Medical Negligence: Bolam's Brethren and the Bean-Counting by the Supreme Court

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I Introduction

From ancient times, certain duties and responsibilities have been cast on persons, who adopt the sacred medical profession as exemplified by Hippocratic Oath[1] (460 BC). Originally, it was the priest who functioned as a preacher, teacher, judge as well as a healer. He was the first physician and his relationship with the patients was unique and unquestioned. With the passage of time, not only the practice of medicine graduated to become independent, but this relationship has also shifted from 'next to god' to 'friend, philosopher and guide' and now to 'service provider'. The veneration with which the doctors were seen earlier and the trust and confidence which remained a hallmark of the medical profession is now waning, and is now almost on the edge of extinction. The exponentially escalating count of complaints being filed by the plaintive patients exposes the environment of 'growing distress' between patients and doctors. The fear-psychosis among the public is not flimsy because the figures have already found a frightening proportion as (even) in the USA, more than a hundred and fifty thousand people are killed and more than a million people are injured by 'Medical Errors' every year, much of which is preventable.[2] One can very well imagine the probable statistics in India.

The whirlwind of corporatization and globalization has impinged upon every aspect of the human life- social, economic, political, moral, ethical etc. Corporate sector barged in the medical sector on singular scale. The predatory profit making propensity of the corporatized hospitals and the revenue-targets oriented medical practice by the doctors therein eye a patient as an opportunity to wrest the maximum procurable money. As a matter of fact there have been

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[1] "I swear by Apollo physician by Esculapinus by health by heal all and by all the gods & goddess making them witness that I will carry out according to my ability and judgment, …
"I will use treatment to help the sick according to my ability and judgment, …
"Now if I keep this oath and break it not, may I enjoy honor in my life and art among all men for all the time, but if I transgress and forever myself, may the opposite befall me,…
http://www.britannica.com/EBchecked/topic/266652/Hippocratic-oath as visited on 3 September, 2014.

[2] Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 959 (March, 2010)

instances when the attendants of the patient alleged disinformation and claimed that the patient had expired way before he was so declared by the doctor/hospital only to keep his body in the ICCU so as to raise the medical bills to the tune of several lakhs of rupees.

Here, it is to be understood that a patient never stands on an equal footing with a doctor and that the acts or omissions of a doctor have peremptory pertinence to his life and corporeal continuance. This situation is realized and comprehended by a patient right from the stage of the initial consultation and then throughout his treatment when he and his attendant/s are rebuked by the doctor for their attempts, howsoever humble and respectful to the doctor, to raise the grim and distressed queries contemplating which they might have spent a few sleepless nights. The doctors do not talk to the patients in a manner fit for fellow human beings but, at the same time without any shame or remorse, charge them with exorbitant fee and prescribe unnecessary diagnostic procedure. The non-participation of the patient in the medical procedure adopted for him by the doctor starts from this germinal juncture. The consent form if any and if ever signed by the patient or his attendant remains an idle formality in fine prints. This situation of harassment and helplessness also continues in the adversarial Courts of law where he finds himself pitted against the disproportionately resourceful medical professional who can easily engage good lawyers and placidly pull the strings of medical testimony to his advantage.

Whereas on the other hand, the doctors raise contention that in the raiment of medical negligence[3] they have been targeted for extracting compensation by the unscrupulous patients for everything that has not gone well with them during the medical treatment. If the predicament worsens at the current pace, the experienced and reputed doctors may start refusing to treat patients on an open to all (of course, those who can pay) basis for fear of being accused of negligence and the young generation shall be deterred from entering the medical profession. Also it has been expressed time and again on behalf of the medical fraternity that the instances of malicious prosecution against the bona fide doctors may not only shake the confidence of the

[3] HALSBURY'S LAWS OF ENGLAND, defines 'Medical Negligence' asa person who holds himself out as ready to give medical advice or treatment, impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties namely a duty of care in diagnosis and deciding whether to undertake the case: a duty of care in deciding what treatment to give: and a duty of care in his administration in that treatment. A breach of any of these duties will support an action for negligence by the patient.

medical profession but also may stifle the medical initiatives which ultimately shall not be in the interest of the humanity at large.

Now the judiciary is confronted with the complication of meting- out justice to both the factions. The poise of the medical profession must be protected while the legitimate claims of a disgruntled patient cannot be overlooked. The present study will highlight the concept of consent of the patient as envisaged in the medical jurisprudence mainly of UK and USA, and its absence in India. An attempt is also made to examine the overall scenario of the medical services and its paraphernalia in India including the blatant commercialization of virtually everything under the sun and its effect on the medical profession. Suggestions are made to infuse the concept of consent in the Indian medical jurisprudence so as to ensure the participation of the patient and the measures to be taken-up to fill the trust deficit and to revive the lost glory of the medical profession.

II Medical Profession and the Province of the Patient's Consent

The diagnosis of disease and the administration of treatment thereof are matters which fall into the ambit of medical judgment, but 'involvement' in deciding from available alternative modalities of treatment and associated materiality of risk therein is quite often recognized as a matter of non-medical judgment. For example, an ordinary prudent patient certainly appreciates risk of cardiac damage, brain damage, paralysis etc. as material risk for which knowledge of medicine or of medical intricacies is not at all essential.

Although, the hallmark of legality cannot be affixed on any particular mode of treatment through the books of statutes but in my view, the decision whether to undergo the medical treatment, and if yes, then which of the alternative modes of treatment, ought to be that of the patient. He should be given liberty to arrive at the decision after appraising him the material risks involved in the procedure. A patient invariably takes into account certain emotional, social and economic factors before opting for a particular mode of medical treatment. These factors play a dominant role especially in more serious treatments like surgery. Here medical evidence has hardly any role to play. A patient wants to know the risks involved in a particular mode of medical treatment because he does not want to expose his body to conceivable hazards unless inevitable. Here it is immaterial that he cannot understand the intricacies of medicine. Doctor's

duty of disclosure of alternative methods of treatment and associated material risks and patient's limited comprehension of intricacies of medicine and medical procedure are two different issues which must not be blended. Now before moving further, let us briefly discuss the concept of consent in the doctor- patient relationship in the medico- legal jurisprudence of UK, USA and India.

