EXPLORING THE LEGAL LANDSCAPE OF MEDICAL NEGLIGENCE IN PAKISTAN: CHALLENGES AND PERSPECTIVES

HAMMAD SALEEM

Hammad Saleem is an Associate at Jawad Zafar & Associates and a Visiting Faculty member at the Roots IVY College of Management Sciences (ICMS) where he teaches Equity and Trust to undergraduate law students. Hammad's work primarily involves criminal, civil, and constitutional litigation matters. Hammad graduated with an LL.B from the University of London with four distinctions, including two Certificates of Excellence. Hammad's areas of interest are human rights law and constitutional law.

ABSTRACT

The law of medical negligence remains largely underdeveloped. However, recently, judges have pro-actively considered tort law jurisprudence from the United Kingdom and India in an attempt to replicate those legal principles in the Pakistani legal framework. This article will medical negligence jurisprudence under tort law as developed over the years in England and Wales and in India. It will then critically analyse how Pakistani courts have applied these principles. This article aims to illustrate that an exact replication of principles developed elsewhere is not the most suitable course of action, and that it is the responsibility of State institutions legislate and adjudicate cases in a manner that is in touch with the ground realities of a country.

KEYWORDS: Medical Negligence, Tort Law, Pakistan, India, England and Wales, Duty of Care, Breach of Duty of Care, Remedies.

---

1. INTRODUCTION

The word 'tort' is a Norman-French word meaning 'harm' or wrong'. The law of torts is best understood as the law of civil wrongs, i.e., wrongful conduct that entitles an aggrieved person to a remedy, primarily in the form of compensation.[1] Tort law covers the law of nuisance, libel, slander, trespass,

[1] Paula Giliker, *Tort* (7th edition, Sweet & Maxwell 2020) 1.

assault, battery, and negligence.[2] The tort of negligence is the most well-known branch of tort law and is the subject of this article.

Negligence is 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate human affairs, would do, or doing something which a prudent and reasonable man would not do.'[3] It must be noted that negligence can be of different types, including gross negligence, vicarious negligence, contributory negligence, professional negligence, and medical negligence. This article considers medical negligence and its development in England and Wales, India, and Pakistan.

This area of the law was developed through common law and eventually became a consolidated area of law on its own. Today, this area of the law continues to develop in order to adopt with changing societal needs.[4] This article examines the development of this concept within the legal system of England and Wales. In doing so, this article will identify the key requirements for establishing a tort of medical negligence and then highlight the remedies available to victims of medical negligence in England and Wales. After this, a comparative analysis will be provided of the development of the jurisprudence on medical negligence in India and Pakistan.

2. ENGLAND AND WALES

The tort of negligence has been most convincingly defined by W.H.V Rogers as: '… a breach of a legal duty to take care which results in damage to the claimant.'[5] From this definition, three crucial ingredients of negligence can be identified: firstly, the defendant owes a duty of care to the claimant; secondly, there is a breach of the duty of care; and thirdly, the claimant suffers a damage that is reasonably foreseeable (i.e., not too remote) a result of the breach of duty of care, It is important to examine the concepts of duty of care and breach of duty of care. The concepts of remoteness and causation is beyond the scope and purport of this article because causation as a concept of law has been developed and tested in other areas of the law, primarily criminal

[2] ibid.
[3] *Blythe v Birmingham Waterworks* [1856] 11 Exch 781, 784.
[4] Giliker (n 1) 28.
[5] W.H.V. Rogers, *Winfield and Jolowicz on Tort* (18th edition, Sweet & Maxwell 2010) 150.

law, and hence is the least controversial requirement for the purposes of negligence.

2.1. Duty of care

The concept of duty of care, as it is understood today, developed primarily on the basis of Lord Atkin's judgment in the landmark case of *Donoghue v Stevenson*.[6] He stated that under English law, there is a general conception of relationship between two individuals which gives rise to a duty of care, framing it as the 'neighbour principle'. This illustrates that a degree of proximity between two individuals is one of the primary characteristics that leads to the imposition of a duty of care towards one another, which includes the duty not to cause reasonably foreseeable harm or injury. In the medical field, a patient is in a proximate enough relationship with a medical practitioner such that the actions or omissions of the practitioner, if they fall below a particular standard, can result in harm to the patient. Thus, the patient-medical practitioner relationship is deemed to be proximate enough to establish a duty of care under the law of negligence.

