



Sociology & Cultural Research Review (SCRR)
 Available Online: <https://scrrjournal.com>
 Print ISSN: [3007-3103](#) Online ISSN: [3007-3111](#)
 Platform & Workflow by: [Open Journal Systems](#)



The Statutory Scheme and Procedural Mechanism of Medical Negligence: Elements and Characteristics under Pakistani Law

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ABSTRACT

One of the biggest principles of tort law is the law of negligence. This principle has been applied in cases of medical issues as a duty of reasonable care is also imposed upon a medical practitioner. The proposition that a medical practitioner can be liable for negligence has expounded upon by the English and Indian Courts. Under the Pakistani Legal System, there exists a uniform procedural mechanism in each of the Provinces and the Federal Capital to deal with cases of medical negligence, although there is a difference of substantive elements of the same between the Provinces and the Federal Capital. The Pakistani Superior Courts have expounded upon the jurisprudence surrounding medical negligence by relying on the principles laid down by the English and Indian Courts respectively. While there is some progress, there needs to be a more- speedy process to deal with cases of medical negligence and also there needs to be uniform law of medical negligence for the sake of proper implementation across Pakistan as there is no general law that exclusively deals with medical negligence, although cases of the same can be made out from these general provisions.

Keywords: Negligence, Medical Negligence, Medical Mal-practice, Law of Tort, Pakistani Legal System.

I. Introduction

One of the biggest principles of tort law is the law of negligence, which has provided for a duty of care to be imposed on a person to another person and him becoming liable for it should he breach said "duty" and cause damage to the other person due to the said breach. These same principles were also applied to medical cases, where medical practitioners were accused of being negligent for certain acts or omissions or for violating a duty of care that was imposed upon him. These same principles are also present in current day Pakistan and have been expounded upon by the Pakistani Superior Courts.

Research in this area has previously been scant with renewed interest accruing in the past few years due to the jurisprudence established by the Lahore High Court in the Mariam Sajjad judgement which we shall deliberate on below. According to one researcher, while there are proper laws in the State that provide for the regulation of medical practitioners and any possible negligence from their side, it is rarely enforced, therefore causing serious issue of injustice in such cases.¹ She is of the opinion that this may be rectified by the following: training the medical staff, reforming the PMDC procedures, encouraging litigation in Pakistan and enforcing internal discipline by the medical institution itself in these types of cases.² As

¹ Zarmina Khan, 'Negligence of Medical Professionals in Pakistan,' *PCL Student Journal of Law* 2, no. 1 (2018): 45, < <https://leappakistan.com/wp-content/uploads/2019/05/Negligence-of-Medical-Professionals-in-Pakistan-Zarmina-Khan.pdf>> accessed 20th August 2024.

² Ibid.

viable as these options may sound, consideration must be given to the fact that the medical staff already goes through highly professionalized training unless she means to say further reform is required in medical practitioner ethics training, which is indeed a genuine concern. Additionally, while encouraging litigation in these cases is indeed a correct approach, resort may also be given to ADR mechanisms such as arbitration or even most ideally mediation. Of course, in both cases, this applies to civil wrongs. In the case of criminal wrongs, it is the prerogative of the victim should they wish to pursue criminal charges on the practitioner. Lastly, most medical institutions try to shift the blame onto the practitioner by at times firing them so as to escape liability. In such a case, internal discipline becomes not a tool to enforce discipline but a means to escape liability by the institution itself.

Another researcher provides that due to the fact that medical negligence has been tried purely under civil liability rather than invoking criminal liability and adding to the fact that there are many different types of remedies provided under different laws as we shall see hereinbelow, a uniform law that incorporates both civil and criminal liabilities and also the constitution of specialized courts who shall hear these cases regarding medical negligence be enacted as a superior alternative to the current legislative and quasi-judicial framework.³ This is indeed a viable alternative to the current legal framework.

According to another work, there has been a growing trend by the Superior Courts to adopt tort jurisprudence from foreign jurisdictions, particularly the jurisprudence of the UK and India is adopted in cases of medical negligence. However, he contends that the replication of legal principles relating to this area of tort jurisprudence in this state is not ideal and that the state institutions, particularly the Legislature and the Judiciary should therefore legislate and adjudicate responsibly in accordance with the ground realities of the Pakistani State.⁴

Another very recent work particularly emphasizes that the outdated data bases, less emphasis on medical ethics by medical institutions during training and also possible legal loopholes in the current legal framework such as the immunity clause for medical practitioners requires reform made at an institutional level particularly by taking guidance from foreign states like the UK's NHS program.⁵

First, this work particularly emphasizes on the statutory scheme of medical negligence in Pakistan, how there is a procedure or mechanism to deal with cases of medical negligence in each of the Provinces and the Federal Capital. It also discusses the substantive elements of medical negligence and how it is uniform only to the extent of the provinces, how the Federal Capital has enunciated more principles for the substantive elements of medical negligence as

³ Rukhsana Shaheen Waraich, "Healthcare System and Medical Malpractice Law in Pakistan," *Policy Perspectives* 15 no. 3, 85. < <https://www.scienceopen.com/hosted-document?doi=10.13169/polipers.15.3.0085>> accessed 20th August 2024.

