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EXAMINING LIABILITIES ARISING FROM DOCTOR'S NEGLIGENCE

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1. Introduction

Negligent behaviour can be perceived at different levels in our daily lives. Instances of negligence in the medical profession is not a new phenomenon. Most people do not know the Hippocratic oath[1] by heart, but what they do expect from their doctors is dedication and compassion. In our fast-paced and increasingly materialistic world today, these and a host of other qualities expected in doctors often come at a high price, if at all. Like everything else in our world today, medical treatment and healing have become expensive, sometimes even exploitative, treated as commodities. It is difficult to find doctors who will take the time to listen to a patient's problems and suggest remedies that will actually work. All of us have heard some stories about doctor's negligence e.g., while performing operation doctors keeping his wristwatch or gauge or scissors inside the patient's body. Doctors and drugs are the two main factors playing important role in health sector. The doctors are very distinguished

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1. HIPPOCRATES, the celebrated Greek physician, was a contemporary of the historian Herodotus. He was born in the Island of Cos between 470 and 460 B.C., and belonged to the family that claimed descent from the mythical AEsculapius, son of Apollo. There was already along medical tradition in Greece before his day, and this he is supposed to have inherited chiefly through his predecessor Herodicus; and he enlarged his education by extensive travel. He is said, though the evidence is unsatisfactory, to have taken part in the efforts to check the great plague which devastated Athens at the beginning of the Peloponnesian war. He died at Larissa between 380 and 360 B.C. The works attributed to Hippocrates are the earliest extant Greek medical writings, but very many of them are certainly not his. Some five or six, however, are generally granted to be genuine, and among these is the famous "Oath." This interesting document shows that in his time physicians were already organized into a corporation or guild, with regulations for the training of disciples, and with an esprit de corps and a professional ideal which, with slight exceptions, can hardly yet be regarded as out of date. One saying occurring in the words of Hippocrates has achieved universal currency, though few who quote it today are aware that it originally referred to the art of the physician. It is the first of his "Aphorisms": "Life is short, and the Art long; the occasion fleeting; experience fallacious, and judgment difficult. The physician must not only be prepared to do what is right to himself, but also to make the patient, the attendants, and externals cooperate. < http://members.tripod.com/nktiuro/hippocra.htm > accessed on June 15, 2005.

class of professionals and it is always expected that they shall exercise care and caution while they are performing professional duties. Despite taking all precautions doctors tend to commit professional blunders which tantamount to negligence. The national dailies in Bangladesh contain lots of news about death or injury of patients due to negligence of doctors almost everyday. Awareness must be created about the issue 'doctor's negligence or medical negligence' so that both the doctors and ordinary people alike can get the protection of law. The issue 'negligence in health care' is so important that the World Health Organisation (WHO) in the year of 1993 selected the theme *Handle life with care; prevent violence and Negligence* as its slogan.

2. Background discussion

Health is the greatest of all possessions reflecting the age old proverb 'if health is lost everything is lost'. The Constitution of the People's Republic of Bangladesh, 1972, in its *Art.32* states that everybody shall have the right to life and this right is constitutionally guaranteed[2] i.e., if anybody is deprived of the enjoyment of his life then he can go to the Court of Law for the enforcement of his right. Sound health is the pre-condition to enjoy this right to life peacefully. It is but an unwritten rule of nature that one's health does not always remain fully fit, sometimes owing to reasons beyond our control that is when we have to visit doctors and seek professional advice. Hence doctors play a role of paramount importance. Due to doctor's negligence sometimes we have to suffer immeasurably to the extent that a good number of people have died prematurely due to such callous disregard of peoples' faith.

Broadly speaking, the Constitution has classified various rights of the citizens in two broad categories i.e. Civil and Political Rights and Economic, Social and Cultural Rights. The first category rights are located in Part III titled "Fundamental Rights" (Articles 27- 44) and the second category rights are placed in Part II under the heading "Fundamental Principles of State Policy" (Articles 8 -25). Article 15 of the Bangladesh Constitution, while dealing with the provision of basic necessities, states in Article 15(1) that it shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a steady improvement in the material and cultural standard of living of the people, with a view to securing to its citizens the provision of the basic necessities of life, including food, clothing, shelter, education and medical care. It is the constitutional obligation of the Govt. of Bangladesh to attain the

2. Article 32, the Constitution of the People's Republic of Bangladesh, 1972.

fundamental principles of state policies. As a result the Government of Bangladesh adopted and enacted a good number of legislations.[3]

3. Defining negligence

Negligence is the mental attitude of undue indifference with respect to one's conduct and its consequence. The concept 'negligence' has been defined by different scholars in different ways. L.B. Curzon, in *Dictionary of Law* defined the term 'negligence' as the breach of a legal duty to take care, resulting in damage to the claimant which was not desired by the

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3. The Vaccination Act, 1880 (Bengal Act V of 1880); The Epidemic Diseases Act, 1897 (Act No. III of 1897); The Lepers Act, 1898 (Act No. III of 1898); The Glanders and Farcy Act, 1899 (Act No. XIII of 1899); The Mining Settlements Act, 1912 (Bengal Act II of 1912); The White Phosphorus Matches Prohibition Act, 1913 (Act No. V of 1913); The Medical Degrees Act, 1916 (Act No. VII of 1916); The Juvenile Smoking Act, 1919 (Bengal Act II of 1919); The Public Health (Emergency Provisions) Ordinance, 1944 (Ordinance No. XXI of 1944); The Undesirable Advertisements Control Act, 1952 (East Bengal Act No. XV of 1952); The Pure Food Ordinance, 1959 (East Pakistan Ordinance No. LXVIII of 1959); The Eye Surgery (Restriction) Ordinance, 1960 (Ordinance No. LI of 1960); The Medical Colleges (Governing Bodies) Ordinance, 1961 (Ordinance No. XIII of 1961); The Allopathic System (Prevention of Misuse) Ordinance, 1962 (Ordinance No. LXV of 1962); The Cantonment Pure Foods Act, 1966 (Act No. XVI of 1966); The Bangladesh College of Physicians and Surgeons Order, 1972 (President's Order No. 63 of 1972); The *Bidi*- Manufacturer (Prohibition) Ordinance, 1975 (Ordinance No. LVII of 1975); The Pharmacy Ordinance, 1976 (Ordinance No. XIII of 1976); The Prevention of Malaria (Special Provisions) Ordinance, 1978 (Ordinance No. IV of 1978); The International Center for Diarrhoeal Disease Research, Bangladesh Ordinance, 1978 (Ordinance No. LI of 1978); The Medical And Dental Council Act, 1980 (Act No. XVI of 1980); The Medical Practice and Private Clinics and Laboratories (Regulation) Ordinance, 1982 (Ordinance No. IV of 1982); The Drugs (Control) Ordinance, 1982 (Ordinance No. VIII of 1982); The Bangladesh Unani And Ayurvedic Practitioners Ordinance, 1983 (Ordinance No. XXXII of 1983); The Fish and Fish Products (Inspection and Quality Control) Ordinance, 1983 (Ordinance No. XX of 1983); The Bangladesh Homeopathic Practitioners Ordinance, 1983 (Ordinance No. XLI of 1983); The Bangladesh Nursing Council Ordinance, 1983 (Ordinance No. LXI of 1983); The Breast-Milk Substitute (Regulation of Marketing) Ordinance, 1984 (Ordinance No. XXXIII of 1984); The Drugs (Supplementary Provisions) Ordinance, 1986 (Ordinance No. XIII of 1986); The *Iodine Obhab Jonit Rog Protirod Ain*, 1989 (Act No. X of 1989); The *Tamakjat Samogry Biponon (Niontron) Ain*, 1988 (Act No. 45 of 1988); The *Madok Drobbo Niontron Ain*, 1990 (Act No. 20 of 1990); The *Paromanobik Nirapotta O Bikiron Niontron Ain*, 1993 (Act No. 21 of 1993); The *Bangabandhu Shiekh Mujibur Rahman Medical Bishwabidhalaya Ain*, 1998 (Act No. 1 of 1998); The Transplantation of Organ in Human Body Act, 1999 (Act No. V of 1999); The Bangladesh Protibondhi Kollan Ain, 2001, The Safe Blood Transfusion Act, 2002 (Act No. XII of 2002).

defendant. In the case of *Blyth vs. Birmingham Waterworks Co. (1856) 11 EX. 78,* the concept 'negligence' was defined as 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. *Actus non facit reun, nisi mens sit rea,* is a very well known maxim of Law of Tort which says that the act itself creates no guilt in the absence of a guilty mind. But this provision of Tort is not applicable in case of negligence i.e., sometimes absence of guilty mind can also create liability. So we need to examine the essential elements of negligence.