There are three elements to establishing a duty of care as per *Caparo v Dickman*.[7] Firstly, there must be reasonably foreseeable damage. Secondly, there must be a sufficiently proximate relationship between the individuals. Thirdly, it must be 'just, fair, and reasonable' for the courts to impose a duty of care in light of the policy considerations at play.[8] Thus, a medical practitioner indeed owes a duty of care to all of his/her patients: as risk is invariably foreseeable during the administration of medical treatment, there is a proximate relationship between the parties and it being 'just, fair, and reasonable' to impose a duty of care in such cases. The courts in England and Wales have gone to the extent of establishing a duty of care not just with respect to a medical practitioner but also with respect to hospital staff when it comes to the provision of accurate information to the patient.[9]

---

[6] *Donoghue v Stevenson* [1932] 1 A.C. 562, 580 (HL Sc).
[7] *Caparo Industries plc v Dickman* [1990] 2 A.C. 605 (HL).
[8] ibid 617-618 (Lord Bridge of Harwich).
[9] *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 [24] (Lloyd-Jones J).

2.2. Breach of duty of care

The breach of a duty of care has been 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.'[10] This concept has been interpreted and applied liberally.

The standard for a breach of duty of care by a professional, such as a medical practitioner, was established in *Bolam v Friern Hospital Management Committee*.[11] where it was held that when adjudging a breach of duty of care on part of a professional, the courts must first examine the conduct of the defendant against the conduct expected from a reasonable individual having the skills that the defendant possesses.[12] Thus, courts must examine the conduct of a medical practitioner in light of the conduct expected of a reasonable medical practitioner having similar skills or areas of expertise. This does not mean that a medical practitioner is to be judged against the conduct expected from the most competent of medical practitioners, but rather against the conduct of a reasonable medical practitioner whose practice involves similar challenges as those of the defendant.

Secondly, where there are multiple treatment options for a particular ailment, a medical practitioner will not be deemed to have acted negligently if he/she chooses one of the options, and if a body of professionals prefers the treatment option chosen by the defendant over other available options.[13] For example, there are multiple views regarding what the correct treatment is for 'thoracic outlet syndrome'. One body of professionals may prefer a surgical approach while another body of professionals may consider physiotherapy as the most suitable form of treatment.[14] Hence, if a medical practitioner

[10] *Blythe v Birmingham Waterworks* (n 3) 784 (Alderson B).
[11] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582.
[12] ibid 587 (McNair J).
[13] ibid 588 (McNair J).
[14] Bo Povlsen, Thomas Hansson and Sebastian D Povlsen, 'Treatment for thoracic outlet syndrome' (2014) 11(CD007218) Cochrane Database of Systematic Reviews 1

chooses either one of the above-mentioned modes of treatment, he/she is not automatically in breach of the duty of care that is owed to the patient as that choice is backed up by the opinion of other professionals as well.

The drawback of this approach is that it leaves a profession self-regulated. The courts will not be able determine whether a breach of a duty of care has occurred without referring to the opinion of a body of professionals. However, as held in *Bolitho v City and Hackney Health Authority*, the fact that the conduct of the defendant is a preferred mode of treatment by a body of professionals does not automatically provide blanket immunity to the defendant.[15] There will indeed be some cases where the courts will be entitled to reject the opinion of expert professionals if the opinion is considered to have no logical basis. Nevertheless, this is an exception to the general rule. The Court of Appeal has reiterated that, generally, it will not be appropriate for the courts to intervene and label the opinion of expert professionals as having no logical basis.[16] Hence, the principle laid down in *Bolitho* does not overrule the test for breach of duty of care for professionals; rather, it acts as a qualification on the existing test, allowing the courts to intervene in cases involving exceptional circumstances.

2.3. Remedies under English law

Having consolidated the concepts of duty of care and breach of duty of care of professionals, it is important to highlight the remedies available to a victim of medical negligence under the legal framework of England and Wales. In most cases, negligence is simply a result of carelessness. The remedies available to a victim of medical negligence differ in light of the magnitude of carelessness involved in each case.

---

https://pmc.ncbi.nlm.nih.gov/articles/PMC11245746/pdf/CD007218.pdf accessed 13 December 2024.

[15] *Bolitho v City and Hackney Health Authority* [1998] A.C. 232; R. Mulheron 'Trumping Bolam: a critical analysis of Bolitho's 'gloss' (2010) 69(3) Cambridge Law Journal 609 https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/trumping-bolam-a-critical-legal-analysis-of-bolithos-gloss/12E1A801046FFA958F745BC5E83776DC accessed 13 December 2024.

[16] *Williams v Cwm Taf Local Health Board* [2018] EWCA Civ 1745 [14].

