

Medical Negligence in India and Indian Penal Code, 1860

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Abstract: Negligence is simply neglect of some care which we are bound to exercise towards somebody. It is something less than misconduct. Medical negligence is simply a neglect of some care which a doctor (defendant) is bound to exercise towards his patient. Medical negligence is a particular type of negligence, i.e. professional negligence. In this type of negligence special skill is required by the wrongdoer, i.e. the professional is one who profess to have some special skill. Medical negligence is not different in law from any other type of negligence. The basis of liability of professional negligence is negligence. . In this paper will be give the overview of the provisions medical negligence under the Indian Penal Code, 1860, Introduction, types medical negligence, medical negligence in Hospital level, case laws and conclusion.

Keywords: *Medical Negligence, Indian Penal Code, 1860.*

Introduction

Negligence and wrongful intent are two alternative forms of “*mens rea*.” Out of these two alternative forms one form is essentially required by law as an essential condition for establishing liability of wrongdoer. The willful wrongdoer or intentional wrongdoer is one who desires to do harm. The negligent wrongdoer is one who does not sufficiently desires to avoid doing it.¹ Careless man is one, who does not care or who is not sufficiently anxious that his activity is going to cause loss to others. It does not mean breach of a duty to care, but simply means careless conduct on the part of the wrongdoer.²

The ideas of the negligence and duty are strictly co-relative. There is no such thing as negligence in abstract. Negligence as the breach of duty to take care is simply a neglect of some care which we are bound by law to exercise towards somebody. Under the law of negligence, professionals such as Lawyers, Doctors, Architects and others are the persons possessing some special skill. Any task which is required to be performed by these professionals wants a special skill. For a medical accident or failure, the responsibility may lie with medical practitioner, and equally it may not. So such negligence necessarily is treated with some difference.³

¹ John Salmond, *Charlesworth on Negligence* 21 (Sweet & Maxwell 6th edn., 1977).

² *State of Punjab v. Shiv Ram* (2005) 7 SCC 10.

³ *Jacob Mathev v. State of Punjab*, (2005) 6 SCC 7.

Meaning of Medical Negligence

Medical Negligence is defined as lack of reasonable care and skill or willful negligence on the part of a doctor in respect of acceptance of a patient, history taking, examination, diagnosis, investigation, treatment medical or surgical, etc., resulting any injury or damage to the patient. Damage in this means physical, mental or functional injury to the patient.⁴

Medical negligence as a tort is the breach of a duty caused by omission to do something which a reasonable medical practitioner would do, or doing something, which a reasonable medical practitioner would not do. The remedies for the violation of a right under the law of a tort are classified into legal remedies and extra-legal remedies. Legal remedies includes the remedies by way of damages, injunction, Extra-legal remedies are expulsion, re-entry on land, etc. out of the above mentioned remedies, the remedy available for medical negligence are damages and compensation.⁵

Medical negligence means want of reasonable degree of care and skill or wilful negligence, on the part of a medical practitioner in the treatment of patient with whom a relationship of professional attendance has been established. All the medical malpractices do not come within the ambit of medical negligence. Only those medical malpractices which have the following three essentials constitute medical negligence. Three essential are as such:“(i) The existence of a duty of takes care owing to the complainant by the defendant. (ii) Failure to attain that standard of care prescribed by the law, thus committing a breach of duty to take care; and (iii)Damage suffered by the complainant, which is casually connected with breach of duty to take care.”⁶In general, there are three meaning of Medical Negligence, i.e.: (i) a state of mind which is opposite to intention. (ii) Careless conduct and (iii) the breach of duty to take care imposed by common or statute law.⁷

Medical Negligence in India

Medical practice is as old as the existence of mankind. Ayurveda is traditional Indian health care system. “This system has been originated in India long back in pre-vedic period. Rigveda and Atharva-veda have references on health and diseases. Another smaller branch of traditional medicine is Unani or Yunani system. Unani system of medicine has been originated in Greece. In India, Arbas introduced the Unani system of medicine.” Another smaller group of traditional practitioners in Indian is Siddha School. It has originated in Tamil culture of Southern India. This system of medicine is also known as

⁴S.K. Palo, *Consumer rights relating to medical negligence* 13 (JMC 2006).

⁵B.M. Gandhi, *Law of Tort* 304 (Eastern Book Co., Lucknow, 1987).

