ROLE OF MEDICAL EVIDENCE IN CIVIL AND CRIMINAL LAW OF INDIA: ISSUES & PERSPECTIVES

A Thesis

Submitted for the Award of Ph.D. degree of

UNIVERSITY OF KOTA

in the

Faculty of Law

By

Abhishek Chayal

Under the Supervision of

Dr. R.K. Upadhyay

Associate Professor

DEPARTMENT OF LAW

UNIVERSITY OF KOTA

KOTA (RAJ.)

2018

CHAPTER–I

INTRODUCTION

Evidence is the soul, heart and body of a case whether civil or criminal. The success and failure of each and every case depend upon the availability of evidence and credibility of evidence. But the heartening development of the society is that, now a days, it is impossible to get “eye-witness” in a case because of humiliation, torture death may result to such a “witness”. Hence, the courts look for “other available evidences”. The medical evidence comes into the picture, on the issue of availability, reliability and credibility, which turns into the sole basis for decision beyond doubt. In some cases like paternity issues, hand-writing, finger prints, forgery, cyber offences, the medical evidence become a guiding star, rather than the only and sufficient evidence for establishing a fact. Thus, the medical evidence has left behind all other evidences today and thus become the life and blood of the socio legal structure.

Science has its own course and own way. Logics, arguments, counter arguments can certainly lead you to the highest logic but may not be the highest truth. It is profoundly wrong that truth has many dimensions; rather it has many shades and expressions. Truth is fact, which can be deduced by logical analysis or may be by facts itself. Logic is mental exercise, which is substantial but truth is realization.

‘Science of Law’ is not an exception to the above premises. It has been well settled that the ‘object of the law’ is different from ‘the nature of law’. At the same time it is also settled that both rely on the facts. Law evolves and revolves around facts. Law, being an exercise of settling the issues and the problems, are psychological treatments, with facts.

If we go deep down to the dimensions of facts what they have done to the civil and criminal proceedings, it will be breath taking, if we explore what medical evidence has done to the humanity is simply ‘unprecedented’. For the first time in

development of the legal and judicial history that a tool is evolving like a sword, cutting the webs of ignorance so mercilessly and reaching the truth so fast.

Medical evidence includes documents written by a registered medical practitioner and other registered health or allied health professionals. This evidence should support the information which anyone provides in the medical details section for any claim. Statements about anyone's are condition written by him or his nominee is taken into account, but these are not considered medical evidence. This applies to information provided by any person who is not a registered health professional.

Medical evidence is not only rich in its pace as an investigative tool, rather it is turning out to be a champion method for predicting the future and settling the uncertain issues. It has challenged the logical questions, arguments and reversed the judgments ruthlessly and uncompromisingly.

In a criminal trial, Medical evidence is an opinion evidence which is used to lend corroboration to the eye-witness.[1] In order to zero down on the relevant facts, the judge has to rely on the knowledge and opinion of certain experts as he may not be in a position to appreciate the technical details involved in a particular case. Evidence is given by the expert of the relevant field in the form of his opinion which is based on the information that he has gathered from the facts of the case. This evidence supplements the assertions of the judge, and together they complement each other and combine to form the basis of the judgment. However, the evidentiary value of the opinion given by the expert is not unshakeable because of the discretionary power available to the Court, which may choose to accept or reject it. This discretionary power in the hands of the Court arises from Section 45 of the Indian Evidence Act, 1872, which, theoretically, gives a lesser degree of importance to expert evidence by terming it as merely corroborative in nature. Section 45[2], states that–

[1] *Anwar v. State of Haryana*, 1997 All Cri R. 529: (1997) 34 ACC 492 (SC)
[2] The Indian Evidence Act, 1872

"When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identify of handwriting or finger impressions, the opinions upon that point of persons especially skilled in such foreign law, science or art, or in questions as to identify of handwriting or finger impressions, are relevant facts" such persons are called expert.

But there is a need to define the expert persons specially the medical expert. The careful reading of the section gives us a vague idea about who is an expert, by the words– the persons especially skilled. There is no clear idea about qualifications, experience or any particular attainment. But especially skilled means there must be something to show that the expert is skilled and has an adequate knowledge of the subject.

It has made the legal journey from possibility to probability quite easy. It has tried to take both the evidentiary concepts on the same side precisely.

A learned Justice of The Supreme Court in **Solanki Chimanbhai Ukabhai** v. **State of Gujarat**,[3] observed about medical evidence as follows:

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use, which the defence can make of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence".

Further in **Duraipandi Thevar** v**. State of Tamil Nadu**[4] it was observed that the medical evidence is usually opinion evidence. The medical opinion by

[3]AIR 1983 SC 484: 1983 Cr. L. 822
[4]AIR 1973 SC 659: 1973 Cr. L.J. 602

itself, however, does not prove or disprove the prosecution case, it is merely of advisory character.[5]

In **Mayur** v**. State of Gujarat**[6], Hon'ble Lordships of the Supreme Court observed that "Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth".

In another case of **Awadhesh v. State of M.P.[7],** again their Lordships of the Supreme Court observed that "Medical expert's opinion is not always final and binding".

The observation made by the apex court in the above mentioned cases reveal the fact that the 'Medical Evidence' is a part of 'opinion' fair enough. But it's fascinating to know how 'Medical Evidence' has turned its application into civil and criminal proceedings in a broader spectrum.

1.1 How medical evidence expanded and changed?

Available medical evidence, recently submitted to the Supreme Court of India, shows that the poison from the Bhopal gas leak[8] may still be persisting in the bodies of gas victims.

Medical knowledge is a specialized form of knowledge. A layman may not be in a position to have medical knowledge without proper education and training. The knowledge of the medical expert is always essential in the criminal justice system. The expert evidence given by a medical person comes to the help of the Court in deciding various matters. Particularly, in case of death of a person, medical evidence is inevitable. Such evidence can be obtained through postmortem report. The importance of the post-mortem report is as a tool in the hands of the prosecution. It becomes useful to decide the guilt of the accused. The

[5] *Stephen Seneviratne v. Kind*, AIR 1936 P.C. 289 at p. 298. 299 : (1936) 37 Cr.L.J. 963; *Anant Chintaman Lagu v. State of Bombay*, AIR 1960 C 500 at p. 523: 1960 Cr.L.J. 682)
[6] AIR 1983 SC 5: 1982 Cr.L.J. 1972)
[7] AIR 1988 SC 1158: 1988 Cr.LJ. 1154 (Para 10)
[8] *Union Carbide Corporation v. Union of India*, AIR 1990 SC 273: 1989 SCC (2) 540

inter-action between Medicine and the Law has played the main role in the recent years. Medical science gives clue as to how the death of the person or how the injury, was caused, while the law prosecutes a person for killing and injuring other. The postmortem report, examination of wounds, chemical analysis, the expert reports are relevant as well as admissible in the Court as an evidence according to our legal system.

The three main statutes, the Criminal Procedure Code 1973, the Indian Penal Code (Act 45 of 1860), and the Indian Evidence Act 1872, regulate our legal system in the area of criminal justice and Criminal Jurisprudence. The importance of medical evidence at present is an increasing tendency in every walk of life. The medical evidence includes doctor's report of examination, chemical analysis report, serologist, DNA (Dioxy-ribo-Neuclic Acid test). In a trial where injury or death is involved, or for an offence of causing hurt to a human body, the opinion of medical man is sought for ascertaining the cause of death or injury or to determine as to the injuries are anti-mortem or postmortem, probable weapon used, the effect of injuries, medicines, poisons, the effect and consequence of wound whether they are sufficient to cause death in the ordinary course, the duration of injuries and the probable time of death. In the same way while the offence or trial of kidnapping and rape the medical opinion is adduced to establish the fact that the girl is minor, whether rape was committed under influence of liquor, medicine or intoxicant, threat by using weapon to extent injury on private part of prosecutrix and that of accused, or if death is caused by excessive force used by the accused to the minor child etc.[9]

Ordinarily medical evidence is corroborative evidence. Expert evidence alone will not convince the Court beyond reasonable doubt that a particular person is guilty of a crime. Where the medical evidence describes the injuries and the same is corroborated, the former can be relied upon. This was clearly summed up by Justice M. Monir (as he then was) in his book titled 'Principles and Digest of the Law of Evidence' where he describes that 'when a medical person is called as an expert, he is not to witness of the facts, because his evidence is not direct

[9] Medical Jurisprudences : HWV Cox & Jhala and Raju : Evidence Act, Section 45.

evidence of how an injury in question was done. He gives his opinion only on how that, in all probability was caused. The value of such evidence lies only to the extent it supports and lends weight to direct evidence of eye-witnesses or contradicts evidence and removes the possibility of the injury in question and could take the manner alleged by the witness.' Although the substantive evidence case is that of the eyewitnesses who seen the incident, expert evidence has corroborative value.

The medical evidence used to discredit the witness account and to show that they could not possibly have been caused in the manner alleged by the prosecution. With the help of decided cases, the role of medical evidence, especially in cases of grave offences against women is proved to be inevitable. The opinion of the doctors based on their knowledge as of at most importance in proving the case of the prosecution. But, if the provisions of the Evidence Act are taken into consideration, medical evidence is not direct evidence. It becomes necessary in each and every case where the expert evidence is admitted to check and counter-check it by producing the expert witness before the court. Without examining the expert witness, his evidence may become inadmissible.'[10]

Practically, the Court have always accorded due importance to expert evidence and there are a plethora of judgments to substantiate this point. In cases of grave offences committed against women, such as rape, murder and dowry burning, the role of medical evidence becomes crucial. Medical evidence may be able to ascertain the cause of death but it is not possible to pinpoint with precision, the exact means by which the cause of death was set into motion. The above discussion highlights the indispensability of medical evidence in criminal trials involving grave offences committed against women. The role of a medical man, in law, is to help in the administration of justice. It is natural that in the course of his professional duties, he frequently enters the arena of law, in examination of cases for age, the examination of injuries on the body of a person rape, sodomy etc. He

[10] Hanishi K. Thanawalla (1996) , "Development and Liberalisation of Hearsay doctrine", Journal of the Indian Law Institute, Vol 38.1

has to examine cases of poisoning, as also to observe and certify persons regarding their sanity or insanity.[11]

Case study of leakage of methyl isocyanate gas in Bhopal in the context of medical Evidence:

Bhopal, the state capital of Madya Pradesh, is geographically at the centre of India. About a third of its one million inhabitants live in tightly packed, shanty ('kucha') housing in its northern and central districts. In 1969, Union Carbide (India), a subsidiary of the large American corporation, set up a pesticide formulation plant on the north edge of the city, originally to import, mix and package pesticides manufactured in the United States. Ten years later, a 5000 ton MIC[12] production unit was installed, primarily to manufacture an effective and inexpensive carbary pesticide marketed as 'Sevin'.

Methyl Isocyanate is produced by the reaction of (mono) methylamine with phosgene, both of which were manufactured elsewhere in India and transported in bulk to Bhopal. There it was mixed with naphthol to produce Sevin for sale throughout the country. MIC[13] is colorless, with a low boiling point ($39^{o}C$) and high vapor pressure; because of its chemical instability it is stored under refrigeration in dry, stainless steel vessels. At the Bhopal plant, there were several such storage tanks, one having an unusually large capacity of 60 tons.

For reasons that remain unclear, the cooling system of tank 610 was not functioning in the last months of 1984. Late in the evening of December 2^{nd}, it is hypothesized that water (either through mechanical malfunction or operator error) entered the tank, mixing with the stored MIC[14].

The result was a violent, exothermic reaction, possibly catalyzed by ferrous corrosion of the tanks lining. By 01.00 a.m. the next morning, the tank ruptured and over the next few hours approximately 27 tons of vapor was

[11] Dr. P.K. Bhattacharji (1998), 'Medico-Legal Companion', 2nd Ed., Allahabad Law House, p.276
[12] Methyl Isocyanate.
[13] Ibid.
[14] Ibid.

discharged. Although most of this was probably pure MIC [15], products of hydrolysis (monomethylamine, carbon dioxide and various ureas) and pyrolysis (carbon monoxide, nitrous oxides and hydrogen cyanide) may also have been released in smaller quantities; the exact constitution of the discharged gases remains a matter for conjecture.

There is very little available information on meteorological conditions that night, but data from the city's airport suggest an air temperature of about 10^{o}C and a slow, northerly wind. At this temperature, the discharged MIC[16] would have rapidly condensed and fallen ground wards, the plume passing over the northern edge of the city and towards its centre. An estimated 350 000 people were exposed. Immediate effects, and those over the following month, included the deaths of approximately 5000 people, most attributable to the direct respiratory effects of inhalation.

Over the next three years, health studies of survivors confirmed residual, obstructive airways disease, though its nature was poorly characterized. Ophthalmic sequelae, prominent in the weeks after the disaster, were believed to be more transient; the presence of disease in other organ systems was not convincingly established. Since 1986, only small case studies of persistent (respiratory) disease have been published and the question of causation has been poorly addressed. No further epidemiological studies have been completed.

Ironically, this was what the ICMR (Indian Council of Medical Research) authorities along with Dr. Heeresh Chandra, head of Bhopal's Medico-Legal Institute, had claimed from January 1985 onwards. They had, however, hastily concluded that this observation implied that MIC [17] exposure led to cyanide poisoning. This was in contrast to the theory propounded and vigorously pursued by Union Carbide Corporation from the very beginning that since MIC[18] was the only component of the toxic emission, there could not be any question of systemic

[15] *Supra Note*, 12, Chapter I, Page 7
[16] Ibid.
[17] Ibid.
[18] Ibid.

and persistent toxicity. According to UCC[19], MIC[20] is instantly transformed into harmless methylamine on contact with water on body surfaces, e g, eyes and lungs; MIC[21], therefore; cannot enter the blood stream and cannot cause any systemic and persistent toxicity; MIC[22], at high concentrations, could at most cause only varying degrees of local injury at the point of contact (i.e., eyes and lungs); multisystemic disorders reported by gas victims are due to the secondary effects of hypoxia (lack of oxygen) resulting from lung injury. In order to bolster up this theory, UCC[23] suppressed all vital information in its possession regarding (a) chemistry of exothermic reaction and thermal decomposition -of MIC[24] that took place in the fateful Tank No 610, (b) identity of the components of the toxic emission, (c) biochemical fate of MIC in the human body as well as toxicological impact of the leaked gas, and (d) antidotal treatment of systemic poisoning by MIC.[25]'

1.2 Indian Council of Medical Research's Analysis:

A number of Indian investigators, at quite an early stage, detected significant pointers towards the possibility of systemic and persistern toxicity of the gas-exposure. Medico Friend Circle's epidemiological study reported presence of multi-systemic ailnients including high frequency of non-respiratory symptoms in a significant number of victims. Among the hospitalised patients, ICMR[26] noted that in about 40 per cent patients suffering from respiratory symptoms no organic damage to lungs could be detected. Laboratory investigations revealed presence of carbamylated haemoglobin (haemoglobin linked with, MIC) and anti MIC[27] antibody in blood samples drawn from gas victims. Animal experiments, conducted at Defence Research Development Establishment, Gwalior, established that Methyl Isocyanate could cross air-blood barrier in the lungs to enter the blood

[19] Union Carbide Corporation
[20] *Supra Note* 12, chapter 1, page 7
[21] Ibid.
[22] Ibid.
[23] *Supra Note*, 19, Chapter I, Page 9
[24] *Supra Note* 12, chapter 1, page 7
[25] Ibid.
[26] Indian Council of Medical Research
[27] *Supra Note* 12, chapter 1, page 7

stream. The most significant finding, however, was ICMR's[28] claim that urine thiocyanate levels of gas victims were elevated 2-3 fold and administration of sodium thiosulphate injection, a known antidote of cyanide poisoning, resulted in further 8-10 fold elevation. ICMR's[29] diagnosis of cyanide poisoning based on this finding had scientific basis. It is commonly believed that cyanide is such a poison that even a drop causes instant death. This is not true. Cyanide radicals enter the human body everyday through certain foodstuffs or through consumption of tobacco. Combining with sulphur by enzymatic action in the body; cyanide is converted into thiocyanate to be excreted through urine. In case of acute cyanide poisoning when lethal amount of cyanide enters the body, the victim dies unless an extraneous large source of sulphur (e.g., a sodium thiosulphate injection) is quickly made available. When it transpired that there was no recorded case of chronic cyanide poisoning, ICMR[30] invoked the theory of 'enlarged cyanogen pool' implying that the poison had somehow been existing in a comparatively stable form to act as a continued source of cyanide and steadily been converted into thiocyanate in the body in increasing amounts. It is on this basis that ICMR[31] recommended mass therapy of the symptomatic gas victims with sodium thiosulphate. The Madhya Pradesh government not only did not implement ICMR's[32] recommendation but went to the extent of closing the voluntary health clinic Janaswasthya Kendra where sodium thiosulphate was being administered to gas victims with palpably beneficial results. Acting on a petition-of the gas victims and their physician Dr. Nisith Vohra, the Supreme Court of India ordered restoration of Janaswasthya Kendra and constituted a seven-member expert committee with five members from official bodies including Madhya Pradesh government and two non-official representatives from voluntary organisations. The Supreme Court Committee was entrusted, inter alia, with preparing a scheme of detoxification and medical relief, to arrange for monitoring the implementation of medical relief, and to carry out proper epidemiological and house-to-house survey which will be "necessary for the purpose of determining

[28] *Supra Note* 26, chapter 1, page 9
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.

the compensation payable to the gas affected victims and their families". The committee, however, after one year of deliberation, decided to submit two reports- one by a majority of official members and the other by the minority constituted by the two non-official members. The minority member submitted a preliminary report of concern to the Supreme Court on October 26, 1987. This report presented the evidence collected by the AIIMS [33] team and recommended immediate consideration of this scientific evidence by the concerned authorities, including Government of India, for the purpose of urgent medical relief and, intervention in the imminent compromise in the compensation case.