2.3.1. Criminal negligence

Where the negligence amounts to such a magnitude that it can reasonably be termed 'gross negligence', a victim has the right to pursue a case of criminal negligence against a medical practitioner.[17] In such cases, it must be proven that the conduct of the medical practitioner could not have been expected from a reasonable medical practitioner in any circumstances. Given that this becomes a criminal case, the case against the defendant must be proven beyond reasonable doubt rather than on a balance of probabilities; the penalties imposed in cases of gross negligence are considerably higher and may include prison sentences for the medical practitioners found guilty.[18] In addition to this, a doctor found criminally negligent is also likely to be made subject to fitness procedures by the General Medical Council and may have his medical licence revoked.[19]

In cases of criminal negligence, the fundamental question put before a jury is whether the conduct of the medical practitioner amounts to criminal conduct. In *R v Adomako*,[20] an anaesthetist failed to notice that the patient was disconnected from a ventilator during an eye operation.[21] As a result of this ignorance, the patient suffered a cardiac arrest and, unfortunately, passed away. The House of Lords, while upholding the conviction of the anesthetist for manslaughter, held that in such cases, the courts must consider whether 'the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death of the patient, was such that it should be judged criminal.'[22] In light of this ruling, the defendant's appeal was dismissed.[23]

---

[17] *R v Adomako* [1995] AC 171 [187] (Lord Mackay); Graham Virgo 'Reconstructing Manslaughter on Defective Foundations' (1995) 54(1) Cambridge Law Journal 14 https://www.cambridge.org/core/journals/cambridge-law-journal/article/abs/reconstructing-manslaughter-on-defective-foundations/002B3EF4D2CE5FCBD07CA3A2751EB9BA accessed 13 December 2024.

[18] Daniele Bryden and Ian Storey, 'Duty of care and medical negligence' (2011) 11(4) Continuing Education in Anaesthesia Critical Care & Pain 124 https://academic.oup.com/bjaed/article/11/4/124/266921 accessed 13 December 2024.

[19] The General Medical Council (Licence to Practise) Regulations Order of Council 2009, s 3.

[20] *R. v Adomako* (n 17).

[21] ibid [181] (Lord Mackay).

[22] ibid [187] (Lord Mackay).

[23] ibid [189] (Lord Mackay).

2.3.2. Negligence not amounting to criminal negligence

Where the negligent conduct does not amount to criminal negligence, remedies are provided for under civil law. In England and Wales, under the Limitation Act 1980, a victim of medical negligence can bring a claim against a medical practitioner up to three years after the cause of action accrues or the date of knowledge of the person injured.[24] This phrasing is of importance because 'knowledge of person injured' as a result of medical negligence occurs after one attains the age of majority i.e., 18-years old. Hence, for victims of medical negligence who were minors at the time of the negligent conduct, the three-year period for filing a claim against the medical practitioner begins after they attain the age of majority. This is significant because it takes account of the fact that minors may not be able to pursue a claim for negligence until they attain the age of majority and can have adequate knowledge of the practitioner's negligence and the injuries and loss that they suffered as a result.

The biggest deterrent when filing a civil claim for medical negligence is the time that it takes for a case of medical negligence to reach its conclusion and the victims being provided with the requisite damages. In 2001, according to the National Audit Office, an average case of clinical negligence took five and a half years to be concluded and 22% of outstanding cases concerned events that took place 10 years previously.[25] However, once a victim of medical negligence successfully goes through the entire court process and gets a favourable decision, the victim is likely to be compensated for a number of losses suffered during the process.

The compensation a victim is entitled to is calculated considering the pain and suffering caused by the medically negligent conduct and the victim's loss of amenity i.e., the impact the injuries had on the victim's enjoyment of their daily life.[26] In addition to this, the victim is also compensated for any foreseeable loss of earnings that might have resulted from them being put in

[24] Limitation Act 1980 (UK), s 11.
[25] UK Comptroller and Auditor General, *Handling Clinical Negligence Claims in England'* (London: National Audit Office, 3 May 2001) 7 https://webarchive.nationalarchives.gov.uk/ukgwa/20170207052351/https://www.nao.org.uk/wp-content/uploads/2001/05/0001403.pdf accessed 13 December 2024.
[26] *Attorney General of St Helena v. AB and others* [2020] UKPC 1; *Hassam and another v. Rabot and another* [2024] UKSC 11.

a difficult situation owing to the medically negligent conduct. Moreover, where the medically negligent conduct has left a victim in a state where he/she requires special care, the victim is also compensated with respect to this special care and support.[27] The damages also contain miscellaneous expenses incurred by the victim in relation to the injury suffered, including travelling expenses, treatment costs, and prescription charges. The victim can also claim an interest on all past losses.