3.1 Essential Elements of Negligence

Negligence consists of unreasonable conduct, which causes harm in breach of a legal duty to take care to avoid harm of that kind.[4] So, there are three elements of negligence and they are: a duty to take care, breach of that duty and loss of the plaintiff as a result of the breach of duty. The elements are discussed as follows.

3.1.1 Duty of Care

The concept of negligence presupposes a duty of care. It is obvious that without having a duty to take care a person shall not be held liable. So, there must have been a 'duty' and that duty must be done 'carefully'. In the case of *Le Lievre vs. Gould [1893] 1 Q.B. 491, 497, 504,* A.L. Smith, LJ held that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. Again the mere fact that a man is injured by another's act gives in itself no cause of action unless there is *mens rea.* If the act involves lack of care, no case of actionable negligence will arise unless the duty to be careful exists.[5]

It is not easy to define the phrase 'duty of care'. It is far from easy to say when the courts will accept or deny that the defendant was under a common law duty to take care of the plaintiff's interests. Lord Atkin made a famous generalization in 1932, in the case of *Donoghue vs. Stevenson (1932), A.C. 562 at 580,* to the effect that a person owed a duty to another ("his neighbour") who, as he should have realized, was likely to be affected by what he was doing if he did it badly. Thirty-year later Lord Wilberforce extended it somewhat (the "two-stage" test). Neither formulation emphasized either the nature of the damage in issue (personal injury, property damage, mere economic loss?) nor the nature of the

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4. Weir, Tony, *A Casebook on Tort,* Sweet & Maxwell, London, 1997, p. 1.
5. *Grant vs. Australian Knitting Mills* [1936] *A.C. 86.*

conduct, apart from its being unreasonable (act or omission, action or speech?). These factors are nevertheless of great importance in the decision as to the existence of duty. The current view is that a duty arises where there is sufficient "proximity" between the parties (an amalgam resulting from the relationship between the parties and the nature of the plaintiff's interest), provided it would be "fair, just and reasonable" to impose a duty (which means "to impose liability in the event of damaging carelessness").

In modern times, to define the "duty of care", the House of Lords laid down three-stage test in the *Caparo Industries Plc vs. Dickman [1990] 1 All E.R. 568.* In this case, it was decided that the Court must now consider the following three stages-

3.1.1.1 The first stage

The first stage is whether the consequences of the defendant's act were reasonably foreseeable. It is purely a question of fact. As for example, in the case of *Jolley vs. Sutton London Borough Council [2000] 3All E.R. 409*, the defendant council left lying (for at least two years) a boat on their land outside some flats. The 14 years old claimant and his friend decided to repair it. They jacked it up but, while they were at work, the boat fell on the claimant and caused him serious injuries. The defendants accepted that they had been negligent in falling to remove the boat but contended that the accident was not one that they could have reasonably foreseen. In allowing the defendant's appeal the Court of Appeal accepted this connection, but the House of Lords saw things differently and held that the accident had been reasonably foreseeable. But in the case of *Bourhill vs. Young [1943] A.C. 92*, the plaintiff was "not in any way physically involved in the collision". The defendant's motor cycle was already some 45 feet past the plaintiff when he collided with a motor car, and was killed. The plaintiff was on the far side of a tramcar, and so shield from the physical consequences of the accident. If, therefore, liability was to be established, it could only be on the basis that the defendant should have foreseen injury by nervous shock. The plaintiff did, in fact, suffer injury to her health as a result of the shock which she sustained. But as the defendant could not reasonably foresee that she would suffer injury by shock, it was held that she could not recover compensation. Again, in the case of *Topp vs. London Country Bus Ltd [1993] 3All. E.R. 448*, the defendants left their mini-bus unattended with the irrigation key visibly in place for nine hours at a bus-stop outside a *pub*. At 11.15 p.m. a person unknown drove it away, and five minutes later knocked down and killed Mrs. Topp who was cycling home. The trial judge held that there was proximity between Mrs. Topp and the defendants but that it would not

be fair, just and reasonable to impose a duty of care on the defendant. The Court of Appeal upheld this decision.

3.1.1.2 The second stage

The second stage is whether there is a relationship of proximity between the parties, i.e., a legal relationship or physical closeness. The existence of relationship of proximity between the parties varies from case to case. Say for example, in the case of *Home Office vs. Dorset Yacht Co. [1970] A.C. 1004*, seven Brostal boys, five of whom had escaped before, were on a training exercise on Brownsea Island in Poole Harbour, and ran away one night when the three officers-in-charge of them were, contrary to instructions, all in bed. They boarded one of the many vessels in the harbour, started it and collided with the plaintiff's yatch, which they then boarded and damaged further. The court held that there was a relationship of proximity. But in the case of *Caparo Industries Plc vs. Dickman [1990] 1 All E.R. 568*, the directors of Fidelity Plc announced unexpectedly poor results in May 1984 shares in Fidelity with a take-over in view. Four days later the counts, Touche Ross, were issued to shareholders as provided by statute, and Caparo bought a further 50,000 shares. Finally Caparo bought all the rest at a price of £125. This proved to be a very bad bargain, since far from making a profit of £1.3 million as indicated by the accounts, Fidelity had made a loss of £ 4,00,000. In addition to claiming (and obtaining) damages in deceit from Fidelity's directors, Caparo sued the auditors for negligence, alleging that it had bought the shares in reliance on the accounts and that they would not have bought them at that price or at all if the accounts had presented, as they said they did, a true and fair view of Fidelity's position. Hence, the court held that there was no proximity between the parties.

3.1.1.3 The third stage

The third stage is whether in all the circumstances it would be fair, just and reasonable that the law should impose a duty. As for example, in the case of *Hill vs. Chief Constable of West Yorkshire (1988) 2All E.R. 238*, the court held that it was not to be fair, just and reasonable to impose a duty on the police. However, a duty was imposed on the fire brigade in the case of *Capital vs. Hampshire County Council (1997)*.

3.2 The Breach of Duty

The second element of negligence is that to make a man liable there must be a breach of that duty. While performing the duty a person should take reasonable care. Otherwise he will be liable for the breach of that duty.

In *Bolton vs. Stone (1951) 2 All ER 1078 (HL)*, during a game of cricket the ball was hit out of the park hitting the plaintiff who was standing on a

nearby highway at a distance of about 100 yards from the batter. Over the whole history of the cricket park a ball had been hit that far only about six times in 30 years.

The House of Lords found that there was no negligence. They calculated whether the defendant had a duty to the plaintiff by taking into account the foressability of the risk was and the cost of measures to prevent the risk.

Lord Porter has observed that the following conditions must be satisfied to make a man reasonable in an action of negligence-

(a) A reasonable possibility of the happening of the injurious event;

(b) There must be sufficient probability to lead a reasonable man to accept it.

3.2.1 The Standard Expected

It is clear that to make a man negligent it has to be proved that that person has not followed the standard of care. It should be kept in mind that standard of care will be different for different categories of people i.e. specific rules shall be applied if the defendant is a child[6], a learner,[7] experts or a professional. In the case of *Bolam vs. Friern Barnet Hospital (1957)*[8] the plaintiff broke his pelvis during electro-convulsive therapy treatment at the defendant's hospital. He alleged that the doctor was negligent in not warning him of the risks of the treatment, in not giving relaxant drugs before the treatment, and in not holding him down during the treatment. It was held that the defendant was not negligent. The decision of this case was exhaustively discussed. In the case of *Whitehouse vs. Jordan [1981] 1 All E.R. 267,* it was held that error of judgement made a doctor liable in the case of negligence; whereas in the case of *Nettleship vs. Weston [1971] 2 Q.B. 691,* the defendant asked the plaintiff, who was a friend and not a professional driving instructor, to teach her to drive her husband's car. On being assured that there was fully comprehensive insurance cover, he agreed to do so. During the third lesson the defendant stopped at a junction prior to turning left. The plaintiff engaged first gear for her, and she started to turn slowly to the left. Her grip on the steering wheel tightened implacably, and despite the plaintiff's advice and efforts, the car followed a perfect curve, mounted the nearside pavement and struck a lamp post with sufficient impact to

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6. *Mullin vs. Richards [1998] 1 All E.R. 920.*
7. *Wilsher vs. Essex Health Authority [1986] 3 All E.R. 810,* H.L.
8. Q.B. 1957, 1 W.L.R 582; 101 S.J. 357; 1957, 2 All E.R. 118.

