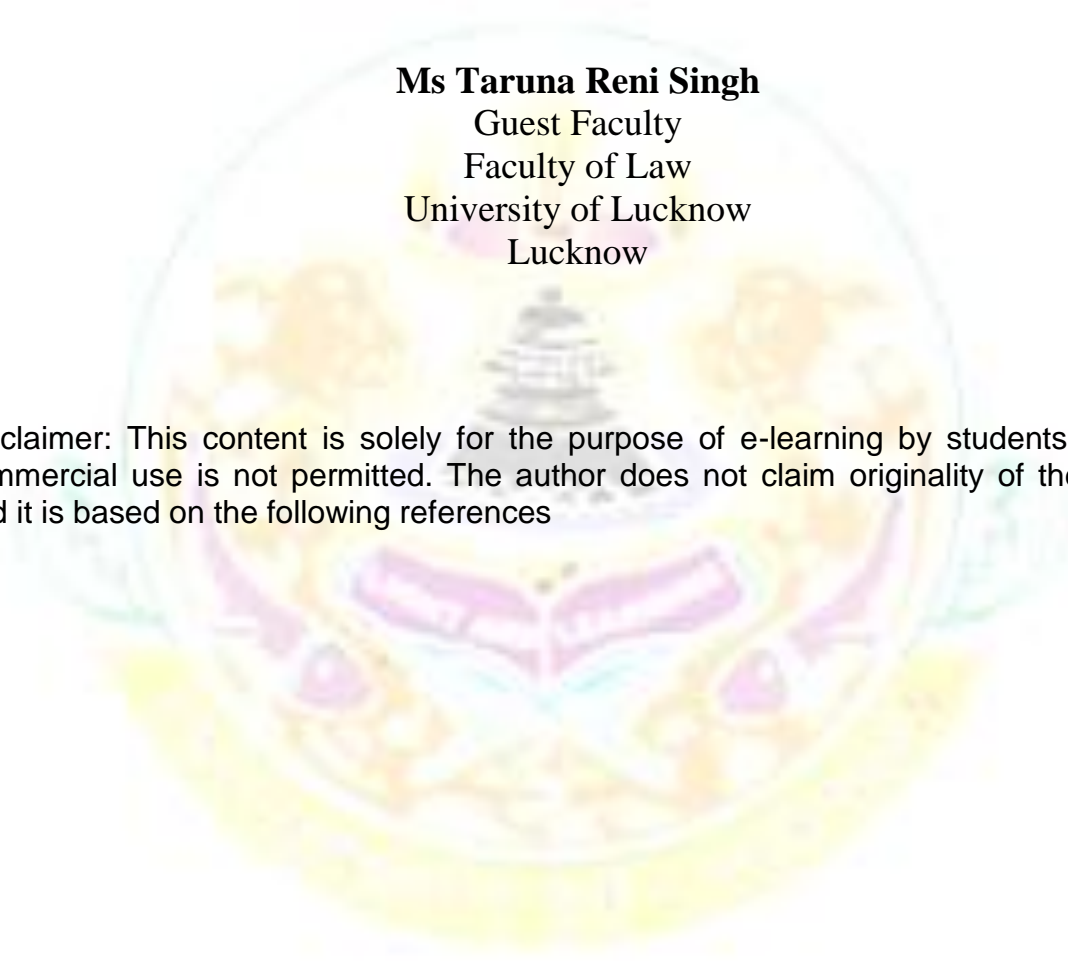


Law of Torts

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Law of Tort

Unit-I:

Introduction and Principles of Liability in Tort

(Lectures-12)

- i. Definition of Tort
- ii. Development of Law of Torts
- iii. Distinction between Law of Tort, contract, Quasi-contract and crime
- iv. Constituents of Tort: Injuria sine damnum, Damnum sine injuria
- v. Justification in Tort, Volenti non-fit Injuria, Necessity, Plaintiff's default, Act of God, Inevitable accidents, Private defense
- vi. Remedies in Tort; Ubi jus ibi remedium, Remoteness of Damages

Unit-II:

Specific Torts-I

(Lectures-10)

- i. Negligence
- ii. Assault & Battery, Trespass & Conversion
- iii. Nuisance
- iv. False Imprisonment and Malicious Prosecution
- v. Judicial and Quasi: Judicial Acts vi. Parental and Quasi-Parental authority

Unit-III:

Specific Torts-II

(Lectures-08)

- i. Vicarious Liability; Joint Tortfeasors
- ii. Doctrine of Sovereign Immunity
- iii. Strict Liability and Absolute Liability
- iv. Defamation v. Cyber Tort & Tort in Intellectual Property Rights Passing Off.

