutt .V. Apollo Hospital Enterprises Ltd. (2002 ACJ   954 (Mad. HC).Hospitals have been also held liable for not providing adequate medical facility as it was held in Paschim Bengal Khet Mazdoor Samity and Ors. v. State of  Bengal(1996(4)SC260).Hospitals are also held vicariously held liable if they are not able to provide proper sanitation facility, as it happened in Mr. M Ramesh Reddy .V. State of Andra Pradesh [2003 (1) CLD 81 (APSCDRC).Medical negligence cases and ethicsIn some cases of medical negligence, the compensation to the victim has given looking on the ethical values related to humanitarian basis as we can infer with the case of Pravat Kumar Mukherjee Vs. Ruby General Hospital and ors 2005 CPJ 35 (NC). In this case National Commission of India delivered a land mark judgment for treating of  accident victim, what happened in this case the complainant were the parents of deceased boy named Samanate Mukherjee a 2nd year B.tech boy who studied in Netaji Subhas Chandra Bose Engineering College , the complaint was filed in National Commission of India. The boy was hit by a Calcutta transport bus and rushed to the hospital which was 1 km from the accident spot. The boy was conscious when he was taken to hospital and he showed his medical insurance card, which clearly says that the boy will be given Rs.65,000 by the Insurance company in case of accident, relying on it hospital started treating boy but after giving some initial treatment hospital demanded Rs15,000 and on the non- payment of the demanded money hospital discontinued treatment of the boy and the boy was rushed to another hospital in the way the boy died. This was the case and in this case the National Commission held Ruby hospital liable and provided Rs. 10 lakhs as compensation to the parents. So, in this case the court looked on  humanitarian basis and compensation was awarded to the complainant.Landmark Judgment on Medical NegligenceWhen we think about landmark judgment in medical negligence cases the first judgment that comes into our mind is one of the high profile and most talked case with the highest amount of compensation granted till date.  Kunal Saha Vs AMRI (Advanced Medical Research institute ) famously known as Anuradha Saha Case, this case was filed in 1998 with the allegation of medical negligence on Kolkata based AMRI Hospital and three doctors namely Dr. Sukumar Mukherjee, Dr. Baidyanath Halder and Dr. Balram Prasad. In simple layman term, the wife was suffering from drug allergy and the doctors were negligent in prescribing medicine which further aggravated the condition of patient and finally led to death. In brief this was the facts and circumstances of the case, in this case the final verdict was given by the Supreme court on 24th October 2013 and a compensation of around  6.08 crore for the death of  his wife.In the case of V.Krishan Rao Vs Nikhil Super Speciality Hospital 2010,  Krishna Rao, an officer in malaria department filed a complaint against the hospital for negligent conduct in treating his wife. His wife was wrongly treated for typhoid fever instead of malaria fever, due to the wrong medication provided by the hospital. Finally, the verdict was given and Rao was awarded a compensation of  Rs 2 lakhs.  In this case, the principle of res ipsa loquitor (thing speak for itself) was applied and the compensation was given to the plaintiff.Defense of Medical ProfessionIn defense of medical profession Supreme court in  Kusum Sharma & Ors vs. Batra Hospital and Medical Research case held that the law of negligence has to be applied according to facts and circumstances of individual case. No one can ignore that medicine is an evolving science, and there is no precise outcome of effect for every person. The operations involve certain calculated risk which cannot be denied because of complication in the operation if some risk is done, the doctors cannot be held liable for negligence as the patient himself has consented to the risk involved in the operation.In another case of Jacob Mathew .V. State of Punjab, the Supreme court held that in some cases of medical profession the doctors are equipped in certain situation where they have to make choices between a devil and the deep sea. Sometimes in certain situation there must be greater risk in the operation but higher chances of success and in another move there would be lesser risk but higher chances of failure. So the decision, that which course would be follow will depend on facts and circumstances of case.ConclusionOn the scrutiny of leading medical negligence cases of India, certain principles should be taken into consideration while pronouncing the judgment in medical negligence cases.1. Negligence should be guided upon the principle of reasonableness of common man prudence and negligence must be established in order to give the compensation in certain cases.
2. Medical profession requires certain degree of skill and knowledge, so the standard of care in cases of medical professional is generally high and should also be taken into account while giving the judgment.
3. A medical professional can be only held liable, when the standard of care is reasonably is less than the reasonable care that should be taken from a competent practitioner in that field.
4. When a choice has to be made between certain circumstance when there is higher risk involved and greater success is involved and lesser risk with higher chances of failure, the facts and circumstances of the individual case should be taken into the consideration.
