

MEDICAL NEGLIGENCE AND REMEDIES TO THE PATIENTS

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INTRODUCTION

Medical malpractice is the negligence in the profession of health management where the patient is given low standard treatment than the expected one, may be because of the act of omission or mere negligence on part of the medical representative. The entire minor to major complexities may be hooked under the medical malpractice. It involves harm to the patient by the doctor who declines executing their duty accurately. Such hazardous medical malpractice alters extensively with the aspect of medicine. It implicates chronic agitation for the patient's safety. In such cases the medical representative is legally responsible for the harm or injuries caused to the patient. Lately with the flourishing perception in patient's rights, the redressal claims for injury by medical negligence are being noticeable. Malpractice claims prevails for such medical negligence cases causing injury to the patient. Subsequent to the execution of Consumer Protection Act, plenty of the doctors were sued for the purpose of medical negligence by the patients. But the medical representative is not directly liable to the patient instead he/she is legally responsible for such act of medical malpractice. Section 304A of Indian penal code, 1860 illustrates the punishment for causing death by negligence other than culpable homicide.



NEGLIGENCE BY MEDICAL PRACTITIONERS

Negligence is the breach of a legal duty to care caused by omission of doing something which a reasonable manner in an ordinary course would do or doing something which a prudent man would not do. Prima facie means carelessness in a matter in which the law mandates carefulness resulting into harm and injury to the other. Thus, what construes the essential ingredient of negligence is legal duty, breach and inflicted harm or damage. Such negligence if caused by the medical practitioners, be it a doctor or its staff would amount to medical negligence.

“The prime object of medical professional is to render service to humanity; reward or financial gain is a subordinate consideration...”¹ Nowadays, a lot medical negligence cases are being reported in India thereby distorting the bondage of trust between the doctor and a patient. Medical Practitioners such as doctors are expected to have skill and knowledge to render medical care with reasonableness and caution. “The doctor has discretion in choosing treatment, which he proposes to give to the patient and such discretion is relatively greater in cases of ‘emergency’².

However, no person is perfect be it a renowned specialist. A doctor can be held liable for negligence only if one can prove that she/ he is guilty of a failure that no doctor with ordinary skills would be guilty of if acting with reasonable care.³ An error of judgement constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would *not* have made the same error.⁴

¹ Chapter 1, (1.1.2) of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002

² Dorland's Illustrated Medical Dictionary, 32nd ed., ISBN-13: 978-1416062578, any urgent condition perceived by the patient as requiring immediate medical or surgical evaluation or treatment.

³ Observations of Lord President Clyde in *Hunter vs Hanley* (1955) SLT 213. In: Nathan HL. *Medical Negligence*. London: Butterworths; 1957.

⁴ *Whitehouse vs. Jordan* (1981) 1 All ER 267 the House of Lords.

COMPONENTS OF MEDICAL NEGLIGENCE

A negligent act comprises of three main components:

1. There should be existence of legal duty towards the patient
2. Breach of the legal duty
3. Damage caused to the patient

1. Existence of legal duty: Apperson approaches to the medical practitioners with a trust that that he warrants that skills and special knowledge which is required for cure the problem. It is not always for the patient to enter into a written contract with them. There is implied contract between the practitioners and the patient, thus erring by the doctor makes him/her liable for breach of professional duty. It is the legal duty of the medical practitioner to exercise all due diligence as is expected in ordinary course from his contemporaries Failure on the part of doctor to exercise reasonable care and caution which was incumbent so, would amounts to negligence.

Now the main issue is what construes '**Reasonable care**' by the doctors? The Indian judiciary through its various ruling same submitted the major aspect of 'Reasonable care' by the doctors. In the case of *Dr. Laxman Balkrishna Joshi v. Dr. Trimbarak Babu Godbole and Anr*⁵, it has been laid down that:

“When a doctor is consulted by a patient, the doctor owes to his patient certain duties which are: (a) duty of care in deciding whether to undertake the case, (b) duty of care in deciding what treatment to give, and (c) duty of care in the administration of that treatment”.

'**Reasonable**' care means exercise of that degree of care and skill which could be expected of a normal, prudent practitioner of the same professional experience.⁶ In addition, 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

⁵Dr. Laxman Balkrishna Joshi v. Dr. Trimbarak Babu Godbole and Anr., AIR 1969 SC 128.

⁶Critis v. Sylvester (1956) 1 D.L.R.
(footnote continued)

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.⁷ But if he falls below the reasonable standard of care and caution which must be needed while treating their patients, then the doctors are said to be liable for medical negligence which is a professional negligence.

