BURDEN OF PROOF IN MEDICAL NEGLIGENCE CASES : A CRITICAL ANALYSIS

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Abstract:

Liability of a doctor for negligence may arise under Contract Law or Tort Law or Consumer Protection Act. But the burden of proving negligence on the part of a doctor falls on the patient,[1] which is a cumbersome task. There are a few exceptions to the rule, which to a certain extent reduces the burden. In this article an attempt is made to critically analyse the legal provisions pertaining to the responsibility of a patient to prove medical negligence of doctor but for which he cannot avail the legal remedies.

Components of Burden of Proof : A patient can approach civil courts under contract or tort law. In addition to that he has the option of moving the consumer courts. Civil courts or consumer courts award damages to a patient for breach of duty on the part of a doctor. But the patient to recover damages must establish a proximate connection between the injury and doctors breach of duty. It has two prongs viz. causation and forceeability. Therefore a patient shall prove causation as well as foreseeability of injury.

Application of the Doctrine of Causation : Causation means linking the injury to breach of duty on the part of a doctor.[2] Accordingly a patient shall on balance of probabilities prove that but for breach of duty on the part of doctor he would not have suffered the injury.[3] He can claim

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[1] Paul v. Dr. K.P. Bakshi & another (2001) I.C.P.J.466; N.S. Sahota v. New Ruby Hospitals & Others (2000)2 C.P.J. 345; Indian Medical Association v. V.P. Shantha (1996) A.I.R. S.C.550
[2] Rodney Nelson Jones and Frank Burton, "Medical Negligence Case Law", London, p.67 (1995)
[3] Joseph H.King, "The Law of Medical Malpractice", St. Paul Minn, West, p.193 (1977)

damages if he succeeds to prove this. In Fish v. Kapoor,[4] a dentist in the course of extracting a wisdom tooth, happened to leave a part of it's root in the patient's jaw. In addition to that jaw got fractured due to some unexplained means. There was expert medical evidence to show that a doctor without being negligent might happen to leave a part of tooth unextracted and cause fracture of jaw. Accordingly the patient was not allowed to recover damages on the ground that he failed to prove causation.

An inevitable injury cannot be imputed as breach of duty on the part of a doctor. In **Barnett v. Chelsea & Kensington Hospital Management Committee**,[5] a doctor was negligent in failing to see and examine a patient who had complaint of vomiting. The patient died. It appeared on balance of probabilities that even if the doctor were to examine the patient it would not have altered the situation that the death was inevitable. The claim of the plaintiff was dismissed on the ground that on balance of probabilities he failed to prove that the doctor's negligence caused the death.

Even if negligence of a doctor is proved it will not make any difference, where injury is inevitable. In **Robinson v. Post Office**,[6] a person sustained a laceration by slipping while descending an oily ladder at work place. The doctor decided to administer an Antic Tetanus Serum injection, which required a test does with a gap of 30 minutes before the administration. But the doctor after the test does waited only for one minute and administered the injection. The patient had already once taken ATS injection which was known to the doctor. At that point of time it was mandatory even in case of immunized patients also to wait for ½ an hour. The patient became delirious with brain damage and contracted encephalitis. It was held that the doctor was negligent in not waiting for ½ an hour. However no recovery was allowed on the ground that even if he were to wait for ½ an hour no reactions would have appeared.

The principle laid down in the above case cannot be applied to a situation of multiple causes giving rise to the injury of a patient. In such a situation the patient has to prove that doctors conduct which substantially or materially contributed to his injury.

[4] [1948] 2 All E R 176 (K.B.)
[5] [1968] 1 All E R 1068 (Q.B.)
[6] [1974] 2 All E R 737 (C.A.)

In **Banningten Castings Ltd., v. Wardle**,[7] the court observed,[8]

> "What is material contribution must be a question of degree. A contribution which comes within the exception de minimis non-curat lex is not material, but ….. any contribution which does not fall with in that exception must be material."

In **Wilser v. Essex Area Health Authority,**[9] a premature baby which had breathing problem was in need of extra oxygen. The doctor inserted the catheter into a vein instead of artery to read the blood level. It gave the reading below the true level. It has resulted in administration of oxygen in higher dosage than the required one, consequent upon which the baby became nearly blind. There was no dispute as to the negligence of doctor in wrongly inserting the catheter into vein instead of artery. It was held that administration of excess oxygen could be one of the causes of blindness, from which no presumption could be drawn that it was the material cause of the injury.