⁶Sweta Thakur and Vikram Singh Jaswal, *Medical Negligence in India* 3 (Regal Publications, New Delhi, 2013).

⁷R.A. Percy, *Charlesworth on Negligence* 1 (Carswell Legal Pubns, 6thedn., 1977).

Agasthyar system and History of Medical Services in British India date back to 1600, when the first medical officer arrived in India along with British East India Company's first fleet as ship's surgeon. A medical department was established in Bengal as far back as 1764 for rendering medical service to troops and servants of company.⁸

Medical negligence is of two types, i.e. civil medical negligence and criminal medical negligence on the basis of liability.

Types of Medical Negligence

Civil Medical Negligence

Medical negligence in which there is an infringement of a civil right. The basis of civil rights in many cases is a contract or agreement between the parties. The remedy for their breach is a civil one, i.e. payment of compensation or injunction. There are some other rights which originate otherwise than from breach of any agreement. There are the rights under the constitution or any other statutory laws.⁹ In order to constitute civil medical negligence there must be:“(i) A legal duty to exercise skill or care, and (ii) A failure to exercise the skill or care necessary in the circumstances of any particular case.”¹⁰

Criminal Medical Negligence

Criminal medical negligence is graver than the breach of a civil duty. The negligence must be so great as to go beyond a mere matter of compensation. The general conditions of criminal liability are indicated with sufficient accuracy in the maxim “*actus non facit reum nisi mens sit rea*” that is, the act alone does not amount to guilt; it must be accompanied by guilty mind.¹¹

The mere performance of a lawful act in a negligent manner does not give rise to criminal responsibility. However, negligence of a greater degree than is necessary to give rise to civil liability may result in criminal responsibility. The conduct of one accused of criminally negligent behavior must show wanton disregard for the safety or rights of others. The risk associated with such conduct is usually death or great bodily harm which is more severe than the simple harm commonly associated with civil negligence. Conduct of this kind is termed as criminal negligence.¹² There are two essential conditions for establishing criminal liability: “(i) Act, and (ii) Guilty mind or *mens rea*.”¹³

⁸Supra note 6 at 7.

⁹R.N. Saxena, *Indian Penal Code* 14 (Central Law Publication, Allahabad, 7thedn., 2007).

¹⁰Keith Simpson, *Taylor's principles and practice of medical jurisprudence* 54 (London, 12thedn. 1965).

¹¹Supra note 9 at 14.

¹²Corpus Jurissecundum 305 (Vol. 65, 2000) 4. *Jacob Mathew v. State of Punjab* (2005) 6 SCC 10 para 10-11.

¹³Supra note 9 at 15.

Medical Negligence in Hospital's Level

Medical negligent at the level a doctor/paramedical staff/hospital authorities may be further divided into the following groups:“(i) Professing/holding out/performing beyond level of competence, (ii) Failure to attend or treat, (iii) Errors in diagnosis, (iv) Failure of advice and communication, (v) Error in treatment, (vi) Mental cases, (vii) Dentists, (viii) Liability to third parties and (ix) Vicarious Liability.”¹⁴

In case of accidents and emergencies, it is primary duty of every of every doctor/hospital-private or government-to provide treatment up to their true level of competence.¹⁵ Where the hospital/clinic claims to provide 24 hours emergency service, availability of necessary equipment in working order and competent staff within reasonable time is mandatory. A hospital/clinic which offers emergency services has a duty to provide an adequate system of securing the attendance, within a reasonable time, of doctors with sufficient expertise to deal with emergencies. There must also be a system to deal with patents under a specialist's care.

Failure to give proper instructions; it is obligatory to give warning about risks and it must be ensured that instructions are given in comprehensive terms making sure that the patient understands both the instructions and the importance of strictly adhering to them, e.g., while giving treatment for scabies; Leaving a serious patient under continuous treatment without equally competent replacement/referral to continue to take care; Failure to inform where pre-natal diagnostic tests fail to confirm or rule out a genetic/metabolic may lead to continuation of pregnancy and birth of child with such a disorder.¹⁶