fracture the plaintiff's knee. It was held by Lord Denning that the driver owes a duty of care to every passenger in the car, just as he does to every pedestrian on the road; and he must attain the same standard of care in respect of each. But in all other cases, the court will consider the following four factors in deciding if there has been a breach of duty:

3.2.1.1 The degree of risk involved

Here the court will consider the likelihood of harm occurring. There may have either no known risk or a low risk[9] or there may have a known risk.[10]

3.2.1.2 The practicability of taking precautions

The courts expect people to take only reasonable precautions and not excessive precautions in guarding against harm to others.[11]

3.2.1.3 The seriousness of harm

Sometimes, the risk of harm may be low but this will be counter-balanced by the gravity of harm to a particularly vulnerable claimant.[12]

3.2.1.4 The social importance of the risky activity

If the defendant's actions served a socially useful purpose then he may have been justified in taking greater risks.[13]

3.2.2 Proof of Breach

The claimant must produce evidence which infers a lack of reasonable care on the part of the defendant. However, if no such evidence can be found, the necessary inference may be raised by using the maxim *res ipsa loquitur*, i.e., the thing speaks for itself.[14]

3.3. Damage caused by breach of duty

The third element of negligence is that the plaintiff must suffer damage due to the breach of that duty. To prove this element the claimant must prove that harm would not have occurred 'but for' the negligence of the defendant,[15] where there are a number of possible causes of injury, the claimant must prove that the defendant's breach of duty caused the harm

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9. *Roe vs. Minister of Health [1954] 2 Q.B. 66, Bolton v Stone [1951] 2 All E.R. 1078 (HL).*
10. *Haley vs. London Electricity Board [1964] A.C. 778.*
11. *Latimer vs. AEC Ltd. [1952] 1 All ER 1302.*
12. *Paris vs. Stepney Borough Council [1951] A.C. 367.*
13. *Watt vs. Hertfordshire County Council [1954] 1 W.L.R. 835; 2 All E.R. 368.*
14. *Scott vs. London & St Katherine Dock Co [1865] 3 H. & C. 596.*
15. *Barnett vs. Chelsea & Kensington Hospital [1968] 1 All ER 1068.*

or was a material contribution.[16] Again, the opinion of the Privy Council was that a person is responsible only for consequences that could reasonably have been anticipated and not for any other consequences.[17] The defendant will be responsible for the harm caused to a claimant with a weakness or predisposition to a particular injury or illness.[18] If harm is foreseeable but occurs in an unforeseeable way the defendant may still be liable.[19] However, there are two cases where the judges reversed this decision.[20]

4. Defining doctor's negligence

Doctor's negligence or medical professional negligence can be defined as a dereliction from medical professional duty or failure to exercise an accepted degree of medical professional skill or learning rendering medical services which result in injury, loss, or damage. It may again be defined as absence of reasonable care and skill or willful negligence of a medical man in course of treatment of patient resulting in bodily injury or death. Actually it is nothing but the failure in the exercise of a reasonable degree of skill and care on the part of a medical practitioner in the treatment of a patient.

4.1 Essential elements of Doctor's negligence

There are four elements that must be present in a given situation to prove a health care professional guilty of negligence. Sometimes called the "Four D's of Negligence" these elements include: **duty** i.e., the person charged with negligence owed a duty of care to the accuser, **derelict** i.e., the health care provider breached the duty of care to the patient, **direct cause** i.e., the breach of the duty of care to the patient was a direct cause of the patient's injury and **damages** i.e., there is a legally recognizable injury to the patient. When a physician (the defendant) is sued by a patient (the plaintiff) for negligence, the burden of proof is on the plaintiff. That is, it is up to the patient's lawyer to present evidence of these four Ds.

4.1.1 Duties of a doctor

A doctor has to perform some duties which are voluntary in nature like he must use average degree of skill, care, judgment and attention during

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16. *Wilsher vs. Essex AHA [1988] 3 All E.R. 810, H.L*
17. *The Wagon Mound [1961] 1 A.C. 617.*
18. *Smith vs. Leech Brain & Co [1961] 2 Q.B. 405.*
19. *Hughes vs. Lord Advocate [1963] A.C. 837.*
20. *Doughty vs. Turner Manufacturing [1964] 1 All ER 98, Crossley vs. Rawlinson [1981] 3 All ER 674.*

treatment, continue the treatment unless he has given due notice for discontinuing his treatment, use clear and proper instruments and appliance, furnish his patient with proper and suitable medicine, if the doctor has his own dispensary, otherwise he should give legible prescription maintaining full and detailed instructions, give full direction in simple language, advice for higher consultant (specialist) under certain circumstances, must maintain professional secrecy, issue medical certificates when needed. All these duties are voluntary duties and it will be presumed that a doctor is quite aware of all these duties.

A doctor has some duties towards the community like notification of infectious diseases like Plague, Cholera, Small pox etc., information of birth and death, notification of any new dangerous disease, e.g., viral infection (Typhoid fever) AIDS, etc., notification of fitness of servant and employees for their employment if known to the medical practitioner, reporting to law enforcing agencies in cases of homicidal poisoning, reporting of certain cases falling under category of privileged communication especially as regards moral and social duties and responsibility in criminal cases, reporting of unnatural deaths.

Besides one of the main obligations of medical profession is that a doctor must follow the ethical principles mentioned in the International Code of Medical Ethics, 1949 (popularly known as Geneva Declaration accepted by the General Assembly of the World Medical Association in London on October 12, 1949).[21] A doctor has to take an oath in the form of promises solemnly, freely and upon by honour where among many other words the doctor has to promise that he solemnly pledge himself to consecrate his life to the service of humanity, he will practise his profession with conscience and dignity, the health of his patient will be his first consideration, he will respect the secrets which are confided in him.

In the case of *Dr. Lakshman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole, AIR 1969 SC 128 at pp. 131-132,* it was held that a medical practitioner, when consulted by a patient, owes him the following duties:

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21. After the serious violations of medical ethics by Fascist doctors in Germany and Japan during the 1939-45 war, when horrific experiments were carried out in concentration camps, the international medical community in 1948 re-stated the Hippocratic Oath in a modern form in the Declaration of Geneva. In 1948, an international medical conference was held in Geneva, which adopted a Declaration for oath to be taken by all the registered practitioners. It was accepted at the assembly of World Medical Association held in London in October 12, 1949. Now a day this is the basis of all internationally accepted code of Medical Ethics.

(a) a duty of care in deciding whether to undertake the case;

(b) a duty of care in deciding what treatment to give; and

(c) a duty of care in the administration of the treatment.

A breach of any of the above mentioned duties give a right of action for negligence to the patient.

4.1.2 Breach of duty

A doctor should always maintain professional secrecy. A doctor should not discuss the illness of his patient with others without the consent of the patient. He should not answer any enquiry by third parties even when enquired by near relatives of the patient, either with regard to the nature of illness or with regard to any subsequent effect of such illness on the patient without the consent of the patient. He should not disclose any information about the illness of his patient without the consent of the patient, even when requested by a public or statutory body, except in case of notifiable diseases. If the patient is a minor or insane consent of the guardian should be taken. If the patient is a major, the doctor should not disclose any facts about the illness without his consent to parents or relatives even though they may be paying the doctor's fees. In the case of a minor or an insane person, guardians or parents should be informed of the nature of the illness. Even in the case of husband and wife, the facts relating to the nature of illness of the one must not be disclosed to the other without the consent of the concerned person. When a domestic servant is examined at the request of the master, the doctor should not disclose any facts about the illness to the master without the consent of the servant, even though the master is paying the fees.

When a doctor examines a Government servant on behalf of the Government, he cannot disclose the nature of the illness to the Government without the patients consent. A person in police custody as an under trial prisoner has the right not to permit the doctor who has examined him, to disclose the nature of his illness to any person. If a person is convicted, he has no such right and the doctor can disclose the result to the authorities. The medical officer of a firm or factory should not disclose the result of his examination of an employee to the employers without the consent of the employee. The medical examination for taking out life insurance policy is a voluntary act by the examinee and therefore, consent to the disclosure of the finding may be taken as implied. A doctor should not give any information to an insurance company about a person who has consulted him before, without the patient's consent. Any information regarding a deceased person may be given only after obtaining the consent from the nearest relative. In divorce and nullity

cases, no information should be given without getting the consent of the person concerned. Medical Officers in Government service are also bound by the code of professional secrecy, even when the patient is treated free. In reporting a case in any medical journal care should be taken that the patient's identity is not revealed from the case notes or photographs. In the examination of a dead body certain facts may be found, the disclosure of which may affect the reputation of the deceased or cause distress to his relatives and as such, the doctor should maintain secrecy.