Accordingly causation can be proved when there was concurrent causes. But the degree of the contribution of cause which is proved to be the cause of injury shall be substantial. It should not be too minimal that the law should not take cognizance of it.[10] As such a patient has to prove that the causative factor is material in bringing about the injury and not deminimis, to obtain complete recovery of damages.

If a patient proves in respect of a chance, he needs to prove the possibility of more than fifty percent of occurrence of injury as a result of negligence on the part of a doctor. To put it alternatively there must be possibility of more than fifty percent of non-occurrence of the injury, but for the negligence of a doctor. In **Mitchel v. Houston and Spelthorne Health Authority**,[11] a woman in labour pain was given an enema. When she was in the toilet, the membrane ruptured. In effect the umbilical cord prolapsed and emerged beyond the introitus. She was not given any first aid treatment until she was taken to the operation theatre. Thereafter a

[7] [1974] 2 All E R 737 (C.A.)
[8] Ibid
[9] [1988] 1 All E R 871 (H.L.) : See also Kay Tutort v. Ayreshine and Aran Health Board, [1987]2 All ER.417(H.L.)
[10] See Rodney Nelson-Jones, op. cit at p.72
[11] (1950) 1 Lancet 579 as quoted in Rodney-Nelson Jones, op cit, at p.458

ceasariation section was performed. A baby girl was born with brain damage. She was allowed to recover full damages on the ground that a first aid treatment like application of pressure to the foetus would have resulted in sixty percent possibility of avoiding the brain damage.

In **Kenyon v. Bell**,[12]a girl underwent medial treatment for an eye injury. Her contention was that as a result of the negligent treatment, she was deprived of the prospect of her eye sight being saved. There was medical evidence to show that even an effective medical treatment could result in a prospect of saving eye sight which was less than 50%. She was not awarded damage. It was held that she could recover damages provided that on balance of probabilities there existed more than 50% chances of saving the eye.

It is obvious from the above decisions that a patient cannot claim damages inspite of negligence of a doctor if the possibility of occurrence of eventuality otherwise is more than fifty percent. In **Hotson v. East Berkshire Area Health Authority**,[13] a boy consequent upon a fall, had injured his hip. Initially no x-ray was taken which would have revealed the fracture. Subsequently on an x-ray being taken, it revealed a fracture of a kind which could develop into a vascular necrosis for which proper treatment was given. There was evidence to suggest that even if there had been a proper diagnosis yet there was seventy five percent (75%) chance of occurrence of the eventuality. The court of appeal scaled down the damages by 75% and the boy was awarded only 25% damages. On appeal the House of Lords set aside the award.

It follows that the remaining possibility of a chance of occurrence of the eventuality, which can be attributed to the negligence of a doctor cannot be converted into damages. It is said that in medical negligence cases, it is not possible to quantify damages with mathematical precision.[14]

Intervening conduct of a patient, i.e, 'novus actus interveniens'[15] may snap the chain of causation, consequent upon which he is not allowed to recover. But law does not take into account the intervening conduct of a patient under some special circumstances. In **Emey v.**

[12] [1953] S.C. 125 (Scot Land Case) as quoted in Michael Davis "Medical Law", London- p.90 (1996)
[13] [1987] 2 Au E R 909 (H.L.)

[14] See Mechael Davies, op cit. at p.95
[15] See for a discussion on novus actus interveniens, W.V.H. Rogers, "winfield & Jolovicz on Tort" London, 15th edition, p.2243 (1995)

Kensington and Chelsia West Minister Area Health Authority,[16] a married woman already having three healthy children underwent abortion and sterilization operation. Subsequently she became pregnant. Doctor suggested an abortion, when she was 18-20 weeks pregnant. She refused. A baby was born with congenital abnormality. She brought an action against the doctor for negligence. The doctor invoked the plea of 'novus actus interveniens'. There were no medical or psychological grounds for termination of pregnancy. The plea of novus actus interveniens failed on the ground that her refusal to undergo abortion was not so unreasonable to eclipse the doctor's negligence as there was nothing to show that the abortion was necessary on some medical or psychological ground. It is then obvious that in the light of some medical or psychological ground warranting abortion, had she refused to undergo the abortion it would have certainly snapped the chain of causation.