A Bolam's Principle and the Denial of Bodily Autonomy to the Patient

In England, the extent and standard of disclosure is governed by the ratio as laid down in *Bolam* v. *Friern Hospital*[4] hereinafter referred to as the Bolam's Principle**,** according to which a doctor is not guilty of negligence if he has acted in accordance with a practice which was accepted as proper by a responsible and respectable body of medical opinion. In effect, the standard of disclosure is left to be determined by the medical profession itself.

This Bolam's Principle has been emphatically approved by the House of Lords in relation to Medical diagnosis and treatment in *Maynard* v. *West Midland*[5]. In the words of Lord Scarman in this case, the justification for this rule was summed- up by observing that difference of opinion exists and continue to exist in the medical profession. A Court may prefer one body of opinion to the other, but that shall not supply any basis for conclusion of negligence because the doctor choose one course of action in preference to the other and he would not be liable if the course of action chosen by him in a particular case was acceptable to the medical professionals.

In *Sidaway* v. *Governors of Bethlem Royal Hospital* [6] the English Court had an opportunity of re-examining the Bolam's Principle when during the course of arguments, the appellant argued that the Court should adopt instead the doctrine of informed consent which had been favored in some jurisdictions in north America, however the English Court held that 'informed consent' was not the appropriate test of liability for negligence. Lord Diplock observed that in English medical jurisprudence, the doctor- patient relationship gives rise to the normal duty of care to exercise his skill and judgment to improve the health of the patient. This is a general duty which is not subject to dissection into a number of components to which different criteria of 'what satisfies the duty of care' apply such as diagnosis, treatment and

[4](1957) 1 W.L.R. 582 (Queen's Bench Division)
[5][1984] 1 W.L.R. 634
[6][1985] A.C. 871

warning of risk of something going wrong during the treatment. In modern medicine and surgery, such dissection of a doctor's duty to take care of his patient is neither legally meaningful nor medically practicable. So, in effect the doctors have the right to withhold information from the patient. The law imposes the duty of care on doctors; however, the standard thereof is a matter of medical judgment only.

The reason for this attitude is to be located in the dominance of paternalistic tradition. The conceptual basis for this is located in the proposition that doctors undergo exacting training, bear heavy responsibilities, work under heavy pressure and always act in the best interest of the patient.

The English Courts apply the professional standard test which is a legacy of Bolam's Principle conferring discretion on the medical professionals to disclose the risk. Accordingly, the criterion for disclosure is 'what a reasonable doctor would or would not disclose in accordance with a practice followed by a respectable body of medical opinion'. The majority may favor disclosure, but a doctor can escape liability for non-disclosure by proving that there is a respectable minority opinion which is against the disclosure.

At times, the attitude is so predominant that it has resulted into an apparent unjust medical practice as has happened in *Hetcher* v. *Black*[7]. In this case, the patient was a professional singer and was diagnosed as suffering from toxic goiter. She was subjected to 'Thyroidectomy'. Her left vocal cord was paralyzed as a result of operation. The doctor had positively informed her that the operation involved no risk to her voice. Denning L.J. observed that it was all for the doctor to decide whether to disclose any risk and whether to give (even) a false information to the patient before he operated on her.

In effect, it follows that a doctor can (even) mention myth and fiction to the patient if he thinks that it is in his interest, which puts the principle of bodily autonomy of the patient into oblivion. The reason for this attitude is to be located in the dominance of paternalistic tradition of English Courts in favor of the medical professionals.

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[7] *The Times*, July 2, 1954 as has been quoted in Teuten B, Taylor D., *"Don't worry my good man—you won't understand our medical talk": consent to treatment today*, BR J OPHTHALMOL 2001; 85:894–6

B American Doctrine of Informed Consent rooted in the concept of Bodily Autonomy of the Patient

It was in the USA that the doctrine of 'informed consent' was invented first. The roots of this doctrine are found in the principle of bodily autonomy that a patient shall have an exclusive right of self-determination to decide what shall or shall not be done with his body. It signifies the consent of a patient obtained after disclosure of information regarding diagnosis and alternative methods of treatment along- with relative material risks and benefits.

The doctrine owes the genesis to the decision in *Salgo* v. *Leland Stanford Jr. University Board of Trustees*[8]. In this case, a patient was subjected to 'Translumber Artography' which involved a risk of paralysis. The patient sustained severe paralysis of the lower limbs as a result of the operation. The doctor had failed to inform the risk of paralysis to the patient. The later brought an action against the former for want of 'informed consent'. Holding the doctor liable on the ground that his failure to obtain 'informed consent' vitiated the 'apparent consent' of the patient, the Court observed that a physician violates his duties to his patient if he withholds any fact which is necessary to form the basis of an 'intelligent consent' by the patient to the proposed treatment.

In a few subsequent decisions, the doctrine of 'intelligent consent' was diluted to an extent on the premises that most of the patients do not understand the information furnished by the doctors as they are laymen in the sphere of medicine.