ICMR's [34] postulation of cyanide poisoning had not found favour in scientific circle for a number of reasons. First, presence of cyanide in the toxic emission or evidence of conversion of cyanide from MIC [35] could not be demonstrated. Second, and most important, the data on urine thiocyanate levels and sodium thiosulphate therapy collected and presented by ICMR[36] were scanty, confusing and bereft on any scientific validity. Indeed it may be observed without hesitation that the standard of scientific and medical' investigations carried out on Bhopal disaster by most of the top class research organisations is so poor as to be rejected at the undergraduate level. One example will suffice. It was in December 1986, after two years of study and research, that ICMR [37] discovered that no proper control study was undertaken; conclusions arrived at and recommendations issued were without any proper control study". [38]

This study is just an instance that the 'medical evidence is not just merely a tool for the investigation of the past incident rather it provided the new dimension to the legal research that the 'Medical Evidence' may also be proved handy in ascertaining the compensation also.

---

[33] All India Institute of Medical Sciences
[34] *Supra Note* 26, chapter 1, page 9
[35] Methyl Isocyanate.
[36] *Supra Note* 26, chapter 1, page 9
[37] Ibid.
[38] Anil Sadgopal and Sujit K. Das: Bhopal: The Continuing Toll : Economic and Political Weekly, Vol. 22, No. 48 (Nov. 28, 1987), pp. 2041-2043

The need to ascertain the dimensions and the expansion of the 'relevance of medical evidence' is essential as to the fact that medical evidence is of highly reliable nature and with the use of such evidence the justice can be precisely met and with very rare changes of being misled as because the scientific development in the field of medical science has been extended to the highest of levels and there are next to zero possibilities of having wrong result.

1.3 Constitutional Provisions :

The provisions of Constitution have made clear that the rights of every individual shall be protected unless and until it has been proven that the person is guilty. The Constitution of India imposes a duty on the state that, "No person accused of any offence shall be compelled to be a witness against himself".[39] It is clear from the text that it is a mandate against the barbarous and brutal ways of implicating anybody and then proving the case against him. To avoid and to abridge the unbridled power of police the provisions were established in the Constitution of India. But the other side of coin is 'to what extent accused may be provided protection'. The main task before the higher judiciary was to interpret the clause in such a way that there should not be any conflict in law of evidence and the said clause.

In this research a very tough and rare attempt shall be made to find out the hidden and never explored possibilities of the expansion of these Constitutional articles such as 'Need of medical evidence' as a tool for providing compensation. Along with that the researcher shall make an attempt to settle the sanctity of the medical evidence on scientific development and precision.

The relevance and the evolution of the provisions and detailed scenario of the present position of the provisions will be described in the following chapters. It has been observed that the relevance and the aid of 'Medical Evidence' have been increased leaps and bounds. Medical evidence has been replaced by the old customs and the other legal evidentiary rules. There are cases where parenthood has been decided by medical evidence and not by the rule of the old customs.

[39] The Constitution of India, 1950, Article 20(3).

Recently in one of the interesting cases it has been observed that the lady who claimed to be Indian and on that bases was bought to Indian from Pakistan. But when her DNA[40] test was conducted, she appeared to be somebody else. [41]

Earlier it has been observed that the saying 'mother is a fact and father is a belief' was deep seated in the culture and in the law has been eventually under threat of losing its charm and wit by DNA[42] tests. Then it has been observed that the Supreme Court along with other high courts has heavily relied on medical evidence in providing compensation.

Chandrima Das[43] case is one of the leading examples.

In **The State of Bombay v. Kathi Kalu Oghad and Ors.**[44] the Supreme Court consisting of eleven judge bench (**B.P. Sinha, C.J., A.K. Sarkar, J.R. Mudholkar, K.C. Das Gupta, K. Subba Rao, K.N. Wanchoo, N. Rajagopala Ayyangar, P.B. Gajendra Gadkar, Raghubar Dayal, S.K. Das and Syed Jaffer Imam, JJ.**) examined the matter thoroughly Question of law regarding interpretation of Article 20(3) of constitution before Supreme Court 'whether act compelling accused to give his specimen handwriting or signature or impression of finger tips amounts to compelling him to be witness against himself within meaning of Article 20(3)[45] - mere questioning of accused person by police officer resulting in voluntary statement which may ultimately turn out to be incriminatory is not compulsion to be witness is not equivalent to furnishing evidence in its wide significance that is to say as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at trial to determine the guilt innocence of accused - to be a witness means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise- to bring statement in question within prohibition of Article 20(3)[46] the person accused must have stood

[40] Dioxy-ribo-Neuclic Acid Test.
[41] Geeta Case reported in newspapers.
[42] *Supra Note* 40, chapter 1 page 13.
[43] (2000) 2 SCC 465.
[44] AIR1961 SC 1808.
[45] *Supra Note* 39, chapter 1, page 12
[46] Ibid.

in character of an accused person at time he made statement and it is not enough that he should become an accused any time after the statement has been made.

This judgment reversed the decisions of High Courts of Kerala and Calcutta. It must be observed that this judgment open the floodgates for all kind of medical evidences expert evidence subject to the admissibility as provided under Law of Evidence.

In **People's Union for Civil Liberties and Anr. v. Union of India (UOI)[47], Supreme Court consisting of bench of S. Rajendra Babu and G.P. Mathur, JJ.** By applying the judgment in Kathi Kalu Oghad held that section 27 of Prevention of Terrorism Act is constitutional. The bench observed, "A close reading of Section 27 of the POTA,[48] makes it clear that upon a 'request' by an investigating police officer, it shall only 'be lawful' for the Court to grant permission. Nowhere, it is stated that the Court will have to positively grant permission upon a request. It is very well within the ambit of Court's discretion. If the request is based on wrong premise, the Court is free to refuse the request. This discretionary power granted to the Court presupposes that the Court will have to record its reasoning for allowing or refusing a request.

This section is only a step in aid for further investigation and the samples so obtained can never be considered as conclusive proof for conviction. Consequently, the constitutional validity of Section 27[49] is upheld".

Science or Art:

The Science or art includes all subjects on which a course of special study or experience is necessary to the formation of an opinion. "Science" or "art" is not limited to higher science or fine art, but it has its original sense of handicraft, trade, profession and skill in work which has been carried beyond the sphere of the common pursuits of life into that of the artistic and scientific action. The fact the medical evidence is a part of science is undisputed but when it comes to the

[47] AIR 2004 SC 456.
[48] Prevention of Terrorism Act, 2002
[49] Ibid.

relevancy of such evidences in the courts of law, it becomes as much as Art. In the following chapters the relevancy and the applicability of the medical evidences shall be brought to light and will be discussed in detail.

1.4 Provisions of Evidence Act, 1872:

The Indian Evidence Act, 1872 being a major act and source for the medical evidence, the same will be dealt with in detail and thoroughly.

1.4.1 Foreign Law:

Foreign law can be proved –

a) by the evidence of a person specially skilled in it and

b) by direct reference to the books printed or published under the authority of the foreign government.

1.4.2 Medical opinion:

The value of Medical evidence is only corroborative. A doctor acquires special knowledge of medicine and surgery and as such he is an expert. Opinions of a medical officer, physician or surgeon may be admitted in evidence to show-

a) Physical condition of the a person,

b) Age of a person

c) Cause of death of a person

d) Nature and effect of the disease or injuries on body or mind

e) Manner or instrument by which such injuries were caused

f) Time at which the injury or wounds have been caused.

g) Whether the injury or wounds are fatal in nature

h) Cause, symptoms and peculiarities of the disease and whether it is likely to cause death

i) Probable future consequences of an injury etc.

When there is a conflict between the medical evidence and ocular evidence, oral evidence of an eye witness has to get primacy as medical evidence

is basically opinionative. Where the direct evidence is not supported by the expert evidence, the evidence is wanting in the most material part of the prosecution case and therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with medical evidence, it is the most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained, it is sufficient to discredit the evidence as well as the entire case.[50]

Where the opinion of one medical witness is contradicted by another and both experts are equally competent to form an opinion, the court will accept the opinion of that expert which supports the direct evidence in the case.[51]

1.4.3 Handwriting:

Like other expert opinion, the opinion of handwriting expert is advisory in nature. The expert can compare disputed handwriting with the admitted handwriting and give his opinion whether one person is the author of both the handwriting.

The court shall exercise great care and caution at the time of determining the genuineness of handwriting. A handwriting expert can certify only probability and 100 per cent certainty. On the question of the handwriting of a person, the opinion of a handwriting expert is relevant, but it is not conclusive and handwriting of a person can be proved by other means also.

The following are the different modes of proving handwriting:-

1. A person who wrote the document can prove it.[52]
2. A person who saw someone writing or signing a document can prove it.[53]
3. A person who is acquainted with the handwriting by receiving the documents purported to have been written by the party in reply to his communication or in ordinary course of business, can prove the

[50] *Mani Ram v. State of U.P.,* 1994 Supp (2) SCC 289,292; 1994 SCC (Cri) 1242.
[51] *Piara Singh v. State of Punjab*, AIR 1977 SC 2274.
[52] Indian Evidence Act, 1872, Section 47.
[53] Ibid.

documents.[54]

4. The court can form opinion by comparing disputed handwriting with the admitted handwriting.[55]
5. The person against whom the document is tendered can admit the handwriting.[56]
6. The expert can compare disputed handwriting with admitted handwriting and thereby prove or disprove whether the documents were written by the same or different persons.[57]

1.4.4 Fingerprint expert:

Expert opinion on fingerprints has the same value as the opinion of any other expert. The court will not take opinion of fingerprint expert as conclusive proof but must examine his evidence in the light of surrounding circumstances in order to satisfy itself about the guilt of the accused in a criminal case.

1.4.5 Ballistic expert:

A ballistic expert may trace a bullet or cartridge to a particular weapon from which it was discharged. Forensic ballistics may also furnish opinion about the distance from which a shot was fired and the time when the weapon was last used.

In **S.G. Gundegowda v. State**[58], the report of the ballistic expert was considered as admissible without calling him as a witness.

In **Rchhpal Singh v. State of Punjab**[59], it was held that in cases where injuries are caused by fire arms, the opinion of ballistic experts play a lot of importance and failure to produce the expert opinion before the trial court effects the credit worthiness.

---

[54] *Supra Note* 52, chapter 1 page 13
[55] Indian Evidence Act, 1872, Section 73
[56] Indian Evidence Act, 1872, Section 21
[57] Indian Evidence Act, 1872, Section 45
[58] Mirdhe (1996). S. *G. Gundegowda v. State Karnataka, Criminal Law Journal*, 852.
[59] Hegde S. (2000). *Rchhpal Singh v. State of Punjab*, AIR SC 2710, AIR, SC.

1.4.6 Evidence of tracking dogs:

Trained dogs are used for detection of crime. The trainer of tracking dogs can give evidence about the behavior of the dog. The evidence of the tracker dog is also relevant under Section 45.[60]

In **Abdul Razak v. State of Maharashtra**[61], question arises before the Supreme Court whether the evidence of dog tracking is admissible in evidence and if so, whether this evidence will be treated at par with the evidence of scientific experts. In this case, Pune Express was derailed near Miraj Railway Station on 10th Oct., 1966. Sabotage was suspected. The removal of fishplates was found to be the cause of derailment and accident. The police dog was brought into service, taken to the scene of crime. After smelling the articles near the affected joint, the dog ran towards embankment where one fishplate was lying, than the dog smelt it and went to a nearby shanty and pounced upon the accused who was a gang man at Miraj Railway station.

The Supreme Court held that evidence of the trainer of tracking dog is relevant and admissible in evidence, but the evidence can't be treated at par with the evidence of scientific experts analyzing blood or chemicals. The reactions of blood and chemicals can't be equated with the behavior of dog which is an intelligent animal with many thought processes similar to the thought processes of human beings. Whenever thought process is involved there is risk of error and deception. The law is made clear by the Supreme Court by enunciating the principle that the evidence of dog tracking is admissible, but not ordinarily of much weight and not at par with the evidence of scientific experts.

Apart from the above fields, there are chemical analyst, explosive experts, mechanical experts, interpreter, patent expert, hair expert etc. whose opinion is admissible in evidence.

---

[60] Indian Evidence Act, 1872.
[61] AIR 1970 SC 283.

1.5 Admissibility of Expert Opinion :

Expert opinion becomes admissible only when the expert is examined as a witness in the court. The report of an expert is not admissible unless the expert gives reasons for forming the opinion and his evidence is tested by cross-examination by the adverse party. But in order to curtail the delay and expenses involved in securing assistance of experts, the law has dispensed with examination of some scientific experts.

For example, Section 293 Cr.P.C.[62] provides a list of some Govt. Scientific Experts as following:-

a) Any Chemical Examiner / Asstt. Chemical examiner to the Govt.

b) The Chief Controller of explosives

c) The Director of Fingerprint Bureau

d) The Director of Haffkein Institute, Bombay

e) The Director, Dy. Director or Asstt. Director of Central and State Forensic Science Laboratory.

f) The Serologist to the Govt.

g) Any other Govt. Scientific Experts specified by notification of the Central Govt.

The report of any of the above Govt. Scientific Experts is admissible in evidence in any inquiry, trial or other proceeding and the court may, if it thinks fit, summon and examine any of these experts. But his personal appearance in the court for examination as witnesses may be exempted unless the court expressly directs him to appear personally. He may depute any responsible officer to attend the court who is working with him and conversant with the facts of the case and can depose in the court satisfactorily on his behalf.

1.5.1 Can an Expert suo-moto examine and furnish his opinion?

No, an expert can't initiate examination or analysis and furnish his opinion unless the Investigating Officer has sought his opinion in compliance with the

[62] The Code of Criminal Procedure Act, 1973.

formal procedure. An expert can't do anything suomoto in regard to analysis or examination and formation of his opinion. According to the case of **Prem Sagar Manocha v. State (National Capital Territory of Delhi)**[63]**,** it was observed that the expert shall provide his opinion only and as per the requirement of the Court and not otherwise "The duty of an expert is to furnish the court his opinion and the reasons for his opinion along with all the materials. It is for the court thereafter to see whether the basis of the opinion is correct and proper and then form its own conclusion".

1.5.2 Investigating officer and expert opinion:

The investigation officer should seek opinion from experts or specially skilled person to form his own opinion whether the materials collected during the course of investigation is actually establishes the link between the crime, the victim and the criminals. The investigating officer shall seek the assistance of an expert whenever he feels necessary for establishing any fact related to the fact in issue.

1.5.3 Procedure of forwarding exhibits to experts:

When forwarding the exhibits to the experts certain procedure and formalities must be followed by the Investigating Officer to dispatch packed exhibits or physical evidence to experts. It ensures identity and continuity and above all question of integrity of such exhibits. The Investigating Officer shall follow the following procedure for forwarding the exhibits to the experts:-

1) Exhibits are sent to experts through the concerned court. A forwarding report shall be prepared by the Investigating Officer in the prescribed format where available.

2) A certificate from the competent authority concern (Chief Metropolitan Magistrate/ Chief Judicial Magistrate/Additional Chief Judicial Magistrate as the case may be) has to be received in the line that "Certified that the Director, Forensic Science Laboratory, has the authority to examine the

[63] CRIMINAL APPEAL NOS. 9-10 OF 2016

exhibits sent to him in connection with the case of State vs.…….(name of the accused) U/s-…… (provision of I.P.C.[64] or any other law) and if necessary, to make them to pieces or remove portions for the purpose of the said examination".

3) The same seal (wax) shall be used by the Investigating Officer on the forwarding report as affixed on the forwarding exhibits.