5. No negligence will apply on medical professional, when he performs his duty with the utmost care that should be taken, and he had taken all the precaution.
6. Medical professional should not be harassed unreasonably and unwanted apprehension and fear should not be created on the medical fraternity that they can give their best in certain cases where it is required, they should be given some liberty in certain peculiar situation where they need to make their judgment without any apprehension freely. So that it can be beneficial for the society.

 MEDICAL NEGLIGENCE - DEFINITIONAL ASPECTSNegligence is simply the failure to exercise due care. The three ingredients of negligence are as follows:1. The defendant owes a duty of care to the plaintiff.
2. The defendant has breached this duty of care.
3. The plaintiff has suffered an injury due to this breach.

Medical negligence is no different. It is only that in a medical negligence case, most often, the doctor is the defendant.Proof of Medical NegligenceIt has been held in different judgments by the National Commission and by the Hon'ble Supreme Court that a charge of professional negligence against a doctor stood on a different footing from a charge of negligence against a driver of a vehicle. The burden of proof is correspondingly greater on the person who alleges negligence against a doctor. It is a known fact that even with a doctor with the best skills, things sometimes go wrong during medical treatment or in a surgery. A doctor is not to be held negligent simply because something went wrong. It is an admitted fact that the Complainant's eyesight was not restored after the operation was conducted by the Appellant but on this ground alone a doctor can not be held negligent because even after adopting all necessary precautions and care the result of the operation may not be satisfactory since it depends on various other factors. The contention of the Appellant was that the patient was suffering from diabetes and blood pressure and in many such cases eyesight is not restored after the operation however carefully it is done. In this case, there is nothing on record to show that something went wrong due to an act of the Appellant-doctor. There is no evidence to come to the conclusion that the Appellant fell below the standard of a reasonably competent practitioner in their field, so much so that their conduct might be deserving of censure. The Appellant cannot be liable for negligence because someone else of better skill or knowledge would have prescribed a different method of operation in different way. The evidence suggests that the Appellant has performed the operation and acted in accordance with the practice regularly accepted and adopted by him in this hospital and several patients are regularly treated for their eye problems. The Hon'ble Supreme Court in the case of Dr. Laxman Balkrishna vs. Dr. Triambak, AIR 1969 Supreme Court page 128 has held the above view and this view has been further confirmed in the case of the Indian Medical Association vs. Santha. The Apex Court and the National Commission has held that the skill of a medical practitioner differs from doctor to doctor and it is an incumbent upon the Complainant to prove that the Appellant was negligent in the line of treatment that resulted in the loss of eyesight. A Judge can find a doctor guilty only when it is proved that he has fallen short of a standard of reasonable medical care. The fact and circumstances of the case before us show that the Appellant has attended to the patient with due care, skill, and diligence. Simply because the patient's eyesight was not restored satisfactorily, this account alone is not grounds for holding the doctor guilty of negligence and deficient in his duty. It is settled law that it is for the Complainant to prove the negligence or deficiency in service by adducing expert evidence or opinion and this fact is to be proved beyond all reasonable doubt. Mere allegation of negligence will be of no help to the Complainant.[[7](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962/#CIT7)]**In medical negligence cases, it is for the patient to establish his case against the medical professional and not for the medical professional to prove that he acted with sufficient care and skill.** Refer to the decision of the Madhya Pradesh High Court in the case of Smt. Sudha Gupta and Ors. vs. State of M.P. and Ors., 1999 (2) MPLJ 259. The National commission has also taken the same view observing that a mishap during operation cannot be said to be deficiency or negligence in medical services. Negligence has to be established and cannot be presumed. Refer to the decision of the National Commission in the case of Kanhiya Kumar Singh vs. Park Medicare and Research Centre, III (1999) CPJ 9 (NC) – (2000) NCJ (NC) 12. A similar view has been taken by the MRTP Commission in the case of P.K. Pandey vs. Sufai Nursing Home, I (1999) CPJ 65 (MRTP) – 2000 NCJ (MRTP) 268. Followed by this, refer to the Commission in Vaqar Mohammed Khan and Anr. vs. Dr. S. K. Tandon, II (2000) CPJ 169. Both the lower Fora have held that there is no evidence brought on record by the Complainant to show that there was any negligence by the Respondent while implanting the lens in the eye of the Complainant resulting in a persistent problem in the left eye.All data collected from various sources.Dr.Vishwajeet Singh |