⁴ Hammad Saleem, *Exploring the Legal Landscape of Medical Negligence in Pakistan: Challenges and Perspectives*, *Research Society of International Law* 8 (2024): 34 < https://www.rsillaw.review/?sdlm_process_download=1&download_id=1164> 13th March 2026.

⁵ Tayyaba Kayani, "Medical Negligence and Malpractice: Surveying the Landscape in Pakistan," *Human Rights Review* Vol. IX, (2026): 167. <https://cdn.prod.website-files.com/67e8a077db3ffc67e56df264/69bad2ed87f4c19f58b96bf4_Human%20Rights%20Review%20Vol.%20IX.pdf> accessed 13th March 2026.

compared to the respective provinces. Lastly, the article also embarks upon an evaluation of the decisions of the Pakistani Superior Courts and how they have evolved the jurisprudence of medical negligence by relying on the principles as laid down by the English and Indian Courts.

II. Brief Background of Medical Mal-Practice under Anglo-American Jurisprudence

Negligence is one of the biggest common law torts. It refers to the “conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm”.⁶ Thus, “a person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances”.⁷ It may therefore be referred as what a reasonable man who guided by the standard of affairs that regulate ordinary human affairs would not do or the non-action of a reasonable man when he was obligated to do something, therefore causing a breach of duty.⁸ This principle of negligence was developed as an independent cause of action in England in the 18th century.⁹ It was developed after the landmark case of *Donohue v Stevenson* [1932]¹⁰, before which there was nothing called the tort of negligence. In this case, a duty of care was imposed upon the ginger beer manufacturer towards the plaintiff because of the snail that was found in the bottle. The manufacturer was thus ordered to compensate the plaintiff. It was after this case that the law of negligence was expounded upon in several later cases. The following principles of negligence were developed overtime:

- i. The defendant must owe a duty of care to the plaintiff;
- ii. The defendant must breach the duty of care;
- iii. The defendant’s acts or omission must cause the plaintiff’s loss or injury.¹¹

In the UK, the English Courts first ruled that the true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care.¹² This position changed later on when the Courts ruled that whenever there was an accusation of medical negligence, a medical practitioner was not to be found guilty of negligence if he had acted in accordance with a practice which is accepted as proper by a responsible body of medical men skilled in the art.¹³ This was famously called the ‘Bolam Test’ and was applied to variety of medical issues but was ultimately criticized as it allowed a negligent medical professional to escape liability by having other fellow medical professionals to testify on the

⁶ Jeffrey Lehman and Shirelle Phelps, “*West’s Encyclopedia of American Law*” 2nd ed., vol. 7, (Thomson Gale, 2nd ed., 2005), 221.

⁷ Ibid.

⁸ *Dr. Nafeesa Saleem v. Add. Sessions Judge, Mult.*, PLD 2022 Lahore 18.

⁹ West’s Encyclopedia, *supra* note 6, at p. 221.

¹⁰ [1932] AC 562.

¹¹ Qiang He, Jia-Ling Feng, Wan-Yun Huang, *Law of Negligence: Duty of Care, Standard of Care, and the Notion of Personal Responsibility*, (Int’l Conf. on Management Science and Management Innovation, MSMI, 2016). <<https://doi.org/10.2991/msmi-16.2016.1>>; *Dr. Nafeesa Saleem v. Add. Sessions Judge, Mult.*, PLD 2022 Lahore 18.

¹² *Hunter v Hanley*, 1955 SLT 213.

¹³ *Bolam v. Friern Hospital Management Committee*, [1957] 1 WLR 583.

lowest common denominator in clinical practice.¹⁴ In fact, Lord Scarman also observed in a case that truthfully, negligence could not be established by preferring one respectable body of professional opinion to another.¹⁵ This position was endorsed by the Judges in the case of “*Bolitho v. City and Hackney Health Authority*”¹⁶, where the Court ruled that before accepting the opinion, the Court must satisfy itself that said opinion has a logical basis and is respectable, responsible and most of all reasonable.¹⁷ While the Bolam Test has not gone away completely,¹⁸ it has been a subject of even more severe criticism after the enforcement of the Human Rights Act from 1998 which obliges UK courts to enforce the same as a means of adhering to its commitments of enforcing the European Convention of Human Rights. The English Courts have recently ruled that the “Bolam Test is inconsistent with the right to life unless the domestic courts construe that the requirement to take reasonable care is equivalent with the requirement of making adequate provision of medical care.”¹⁹ Hence, the Bolam Test in itself is not applied as much as it used to be. This tort of negligence was adopted by the United States, where it was developed under Anglo-American jurisprudential discourse.²⁰ This is also where the most documented medical mal-practice cases were initiated starting from the late 1960s.²¹ This process culminated in the mid-1970s, when lawyers, doctors and insurance companies complained about a potential medical mal-practice crisis due to inadequate availability of professional medical coverage.²² This was followed by two other crises, in the 80s, where there was a rapid increase in the premium rates that led to problems of affordability of policies for medical liability and in the late 90s and early 2000s, where there was a reduction in the availability of this type of insurance.²³ Similar problems have also occurred in other countries in the last decade.²⁴

Medical Mal-practice refers to the “improper, unskilled, or negligent treatment of a patient by a physician, dentist, nurse, pharmacist, or other Health Care professional.”²⁵ Thus, it is the

¹⁴ Michelle Robson et al, “Doctors Are Aggrieved – Should They Be? Gross Negligence Manslaughter and the Culpable Doctor,” *Journal of Criminal Law*, 84, no. 4 (2020): 312, 327. <<https://doi.org/10.1177/0022018320946498>>

¹⁵ *Maynard v West Midlands Health Authority*, [1985] 1 All ER 635.