4) The specimen seal shall be on sealing wax and not in the ink.

5) A copy of label (carbon copy) of each exhibit shall accompany the report.

6) The forwarding report shall be prepared in quadruplicate (two for expert, one for case diary and one for the court's record) and shall be sent to the expert separately in a sealed cover.

7) The exhibit should always be sent to the expert through police messenger.

8) This should make specific question that may establish the links between crime, victim and criminals. The questions should be formulated with some objectivity towards establishing such links between one another.[65]

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values".

It will also be attempted to study various fields wherein the medical evidence has been considered and has been proved decisive. For instance, in the late 1970s and 1980s, trenchant criticism was voiced about almost every aspect of the forensic medical examination of sexual assault victims. Concern was focused

[64] The Indian Penal Code, 1860.

[65] http://www.legalservicesindia.com/article/article/experts-opinion-and-its-admissibility-and-relevancy-law-of-evidence-1583-1.html

on the lack of skill of some doctors in the performance of examinations which was leading to loss of vital evidence, on the location of examinations which were generally held in the unpleasant and ill-equipped facilities of the police station and on the attitude of doctors to rape victims which was found in some cases to be unsympathetic to the point of hostility. Police surgeons were mostly unfamiliar with the Rape Trauma Syndrome, which explains the impact of rape on victim.[66] This was the time when medical examination and medical witness were considered handy tools to settle the cases.

In a recent instance in Haryana, the riots which took place during the demand of reservation, if medical evidence is to be believed, some fearsome truths of society can come out. Medical evidence, in the whole episode played the most important part and come out with committing of offences such as rape and murder.

Then the researcher shall try to attempt and suggest the role of medical evidence in the court and outside the court.

1.6 Review of Literature:

On my research topic, I read the works of these writers but their work was not like I actually wanted for my research, but they prove to be really helpful:

1. Edward Phillips, Brief case on Law of Evidence Ist 1996, Cavendish Publishing Limited, London.

This book is a summary of the most essential cases, in Law of Evidence. This book is useful for the Law students to read with the text book. The book contains the cases in Great Britain particularly. They are useful for the researcher because the Indian Law of Evidence is much similar to English Law. The Evidence Law in England has undergone legislative reforms in the course of time and Civil Evidence Act of 1995 was passed.

[66] Jennifer Temkin: Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice: The Modern Law Review, Vol. 61, No. 6 (Nov., 1998), pp. 821-848.

Indian Evidence Act 1872 has not undergone any changes in all these years. The picture of the changes in the cases mentioned in the book is an inspiration to the researcher. This book is valuable concise guide on the subject and interesting and much relevant.

2. Vepa P. Sarathi, Law of Evidence, 6th Ed. 2006, Eartern book company, Lucknow.

The author has his original approach to the subject of evidence and the clarity in the exposition of the evidentiary principles. The author took a reference from English and Indian decisions and extracts from the Judgments are set out to illustrate the principles of the subject.

The best part of the book is that it is not section by section, commentary method, but the author explained the scope of the rule in the language of the Judges of the Supreme Court of India, or of Privy Council.

The essential and legal terminology has been discussed in a simple manner. The author's contributions in law will lead a path for my research work.

3. Dr. Avtar Singh, Principles of the Law of Evidence, 18th Ed. 2010, Central Law Publications, Allahabad.

This book is an preface and study of the principles of Law of Evidence. The author in this book admires the success of the Act for more than a century. Still some provision may be unneeded and so to be evicted or some suggestions to provide some new material in the act, to be introduced according to the author. The author has put down all current updates in his book which is helpful for the research.

4. R.V. Kelkar, Lectures on Criminal Procedure, 4th Ed. 2006, Eastern Book Company, Lukhnow.

This book has the section wise description supported by relevant case law. The author has arranged lectures concept wise and in their logical order, a feature rarely found amongst the commentaries on the Code of Criminal Procedure. He

has included under each topic all the connected provisions and explained the matter in exact and quiet understandable way.

The researcher feels that this book will develop proper perspective on the various provisions of the Code of Criminal Procedure. The efforts have been made to focus attention on the basic principles of criminal procedure and also on the interaction of the different statutory provisions through which these principles operate in practice.

5. K.D. Gaur, Criminal Law : Cases and Materials, 6th Ed. , Lexis Nexis, Butterworths, Wadhwa, Nagpur.

This book is an exercise to project the legal concepts applicable to a given set of facts. This book teaches us the legal concepts through case. This book is an magnificent commentary on the Indian Penal Code. This book includes recent landmark judgments of various countries.

6. Pillai PSA, Criminal Law, 10th Ed. 2008, Lexis Nexis, Butterworths, India.

7. Taylor, Alfred Swaine, 1806-1880: The Principles and Practice of Medical Jurisprudence (second edition, 2 volumes; Philadelphia: H. C. Lea, 1873)

8. Adrian Keane, Paul McKeown: The Modern Law of Evidence, Oxford University Press, 2014

9. B.S.Nabar, Forensic Science in Crime Investigation, 3rd Ed. 2010-11, Asia Law House, Hyderabad.

10. R.S. Verma and Thockchom IBS, Commentary on Rape, Kidnapping and Abduction, 1st Ed. 1999, Verma Publication, Delhi.

11. Dr. P.K. Bhattacharji (1998), 'Medico-Legal Companion', 2nd Ed., Allahabad Law House.

12. Jennifer Temkin: Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice: The Modern Law Review, Vol. 61, No. 6 (Nov., 1998),

13. Law Commission of India 172nd Report - Review of Rape Law Government of India, 2000, para 3.1.2

14. The Malimath Committee Report on Reforms of Criminal Justice System 2003

15. An article by Dr. Jyotirmony Adhikary, Legislation on DNA Evidence – A proposal 2008 2 SCC J 24

16. An article by K. Kumar, The Expert and the Law Court, 1987 4 SCC J 7

17. An article by Nidhi Tondon, The Journey from One Cell to Another, Role of DNA Evidence.

18. Janice Du Mont and Deborah White, The uses and impacts of medico-legal evidence in sexual assault cases : A global review, publication 2007, World Health Organization, Sexual Violence Research Initiative, printed in Switzerland.

19. Online Databases – Manupatra

20. Westlaw SCC Online

21. http://www.atc.gov.au/publications/proceedings/02/Philips.pdf

1.7 Objective of the Research:

The object of this research is to study, analyze and find out the various dimensions of medical evidence in civil and criminal procedure. Followings are the objectives of the research study.

(1) To find out the latest trends of Medical developments in the Indian Jurisprudence vis-à-vis progressive society.

(2) To evaluate the constitutionality of various developed Medical Evidences in India.

(3) To understand the uses and impacts of medical evidence.

(4) To find out the importance of the evidence of medical expert in Civil and Criminal law of India.

(5) To find out the approach of Legislation to deal with role of medical evidence in administration of civil and criminal justice.

(6) The view of the Judiciary and legal luminaries on the present issue.

(7) Lastly, whether the provisions of ancient and modern legislations are sufficient to cover the various dimensions of relevancy of Medical Evidences in India.

1.8 Research Hypothesis :

Research work on Role of medical science in administration of civil & criminal justice is the most developing concept of present era. The thesis has been included with reference to the prevalent laws as well as some new trends including developments in medical science that are throwing a challenge to the present time for a competent approach that will help to clarify all aspects of relevancy and conclusiveness of medical evidence. Paternity test, organ transplantation, sex and operations, narco test & other medical innovations have caused serious challenges before law and legal procedure.

Many burning questions have been raised from time to time like-

1. Whether the present law is sufficient to cope with the developing medical scenario?

2. Whether the provisions under the various Laws are sufficient or need redrafting, reframing?

3. Whether recent judicial pronouncements are creating Judicial Activism for improving the old theories of relevancy of medical evidence?

4. What efforts should be made to match developments of medical science in administration of justice?

By the time this research work is completed, the scholar feels a new trend of medical evidence in India. So the researcher would like to suggest some new amendments and redrafting in the present laws dealing with relevance of medical science in administration of civil and criminal justice in India.

1.9 Research Methodology :

Research methodology for this research study will be analytical and descriptive. First, historical and current data will be summarized to show the circumstances under which the need of medical evidence comes into light. The data suggest that the constant development of medical jurisprudence is helping the parties more and more to proceed towards their case. Therefore, drawing a direct nexus between the ancient, traditional explanations of the practice and the factors that can bring it about today can be misleading.

Analyses of the legal issues and implications persist while measuring trustworthiness and evidentiary value of these. Researcher will carry out this research work by analytical way, legislative provisions, International Conventions and various important Judicial Pronouncements relating to relevance of medical evidence in India. Besides this researcher will also evaluates the effectiveness of the administrative, legislative and judicial machinery in finding out the evidentiary value of these in various cases.

Further the analyses of the international development in medical jurisprudence and legal provisions concerned under legislations of various countries so as to recommend some uniform legal provisions and policies towards this issue.

Lastly, after analyzing the researcher's topic through all major headings some valuable suggestions will be given for the proper use and promotion of medical evidence in India.

It is to adopt doctrinal methods of research for the study. The study includes the historical aspect and methods, descriptive method and analytical method or exploring, probing the provisions relating to the Medical Evidence in Civil and Criminal Law of India. An analytical and critical study of various judicial pronouncements on the subject matter, the legislative provisions relating to Medical Evidence in Civil and Criminal Law of India and the work of different intellectuals and learned authors.

The methodology which has been adopted for the present research work is mainly based on doctrinaire as well as empirical analysis. The study is based on primary as well as secondary source of information. Efforts have been made to study the:

(1) Law, rules and regulations.

(2) Judicial pronouncements of the Supreme Court and High Court.

(3) Legal Commentaries and reports.

(4) Empirical studies for the Medical Evidence in Civil and Criminal Law of India.

And in order to make the study broad based, researcher has used the empirical method such as:

(1) collect data and material from the library of Delhi University;

(2) from library of University of Kota and Rajasthan University;

(3) from the library of the Institute of Development studies, Jaipur;

(4) from library of Indian Law Institute and Indian Society of International Law, Delhi;

(5) gather ratified questionnaires form Medical Evidence in Civil and Criminal Law in India activities also; and

The researcher has made a review of the literature available from the books of eminent authors, periodicals and articles published by standard institutions.

1.10 The Plan of the Thesis:

The research study comprises seven chapters. The chapterization is as follows:

Chapter–I : Introduction

Brief introduction relating to the concept of medical evidence has been discussed in this chapter which is necessary as to understand the research work and the selection of this topic. The basic understanding about the research is sought by the researcher in this chapter.

Chapter–II : Concept of Medical Evidence under the Constitution of India

The researcher in this chapter has discussed the provisions relating to medical evidence in Constitution of India. Articles 20(3)[67] (No person accused of any offence shall be compelled to be a witness against himself), Article 21[68] (No person shall be deprived of his life or personal liberty except according to procedure established by law), Article 39[69], Article 48A[70] and Article 51A[71]. Various other provisions relating to 'medical evidence' in the Constitution of India will also be discussed in this chapter.

Though it is well settled that *there is no conflict between general burden, which shall always on prosecution and which never shifts, and special burden that rests on Accused to make out his defence.*

Chapter–III: Relevance of Medical Evidences in Criminal Law- Legislative Principles and Doctrines

The researcher has analysed the various law such as Evidence Act, 1872, Indian Penal Code, 1860, Criminal Procedure Code, 1973, Information Technology Act 2002, PCPNDT Act 1994[72], Drugs Control Act 2002 etc. and there relation to the concept of medical evidence and its relevancy in the law.

Chapter–IV: Relevance of Medical Evidences in Civil Law- Legislative Principles and Doctrines

The researcher has analysed the provisions pertaining to medical evidence in Civil laws of the land such as Civil Procedure Code, 1908, Consumer Protection Act, 1986, Prevention of Food Adulteration Act 1954, Cigarettes and other Tobacco products (Prohibition) Act 2003, Biological Diversity Act 2002, Wildlife Prevention (Amendment) Act 2002, Competition Act, 2002. Since the

[67] The Constitution of India, 1950.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994

civil law also relies on the evidence, it is pertinent to have some overlapping, which is good in a way for the through study of the subject.

Chapter–V: Comparative study with other Legal systems

The researcher has compared other Legal systems with Indian Legal System. The researcher has analysed the United States system, UK system, and European Countries. One of the instances shows that "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute". [73] When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[74]

Chapter–VI: Judicial Approach towards Medical Evidence

Judicial approach regarding medical evidence has been discussed thoroughly. It has been observed that courts have travelled a lot in interpreting the medical evidence and its role. Since the advancement and sophistication has changed the whole course of investigation and has become fact rather than mere hypothesis, the researcher will try to make an attempt regarding the course and journey of courts that how they have interpreted the same. There are occasions where the courts have interpreted and observed circumstantial evidence as trustworthy then direct evidence.

Chapter–VII: Conclusion and Suggestions

Finally, the researcher has studied on above topic and given valuable suggestions in regard to medical evidence and the scope of the medical cases. At last researcher has made fruitful recommendations regarding the betterment of the use and relevance of medical evidence in the Indian Judicial/legal system in further study.

[73] Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952)
[74] 7 Wigmore §1918

Medical science and Law are inter-related. One is complimentary for the other as both cannot move/survive without one another. It is presumed that medical science is the only branch of science which takes all branches of science to common man and helps the justice system. The law of evidence defined many areas of medical evidence as “technical or other specialized knowledge”. It has evolved many domains of its own which include Fingerprints, Ballistics, Hand writing, DNA, Brain mapping, Narco Analysis, Polygraph etc. which are being analyzed and evaluated by courts under different standards of reliability. It helps courts in deciding questions of fact in civil and criminal trials.

CHAPTER–II

CONCEPT OF MEDICAL EVIDENCE UNDER THE CONSTITUTION OF INDIA

The Constitution of India is the foundation of all laws. Under the Indian Constitution, nowhere specifically has been mentioned the term "medical evidence". But under Article 20(3)[75] protection against self incrimination deals it. Protection against self incrimination includes the evidence and the evidence cover medical evidence. The Narco Analysis and Test of an accused person is an glaring example of medical evidence which may sent the accused to jail and liable for death sentence or may allow him to go scot-free as a "free bird of sky". Thus, the object of this chapter is study and analyse the relevance of medical evidence in the matter of a crime by an accused person or disputes between citizens and State and Centre on certain vital issues pending between them.

"Journey, as it has been seen, of law of evidence is from supernatural to natural and then from natural to logical and finally from logical to legal and scientific, stopping on each platform for quite some time. The main task for law of evidence is to find out the truth as a direction and not merely what is just and unjust. But at the same time Constitution imposes a duty, by virtue of 'fundamental rights', on the state not to diminish the dignity of individual. Here comes the problem of tackling the issue 'whether truth is important or the dignity'. The problem can be sorted out by putting both of the concepts in different categories in such a way that they do not overlap. This can be done by splitting them and placing them in altogether different area".[76]

'*Nemo tenetur seipsum accusare*'

[75] The Constitution of India.
[76] Dr. Sankalp Tyagi: Rule against 'Self-incrimination' and 'Law of Evidence'.

2.1 Provisions under Article 20 of the Constitution:

Clause (3) of Article 20[77] imposes a duty on the state that, "No person accused of any offence shall be compelled to be a witness against himself". It is clear from the text that it is a mandate against the barbarous and brutal ways of implicating anybody and then proving the case against him. To avoid and to abridge the unbridled power of police the provisions were established in the Constitution of India. But the other side of coin is '*to what extent accused may be provided protection*'. The main task before the higher judiciary was to interpret the clause in such a way that there should not be any conflict in law of evidence and the said clause.

In **M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors**.[78] the court consisting of **Mehr Chand Mahajan, C.J., B. Jagannadhadas, B.K. Mukherjea, Ghulam Hasan, N.H. Bhagwati, Sudhi Ranjan Das, T.L. Venkatarama Aiyyar and Vivian Bose, JJ**. Held that that a search and seizure under the provisions of the Code of Criminal Procedure was not a compelled production and hence was not violative of Article 20 (3)[79].

But the problem arose in **Farid Ahmed v. The State**[80] wherein the court consisting the bench of **Jyoti Prakash Mitter and B. Bhattacharya, JJ**. held that Magistrate's direction for Investigating Officer to take specimen writings and signatures of petitioner was violative of article 20 (3) of Indian Constitution.