4.1.2.1 *Res Ipsa Loquitur*

The English equivalent of the Latin maxim "*Res Ipsa Loquitur*" is "the thing speaks for itself". It means that to make a person liable, it is not always necessary to prove that a person was negligent. Sometimes the nature of his job will clearly spells out that the person was negligent. As for example if it is found that a doctor finishes operation while keeping scissor inside of the patient's stomach it is a clear case of "*Res Ipsa Loquitur*".

To apply the Rule three things must be satisfied i.e., (a) in the absence of negligence the injury would not have occurred ordinarily, (b) the defendant had exclusive control over the injury producing instrument or treatment, and (c) the plaintiff was not guilty of contributory negligence. This enables the plaintiff's lawyer to prove his case without medical evidence. Prescribing overdose of a medicine producing ill effects, giving poisonous medicines carelessly, failure to removes swab, instrument during operation, failure to give T.T. in case of injury causing tetanus, burns from application of hot water bottle or from excessive X-ray therapy, misadventure with blood transfusion.

4.1.2.2 Novus Actus Interveniens

The principle of *Novus Actus Interveniens* states that a person is responsible not only for his actions but also for the logical consequences of those actions. That is, if a doctor conducts an operation and that is a bad one and as a result the patient has to suffer infection then the doctor will be liable for both the wrong operation and for the infection. This principle is applied to cases of assault and accidental injury.

4.1.2.3 Doctor's duty and Privileged Communication

The word "privileged" in law is used to mean an exceptional right, immunity or exemption belonging to a person by virtue of his status or office. The phrase "privileged communication" means communication made to a person by virtue of his status or office. Though sections 126-132 of the Evidence Act, 1872 does not consider the relationship between

doctors and patient as privileged one but if we take into account the theme it will be clear to us that there is a privileged relation between doctor and patient. Under the above-mentioned sections, the persons who are enjoying the communication of privilege must not disclose the fact he obtained due to his status or office. "Breach of privileged communication" in relation to doctors may be defined as a statement made by a doctor to the authorities concerned, *bona fide* and without malice, in the interests of the community or the public towards whom he has a legal, social or moral duty, although such communication under normal conditions contravenes the general rule of professional secrecy. Breach of privileged communication is justifiable in the following cases.

In case of an infectious diseases, if a patient is suffering from an infectious disease and is employed as cook or waiter in a hotel, as children's nurse etc., the doctor may pursue him to leave the job until he becomes non–infections. If the patient refuses to accept this advice the doctor can disclose it to the employer of his patient.

Again, in case of servants and employees, if an engine or bus driver, ships officer or aeroplane pilot may be suffering from epilepsy, Parkinson's disease, malignant hypertension, alcoholism, drug addiction or colour blindness, then the doctor's first duty in such a case is to try to get the patient to change his employment pointing out to him the dangers of his present occupation, both to himself and to the public. If this fails, the doctor should inform the employer that the patient is unfit for that kind of employment.

In case of venereal diseases, if a person is suffering from syphilis or gonorrhea and is going to marry, it is the duty of the doctor to advise the patient not to marry till he is cured, if the person refuses, he can disclose the matter to the woman to whom he is getting married, or to her parents. It is also similarly applicable to females. Swimming pools should be prohibited to those having syphilis and or gonorrhea, but if the person refuses, the authorities can be informed. The doctor can also inform the hostel superintendent, if any boarder is suffering from such venereal diseases.

In case of laying information of a suspected crime, e.g., murder, the doctor is bound to give information to the police. Again, when the patient brings either civil or criminal actions against the doctor, evidence about the patient's condition may be given without any hesitation. Besides, a doctor can warn the parents about the suicidal tendency of the patient.

5. Kinds of Doctor's Negligence

Doctor's negligence is manifest in a number of ways. However, in the

broad sense, Doctor's negligence can be divided into two categories namely civil and criminal.

5.1 Civil negligence

It is a form of negligence in which a patient brings an action against his physician in the civil court for injury or damage caused to him as a result of breach of his legal duty to exercise skill and care, i.e., his professional duty necessary in the circumstances of the case. Failure to prescribe tetanus toxoid to a patient of multiple road injuries, breaking of needle during injection, medical examination of a person against his or her consent, prescribing overdose of medicine and causing harm, giving poisonous drug carelessly, loss or damage of limbs due to prolonged or careless plastering, burns due to careless deep X-ray or burns due to application of extreme hot water bottles, prescribing overdoses of medicine and causing harm can be examples of civil negligence.

The question of civil negligence arises in two circumstances i.e., where in case of death of a patient, his relative brings a civil suit for realisation of compensation from the doctor and when a doctor brings a civil suit for recovery of his fees from his patient or patient's relative who refused to pay on the ground of professional negligence.

5.2 Criminal negligence

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable or proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted.[22] It is a form of negligence in which the physician exhibits gross lack of competency, gross inattention, criminal indifference to the patient's safety or gross negligence in the selection and application of remedies resulting in death or serious injury to the patient. Examples of criminal negligence may be performing criminal abortion,[23] issuing false medical certificates,[24] leaving instrument or swabs in the site of operation after performing operation, gross mismanagement of delivery of a woman especially by a doctor addicted to the inhalation of anesthesia, grossly incompetent administration of a general anesthetic by a doctor addicted to the inhalation of anesthetic, use of wrong drug in the eye causing loss

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22. Per Straight J., in *Idu Beg, (1881) ILR 3 All 776, 780; Attra, (1891) PR no. 9 of 1891; Bhalchandra, (1968) 71 Bom LR 634, (SC)*
23. Sections 313 and 314 of the Penal Code, 1860.
24. Sections 191 and 192 of the Penal Code, 1860.

of vision or damage of the eye, amputation of wrong finger or leg or operation on wrong limb or wrong patient, gangrene due to very tight plaster, causing paralysis after splints, dressing with corrosive instead of bland liquid, removal of wrong organ or errors in ligation of ducts, damages caused by mismatched blood transfusion.

The question of criminal negligence arises in three circumstances i.e., when a doctor shows gross absence of skill or care in the course of treatment resulting in serious injury to or death of the patient by acts of omission or commission, when a doctor performs an illegal act, so as to abuse his rights and duties, when an assaulted person dies the defence may attribute the death to the negligence or undue interference in the treatment of the deceased by the doctor.

Where death is caused involuntarily by professional negligence, there it is necessary for criminal conviction that there is a duty, there is breach of that duty amounting to gross negligence and the causing of death. In a case two junior doctors erroneously injected a substance into the spine of a youth who died;[25] an electrician fitted into a house an electric programmer which electrocuted a person.[26] They were convicted for manslaughter. They appealed. The doctors and the electrician succeeded in their appeal. The court said that gross-negligence may be shown by indifference to an obvious risk or by foresight of the risk and a determination to run the risk or attempting to avoid the risk with such a degree of negligence that a conviction is justified or by failure to avert a serious risk going beyond mere inadvertence in respect of an obvious and important matter which demanded the accused person's dutiful attention.

From the above discussion it is clear that there are some differences between civil and criminal negligence.

5.3 Difference between Civil and Criminal negligence

As regards the offence, in civil negligence, no specific or clear violation of law need to be proved but in criminal negligence violation of law must be specifically proved. Again, if there is simple absence of care and skill it is civil negligence whereas if it is willful, wanton, gross or culpable, it is criminal negligence. The single test to make a doctor civil negligent is it is compared to a generally accepted simple standard of professional conduct, in criminal negligence, no such single test can be suggested. Consent by the patient for doing an act is a good defence in civil

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25. *R vs. Prentice, [1993] 3 WLR 927 (CA).*
26. *R vs. Adomako, [1993] 3 WLR 927 (CA).*

negligence, which cannot be presented in criminal negligence. Preponderance of evidence is sufficient as evidence in civil negligence but the guilt should be proved beyond reasonable doubt in case of criminal negligence. The accused is liable to pay damages or compensation in civil negligence, whereas the accused will be punished with fine or imprisonment or with both in criminal negligence. Civil negligence can be tried twice, which is not possible in criminal negligence.

6. Examining Liabilities arising from Doctor's Negligence

Courtesy, compassion and common sense are often cited as the "three C's", most vital to the professional success of health care practitioners. In absence of these "three or any one of the C's", the doctors have to face some legal consequences.