All of this suggests that after a claim of medical negligence has been concluded in favour of a victim, the compensation afforded to the victim is significant and covers all quantifiable losses incurred. The courts in England and Wales have comprehensively defined the concept of medical negligence along with its requirements, and outlined various types of pain and damage that can be compensated for if attributable to the negligent conduct. However, the time that it takes for a victim to finally get compensated for the pain and damage caused is significant.

3. INDIA

The legal framework of the tort of negligence in India was essentially inherited from the British colonial framework, and is therefore very similar. In *Poonam Verma v. Ashwin Patel and others*,[28] the Supreme Court of India affirmed the definition of negligence *per se* found in Black's Law Dictionary:

> Conduct, whether of action of omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence, that it can be said without hesitation or doubt that no careful person would have been guilty of it." As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.[29]

[27] ibid.
[28] *Poonam Verma v. Ashwin Patel and others* (SCC 1996 322).
[29] ibid [40] (Saghir Ahmad J).

This illustrates that judges have not shied away from defining negligence as broadly as possible to include all forms of careless conduct within its parameters.[30] It is important to further examine the requirements that must be satisfied to establish a case for medical negligence within the Indian legal system.

3.1. Requirements for the tort of medical negligence

The requirements for the tort of medical negligence in the Indian legal system were laid down in the cases of *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another*[31] and *A.S Mittal v. State of U.P*[32] wherein the Supreme Court of India held that a doctor owes three distinct kinds of duties to a patient.[33]

Firstly, a duty of care is owed by the medical practitioner to the patient in deciding whether the case of the patient should be undertaken by the concerned medical practitioner.[34] This means the doctor must decide if he/she considers himself/herself to have the professional competence to successfully relieve the patient of the medical issue that he/she may be suffering from. This was further explained in *State Of Haryana & Ors vs Smt. Santra*,[35] wherein the Supreme Court of India held a fertility doctor liable for medical negligence for making a representation that he was competent enough to attend to the medical needs of the patient.[36] Subsequently, when the doctor failed to demonstrate due care and caution on his part, causing the patient loss and injury, the doctor fell short of the standard expected from a reasonably competent doctor in similar circumstances by failing to discharge his duty of care in deciding whether he should have taken the patient's case.

---

[30] ibid.
[31] *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (AIR 1969 Supreme Court 128).
[32] A.S. Mittal v. State of U.P (AIR 1989 Supreme Court 1570).
[33] ibid [9]; *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (n 31) [11].
[34] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].
[35] *State Of Haryana & Ors vs Smt. Santra* (AIR 2000 Supreme Court 1888)
[36] ibid [2].

Secondly, where multiple acceptable methods of treating the patient's condition exist, the doctor owes a duty of care to the patient in choosing the most suitable mode of treatment.[37] Hence, this second duty of care is similar to the principle laid down in *Bolam v Friern Hospital Management Committee*, i.e., that a doctor's choice of one out of multiple courses of treatment does not automatically render the doctor liable for medical negligence as long as there is sufficient professional backing for the mode of treatment chosen by the doctor.[38] Similarly, the Indian courts do not expect the doctor's conduct to be in line with the highest degree of competency expected from a medical practitioner, but rather conduct that is reasonable in light of the facts of every case.[39]

Thirdly, a doctor also has a duty of care in the administration of the chosen treatment.[40] A doctor does not discharge his/her duty of care by the mere selection of the appropriate treatment; he/she must also ensure its proper administration. The Supreme Court of India held that a patient could recover damages where it can be established that the doctor breached any of the three duties owed to the patient. The Court also clarified that this should not be taken to mean that the courts are trying to diminish doctors' discretion in choosing and administrating distinct modes of treatments with respect to the patient's needs. Rather, the discretion that a doctor must exercise in treating a patient is heightened in cases of emergency, which suggests that the more critical a patient's condition, the greater the discretion that a doctor will have. This makes it more difficult to establish that the doctor acted negligently because the question of negligence in such situations will be determined while keeping in mind the tense situation in which the doctor acted.