¹⁶ [1998] AC 232.

¹⁷ *Ibid*, 240.

¹⁸ *V. Kishan Rao v Nikhil Super Specialty Hospital*, [(2010) 5 SCC 513].

¹⁹ *Ibid*.

²⁰ For more information on this, see, David G. Owens, “The Five Elements of Negligence,” *Hofstra Law Review* 35, no. 4, (2007): 1671. <<https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2282&context=hlr>> See also, Gary T. Schwartz, “The Beginning and End of the Rise of American Tort Law,” *Georgia Law Review*, 26, no. 3 (1992): 601.

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1066&context=lectures_pre_arch_lectures_sibley>

²¹ Paola Bertoli, “Medical Mal-Practice in Public Healthcare Systems: An Empirical Investigation of Scheduled Damages”, (PhD Thesis: Erasmus University Rotterdam, 2014), 1. < <https://repub.eur.nl/pub/51564/>> accessed 20th February 2026

²² *Ibid*.

²³ *Ibid*.

²⁴ *Ibid*.

²⁵ West’s Encyclopedia, *supra* note 6, at p. 29.

application of the tort of negligence to medical healthcare. Under American jurisprudence, to prove medical negligence, the claimant must prove the following four elements: (1) a duty of care was owed by the physician; (2) the physician violated the applicable standard of care; (3) the person suffered a compensable injury; and (4) the injury was caused in fact and proximately caused by the substandard conduct.²⁶ This paper shall concern itself with the parameters of medical mal-practice under the Pakistani legal system.

III. Statutory Scheme of Medical Mal-Practice in Pakistan

In Pakistan, legislation for the sake of monitoring, implementing and regulating health care have been promulgated.²⁷ On the conferment of liability and its parameters, the following statutes and regulations are relevant: 1). The Pakistan Medical Commission Act from 2020, 2). The Pakistan Medical Commission (Enforcement) Regulations from 2021, 3). The Medical Tribunal Act from 2020, 4). The right to sue for civil liability under Section 19 of the Code of Civil Procedure from 1908 (CPC), 5). Criminal Liability under the Pakistan Penal Code from 1860, 6). Health Care Commission Acts,²⁸ 7). Islamabad Healthcare Regulation Act, from 2018, 8). The Pakistan Medical and Dental Council Ordinance (PMDC) from 1962.

Hence, there is a general law that allows a person to sue another person for any wrong committed against him.²⁹ There is also criminal liability for anyone who causes a woman to miscarry her child, including the pregnant woman herself.³⁰ This liability thus is not exclusively for the medical practitioner who is operating on said woman. In fact, if the miscarriage was carried out for the sake of saving the pregnant woman's life, then there shall be no incurring of criminal liability.³¹ There is no criminal liability for any person who for that person's benefit and in good faith causes harm to said person, regardless of whether it is implied or express.³² The same goes for an insane person and a child under 12 years old provided the the guardian's consent to do so either explicitly or implicitly has been obtained.³³ This also goes for those situations in which consent cannot be obtained for whatever reason and the act that causes harm was done in good faith and for the benefit of that person.³⁴ It should be noted however that this does not apply exclusively to medical practitioners or to cases involving medical negligence. However, in the illustrations to these provisions, the examples of a surgeon are provided. Hence, we can gather that a case for medical negligence can be made out in the

²⁶ Ibid. For a comprehensive discussion of the law of medical negligence in the United States, see, Theodore Silver, "One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Jurisprudence," *Wisconsin Law Review* (1992): 1193. <https://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1377&context=scholarlyworks>

²⁷ Zarfshan Qaiser et al, "Critical Analyses of Medical Mal-Practice Laws in Pakistan: An Expedition from Enactment to Opulent Enforcement," *Pakistan Social Sciences Review*, 5, no. 1 (2021): 471, 474. <https://pssr.org.pk/issues/v5/1/critical-analysis-of-medical-malpractice-laws-in-pakistan-an-expedition-from-enactment-to-opulent-enforcement.pdf>

²⁸ Each province and the Islamabad Capital Territory have their own respective variation of it.

²⁹ The Code of Civil Procedure, 1908, s. 9.

³⁰ The Pakistan Penal Code, 1860, s.338-s.338C

³¹ Ibid.

³² Ibid, s.88.

³³ Ibid, s. 89.

³⁴ Ibid, s. 92.

circumstances discussed hereinabove if the following elements are found: 1). The act was not done for the benefit of the other person or in good faith, 2). The consent was not obtained from the concerned person or his guardian or lawful charge and lastly, 3). In a circumstance where consent was unobtainable, the act that caused harm was not made for the person's benefit or in good faith.