6.1 Negligence in Bangladeshi Law

In the recent past, a growing tendency has been witnessed to label every incident of medical mishap as gross negligence amongst law enforcing agencies, mass media and public. The criminal cases against the doctors were registered under Section 304 of the Penal Code, 1860 (Culpable homicide amounting to murder) and 304A of the Penal Code, 1860 (Rash and negligent act) against the doctors. This has led to a situation, where doctors were always apprehensive of a sword hanging on their head while treating a patient. A large majority of doctors have started using defense medicine whereby increasing the cost of treatment. Many of the doctors avoided using useful procedures just to save them from criminal liability. Referring of patient to specialist for the sake of avoidance became routine. Since, majority of the patients in our country belong to poor socioeconomic strata, it is beyond their reach to cough out the cost of treatment from specialists and super-specialists.

Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under section 304A of the Penal Code, 1860.

The accused, a Homoeopathic practitioner, administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf of *dhatura* without studying its effect; the patient died of poisoning. The accused was held guilty under section 304A of the Penal Code, 1860.[27]

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27. *Juggankhan, AIR 1965 SC 831.*

Again, compounder in order to make up a fever mixture took a bottle from a cupboard where non-poisonous medicines were kept and without reading the label of the bottle which was in its wrapper added its full contents to a mixture which was administered to eight persons out of whom seven died. The bottle was marked poison and contained strychnine hydrochloride and not quinine hydrochloride as was supposed. It was held that the compounder was guilty under section 304A of the Penal Code, 1860.[28]

To be criminal in nature, the negligence must be willful, wanton, gross or culpable. For criminal malpraxis the doctor may be prosecuted by the police and charged in criminal court under sections 304A and 337 of the Penal Code, 1860 which deals with causing death by negligence. The provisions of section 304A apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death.[29]

A hakim (native physician) performed an operation of the eye with an ordinary pair of scissors and sutured the wound with an ordinary thread and needle. The instruments used were not disinfected and the complainant's eye-sight was permanently damaged. It was held that the *hakim* had acted rashly and negligently, and was guilty under section 336 of the Penal Code, 1860 as there was no permanent privation of the sight of the eye.[30]

Again, the single Act, which deals with the negligence or malpractice of the doctor to some extent, is the Bangladesh Medical and Dental Council Act, 1980 (Act No. XVI of 1980). This Act was passed to repeal and, with certain modifications, re-enact the Medical Council Act, 1973, to provide for the constitution of a Medical and Dental Council, for regulating registration of medical practitioners and dentists and also for the purpose of establishing a uniform standard of basic and higher qualifications in medicine and dentistry.

The second proviso to section 5(2) of the Act says that a doctor shall be deemed to have vacated his seat if he is declared by a competent court of law to be of unsound mind, or insolvent, or is convicted for a criminal offence involving moral turpitude, including unprofessional and

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28. *De Souza, [1920] 42All 272.*
29. *Sukaroo Kobiraj, (1887) 14 Cal 566, 569 Chhallu, (1941) All 441.*
30. *Gulam Hyder Punjabi, (1951), 17 Bom LR 384, 39 Bom 523.*

infamous conduct. The Act only contains provision relating to covering[31] and the prescribed punishment is fine up to 2000/= or imprisonment for up to 2 years.[32] Section 28 says that the Bangladesh Medical and Dental Council can remove the name of the Doctor for the abovementioned reasons.

6.2 Different tests to determine Doctor's negligence

Since we do not have specific provision of law relating to the negligence of doctor's we have to taken into consideration different opinions given by learned judges in different cases. On the basis of those decisions we have cited here different tests to determine the doctor's negligence.

6.2.1 Reasonable skill and care

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. The doctor, no doubt, has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency. The question for the judge had been whether the surgeons in reaching their decision displayed such a lack of clinical judgment that no surgeon exercising proper care and skill could have reached that same decision.[33]

What will be the consequence if an act which is done by an ordinary doctor is done by a specialist? A surgeon or anesthetist will be judged by the standard of an average practitioner of class to which he belongs or holds himself out to belong.[34] But in the case of specialist, a higher degree of skill is needed.[35]

In the case of *Dr. Lakshman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole, AIR 1969, SC 128,* the son of the respondent, aged about 20 years, met with an accident on a sea beach, which resulted in the fracture of the femur of his left leg. He was taken to the appellant's hospital for treatment. The appellant did not give an anaesthetic to the patient but

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31. The term 'covering' means association with unqualified or unregistered person practicing medicine in such a way that members of public are misled as to their true status.
32. Section 25, the Bangladesh Medical and Dental Council Act, 1980 (Act No. XVI of 1980).
33. *Hughes vs. Waltham Forest Hospital Authority, 1990, Times L.R. 714.*
34. *Dr. P. Narshima Rao vs. G. Jayaprakasu, AIR 1989 A.P. at p. 215.*
35. *Dr. P. Narshima Rao vs. G. Jayaprakasu, AIR 1989 A.P. at p. 215.*

contented himself with a single dose of morphine injunction. He used excessive force in going through this treatment, using three of his attendants for pulling the injured leg of the patient. He then put this leg in plaster of paris splints. The treatment resulted in shock, causing the death of the patient. The doctor was held guilty of negligence by the Supreme Court.

If the doctor does not take proper or reasonable care he will be liable. In C. *Sivakumar vs. Dr. John Mathur & Another, 1998,*[36] the complainant had the problem of blockage of urine. The opposite party, a doctor, with an attempt to perform the operation for curing the problem, totally cut off the complainant's penis. There was enormous bleeding, and the complainant now could not pass urine and became permanently impotent. It was held that there was deficiency in service and the opposite party was directed to pay compensation to the complainant.

In *Lakshmi Rajan vs. Malar Hospital Ltd., 1998,*[37] the complainant, a married woman, aged 40 years noticed development of a painful lump in breast. The opposite party hospital while treating the lump, removed her uterus without justification. It was held to be a case of deficiency in service for which the opposite party was required to pay as compensation to the complainant.

It is the duty of the doctors to render services to community. The Doctors may say that it is their constitutional right not to work as the Constitution of the People's Republic of Bangladesh, 1972 prohibited forced labour, but as when they take oath according to the Geneva Declaration, 1949, they cannot stop from offering their services. There may be some other ways to establish their claim. In *Dr. Mohiuddin Farooque vs. Bangladesh and Others, 1994 (Writ Petition No. 1783/1994),* one Dr. Mohiuddin Farooque filed a writ petition on 3.10.1994 requesting the intervention of the High Court Division of the Supreme Court in restoring the public medical services and care all over the country, which had been disrupted by the continuous strike of. In that Writ Petition the petitioner challenged the continuance of strike by the doctors of all the Govt. Medical Hospitals, Health Complexes and Centres. It was submitted that due to a long strike by the government medical hospitals, health complexes and centers, the whole system for providing treatment for the people become paralysed, and the sufferings of the people knew no bounds. The High Court Division of the Supreme Court issued a Rule and granted a mandatory injunction to call off the strike of the BCS (Health) Cadre doctors of all the

36. 111 (1998) CPJ 436 (Tamil Nadu S.S.D.R.C.).
37. 111 (1998) CPJ 586 (Tamil Nadu S.C.D.R.C.).

government medical hospitals, health complexes and centers immediately with effect within 24 hours from the date of service of notice and to join their respective offices.

6.2.2 Difference of Opinion

Sometimes it may happen that one doctor differ from the opinion of the other doctors. As such if a patient suffers for that the doctor may not be held liable. In a Scottish Case, Lord President Clyde said: "In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of the others. The true test for establishing negligence in diagnosis or treatment on the part of a doctor of ordinary skill would be guilty of, acting it with ordinary care."[38]

6.2.3 Error of Judgement

Again if a doctor makes an error of judgement he cannot be found guilty of negligence. In the case of *Whitehouse vs. Jordan, 1981, 1 All E.R. 267,* a charge of negligence was brought against a senior registrar in charge of a childbirth in which the child suffered brain damage. The defendant realized that normal birth by contraction was impossible and attempted a trial by forceps in order to see whether delivery by forceps, a better method than Caesarean section, might be possible. The question was whether he pulled too long and too hard. The House of Lords unanimously held that the defendant did not pull too long and too hard.