Then the landmark judgment in *Canterbury* v. *Spencer* [9] replaced the concept of 'intelligent consent' by that of 'informed consent'. In this case, a patient underwent 'Laminectomy'. He suffered from paralysis as a result of the procedure. He sued the doctor of his lapse to warn of the risk of paralysis. The Court observed that respect for the patient's right of self-determination for a particular therapy demands a standard set by law for a physician rather than one which physician may or may not impose upon themselves. Accordingly, it was held that a doctor was under an obligation to divulge all known material risks inherent in a procedure. It is obvious that the Court discarded the 'reasonable doctor test' and laid down the 'prudent patient

[8] 154 Cal. App. 2d. 560
[9] 1972 (464) U. S. Fed. Rep. CA 2 d 772

test'. The test of materiality is not what risk a reasonable doctor would have considered to be material, but the risk to which a prudent person placed in the patient's position would have attached significance to decide whether to undergo the particular treatment or not. Thus the Court laid down an objective criterion to determine the question of disclosure of risks as those risks which would be considered as material by a prudent patient ought to be divulged; and it was through this judgment that the 'Doctrine of informed consent' found the terra-firma in the American medical negligence jurisprudence. Notably the doctrine of informed consent is not an absolute doctrine. Various exceptions to it have been recognizes as:

1. Therapeutic privilege**:** It is the therapeutic privilege of a doctor to withhold the information when disclosure is detrimental to the health of the patient. Even though the risk is material it need not be disclosed, if a doctor on a reasonable assessment of his patient's condition arrives at a conclusion that disclosure shall be detrimental to patient's health. In *Nishi* v. *Hartwell*[10] the patient underwent a medical procedure for suspected aneurysm. The doctor did not warn him of the risk of paraplegia. The patient was extremely fearsome and was suffering coronary and kidney disease. The Court recorded a verdict in favor of the doctor as he was justified in withholding the information. However, if there was no evidence to show that a patient was emotionally or psychologically weak, non- disclosure of grave risk cannot be justified on the doctor's therapeutic privilege.

2. Emergency: It implies a situation warranting immediate treatment to save the life of a patient. In such a situation, it is taken into account that there was no time to disclose the risk and alternative methods of treatment to the patient. In *Crouch* v. *Most*[11] the patient was a snake-bite victim and the doctor did not disclose the possible consequences for pumping the poison out of his body. In an action for medical negligence, the doctor was exempted from liability on the ground that any waste of time on the part of the doctor in discussing the procedure would have certainly exposed the patient to the peril of death.

3. Waiver: A patient may relinquish the right to know. It may be either express or implied. A patient may repose confidence on a doctor and request not to furnish any information to him.

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[10]473 P. 2d 116 (1970)
[11]432 P. 2d 254 1967

4. Non-elective treatment: Where there is no choice to the patient but to opt for a treatment, a doctor can invoke the protection of therapeutic privilege for non- disclosure. This privilege cannot be extended to an elective treatment.

C The Supreme Court of India aligned with Bolam's Principle

In India, the standard settled for examining the medical negligence is that of *Bolam* v. *Friern Hospital*[12] wherein the doctor decides which of the alternative modes of the medical treatment is to be undergone by the patient; and it is generally left at his professional discretion without even an iota of patient's involvement in his decision.

Jacob Mathew v. *State of Punjab*[13] is a landmark judgment decided by the full bench of the Supreme Court of India, which has decided the issue of medical negligence in-sync with the Bolam's Principle. In this case the complaint was that the appellant doctor was called to attend the patient in a hospital as the patient was having difficulty in breathing. The doctor connected an oxygen cylinder to the mouth of the patient but the breathing problem increased further, as the oxygen cylinder was later found to be empty. There was no other gas cylinder available in the room and a gas cylinder was brought by the attendant of the patient himself from the adjoining room, but there was no arrangement to make that gas cylinder functional. The patient ultimately died in this chaos. A complaint was registered under Section 304-A of the Indian Penal Code, 1860. The Supreme Court in this case observed that no sensible professional would intentionally commit an act or omission an act or omission which would result in loss or injury to the patient as the professional reputation of the person is at stake. The Court held that the doctor must exercise a reasonable degree of care for his patient and he must bring to his task a reasonable degree of skill and knowledge. A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in a particular art, even though there existed a body of adverse opinion among medical men. The Court further held that when the charge of negligence arose out of the failure to use some particular equipment, the charge against the doctor would fail if the equipment was not generally available at the relevant point of time as the case in hand was regarding non-availability of the oxygen

[12] *Supra* note 4
[13] (2005) 6 SCC 123

cylinder either because of the hospital having failed to keep it or because of the gas cylinder found empty at the relevant time.

In an earlier case *Achutrao Haribhan Khodwa* v. *State*[14] deciding on the lines of the Bolam's Principle, the Supreme Court after discussing the entire spectrum of case law on the point observed that the Indian condition cannot be ignored where people are poor, illiterate or semi illiterate who do not understand the medical terms, treatment procedure or functions of various organs of body. People generally here are passive, ignorant and uninvolved spectators to the procedure being done to them or their near- dears.

It is submitted that just because Indian mass is poor and illiterate, it cannot be said that they are 'ignorant' and 'uninvolved' and do not know the material risks to life and limb to them or to their near & dear ones; especially in view of the observation in *Canterbury* v. *Spencer*[15] by the American Court that the empirical studies in US revealed that the disclosures which were required under informed consent did not warrant any special knowledge of medical procedure on the part of the patient.

The Supreme Court further observed in *Achutrao* case[16] that the Indian psyche rarely questions or challenges medical advice.

It is submitted that the melancholic effect of 500 years of foreign rule does not concede the *élan vital* of Indian masses to question or challenge certain 'elite' people which in the typical Indian setting included doctors[17] and the more disturbing part is that even after all the judicial activism, the Supreme Court is still not coming forward to dispel this colonial inhibition and to create a conducive environment so as to turn the Indian masses into an 'aware' and 'participating' lot. Today, the Indian citizenry especially those living in urban areas are lot more 'aware' and 'inquisitive'; and as we have seen above, 'involvement' in deciding from available alternative modalities of treatment and associated material risks is a matter of non-medical judgment which takes into account certain emotional, social and economic factors, and require no special medical knowledge et al on the part of the patient.