In **State of Kerala v. K.K. Sankaran Nair**[81] full bench of Kerala High Court consisting of **M.A. Ansari, C.J., Anna Chandy and P. Govinda Menon, J.J.** held that finger prints of respondent obtained without his consent is violative of right of respondent guaranteed under Article 20 (3)[82] violated. Brief facts of the case were "revision petitions sought to vacate the order by the Additional Sessions Judge of Kottayam, sustaining the accused's objection to the admissibility of the

[77] *Supra Note*, 1, Chapter 2, Page 32
[78] AIR 1954 SC 300.
[79] *Supra Note*, 1, Chapter 2, Page 32
[80] AIR 1960 Cal 32.
[81] AIR 1960 Ker 392.
[82] *Supra Note*, 1, Chapter 2, Page 32

specimen of his handwriting, which was sought to be proved by a witness. The accused The prosecution case was that, with a view to cause wrongful loss to the Transport Department and make unlawful gain, the accused got printed bogus warrant form, affixed false seal on the form purporting to be that of the Superintendent of Police, entered in his own handwriting the false names and numbers of three fictitious constables, made other entries, further forged the signature of one Plathanam a Sub-Inspector of Police who had retired, by false representation induced one of the Prosecution parties. Titus a Conductor to hand him three bus tickets, and utilised these for making unlawful gain.

During the Sessions trial, the prosecution examined the Sub-Divisional Magistrate as P.W. 16 to prove the specimen handwriting, and the accused's advocate then objected to the document being admitted in evidence on the ground that the specimen handwriting was taken by the witness against consent, and the guarantee against testimonial compulsion under Article 20(3) [83] has been infringed. The prosecution has urged that the handwriting was taken under Section 73[84], that it was for the purposes of comparison that the accused willingly agreed to give the specimen, and that the complaint of the constitutional guarantee having been infringed, cannot therefore, be sustained. The Additional Sessions Judge has, however, held that the specimen handwriting cannot be proved, for the admission of the specimen handwriting compelled from the accused, was prohibited by Article 20(3) [85], and has relied on **M.P. Sharma v. Satish Chandra.**[86]

The learned Advocate General has urged that a number of decisions in this country have held the guarantee against self-incrimination not to be infringed where the accused's finger impressions are taken though by compulsion; and that the accused's handwriting being as such part of his person, the decisions taking a different view where handwriting be taken, should not be followed. He has further argued that compulsory exposing of the accused person has been held not to be

[83] The constitution of India. Art.20 (3)
[84] Indian Evidence Act, 1872
[85] *Supra Note, 9*, Chapter 2, Page 34
[86] AIR 1954 SC 300.

covered by the guarantee, and it is difficult to see how asking the accused to give specimen of his handwriting should be treated differently, from asking him to expose some scar on or part of his body.

He has also argued that the specimen handwriting does not amount to documentary evidence and would not be covered by Article 20(3)[87]. We think the last argument should be dealt with first. If the paper containing the specimen of the accused's handwriting be not document, we do not see why the prosecution should seek to prove it, or complain against its being made inadmissible; and, having sought to prove the paper as a document, it would hardly be consistent with that position to seek revision of the order on the assumption that the payer is something different. That apart, we think the paper containing the writing to be a document.

Coming to other arguments, it is clear that pronouncements by the High Courts in this country cannot be reconciled, and in such a state of conflicting decisions, it would be helpful to trace how the rule against testimonial compulsion came to be accepted as one of the cardinal principles of administering criminal justice. It is not disputed that the maxim of no man being compellable to incriminate himself, was evolved in order to prevent courts of law adopting inquisitional procedure of the accused being obliged on oath to answer questions, which procedure began to be followed in Ecclesiastical Courts early in 1200.

Before that date, there was no interrogation of the accused by the tribunal, but early in that century the new method of administering oath was followed in order to probe from the accused by questions the details of the matter for which he was brought before the tribunal. The Procedure was first allowed in England by the Ecclesiastical Courts that exercised jurisdiction over matrimonial and testamentary causes; and after Coke became the Chief Justice, efforts were made to keep these Courts within the bounds of their jurisdiction. The opposition to the aforesaid procedure became accentuated when the Court of the Star Chamber

[87] *Supra Note, 9*, Chapter 2, Page 34

came to adopt it, and in 1637-45 came Lilburn's agitation, which finally resulted in that court being abolished.

The facts of the case were that Lilburn was committed to prison on a charge of printing or importing certain heretical and seditious books. While under arrest, and having denied these charges, he was asked by the Attorney-General as to other like charges; but he refused. When examined before the Star Chamber itself, the accused again refused, was condemned to be whipped and pilloried for his boldness in refusing to take legal oath, without which many offences might go undiscovered and unpaged, On November 2, 1640, Lilburn preferred a complaint to the Commons, and on May 4, 1641, the Commons voted that the sentence was illegal, against the liberty of the subject, and ordered reparation. No steps appear to have been taken, and Lilburn applied once more, whereupon, on 13-2-1645, the House of Lords ordered the sentence to be vacated totally as illegal, unjust and against the liberty of the subject and law.

Thus the maxim '*nemo teneture selpsum accused*' (No man can be compelled to criminate himself) became an important principle of the English Law, which Coleridge, J., in **R. v. Scott**[88]**,** describes as "a maxim of our law as settled, as important, and as wise as almost any other in it". Having regard to the aforesaid history, it cannot be denied that the insistence on the maxim being observed rests more on grounds of humanity than on excluding perjured evidence from trials. We would, therefore, differ with respect from the decisions where it has been held that the guarantee against testimonial compulsion would not be available where the veracity of evidence sought to be excluded be assured.

It is equally well established that much earlier to the inauguration of the Constitution, the aforesaid maxim had received legislative recognition in this country; for Section 3 of Act. XV of 1852 had enacted that an accused in a criminal proceeding was not a competent or compellable witness to give evidence for and against himself. Later Sections 204 and 203 of the Code of Criminal Procedure, 1861, had provided that no oath shall be administered to the accused,

[88] (1856) Dears and B. 47.

and that it shall be in the discretion of the Magistrate to examine him. Though the Indian Evidence Act of 1872 had repealed Section 3 of Act XV of 1852, Section 250 of the Criminal Procedure Code of the same year had made provision for a general questioning of the accused after the witnesses for the prosecution have been examined compulsorily, and Section 345 provided that no oath or affirmation should be administered by the accused.

These have since been incorporated in Section 342 of the present Criminal Procedure Code of 1973. It follows that the accused could not be compelled to make self-incriminatory statements, and this had been a settled principle of the administration of criminal Justice in this country as well. Moreover, the English ramification of the principle of the witness not "being compelled to answer questions, whose answer would make the witness subject to criminal prosecution, was also accepted, though with modification; for Section 32 of Act II of 1855 had made the witness compellable to answer such questions, yet it provided immunity from arrest or prosecution on the basis of such evidence in criminal proceedings, except prosecution for giving false evidence.

This position has been continued under the Evidence Act, 1 of 1872. Therefore, the principle, which is spoken of as being one of the important principles of English Criminal Justice, has been, with insignificant modifications, equally important part of the Indian Law much prior to the inauguration of the Constitution, In this connection we would quote the following observations of Jagannadha Das, J., in **M.P. Sharma v. Satish Chandra** AIR 1954 SC 300 :

"Thus so far as the Indian law is concerned, may be taken that the protection against self-in termination continues more or less as in the English. Common law, so far as the accused and production of documents are concerned, but that it has been modified as regards oral testimony of witnesses, by introducing compulsion and providing immunity from prosecution on the basis of such compelled evidence".

We have thought it necessary to emphasis to historical background, for the principle having already become part of administering criminal justice, the

intention of the guarantee being conferred would not be to uncover what was already governed. On the other hand, the intention would be to extend and to make legislations not otherwise governed subject to the principle. It follows that in adjudicating on the claim of the guarantee contained in Article 20(3)[89] having been infringed, any consideration of how far the particular evidence be excluded by Section 162 of the Criminal Procedure Code, 1973 or covered by Section 72 of the Evidence Act, 1872 would not be of importance.

The objection should rather be decided on consideration of what the guarantee is & how far the complaint is justified, having regard to several elements constituting it. We feel that some decisions have confused the issue by considering how far the evidence tendered is assured of being true, or whether it be documentary or oral evidence, according to the Evidence Act, 1872 or excluded by the Criminal Procedure Code. We would emphasis that any objection lodged by the accused must be adjudicated by settling how far the Constitutional guarantee has been violated, the guarantee which enshrines a recognised principle of administering criminal justice. We, therefore, propose to decide these revision petitions on that ground alone.

In this connection we would begin with **Kalavati v. Himachal Pradesh State[90],** where one Kanwar Bikram Singh was murdered, & the prosecution case was that the two appellants before the Supreme Court, one being his wife, and the other a distant cousin, had illicit intima, and got rid of the deceased as he was cruel in behavior to the wife. The wife having been chased under Sections 114[91] and 302[92], and the court under Section 302[93], the Sessions Judge acquitted them and found the cousin guilty. On appeal, the wise acquittal was set aside and the cousin's appeal missed. Both the accused had made confess under Section 164[94], but they retracted before the Committing Magistrate.

---

[89] *Supra Note, 9*, Chapter 2, Page 34
[90] AIR 1953 SC 131.
[91] *Supra Note, 64*, Chapter 1, Page 21
[92] Ibid.
[93] Ibid.
[94] *Supra Note, 62*, Chapter 1, Page 19

These confessions were used against them it their examination under Section 342[95], and before the Supreme Court it was contended that the accused having retracted confessions, they should not be us against them as that would contravene Article 20(3)[96] Chandrashekaran Iyer, J., rejecting the argument, has observed:

"Sub-section (3) of Article 20[97] does not apply at all to a case where the confession is made without any inducement, threat or promise, It is true that a retracted confession has only little value as the basis for a conviction, and that the confession of one accused is not evidence against a co-accused tried joint-for the same offence, but can only be taken into consideration against him. This deals with its probative value and has nothing to do with any repugnancy to the Constitution".

It follows that the guarantee is against compelling self-incrimination. The next authority is **M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors**.[98], where the Government had ordered investigation into the affairs of a company, and the report of the Inspector appointed showed organised attempt, from the company's inception, to misappropriate & embezzle the funds & to declare substantial loss, thereby concealing from the share-holders the true state of affairs, by submitting false balance sheet. The Special Police, on the basis of the information applied to the District Magistrate, under Section 96[99], for warrant to search documents at different places.

The District Magistrate ordered investigation, and issued warrant for searches at 34 places. On the records being seized, an application was made to the Supreme Court under Article 32 [100] , that the warrants being illegal and unconstitutional, the documents should be returned. It was argued that a search to obtain documents for investigation into an offence amounted to compulsory procurement of incriminatory evidence from the accused and would be hit by

[95] Ibid.
[96] *Supra Note, 1*, Chapter 2, Page 32
[97] Ibid.
[98] AIR 1954 SC 300.
[99] *Supra Note, 62*, Chapter 1, Page 19
[100] *Supra Note, 1*, Chapter 2, Page 32

Article 20(3) of the Constitution. Rejecting the petition, Jagannadha Das, J., observes at p. 303, as follows:

"Analysing the terms in which this right has been declared in our Constitution, it may be said to consist of the following components.

(1) it is a right pertaining to a person "accused of an offence";

(2) it is a protection against "compulsion to be a witness"; and

(3) it is a protection on against such compulsion resulting in his giving evidence "against himself". The learned Judge further continues as follows;

"Broadly stated, the guarantee in Article 20(3)[101] is against "testimonial compulsion". It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely general import. So to limit it, would be to rob the guarantee of its substantial purpose and to miss the distance for the sound, as stated in certain American decisions. The phrase used in Article 20(3)[102] is to be a witness". A person can be a witness" not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (Section 119, Evidence Act, 1872) or the like. "To be a witness" is nothing more than to furnish evidence' and such evidence can be furnished, through the lips or by production of a thing of a document or in other modes".

"The phrase used in Article 20(3)[103] is "to be a witness and not to "appear as a witness''. It follows that the protection afforded to an accused in so far as it is related to the phrase "to be a witness" is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled

[101] *Supra Note*, 9, Chapter 2, Page 34
[102] Ibid.
[103] *Supra Note*, 1, Chapter 2, Page 32

which in the normal course may result in prosecution. Whether it is available to other per sons in other situations, does not call for decision in this case. ,

Considered in this light, the guarantee under Article 20(3)[104] would be available in the present case to these petitioners against whom a First Information Report has been recorded as accused therein. It would extend to any compulsory process for 'production' of evidentiary documents, which are reasonably likely to support a prosecution against them. The question then that arises next is whether search warrants for the seizure of such documents from the custody of these persons are unconstitutional and hence illegal on the ground that in effect they are tantamount to compelled production of evidence.

It is urged that both search and seizure of a document and a compelled production thereof on notice or summons serve the same purpose of being available as evidence in a prosecution against the person concerned, and that any other view would defeat or weaken the protection afforded by the guarantee of the fundamental right. This line of argument is not altogether without force". The learned Judge then rejects the argument in these words:-

"A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law. When the Constitution makers have thought fit not to subject such regulation, to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction, Nor is it legitimate to assume that the constitutional protection under Article 20(3)[105] would be defeated by the statutory provisions for searches".

The next two pronouncements by the Supreme Court do not reject what has been held above to amount to self-incrimination and would constitute

[104] *Supra Note*, 1, Chapter 2, Page 32
[105] Ibid.

infringement of the guarantee. In **Govinda Reddy v. State of Mysore**[106], the High Court had relied on comparison of finger prints found on the silver vessel with what was taken by the police, but Subba Rao, J., dismissing the appeal, excluded from consideration the evidence furnished by the aforesaid comparison and therefore the constitutionality of admitting evidence furnished by the finger prints taken from the accused, was not decided in the case. Thus petitions were dismissed.

Then in **The State of Bombay v. Kathi Kalu Oghad and Ors.**[107] the Supreme Court consisting of eleven judge bench (**B.P. Sinha, C.J., A.K. Sarkar, J.R. Mudholkar, K.C. Das Gupta, K. Subba Rao, K.N. Wanchoo, N. Rajagopala Ayyangar, P.B. Gajendra Gadkar, Raghubar Dayal, S.K. Das and Syed Jaffer Imam, JJ.**) examined the matter thoroughly Question of law regarding interpretation of Article 20(3)[108] before Supreme Court 'whether act compelling accused to give his specimen handwriting or signature or impression of finger tips amounts to compelling him to be witness against himself within meaning of Article 20(3)[109] - mere questioning of accused person by police officer resulting in voluntary statement which may ultimately turn out to be incriminatory is not compulsion to be witness is not equivalent to furnishing evidence in its wide significance that is to say as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at trial to determine the guilt innocence of accused - to be a witness means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise- to bring statement in question within prohibition of Article 20(3)[110] the person accused must have stood in character of an accused person at time he made statement and it is not enough that he should become an accused any time after the statement has been made.

[106] AIR 1960 SC 29.
[107] AIR 1961 SC 1808.
[108] *Supra Note*, 1, Chapter 2, Page 32
[109] Ibid.
[110] Ibid.

In historical judgment in **Smt. Selvi and Ors. v. State of Karnataka**[111] the court held that "Right against self-incrimination is very much protected under article 20(3). The main question was constitutionality of Involuntary administration of Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) - Article 20(3) of Constitution of India, 1950 - Whether the involuntary administration of the Narco-analysis, polygraph examination and the Brain Electrical Activation Profile violates the 'right against self-incrimination' enumerated in Article 20(3) of the Constitution. The court held, circumstances that could 'expose a person to criminal charges' amounts to incrimination' for the purpose of Article 20(3).

Article 20(3) aims to prevent the forcible 'conveyance of personal knowledge that is relevant to the facts in issue'- Protective scope of Article 20(3)[112] extends to the investigative stage in criminal cases- Since, the underlying rationale of the 'right against self-incrimination' is to ensure the reliability as well as voluntariness of statements that are admitted as evidence, the compulsory administration of the impugned techniques violates the 'right against self-incrimination- Article 20(3)[113] protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory Results obtained from each of the impugned tests bear a 'testimonial' character and they cannot be categorised as material evidence Hence, test results cannot be admitted in evidence if they have been obtained through the use of compulsion. It was also held that Compulsory involuntary administration of the Narcoanalysis, polygraph examination and the Brain Electrical Activation Profile violates the `right against self-incrimination' enumerated in Article 20(3)[114] of the Constitution as the subject does not exercise conscious control over the responses during the administration of the test and

[111] AIR 2010 SC 1974.
[112] *Supra Note*, 1, Chapter 2, Page 32
[113] Ibid.
[114] Ibid.

Article 20(3)[115] not only a trial right but its protection extends to the stage of investigation also".[116]

It must be noted that the above-mentioned judgment has not been overruled. In this judgment also a conflict of just/unjust and truth was apparent. However while dealing with these kinds of issues sanctity of evidence should also be considered and verified.