3.1.1. Remedies for medical negligence in the Indian legal system

A victim of medical negligence in India has four distinct routes to attain a suitable remedy for the injury and losses incurred. Firstly, the victim can file a case for compensation through consumer dispute resolution channels, the High Courts, or the Civil Court under the Consumer Protection Act 2019,

---

[37] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].
[38] *Bolam v Friern Hospital Management Committee* (n 11).
[39] *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbole and another* (n 31).
[40] *Poonam Verma v. Ashwin Patel and others* (n 37) [19].

the Constitution of India 1950 or the law of torts respectively. Secondly, the victim can file a criminal complaint against the doctor under the Bharatiya Nyaya Sanhita 2023 (the official criminal code in India), which will result in punitive action being taken against the doctor but does not offer compensatory damages. Thirdly, the victim can initiate disciplinary action against the doctor before the Indian Medical Council or the requisite State Medical Council, potentially leading to the suspension or revocation of the doctor's medical license.[41] Lastly, the victim can file a recommendatory action before the National Human Rights Commission or a state's Human Rights Commission to seek compensation. This section will focus on remedies under constitutional law and consumer protection law as these are the remedies that are sought in the majority of cases that arise in this area in the Indian legal system.[42]

3.1.2. Remedies under Constitutional Law

The courts have interpreted the right to life as enshrined under Article 21 of the Constitution of India to encapsulate the right to health and proper medical treatment.[43] Furthermore, one can argue that all constitutional rights can only be enjoyed if a citizen is in good health and is not injured or impaired (particularly as a result of negligent medical treatment). Hence, medical negligence can be interpreted as a breach of an Indian citizen's constitutional rights. Considering this, a victim of medical negligence can file a petition to the Supreme Court under Article 32 and to the High Court under Article 226 of the Constitution, respectively. The courts are constitutionally responsible for upholding the fundamental rights of all citizens and ensuring that these rights are enforced. In medical negligence cases brought before the Apex Courts under the Constitution, the High Court and the Supreme Court have the power to issue writs i.e., *habeas corpus*, *mandamus*, prohibition, *quo-warranto*, and *certiorari* – whichever may be appropriate in a particular case. However, it must be noted that a writ petition can only be filed against public hospitals

[41] Indian Medical Council Rules 1957, Rule 15.
[42] Shyamkrishna Balganesh, 'The Constitutionalization of Indian Private Law' (2016) All Faculty Scholarship 1557, 1564.
[43] Abhishek R Bhardwaj and Kuljit Singh, 'Medical negligence in India: A study with special reference to liability in tort' (2018) 3(2) International Journal of Academic Research and Development 1415, 1421; Sharma MK 'Right to Health and Medical Care as a Fundamental Right' (2005) All India Reporter 255.

and not against private hospitals, as the Articles 32 and 226 only allow petitions against State officials or functionaries and not against private actors.[44]

3.1.3. Remedies under Consumer Protection Law

Where a consumer suffers loss resulting from the provision of deficient services, the consumer can file a claim for damages under the Consumer Protection Act 2019. The Act establishes Consumer Dispute Resolution Commissions at the district, state and national levels. For a patient to bring a claim, the patient must qualify as a 'consumer' under the Act. In *Indian Medical Association v. V.P. Shantha and others*,[45] the Supreme Court of India held that a consumer under Section 2(1)(d) of the Act only includes those individuals who have been rendered medical services in exchange for consideration.[46] In addition to this, in *Consumer Unity & Trust Society, Jaipur v. State of Rajasthan*, the National Consumer Disputes Resolution Commission (NCDRC) held that individuals who avail medical services in government hospitals cannot be regarded as consumers as these services cannot be regarded as being hired in exchange for consideration.[47] Thus, one can only avail remedies through the Consumer Protection Act where medical services were availed in a private hospital or healthcare facility in exchange for consideration.

However, confusion arises within the Indian legal system due to the multiplicity of forums available to a victim of medical negligence. The most suitable route to take is to file a constitutional claim and establish a breach of fundamental rights as a result of medical negligence.[48] This will allow a victim to seek compensation irrespective of the fact whether the medical services were available in a private facility or a government facility as the victim will not be assessed as a consumer as opposed to claims under the Consumer Protection Act, which are only an option for victims of medical negligence who availed medical services in private healthcare facilities. Hence, it is important that this area of the law be streamlined, and victims of medical

[44] *AK Gopalan v. State of Madras* (AIR 1950 SC 27).
[45] *Indian Medical Association vs. V.P. Shantha & others* (1996 AIR 550)
[46] ibid [11].
[47] *Consumer Unity & Trust Society, Jaipur v. State of Rajasthan* 1 CPR 241 (NC).
[48] Balganesh (n 42) 1564.

negligence be provided with a singular legal option to pursue which is broad to enough to encompass all possible cases.