2. Breach of legal duty: There is certainly the breach of legal duty if the doctor does not exercise the reasonable care as expected by him/her. But when it comes to the failure in exercising and caution, such caution is to be judged at par with what the ordinary experience of doctor has found to be sufficient. So also, while analyzing the standard of care, circumscribing situation and knowledge of the doctor at time of incident is taken into consideration. Such standards are not expected to be of very high degree or otherwise, but what is expected from man in the ordinary course of treatment.

3. Damages caused by the breach: The injury which is suffered due to negligent act of medical practitioners is liable to get compensated either under Civil Law or Criminal Law. Both the remedy is available but not every negligent act imposes liability. The degree of negligence is to be determined by the court before such imposition. At various situations, the victim can invoke the principle of *res ipsa loquitur* or “the thing speaks for itself” where no proof of negligence is required, the accident is itself sufficient. This principle is applied by the hon’ble he National Consumer Disputes Redressal Commission in *Dr Janak Kantimathi Nathan v. Murlidhar Eknath Masane*⁸.

⁷Kusum Sharma and Ors. v.Batra Hospital and Medical Research Centre and Ors. (10.02.2010 - SC)

⁸ Dr Janak Kantimathi Nathan vs Murlidhar Eknath Masane 2002 (2) CPR 138.

LIABILITY ON DOCTORS

A doctor is not necessarily liable in every case where injury is reported by the patient. It is scientifically proved every individual's body is subjected to various variations in health, which can arise anytime. It is unforeseeable for a doctor too. Therefore, the doctors cannot be held liable for the death of patients which occurs due to '**unforeseeability**'⁹ of their condition. It is argued that it will be doing disservice to the community at large if the court were to impose liability on doctors and hospitals for everything that happens to go wrong¹⁰.

In *Dr. Ganesh Prasad and Anr.v. Lal Janamajay Nath Shahdeo*¹¹, 11th National Commission reiterated the principle that:

'Where proper treatment is given, death occurring due to process of disease and its complication, it cannot be held that doctors and hospitals are negligent and orders of lower fora do not uphold the claim and award compensation'.

In this case, a four-and-a-half-year-old child suffering from cerebral malaria was admitted to the hospital. A life-saving injection was given. As opined by the child specialist, doses were safe and the treatment was proper. Though the death of the child is unfortunate, Negligence cannot be attributed to the doctor.

Error of judgment resulting into death of a person can impose liability if it is error of judgment due to negligence not a mere error of judgement. The courts recognized the later one as not being the kind of a breach of the duty of care. At the time when the decision made, it does not seem wrong. It is only the due consideration of all precautions needed while taking the decisions to escape liability if some wrong happens or injury is caused to a person while exercising that decision.

⁹Bryan A. Garner, *Black's Law Dictionary*, (9thEdn., West, 2009), "unforeseeable: not expected".

¹⁰Lord Denning, in *Roe v. Ministry of Health* 1954 All ER 131.

¹¹MANU/CF/0195/2005, 1(2006)CPJ117(NC).

REMEDIES AVAILABLE TO THE PATIENTS

Patient who is the sufferer from the negligent act of the doctors can seek remedy under various laws:

1. **Compensatory action** involving complaint against doctors, staff or hospital whether private or government hospitals who committed negligence seeking monetary compensation before Civil Court under law of Torts or Law of Contract, High Court under the constitutional law, or Consumer Courts under Consumer Protection Act (Individual liability and Institutional or hospital liability)
2. **Punitive action** involving criminal complaint under Indian Penal Code against the doctor.
3. **Disciplinary action** which involves Complaint seeking disciplinary action against the medical practitioner or the hospitals as the case may be, before statutory bodies governing the medical practitioners such as Indian Medical Council or State Medical Council.
4. **Recommendatory action** involves lodging of complaint before the National/State Human Rights Commission seeking compensation.