The decision suggests that if a procedure is necessary from medical point of view, any refusal to undergo the same will break the chain of causation. Same will be the case if the real intention of the patient is to sue the doctor.

In India also, a patient has to prove the negligence of a doctor, i.e., both causation and forceeability, on pre-ponderance of probabilities in order to recover compensation either in the consumer courts or civil courts.

In **Dr. Ashok Dhawan v. Surjeeth Singh**,[17] the doctor administered an injection to a patient without proper test as a result of which he lost the movement of his arm. He made a bald assertion that he had to spend a huge amount to set right the injury. There was no direct evidence regarding the loss suffered by him. The National Commission held that on balance of probabilities, he proved his cause and accordingly he was allowed to recover.

In **Suvarna Baljekar v. Rohit Bhatt**,[18] the contention of the patient was that it was the adverse effects of the medicines prescribed by the doctor led to his ailments. He was not granted the remedy as he failed to prove the same.

[16] [1986] 2 W.L.R.233
[17] (1997) IC PJ 82 (NC)
[18] (1996)2 CPJ 75 (NC)

In **Devendra Kanthilal Nayak v. Dr. Kalyaniben Dhruv Shah**,[19] the doctor performed a ceasarian operation on a woman. She died after the operation due to profuse bleeding. Under such a situation, removal of uterus was the only way out to save the life of a woman. The doctor failed to do that. It was held that non-removal of uterus was the proximate cause of death. Accordingly the patient was awarded damages.

In **Tapan Kumar Nayak v. State of Orissa**,[20] a child was administered triple antigen injection and polio drops. Subsequently the child suffered severe reaction and brain damage. The other children of the batch who were similarly vaccinated did not suffer any complication. It was held that vaccination was not the proper cause of death.

Forceeability of Injury : The patient should not only prove causation but also forceeability of injury. That mere proof of breach of duty on the part of a doctor is not suffice. It should be proved that injury was forceeable. In case of an action under contract law, it needs to be proved that injury was reasonably forceeable when the contract was made.[21] If the claim is brought in under tort law, at the time of commission of alleged act of negligence (when the breach of duty occurred) the injury was reasonably forceable.[22]

Generally the complaint of a patient against a doctor includes continuation of disease which ought to have been cured of, aggravation of an existing injury and infliction of a new injury. A doctor by virtue of his knowledge of medicine is capable of foreseeing the consequences of negligence. In **Smith v. Brighten and Lewis Hospital Management Committee**[23] a woman who was suffering from severe attack of boils was admitted to a hospital. The doctor prescribed 30 streptomycine injections. Due to the negligence of the ward sister, she was administered four more injections than prescribed. The next day she experienced giddiness and suffered a permanent loss of balance. According to the court, perhaps it was the last

[19] (1997) IC PJ 103 (Gujarath S.C.D.R.C.), See also Force Society v. Ganeswar Rao, (1997) 3 CPI 228 (Andra Pradesh S.C.D.R.C.), S.B. Jain v. Smt. Munnidevi, (1998) 2 CPI 239 (Haryana S.C.R. R.C.)

[20] (1997) 2 CPJ 14 (NC), see also M.D. Aslam v. Ideal Nursing Home (1997) 3 C.P.J. 81 (NC); Joseph Animon v. Dr. Elizabath Zaceria (1997) I.C.P.J. 96 (Kerala S.C.D.R.C.)

[21] For a discussion on foreseeability of damages in contract, see A.G. Guest (ed), "Chitty on Contracts,"London Vol.1-27th edition, pp 1216-1223 (1994)

[22] For a discussion on forceeability of damages in tort see John G. Flemaning, "The law of Torts", New South Wales, 8th edition, pp 208-215 (1992)

[23] 1958) Times, 2 May, quoted in Rodney Nelson-Jones, op. cit., at p.559

injection which caused the injury. It further observed that the ward sister ought to have foreseen the ensuing injury from administering injections more than the prescribed ones. It was also held that it was not necessary to foresee the quality and quantity of damages. Hence the patient was allowed to claim compensation from the hospital authorities.

It is evident from the above decision that if the injury is not foreseeable, no recovery is allowed. In **Roe v. Minister of Health**,[24] glass ampoules containing nupercaine were stored in phenol solution. There were invisible cracks in the composites through which the phenol solution entered into the ampoules and contaminated the nupercaine. The two patients to whom nupercaine was administered suffered permanent paralysis. They were not allowed to claim compensation on the ground that what could be forseen was loss of nupercaine through crack and not occurrence of permanent paralysis.