In the case of *Dr. Suresh Gupta vs. Govt. of N.C.T. of Delhi & Another, 2003*[39] *(Criminal Appeal No. 778 of 2004),* a patient was operated for removal of nasal deformity. He died on the same date. The Post Mortem report mentioned the probable cause of death is "blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum". Medical records and opinion of experts committee did not give direct cause of cardiac arrest. It was held that where a patient's death results merely from error of judgment or an accident, no criminal liability should be attached to it. Mere inadvertence or some degree of want of adequate care and caution might create civil liability but would not suffice to hold him criminally liable. They further added, "It is not merely lack of necessary care, attention and skill. When a patient agrees to go for medical treatment or surgery, every careless act of the medical man cannot be termed as 'criminal'. It could be termed 'criminal' only

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38. *Hunter vs. Hanley, 1955, S.L.T. 213, 21.*
39. http://www.imakarnal.com/archives/supreme.htm (accessed on May 5, 2005).

when the medical man exhibited gross lack of competence or inaction and wanton indifference to his patient's safety and which is bound to have arisen from gross ignorance or gross negligence".[40] So, the doctors are not liable under Section 304A.

Advancement in technique is another problem for the doctors. Sometimes it may happen that a doctor used a technology which was best at the time of use but subsequently better technology was invented by which his previous treatment was proved to be erroneous. The law is silent in such places but in Europe, the Brussels Directive[41] left it to the various member states to decide whether to impose liability or not.

6.2.4 Decisions taken for the benefit of the Patient

In ordinary cases where the consequence of an act is foreseeable and if the doctor does not apply due diligence he will be liable. In the case of *Dr. P. Narsimha Rao vs. G. Jayaprakasu, 1990,* [42] the plaintiff, a brilliant student, aged 17 years, suffered irreparable damage in the brain due to the negligence of the surgeon and the anaesthetist. In this case, proper diagnosis was not done, and if the surgeon had not performed the operation, there was every possibility of the plaintiff being saved from the brain damage. The anaesthetist was also negligent in so far as he failed to administer respiratory resuscitation by oxygenating the patient with a mask or bag, which is an act of *per se* negligence in the circumstances. The plaintiff was, therefore, held entitled to claim compensation for the same.

It should be kept in mind that only in extremely necessary cases the doctor can take serious decisions otherwise he will be held liable. The question of professional negligence arose before the Madhya Pradesh High Court in *Ram Bihari Lal vs. Dr. J.N.Srivastava, 1985.*[43] In that case, the wife of the plaintiff complained of abdominal pain. The defendant was a Civil Assistant Surgeon and started her treatment, and when the treatment did not respond, the defendant advised plaintiff No.1 that this was to be *operated for appendicitis,* to which the plaintiff and his wife reluctantly agreed. The patient was put under chloroform anaesthesia. On incision, the appendix was found to be normal and not at al inflamed. The defendant then made another incision and removed the gall bladder

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40. *Lets doctors off the Hook,* The Times of India. Aug 6,2004.
41. The Council of the European Communities Directive of July 25, 1985.
42. A.I.R. 1990 A.P. 207.
43. A.I.R. 1985 M.P. 150 (D.B.), reversing the Single Bench decision, A.I.R. 1982 M.P. 132.

of the patient without taking her husband's consent for the same, although he had been waiting outside the operation theatre. The liver and the kidney of the patient, which were already damaged, has been further damaged due to the toxic effects of the chloroform and as a consequence of the same, the patient died on the third day after this operation. It was found that the operation had been performed in that ill-equipped hospital having no anaesthetical and other basic facilities like oxygen and blood transfusion, and without carrying on necessary investigations like urine test, which are necessary for carrying out any major operation, and without preparing the patient for the operation. Moreover, the second operation for removing the gall bladder was performed without the consent of the patient's husband, who was available, though the gall bladder was neither gangrenous nor was there any pus formation and therefore, it was not a case of emergency operation, and it took hours before the completion of operation when the patient was under the effect of chloroform. Reversing the Single Bench decision, it was held by the Division Bench that the patient died due to rash and negligent act of the Surgeon and therefore he is liable for damages.

Again, on the other hand, failure to perform an emergency operation to save the life of a patient amounts to a doctor's negligence. In case of *Dr. T.T. Thomas vs. Elissar, 1987,*[44] the plaintiff's husband was admitted as an in-patient in a hospital on 11.3.1974 for complaints of severe abdominal pains. It was diagnosed as a case of acute appendicitis, requiring immediate operation to save the life of the patient. The doctor failed to perform the operation and the patient died on 13.3.1974. It was held that the doctor was negligent in not performing the emergency operation, and he was liable to the death of the patient. The doctor plead that the patient had not consented to the operation. The plea of the doctor was rejected. It was held by the Kerala High Court that the burden of proof was on the doctor to show that the patient had refused to undergo the operation and in this case, the doctor had failed to convincingly prove the same.

6.2.5 Causal relation between the alleged illness and the medical treatment

For an action for medical negligence causal relation between the alleged illness and the medical treatment has got to be proved. If no causal relationship can be proved between the illness and the alleged negligent treatment, the doctor cannot be held liable for negligence.

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44. A.I.R. 1987 Kerala 42 : 1987 ACJ 192.

In *Venkatesh Iyer vs. Bombay Hospital Trust, 1998* [45] the plaintiff, a young college student complained of fever and loss of appetite. There was also growth of a boil near the lower side of his abdomen. After some initial treatment for malaria etc., the patient got admitted to a Hospital. The doctors diagnosed cancer of Lymph Glands, in initial curable state. He was given treatment ABVD Chemotherapy and radiation. The plaintiff was thereafter discharged but was advised to visit the Hospital every fortnight for Chemotherapy. After a few months, the plaintiff complained of swelling in left leg, which continued without relief. He was admitted to the Hospital again and there was diagnosis of recurrence of cancer. He was given further radiation. The plaintiff was thereafter asked to visit another Hospital for checkup. The expert medical opinion there was that the patient had fully recovered from cancer. Within a few months after the second radiation, the plaintiff began to suffer from one illness and another. He was then hospitalized in the said Hospital. An abscess formed on his left thigh where 1000 cc. of pus was drained. Soon afterwards, he developed Hepatitis B, along with severe stomachache. Thereafter, his irradiated area burst open by itself. This was diagnosed as Fecol Fistula. The complications continued and after a few years a major operation was performed.

The plaintiff alleged permanent major problems like swollen left leg giving him a imp, a large hole at the radiated side resulting in continuous leakage of mucus, and colostomy, which cased leakage of faccal matter to collect which he had to always wear a plastic bag, which needed continuous replacement. The plaintiff claimed compensation of Rs. 47 lakhs from the Bombay Hospital alleging that all these complications had occurred due to the negligence of the medical staff of the Bombay Hospital. It was found that the treatment given by the defendant hospital as necessary to save the plaintiff's life. The plaintiff had taken treatment from other doctors also. There was held to be no causal connection between the treatment given by the defendant and illness of the plaintiff. The defendant was held not liable.

6.2.6 Consequence of Disobeying Govt. Prescribed Guidelines

If the government prescribes a guideline for the treatment of the patient and if it is not followed then the authority will not be able to escape its liability. In *Pushpaleela vs. State of Karnatak, 1999,*[46] a Free Eye Camp was organized by Lions Club, where 151 persons were operated upon for cataract problem. Most of these persons developed infection and severe

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45. A.I.R. 1998 Bom. 373.
46. A.I.R. 1999 Kant. 119.

pain after surgery. 72 out of them lost sight of one eye and 4 victims lost the sight of both the eyes. According to an enquiry report the guidelines laid down by the Govt. of India for such eye camps were not followed, and the procedure adopted for sterilization was not up to the mark. There was found to be careless and negligence in performing eye operations. The court directed payment of Rs. 5000 as interim compensation to 4 persons who had become totally blind, in addition to Rs. 1000 already paid and directed the payment of Rs. 250 per month to each of the 66 victims. Subsequently, on the basis of a Public Interest Litigation on behalf of the victims, the Rajasthan High Court awarded costs to the petitioners and lump sum payment of compensation ranging from Rs. 40,000 to Rs. 1,50,000 to the victims, on the basis of the injury suffered by them.

6.2.7 Doctor's duty to maintain secrecy

As per the Hippocratic Oath[47] and the Geneva Declaration, 1949, a doctor is under a moral duty not to disclose the diseases of the patients in front of the society. In *Dr. Tokugha vs. Apollo Hospital Enterprises Ltd., 1999,*[48] the appellant, a doctor by profession, whose marriage was proposed to be held on December 12, 1995 with one Ms. Akli, was called off, because of disclosure by the Apollo Hospital Madras to Ms. Akli that the appellant was HIV(+). The appellant claimed damages from the respondent alleging that his marriage had been called off after the letter disclosed the information about his health to his fiancé, which it was required under medical ethics to be kept secret. It was held that the rule of confidentiality is subject to the exception when the circumstances demand disclosure of the patient's health in public interest, particularly to save others from immediate and future health risks.