COMPENSATORY ACTION

ACTION UNDER LAW OF TORTS

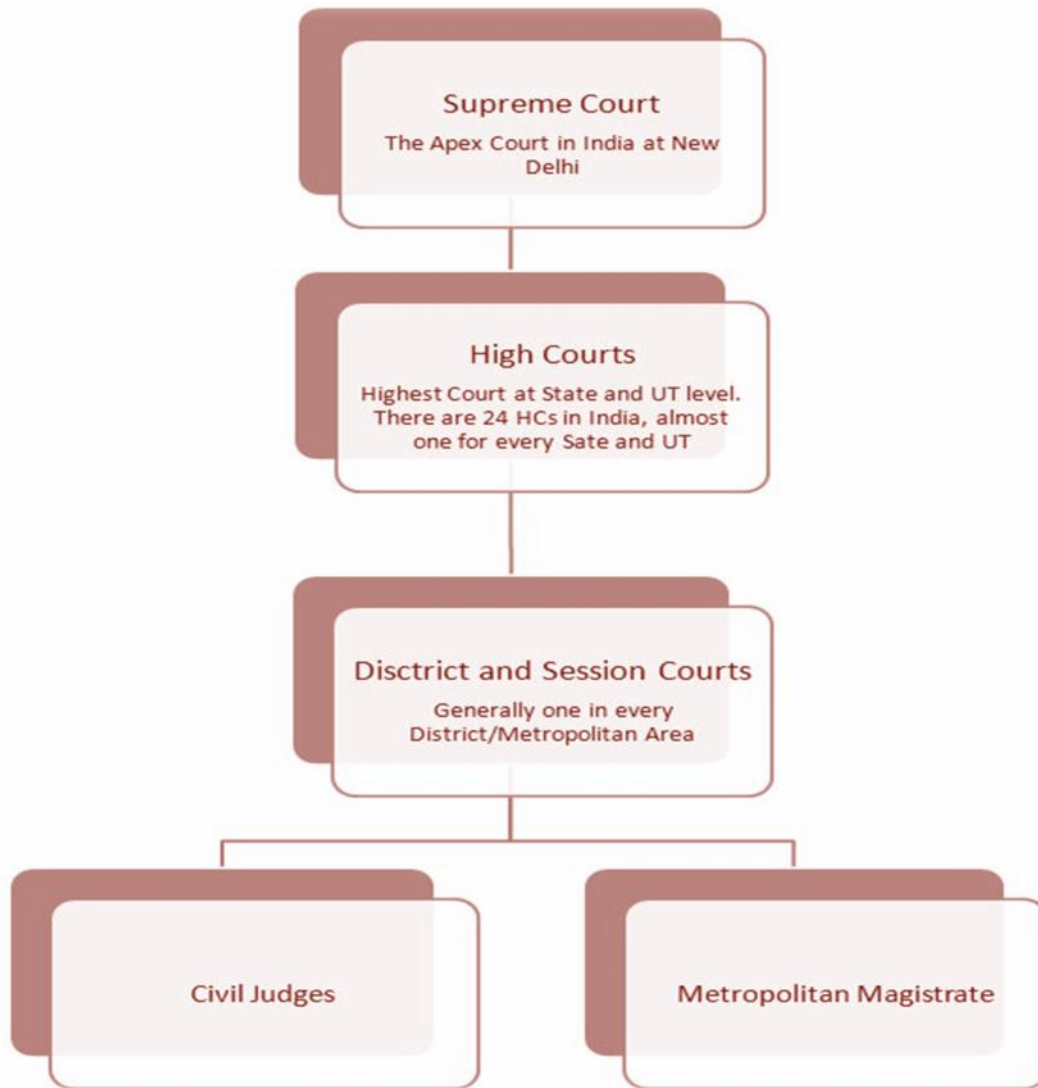
Law of torts circumscribes the principle to compensate the victim for the injury or loss suffered by him. Since it is in the nature of civil proceeding a civil court has to be approached to seek the remedy. Under the law of torts action for medical malpractice lies in the civil court where the burden of proof is high and adheres to the strict proof of evidence. Mere complying with the requirements like duty of care, breach of duty and damages will not sufficient to find the defendant doctor being guilty of negligence. The issue of negligence should be proved by the plaintiff with the cogent evidence of medical expert and medical records.

ACTION UNDER LAW OF CONTRACTS

The scope of liability of the health professional for the breach contractual is very limited in comparing with law of torts. Whenever a patient approaches a private health professional for medical care, the relationship between the hospital and the patient is one of contractual in nature. The civil suit under law of contract is not maintainable unless the plaintiff proves that he availed of service of the defendant health carer for consideration and thus a contractual obligation exists between the patient and the doctor No suit can be brought in the civil court for remedies under the law of contract without hiring the service for



HIERARCHY OF CIVIL COURTS



REMEDY UNDER CONSUMER PROTECTION ACT, 1986

A consumer that has suffered loss or damage as a result of any deficiency of service can file a complaint under Consumer Protection Act, (hereinafter referred as Act), 1986. The Act ensures that the aggrieved consumer should be provided with remedy through its three tier quasi-judicial bodies: – District forum, State Commission and National Commission.