In **Nandini Satpathy v. P.L. Dani and Anr[117],** the Supreme Court consisting of **Jaswant Singh, V.D. Tulzapurkar and V.R. Krishna Iyer, JJ.** held "right of witness to keep silence extents to other matters also if it expose him to criminal charges in other cases - compelled testimonies cannot be admitted as potent evidence".

2.2 Provisions under Article 21 of the Constitution:

In **Smt. Selvi and Ors. v. State of Karnataka[118],** the court examined Inter-relation between Right to fair trial and 'personal liberty' and "Whether the involuntary administration of the impugned techniques a reasonable restriction on 'personal liberty' as understood in the context of Article 21[119] and held, inter-relationship between the 'right against self- incrimination' and the `right to fair trial' has been recognised under Article 21 - Forcing an individual to undergo any of the impugned techniques violates the standard of `substantive due process' which is required for restraining personal liberty. Compulsory administration of these techniques an unjustified intrusion into the mental privacy of an individual which amount to `cruel, inhuman or degrading treatment' Invocations of a compelling public interest cannot justify the dilution of constitutional rights such as the `right against self-incrimination Thus, no individual to be forcibly subjected to any of the techniques in question, whether in the context of investigation in criminal cases or otherwise.

---

[115] Ibid.
[116] Ibid.
[117] AIR1978 SC 1025.
[118] (2010) 7 SCC 263.
[119] *Supra Note*, 1, Chapter 2, Page 32

In **Smt. Ningamma and another v. Chikkaiah and another**[120] justice Harinath Tilhari held, "Order directing 'petitioners to surrender for medical examination and blood test and on failure adverse inference' nothing but act of Court in excess of jurisdiction. Order without jurisdiction and against spirit of law and passed without due application of mind to relevant provisions of the Evidence Act of 1872 and Article 21[121] - Order got tendency to jeopardise fundamental right of personal liberty - held, Order liable to be set aside. The facts of the case were as follow**; "**order impugned suffers from jurisdictional error on the part of the Court below as powers under Section 151 of the Code of Civil Procedure, 1908 could not be exercised for roving enquiry, as well as to compel the plaintiffs to subject themselves to the blood group test or medical examination for the blood group test to determine the paternity of the revision petitioner i.e., plaintiff 2. The learned Counsel contended that there is no provision of law either under the Code of Civil Procedure, Indian Evidence Act or under the Code of Criminal Procedure to compel a person or party against her or his wish or consent, to be subjected for medical examination and the blood group test to determine his or her paternity, leaving aside the case of a party which voluntarily consents himself or herself to be subjected to such test. The learned Counsel further contended that in view of the provisions of law including the one relating to the dignity of an individual and the dignity of a woman in particular as well as in view of the provisions of Section 112[122] read with Section 4 thereof defining the expression 'Conclusive Proof', and Article 21[123], the Court below had no jurisdiction to direct and to compel the revision petitioners that they should subject themselves to the medical examination or the blood group test to determine the paternity or to create doubt one way or the other. The learned Counsel contended that the fact a person was born during the continuance of the valid marriage between his mother and any man or born within 280 days after the dissolution, and the mother remaining unmarried, it shall be the conclusive proof that the person so born is and has been the legitimate son or daughter of the man to whom his mother has been married.

[120] AIR 2000 Kant 50.
[121] *Supra Note*, 1, Chapter 2, Page 32
[122] *Supra Note*, 60, Chapter 1, Page 18
[123] *Supra Note*, 1, Chapter 2, Page 32

The learned Counsel contended that this section not only lays down the provision of legal presumption simpliciter, but the doctrine of conclusive proof in this regard subject to one exception viz., where it has been shown or where it is shown that the parties to marriage had no access to each other at any time during the period when the person or child concerned could be begotten. The learned Counsel contended that this section mandates the Court to take it to have been conclusively proved on proof of facts and circumstances referred to in Section 112[124] that the person concerned has been the legitimate son of the person to whom mother of such person was married. The learned Counsel contended that use of the expression "conclusive proof clearly indicates that on proof of the facts mentioned in Section 112[125] viz., that the mother of the person concerned was legally married to a man concerned and the child was either born during the continuance of the marriage, or was born within 280 days of the dissolution of the marriage and the mother having not remarried, it shall be taken to be proved that the person or child concerned was the legitimate child of the man whom his mother was married and the Court shall not allow giving of any evidence for the purpose of disproving the said fact of legitimacy. The learned Counsel contended that the use of expression "unless it can be shown that the parties to the marriage has no access to each other at any time when the child could have begotten and provides a limited scope of evidence to be lead to rebut that conclusive proof viz.,

If it is shown that the parties to the marriage had no access to each other at any time when the person or child concerned could have been begotten and it is then that conclusive proof, doctrine will not apply. The learned Counsel contended that the expression unless it can be shown that the parties to marriage could have no or had no access to each other at the relevant period, then Section 112[126] would apply.

The learned Counsel contended that reading of Section 112[127] along with

[124] *Supra Note*, 60, Chapter 1, Page 18
[125] *Supra Note*, 60, Chapter 1, Page 18
[126] Ibid.
[127] Ibid.

the definition of "Conclusive proof given in the Evidence Act, vide Section 4[128] clearly reveals that no evidence could be lead to disprove a fact which is said to be conclusive proof of the legitimacy, except that person denying paternity, may lead evidence to the effect that he had no access or parties to the marriage had no access to each other during the relevant period when the child could be conceived. The learned Counsel contended that investigation is of limited scope and medical test or direction to medical test compelling the parties to subject themselves for medical test could not be issued even in exercise of powers under Section 151[129], as inherent powers are not meant to be exercised to render nugatory an effective provision of law.

The learned Counsel further contended that right to life includes in the case of man or woman includes in itself right to live with dignity, honour and reputation and no person can be deprived of such right of life under Article 21 of the Constitution except according to the procedure established by law. The learned Counsel contended that exercise of power under Section 151[130] in this case appears to run counter to the basic principles of law under Section 112 of the Evidence Act read with Section 4 thereof as well as runs counter to the letter and spirit of the provisions of Article 21 of the Constitution.

The learned Counsel contended that unless the provisions of law authorises or entitles the Court to subject a person or party and to compel him to be put to blood group test to determine paternity, the Court below, in view of the provisions of Section 112 read with Section 4 of the Evidence Act as well as in view of Article 21 of the Constitution and the concept of dignity of woman had no jurisdiction as well as to direct the revision petitioners to subject themselves against their wish and desire and against their volition and free will to such medical test or to observe that on failure to appear before the District Surgeon for medical examination and blood group test the Court would raise adverse inference against such a party.

---

[128] Ibid.
[129] The Code Civil Procedure, 1908
[130] *Supra Note*, 55, Chapter 2, Page 46

The learned Counsel contended that in this view of the state of law as above as well as the order runs counter to the dignity of the revision petitioners, this Court may be pleased to exercise its powers under Section 115[131] and set aside the impugned order.

The above contentions of the learned Counsel for the petitioners have been hotly contested by Sri Vinayswamy, learned Counsel for the respondents.

The learned Counsel for the respondents submitted that medical science has developed and the blood group test can provide reliable medical and substantial circumstantial evidence to determine the paternity of plaintiff 2 i.e., to determine if defendant 1 is or has been the father of plaintiff 2. The learned Counsel submitted that many English Courts have allowed such medical blood group tests and it being one of the best and scientific modes for determining the paternity and legitimacy, the Court below in the absence of any specific provisions did exercise its inherent jurisdiction under Section 151[132], in the interest of justice and particularly when presumption under Section 112 of the Evidence Act has to be rebutted by defendant 1-respondent 1. The learned Counsel contended that presumption under Section 112 is rebuttable and to rebut the said presumption medical blood group test of the three could have provided best possible evidence and therefore the Court below did not act illegally or in exercise of jurisdiction in passing the order under Section 151[133].

The learned Counsel has submitted that powers under Section 151[134] conferred on the Code of Civil Procedure are very wide and in the absence of any other provision one way or other on the subject, recourse could be validly had to Section 151[135] of the Civil Procedure Code, which is declarative of inherent powers being vested in the Code to pass such orders as are necessary in the interest of justice and for doing justice to the parties. The learned Counsel further

[131] Ibid.
[132] *Supra Note*, 55, Chapter 2, Page 46
[133] Ibid.
[134] Ibid.
[135] Ibid.

contended that Section 151[136] is one of the provisions of procedural law viz., Civil Procedure Code and Article 21 of Constitution provides that right to life and personal liberty shall not be deprived to a person except according to procedure established by law. So the impugned order cannot be said to be hit by Article 21 and the order impugned does not suffer from any jurisdictional error or illegal in exercise of the jurisdiction. As such the revision needs be dismissed. The learned Counsel further submitted that the impugned order has been passed for the purpose of the case and it does not determine any rights of the parties and so it does not amount to a case decided. As it does not amount to a case decided, the revision petition may be dismissed as not maintainable.

I have applied my mind to the above contentions advanced by the learned Counsels for the parties.

As regards the last contention whether the order impugned in this petition amounts to a case decided, in my opinion, the preliminary objection is without any substance. It is no doubt well settled in the case of **Major S.S. Khanna v. Brig. F.J. Dillon**[137], that the expression "case" is not synonymous with a suit. Even on interlocutory order which has the effect of determining or deciding the rights of a party whether involved in the suit or in relation to the proceedings of the suit may amount to a case decided. In the present case, the Court deems to have taken the view that it can compel a party to subject itself even against his wishes and without his or her consent to medical examination involving blood group test. As such the order really has the effect of deciding or being determination in connection with the right of a party to the effect that consent or no consent, it has got right to direct the party to subject itself to medical examination i.e., blood group test as claimed by defendant-respondent 1 and such an order impugned in view of the expression "case decided" as per explanation under Section 115 and the law laid down in **Major S.S. Khanna's case**[138], supra, amounts to be a case decided and in view of the above preliminary objection raised on behalf of the respondents is hereby rejected.

---

[136] Ibid.
[137] 1964 AIR 497; 1964 (4) SCR 409 - C.A. 320.
[138] Ibid.

The powers under Section 151[139], is inherent powers of Court. Section 151[140] by itself does not confer inherent jurisdiction upon the Court. Section 151[141] is declarative of inherent powers of the Court and provides that inherent powers of the Court can be exercised to make orders as may be necessary in the ends of justice and to prevent abuse of the process of the Court and no provision in the Civil Procedure Code shall be deemed to limit or otherwise effect inherent powers of the Court. Every Court is constituted for the purpose of doing justice according to law and must be deemed to possess, as a necessary corollary and as inherent in its very constitution, all such powers as may be necessary to do the right and to undo a wrong in the course of the administration of justice. Section 151[142] does not authorise the Court to pass any order which may run counter to the express provisions of law of a statute on a subject. Section 151[143] declares that nothing in the Code of Civil Procedure shall be deemed to limit or otherwise affect the inherent power of the Court. Thus, it makes it clear that nothing in the Code of Civil Procedure will be deemed to limit or otherwise affect the inherent power of the Court to make such orders necessary in the ends of justice.

The expression nothing in the Code indicates that it is only the provisions of Civil Procedure Code which provisions cannot be deemed to limit or otherwise affects the inherent power of the Court and inherent power can be exercised even the provisions of the Code do not cover a particular situation of fact, but the Court finds that the order is necessary to be passed in the ends of justice, it can pass such order as is necessary for the ends of justice and to avoid abuse of process of Court. But so far as the provisions of other statutes or enactments are concerned, which prescribe for certain mode of exercise of power vested in the Court including in the matter of admissibility and relevancy of evidence shall remain operative and may control exercise of inherent powers. Inherent power has to be exercised so as not to conflict with the sound principles of general law or other special law. It is well-settled that the Court is expected to do justice according to law. When I so

[139] *Supra Note*, 55, Chapter 2, Page 46
[140] Ibid.
[141] Ibid.
[142] *Supra Note*, 55, Chapter 2, Page 46
[143] Ibid.

observe I find support for my view from the decision of their Lordships of the Supreme Court in the case of Cotton Corporation of India Limited v United Industrial Bank Limited and Others, in the context of power of the Court to grant temporary injunction under the inherent powers in a case not covered by Order 39[144]. Their Lordships observed as under:

"But while exercising this inherent power, the Court should not overlook the statutory provision, such as Section 41(b)[145], which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b)[146] is one such provision. And it must be remembered that inherent power of the Court cannot be invoked to nullify or stultify a statutory provision".

Section 112 of the Evidence Act, 1872 has been enacted to consolidate, define and amend Law of Evidence. Evidence Act is a complete Code on the Law of Evidence. It is well-settled principle of law that a finding on question of fact has to be recorded on the basis of the relevant and admissible piece of evidence. Relevancy and admissibility of evidence is controlled by the Evidence Act. Section 112[147], provides that conclusive proof of legitimacy of a person born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried. It provides and reads as under:

"Birth during marriage, conclusive proof of legitimacy.- The fact that any person was born during the continuance of a valid marriage, between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten".

A reading of this section reveals that in two types of cases or of proof of other two sets of facts, conclusive proof of legitimacy shall apply. It provides that

[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] *Supra Note*, 60, Chapter 1, Page 18

if it is proved as fact that any person was born during the continuance of a valid marriage, between his mother and any man, then birth of a person during the continuance of a valid marriage between his mother and any man will itself be the conclusive proof of his being legitimate son of that man or in a case where it is proved as a fact that the person concerned was born within two hundred and eighty days of the dissolution of the marriage between his mother and the man concerned and that mother during this period i.e., these two hundred and eighty days remained unmarried, then the person concerned born during the period of two hundred and eighty days from the dissolution of the marriage i.e., the child shall be presumed or the said person should be presumed to be the legitimate son or daughter of the man to whom his mother was married and whose marriage has been dissolved prior to his birth. The latter part of the section which says unless it can be shown that parties of the marriage no access to each other at any time when he could have been begotten. This latter part indicates that the conclusive proof will not arise and shall not be made under Section 112[148], if it is shown and established by the person denying the paternity that the parties to the marriage had no access to each other at any time when he could have been begotten. It means that if the party is denying legitimacy, that party has to establish that the parties to the marriage had no access to each other at the relevant time i.e., during the period when the child on person whose legitimacy in dispute could have been conceived or could have been begotten. The expression "May presume", "Shall presume" and "Conclusive proof" have been defined in Section 4 of the Evidence, Act. That Section 4[149] provides and reads as under:

"*May presume*" - Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"*Shall presume*" - Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"*Conclusive proof* " - When one fact is declared by this Act to be

[148] *Supra Note*, 60, Chapter 1, Page 18
[149] Ibid.

conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it".

The distinction between the three expressions has been made very clear by the Legislature by defining the three expressions "May presume", "Shall presume" and "Conclusive proof.

As regards "Conclusive proof, the Evidence Act provides and declares that the proof of one fact will be the conclusive proof of another fact, then Evidence Act mandates that no evidence shall be given for the purpose of disproving that fact. Section 112[150] provides the conditions that when and in what circumstances the doctrine of conclusive proof will really apply viz., when it is proved as a fact that a person was born during the continuance of a valid marriage between his mother and any man or the proof of the fact that the person concerned was born within two hundred and eighty days after the dissolution of the marriage and his mother remained unmarried. It provides on proof of either of these two sets of facts and it's not having been shown and established by the other party challenging the legitimacy that parties to the marriage had no access to each other at any time when the person or child conceived could have begotten. The Court shall deem the earlier facts to be conclusive proof of legitimacy of the person concerned that he is the legitimate son of that man. No evidence, as such, can be lead to disprove the legitimacy on establishment of the above-mentioned facts. If the person denying the legitimacy of a child has to show that the doctrine of conclusive proof of legitimacy does not apply, he can lead limited evidence only to show that parties to the marriage had no access to each other at any time when the child could have been begotten. Thus, it appears that where doctrine of conclusive proof is applicable and it has not been shown that the parties to marriage had no access to each other at the material and relevant period when the child i.e., person concerned could have been begotten, the person denying is not entitled to disprove the fact of legitimacy by evidence of any other nature including medical examination and blood group test of the mother, child and

[150] *Supra Note*, 60, Chapter 1, Page 18

himself, in view of Section 4[151] in particular which defines "Conclusive proof. When Section 112[152] read with Section 4[153] reveals that no other evidence can be lead to dislodge conclusive proof except the evidence that parties to the marriage had no access to each other at the relevant time, in my opinion, the Court below could not have and had no jurisdiction to direct the parties to undergo medical examination of their blood group test in exercise of its inherent powers.

In the case of **Smt. Dukhtar Jahan v. Mohammed Farooq**[154], their Lordships of the Supreme Court observed as under:

"Section 112[155] lays down that if a person was horn during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution and the mother remains unmarried, it shall be taken as conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. This rule of law based on the dictates of justice has always made the Courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother as unchaste woman".