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[14](1996) 2 SCC 634
[15]*Supra* note 9
[16]*Supra* note 14
[17] For a lucid illustration of the psyche of a common man approaching a doctor, see *Mantra*, a story by the famous Hindi Writer Munshi Premchand (1880- 1936)

The Supreme Court in *Achutrao* case[18] also observed that the extent and nature of information required to be given by the doctor to the patient should continue to be governed by Bolam's Principle. It is for the doctor to decide with reference to the condition of the patient as to how much information regarding risk and consequences should be given to the patient.

It is submitted that today this statement seems to be largely fickle and presumptive. It is total falsehood today to state that the doctors are seen with the kind of trust and faith which they commanded in the earlier times. In fact, hospitals are now ruminated to be the new addition to the lineup of torture centers, previous being police stations, government offices, Court rooms etc., where even the hitherto serving elements such as money, persuasion, allurement, pressure etc. do not operate. There had been a number of cases before the Supreme Court of India, in which a particular mode of treatment was adopted by the doctor, allegedly without discussing it along with material risks involved with the patient, and which later became the bone of contention.

In *Samira Kohli* v. *Dr. Prabha Manchanda & Anr*[19] the consent form obtained from the patient referred to diagnostic and operative laparoscopy and laparotomy, if needed. The doctor took the consent from the appellant's mother for hysterectomy when she was lying unconscious under the treatment and removed her ovaries and fallopian tubes (the reproductive organs). In consonance with the Bolam's Principle, the Supreme Court of India held the doctor not guilty of medical negligence on the premise that the line of treatment through radical surgery instead of some conservative treatment, adopted by the doctor in this case has been adopted by several doctors world-over as has been shown by the expert evidence of the doctors. It is notable in this case that the Supreme Court of India although observed that there was no consent by the appellant to perform hysterectomy and that an unauthorized invasion was committed with respect to the body of the appellant, but then again showing its aversion to move beyond the Bolam's Principle and in this scheme of things exactly echoing the expert evidence given by a section of doctors, it refused to hold the respondent doctor negligent while holding that it was an unauthorized act of invasion of the body of the appellant which amounted to deficiency of

[18] *Supra* note 14
[19] (2008) 2 SCC 1

service and the respondent was directed to refund the medical cost incurred by the appellant along with Rs. 25,000 as compensation.

Again in *Kusum Sharma* v. *Batra Hospital*[20], where the Division Bench of the Supreme Court noticed that the appellant alleged that the informed consent was completely lacking in this case. The appellant alleged that they were not told about the possible complications of the operation and that the anterior approach adopted at the time of first surgery was not the correct approach and the surgery should have been done by adopting posterior approach for removal of left adrenal malignant part. However, the Supreme Court rejecting all these contentions and showing paternalistic attitude on the lines of *Bolam* v. *Friern Hospital*[21](which has been adopted by the full bench in *Jacob Mathew* v. *State of Punjab*[22]**,** and thence became the law of the land) totally neglected the consideration of the issue of informed consent on the part of the patient and decided on the premises that if we were to hold the doctors liable for everything that goes wrong then the doctors would have to think twice for their own safety than that of their patients, initiatives would be stifled and confidence shaken.

While echoing its own earlier observations in *Achutrao Haribhan Khodwa* v. *State*[23]and upholding the English medical paternalism in this case, the Supreme Court not only further bleaked the prospects of its review in near future, but also overtly disfavored the American concept of 'informed consent' and demonstrated its dissent for the emergent jurisprudential thinking in England that Bolam's Reasonable Doctor Test is inconsistent with the right to life and personal autonomy of patient.

The Supreme Court in *Kusum Sharma* v. *Batra Hospital*[24] missed the opportunity to refer the case to a larger bench (*Jacob Mathew* v. *State of Punjab*[25]was a three judge's bench decision) where there might be a possibility of breaking through the inertia created by *Jacob Mathew* dictum and moving beyond the test laid down in *Bolam* v. *Friern Hospital*[26]**.**

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[20](2010) 3 SCC 480
[21]*Supra* note 4
[22]*Supra* note 13
[23]*Supra* note 14
[24]*Supra* note 20
[25]*Supra* note 13
[26]*Supra* note 4

III Attacks on the Bolam's Principle outside India

Eminent author Michael Jones[27] criticized the Bolam's Principle as it opts for the lowest common denominator. The learned author noted that an opinion was gaining ground in England that the Bolam's Principle should be restricted to those cases where an adverse result follows from a course of treatment which has been intentional and has been shown to benefit other patients previously. This should not be extended to medical accidents merely on the basis of how common they are as it is now commonly felt that doing so would set us on the slippery slop of excusing carelessness when in reality it happens often enough.

Even though the Bolam's Principle has not yet been uprooted in England, it has come under severe criticism as has been noted by Jackson & Powell[28] that there was an argument to the effect that the Bolam's Principle was inconsistent with the right to life unless the domestic Courts construe that the requirement to take reasonable care was equivalent to the requirement of making sufficient medical care provisions.

In England, the Bolam's Principle is *now* considered merely a rule of practice or evidence. It is not a rule of law, as has been noted by the authors Michael Powers QC, Nigel Harris and Anthony Barter[29].

In *Bolitho* v. *City and Hackney Health Authority*[30] the English Court observed that the judge before accepting a body of expert opinions of doctors will need to satisfy himself that the experts before forming their views have directed their minds to the question of comparative risks and benefits in alternative medical procedures available.