DEFICIENCY OF SERVICE

Deficiency of service means any fault, imperfection, shortcoming, or inadequacy in the quality, nature, or manner of performance that is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.¹²

PATIENT AS A CONSUMER

In order to file complaint against the medical practitioner under the ambit of Consumer Protection Act 1986, the patient should justify with the definition of 'consumer,' which includes a person who have

hired or availed of any services for a consideration. The element of consideration serves as a test to determine whether a patient is a consumer or not.

- A) The service must be hired by him;
- B) The service should have been rendered to him;
- C) For hiring service, he must have paid or promised to pay consideration 153.

If services are rendered free of charge, it cannot be hire. If a patient gets free medical treatment in a governmental hospital or in any charitable hospital, without payment, is not a 'consumer.'¹³

¹² Section 2 (1) (g) of Consumer Protection Act, 1986.

¹³ Remedies for Medical Negligence, Shodghana, 280-285.

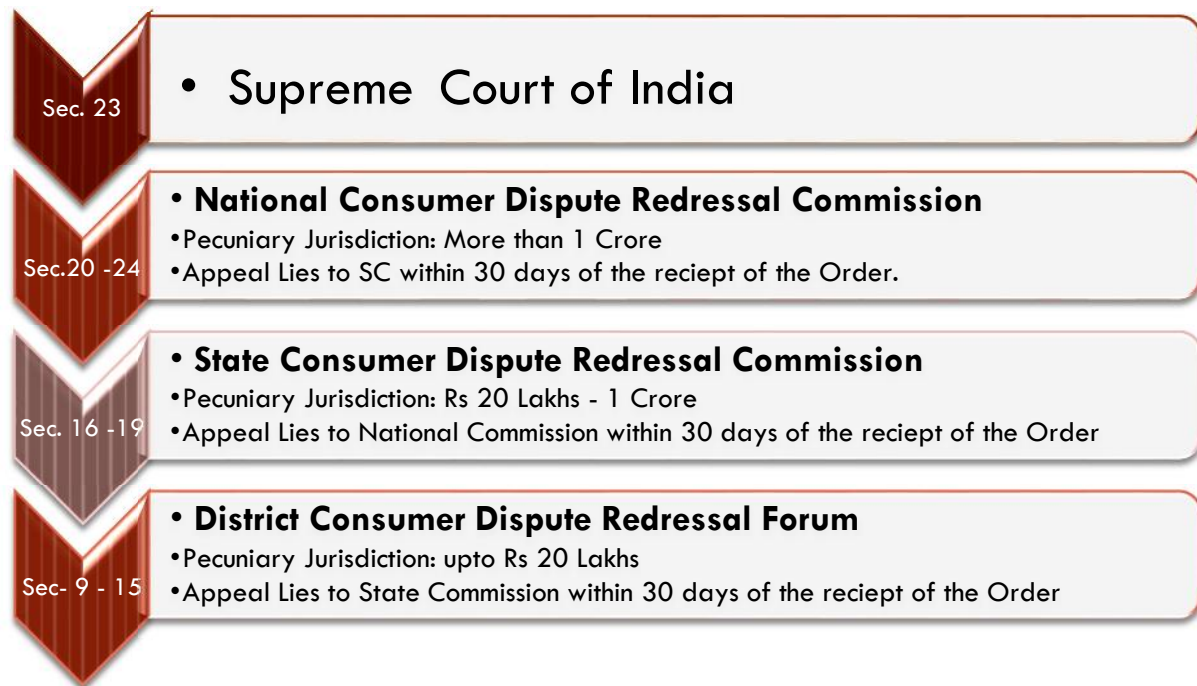
MEDICAL SERVICES COVERED BY SEC 2(1) (I) OF THE ACT

To initiate action against medical practitioner under the said Act, the services rendered by medical practitioner, hospital or nursing

home should fall within services the definition of service under section 2(1)(i) of the Act.¹⁴ The expression 'service' has been defined as meaning "service of any description which is made available to potential users."

In *IMA v. V.P. Shantha and others*, the Supreme Court of India observed that the medical services rendered by the medical practitioners are covered by Sec. 2 (1) (i) of the Act. It excludes free services or services under a contract of personal service.¹⁵