The Health Care Commission Acts (Commission Acts) were promulgated and enforced due to the institution of lots of cases of medical mal-practices across the state.³⁵ In the province of Punjab, the Act was promulgated in 2010. Section 3 of the Punjab Health Care Commission Act establishes a Commission, called the Punjab Health Care Commission, while Section 4 empowers said Commission to enquire and investigate into any mal-practice and failures in the provision of health care services and issue any consequential advice and orders.³⁶ Section 4(7)(d) also empowers the Punjab Health Care Commission to investigate into any alleged mal-practice by a health care service provider or by the said provider's employees, either on the motion of the Lahore High Court (LHC) or the SCP, or by the reference of the Provincial Government or Assembly of Punjab, on the complaint of an aggrieved health care service provider or person.³⁷ The Commission is also empowered to appoint an inspection team to make such investigations.³⁸ After such investigation concludes, should the healthcare service provider be found guilty of negligence, then a fine of up to Rs. 500,000 can be imposed on him.³⁹ However, should the complaint prove to be false, then a fine of Rs. 200,000 can be imposed on the complainant instead.⁴⁰ Similar provisions also exist in the other respective provincial health care commission Acts.⁴¹ Hence, each province has its investigative body where an aggrieved person may complain of any alleged mal-practice and impose fines if the conclusion of said investigation turns out to be positive.

Medical negligence has been defined as a case where a patient sustains injury or dies as a result of improper treatment in a healthcare establishment.⁴² The death must also be determined based on an autopsy report.⁴³ It can incur liability if the two following prerequisites are met: 1). Lack of mandatory human resources and equipment which the healthcare establishment professes to have possessed and 2). The healthcare establishment's

³⁵ Qaiser, *supra* note 27, at p. 474.

³⁶ *Dr. Riaz Qadeer Khan v. Presiding Officer*, PLD 2019 Lahore 429.

³⁷ *Ibid.*

³⁸ Punjab Health Care Act, 2010, s. 22.

³⁹ *Ibid.*, s. 28. See also: *Naseem Akhtar v. Ex-Officio Justice of Peace*, PLD 2018 Lahore 903; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

⁴⁰ *Ibid.*

⁴¹ Sindh Health Care Act, 2013, s. 4, s. 22, s. 28; KPK Health Care Act, 2015, s. 6, s. 13, s. 14, s. 18; Balochistan Health Care Act, 2019, s. 4, s. 28, s. 34; *Anees v. Province of Sindh*, PLD 2022 Sindh 151. The Court ruled that the Sindh Healthcare Commission can enquire and investigate into alleged cases of mal-practice.

⁴² Punjab Health Care Act, 2010, s. 2; Sindh Health Care Act, 2013, s. 2; Balochistan Health Care Act, 2019, s. 2; *Dr. Naik Parveen v. District Co-ordination Officer, Multan*, 2017 CLC 1150; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037; *Dr. Shuaib Kausar v. The State*, 2021 P Cr. LJ 527; *Riaz Ahmad v. Add. Sessions Judge, Dist. Rajanpur*, 2022 P Cr. LJ 1067.

⁴³ *Ibid.*

employees did not exercise the skills they possess with reasonable competence.⁴⁴ However, any known or recognized complications of a surgical procedure is not considered as medical negligence.⁴⁵

Section 18 of the Punjab Commission Act provides that the Commission is empowered to suspend or revoke the license of a healthcare establishment if there are repeated cases of medical negligence of the same nature are committed by it. Similar provisions also exist for the other respective provincial commissions except the provincial commission for the province of Kyber Pakhtunkhwa (KPK).⁴⁶

The provisions of the Commission Acts shall apply to all healthcare establishments, public or private hospitals, non-profit organizations, charitable hospitals, trust hospitals, semi-government and autonomous healthcare organizations.⁴⁷ The Commissions are also empowered to refer the cases to the civil and criminal courts for a proper trial to be heard.⁴⁸ Should anyone feel aggrieved by the order of the Commission, then an appeal can be filed to the District and Sessions Court.⁴⁹

A. Medical Negligence under Federal Law

Unlike the respective provinces which have Healthcare Commissions to investigate and take action against alleged cases of medical negligence, the Federal, which is the Islamabad Capital Territory (ICT) does not have such a commission. Rather, the ICT has a Healthcare Regulatory Authority which is established under Section 3 of the Islamabad Healthcare Regulation Act from 2018. Section 2 of the same provides that medical negligence means any act or omission of a healthcare professional in performing his duty. It also provides that in cases of medical negligence, the following prerequisites have to be established: 1). There was a duty which the healthcare professional owed to the patient, 2). There was a breach of duty, 3). The breach resulted in injury to the patient and lastly 4). The injury resulted in causing damage or death. Similar to the Healthcare Commissions, the Healthcare Regulatory Authority is also empowered to investigate any complaints of medical negligence⁵⁰ and revoke or suspend the license of any cases of medical negligence has been proved against the Healthcare establishment.⁵¹ The Regulatory Authority can also appoint an inspection team for the sake of investigating any medical negligence.⁵² Also, similar to the Commission Acts, the Regulation

⁴⁴ Punjab Health Care Act, 2010, s.19; Balochistan Health Care Act, 2019, s. 22; Sindh Health Care Act, 2013, s. 19; *Naseem Akhtar v. Ex-Officio Justice of Peace*, PLD 2018 Lahore 903; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037; *Dr. Shuaib Kausar v. The State*, 2021 P Cr. LJ 527.

⁴⁵ *Ibid.* See also: *Dr. Naik Parveen v. District Co-ordination Officer, Multan*, 2017 CLC 1150; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

⁴⁶ Balochistan Health Care Act, 2019, S. 20; Sindh Health Care Act, 2013, s. 18; *Anees v. Province of Sindh*, PLD 2022 Sindh 151. The Court ruled that the Sindh Healthcare Commission has the power to suspend or revoke the license of a healthcare service provider.