4. PAKISTAN

In Pakistan, there appears to be a lack of tort law jurisprudence; however, Pakistani courts have started to develop this area in line with the courts of England and Wales and the Indian courts in this regard. Much of the tort jurisprudence has been a result of a liberal interpretation of the Constitution of the Islamic Republic of Pakistan 1973 (Constitution) and a reliance on settled principles of law as applied in England and Wales and in India.

4.1. The application of the *Bolam* test in Pakistan

In *Punjab Road Transport Corporation vs. Zahida Afzal & Others*,[49] the Supreme Court of Pakistan highlighted the importance of promoting the development of tort law jurisprudence in Pakistan.[50] The Court held that Articles 4 and 5(2) of the Constitution impose a duty on all organs of the State and citizens of Pakistan to act within the limits prescribed by law, and where any State organ or individual violates these boundaries, they shall be subject to legal action.[51] As per Article 4 of the Constitution, no action detrimental to the life, liberty, body, reputation, or property of any person shall be taken except in accordance with the law. One can argue that where a medical practitioner causes damage to a patient as a result of negligent conduct, the patient's right to be treated and protected in accordance with the law is violated.

In *Mrs. Alia Tareen v. Amanullah Khan*,[52] the Supreme Court of Pakistan reiterated the test for professional negligence as was enunciated in *Bolam v Friern Hospital Management Committee*. The Supreme Court of Pakistan held that the test for a breach of duty in cases of medical negligence is whether the conduct of the medical practitioner acted according to what can be reasonably expected from a medical practitioner faced with the circumstances under which the concerned medical practitioner was working.[53] In addition to this,

---

[49] *Punjab Road Transport Corporation vs. Zahida Afzal & Others* (2006 SCMR 207)
[50] ibid.
[51] Constitution of the Islamic Republic of Pakistan 1973 ('Constitution') arts 4, 5(2).
[52] *Mrs Alia Tareen v. Amanullah Khan* (PLD 2005 Supreme Court 99) [32].
[53] ibid.

it was also held that a medical practitioner's conduct is not automatically considered to be negligent where a body of professionals disagrees with the mode of treatment adopted by the concerned medical practitioner as long as the mode of treatment adopted by the medical practitioner is preferred by another body of professionals.[54]

In addition to this, in *Dr. Atta Muhammad Khanzada v. Muhammad Sherin*,[55] a suit for damages was decreed in favor of a victim of medical negligence who suffered damage as a result of the negligent conduct of an eye doctor.[56] It was held that even where medical treatment is consented to, the medical practitioner is not absolved of the duty of care that the medical practitioner owes to the patient.[57] Thus, the courts have begun liberally considering claims for damages against medically negligent conduct and have not allowed medical practitioners to shield themselves by claiming consent to treatment as a defence.

In the seminal case of *Mariam Sajjad v. Dr. Prof. Rasool Ahmed Chaudhry*,[58] a 22-year-old woman went to a government hospital as she was suffering from mild pain in her arm.[59] The patient was attended to by the Head of the Orthopedics Department at the concerned facility, who advised a surgical treatment to the woman's condition. After her surgery, the patient suffered paralysis of the lower limb. Upon further examination, it was revealed that this impairment was caused by the the negligent surgery.

Thereafter, the victim filed a claim before the concerned Punjab Healthcare Commission which suspended the surgeon's license and fined the government hospital a sum of PKR 500,000. The victim also filed a suit for damages against the surgeon before the Civil Court, which decreed damages of PKR 5 million. She then appealed to the Lahore High Court. The matter was taken up as a Regular First Appeal and the sum of damages was increased from PKR 5 million to PKR 10 million.

---

[54] ibid [37].
[55] *Dr. Atta Muhammad Khanzada v. Muhammad Sherin* (1996 CLC 1440)
[56] ibid [2], [13].
[57] ibid [11].
[58] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (RFA. No. 70634/2023)
[59] ibid.

In the judgment that followed, the Court not only failed to cite previously decided cases in Pakistan but also examined the tort law jurisprudence from England and Wales and India.[60] However, the judgment falls short in resolving the controversy on the application of immunity afforded to medical practitioners against medical negligence claims.[61] This will be discussed further below.