Further, the right of privacy of a person was also held to be not an absolute right, particularly when the fact of a person's health condition would violate the right to life of another person. If the fact of the appellant being HIV(+) had not been disclosed to Ms. Akli with whom the appellant was likely to be married, she would have been infected with the dreadful disease if the marriage had taken place and consummated. The appeal was, therefore, dismissed.

6.2.8 Action brought without seeking an explanation

It is necessary that before filing a case against a medical personal, the injured should seek an explanation of the injury otherwise his claim may

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47. *Supra,* footnote 1.
48. A.I.R. 1999 S.C. 495; 111 (1998) C.P.J. 12 (S.C.).

be failed. In the case of *Roe vs. Minister of Health, 1954, 2 Q.B., 66, 2 W.L.R. 915, 98 S.J. 319, 2 All E.R. 131*, the two plaintiffs were insured contributors to the hospitals, paying a small sum each week, in return for which they were entitled to be admitted for treatment when they were ill. The plaintiffs entered hospital for minor surgery and was rendered permanently paralysed from the waist down. The reason was that the ampules of the anaesthetic, nupercaine, which was injected spinally by Dr. Graham, a visiting anaesthetist, had tiny cracks in them, and some phenol, the disinfectant in which they were kept, had percolated through those cracks and had contaminated the anaesthetic. The action was brought against the Ministers of Health, as successor in title to the trustees of the Chesterfield and North Derbyshire Royal Hospital, and the obligation to provide a regular service at the hospital. The trial judge dismissed the plaintiff's action and the Court of Appeal dismissed their appeal.

6.2.9 Burden of Proof

The burden to prove that the doctor was negligent lies on the plaintiff i.e., the patient. The plaintiff must prove that the death was caused due to the doctor's negligence. In *Philips India Ltd vs. Kunju Punnu, 1974,*[49] the plaintiff's son, who was treated for illness by the defendant company's doctor, died. The plaintiff in her action contended that the doctor was negligent and had given wrong treatment. It was held that the plaintiff could not prove that the death of her son was due to the negligence of the doctor and therefore the defendants could not be made liable.[50]

In *M. Sobha vs. Dr. Mrs. Rajkumari Unithan, 1999,*[51] the plaintiff, M., Sobha, aged 35 years, who had an 8 years old son, approached the defendant gynecologist. The gynecologist advised the plaintiff to have test tubing to clear the obstructions, if any, in the fallopian tube blocking the delivery of ovum into the uterus. The needful was done by a simple procedure of blowing of air through an apparatus into the vagina under the controlled pressure. Subsequently, infection had occurred in the reproductive system of the plaintiff, and the same had to be removed. It could not be proved that the infection had occurred due to the negligence of the defendant. The cause of infection could not be known. It was held that in the absence of proof of negligence, the defendant could not be held liable for the sufferings of the plaintiff.

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49. 77 Bom. L.R. 337: AIR 1975 Bom. 306: Also see: *Dr. Sharad Vaidya vs. Pailo Joel Vales, A.I.R. 1992 Bom. 478.*
50. A.I.R. 1975 Bom. 306, at 312.
51. A.I.R. 1999 Ker. 149.

7. Vicarious Liability or Responsibility

There is a Latin maxim i.e., *Qui facit per alium facit per se* "He who employs another to do something does it himself. By vicarious responsibility is meant the liability that exists in spite of the absence of blameworthy conduct on the part of the master. It is the "responsibility of a medical practitioner for negligence acts of nurses or medical students". Under the doctrine of *'respondeat superior'*, which is a Latin for 'Let the master answer', physicians are legally responsible for their own acts of negligence and for negligent acts of employees working within the scope of their employment.

Medical practitioners work with physicians as part of the health care team. Non-physicians members of the health care team share responsibility for the delivery of health services.[52] In developed countries, there are few people who work with physicians, dentists and/or other professionals in providing services to patients in medical offices, dental offices, hospitals, clinics, community programs and other health care settings like Audiology, Dental Hygienist, Dietician and Nutritionist, ECG Technicians, ECG Technicians and Technologist, EMT/Paramedic, Health Information Technologist or Technologist, LPN/LVN, Medical Assistant, Medical Laboratory Technician and Medical Technologist, Medical Transcriptionist, Nurse Practitioner, Nursing Assistant, Occupational Therapist, Optician, Optometrist, Phlebotomist, Physical Therapist, Physicians Assistant, Radiologic, or Medical Imaging, Technologist, Registered Nurse, Respiratory Technicians and Therapist etc.

A medical practitioner will be held responsible civilly, but not criminally, if the nurse, compounder, student or assistant is negligent in carrying out his instructions provided the negligent act was done in his presence and with his acquiescence.

In modern law many people are treated as 'servants' for the purposes of vicarious liability who are not directly subject to their employer's control.[53] In *Collins vs. Hertfordshire County Council, 1947 KB 598, 1 All ER 633*, the defendants were a hospital authority. A house surgeon in their employment, instead of 'procaine', negligently ordered 'cocaine' to be supplied as a local anaesthetic during an operation. Cocaine in the quality supplied, and in the event injected, was known to be, and in fact

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52. Judson, Karen and Hicks, Sharon, CMA, *"Law and Ethics for Medical Careers"*, 2nd ed., McGraw-Hill Companies, Inc. NY, 1999, p.19.

53. *Md. Akber Ali Vs. Mrs. Rezia Sultana Begum, 1983, 35 DLR 391.*

proved to be, lethal. It was held that the house surgeon was in the position of a servant to the authority; and they were therefore liable for the death of the patient so injected.

The hospital authority will be liable for the activities performed by its staff, nurses and doctors, anaesthetists or surgeons whether permanent or temporary, resident or visiting, whole time or part time. But there is an exception to this rule and that is if the patient himself employs and selects the consultants or anaesthetists,[54] then the hospital authority can escape its liability. In *A.H. Khodwa vs. State of Maharashtra,1996,*[55] a sterilization operation was performed after the child birth of a patient. The surgeon concerned left a mop inside the abdomen of the patient. As a consequence of that, she developed peritonitis, and the same resulted in her death. The doctor performing the operation was presumed to be negligent and for that the State, who was running the hospital, was held vicariously liable.

The hospital authorities may be liable for the consequences of initial carelessness of the nurse, even though the consequences could not reasonably have been foreseen. The decision of *Re Polemis 1921, 3 K.B. 560,* is of very limited application. The reason is because there are two preliminary questions to be answered before it can come into play. The first question in every case is whether there was a duty of care owed to the plaintiff; and the test of duty depends, without doubt, on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct.[56]

8. Defences for the doctors

The doctors can follow the following issues to save them from the liabilities of negligence. In Bangladesh, the doctors can be protected under section 82 of the Penal Code, 1860, but in such cases the burden of proof lies on the defendant i.e., the doctor. Section 103 of the Evidence Act, 1872, imposes an obligation on the part of a person who wants to proof a particular fact and section 105 of the same Act as provides that if anybody wants to get the benefit of the General Exceptions in the Penal Code, 1860, he has to proof that fact.[57]

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54. *Roe vs. Minister of Health, 1954, 2 Q.B., 66, 2 W.L.R. 915, 98 S.J. 319, 2 All E.R. 131.*
55. 1996 ACJ 505 (S.C.).
56. *Bourhill vs. Young, 1943, A.C. 92. , Woods vs. Duncan, 1946, A.C. 401, 137.*
57. *Jalal Din vs. Crown, 5 DLR (WP) 58.*

The Doctors can discontinue the treatment in some cases like when the patient wants to change the doctor, medicines other than those prescribed by him are being used by the patient, when the patient does not follow his instructions about diet/medicine, when another practitioner is also attending the patient.

This is not always possible that a medical practitioner will understand everything. Sometimes the situation may require him to make consultation with specialists. One can consult with specialists when the case is obscure and difficult and has taken a serious turn, when an operation or special treatment endangering the life is to be undertaken, when an operation affecting vitally the intellectual or generative functions is to be performed, when an operation is to be performed on a patient who has received serious injuries in criminal assault, when an operation of mutilating or destructive nature is to be performed on an unborn child, when a therapeutic abortion is to be performed, when a woman on whom criminal abortion has already been performed, sought his advice for treatment, in case of suspected poisoning especially homicidal, when the equipment or facilities of a physician are inadequate, in an emergency.