HEIRARCHY FOR CONSUMER DISPUTES REDERESSAL COMMISSIONS UNDER CONSUMER PROTECTION ACT, 1986



¹⁴*Ibid.*

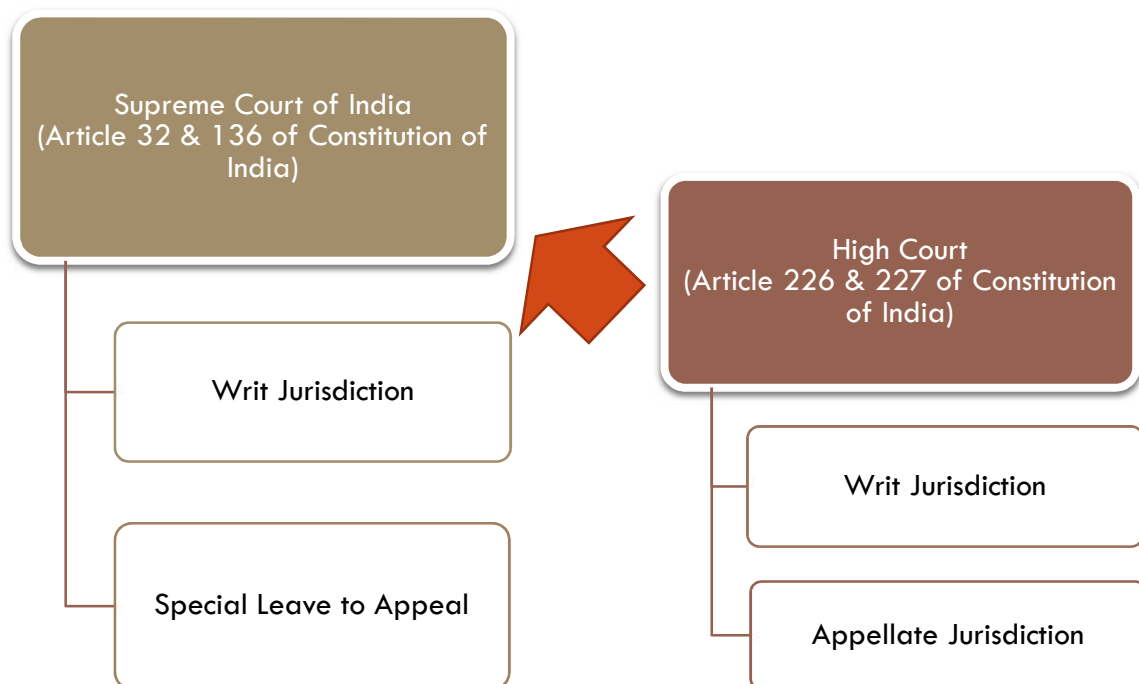
¹⁵ Virendar Pal Singh, Amit Bery, Gautam Biswas and Akashdeep Aggarwal, *Awareness about Consumer Protection Act and Medical Negligence among Private and Government Medical College & Hospital Faculty Members*, 151, 36 (2) J Indian Acad Forensic Med (2014).

REMEDY UNDER CONSTITUTION OF INDIA

Per se the Constitution of India does not guarantee any special rights to the patient. However, the same can be interpreted under widest interpretation to the **Article 21** of the Constitution of India which guarantees right to health and medical treatment.

The right to life would be meaningless unless medical care is assured to a sick person. **Article 19(1)** provides six fundamental freedoms to all its citizens which can be restricted only on grounds mentioned in **Clauses (2) to (6) of Article 19** of the Constitution. These fundamental freedoms can be effectively enjoyed only if a person has healthy life to live with dignity and free from any kind of disease or exploitation which further ensured by the mandate of Article 21 of the Constitution. When breach of this right occurs, the health care provider will be held liable for negligence.¹⁶

JUSTICE DELIVERY SYSTEM UNDER CONSTITUTION OF INDIA



¹⁶MK Sharma, Right to Health and Medical Care as a Fundamental Right , 255 (2005).

PUNITIVE REMEDY

CRIMINAL NEGLIGENCE UNDER SECTION 304 -A of INDIAN PENAL CODE

To impose criminal liability under **Section 304-A** of Indian Penal Code, it is necessary that the death should have been the direct result of a rash and negligent act of the accused and that the act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans* (immediate or operating cause); it is not enough that it may have been the *causa sine qua non* (a necessary or inevitable cause). That is to say, there must be a direct nexus between the death of a person and rash or negligent act of the accused.

The doing of a rash or negligent act, which causes death, is the essence of Section 304-A. There is distinction between a rash act and a negligent act. '**Rashness**' means an act done with the consciousness of a risk that evil consequences will follow. (It is an act done with the knowledge that evil consequence will follow but with the hope that it will not). A rash act implies an act done by a person with recklessness or indifference as to its consequences. A negligent act refers to an act done by a person without taking sufficient precaution or reasonable precautions to avoid its probable mischievous or illegal consequences. It implies an omission to do something, which a reasonable man, in the given circumstances, would not do. Rashness is a higher degree of negligence. The rashness or negligence must be of such nature so as to be termed as a criminal act of negligence or rashness. Criminal rashness is resulting into a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. **Criminal negligence** is the gross and culpable neglect or failure to exercise that reasonable and 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.