⁴⁷ *Riaz Ahmad v. Add. Sessions Judge, Dist. Rajanpur*, 2022 P Cr. LJ 1067.

⁴⁸ Punjab Health Care Act, 2010, s. 26; Sindh Health Care Act, 2013, s. 26; Balochistan Health Care Act, 2019, s. 32; *Dr. Khair Muhammad Sahawal v. Province of Sindh*, 2022 YLR 63.

⁴⁹ Punjab Health Care Act, 2010, s. 31; Sindh Health Care Act, 2013, s. 31; KPK Health Care Act, 2015, s. 21; Balochistan Health Care Act, 2019, s. 37; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

⁵⁰ Islamabad Regulatory Act, 2018, s. 33.

⁵¹ *Ibid.*, s. 26.

⁵² *Ibid.*, s. 20.

Act also provides that medical negligence does not include any recognized or well-known complications of any medical or surgical treatment are not considered as medical negligence.⁵³ Anyone aggrieved by the Regulatory Authority's order can challenge it within 30 days to Secretary, Ministry of National Health Services, Regulations and Coordination.⁵⁴

Similarly, under the Pakistan Medical Commission Act from 2020, a Pakistan Medical Commission ("PMC"), constituted under Section 3 of the same shall on its own motion on information received or on the receipt of a complaint from any person or authority, initiate disciplinary proceedings against any license holder or any recognized institution in respect of medical negligence and even may temporarily suspend or permanently cancel the license of a practitioner or impose such penalties as may be prescribed, in compliance of the directions of the Medical Tribunal.⁵⁵

Another body that can impose penalties on medical negligence is the Pakistan Medical and Dental Council, constituted under Section 3 of PMDC. One of the duties of the Council is to maintain a register of qualified medical practitioners⁵⁶ and qualified dental practitioners⁵⁷ respectively. The Council is also empowered to direct the Registrar to remove the name of any such medical or dental practitioner should either of them after an inquiry and disciplinary hearing by a disciplinary committee has been convicted of professional negligence.⁵⁸

IV. Jurisprudence of the Superior Courts

In the case of "*Muhammad Aslam v. Dr. Imtiaz Ali Mughal*,"⁵⁹ where the appellant had appealed the decision of the Sessions Judge, acquitting the respondents. He had lodged a complaint of negligence against the respondents, who were Doctors, alleging that they had committed medical negligence. The Department of Health, Sindh where the inquiry was lodged also did not find any signs of negligence. The Sindh High Court ruled that criminal liability for medical negligence is incorporated within Section 318, PPC, namely under the offence of *Qatl-e-Khata* (unintentional murder) as Section 318 includes death caused by a rash or a negligent action.⁶⁰ The Court also ruled that in order for Section 318 be applicable in the instant case, it was necessary to prove that the Doctors failed to provide the appropriate and reasonable care towards the patient as was their obligations or that they were negligent in discharge of their professional duties so much so that their conduct amounted to either criminal rashness (i.e., recklessness or indifference to the consequences of their conduct) or to criminal negligence (i.e., to a gross and culpable neglect.⁶¹ The Court also distinguished the following differences between medical negligence in criminal and civil law, namely that first, the standard of proof is civil liability is the balance of probabilities, while for criminal liability, it must be beyond reasonable doubt.⁶² And secondly, the degree of

⁵³ Ibid, s. 33.

⁵⁴ Ibid, s. 31.

⁵⁵ Pakistan Medical Commission Act, 2020, s. 32.

⁵⁶ Pakistan Medical and Dental Council Ordinance, 1962, s. 23.

⁵⁷ Ibid, s. 26.

⁵⁸ Ibid, s. 31; *Shifa International Hospital v. Mst. Hajira Bibi*, PLD 2018 Islamabad 372.

⁵⁹ PLD 2010 Karachi 134.

⁶⁰ Ibid, 140.

⁶¹ Ibid.

⁶² Ibid, 142.

negligence committed must be higher in order for it to be constituted as a criminal offence.⁶³ The Court relied upon the principle as laid down by the Indian Courts, who had distinguished between criminal and civil liability for negligence.⁶⁴ The Court proceeded to dismiss the case on the grounds that there was incurring of medical negligence under Section 318, PPC in the instant case. Hence, the provisions of Section 318, PPC can be attracted to cases of medical negligence. The same goes for the provisions of Section 321, PPC.⁶⁵

Hence, for the initiation of criminal proceedings in cases of medical negligence, the complainant is required to show that the death was due to the medical practitioner's recklessness or gross negligence.⁶⁶ Criminal prosecution will not be initiated towards a medical practitioner due a mere lack of necessary care, attention and skill.⁶⁷ Hence, a medical practitioner would not be held responsible criminally for a patient's death unless his negligence or incompetence showed such disregard for life and safety of his patient so as to amount to a crime.⁶⁸ Or in simpler words, every lapse of a medical practitioner in their treatment and/or even diagnosis does not automatically amount to medical negligence.⁶⁹ While the Courts might tend to follow the 'Bolam Test' as discussed hereinabove, the final judgement as to whether there was any medical negligence lies with the Court and not the medical profession.⁷⁰ Hence, the Pakistani Courts also follow the principle enunciated by the Bolitho case. In "*Dr. Riaz Khan v. Presiding Officer, District Consumer Court, Sargodha*"⁷¹, where the proposition was whether the Consumer Courts were a competent forum to entertain complaints of medical negligence, the LHC ruled that the Consumer Courts had no jurisdiction to entertain such matters and the appropriate forum for entertaining cases of medical negligence was the Punjab Healthcare Commission.⁷² Interestingly enough, the Pakistani legal framework provides that the Consumer Courts are competent to hear cases

⁶³ Ibid.