It was noted by the eminent authors Mason & McCall Smith[31] that the new talk is of 'producers and consumers' and the concept that 'he who pays the piper calls the tune' is established whereby the competent patient's inalienable rights to understand his treatment and to accept or refuse it are now well settled in the medical negligence jurisprudence.

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[27] *Treaties on Medical Negligence*, 4th edition, 2008
[28] *Professional Negligence*, 5th edition, 2002
[29] *Clinical Negligence*,4th edition, 2008
[30] (1997) 4 All ER 771
[31] *Law and Medical Ethics*,7th Ed., 2006

IV The intermittent traces of Pro-Patient Advancement in India

In *Samira Kohli* v. *Dr. Prabhu Manchanda*[32] some traces of recognition of the consent and participation of the patient in the medical procedure were found when the Supreme Court observed that in medical negligence cases, where consent of the patient is taken for diagnostic purpose, such consent cannot be considered for surgery of any type. In the same spirit when consent is taken for a particular surgery, it cannot be considered as working for an additional surgery for instance to remove an organ on the premises that such removal shall be beneficial to the patient unless the additional procedure was done to save the life of the patient. Also the Supreme Court went on a detailed discussion distinguishing the difference between the real consent as is (now) followed in U.K. and the informed consent of the patient developed and established in American jurisprudence of medical negligence; and observed that the principles in this respect to be followed in India shall be as that before commencing a treatment, the doctor must secure the consent of the patient which must be real based on adequate information and in this respect, adequate information includes disclosure of alternative lines of medical treatment if any, disclosure of procedure of the particular treatment/s, its effect on the patient and the substantial risks involved therein. Further, the Court observed that the appellant in that case was only temporarily unconscious undergoing a diagnostic procedure by way of laparoscopy; so, in such a situation the doctors ought to have waited till the appellant regained consciousness, discussed the result of laparoscopic examination and after that should have taken her consent for the removal of her organs. In the absence of all this, the consent by mother alone cannot be treated as valid or real consent.[33]

This Supreme Court judgment may prove to be of far reaching consequence especially because it, in a way, introduced the concept of 'real consent' in Indian jurisprudence of medical negligence. This while serving the purpose of exposing the high handedness and haste in the conduct of doctors, will definitely contribute in curbing the growing practice of hospitals/doctors to conduct unnecessary procedures, tests and operations for the sake of money only while keeping the patient as a mere mute spectator.

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[32] *Supra* note 19

[33] Although as we have discussed above, the Court in this case found the absence of consent of the patient for the additional procedure/surgery, but then the Court refused to hold the doctor liable for the medical negligence; instead the doctor was held liable for deficiency in service as in the opinion of the Court the act of unauthorized invasion of the appellant's body amounted to assault and battery.

However, it is clear that the facts of this case did not even enter the realm of American informed consent jurisprudence because at the diagnosis level itself the doctor conducted an unauthorized surgery, so there arose no opportunity whatsoever to discuss the pros and cons of alternative modalities of the treatment, if any and the associated material risks. But, even as it stands, it shows the stark reality that today in the atmosphere of blatant commercialization of medical profession, doctors are having less and less time and inclination to (even) give a genuine try to be at the same frequency as that of the patient and look at them as human beings.

Also in *Malay Kumar Ganguly* v. *Dr. Sukumar Mukherjee*[34], the Supreme Court extended the realm of medical negligence in proportion to the reputation of a medical establishment and observed that the Court must also consider the level of 'expectation' from a particular hospital/doctor while deciding the issue of medical negligence alleged against it.

It has been a long time now that a strong undercurrent against the Bolam's reasonable doctor is evident in the Indian jurisprudence of medical negligence. In *Achutrao* case[35] itself, the Supreme Court noted the practice of other nations like Canada, Australia etc., which have already moved towards *Canterburry*[36] case (American) informed consent and mentioned that (even) in English Courts, there is now a tendency to make the doctor's duty to inform the patient more stringent in comparison to that in *Bolam* case[37]. It was further observed that though in the present context, Bolam's Principle holds good in Indian context, but due to commercialization of medical services and a corresponding increase in awareness of patient's rights, the day is not far when we too have to move towards American concept of informed consent.

Another Division Bench of the Supreme Court in *V. Kishanrao* v. *Nikhil Super Speciality Hospital*[38] observed that the Bolam's Principle was accepted by this Court as providing the standard norms in cases of medical negligence, though in the country of its origin, it is now being questioned on various grounds. It was further observed that the inherent danger in the Bolam's Principle is that if the Courts accept expert evidence too readily, the medical standards would inevitably decline and hence, the time has come for this Court also to reconsider the

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[34] (2009) 9 SCC 221
[35] *Supra* note 14
[36] *Supra* note 9
[37] *Supra* note 4
[38] (2010) 5 SCC 513

parameters set down in the Bolam's Principle as a test to decide the cases of medical negligence, especially in view of Article 21 of the Constitution which encompasses within its guarantee, a right to medical treatment and a concomitant greater autonomy in terms of medical procedure to be exerted on one's body.

In a significant judgment in *Indian Medical Association* v. *V. P. Shantha*[39], a three-judge bench of the Supreme Court held that service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service) by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of service as defined in the Consumer Protection Act, 1986[40] and that the deficiency in service has to be judged by applying the test of reasonable skill and care which is applicable in action for damages for negligence.