There must be a proximate connection between breach of duty on the part of a doctor and injury. Absence of such connection results in remoteness of damages signifying non-feasibility of foreseeability of risks. But there are medical negligence cases where the remoteness is viewed something connected with the negligence or breach of duty on the part of a doctor. In **Hothi v. Greenwich Health Authority**,[25] a patient who had sustained severe head injury was given phenobarbitone. As a result of it he developed rashes and symptoms known as Stevens Johnson Syndrome. He contended the above drug should not have been given or otherwise a sensitivity test should have been conducted. It was held that as the patient had the symptoms of epilepsy the above drug was the proper anti convulsant. The court further opined that the possibility of such a syndrome was too remote. Hence a doctor cannot be held liable for negligence because there was a slight risk of some hypersensitive patients might have had adverse reactions. Accordingly he was not allowed to recover damages.

It is evident that in the absence of negligence, the injury cannot be attributed to the doctor. Though the risk is known, if it's occurrence is very remote a doctor cannot be held liable. When it is known to a doctor that a patient is hypersensitive, then he must foresee the consequence to

[24] [1954] 2 All E.R.131 (C.A)

[25] [1982] 2 Lancet 1474, quoted in Rodney Nelson Jones, op. cit., at p.389

avoid the contemplated risk. In Dr. Rashmi B. Fadnavis v. Mumbai Grakah Panchayath,[26] the patient was bleeding. She was an obese patient with a rare blood group. The doctors performed a major surgery on her, without sufficient stock of blood. The operation went beyond the estimated time. They failed to provide artificial respirator and a long needle required for administration of an inter-cardiac injection knowing that she was obese. Finally the patient died. The Maharastra State Commission held that there was deficiency in service on the part of the doctors. On appeal the National Commission affirmed the decision on the ground that the doctors had failed to foresee the potential risks which the condition of the patient itself suggested. Accordingly, they were held liable.

A doctor is not required to foresee third party liability to his patient. In Steven v. Bemondsey and Southwark Group Hospital Management, [27] the plaintiff sustained an injury by an accident caused by an employee of Borough Council. He was given treatment in the defendants hospital. He settled the claim against the council for $ 125, relying on the medical advice. Subsequently he learnt that he had contracted spondylolistherris. The contention of the plaintiff was that because of the negligence of defendents he had to settle the claim for a lesser amount. The court did not accept his contention. Hence no recovery was allowed.

The above discussion reveals that a patient should prove both causation and foreseeability of risk on the part of the doctor. In doing so he has to examine an expert in the subject. Mere personal affidavit is not sufficient. In Paul v. Dr. K.P. Bakshi and another,[28] an operation was performed on the left eye of a patient. After the operation he lost his vision in that eye. His allegation against the doctor was that the thread cord was not removed immediately after the operation and removed only after two years, which resulted in the eventuality. But he did not examine any expert on the subject. He was not allowed to recover as he did not produce any expert evidence.

Burden of proof means task of convincing the court that his version of the facts is correct one.[29]

[26] (1998) 3 C.P.J. 21 (N.C.)
[27] (1963) 107 S.J. 478 as reproduced in Rupert M. Jackson & John L. Powell, "Professional Negligence", London, 2nd edition, p.351 (1987)
[28] (2001)1 C.P.J. 466

[29] Amar Singh v. Francis Newton Hospital & Another (2000) IC PJ 8

In Indian Medical Association v. V.P. Shantha[30] the Supreme Court observed that medical negligence on the part of a doctor is to be proved as a fact by leading evidence which may be of an expert.

It follows that it can be proved by other evidence, other than of an expert. The only option for a patient, when no doctors come forward to give evidence on behalf of a patient to rely upon his personal affidavit. It implies that if the court is convinced of the facts alleged in the affidavit then recovery is allowed.[31] Expert evidence under certain circumstances cannot be relied upon as establishing the proper level of skill and competence. [32]The burden on a patient to prove negligence has to be judged taking into consideration of the facts of the case. As the concept of negligence cannot be put into a straight jacket matter of its proof also depends on the facts of the case i.e., whether burden falls on the doctor or onus shifts to the doctor. Sometimes the court itself may get convinced of negligence on the part of a doctor, which relieves a patient from the his onerous task. In such a situation, onus shifts to the doctor. In **Nadiya v. Proprietor Fathima Hospital and others**[33] the complainant approached the opposite parties hospital for surgery for increasing the height. She underwent corticotomy with external fixator. After operation her left leg remained shorter by 1 ½ inch. She needed the aid of a walker as she had to lean on the left leg. The opposite parties contended that there was contributory negligence on the part of the patient. It was held that the onus shifted to the opposite parties to prove that they have exercised reasonable care and skill.