The conclusive presumption under Section 112[156] is rather based on a sound policy of affording protection to the sanctity and stability of the family relationship so that for every trifling suspicion or for oblique purpose the question of legitimacy of a child born or conceived in the wedlock does not become a handy target of scandalisation and indecent investigation. The Calcutta High

---

[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] (1987) 1 SCC 624 : AIR 1987 SC 10493.
[155] *Supra Note*, 60, Chapter 1, Page 18
[156] Ibid.

Court in the case of **Tushar Roy v. Smt. Sukla Roy**[157], has been pleased to consider Section 112[158] in the context of Section 4. The observations of the Calcutta High Court in this regard are worth being quoted and read as under:

"The term access as used in Section 112 [159] has been consistently interpreted to include the existence of opportunities for marital intercourse between the husband and the wife at the time when the child could have been begotten according to the ordinary course of nature. A conclusive presumption of legitimacy attracted by Section 112[160] can be rebutted only by showing that the husband and the wife had no access to each other at any time when the child could have been begotten. What is required to be shown for rebutting the conclusive presumption, which is a presumption of law, is that the husband and the wife had no access to each other at any time when the child could have been begotten. The words "at any time" and "could have been begotten'' are very significant. The requirement of the section for rebutting the conclusive presumption is not to show "non-access" exactly at the time when the child was begotten, but the requirement is still more onerous and pervasive so much so that the contending party will have to show non-access at any time when the child could have been begotten which means non-access not at any particular moment but during the whole span of the time when the conception according to the ordinary course of nature possibly could have taken place. The expressed terms of the provision of Section 112[161] require the contending party to show that during the whole of the period when the child could have been begotten according to the ordinary course of nature, the husband and the wife had no access to each other. If instead of undertaking to discharge that pervasive and wider responsibility or onus, the contending party slices out only a fraction of that responsibility and proposes to rebut the conclusive presumption of law only by showing non-access in a derivative way at the particular moment when the child was actually begotten by proving through blood test that the husband is not the biological father of the child plainly the same

[157] 1993 Cri LJ 1659 (Cal).
[158] *Supra Note*, 60, Chapter 1, Page 18
[159] Ibid.
[160] *Supra Note*, 60, Chapter 1, Page 18
[161] Ibid.

does not constitute a proposal to satisfy the whole of the requirement of the rebuttal responsibility imposed by the section itself. That being so there cannot be any question of permitting the contending to undertake only a fractional responsibility out of the requirement of the total responsibility prescribed under Section 112[162] for dislodging the conclusive presumption of law which the section project.

This is more so where, as it must be in most of the cases the venture of blood test is only exploratory or investigative in nature due to the fact that the husband also had access to and sexual intercourse with the wife during the possible period of conception even if any other person also had such access at any possible time to the same woman thereby rendering it a matter of narrow chance or purely fortuitous coincidence that either of the two men can turn out to be the biological father of the child. Blood test in the circumstances is only an investigation for ascertaining, if possible, a biological fact. It is not evidence till it yields a particular result in a particular manner. If blood test evidence is to be allowed on the reasoning that in case the test establishes that the husband is not the biological father of the child this will show that the husband had no access to the wife at the moment when the child was actually begotten because two men cannot have access to the same woman at the same time where the question of conception by such access is concerned, then this test will have to be allowed even when as a matter of fact the husband actually had access to and sexual intercourse with the wife at the possible time when the conception could have taken place.

This is plainly contrary to the terms of Section 112[163] and will be rather tantamount to putting the cart before the horse. Section 112[164] is clear enough that once the husband is shown to have had access to the wife at any time when the conception could have taken place the scope of adducing rebuttal evidence becomes non-available. The contending party cannot be permitted to say that that he will rebut the conclusive presumption of law regarding paternity by proving directly by blood test that the husband is not the biological father of the child

[162] Ibid.
[163] *Supra Note*, 60, Chapter 1, Page 18
[164] Ibid.

which will virtually be an abrogation of the existing provision of Section 112[165]. That would have been permissible had there been no provision of statutory presumption in the matter in which case the matter would have been governed by the ordinary rules of evidence regarding proof and disproof. That would have been also permissible as I have already pointed out, had Section 112[166] instead of the existing provision, contained a provision for keeping the matter in the domain of shall presume as defined in Section 4 of the Evidence Act, to which case the contending party would have been at liberty to adduce any sort of rebuttal evidence admissible under the law for dislodging the statutory presumption of paternity because provides that whenever it is directed by the Act that the Court shall presume a fact it shall regard such fact as proved, unless and until it is disproved.

The provision of Section 112 [167] being what it is the conclusive presumption of law raised by it will have to be accepted. But if that conclusive presumption is to be assailed it has to be assailed in the limited manner prescribed by the section namely by showing non-access during the whole of the period when the child could have been begotten according to the ordinary course of nature and not otherwise. It must be noticed that Section 112[168] requires proof of non-access during the whole of the relevant period, so that the presumption that the husband is the father of the child can be demolished. The process is not reversible. Contrary to the conclusive presumption of law, the husband is not allowed to directly prove first that he is not the father of the child born during the wedlock and then to say that since he is not the father therefore he did not have access (to the wife) in the sense of sexual intercourse with the wife at least at the time when the child was actually begotten and therefore the presumption of legitimacy stands rebutted. The question of blood test is not a question of effect of the evidence that may or may not be projected by such test, but it is rather the threshold question of admissibility of evidence in the context of the provision of Section 112[169]".

[165] Ibid.
[166] Ibid.
[167] India *Supra Note*, 60, Chapter 1, Page 18
[168] Ibid.
[169] Ibid.

Dealing with the question of English principles of law which provide for directing the blood test, in the Indian circumstances, the Calcutta High Court observes that in Indian circumstances this doctrine cannot be followed particularly when Evidence Act bars the production of other evidence. It will be appropriate to quote the following observations of the Calcutta High Court in **Tushar Roy's case**[170], supra:

"In both the English cases discussed above the circumstances were such that either the husband or the party cited co-respondent was the biological father of the child and in both the cases either of the two men would have accepted the child, it could be ascertained that he was the biological father of the child. In such circumstances, it may be in the best interest of the child to ascertain the biological father by blood test. It also seems that such is the situation in most of the cases in England where paternity is disputed. But what is the situation in India. Here in India very rarely an adulterer admits his involvement far less claims paternity of a child not born in his own wedlock. Even in the instant case, although the husband/petitioner wants an exploratory blood test for ascertaining whether he is the biological father of the child born in his wedlock, he has not come forward with any specific case that some other particular person must be or is possibly the father of the child. And no second man is coming forward with any admission or confession of adultery not to speak of claiming the paternity of the child. In the circumstances, what interest of the child can be served by bastardizing it through blood test. Assuming for the sake of argument that in this case it is possible to bastardize the child by blood test, in that case the child will be exposed to the risk of starvation or of begging for survival as it will be deprived of support by the husband of the wedlock in which it was born, there being at the same time no substitute or putative father to offer support. Therefore, even if we were to follow the English principle that blood test may be ordered for determining paternity only in cases where such determination will serve the best interests of the child, it is crystal clear that a situation like this will not only not serve any interest of the child. even if it serves the purpose of an adult who may be interested in

[170] 1993 Cri LJ 1659 (Cal).

bastardising it for avoiding maintenance, but may rather jeopardise the very survival of the child for no fault of it".

In the case of **Polavarapu Venkteswarlu v. Polavarapu Subbayya**[171], their Lordships of the Madras High Court lays down at paragraphs (3) and (4) as under

"Section 151[172], Civil Procedure Code has been introduced into the statute book to give effect to the inherent powers of Courts. as expounded by Woodroffe, J. in **Hukum Chand Boid v. Kamalanand Singh**[173], at pages 931 and 932. Such powers can only be exercised ex debito justitiae and not on the mere invocation of parties or on the mere volition of Courts. There is no procedure either in the Civil Procedure Code, 1908 or in the Indian Evidence Act, 1872 which provides for a test of the kind sought to be taken by the deft, in the present case. It is said by Mr. Ramakrishna for the respondent before me that in England this sort of test is resorted to by Courts. where the question of non-access in connection with an issue of legitimacy arises for consideration. My attention has been drawn by learned Counsel to p. 69 of Taylor's Principles and Practice of Medical Jurisprudence, Vol. 2, where it is stated thus:

"In **Wilson v. Wilson**[174]**,** Lancet, evidence was given that the husband's group was OM, that the wife's was BM, and that the child's was ABN. The Court held that the husband was not the father of the child, and granted a decree for nullity".

It is also pointed out by learned Counsel that in the textbooks on Medical Jurisprudence and Toxicology by Rai Bahadur Jaisingh P. Modi (Edn. 8) at p. 94 reference is made to a case decided by a criminal Court at Mercara in June 1941, in which the paternity and maternity of this child being under dispute, the Court resorted to the results of the blood grouping test.

---

[171] AIR 1951 Mad 910, (1951) 1 MLJ 580.
[172] *Supra Note*, 55, Chapter 2, Page 46
[173] (1906) ILR 33 Cal 927
[174] 492 S.E.2d 495 (1997). 25 Va. App. 752.

That may be. But I am not in any event satisfied that if the parties are unwilling to offer their blood for a test of this kind, this Court can be forced to do so. Mr. Krishnainurthi, says that his clients are not prepared to offer their blood for such a test".

In the case of **Goutam Kundu v. State of West Bengal and Another**[175], their Lordships of the Supreme Court at para 15 observed that in India there is no special statute governing this. Neither the Criminal Procedure Code nor the Evidence Act empowers the Court to direct such a test to be made.

Further their Lordships of the Supreme Court dealing with Section 112 of the Evidence Act, 1872 have been pleased to observe of the said report reads as under:

"The effect of this section is this: there is a presumption and a very strong one though a rebuttable one. Conclusive proof means as laid down under Section 4 of the Evidence Act, 1872.

From the above discussion it emerges:-

(1) that Courts in India cannot order blood test as a matter of course;

(2) wherever applications are made for such prayers in order to have roving inquiry the prayer for blood test cannot be entertained;

(3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act;

(4) the Court must carefully examine as to what would be the consequence of ordering the blood test, whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman;

(5) no one can be compelled to give sample of blood for analysis".

Similar view has been expressed by the Madras High Court in the case of **Ranganathan Chettiar v. Chinna Lakshmi Achi**[176]. In the case of **Subayya**

[175] 1993 AIR 2295 1993 SCR (3) 917 1993 SCC (3) 418
[176] AIR 1955 Mad 546.

Gounder v. Bhoopala[177], his Lordship Ramaswami, J. has observed the value of blood group test is however limited and thereafter quoted from Glaister Medical Jurisprudence as under:

> *"The tests, however have their limitation they may exclude a certain individual to the possible father of a child, but they cannot possibly establish paternity. They can only indicate its possibilities. Another man with the same group as the father of the child could be responsible for the child".*

His Lordship further observed in the same report that in India there is no special statute and there is no provision either in the Criminal Procedure Code or in the Indian Evidence Act, 1872, empowering Courts to direct such a test to be made. Similarly, as pointed out by Raghava Rao in Venkteswarlu's case, supra, there is no procedure either in the Civil Procedure Code or in the Evidence Act which provides for a blood test being made of a minor and his mother when the father is disputing the legitimacy of the minor and held "that if the parties are unwilling to submit to such a test the Court has no power to direct them to submit themselves to such a test".

Article 21[178] confers fundamental right of life and personal liberty, Life full of dignity and honour. In India chastity of the woman and paternity of the child have got their importance and pride places. No person in India will ever tolerate nor cherish or like to be called bastard nor will a woman tolerate to be called unchaste. Legitimacy of the paternity of a child or person and chastity of a woman are parts of the dignity and honour for each man and woman according to law. Article 21[179] confers right to life and provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life is not merely animal life. Right to life means life full of dignity and honour and right to live with honour and dignity. Right to personal liberty is also very important. To compel a person to undergo or to submit himself

[177] AIR 1959 Mad 396, 1959 CriLJ 1087
[178] *Supra Note*, 1, Chapter 2, Page 32
[179] Ibid.

or herself to medical examination of his or her blood test or the like without his consent or against his wish tantamounts to interference with his fundamental right of life or liberty particularly even when there is no provision either in the Code of Civil Procedure, 1908 or the Evidence Act, 1872 or any other law which may be said to authorise the Court to compel a person to undergo such a medical test as blood group test or the like against his wish, and to create doubt about the chastity of a woman or create doubt about the man's paternity. It will amount to nothing but interference with the right of personal liberty. Here as mentioned earlier, Section 112 read with Section 4[180], really has the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the law says that to be the conclusive of proof of legitimacy and paternity of child covered by Section 112 of Evidence Act, except by showing that during the relevant period of time as referred to in Section 112[181] the parties to the marriage had no access to each other, the allowing of medical test to test the blood group to determine paternity would run counter to the mandate of Article 21 of the Constitution as well and inherent powers are not meant to be exercised to interfere with the fundamental right of life and liberty of the person nor to nullify or stultify any statutory provision.

In the case of **Revamma v. Shanthappa**[182], this Court had an opportunity to consider this question of medical examination as to whether the Court can compel a person to undergo medical examination. His Lordship Hon'ble H.B. Datar, J., as he then was had been pleased to observe are as under:

"In a case where a party alleges that a person is impotent or suffering from other such incurable disease, it is for the person making such an allegation to prove the same. A party cannot be compelled to undergo medical examination. As stated by the High Court of Gujarat,

"There is no provision under the Hindu Marriage Act, 1955 or the Rules framed there under, or in the Code of Civil Procedure, 1908 or by the Indian

[180] *Supra Note*, 60, Chapter 1, Page 18
[181] *Supra Note*, 60, Chapter 1, Page 18
[182] AIR 1972 Kant 157, AIR 1972 Mys 157.

Evidence Act, 1872 or any other law which would show any power in the Court to compel any party to undergo medical examination".

A medical examination for ascertaining whether a person is insane or impotent are all cases in which unless by the law of the land a person can be compelled to undergo medical examination, an order directing a person to medical examination would be clearly illegal and without jurisdiction. In **P. Sreeramamurthy v. P. Lakshmikantham** [183], when an order was passed directing medical examination, it was held that there must be some statutory provision under which it would be open to the Court to compel medical examination of a party, thus restricting the enjoyment of personal liberty of the person. It was also held that in a case like this, it was not right to rely upon the general or inherent powers of the Court under Section 151 of the Civil Procedure Code. It may be rejected and that even medical examination is specifically provided as under the terms of the Indian Lunacy Act. In the absence of any provision, it is not competent to any party to compel the other party to undergo medical examination.

In the case of Ranganathan Chettiar, supra, it has been held that it is not open to the Court under Section 151 of the Code of Civil Procedure, 1908 to order a medical examination of a party against the consent of such party. To pass such an order is that amounts to treating a human being as a material object, which no Court should do under its inherent power. It is, thus, clear that it is not open to the Court to invoke Section 151 of the Code of Civil Procedure, 1908 to order a medical examination against his consent. In that view the order directing the medical examination of the petitioner is one which has been passed by the learned Judge in excess of the jurisdiction and the same is liable to be set aside".

Thus considered in my view the Court below committed an error of jurisdiction and acted in excess of jurisdiction in directing the revision petitioners to subject themselves to medical examination for the blood test.

I am further to observe that the Court below has observed that if the parties

[183] AIR 1955 Andhra 207

or any of them fails to appear before the District Surgeon for medical test on 4-12-1996, adverse inference shall be or may be drawn as per law. Here again the Court below acted illegally in making this observation, because Section 4 provides and mandates that when one fact is said to be conclusively proved on establishment of another relevant fact, then it completely shuts down and rules out every sort of evidence to disprove that fact. Adverse presumption under Section 114[184] may furnish a circumstantial evidence to dislodge the conclusive proof, then that will be running counter to the provisions of Section 112 read with Section 4 of the Evidence Act, 1872. The Court below observed illegally that failure or refusal to surrender to medical test will result in raising adverse presumption against the party when in view of Section 112 read with Section 4 of the Evidence Act, 1872 every sort of evidence, other than referred in Section 112[185] is barred and closed including presumptive circumstantial evidence under Section 114 and then the presumption cannot be raised under Section 114 from the failure to surrender. What evidence can be lead so that conclusive presumption or doctrine of conclusive proof under Section 112 may not arise is of the fact that the parties to marriage had no access to each other or occasion to have access during the relevant period i.e., period when the child or person concerned whose paternity or legitimacy in question was conceived as per the latter part of Section 112 of the Evidence Act. Further threat to raise such adverse presumption in such case will amount to interference with fundamental right under Article 21 of personal liberty by implicitly forcing an unwilling person to undergo the medical test i.e., blood group test against his wish and against his or her free will and liberty.