Unit-IV:

The Consumer Protection Act, 1986

(Lectures- 10)

- i. Definitions of Consumer, Goods and Services
- ii. Rights and Duties of Consumer
- iii. Authorities for Consumer Protection
- iv. Remedies

Books

1. Salmond & Heuston-On the Law of Torts, Universal, Delhi
2. D.D.Basu, The Law of Torts. Kamal, Calcutta
3. Winfield & Jolowiz on Tort Sweet and Maxwell, London
4. Ratan Lal & Dhiraj Lal-The Law of Torts Universal, Delhi.
5. R.K.Bangia, Law of Torts.

Negligence by professionals

In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practicing and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practices. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd*¹. Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable.²

An often quoted passage defining negligence by professionals, generally and not necessarily confined to doctors, is to be found in the opinion of McNair, J. in *Bolam v. Friern Hospital*

¹ *Charlesworth & Percy, ibid.*, para 8.03.)

² *Ibid*

Management Committee,³ WLR at p. 586 in the following words: [W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill < It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art⁴

The water of *Bolam* test has ever since flown and passed under several bridges, having been cited and dealt with in several judicial pronouncements, one after the other and has continued to be well received by every shore it has touched as neat, clean and a well condensed one. After a review of various authorities Bingham, L.J. in his speech in *Eckersley v. Binnie* summarised the *Bolam* test in the following words: (Con LR p. 79) From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such awareness as an ordinarily competent practitioner would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet.¹

The degree of skill and care required by a medical practitioner is so stated in *Halsbury's Laws of England*⁵ (The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and

³ All ER p. 121 DF)

⁴ . (*Charlesworth & Percy, ibid.*, para 8.02)

⁵ 4th Edn., Vol. 30, para 35):

knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men. Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (1) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care. The above said three tests have also been stated as determinative of negligence in professional practice by **Charlesworth & Percy** in their celebrated work on *Negligence*.

The decision of the House of Lords in *Maynard v. West Midlands Regional Health Authority* by a Bench consisting of five Law Lords has been accepted as having settled the law on the point by holding that it is not enough to show that there is a body of competent professional opinion which considers that the decision of the defendant professional was a wrong decision, if there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances. It is not enough to show that subsequent events show that the operation need never have been performed, if at the time the decision to operate was taken, it was reasonable, in the sense that a responsible body of medical opinion would have accepted it as proper. Lord Scarman who recorded the leading speech with which the other four Lords agreed quoted (at All ER p. 638f) the following words of Lord President (Clyde) in *Hunter v. Hanley*, observing that the words cannot be bettered: (SLT p. 217) 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 other professional men. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care. Lord Scarman added: (All ER p. 638g-h) A doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. Differences of opinion and practice exist, and will always exist, in the medical as in other professions. There is seldom any one answer exclusive of all others to problems of professional judgment. A court may prefer one body of opinion to the other, but that is no basis for a conclusion of negligence. His Lordship further added that: (All ER p. 639d) *A+ judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish

negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred.

The classical statement of law in *Bolam* case has been widely accepted as decisive of the standard of care required both of professional men generally and medical practitioners in particular. It has been invariably cited with approval before the courts in India and applied as a touchstone to test the pleas of medical negligence. In tort, it is enough for the defendant to show that the standard of care and the skill attained was that of the ordinary competent medical practitioner exercising an ordinary degree of professional skill. The fact that a defendant charged with negligence acted in accord with the general and approved practice is enough to clear him of the charge. Two things are pertinent to be noted. Firstly, the standard of care, when assessing the practice as adopted, is judged in the light of knowledge available at the time (of the incident), and not at the date of trial. Secondly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time on which it is suggested as should have been used.