⁶⁴ *Dr. Suresh Gupta v. Government of NCT Delhi*, AIR 2004 SC 4091; *Jacob Matthew v. State of Punjab*, AIR 2005 SC 3180.

⁶⁵ *Dr. Khair Muhammad Sahawal v. Province of Sindh*, 2022 YLR 63.

⁶⁶ *Naseem Akhtar v. Ex-Officio Justice of Peace*, PLD 2018 Lahore 903; *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

⁶⁷ *Dr. Sheeraz-Ur-Rehman v. Province of Sindh*, 2020 CLC 2037.

⁶⁸ Ibid, 2044.

⁶⁹ *Dr. Nafeesa Saleem v. Add. Sessions Judge, Mult.*, PLD 2022 Lahore 18.

⁷⁰ *Dr. Muhammad Asif Osawala v. Mrs. Qamur-Un-Nisa*, PLD 2022 Sindh 430.

⁷¹ PLD 2019 Lahore 429.

⁷² Ibid, 434.

that involves medical services of any kind⁷³ which has also proven to be a very efficient at resolving claims of medical negligence.⁷⁴

While one would consider granting the Consumer Courts with jurisdiction to try cases of medical negligence would be a means of granting the litigant another quick access forum and another potential remedy for such cases, this would cause more problems as it would equate problems of medical negligence stemming from a medico-business transaction and therefore bring it under the umbrella of commercial law. In more simpler terms, it converts the patient into a consumer who was dissatisfied with the service of his transaction. This should never happen as medical damages caused from medical negligence are life-altering and cannot be equated to mere dissatisfaction of a service.⁷⁵

In the case of *“Dr. Sheeraz-Ur-Rehman v. Province of Sindh”*⁷⁶, the Sindh High Court (SHC) observed that the Sindh Healthcare Commission Act has differentiated between medical negligence and medical mal-practice on the basis that the Commission has been granted powers of enquiry and investigation for the latter while no such authority has been extended to the Commission for the former.⁷⁷ Although, the SHC also recognized that the Commission has been granted the powers to accept complaints of medical negligence under the Commission Enforcement Regulations, but the conferment of such power by a subordinate legislation is questionable, moreover, there is no specific punishment for medical negligence.⁷⁸ The SHC also observed that a fine of up to Rs. 500,000 was not enough compensation in medical negligence cases as the patient who ultimately dies might have been earning more than the amount of the fine, thus this was against the principle of natural justice.⁷⁹ The SHC also laid down that when a First Information Report (FIR) alleging medical negligence against a medical practitioner is registered, the investigation officer shall first involve the Commission for an opinion from senior doctors concerned in verification of such

⁷³ See: The Islamabad Consumer Protection Act, 1995, s. 2(f)(x). It provides that an unfair trade practice includes falsely representing for provision of services by professionals and experts, including by doctors, engineers, advocates, mechanics, teachers, hakeems and spiritual healers. The Punjab Consumer Protection Act, 2005, s. 2(k) similarly provides that services include the provision of any kind of advice, facilities and assistance which includes medical services.; The North-West Frontier Province Consumers Protection Act, 1997, s. 2(n)(o)[x] reproduces s. 2(k) of the Punjab Consumer Protection Act, 2005 and s. 2(f)(x) of the Islamabad Consumer Protection Act, 1995 respectively. When it comes to the provision of services however, it provides that it includes ‘services of any description.’ The Sindh Consumer Protection Act, 2014, s. 2(q) also includes medical services within the definition of services and also includes ‘communication’ as a type of service alongside advice, assistance and provision of facilities. The Balochistan Consumer Protection Act, 2003, s. 2(n) also provides for ‘services of any description’ which include medical services. s. 2(o)[x] of the same also provides the false representation of services provided by an expert and professional like medical professionals as an unfair trade practice similar to the Islamabad and KPK Consumer Protection Acts with the sole exception of both the latter using the word ‘doctor’ specifically rather than ‘medical practitioner’ like the Balochistan Consumer Protection Act.

⁷⁴ For a detailed discussion, see: Rukhsana Shaheen Waraich, *“Medical Malpractice: An Analytical Study in the Light of Shar‘iah and Law”* (PhD Thesis: International Islamic University, Islamabad, 2020), 103-111.

⁷⁵ See: Waraich, *supra* note 3 at 92-93. See also: Kayani, *supra* note 5 at 185-186.

⁷⁶ 2020 CLC 2037.