In a later case *Martin F. D'Souza* v. *Md. Ishfaq*[41] the Division Bench of the Supreme Court while equating the consumer forums with criminal courts directed that whenever a complaint is received against a doctor or hospital by the consumer forum or by the criminal court, then before issuing notice to the doctor or the hospital, the consumer forum or the criminal court as the case may be, should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that if doctor or committee reports that there is a prima facie case of medical negligence, should notice be issued to the doctor/hospital concerned. But then the Supreme Court was quick to change guards and nullify this direction through another Division Bench in *V. Kishanrao* v. *Nikhil Super Specialty Hospital*[42], wherein it observed that those directions were not consistent with the law laid down by the larger bench in *Jacob Mathew* v. *State of Punjab*[43]as there the direction for consulting the opinion of another doctor before proceeding with criminal investigation was confined only to the cases of criminal complaint and that was not required in respect of cases before the consumer forum. The Court went on to observe that such an interpretation was in consonance with the objectives set to be achieved through the Consumer Protection Act to provide speedy and efficacious remedy to the consumer of service; and finally,

[39]1996 SC 550.
[40]Section 2(1)(o) of the Consumer Protection Act, 1986
[41]2009 (3) SCC 1
[42]*Supra* note 38
[43]*Supra* note 13

the Court held that the general direction given in *Martin F.D'Souza* case[44] cannot be treated as a binding precedent and those directions must be confined to the particular facts of that case only. Still, as far as the allegation of criminal offence involving medical negligence is concerned, the Supreme Court reaffirmed through *Lalita Kumari* v. *Govt. of U.P. and Ors*[45] that the registration of FIR is mandatory under Section 154 of the Criminal Procedure Code, 1973 if the information discloses the commission of a cognizable offence and no preliminary inquiry is permissible in such a situation. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The Court further observed that the category of cases in which preliminary inquiry may be made included the cases of medical negligence. In the same spirit, the Court observed that a private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of medical negligence on the part of the doctor.

Today, there is a growing public awareness about the cases of medical negligence and hence a number of cases have been filed against the hospitals also for the alleged medical negligence of the doctors employed there or otherwise having some kind of arrangement there. In *Savita Garg* v. *National Heart Institute*[46], the Supreme Court settled the controversy of denial of its responsibility by the hospitals for the alleged medical negligence on the basis of distinguishing between 'contract of service' and 'contract for service' i.e. between the doctors who are their permanent staff and those who are non-permanent and whose services are temporarily taken for treatment of the patients, in a pro-patient way by observing that in both the contingencies, the Courts have taken the view that the hospital shall be responsible for the acts of their permanent staff as well as for the acts of those whose services are temporarily requisitioned for the treatment of the patients. In *PGI, Chandigarh* v. *Jaspal Singh*[47], the Supreme Court observed that the death of the patient occurred due to the mismatched blood transfusion and held the hospital along with the attending staff liable for the medical negligence. It was through *Dr. Balram Prasad* v. *Dr. Kunal Saha & Ors*[48] that the Supreme Court sent a strong deterrent

[44] *Supra* note 41
[45] AIR 2014 SC 187
[46] AIR 2004 SC 5088
[47] (2009) II CPJ 92 (SC)
[48] (2014) 1 SCC 384

message for the doctors and the corporatized hospital honchos who have mislaid their priorities by passing an order for unprecedented compensation to the tune of Rs. 6 crores for the medical negligence.

V Medical Profession and the Judicial Attitude Revisited

Today, if we record the experience of a common man at the hands of the doctors across the length and breadth of this vast country, there shall be no denying the fact that the medical profession has long lost the humanity and sensitivity, and treats the patients as a flock of cattle. The notion that 'whatever is done by the doctor, is for the good of the patient' has now lost its validity rather it would tantamount to totally ignoring the stark realities of this era of globalization and commercialization. If this proposition continues to be accepted as a basis to judge the medical negligence, the medical paternalism would become fetterless to render every patient a 'blank cheque' in the hands of the doctors.

In case of application of the Bolam's Principle in a given case of alleged medical negligence, a doctor is allowed to escape the liability if he produces some medical experts to give their opinion that the course of action taken by him in that case was in consonance with a practice adopted by a responsible body of medical professionals which is deemed to be implied by their opining that 'n' number of doctors practice the same way. Nothing more is required. A doctor has every incentive to protect another doctor in such legal actions on the *quid-pro-quo* basis unless the alleged negligence is so blatant that he would feel as if (even) he might land in trouble if he favored the defense in the trial or he is the man of impeccable values and integrity. But then in the latter case, the accused doctor does not require him in the Court of law; and on the other hand, the victim succeeding in drawing such uncommon somebody to the Court for speaking in his favor shall itself be a rarity.

A doctor must not evade the accountability for negligent treatment just because he manages to produce a number of other doctors who may give their opinion that the line of treatment adopted by the concerned doctor was in consonance with the medical practice adopted by a number of other doctors in the medical fraternity. The justifiability of the impugned practice of the concerned doctor must not depend upon the head- counts of the doctors saying that 'yes, we are doing the same thing in the same way', but it must depend upon their conclusion after due

application of mind to the comparative risks and benefits in the adopted procedure in comparison to the other lines of treatment. These sentiments have also been expressed by the English Courts[49]where the Bolam's Principle originated. So in the adversarial Court, the contest must not be as to who produces more medical experts in his favour opining about the adopted medical practice as to whether it had or had not been adopted by other doctors rather it should be centered on the qualitative aspect by comparing between the various available medical alternatives as to the suitability to the concerned patient in the given circumstances.