RASH OR NEGLIGENT ACT IN MEDICAL TREATMENT

A doctor can be punished under Section 304A of the Indian Penal Code (IPC) for causing death by a rash or negligent act, say in a case where death of a patient is caused during operation by a doctor not qualified to operate. According to a recent Supreme Court decision¹⁷, the standard of negligence required to be proved against a doctor in cases of criminal negligence under Section 304A of the IPC should be so high that it can be described as '**gross negligence**' or '**recklessness**', not merely lack of necessary care. Criminal liability will not be attracted if the patient dies due to error in judgment or accident. Every civil negligence is not criminal negligence, and for civil negligence to become criminal it should be of such a nature that it could be termed as gross negligence. A doctor is not criminally liable for patient's death, unless his negligence or incompetence passes beyond a mere matter of competence and shows such a disregard for life and safety, as to amount to a crime against the state.

DEGREE OF NEGLIGENCE

To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of Such nature which likely may cause harm. Hon'ble SC¹⁸ has held that "negligence in the context of medical profession necessarily called for a treatment with a difference, the negligence attributed to the doctor must be gross in nature to make him liable for criminal prosecution" such a degree that injury was most likely imminent.¹⁹

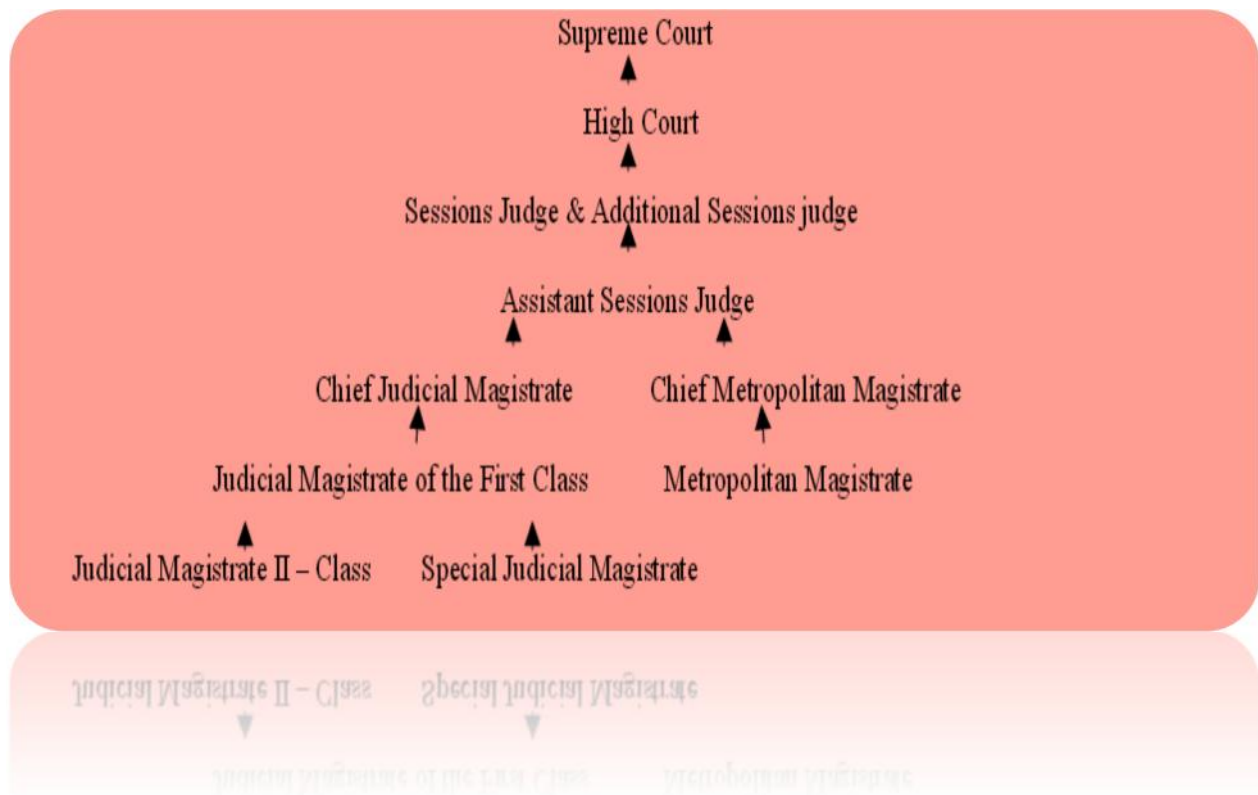
¹⁷ Suresh Gupta (Dr) v. Govt. of NCT of Delhi (2004) 6 SCC 422

¹⁸ Jacob Mathew v. State of Punjab (2005) 6 SCC 1.