⁷⁷ 2020 CLC 2037, 2042.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, 2042-43.

allegations before proceeding further against him.⁸⁰ In the case of “*Dr. Nafeesa Saleem v. Additional Sessions Judge, Multan*,”⁸¹ the LHC embarks on a comprehensive discussion on the scope and ambit of medical negligence as expounded by the Pakistani Superior Courts. The LHC first discussed how the principle of medical negligence existed in ancient times since the time of Hammurabi that the premise behind this principle is that anyone who considers himself to be someone capable of giving medical advice or treatment also implies that he possesses the necessary skill and knowledge to do so.⁸² The Court further discussed the development of medical negligence under Anglo-jurisprudence, from the ‘Bolam Test’ to the test of ‘reasonable care’ and ‘recklessness’⁸³ and how the parameters of the ‘Bolam Test’ were expounded upon by the Indian Superior Courts.⁸⁴ The Court then discussed how provisions of both Sections 318 and 321, PPC attract the cases of medical negligence and how the Pakistani Superior Courts tend to follow Anglo jurisprudence when it comes to medical negligence.⁸⁵ In the latest case of “*Mariam Sajjad v. Prof. Dr. Rasool Ahmed Chaudhary*,”⁸⁶ where the appellant/defendant had challenged the decree of the Civil Court that had partially granted the plaintiffs Rs. 5 million instead of the claimed Rs. 750 million in a suit for recovery of damages. The facts of the case were that the plaintiff had been diagnosed with ‘Cervical Rib’ disease and the surgeon, the respondent/defendant had performed surgery on her, after which she lost control over her lower body. After consulting with another Doctor and running the relevant scans and tests, it was discovered that three of her vertebrae were damaged and her spinal cord had been cut due to negligence on the part of the defendant during the surgery. Her father thereafter filed a formal complaint with the hospital’s administration, whereupon a medical board was constituted and investigated the matter. The board after its investigation concluded held that the defendant had indeed committed medical negligence which has thus costed the plaintiff control over her lower body. A formal complaint was also filed with the Punjab Healthcare Commission, who also after an inquiry and investigation reported the same findings as the hospital’s medical board. The Commission further referred the matter to the Punjab Provincial Government to take serious action against the defendant. The defendant appealed this order in the District and Sessions Court, who dismissed the same. This was further challenged via writ petition in the LHC, who also dismissed the same. The Health Department also penalized the defendant by withdrawing his pension. It was after this that the plaintiff sued the defendant for damages of Rs. 750 million in the Civil Court, who had only granted damages of Rs. 5 million instead of the claimed amount. The proposition before the LHC was whether the plaintiff was entitled to the amount of damages she has claimed? The Court first discussed the definition of medical negligence as provided under Section 19 of the Punjab Healthcare Commission Act and on that touchstone further discussed its significant elements, namely:

⁸⁰ 2020 CLC 2037, 2047.

⁸¹ PLD 2022 Lahore 18.

⁸² Ibid, 23.

⁸³ Ibid, 24-26.

⁸⁴ Ibid, 26-27.

⁸⁵ Ibid, 27-28.

⁸⁶ RFA. No. 70634/2023. < <https://sys.lhc.gov.pk/appjudgments/2024LHC205.pdf>> accessed 25th April 2025.

1. Duty of Care: Healthcare providers have a legal and ethical duty to provide a reasonable standard of care to their patients.
2. Breach of Duty: Negligence occurs when a healthcare provider fails to meet the standard of care that is expected in the field. This can involve errors in diagnosis, treatment, surgery, medication administration, or communication.
3. Causation: The breach of the standard of care must be shown to have directly caused harm or injury to the patient. It must be proven that the negligence was a significant factor in the patient's adverse outcome.
4. Damages: To pursue a medical negligence claim, the patient must have suffered actual harm, such as physical injury, emotional distress, additional medical expenses, loss of income, or other damages.⁸⁷

The Court further discussed common examples of medical negligence such as delayed diagnosis, surgical errors, medication errors, birth injuries, misdiagnosis, failure to properly monitor a patient's condition and failure to obtain informed consent.⁸⁸ The Court also observed that claims of medical negligence mostly come up in the following scenarios: 1). Death, 2). Personal Injuries and 3). Financial Loss.⁸⁹ The Court ruled that the principles that are used for the calculation of damages of the tort of negligence can also be applied to the calculation for damages in medical negligence, which include:

- i.). Reasonable and fair monetary compensation for the injury caused.
- ii). Small amount of damages can be granted under the head of pain and suffering.
- iii). Loss of Amenity includes the loss of activities of claimant, his job satisfaction, hobbies, and recreational activities. Court will consider all these losses during award of damages. This will include in the damage even if the patient is unconscious and does not realize the loss of all these activities.
- iv). Medical Expenses: A patient can recover medical and other expenses as damages. Likewise, damages can be granted for traveling costs and additional housing or adapting accommodation for the special needs of the patient.
- v). Loss of Earning must be estimated for two periods. First: the lost incomes due to the medical malpractice till the date of estimation. Secondly, future loss of earnings. Calculating the prospective loss of earning is a difficult question for the court.
- vi). Pecuniary Loss: A patient who is a victim of medical negligence usually suffers from pecuniary cases such as, medical expenses, traveling expenses, the cost of equipment bought because of the injury, loss of earning, future loss of earning and cost of hiring someone else for performing chores which the patient is no longer able to perform due to the injury caused to him because of medical negligence.
- vii). Pain and Suffering & non pecuniary loss:- A patient can be awarded damages for the pain and suffering as a result of injury because of medical malpractice. If patient faces discomfort, humiliation or body disfigurement or the significant reduction of his life expectancy due to the negligent behavior of the medical practitioner, he shall become entitled to damages.