When I so observe that neither a person can be compelled to give sample of blood for analysis or to undergo medical examination for blood group test against his or her will as well as no adverse inference can be drawn against the person refusing to undergo such test, I find support for my view from the observations of their Lordships of the Supreme Court in the case of Goutam Kundu, supra, vide the following observations of the said report:

[184] *Supra Note*, 60, Chapter 1, Page 18
[185] *Supra Note*, 60, Chapter 1, Page 18

"Blood grouping test is a useful test to determine the question of disputed paternity. It can be relied upon by Courts as a circumstantial evidence which ultimately excludes a certain individual as a father of the child. However, it requires to be carefully noted no person can be compelled to give sample of blood for analysis against her wilt and no adverse inference can be drawn against her for this refusal".

This has been the view also expressed by Madhya Pradesh High Court in the case of **Hargovind Soni v Ramdulari**, which appears to have been approved by the Supreme Court as per the observations in referred to above.

The learned Counsel for the respondents referred the decision of this Court in **Gangadharappa v. Basauaraj**[186], in my opinion this decision will not help to the respondents, as that is not a case with reference to Section 112 read with Section 4 of the Evidence Act, 1872 nor Article 21 of the Constitution of India in the context of blood group test. This question was not at all raised in that case. The decision of the Himachal Pradesh High Court in **Paras Ram v. Dayal Das**[187], relied on by the Counsel for the respondents is also of no help to the respondents. It supports the view taken by the Court that contusive proof under Section 112 can be displaced or can't be allowed to operate and govern only on proof of certain facts mentioned in the section that no access between the parties at any time when according to the ordinary course of nature the husband could have been the father of the child and if that fact as mentioned in the latter part of Section 112[188] is established and shown then and then only the doctrine of conclusive proof may not apply.

Thus considered, in my opinion, the order allowing I. As. XIV and XV directing the revision petitioners to surrender before the District Surgeon, Mandya for medical examination-blood group test and if they fail to appear before the District Surgeon on 4.12.1996 adverse inference will be drawn is nothing but an act of the Court which is in excess of the jurisdiction, as which the Court had no

[186] AIR 1996 Kant 155, I (1996) DMC 194, ILR 1995 KAR 2642, 1995 (5) KarLJ 134.
[187] AIR 1965 HP 32.
[188] *Supra Note*, 60, Chapter 1, Page 18

jurisdiction to direct. The order impugned, as such, is without jurisdiction and against the spirit of law and the one passed without due application of mind to the relevant provisions of the Evidence Act and the provisions of Article 21 of the Constitution of India referred to above and per se appears to be an order without jurisdiction as well as suffers from jurisdictional error amounting to illegality on the part of the Court as well. The order having got tendency to jeopardise the fundamental right of personal liberty conferred under Article 21 of the Constitution of India deserves to be set aside and is hereby set aside". [189]

2.3 Provisions under Article 21 and 39A[190] of the Constitution :

In **State v. Jitender[191],** S. Ravindra Bhat and Pratibha Rani, JJ. Held "As per prosecution, accused strangulated his 70 years old father, severed his head and removed entrails and some organs from body- Relying on testimony of his mother (PW 3), sister (PW 4) and brother (PW 16), trial Court convicted under Section 302[192] and sentenced him to death-Held, circumstances prove guilt of accused beyond reasonable doubt- Rarest of rare principle is an attempt to streamline sentencing and bring uniformity in judicial approach. When drawing a balance sheet of aggravating and mitigating circumstances for sentencing, full weight had to be given to mitigating circumstances. State of mind of accused at the relevant time, his capacity to realize consequences of crime are relevant. Although accused did not take plea of insanity, circumstances point to his alienation from surroundings, family, near relatives and others. If unusual or peculiar features there in allegations which excite suspicion of judge at preliminary stage, that there is possibility of accused laboring under mental disorder, Court bound under Article 21[193] and 39A[194] to record so and send accused for psychiatric or mental evaluation. Accused indulged in ritual human sacrifice of father- Unusual nature of facts relevant to making sentencing choice- Aggravating circumstancing of killing an aged defenseless person coupled with mutilation of body and its

[189] Ibid
[190] *Supra Note*, 1, Chapter 2, Page 32
[191]MANU/DE/0534/2013
[192] *Supra Note*, 64, Chapter 1, Page 21
[193] *Supra Note*, 1, Chapter 2, Page 32
[194] Ibid.

beheading has to be balanced with factors like his social alienation, no known record of violent behavior, young age (25 years). Accused not beyond pale of reformation. Death sentence not confirmed and substituted with life imprisonment. Direction that in cases of serious crimes where accused indulged in unusual behavior indicative of mental disorder (specially ritual or sacrifice killing), magistrate taking cognizance of offence shall refer accused for medical check-up to evaluate if mental condition might entitle him to defence of insanity. This procedure integral part of legal aid and right to fair trial under Article 21. Death Reference No. 1/2011 not confirmed. Criminal Appeal 912/2011 partly allowed.

Ratio Decidendi:

"There is no conflict between general burden, which shall always on prosecution and which never shifts, and special burden that rests on Accused to make out his defence of insanity".

2.3.1 Value of Medical evidence: Instances and inferences :

In **the State of Maharashtra v. Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid [195],** the court in following para rightly observed the value of medical evidence and other evidences and has compared both.

It was urged by Mr. Solkar that the prosecution case that A1-Kasab fired at ASI Ombale from very close quarters is not substantiated by the medical evidence. He submitted that, if A1-Kasab had used AK-47 rifle and fired at deceased Ombale from close quarters, there would be singing, blackening or tattooing around the wounds suffered by ASI Ombale, Mr. Solkar submitted that there is no such evidence in this case. Therefore, the bullets were fired from beyond the firing range.

Our attention is drawn to Modi's Medical Jurisprudence and Toxicology, Twenty-third Edition in which the learned author has observed at page 721[196] that,

[195]MANU/MH/0169/2011
[196] Modi's Medical Jurisprudence and Toxicology, Twenty-third Edition

if a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. It is observed that the adjacent hairs are singed and the clothes covering the part are burnt by the flame. However, the learned author has further observed that these signs may be absent when the weapon is pressed tightly against the skin of the body, as the gases of the explosion and the flame smoke and particles of gunpowder will all follow the track of the bullet in the body.

In J.B. Mukherjees book titled Forensic, the learned author has observed that when firearm is fired with its muzzle end in firm and direct contact with the body surface, then whole of the discharge containing flame, gases, powder, smoke and metallic particles, etc. will be blown into the track taken by the bullet through the body under pressure. It is further observed that in such a situation there will be little or no evidence of burning, singeing, blackening and tattooing around the wound of entrance.

In Textbook on Forensic Medicine And page no. 319[197], learned author has observed that if the contact with the skin is firm, and effective seal is formed between the muzzle and the skin which prevents much escape of gases, soot and powder, so that soiling, burning and powder deposition around the margins of the entrance wound will be minimal or absent.

The above extracts indicate that absence of singeing, blackening and tattooing around the wounds suffered by ASI [198] Omble will not affect the credibility of the prosecution case. It is possible that the rifle came in close contact with the skin. In such case, singeing, blackening and tattooing will not be present. There is no absolute rule that singeing, blackening and tattooing must be present. In any case, when there is clear eye-witness account, which establishes how ASI[199] Ombale died, we are not inclined to accept Mr. Solkar's submission and

[197] J.B. Mukherjees book, Forensic Science
[198] Assistant Sub-Inspector.
[199] Ibid.

reject the prosecution story on the ground that there was no singing, blackening and tattooing around the wounds suffered by Assistant Sub-Inspector Ombale.

The alleged discrepancies in the eye-witness account and medical evidence and also between the eye-witness account and Ballistic Expert's Report do not help Mr. Solkar. It is well settled that expert's evidence is not conclusive but it is used as corroborative piece of evidence. When there is consistent, cogent and credible eye-witness account, the expert's evidence recedes in the background.

In **Surendra Singh and Anr. v. State of U.P**.[200], it was contended that the injuries noticed by the doctor are at variance with the ocular evidence. The Supreme Court observed that mere fact that the doctor said that injuries appear to be on one side of the body and the witnesses said that attacks were from different sides is too trifle an aspect. The Supreme Court observed that it is only when the medical evidence totally improbabilizes ocular evidence that the court starts suspecting the veracity of the evidence and not otherwise.

Similar view has been taken by the Supreme Court in **State of Madhya Pradesh v. Dharkole @ Govind Singh**[201]**.** In that case the Supreme Court observed that it would be erroneous to accord undue primacy to hypothetical answers of medical witnesses to exclude the eye-witness account which had to be tested independently and not treated as the variable, keeping the medical evidence as the constant. The Supreme Court observed that it is trite that where the eye-witness account is found credible and trustworthy medical opinion pointing to alternative possibility is not accepted as conclusive.

In **Vijay Kumar Chauhan v. State of Uttar Pradesh**[202], the accused had used firearm and had killed the complainants wife, however, the ballistic expert was not examined. The Supreme Court held that there is no inflexible rule that in every case where the accused person is charged with murder caused by lethal weapon, the prosecution case can succeed in proving the charge only if ballistic expert is examined. In what cases the examination of a ballistic expert is essential

[200] 2004 SCC 717.
[201] AIR 2005 SC 44.
[202] (2009) 1 SCC 9515.

for the proof of the prosecution case must depend upon the facts and circumstances of each case. In the facts before it the Supreme Court observed that having regard to the ocular evidence adduced by the prosecution there was no reason to discard the prosecution theory, that the injury suffered by the complainant's wife was caused by a bullet fired from a revolver. Thus it is clear that eye-witness account which inspires confidence overrides the experts evidence and in fact, in a given case, even if an expert is not examined, that will not have adverse impact on the prosecution case.

Mr. Solkar submitted that it is the prosecution case that AK-47 rifle (Article 12) was given to Addl. C.P. Kamte by PW-7 Arun Jande, the armoury in-charge. According to the prosecution, it was picked up by deceased A1-Abu Ismail from Addl. C.P. Kamte after he was shot dead. It was stated to be in the leg space of the front seat of the Skoda car. Mr. Solkar submitted that, however, the Ballistic Experts report and the evidence of PW-216 Bhupendra Dhamankar, who is a pancha to the panchnama which was drawn at Hotel Oberoi indicates that Article 12 was used at Hotel Oberoi. As per the Ballistic Experts report, four empties found on the 18th floor of Hotel Oberoi i.e. Ex-15A to Ex-15D were in fact fired from Article 12. Therefore, Article 12 could not have been used by deceased A1-Abu Ismail at Chowpaty and the prosecution has planted it.

This submission has no merit. On 7/8/2009, PW-150 Gautam Gadge, who is a Chemical Analyzer was examined. In his evidence PW-150 Gadge stated that empties Ex-15A to Ex-15D were examined and they were compared with the empties of test fired cartridges from Ex-1 and Ex-2 (Article 765 and 768) and it was found that Ex-15A to Ex-15D were not fired either from Ex-1 or from Ex-2. He further stated that on the basis of characteristic features of firing pin impression and the ejector marks on these empties and the empties of test fired cartridges from Ex-1 of BL 990A-08, he had come to the conclusion that Ex-15A to 15D tallied amongst themselves and they were fired from 7.62 mm assault rifle (Ex-1) of BL 990A-08 (Article 12).

On 7.10.2009, on the request of learned Special Public Prosecutor, the examination was deferred. On the next day this witness stated that there is a

typing mistake in his final opinion/report. He stated that he had earlier stated that Ex-15A to 15D tallied amongst themselves and they were fired from 7.62 mm assault rifle Ex-1 of M.L.C. No. 990/A08 (Article 12). He further stated that he had now gone through his original notes which are in his handwriting. He produced the original notes in the court. He pointed out that in the original note he has stated 15A, B, C, D tally amongst themselves and are fired from 7.62 mm (short) assault rifle other than Ex-1 and Ex-2 of M.L.C. No. BL 990A/08 received from the Sr. P.I. DCB CID Unit-I, Crime No. 182 of 2008. He has reiterated the said opinion in the court. In his cross-examination, this witness has stated that he had not examined Article 10 and Article 12 produced before the court. They were examined by Chemical Analyzer Mr. Patil. He has stated that the empties found by D.B. Marg Police Station and forwarded to Chemical Analyzer for examination were examined and compared by Mr. Patil and report was submitted by him vide BL No. 990A/08. He has stated that it is correct to say that empties Ex-15A to Ex-15D of BL No. 1119-08-(Article 843 (Colly.) were not compared with empties of test fired cartridges from Article 10 and Article 12. He has stated that his opinion (Ex-841) is verbatim copy of his handwritten notes (Ex-840) except the mistake he had pointed out earlier in his evidence in examination-in-chief. (Ex-839 is forwarding letter). He has stated that there was no query from the police to give opinion whether Article 843 (Colly.) i.e. Ex-15A to Ex-15D i.e. empties were fired from Article 10 or Article 12.

The Court finds that there is no tampering of the original notes or fabrication of the original notes. This is a case of mistake and that is confirmed by the fact that a mistake is also committed while typing the unit number. In the result of his analysis, as regards empties Ex-15A to Ex-15D he has stated that they were received from Senior Police Inspector, Unit No. I, C.R. No. 182 of 2008 when in fact, C.R. No. 182 of 2008 (Chowpaty incident) was investigated by Unit No. III and Unit No. I was investigating C.R. No. 191 of 2008 (Hotel Oberoi incident). This submission of Mr. Solkar is, therefore, rejected. Mr. Solkar also argued that examination-in-chief of PW-150 Gautam Gadage was differed to fill in the lacuna. We reject this submission also. After examining the original note and the report, we are of the opinion that there was a genuine mistake.

Clarification was necessary. Therefore, at the request of Special Public Prosecutor, learned Sessions Judge rightly differed the examination-in-chief.

In his confessional statement, A1-Kasab has stated about his journey along with deceased A1-Abu Ismail in the Skoda car. After they seized the car of PW-144 Sharan Arasa, they sat in it and deceased A1-Abu Ismail started driving it towards Malabar Hill. He has stated that after they travelled some distance, he realized that they were travelling on a road which was passing by the side of sea. He realized that it is the same road which goes towards Malabar Hill as demarcated in their maps by A3-Sabauddin and A2-Fahim. He has further stated that as they were travelling in high speed they saw barricades put on the road. Policemen were standing around the barricades. He has further stated that the policemen saw their car from far and raised their hands, blew whistles and asked them to stop. It was difficult to cross-over the barricades, hence A1-Kasab told deceased A1-Abu Ismail to stop the car somewhere near the barricades. He told him to keep the headlights of the car on so that the car numbers and their faces are not seen by the police. According to him, as stated by him, deceased A1-Abu Ismail stopped the car at some distance from the barricades and he kept the car lights on.

The policemen were shouting from far that Naka Bandi was on and that they should put out the lights. A1-Kasab has further stated that when he inspected the place, he felt that the height of the left side divider was less. He felt that, if they took the car in a high speed they could cross it. He told deceased A1-Abu Ismail about it. Deceased A1-Abu Ismail started spraying water on the glasses of the car and started wiper. He took the car little ahead in a fast speed. He turned the car on his left and on to the divider. However, the car could not cross over the divider and stopped there. At that time, police came towards them from both sides. They realized the situation and raised their hands. The policemen moved forward towards them. Seeing this, deceased A1-Abu Ismail tried to lift AK-47 rifle, however, the said AK-47 rifle which was kept down could not be taken out. He, therefore, picked up the pistol which was kept on the seat and fired towards the police. At that time A1-Kasab also opened the door and picked up AK-47

rifle. Police started firing. Policemen started snatching his AK-47 rifle. In that scuffle, he fell down, however, he fired from AK-47 rifle. The bullets hit the policeman, who had caught hold of the rifle. That policeman fell down but the other policemen beat him with lathis and snatched the AK-47 rifle from him. They caught hold of him. In the meanwhile, deceased A1-Abu Ismail who was injured was also apprehended by police. Both of them were taken to the hospital. He got to know that in the hospital, deceased A1-Abu Ismail had died. He has further stated that in the hospital he told the police and the doctor his name and deceased A1-Abu Ismails name. He told them that they were Pakistanis. He has further stated that then he was treated at the hospital. He was given hospital clothes to wear. The police then interrogated him about the incidents and he narrated all the facts to the police.

The confessional statement of A1-Kasab fits in catalogue of events which is brought on record by the above prosecution witnesses. The evidence on record is in tune with the general trend of the confession. Having gone through the relevant eye-witnesses' account and circumstantial and medical evidence, we are of the opinion that the prosecution has successfully proved its case about the incident at Girgaum Chowpaty".