4.2. The impact of the Punjab Healthcare Commission Act

Each province in Pakistan has its own statutorily established Healthcare Commission responsible for regulating medical professionals and medical facilities in the province. In Punjab, the Punjab Healthcare Commission Act 2010 (PHCA) governs the administration of the Punjab Healthcare Commission. Under section 2(xvii) of the of the PHCA, a 'healthcare service provider' is defined as 'an owner, manager or in-charge of a healthcare establishment and includes a person registered by the Medical and Dental Council, Council for Tibb, Council for Homeopathy or Nursing Council.'[62] Hence, a doctor who is also the Head of Department in a healthcare establishment falls within the ambit of section 2(xvii) and is considered as a healthcare service provider. Medical negligence is defined under Section 19 of the PHCA as:

> **19. Medical negligence**. (1) Subject to sub-section (2), a healthcare service provider may be held guilty of medical negligent on one of the following two findings:-
> (a) the healthcare establishment does not have the requisite human resource and equipments which it professes to have possessed; or
> (b) he or any of his employee[s] did not, in the given case, exercise with reasonable competence the skill which he or his employee did possess. [63]

---

[60] *Mrs Alia Tareen v. Amanullah Khan* (n 52); *Sikandar Shah & Others v. Dr. Nargis Shamsi & Others* (2014 MLD 149); *Abdul Basit and another v. Dr. Saeeda Anwar* (PLD 2011 Karachi 117); *Dr. Atta Muhammad Khanzada v. Muhammad Sherin* (n 55).
[61] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58); Punjab Healthcare Commission Act 2010, s 29.
[62] Punjab Healthcare Commission Act 2010, s 2(xvii).
[63] ibid, s 19.

In addition to this, Section 29 of the PHCA lays down immunity for healthcare service providers in the following terms: 'No suit, prosecution or other legal proceedings related to [the] provision of healthcare services shall lie against a healthcare service provider except under this Act.'

On a plain reading of this particular provision, it bars all kinds of suits and other legal proceedings except under the PHCA. Under the PHCA, there appears to be no concept of monetary compensation; while medical negligence is included as an offence under Section 28 of the PHCA, the Punjab Healthcare Commission only has the jurisdiction to impose a fine not exceeding Rs. 500,000 and – either additionally or alternatively – revoking the medical license of the healthcare service provider.[64] Consequently, allowing a suit for damages against a medical practitioner would be a clear contravention of Section 29 of the PHCA as the language of this particular provision categorically grants healthcare service providers immunity against such legal proceedings.

This interpretation of Section 29 read with Section 26(2) of the PHCA was upheld by the Lahore High Court in *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others*.[65] In this case, it was held that the purpose of Section 29 is to grant exclusive jurisdiction to the Healthcare Commission over the adjudication of matters against a healthcare service provider. Furthermore, this exclusive jurisdiction is subject to Section 26(2) of the PHCA, which grants the Commission the power to refer a particular matter to another forum for initiation of criminal or civil proceedings against a healthcare service provider.[66] Thus, a victim of medical negligence is not allowed to directly approach a forum other than the Commission itself to pursue a civil or criminal claim against the medical service provider. This was also clarified in *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha and others*,[67] where the Lahore High Court held that a victim of medical negligence cannot pursue a remedy under

[64] ibid, s 28.
[65] *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others* (PLD 2022 Lahore 18).
[66] ibid [44].
[67] *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha, and others* (PLD 2019 Lahore 429)

the consumer protection laws before the Consumer Courts as the only competent forum in this regard is the Healthcare Commission.[68]

It is unclear how the courts have continued to circumvent these provisions in cases such as *Mariam Sajjad* without any justification of this issue.[69] Furthermore, the fact that in the case of *Mariam Sajjad*, the judgments of the Lahore High Court in *Lady Dr. Nafeesa Saleem* and *Dr. Riaz Qadeer Khan* were neither cited, nor were any reasons provided to depart from the interpretation of the PHCA provided in these cases, which is a glaring question mark on the reasoning provided in the judgement.[70] There is a need to challenge the legal validity and constitutionality of Section 29 of the PHCA as it violates Article 10A of the Constitution, which confers upon all citizens a right to fair trial and due process for the determination of civil rights and obligations.[71] When a victim of medical negligence is apparently barred by a statutory provision to seek remedies against negligent conduct, the victim is left with nothing more than the imposition of a fine and possibly revocation of the medical practitioner's medical licence.

The above remedies are clearly insufficient in most cases. In *Mariam Sajjad*, the victim suffered significant impairment which requires a proper quantification of damages as is done in other jurisdictions.[72] This is not to say that the Lahore High Court has, as of now, completely failed victims of medical negligence; rather, the Court has encouraged suits for damages in cases involving medical negligence, but has not properly explained the purport of the PHCA. Hence, it has exceeded the scope of their competence without dwelling too much on the constitutionality of the aforementioned provision.