The Bolam's Principle as is the foundation of the law of medical negligence after the full bench decision in *Jacob Mathew* v. *State of Punjab*[50] has been way too protective for the medical professionals and in today's world it has proved to be rather oppressive to the patients. India is known internationally for its judicial activism and the Supreme Court of India has many-a-times raised to the occasion and initiated radical social welfare measures but on the issue of medical negligence it seems to be in a state of inaction which at times seems to be deliberate. Since *Jacob Mathew* v. *State of Punjab*[51]almost 10 years have passed but the Supreme Court has still not been able to shed its inclination towards the medical profession. In fact in *V. Kishanrao* v. *Nikhil Super Specialty Hospital*[52] the Supreme Court observed that the Bolam's Principle needs to be reconsidered in India, and thereafter expressed its inability to do so because of the binding effect of the larger bench in *Jacob Mathew* v. *State of Punjab*[53]; but then there was no stopping it to refer the case or for that matter any case thereafter to a larger bench to neutralize the repercussions of *Jacob Mathew* v. *State of Punjab*[54] which has outlived its utility. This has become long overdue on the part of the Supreme Court. While standing in a Court of law facing accusation of medical negligence, a doctor has already been provided a heavy internal protection in the form of 'mere peer- review of his conduct' as a direct result of the application of the Bolam's Principle in the cases of medical negligence, the over- jealous attitude of the Supreme Court favouring medical professionals was again evident when in *Lalita Kumari* v. *Govt. of U.P. and Ors*[55] while reaffirming the layer of external protection in the form of a pre- requisite of an

[49]See, *Bolitho* v. *City and Hackney Health Authority,supra* note 31
[50]*Supra* note 13
[51]*Supra* note 13
[52]*Supra* note 38
[53]*Supra* note 13
[54]*Supra* note 13
[55]*Supra* note 45

independent medical opinion for a criminal action to walk past Section 154 or Section 200 of the Criminal Procedure Code, 1973 it observed that the service which the medical profession rendered to human beings counted among the noblest of all, and hence there was a pressing need to protect doctors from frivolous or unjust prosecutions. The Court noted that a lot of complainants preferred recourse to criminal process as a tool for pressurizing the medical professionals for extracting unjust compensation which must be stopped. It is submitted that the Judges must not be disconnected from the reality Today in the society, 'ways and means' have lost relevance in an abrupt manner. Money is the national God. The Supreme Court must not pronounce judgments confining themselves in cocoons.

Instances of malicious prosecution of doctors, if any in the true sense of the term must be seen in juxtaposition to the fact that a colossal count of the patients, when suffer or die at the hands of negligent doctors, do not approach the Courts of law against the doctors because of the obvious reasons such as poverty, sheer expense of bringing legal action, denial of legal aid to all but the poorest, illiteracy, lack of knowledge and initiative, and on top of all after suffering for long at the hands of the doctor and losing a considerable amount of their hard-earned money they do not want to take-up another harassment in the Court of law as per the prevalent notion in the society and being cognizant of the fact that it shall be an unequal fight with the resourceful doctors/hospitals. The 'easy-target propaganda' floated by the medical professionals does not relate to the reality. It is in fact an unacceptably difficult task to raise an action based on medical negligence in the Court of law. After the practical difficulties faced by a common man in the initiation of such a case in the Court of law, the next level shall (even) be a more uphill task for him as the standard of care to examine the conduct of the accused doctor in the trial shall be erected by his Bolam's brethren.

Actually, the globalization and commercialization has taken away the reasonability of the Bolam's doctor, and the only way out seems to be the 'participative jurisprudence' modeled on the lines of American informed consent jurisprudence. It is not that the Supreme Court is totally inadvertent towards Bolam's presumptive paternalistic notions of a reasonable doctor and thereby the almost total exclusion of patient from the medical procedure; there is another parallel line of cases which is indicating away from the Bolam's Principle as discussed above.

It is argued that the informed consent jurisprudence dilutes the ideal doctor-patient relationship as thereby a variety of factors enter into the medical decision making. Also, that a patient can't understand the intricacies of the medicine, so his participation in the decision making is meaningless. Both these arguments are fallacious. In fact, disclosure of the risks involved strengthens this relationship when seen from the view- point of the patient. It brings an invaluable assurance to him that he had been the part of the decision-making of such a momentous measure which may (even) affect his anatomical actuality. In today's world of crass commercialization and declining moral values, a patient wants to know the available alternative treatments and the risks involved because he doesn't want to expose his body to some random medical experimentation or to some such unnecessary medical procedure which may be required by the doctor only for minting money or achieving the revenue targets if working in those glittering corporate hospitals. Here, it is immaterial that an average patient cannot understand the intricacies of the medical procedure. Duties of disclosure of alternative modes of treatment and associated material risk on one hand and patient's limited comprehension of medical intricacies on the other hand, are two different issues, which must not be blended.

In *Samira Kohli* v. *Dr. Prabha Manchanda & Anr*[56] inspite of the clear holding that there was an absence of the consent on the part of patient for the additional surgery done on her and that the surgery done on her was an unauthorized invasion of her body, the Supreme Court basing its decision on the expert opinion produced by the doctor to the effect that the line of surgery adopted by him was the one adopted by many doctors world-over, refused to hold him liable for medical negligence and instead held him liable for the tortuous act of assault and battery. It is high time that the Supreme Court must change its stance. The Supreme Court also seems to have realized the rot which has settled in the medical profession when it noted in a case [57] though in a subdued tone that the medical profession had to an extent become commercialized and there were many doctors whose conduct illustrated that they had departed from the Hippocratic Oath for the purpose of making money at any cost. However the Supreme Court was quick to add that the entire medical fraternity could not be blamed or branded as lacking in integrity or competence just because of some bad apples. It is submitted that today the medical profession has to a great extent become commercialized so much so that finding a doctor