¹⁹ Mukesh Yadav & Pooja Rastogi, "Can A Hospital Commit Criminal Negligence?" 35, *J Indian Acad Forensic Med.* (October-December 2013).
(footnote continued)

n *Dr. Suresh Gupta's Case*²⁰ – Supreme Court of India, 2004 – the court held that the legal position was quite clear and well settled that whenever a patient died due to medical negligence, the doctor was liable in civil law for paying the compensation. Only when the negligence was so gross and his act was so reckless as to endanger the life of the patient, criminal law for offence under section 304A of Indian Penal Code, 1860 will apply.²¹

HIERARCHY OF CRIMINAL JUSTICE SYSTEM IN INDIA



²⁰ *Supra* note 7.

²¹ Murthy, K, "Medical negligence and the law" 116-118, *IJME* (2010).

DISCIPLINARY ACTION

COMPLAINT BEFORE MEDICAL COUNCIL OF INDIA

The **Medical council of India** grants recognition to medical degrees granted by universities or medical institutions in India and such other qualifications granted by medical institutions in foreign countries. It lays down and prescribes the minimum standards of medical education required for granting recognition to the degrees awarded by Universities in India.

Furthermore, the Council is empowered to have disciplinary control over the medical practitioners including the power to remove the names of medical practitioners permanently or for a specific period from the medical registers when after due inquiry they are found to have been guilty of serious professional misconduct.²²

GROUND TO INITIATE DISCIPLINARY ACTION AGAINST MEDICAL PRACTITIONER

It includes:

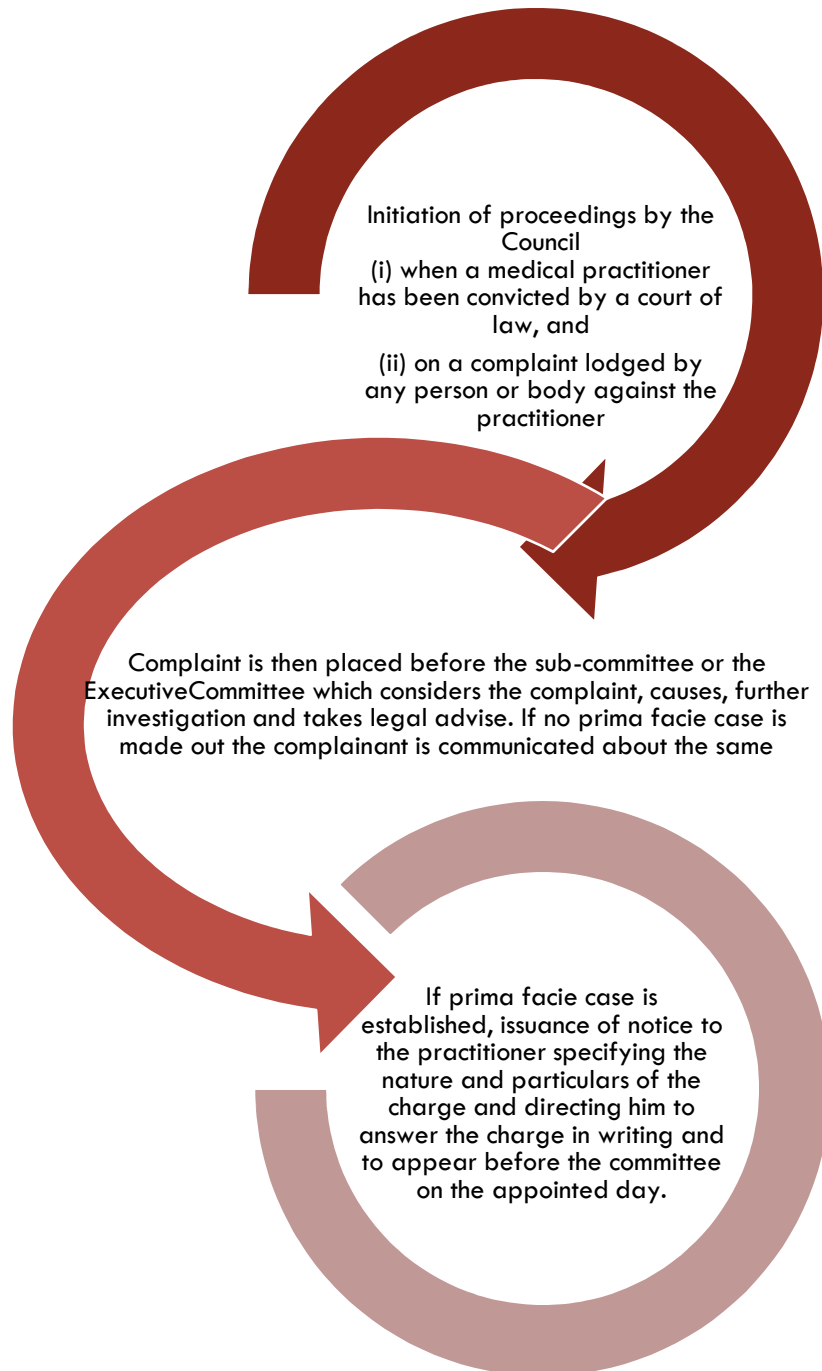
- (a) conviction of any offence by a court of law and
- (b) guilty of professional misconduct.