Error in Treatment: (i) Failure to monitor blood counts in a patient on chloramphenicol, defer prone, immune-suppressive, anti-cancer drugs, sodium valproate, etc.; (ii) Failure to monitor blood and urine sugar in a diabetic whose does of insulin are being adjusted; (iii) Failure to monitor severity of jaundice in a jaundiced new born baby; (iv) Failure to advise anti-rabies treatment in case of dog bite; (v) Failure to screen blood for Hepatitis-B, HIV infection, etc. before blood transfusion and surgery are other examples under this category etc.¹⁷ (vi) Injecting anesthesia in fetal fatal doses or in wrong diseases; (vii) Amputation of wrong organ and operation of wrong limb, removal of wrong organ or errors in litigation of ducts; (viii) Operation of wrong patient; (ix) Leaving instrument or sponge inside the part

¹⁴ Dr. Jagdish Singh & VishwaBhusan, *Medical Negligence & Compensation* 76 (Bharat Law Publication, Jaipur, 3rd edn., 2007).

¹⁵ *Ibid.*

¹⁶ *Id.* at 79.

¹⁷ *Id.* at 80.

of body operation upon; (x) Leaving tourniquets too long, resulting in gangrene; and (xi) Transfusing wrong blood.¹⁸

Negligence in case of surgery: (i) Fixing of a clip at wrong site during laparoscopic cholecystectomy resulting in CBD stricture; (ii) Perforation of large blood vessels; (iii) Poor apposition of bone ends; (iv) Failing to take corrective measures about deteriorating condition of the patient's limb following the application of a plaster cast; (v) Failure of surgeon/visiting surgeon to give instructions for post-operative care after a major surgery or failure of hospital in not seeking advice of a surgeon/visiting surgeon who conducted surgery in a case where complications arise etc.¹⁹

Psychiatric Cases: (i) Failing to control such patients resulting in hurting themselves, or causing harm to third parties; (ii) Not taking proper preventive measures, including proper medication, before and after electro-convulsive therapy.²⁰

Dentists: (i) Dislocation of fracture of jaw; (ii) Locking of jaws; (iii) Bleeding; (iv) Injury to lingual nerve; (v) Adverse reactions of local anaesthetic; (vi) Extensive root canal therapy and bridge work leading to malocclusion.²¹

Medical Negligence in Indian Penal Code, 1860

The general Penal Law of land does not create any distinct substantive offence in regard to medical negligence. But analysis of Indian Penal Code, 1860 shows that certain Section under Chapter XIV and few sections under Chapter XVI deals with cases of medical negligence. Chapter XIV of Indian Penal Code deals with "of offences affecting the Public Health, Safety, Convenience, Decency and Morals" contains Sections Section 52- Good Faith²², Section 80- Accident in doing a lawful act²³, Section 81- Act likely to cause harm, but done without criminal intent, and to prevent other harm²⁴, Section 88- Act not intended

¹⁸ *PoonamVermav. Ashwin Patel* (1996) 4 SCC 332 at Para 40.

¹⁹ *Supra* note 11 at 81.

²⁰ *Id.* at 82.

²¹ *Ibid.*

²² Section 52 of the IPC, 1860 "Good faith": Nothing is said to be done or believed in "good faith" which is done or believed without due care and attention.

²³ Section 80 of the IPC, 1860: Accident in doing a lawful act.--Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

²⁴ Section 81 of the IPC, 1860: Act likely to cause harm, but done without criminal intent, and to prevent other harm.--Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

to cause death, done by consent in good faith for person's benefit²⁵, Section 90- Consent known to be given under fear or misconception²⁶, Section 92- Act done in good faith for benefit of a person without consent²⁷, 269, 270, 274, 275, 276, and 284 which cover cases of medical negligence.²⁸

If any medical practitioner unlawfully or negligently does any act which is, and which he knows or likely to spread disease which is dangerous to life shall be punished.²⁹

If any medical professional malignantly spread dangerous disease then he shall be punished under Section 270 of Indian Penal Code, 1860, Section 270 provides, punishment, i.e. imprisonment of either description for a term which extend to two years, with fine and both.³⁰

If any medical practitioner whether practicing Ayurvedic, Unani, Siddha, Homeopathic and Allopathic system of medicine adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the change the operation of such drug or medical preparation, he shall be punished under Section 274 of the Indian Penal Code, 1860.³¹ Sale of such adulterated drugs shall be punished with a term which

²⁵ Section 88 of the IPC, 1860: Act not intended to cause death, done by consent in good faith for persons benefit.--Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied to suffer that harm, or to take the risk of that harm.

