LAW & MEDICINE (2010). By Lily Srivastava, Universal Law Publishing Co. Pvt. Ltd., C-FF-1.A, Dilkhush Industrial Estate, G.T. Karnal Road, Delhi-110033. Pp. xxiv + 360. Price Rs.295/-.

THE BOOK *Law & Medicine* may rightly be stated as an anthology on medico-legal discipline. The basic theme behind this work is to bring in sharp relief the fundamental idea of modern law that fairness demands that everyone should be accountable, at least in damages, for the consequences of failure to take reasonable care which results in injury to others, and this is so whether a person at fault is driving a car, running a beauty parlour, or prescribing a medicine to a patient or performing a surgical operation or maintaining doctor-patient confidentiality while dealing in clinical trials preserving constitutional and legal rights of the person they deal with.

The author has taken care to separately deal with various forms of medical professions in the country like homeopathy, ayurveda, naturopathy, unani systems of medical profession, and even reiki and yoga systems as also modern medical system for bodily cures, fitness and perfection.

She has also devoted pages to the subject of clinical trials and its ethics which is a research study to answer specific questions on new therapies for curing and treatment of diseases which have no or little remedial answer in modern medical science. In clinical trials the research studies determine whether the new drugs or treatments are both safe and effective as also endurable. No experiment should be conducted if there is a reasonable belief that injury, disablement or death may result. The degree of risk should always be balanced or exceeded by the importance of the problem to be solved by the experiments in the laboratory. This should be undertaken only by scientifically qualified persons who alone should conduct such experiments in safe environments. For this very reason in June 1964 the World Medical Assembly adopted Declaration of Helsinki containing recommendations guiding physicians and biomedical researchers dealing with human subjects. This declaration since then has been reviewed and updated in 1975, 1983 and 1989 to improve diagnostic, therapeutic and prophylactic procedures. The research protocol should always contain a statement of compliance of the international principles in the backdrop of etiology, that is the cause of disease.

The book addresses itself to the problems of exploding population growth which is one of the most basic problems that the country is facing. The book deals with sterilization and injectable contraceptives which demonstrated the potential for coercion in a manner where the recipient herself need not be

aware. Several cases came up before the courts like *Stree Shakti Sangathanan* v. *Union of India*[1] and academic writing like that of C. Sathyamala, entitled "Hazardous contraceptives and the Right to life"[2]

In any policy decision on population control, the ethical and safety issues should never be bypassed. Courts have gone to such an extent where a 19-year old mentally challenged orphan girl was raped in which the Supreme Court allowed her to keep the pregnancy and the national trust for mentally retarded were given the care of the mother and the child for the rest of their lives. The bench stated that it was the duty of the government to take care of such victims to safely deliver and also endure the post-natal care of both the mother and the child.

The chapter on medical negligence deals with a very common complaint since it is very individualistic so far as the patient and the doctor have rights and duties for and against each other. The wrong of negligence lies in the words of Lord Diplock: "The fundamental human right is not to a legal system that is infallible but to one that is fair."[3]

At the same time fairness also demands that liability in negligence be confined to cases of genuine fault without casting responsibility imposed arbitrarily on one section of the community in order to compensate another. The law of negligence is thus a balancing act – an attempt to compromise between the needs of those who are unwittingly injured and the social consequences of imposing legal liability on those from whom they seek compensation. Judges have deliberately avoided laying down detailed rules for determining what conduct amounts to negligence. Therefore, judges seek to employ the reasonable man's test. In *Blyth* v. *Birmingham Waterworks*,[4] Anderson B. laid down that "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which is a prudent and reasonable man would not do."

To the common man the above statement does not take him very far and leave him confused. The test of negligence in these words convey that the test of negligence is a objective one and the judge would come to a conclusion after hearing each case and the evidence available for determining negligence. Lord Denning is of the view that it may be conceded that a very high standard of professional competence is involved in medical profession. But he adds

1. Writ Petition (Civil) No.680 of 1986.
2. 40 *JILI* 187(1998).
3. *Maharaj* v. *Attorney-General of Trinidad and Tobago*, 1978, IWLR 902, 911.
4. [1856] 11 Exch.781

that "we say firmly, that in a professional man, an error of judgement is not negligence. To test it, I would suggest that you ask the average competent and careful practitioner: Is this sort of mistake that you yourself might have made? If he says yes, even doing the best I could, it might have happened to me, then it is not negligence…."

The other judges of the court of appeal echoed Lord Denning's words of caution. Lord Lawton J made some interesting but very sensible remarks: "If Courts make findings of negligence on very flimsy evidence or record failure to produce an expected result as strong evidence or regard failure to produce result as strong evidence of negligence, doctors are likely to protect themselves by what has become known as "defensive medicine", that is to say, adopting procedures which are not for the benefit of the patient but safeguard against the possibility of the patient making a claim for negligence.

The author of the present work under review has very aptly summed up the law on medical negligence when she writes that "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 that particular art…. a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes contrary view." The author has rightly stated that the issue is not contrary to the established practice by doctors and surgeons, and negligence would not be established. But where the medical practitioner has opted for a new treatment after considerable research and compulsions for a novel treatment one must test the new treatment for cure or better results, Lord Clyde in *Hunter* v. *Hanley*[5] stated: "It follows from what I have said in regard to allegations of deviation from ordinary professional practice…. Such deviation is not necessarily evidence of negligence. Indeed it would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed. Even a substantial deviation from normal practice may be warranted by the particular circumstances." In substance the courts would not stifle progress even if the doctor opted against the prevalent practice for the benefit of the patient which did not work out for in his patient's case. The House of Lords, on the contrary, have reserved the rights of the court to hold even a very widespread medical practice negligent.

The book under review gives a wealth of tests which eminent judges have resorted to determine negligence, one of which is the Latin term *res ipsa loquitur* that means "the thing speaks for itself." The peculiar circumstances constituting the accident may often proclaim the conduct – clear and unambiguous circumstances of negligence for holding a doctor liable.

5. 1955 SLT 213

The author has done a splendid job reflecting the labour and learning that have gone into the pages of her book. The bibliography of books, articles, report of expert committees and their recommendations and various enactments and regulations of Indian Medical Council have further enriched the book as a handy collection of opinions to help the courts and the academic community in determining the rights and responsibilities of the medical profession.

*L.N. Mathur**

* M.A, LL.M. (Lucknow), LL.M. (York, Toranto), Emeritus Professor, Amity Law School, Lucknow.