Despite this inadequacy in the approach taken by the Court, this article will now examine the mode of assessment that has been recognised by the Lahore

---

[68] ibid [12].
[69] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58).
[70] *Lady Dr. Nafeesa Saleem and another versus Justice / Additional Sessions Judge, Multan and 2 others* (n 65); *Dr. Riaz Qadeer Khan versus Presiding Officer, District Consumer Court, Sargodha, and others* (n 67)[12].
[71] Constitution, art 10A.
[72] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58).

High Court with respect to compensatory damages in medical negligence cases.

4.3. Standard for assessment of damages in medical negligence cases

In *Mariam Sajjad*, the Lahore High Court declared seven kinds of damages and injuries to be compensable.[73] Firstly, the victim of medical negligence should be provided with a fair and reasonable compensation for the injury caused.[74] Secondly, a small amount of compensation should be provided under the category of pain and suffering.[75] Thirdly, the victim must also be compensated for loss of amenity, i.e., the ability of the victim to enjoy his daily jobs, recreational activities, and hobbies due to some form of impairment caused as a result of the negligent conduct of the medical practitioner.[76] The Court further noted that damages for loss of amenity can be granted even where the victim is unconscious and cannot actively realize the loss of amenity that he/she has suffered.

Fourthly, the victim must also be compensated for all medical expenses incurred in connection with the treatment that was administered negligently.[77] These expenses shall include any expenses that might result due to the change in lifestyle that could be required in order for the victim to properly adopt to his/her altered circumstances.[78] Fifthly, the court must make a determination for the loss of earning suffered by the victim and this determination shall include losses suffered till date and any future losses that the victim can be expected to suffer as a result of the injury suffered.[79] Sixthly, all pecuniary losses, i.e., losses related to the injury suffered where the costs cannot be categorised as medical in nature but are in any case related to the injury suffered.[80] Lastly, the courts are also to examine any pain and suffering that the victim can be expected to suffer in the future, which may include the

[73] ibid.
[74] ibid [13].
[75] ibid.
[76] ibid.
[77] Jonathan Herring, *Medical Law and Ethics* (9th edition, OUP 2022) 124; Michael Jones, *Medical Negligence* (6th edition, Sweet & Maxwell 2021) 1001-1002.
[78] *Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhry* (n 58) [13].
[79] ibid.
[80] ibid.

humiliation and emotional stress that the victim will have to go through while acclimatising in the society owing to the altered circumstances.[81]

This illustrates that the Lahore High Court has not acted conservatively in describing the losses that can be monetarily compensated by a court and have actually actively included all forms of possible losses which might be in the minds of the victims of medical negligence.[82] However, it must be noted that significant confusion exists in regard to the overall structure of the tort redressal mechanism in Pakistan. While the Lahore High Court has consistently allowed cases to proceed as regular appeals under the Civil Procedure Code 1898, this seems to be in contravention of Section 29 of the PHCA and the immunity it affords to medical practitioners.[83] Moreover, it appears that the basis of this confusion has been that the Lahore High Court has interpreted Section 19 of the PHCA as a provision which lays down the offence of medical negligence rather than a provision that merely defines the term medical negligence.[84] This raises questions about the legality of the resulting judgements. [85]

5. CONCLUSION

This article compares the different approaches to medical negligence law across England and Wales, India and Pakistan. The latter two legal systems have regularly cited cases and academic opinions from the English legal system. Most fundamentally, in the area of medical negligence, the *Bolam* case has been significant as it has been recognised in India and Pakistan as well.[86] This replication of jurisprudence in Indian and Pakistani courts is praiseworthy for a number of reasons, but is not necessarily flawless. It is to be appreciated that every jurisdiction has its own unique challenges, and it is these challenges which the judges are to keep in mind when they are in a position to set a precedent.

---

[81] ibid.
[82] ibid.
[83] Code of Civil Procedure 1908, s 96; Punjab Healthcare Commission Act 2010, s 29.
[84] Punjab Healthcare Commission Act 2010, s 19.
[85] ibid, s 29.
[86] *Bolam v Friern Hospital Management Committee* (n 11).

The Indian legal system shares the issue of replicating English jurisprudence without accommodating the ground realities in the Indian medical sector. Additionally, there is confusion as to the most suitable route to take in order to gain access to monetary compensation as a result of medical negligence. An example of this is that, as discussed above, in India, a victim of medical negligence as a result of treatment administered in the absence of consideration cannot make use of the consumer protection jurisprudence if the victim cannot be classified as a consumer.

In the end, the proactive approach taken by the Indian and Pakistani courts must be appreciated; however, there is still a long way to go for the tort law jurisprudence in both countries to become more in line with the ground realities and also be less confusing for prospective litigants.