²⁶ Section 90 of IPC, 1860: Consent known to be given under fear or misconception.--A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person. Consent of insane person.-if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child. Consent of child.-unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

²⁷ Section 92 of the IPC, 1860: Act done in good faith for benefit of a person without consent.-Nothing is an offence by reason of any harm which it may causes to a person for whose benefit it is done in good faith, even without that persons consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him FROM whom it is possible to obtain consent in time for the thing to be done with benefit.

²⁸ *Supra* note 6 at 45.

²⁹ Section 269 of IPC, 1860: Negligent act likely to spread infection to disease dangerous to life: Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

³⁰ Section 270 of IPC, 1860: Whoever malignantly does any act which is and which he knows or had reason to believe to be, likely to spread the infection of any diseases dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

³¹ Section 274 of IPC, 1860: Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration shall be punished with imprisonment of either description for a term which may extend to one thousands rupees, or with both.

may extend to six months, or with fine which may extend to one thousand rupees or with both.³²

Any medical practitioner who rashly or negligently causes hurt or injury to any person with any poisonous substance shall be punished under Section 284 of the Indian Penal Code, 1860.³³ Similarly, if any medical practitioner does any rash or negligent act with any machinery which endangers human life shall be punished under Section 287 of the Indian Penal Code, 1860.³⁴

Section 304-A deals with the cases of death caused by negligence which also include the death caused by act of medical practitioners such as medical assistants, nurses and doctors, etc. Section 304-A prescribe the punishment for imprisonment of either description for a term which may extend to two years, or with fine, or with both.³⁵

Any registered medical practitioner causing negligent abortion of a woman shall be prosecuted and punished under Section to 315 of the Indian Penal Code, 1860.³⁶

³²Section 274 of IPC, 1860.

³³Section 284 of IPC, 1860: Whoever does, with any poisonous substance, any act in manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any problem danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees or with both.

³⁴Section 287 of IPC, 1860: Whoever does, with any machinery any act as rashly or negligently as to endanger human life or to be likely to cause hurt or injury to any such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

³⁵Section 304A of IPC, 1860: Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

³⁶ Section 312 of IPC, 1860: Causing miscarriage: Whoever voluntarily causes a woman with child to miscarry, shall if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Section 313 of IPC, 1860: Causing miscarriage without woman's consent.--Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 314 of IPC, 1860: Death caused by act done with intent to cause miscarriage: Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

If act done without woman's consent and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

Section 315 of IPC, 1860: Act done with intent to prevent child being born alive or to cause it to be die after birth:Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or cause it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Any medical practitioner who negligently by his acts causes death of any person is prosecuted under Section 304-A, i. e. causing death by negligence. But if his act only causes hurt or grievous hurt then such medical practitioner is prosecuted under Sections 323 and 325 respectively. If any negligent act of medical practitioner causes hurt to the patient then he shall be punished with imprisonment of either description for a term which may extend to one year or with fine which may extend to one thousand rupees, or with both.³⁷ Similarly, if any negligent act of medical practitioner causes grievous hurt to the patient.³⁸ If any medical practitioner causes grievous hurt then he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.³⁹ When a hakim gave a procaine penicillin injection to a patient because of which he died, it was held that the hakim was guilty under section 304A.⁴⁰

Negligence of such a character, or occurring under such circumstances as to be punishable as a crime by a statute; or such a flagrant and reckless disregard of the life and safety of others, willful indifference to the injury liable to follow, as to convert an act, otherwise lawful, into a crime against the State when it results in personal injury or death. Not only has the doctor made a wrong diagnosis and treatment, but also that he has shown such gross ignorance, gross carelessness or gross neglect for the life and safety of the patient that a criminal charge is brought against him. For this he may be prosecuted in a criminal court for having caused injury to or the death of his patient by a rash and negligent act amounting to culpable homicide under Section 304A of the Indian Penal Code. Some instance which may amount to criminal negligence may include:⁴¹(i) Injecting an aesthesia in fatal dosage or in wrong tissues; (ii) Amputation of wrong finger, operation on wrong limb, removal wrong organ, or errors in ligation of ducts; (iii) operation on wrong patient; (iv) Leaving instrument or sponges inside the part of body operate upon; (v) Leaving tourniquets too long, resulting in gangrene; (vi) Transfusing wrong blood; (vii) Applying too tight plaster or splints which may cause gangrene or

³⁷Section 323 of IPC, 1860: Punishment for voluntarily causing hurt: Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

³⁸Section 320 of IPC, 1860.