⁸⁷ Ibid, p. 13.

⁸⁸ Ibid.

⁸⁹ Ibid, p. 29.

Similarly, a patient's development of any psychiatric condition due to such injury shall also be reflected in the award of damages.⁹⁰

The Court observed that the plaintiff has become paralyzed from the waist down for the rest of her life and thus cannot live a normal life as she did before due to the sheer negligence on the part of the defendant. The Court accepted the appeal and enhanced the damages of Rs. 5 million granted by the Civil Court to Rs. 10 million instead. The Court has thus laid down significant principles to be applied in the calculation of damages for medical negligence and thus has increased the scope of civil liability for medical negligence. As discussed hereinabove, while there were significant penalties, fines and other such punishments and as well as criminal liability, there was nothing for the incurring of civil liability in medical negligence. The LHC has thus brought forth a significant change in the landscape of medical negligence in Pakistan.

V. Conclusion

Negligence is one of the biggest common law torts that imposes a duty of reasonable care on a person who will be liable to be negligent on a particular situation if said duty has been breached. Medical negligence/Mal-practice is the application of this tort to medical cases. Under English Law, the Courts at first discussed whether there was a reasonable duty of care imposed on a medical practitioner. They developed the 'Bolton Test', where the medical practitioner's act or practice will be verified by a group of medical experts. This test became a subject of criticism and the English Courts ultimately ruled that this opinion is not binding upon the Court and it is up to the Court to determine whether said opinion has any rational basis and is reasonable. Under American jurisprudence, the Anglo principles of medical negligence were also applied there as it was former British Colony who had adopted the Common Law Legal system and thus relied on decisions of the English Courts. In Pakistan, a person has a right to sue someone for any damage to his person or property and also there are certain provisions under the Penal Code under which a case for medical negligence can be made out, however, these provisions do not apply to cases of medical negligence exclusively. Each and every province except the ICT have their own Healthcare Commissions which were constituted under the Commission Acts. These Commissions can enquire, investigate and even penalize the medical practitioner who has committed professional negligence and even refer the matter to another competent body or forum for more strict measures against him. The Provincial Commissions are also empowered to suspend or revoke the license of the medical practitioner with the exception of the KPK Healthcare Commission. Anyone aggrieved of the Commission's order can challenged the same on appeal to the District and Sessions Court. In the ICT, rather than a Healthcare Commission, there is an Islamabad Healthcare Regulatory Authority which has the same powers that the Provincial Healthcare Commissions possess. Other Federal bodies that possess similar powers with the Provincial Commissions are the Pakistan Medical Council and the Pakistan Medical and Dental Council. The latter can even take away the licenses of a medical and dental practitioner should they be found guilty of medical negligence. There is a difference between the Provincial Commissions and the ICT Regulatory Authority as far as the substantive elements of medical

⁹⁰ Ibid, p. 29-30.

negligence are concerned. Under the Commission Act, medical negligence has been defined as a case where a patient sustains injury or dies as a result of improper treatment in a healthcare establishment. The death must also be determined on the basis of an autopsy report. It can incur liability if the two following prerequisites are met: 1). Lack of necessary human resources and equipment which the healthcare establishment professes to have possessed and 2). The healthcare establishment's employees did not exercise the skills they possess with reasonable competence. Under the Regulatory Authority Act however, the substantive elements are far enunciated. Under this Act, medical negligence has been defined as any act or omission of a healthcare professional in performing his duty. The substantive elements to incur liability on its basis are that: 1). There was a duty which the healthcare professional owed to the patient, 2). There was a breach of duty, 3). The breach resulted in injury to the patient and lastly 4). The injury resulted in causing damage or death. Hence, while there is a uniform system of procedural processes in all of Pakistan, the substantive elements are not uniform. They are only uniform in all of the provinces and not in Pakistan, which has enunciated more elements in its principle of medical negligence. Although, all of them agree that any recognized or well-known complications of any medical or surgical treatment is not to be considered as medical negligence. Additionally, cases of medical negligence have been evinced within the framework of consumer protection laws, which albeit have proved efficient in handling such disputes have essentially made a patient who may potentially suffer from life-altering changes into a consumer who is dissatisfied with his service. The jurisprudence of the Pakistani Superior Courts has expounded upon medical negligence by relying on the principles enunciated on the same by the Indian and English Courts. The Pakistani Superior Courts also follow the Bolen Test as a means of persuasive opinion that can be relied upon as per the Court's discretion after properly applying judicial scrutiny. They have also distinguished between civil and criminal liability of medical negligence by relying on the Indian Courts. While the Pakistani Superior Courts have also recently ruled on how to determine the quantum of damages for cases involving medical negligence by applying the principles of the tort of negligence. While Pakistan has progress in this regard, Pakistan still needs to be able to make sure that cases involving medical negligence are speedily dealt with as it takes quite a long time to go from the subordinate Commissions, to civil or criminal Courts to the first appellant Court to then the Superior Courts. Pakistan can also make a uniform law for medical negligence, which all the provincial and federal bodies can systematically implement as in the current statutory scheme as the ICT regulatory authority has more scope in its substantive elements of medical negligence than the respective provincial Commissions. Hence, there needs to be uniform law of medical negligence for the sake of proper implementation across Pakistan as there is no general law that exclusively deals with medical negligence, although cases of the same can be made out from these general provisions.