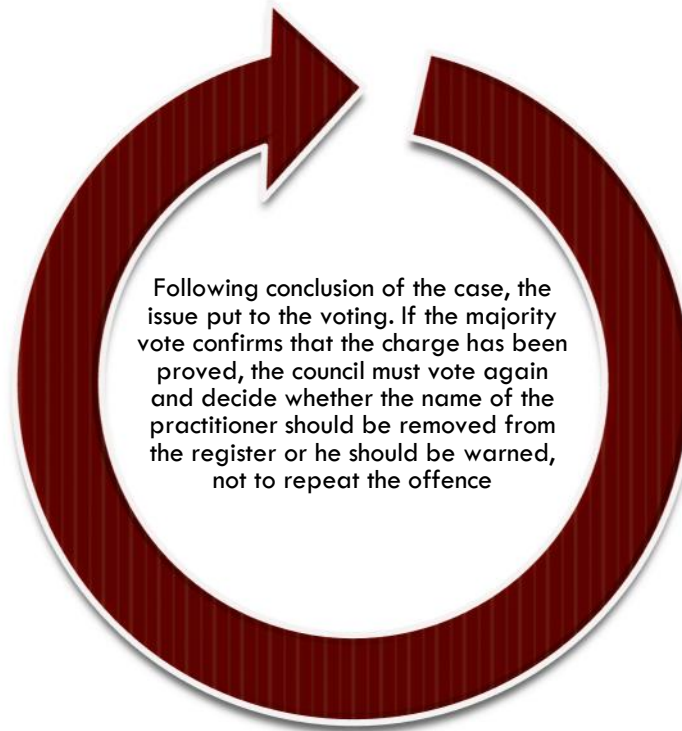
Any conduct of the practitioner which brings in disgraceful to the professional status what is known as “serious professional misconduct,” for e.g. adultery or improper conduct or association with a patient, conviction by a court of law for offences involving moral turpitude, issuing false certificates, reports and other documents; issuing certificate of efficiency in modern medicine to unqualified person or non-medical person; performing an abortion or illegal operation for which there is no medical, surgical indication, revealing identity of a patient without his permission; performing an operation which results in sterility, without obtaining the written consent of patient/relative and refusing on religious grounds alone to extend medical assistance etc. If anyone is found guilty of offences mentioned in the warning

²² The Medical Council Act, 1956

notice issued by the appropriate medical council, it constitutes serious “professional misconduct”.

JUDICIAL PROCEDURE





RECOMMENDATORY ACTION

COMPLAINT BEFORE HUMAN RIGHT COMMISSIONS

Irrespective of different remedies medical negligence and medical malpractice discussed above, there is yet an alternative mechanism for the protection of patients' rights under National and State Humans Rights Commission (NHRC and SHRC). Each patient irrespective of its caste, creed, religion, economic status enjoys various Human Rights including Right to Life. Human Right Commissions at national and state level protects are guardian of these rights. For instance, NHRC/SHRC can hold the state accountable for violation of human rights of patients. NHRC can play vital role in fulfilment of national and international human rights norms. Patient can file complaints regarding violation of human rights before NHRC/SHRC as the case may be. NHRC/SHRC then seeks explanations from the government for such violations and can also initiate proceedings including independent investigation, issuance of summons to witness, examination on oath etc. Thus, NHRC/SHRC is endowed with the powers of a Civil Court. It persuades the state to pay compensation to the victims, patients in present case and also recommends for the grants of immediate interim relief to the victim or his / her family.



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