8.1 Contributory negligence

Contributory negligence is defined as concurrent negligence by the patient and the doctor which has caused delayed recovery or harm to the patient. In other words, it is any unreasonable conduct or negligence on the part of the patient which is the cause of the harm complained of, although the doctor was also negligent. Failure to give the doctor an accurate medical history, failure to cooperate with his doctor in carrying out all reasonable and proper instructions, refusal of taking the suggested treatment, leaving the hospital against the advice of the physician, failure to seek further medical assistance if symptoms persist can be the some examples of contributory negligence.

The question of contributory negligence arises, when the patient does not follow the instructions of the doctor and thereby causes further harm or injury to himself or delayed recovery. In such cases the patient loses his right in whole or in part to claim damages from the doctor. Contributory negligence is a good defence for the doctor in civil cases but not in criminal cases. The burden of providing such negligence rests entirely on the doctor.

The doctrine of contributory negligence does not apply to criminal liability, that is, where the death of person is caused partly by the negligence of the accused and partly by his own negligence. If the accused is charged with contributing to the death of the deceased by his

negligence, it does not matter whether the deceased was deaf, or drunk or negligent, or in part contributed to his death.[58]

There is a Latin maxim *"Nemo contra factum suum venire potest"* means 'no one can come against his own deed'. The plaintiff cannot shout compensation from the doctor if the doctor acts on the statement of the patient, and has no reason to disbelieve the same, he is not deemed to be negligent. In *Satish Chandra Shukla vs. Union of India, 1987,*[59] the appellant-plaintiff got himself operated upon for sterilization for getting money by falsely stating that he was married and had two female children. The father of the appellant pleaded that the appellant was of unsound mind and was not capable of consenting to the operation, and that the respondents should be liable for performing the vasectomy operation of a unmarried person. The court found that when the plaintiff went for the operation, there was nothing to indicate from his conduct or behaviour that he was mentally ill, rather he showed proper understanding of the things. Under the circumstances, it was held that there was no negligence on the part of the medical authorities in performing the said operation, and they were, therefore, not liable for the same.

8.2 Volenti non fit injuria

The doctrine *"Volenti non fit Injuria"* is another defence a doctor can utilize to escape his liability. The doctrine says that if anyone does anything with free consent[60] where he has knowledge of the risk that may arise out of that act and suffers an injury then that person cannot claim any compensation for that injury. This is what the doctors do before an operation. The doctors take the signature of the patient or his guardian before performing an operation and escape liability.

8.3 Illegality

Another defence available for the doctor is based on the Latin maxim *ex turpi causa non oritur actio.* The defence tends to be raised where the parties are fellow criminals and the activity is dangerous as well as illegal, i.e., in cases where elements of both consent and contributory negligence are also present. In such cases, the doctor is not bound to maintain professional secrecy.

8.4 Doctrine of Calculated Risk

Doctrine of calculated risk states that the doctrine *res ipsa loquitur* should

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58. *Swindall, (1846) 2 C & K 230.*
59. 1987 A.C.J. 628.
60. Section 14 of the Contract Act, 1872, says that consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation, mistake.

not be applied when the injury complained is of a nature that may occur even though reasonable care has been employed. It is an important defence to any malpractice defendant, who can produce expert evidence or statistics demonstrating that the accepted method of treatment he employed posed unavoidable risks.

As for example, in UK, Termination of Pregnancies in the UK are performed under the legal umbrella of Abortion Act, 1967, as amended by the Human Fertilisation and Embryology Act, 1990. In an operation of termination of pregnancies two doctors need to decide in good faith that one or more of the following five conditions apply and complete Form HSAI: the five conditions are-

(a) The continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if the pregnancy were terminated.

(b) The termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.

(c) The pregnancy has not exceed its 24th week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated or injury to the physical or mental health of the pregnant woman.

(d) The pregnancy has not exceed its 24th week and the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated of injury to the physical or mental health of the existing child(ren) of the family of the pregnant woman.

(e) There is substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

If a doctor abides by the above mentioned conditions he can escape his liability. In Bangladesh also, the doctors can follow these conditions to save them from the liability even though we do not have such provision of law.

9. Suggested Precautions against Negligence

There are some dos and don'ts which doctor can follow to keep him safe from the liability of negligence. A doctor should get consent before medical examination, get written informed consent before operation or giving anesthesia, employ ordinary skill and care at all times, confirm the diagnosis by laboratory investigations, X-ray etc., keep full accurate medical records, take Skiagrams in bone or joint injuries or when

diagnosis is doubtful, do sensitivity test before injecting preparations which are likely to produce anaphylactic shock, identify the drug before being injected or used otherwise, do immunization when necessary particularly for tetanus, give anesthesia by a qualified person, report to the police for holding a police enquiry in case of death from an anesthesia or during an operation, give proper instruction and take proper post-operative care after a surgical operation, consult a specialist when diagnosis is obscure, in suspected cases of cancer, do all laboratory investigations without delay to establish early diagnosis, specially biopsy, etc.

When it comes to the use of drugs, one solution, as implemented by Médecins Sans Frontières (MSF), is to use the World Health Organization (WHO) Model List of Essential Drugs,[61] and not to encourage physicians to use the most advanced, costly, non-replicable drugs.

Again, a doctor should not do the following things like he should never guarantee a cure, he should not examine a female patient unless third person (female) is present, should not perform criminal wounding unless it is absolutely necessary, should not leave a patient unattended during labour, should not fail to written consent of both the husband and wife if an operation on either is likely to result in sterility.

10. Role of Bangladesh Medical and Dental Council

As the doctors are professional they may like to avoid visiting the court of law for the trial of negligence case and they may say that it is better to be tried by the Bangladesh Medical and Dental Council. Recently, in *Indian Medical Association vs. V.P. Shantha, 1996,*[62] the Supreme Court recognized the liability of medical practitioners for their negligence and held that the liability to pay damages for such negligence was not affected by the fact that the medical practitioners are professionals, and are subject to disciplinary control of the Medical Council.

11. Suggestions for legislative enactment

It is true that judges are more sympathetic to doctors. Trial judges are too strict to apply a true test against a doctor. In Bangladesh, as far as we learn civil or criminal cases arise out of doctor's negligence is not common. In India, the conduct of the doctors are regulated by the Consumers Protection Act, 1986. Now, the doctors have to remain very

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61. World Health Organization. WHO Model List of Essential Drugs (EDL) by Drug Name, 11th Edition.1999.[http://www.who.int/medicines/organization/par/edl/infedl11alpha.html] (Accessed on February 12, 2002).
62. A.I.R. 1996 S.C. 550.

serious about the treatment of a patient. In UK enacted the Consumer Protection Act, 1987 according to the Council of the European Communities Directives of July 25, 1985. Article 1382 of the French Code says that every act whatever of man which causes damage to anther binds the person which default it was to repair it. Section 823 of the German Civil Code says that a person who deliberately or carelessly injures another contrary to law in his life, body, health, freedom, property or other right is liable to compensate that other for the resulting damage. The Government of Bangladesh can enact a law containing specific provisions relating to doctor's negligence i.e., the following provisions must be incorporated in our national laws-

(1) the duties of a medical profession should be specified as far as possible;

(2) the conducts amounting to breach of duty must be specified;

(3) provisions relating to privileged communication of doctors and patient must be inserted in the Evidence Act, 1872;

(4) provisions relating to liabilities arise out even after taking reasonable care;

(5) provisions relating to liabilities arise out when there is a difference of opinion between doctors;

(6) provisions relating to liabilities arise out in case of gross negligence;

(7) specific provisions of punishment;

(8) provisions of defence to be followed by the doctor to save them from the liability of negligence.

12. Conclusion

The doctors are engaged in one of the noblest professions of the society. It is our strong belief that doctors, generally, is pledge bound by the solemn oath of the health professionals and we entrust them with our lives which they take utmost care to protect and preserve. But it may sometimes so happen that due to some difficulties, workload, inventions of scientific instrument, amendment of national legislation, the doctors do something which amount to negligence. The doctors should be aware of the legal consequences of such situations so that they act dutifully and meticulously and avoid landing themselves in controversies and litigations. People at large, too, should appreciate the constraints imposed on the doctors in our country by the sheer imbalance in the ratio of doctor and patient. The ever increasing vital role of doctors in our lives cannot be over stated and the doctors too, in turn, should be able to value the faith put in them. Only then can we boast of a society based on mutual faith and harmony where interest of all can and shall truly be protected.