A mere deviation from normal professional practice is not necessarily evidence of negligence. Let it also be noted that a mere accident is not evidence of negligence. So also an error of judgment on the part of a professional is not negligence *per se*. Higher the acuteness in emergency and higher the complication, more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and he has to choose the lesser evil. The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure. So long as it can be found that the procedure which was in fact adopted was one which was acceptable to medical science as on that date, the medical practitioner cannot be held negligent merely because he chose to follow one procedure and not another and the result was a failure.

No sensible professional would intentionally commit an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. A single

failure may cost him dear in his career. Even in civil jurisdiction, the rule of *res ipsa loquitur* is not of universal application and has to be applied with extreme care and caution to the cases of professional negligence and in particular that of the doctors. Else it would be counter-productive. Simply because a patient has not favourably responded to a treatment given by a physician or a surgery has failed, the doctor cannot be held liable *per se* by applying the doctrine of *res ipsa loquitur*.

Res ipsa loquitur is a rule of evidence which in reality belongs to the Law of Tort. Inference as to negligence may be drawn from proved circumstances by applying the rule if the cause of the accident is unknown and no reasonable explanation as to the cause is coming forth from the defendant. In criminal proceedings, the burden of proving negligence as an essential ingredient of the offence lies on the prosecution. Such ingredient cannot be said to have been proved or made out by resorting to the said rule. Incidentally, it may be noted that in ***Krishnan v. State of Kerala***, the Court has observed that there may be a case where the proved facts would themselves speak of sharing of common intention and while making such observation one of the learned Judges constituting the Bench has in his concurring opinion merely stated '*res ipsa loquitur*'. Nowhere has it been stated that the rule has applicability in a criminal case and an inference as to an essential ingredient of an offence can be found proved by resorting to the said rule. In our opinion, a case under Section 304-A IPC cannot be decided solely by applying the rule of *res ipsa loquitur*.

A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.

The purpose of holding a professional liable for his act or omission, if negligent, is to make life safer and to eliminate the possibility of recurrence of negligence in future. The human body and medical science, both are too complex to be easily understood. To hold in favour of existence of negligence, associated with the action or inaction of a medical professional, requires an in-depth understanding of the working of a professional as also the nature of the job and of errors committed by chance, which do not necessarily involve the element of culpability.

The subject of negligence in the context of the medical profession necessarily calls for treatment with a difference. Several relevant considerations in this regard are found mentioned by Alan Merry and Alexander McCall Smith in their work *Errors, Medicine and the Law* (Cambridge University Press, 2001)⁶. There is a marked tendency to look for a human actor to blame for an untoward event, a tendency which is closely linked with the desire to punish. Things have gone wrong and, therefore, somebody must be found to answer for it. To draw a distinction between the blameworthy and the blameless, the notion of *mens rea* has to be elaborately understood. An empirical study would reveal that the background to a mishap is frequently far more complex than may generally be assumed. It can be demonstrated that actual blame for the outcome has to be attributed with great caution. For a medical accident or failure, the responsibility may lie with the medical practitioner and equally it may not. The inadequacies of the system, the specific circumstances of the case, the nature of human psychology itself and sheer chance may have combined to produce a result in which the doctor's contribution is either relatively or completely blameless. The human body and its working is nothing less than a highly complex machine. Coupled with the complexities of medical science, the scope for misimpressions, misgivings and misplaced allegations against the operator i.e. the doctor, cannot be ruled out. One may have notions of best or ideal practice which are different from the reality of how medical practice is carried on or how the doctor functions in real life. The factors of pressing need and limited resources cannot be ruled out from consideration. Dealing with a case of medical negligence needs a deeper understanding of the practical side of medicine.

At least three weighty considerations can be pointed out which any forum trying the issue of medical negligence in any jurisdiction must keep in mind. These are:

- (i) that legal and disciplinary procedures should be properly founded on firm, moral and scientific grounds;
- (ii) that patients will be better served if the real causes of harm are properly identified and appropriately acted upon; and
- (iii) that many incidents involve a contribution from more than one person, and the tendency is to blame the last identifiable element in the chain of causation, the person holding the 'smoking gun'.

⁶ <https://www.cambridge.org/core/books/errors-medicine-and-the-law/D49C76C27F787D7F8490EEE2B7FE112D>

Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated⁷. Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence.

Summary

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of the medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the

⁷ (see Black's *Law Dictionary*, 7th Edn.)

equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

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- Charlesworth & Percy on *Negligence* (10th Edn., 2001),
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