It is evident that the rule which enjoins a duty on a patient to prove the medical negligence is not invariable one. The onus may shift to the doctor. In **Clark v. McLennan**,[34]

> " Although in an action in negligence the onus of proof normally rested on the plaintiff, in a case where a general duty of a care arose and there was a failure to take a recognized precaution and that the failure was followed by the very damages which that precaution was designed to prevent, the burden

[30] (1996) A.I.R. S.C. 550
[31] See supra n.17

[32] Bolitho v. City & Hackney Health Authority, [1997] 4 All E.R. 771, Vinitha Ashok v. Laxshmy Hospital, A.I.R. 1996 S.C. p.558
[33] (2001) 2 C.P.J. 93
[34] [1983] 1 All E.R. 416

> of proof lay on the defendant show that he was not in breach of any duty, i.e., plaintiff's damage was not the result of his breach."

It is a known fact that the operations are conducted in operation theatres to which except the concerned doctors and para medical staff, others have no access. Patient will be unconscious as a result of administration of anaesthecia. Nothing comes to his knowledge. In this regard in **Bhanupal v. Dr. Prakash Parode and Ors.**[35]it was aptly observed,

> "What happens in the operation theatre is not known to the patient, hence onus is on the doctors.[36]

It follows that in a situation contemplated above the onus is on the doctor to prove that the cause of damage is not the result of breach of duty on his part. It will be unreasonable to insist the patient to prove the negligence on the part of a doctor, when the latter is in a position of active evidence. In Smith v. Kay,[37] it was held that where there is a question of good faith of transaction between the parties, one of whom stands to the other party in the position of active evidence the burden of proof of good faith lies on the party who is in a positive position of active evidence.

Moreover the courts may presume the existence of any fact which in their assessment likely to have happened taking into consideration the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.[38]

Application of the doctrine of Res Ipsa Locquitor: The above discussion reveals that in most of the cases the patients failed to recover because of failure on their part to discharge the burden of proof. The judicial variation of the rules relating to burden of proof though appears as silver lines in a cloudy atmosphere, in the of the things, it is apt to state that the only solace of a patient lies in the application of the doctrine of res ipsa locquitor[39] which signifies the things speak for themselves. The application of this doctrine may provide the missing element through

[35] (2000) C.P.J. 384
[36] Ibid
[37] 1956 SLC 1779
[38] Sec. 114 of Indian Evidence Act
[39] Res Ipsa implies that the accident must be of such a kind which ordinarily would not happen but for negligence. For a general discussion on the doctrine, see Mark F. Grady, "Res Ipsa Locquitor and Compliance Error, 142 UPLR 887 (1994),

inference for example the nature of injury like bruises, burns and fractures, which have no access whatsoever with the condition for which the patient has received treatment.[40] The type of injury itself suggests negligence on the part of a doctor. The following three conditions are to be fulfilled to invoke the application of the doctrine.[41]

a) Where it is a matter of common knowledge that the injury would not have occurred but for negligence on the part of a doctor i.e., it is based the common experience of a layman, which dispenses the need for expert evidence to establish negligence on the part of a doctor.

b) The patient must not contribute to his own injury.

c) The doctor must be in exclusive control of instrumentalities.

Generally the doctrine is applied in instances of leaving foreign objects in body after operation,[42]involving burn or traumatic injury to that part of the body not within the vicinity of operation[43] and unnecessary removal of or injury to a healthy limb or operation performed on a wrong person.[44] In Achutrao Hariban Kodwa and Ors. V. State of Maharashtra and Others,[45] a pregnant woman was admitted to hospital for delivery. After delivery as per her request, a sterilization operation was performed on her. Immediately she developed high fever and suffered acute pain, which is uncommon after such a simple operation. She was subjected to another operation after a few days, by another doctor. On opening the abdomen it was found that a mop had been left there, when a sterilization operation was performed on her. Eventually she died. Her husband brought an action against the doctor for negligence. The court applying the doctrine found it for him as things spoke for themselves and was allowed to claim damages.