[56] *Supra* note 19
[57] *Martin F. D'Souza* v. *Md. Ishfaq*, *supra* note 41

who really stand by the Hippocratic Oath taken by him at the time of entering the sacred medical profession shall be a rarity if not an impossibility. As discussed above, the decay has seeped in so much that it is not uncommon these days to hear about the allegation made by the relatives and the near and dear ones of a deceased patient against the hospital and the concerned doctor that the patient was kept in ICCU for days after his death where they could see him only through a glass with an ulterior motive to raise the medical bills to several lakhs. Recently, a Delhi Court ordered for registering the FIR under Section 304A of the Indian Penal Code, 1860 against the five doctors' team headed by Dr. Sudhir Khanna, Urology Surgeon for the alleged medical negligence in cutting the external iliac artery and thereafter continuing with the surgery for another three hours without first taking immediately required remedial measures. It was also alleged in the FIR by the complainant who was an Engineering Service Officer with the Indian Air Force that against an original estimate of Rs. 1.5 lakhs for the surgery, the hospital produced a bill of Rs. 4.16 lakhs and later reduced it to Rs. 3.67 lakhs when the family objected.[58]

The extent of the decadence in the medical profession can be gauged by the malpractices adopted by the doctors today which at once appear to be both surprising and frightening. A non-profit organization namely People for Better Treatment which fights medical negligence in India filed complaints in seven police stations against twelve diagnostic centers on the basis of a sting operation conducted by a T.V. News Channel wherein the doctors were caught taking commission from the diagnostic centers in Delhi.[59] The spoilage does not stop here. Today the big pharmaceutical firms promote the sales of their products by influencing the doctors directly or through various medical associations which are hugely funded by them. The gravity of the situation can be appreciated by reading a few lines of Jag Suraiya, a regular columnist in The Times of India, '…findings of (Dr. David Diamond, an American neuro-scientist and a professor attached to the University of South Florida) are not just startling, they are shocking…statin based drugs which are routinely prescribed for lowering cholesterol by all the doctors world-wide form a multi-billion dollar industry…there is no reliable statistical evidence to prove that statin lowered cholesterol significantly reduces the risk of cardiac arrest…its adverse effects can include muscular dystrophy, brain function impairment and loss of memory…' [60]. Gigantic

[58] *The Times of India*, Delhi Edition, 21 August, 2014
[59] *The Times of India*, Delhi Edition, 3 September, 2014
[60] *The Times of India*, Delhi Edition, dated 27 August, 2014.

corporate houses driven and dictated by the profit propensity consider the patients as a money spinning proposition, and in this corporate environment the doctors are terribly obsessed with all-paid foreign trips, huge pay-cheques and scaling the corporate heights while remaining cold, indifferent and unsympathetic towards the patients.

VI Conclusion

Reckless medical treatment by wayward doctors is a matter of concern for the society because the results are ruinous and in most cases irreversible. The patients irrespective of their social, cultural and economic background are entitled to be treated with dignity which is both their fundamental right as well as their human right; the doctors must now take their responsibility resolutely. Here in all fairness, we must maintain that in medical profession, an error of judgment does not constitute negligence. However, remaining reclusive and reticent before the patient and posturing as the God thyself, rebuking them on their perturbed and pensive queries shall not elevate their status especially when the medical profession today is in the docks for its dubious and debatable practices. In this backdrop, some of the urgent measures which must be taken-up at once by the medical professionals to retrieve their lost glory are providing the participation[61] to the patient in the medical procedure adopted, keeping the patient's welfare-physical, psychological as well as economic at paramount position and the most important of all, keeping a conducive environment and an astute aura around themselves while interacting with the patients and their kith and kin.

The Apex Court's initiative is also long overdue as the escape route for the doctors who acted negligently in discharging their professional duties through an arrangement of peer review in the Court by such experts who are his colleagues in the same profession must be bricked now. The test in the trial must not depend on the head- count of the witnesses[62] that is the number of doctors produced by the accused-doctor in his favor. It shall no more suffice for the Supreme Court to keep on expressing its concerns[63]that the inherent danger in the Bolam's Principle is that if the Courts continue deferring too readily to expert opinion, medical standards would fall

[61] There may be various denotations to it viz. Real Consent, Informed Consent etc., but the overall requirement remains that of including the patient in the medical procedure and the line of treatment adopted for him by giving him adequate knowledge about the comparative material risks and the benefits associated.
[62] *Hucks* v. *Cole*(1986) 118 New L.J. 469
[63] As in *V. Kishanrao* v. *Nikhil Super Speciality Hospital, supra* note 38

into a trench. The extant exigency for the judiciary is to move beyond Bolam's Principle and also to pave the way for participation of the patients in the medical procedure by referring an appropriate case to a larger bench of the Supreme Court rather than expressing inability because of the binding effect of the larger bench in *Jacob Mathew* v. *State of Punjab*[64].Though it may not be possible to transplant the doctrine of informed consent, a trans-Atlantic doctrine, in India on the exact lines but at the same time when the medical negligence jurisprudence in other countries has advanced to the next level of embracing 'contractual' medical malpractice liability where medical negligence liability is to be imposed through contract executed between the patient and the medical- providers, graduation of Indian medical jurisprudence from Bolam's reasonable doctor to Canterburry's prudent patient cannot be shelved and ignored for indefinite period. These measures will automatically facilitate in curbing the medical negligence and other dubious medical practices. The fragmentary and piecemeal efforts as in *Dr. Balram Prasad* v. *Dr. Kunal Saha & Ors*[65] wherein the Supreme Court awarded an unprecedented compensation of Rs. 6 crores[66] for medical negligence shall be of no permanent ramifications. Medical negligence has already assumed a frightening proportion in India and the time has come that the bodily autonomy of the patient must be ensured which is a necessary offshoot of the Right to Life and Personal Liberty under Article 21 of the Constitution of India.

[64] *Supra* note 13
[65] *Supra* note 48
[66] Reacting on the Supreme Court decision dated 24.10.2013, the Indian Medical Association decided to submit a memorandum asking the law ministry to withdraw the medical services from the ambit of the consumer protection Act, 1986. *Indian Express***,** 02 November, 2013