³⁹ Section 325 of IPC, 1860: Punishment for voluntarily causing grievous hurt:

Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

⁴⁰Dr K.I. Vibhute, *PSA Pillai's Criminal Law* 593 (Lexis Nexis Butterworths Wadhwa, Nagpur 12th edn., 2012).

⁴¹ Dr. Jagdish Singh & VishwaBhusan, *Medical Negligence & Compensation* 206-207 (Bharat Law Publication, Jaipur, 4th edn., 2014).

paralysis; (viii) Performing a criminal abortion; (ix) Performing an act which is prohibited or punishable by law; (x) Unqualified doctor administering injection leading to death; and (xi) Unqualified person conducting operation.”⁴²

Judicial Responses regarding Medical Negligence

In *Pt. ParmanandKatrav. Union of India and Ors*⁴³, the Supreme Court of India upheld “the right to medical aid in a leading case, and ruled that “every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise, i.e. without any type of medical negligence for protecting life. The court laid down the following guidelines for doctors, when an injured person approaches them, whenever medical professional is approached by injured person. And if he finds that his assistance is not really sufficient to save the life of patient, but some necessary better assistance is necessary. It is the duty of the medical professional so approached to render all the help which he could, and also see that the person reaches the proper expert as early as possible.”⁴⁴

In *John Oni Akerele’s case*⁴⁵, “a medical practitioner had administered a medical dose of sorbitol injection to a child, because of which the child died. The doctor was charged under section 304A IPC. The contention of the accused doctor was that the child was peculiarly susceptible to the medicine and therefore unexpectedly succumbed to a dose which would have been harmless in a case of a normal child. The Privy Council held that the doctor was guilty of criminal negligence.”⁴⁶

In *Jacob Mathew (Dr.) v. State of Punjab*⁴⁷, in the guidelines in consultation with the Medical Council of India:

- (i) “A private complaint would not be entertained unless the complainant produced prima facie evidence before the court in the form of credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.”
- (ii) “The investigating officer would, before proceeding against the accused doctor, be obliged to obtain an ‘independent and competent medical opinion. preferably from a doctor in government service, who can be expected to give an impartial and unbiased opinion; by applying the “Bolam test” to the facts of the case.”

⁴²*Ibid.*

⁴³AIR 1989 SC 2039.

⁴⁴*Ibid.*

⁴⁵AIR 1943 PC 72, (1944) Cr LJ 569 (PC).

⁴⁶*Ibid.*

⁴⁷2005 (3) CPJ 9: 2005 ACJ 1840: 2005(3)CPR 70: 2003 Cr LJ 3710:2005 SCR 307:2005 (3) CCR 9 SC.

- (iii) “A doctor accused of rashness or negligence would not be arrested in a routine manner, unless his arrest was necessary for furthering the investigation or for collecting evidence, or if there arose a reasonable suspicion that he would not make himself available to face the prosecution in the court.”⁴⁸

In *Juggan Khan v. State of Madhya Pradesh*⁴⁹, “the accused was a registered homeopath who had administered to a patient suffering from guinea worm, 24 drops of stramonium and a leaf of dathura without properly studying its effect. The patient died as a result of the medicine given by the accused. Stramonium and dathura are poisonous. So, giving the same without being aware of its effects was held to be a rash and negligent act. The accused was convicted under section 304A, IPC, and sentenced to two years rigorous imprisonment.”⁵⁰

Conclusion

Negligence is simply negligence of some care which we are bound to exercise towards somebody. It is something less than wrongdoing. Medical neglect is simply a negligence of some care which a clinician (defendant) is assured to exercise towards his patient. Medical negligence is a specific kind of negligence, i.e. expert negligence. In this kind of negligence special ability is required by the criminal, i.e. the expert is one who profess to have some special skill. Medical negligence is not dissimilar in law from any other kind of negligence. The base of responsibility of professional negligence is negligence. In overall, there are three meaning of Medical Negligence, i.e.: “A state of mind which is opposite to intention and Careless conduct.”

⁴⁸*Ibid.*

⁴⁹AIR 1965 SC831.

⁵⁰*Ibid.*