[40] Mathiharan K. and Amrith K. Pataik. Modi's Medical Jurispondence & Toricology, Nagpur, 23rd edition p.176
[41] Ibid
[42] Mahone v. Osborne (1939)2 K.B. 14
[43] Joseph H. King, "The Law of Medical Malpractice" St. Paul Minn West p.121

[44] Ibid
[45] A.I.R. 1996 S.C. 2377

In **P.M. Ashwin v. Manipal Hospital, Bangalore**[46] a boy of five years underwent an operation for inguinal harnea. Warm water bag was put under the legs of the boy after operation. As a result of that both the legs were burnt and scalded permanently. Admittedly the heat was transmitted to the legs of the boy from metallic platform on which he was kept. If the temperature was manually assessed, the child would not have received such severe burns. It was held that the doctrine of res ipsa locquitor was applicable. Accordingly, compensation of Rs.5,00,000 was awarded.

In **Ram Babu v. Dr. Anjani Kishore**[47] a patient had cataract in his right eye. Thereafter due to some persistent problems in the eye, he was referred to doctor who diagnosed it a case of retinal detachment and performed a operation on the eye. His condition further deteriorated. He was referred to another doctor, who diagnosed it as aphakia with total retinal detachment and opined that it was hopeless case. The State Commission invoked the doctrine of res ipsa locquitor against the doctor who performed the operation. He failed to explain how the patients eye was damaged. The patient was allowed to recover damages amounting Rs.1,90,000.

It is evident from the above decision that, if a doctor fails to give satisfactory account of treatment burden falls on him to prove that he is not negligent. In Aphraim Jayanand Rathod v. Dr. Shailesh Shah,[48] a patient underwent an appendicitis operation. A second operation was performed without written consent in the guise of removing stitching. The doctor did not give any explanation for second operation. It was held that the failure on the part of the doctor to render proper explanation for second operation itself was sufficient proof of the fact that the first operation was conducted negligently. The Gujarath State Commission held that a patient could not be compelled to prove negligence on the part of the doctor for the reason that an operation was performed in operation theatre where no one was allowed to enter and moreover the patient was unconscious due to administration of anaesthecia. Hence onus shifted to the doctor to prove that he was not negligent.

Unless the conduct of the doctor speaks for itself, courts are slow to invoke the doctrine. Inspite of the best care, a patient may die or suffer an injury which by itself does not suggest

[46] (1997) 1 C.P.J. 238 (Karnataka S.C.D.R.C.)
[47] (1998) 2 C.P.J. 684 (Bihar S.C.D.R.C.)
[48] (1996)1 C.P.J. 243 (Gujarath S.C.D.R.C.)

negligence on the part of a doctor. In Air Commander Sathya Narayana v. L.V. Prasad Eye Institute,[49] a patient aged about 75 years was operated for a cataract of right eye and an Intra Ocular Lens was implanted. He developed severe infection in the post-operative period. As a result of that he lost the vision in that eye. He contended that but for the gross negligence of the doctor and lack of aseptic conditions, the eventuality would not have occurred and hence the doctrine was applicable. Rejecting the contention of the patient, the State Commission held that res ipsa locquitor was not applicable in this case and the doctors being fully qualified to perform the operation had taken best of care inspite of which if a patient happened to die or suffer any damage the plea of res ipsa locquital was of no avail.

One of the requisites for application of the doctrine is that the things must be under the exclusive control of a doctor. If things are under his control, yet if an injury is allowed to occur then the things speak for themselves. It shows that the cause of the harm is known to him. But in Beena Gard v. Kailash Nursing Home & Others,[50] a woman after six months of caesarian operation developed utero vesical fistula for which she alleged negligence on the part of the respondent doctors. She contended that the principle of res ipsa locquitor was applicable. She did not produce any evidence establishing the link between surgery and the development of fistula. The National Commission refused to apply the doctrine on the ground that res ipsa locquitor did not apply if the cause of the harm was known. It is submitted that instrumentalities under the control of a doctor indicates that cause of the harm must be known before that the maxim can be applied. However the case could have been decided on the ground of failure to prove causation.

Res ipsa locquitor is a mere rule of evidence.[51] It is invoked only in civil cases. It cannot be applied in criminal cases.[52] The reason is that in criminal cases it is the obligation of the prosecution to prove the guilt of an accused beyond reasonable doubt.

[49] (1998)1 C.P.J. 110 (Andhrapradesh S.C.D.R.C.)
[50] (2002)3 C.P.J. 99 (N.C.)
[51] Jacob Mathew v. State of Punjab, (2005) 3 C.P.J.9 at p.18(S.C.); Martin D'Souza v. Mohd. Isfaq (2009)1 C.P.J. 32 (S.C)
[52] Ibid. See also Syad Akbar v. State of Karnataka (1980)1 S.C.C. 30

CONCLUSION

The burden of proving negligence on the part of doctor falls on a patient whether action be initiated under contract or tort law or Consumer Protection Act. Strict proof is not necessary. On balance of probabilities, he has to prove that but for the negligence of the doctor, he would not have suffered the injury. Even then it is a cumbersome task to prove the negligence of doctors. It is only in a fraction of cases, patients are able to recover compensation. In substantial number of cases, patients could not recover on the ground of failure to prove negligence. It is very difficult to prove causation. That is to link the injury to breach of duty on the part of a doctor. Even though negligence of a doctor is proved, if the injury, even otherwise would have occurred no recovery is allowed. Likewise recovery is not allowed, where substantially the cause of injury is some other factor along with negligence on the part of a doctor. In such a situation courts do not award damages on the ground that quantification of damages does not admit mathematical precision. But wherever negligence of a doctor substantially contributes to the injury of a patient the damage assessed inspite of objective assessment is not completely free from subjective element. What is required is not mathematical precision but awarding of damages to the extent to which the negligence of doctor contributed to the injury. Otherwise a patient will be exposed to hardship by an unjustifiable swing of balance in favour of a doctor. Moreover it will act as assurance of immunity from liability that there is a possibility of the doctor continuing his negligent behaviour. Therefore it is submitted that a doctor should be held liable wherever he was found negligent to tilt the balance justifiably in favour of the patient.

Even though it is difficult to prove causation, forceeability of injury on the part of a doctor does not pose any difficulty, for the reason that by virtue of his knowledge of medicine he must be in a position to anticipate the known injury and risk. If risk is unknown, a doctor cannot be held liable.

There arises a question as to how a patient should discharge the onerous task of obligation of proving the negligence. In some cases courts have laid down the proposition that a medical expert in the concerned subject needs to be examined. That is, mere personal affidavit of a patient is not suffice. It requires expert evidence. But in **Indian Medical Association Case**, the Supreme Court has laid down the proposition that a patient needs to prove breach of

duty on the part of a doctor which may be done by adducing expert evidence. It suggests that production of expert evidence by a patient is not an invariable rule. Reliability of expert evidence under all circumstances is questionable. Hence it follows that at times, personal affidavit is also admissible. A bald assertion on the part of a patient is suffice. In fact in a few cases courts have allowed recovery on the basis of such bald assertion also which goes with the proposition laid down in **Indian Medical Association Case**. Therefore burden of proof signifies the responsibility of proving the negligence of a doctor to the satisfaction of the court. It is the discretion of the court whether to call for an expert evidence or confine itself to personal affidavit of a patient. Generally a doctor does not come forward to give testimony against a fellow doctor. In such a situation the only way out is to rely upon the personal affidavit of the patient. If the court is not satisfied it can insist for expert evidence. If expert evidence is not available, nothing can be done. It has to be considered as an inevitable hardship to the patient. In such a situation a doctor cannot be asked to prove that he is not negligent. However onus to prove that he is not negligent shifts to him when he fails to give a satisfactory explanation regarding the treatment or procedure. This proposition obviates the difficulty of the patient to prove negligence.

In case of an operation resulting in an injury to the patient his position is very precarious due to the reasons already discussed above. It is laudable that courts have taken cognizance of this lamentable situation by shifting the onus to the doctor to prove that cause of injury is not the result of breach of duty on his part. It should be noted that in such a situation the active evidence lies with the doctor who stands in a position of good faith to his patient. In addition to that courts may presume negligence on an objective appraisal of the facts of the case.

The real hope of a patient rests on the application of doctrine of res ipsa locquitor. But this maxim applies only to civil cases under limited circumstances.

It is evident from the above discussion that the courts have sufficiently relaxed the rigidity of law relating to burden of proof to strike a proper balance between the interests of doctors as well as patients.