2.4 Provisions under Article 39 of the Constitution:

Article 39 of Indian Constitution provides, "Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;

(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;

(d) that there is equal pay for equal work for both men and women;

(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment".

This article specifically under clauses (E) and (f) clearly provides that there should be adequate safe guards for women and children and that can only be ensured by encouraging worth and value of medical evidence with respect to their claims and procedure to claim their rights.

2.5 Provisions under Article 48-A of the Constitution and Medical Evidence :

In **Charan Lal Sahu v. Union of India**[203] Sabyasachi Mukherjee, CJ., K.N. Singh, S. Ranganathan and A.M. Ahmadi, JJ. Held in para 90 and 91 "Over 120 years ago **Rylands v. Fletcher**[204]**,** was decided in England. There A, was the lessee of certain mines. B, was the owner of a mill standing on land adjoining that under which the mines were worked. B, desired to construct a reservoir, and employed competent persons, such as engineers and a contractor, to construct it. A, had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts which communicated with the land above, and which had also been out of use for years, and were apparently filled with marl and the earth of the surrounding land. No care had been taken by the engineer or the contractor to block up these crafts, and shortly after water had been introduced into the reservoir it broke through some of the shafts, flowed through the old passage and flooded A's mine. It was held by the House of Lords in England that where the owner of land, without willfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages.

[203] AIR1990 SC1480.
[204] [1868] LR E 3 and 1 AC 330.

But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. In the background of the facts it was held that A was entitled to recover damages from B, in respect of the injury. The question of liability was highlighted by this Court in **M.C. Mehta's case**[205] where a Constitution Bench of this Court had to deal with the rule of strict liability.

This Court held that the rule in **Rylands v. Fletcher**[206], laid down a principle that if a person who brings on his land and collects and keep there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. This rule applies only to non-natural user of the land and does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the things which escape are present by the consent of the person injured or in certain cases where there is a statutory authority. There, this Court observed that the rule in **Rylands v. Fletcher**[207], evolved in the 19th century at a time when all the developments of science and technology had not taken place, and the same cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. In a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to be carried on as part of the developmental process, Courts should not feel inhibited by this rule merely because the new law does not recognise the rule of strict and absolute liability in case of an enterprise engaged in hazardous and dangerous activity.

This Court noted that law has to grow in order to satisfy the needs of the fast-changing society and keep abreast with the economic developments taking place in the country. Law cannot afford to remain static. This Court reiterated

[205] AIR 1987 SCR (1) 819.
[206] [1868] UKHL 1.
[207] Ibid.

there that if it is found necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concomitant to an industrial economy, the Court should not hesitate to evolve such principle of liability merely because it has not been so done in England. According to this Court, an enterprise which is engaged in a hazardous or inherently dangerous industry which poses potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone.

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results to anyone on account of an accident in the operation of such activity resulting, for instance, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who were affected by the accident as part of the social cost for carrying on such activity, regardless of whether it is carried on carefully or not. Such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in **Rylands v. Fletcher**[208]. If the enterprise is permitted to carry on a hazardous or dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such activity as an appropriate item of its overheads. The enterprise alone has the resources to discover and guard against hazards or dangers and to provide warning against potential hazards. This Court reiterated that the measure of compensation in these kinds of cases must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise. The determination of actual damages payable would depend upon various facts and circumstances of the particular case.

[208] *Supra Note*, 132, chapter 2, page 75

It was urged before us that there was an absolute and strict liability for an enterprise which was carrying on dangerous operations with gases in this country. It was further submitted that there was evidence on record that sufficient care and attention had not been given to safeguard against the dangers of leakage and protection in case of leakage. Indeed, the criminal prosecution that was launched against the Chairman of Union Carbide Shri Warren Anderson and others, as indicated before, charged them along with the defendants in the suit with delinquency in these matters and criminal negligence in conducting the toxic gas operations in Bhopal. As in the instant adjudication, this Court is not concerned with the determination of the actual extent of liability, we will proceed on the basis that the law enunciated by this Court in M.C. Mehta's case (supra) is the decision upon the basis of which damages will be payable to the victims in this case. But then the practical question arises: what is the extent of actual damages payable, and how would the quantum of damages be computed? Indeed, in this connection, it may be appropriate to refer to the order passed by this Court on 3rd May, 1989 giving reasons why the settlement was arrived at the figure indicated. This Court had reiterated that it had proceeded on certain prima facie undisputed figures of death and substantially compensating personal injury. This Court has referred to the fact that the High Court had proceeded on the broader principle in M.C. Mehta's case (supra) and on the basis of the capacity of the enterprise because the compensation must have deterrent effect. On that basis the High Court had proceeded to estimate the damages on the basis of Rs.2 lakhs for each case of death and of total permanent disability, Rs.1 lakh for each case of partial permanent disability and Rs. 50,000 for each case of temporary partial disability. In this connection, the controversy as to what would have been the damages if the action had proceeded is another matter. Normally, in measuring civil liability, the law has attached more importance to the principle of compensation than that of punishment. Penal redress, however, involve both compensation to the person injured and punishment as deterrence. These problems were highlighted by the House of Lords in England in **Rookes v. Barnard** [209], which indicate the difference between aggravated and exemplary damages. Salmond on the *Law of*

[209] [1964] AC 1129.

Torts, 15th Edition at page 30 emphasises that the function of damages is compensation rather than punishment, but punishment cannot always be ignored. There are views which are against exemplary damages on the ground that these infringe in principle the object of law of torts, namely, compensation and not punishment and these tend to impose something equivalent to fine in criminal law without the safeguards provided by the criminal law. In **Rookes v. Barnard**[210]**,** the House of Lords in England recognised three classes of cases in which the award of exemplary damages was considered to be justifiable. Awards must not only, it is said, compensate the parties but also deter the wrong doers and others from similar conduct in future. The question of awarding exemplary or deterrent damages is said to have often confused civil and criminal functions of law. Though it is considered by many, that it is a legitimate encroachment of punishment in the realm of civil liability, as it operates as a restraint on the transgression of law which is for the ultimate benefit of the society. Perhaps, in this case, had the action proceeded, one would have realised that the fall out of this gas disaster might have been formulation of a concept of damages, blending both civil and criminal liabilities. There are, however, serious difficulties in evolving such an actual concept of punitive damages in respect of a civil action which can be integrated and enforced by the judicial process. It would have raised serious problems of pleading, proof and discovery, and interesting and challenging as the task might have been, it is still very uncertain how far decision based on such a concept would have been a decision according to 'due process' of law acceptable by international standards. There were difficulties in that attempt. But as the provisions stand these considerations do not make the Act constitutionally invalid. These are matters on the validity of settlement. The Act as such does not abridge or curtails damages or liability whatever that might be. So the challenge to the Act on the ground that there has been curtailment or deprivation of the rights of the victims which is unreasonable in the situation is unwarranted and cannot be sustained". [211]

It clearly shows that whatsoever law is, unless and until is evidence is

[210] Ibid.
[211] *Supra Note,* 135, chapter 2, page 77

produced in sufficiency there is no point in claiming rights.

2.6 Provisions under Article 51-A of the Constitution and Medical Evidence :

Article 51A (h) provides, “to develop the scientific temper, humanism and the spirit of inquiry and reform”.

It must be noted that medical evidence is the most useful tool of all provided under the article. If really want to develop scientific temper medical evidence can be handy.

The medical evidence especially Narco-analysis, Brian-Mapping and polygraph, are held to be violative of fundamental rights, which they have no fixed content. It is well established that new scientific technology is helpful in detecting lie, crime and criminal, and it may be borne for justice system. The courts in India have yet not decided on its acceptability, but certainly this type of scientific test do provide some evidence or clue about the culpability of accused which may corroborate other oral testimonies. The courts should approve the legal use of narco- analysis, polygraph and brain mapping Brain fingerprinting and lie-detector test is not statement because it only discloses existence of knowledge about crime in brain. Though statement is given in narco- analysis test however it cannot be termed as involuntary.

The protection given by Article 20(3) gives protection from compulsory testimony that is no one is to be compelled to be witness against himself. So, as long as, the person is not compelled to give testimony protection of Article 20(3) is not available. Narco-analysis test is a step in aid of investigation. It forms an important base for further investigation as it may lead to collection of further evidence on the basis of what transpired during such examination. The use of above stated evidence is of particular relevance in the context of terrorism related cases, conspiracy to commit murder and other serious offences where the Investigating agencies do not have vital leads. The attempt of the courts should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The fundamental rights have not been declared immutable, but

these have to be kept in conformity with the changing conditions Constitution has to be kept young, energetic and alive.[212] If it is the duty of the judge to see no innocent is punished then he must also ensure that no guilty man escapes. Both are public duties[213] when security, protection and justice to the society is in conflict with the rights of accused, obviously first should get importance. Social security is more important the accused rights and moreover, these techniques are not at all unlawful. They will just help in investigation, courts of law will decide on that basis. It is respectfully submitted that by exaggerating rights of accused obstacles should not be put into the way of scientific, efficient and effective investigation into crime.

Though it must be noted that it can destroy age-old perceptions and fortress of legal concepts but it can ensure truth as matter of direction and predictability.

[212] *People's Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363.
[213] *State of Punjab v. Karnail Singh* (2013) 11 SCC 27.

CHAPTER–III

RELEVANCE OF MEDICAL EVIDENCES IN CRIMINAL LAW- LEGISLATIVE PRINCIPLES AND DOCTRINES

As soon as a person commits and offence, various criminal laws immediately come into operation in favour and against such accused person. From the time of offence (as in the case of rape, sodomy, bestiality, murder) the medical evidence come into picture, for example the medical examination of accused person and victim, the blood, semen, viscera and lastly the post-mortem report are the glaring examples of importance, relevancy of medical evidence. Various sections of the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872, Indian Penal Code, 1960, reveals the farsightedness of the legislators that they anticipated that in future, a time may come when medical evidence will dominate the criminal and legal jurisprudence of the country and the world. Hence, an attempt has been made under this chapter to study the principles and doctrines of medical evidences in the field of criminal matters and laws.

Medical Evidence, as it has been seen, has become inevitable and there are fewer sorts of evidences which can match the accuracy of medical evidence. If the laws are to be examined, criminal law more specifically (though it cannot be said that the civil law does not have that requirement) it can be found that whatever the principle of the law is, medical evidence, wherever it is relevant, can be among the most trusted evidences, if not most trusted.

3.1 The Indian Evidence Act, 1872 :

A plain reading of Indian Evidence Act, leads towards the need of medical evidence wherever there is no direct evidence or wherever there is a conflicting views or inferences are possible. Furthermore there are occasions where the courts have gone far and have decided that there are instances when ‘medical evidence’ can be more reliable than dying declaration or direct evidence.

3.2. Provisions relating to Medical Evidence :

3.2.1 Admissibility :

As a principle, it must be noted that evidence can only becomes admissible when it falls under section 6 to 55 except few exceptions such as 112, 155 etc. Law of evidence distinguishes between 'relevancy and admissibility 'and there are occasions where legal and logical relevancy fall apart and do not go along far away. Hence this part of the chapter provides where medical evidence can be relevant and hence admissible.

Section 7[214]: Facts which are the occasion, cause or effect of facts in issue.– acts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

If we go the illustration (c) of the said section which reads as follows; "The question is, whether A poisoned B. The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts".

This illustration provides that evidence of an opportunity whether on medical grounds or otherwise may be admissible.

If it is proved by the medical evidence that there was an opportunity for committing an offence it become admissible and court may presume that the offence has been committed by the accused. Now it is up to0 the accused to rebut the same presumption.

Section 8[215]: Motive, preparation and previous or subsequent conduct.– Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any

[214] The Indian Evidence Act, 1872
[215] Ibid.

party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto. Explanation 1.–The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act. Explanation 2.–When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustration (c) of the said section also provides, "A is tried for the murder of B by poison. The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant".

Now this illustration has two parts i.e., a. where the trial is for murder by poison, b. where the question is whether the poison is same which was administered to the deceased. It is clear that the same cannot be ascertained without obtaining medical evidence.

In the same way illustration (j) of the same section provides "The question is, whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant. The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant as a dying declaration under section 32[216], clause (1), or as corroborative evidence under section 157[217]".

This illustration effectively reflects the weight age of medical evidence. If we look that the lady has been ravished. It can only be proved by giving medical evidence and then rest of the case is based on the same.

[216] *Supra Note*, 60, chapter 1, page 18
[217] Ibid.

Section 9[218]**:** "Facts necessary to explain or introduce relevant facts. – Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose".

It must be observed from the reading of the section that to support or to rebut the inference evidence may be provided which will be relevant. Medical evidence has been used as a effective tool for support or to rebut the same.

In **State of Rajasthan v. Roshan Khan and Ors.** [219] A.K. Patnaik and Gyan Sudha Misra, JJ. Held "Evidence of prosecutrix clear that all six accused-respondents committed rape on her without her consent and forcibly-Evidence of prosecutrix corroborated by evidence of informant, who had himself witnessed one accused committing rape on prosecutrix-Medical evidence also corroborates evidence of prosecutrix and informant that-there was sexual intercourse between prosecutrix and accused-respondents-Impugned judgment of High Court contrary to evidence on record- Impugned judgment of High Court acquitting accused-respondents-Set aside-Judgment of trial court convicting accused-respondents for offences under Sections 376(2)(g)[220] and 366-Restored-Sentences imposed on accused-respondents by trial court-Maintained.

The prosecutrix (P.W. 2) has deposed categorically that all the six persons had raped her without her consent and forcibly. Section 114A[221] clearly provides that in a prosecution for rape under Clause (g) of sub-section (2) of Section 376[222], where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume

[218] *Supra Note*, 60, chapter 1, page 18
[219] 2014(1)ACR781
[220] *Supra Note*, 64, chapter 1, page 21
[221] *Supra Note*, 60, chapter 1, page 18
[222] *Supra Note*, 64, chapter 1, page 21

that she did not consent. Since the prosecutrix (P.W. 2) has categorically said that sexual intercourse was committed by the accused without her consent and forcibly, the Court has to draw the presumption that she did not give consent to the sexual intercourse committed on her by the accused persons. The defence has not led any evidence to rebut this presumption. The High Court could not have therefore, held that there were circumstances to show that P.W. 2 had gone on her own and on this ground acquitted the respondents".

In **Sudhakar S/o Sukhdev Ramteke and Ors. v. State of Maharashtra**[223] the court held, "there existed evidence of sexual intercourse and the case, therefore, centers around proof of consent for sexual intercourse- Entire case centers around evidence of Prosecutrix- all what is required is to examine collective effect of the evidence of Prosecutrix and Medical examination together – Medical examination did not show the injuries consequent upon rape- Consent was a question of fact and state of mind of victim as could be gathered from circumstances around at the time of incident and conduct and behaviour of victim at relevant time - FIR, oral statement before police and statement before Court certainly leaves room for doubt as to witness being tutored and trained - Barring physical force of holding by her hand, there was no other force or threat that Prosecutrix has pleaded - Totality of evidence lead to the conclusion that intercourse was a sexual intercourse with consent of prosecutrix. It was not case of prosecution that Prosecutrix gave consent under threat. Appellants have in very clear terms stressed that some collective effect of the testimony of Prosecutrix and medical evidence reveals no amount of involvement of force - Manner in which victim had openly moved with accused persons against veracity of the victim and it is very difficult to assume that all her movements were without her consent - Judgment and order under appeal of conviction and sentence reversed and set aside - Appeal allowed".

Section 11 [224] provides," When facts not otherwise relevant become relevant. Facts not otherwise relevant are relevant–

[223] 2004 (4) MhLj 292.
[224] *Supra Note*, 60, chapter 1, page 18

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable".

It may be observed that if the medical evidence proves that there was no possibility or probability for the offence, it can be relevant under the same section

Section 14[225] provides, "acts showing existence of state of mind, or of body or bodily feeling.–Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant. Explanation 1.–A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question. Explanation 1.–A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question". Explanation 2.– But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact".

Illustration (l) provides, "(l) The question is, whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts".

Section 15 [226] provides, "Facts bearing on question whether act was accidental or intentional.–When there is a question whether an act was accidental or intentional, 1[or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.–When there is a question whether

[225] *Supra Note*, 60, chapter 1, page 18
[226] Ibid.

an act was accidental or intentional, 1[or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant".

3.3 Admissions and Confessions: Where medical evidence is relevant

Admission defined "Admission defined – An admission is a statement, 1[oral or documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Comment s Admissibility is substantive evidence of the fact Admissibility is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness".

It must be noted that admissions are used in civil and criminal both laws whereas confession has specific meaning under Evidence Act and it provides when confessions become irrelevant. Section 24[227] provides, "Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding.–A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, 1 having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.–A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable,

[227] *Supra Note*, 60, chapter 1, page 18

for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".

3.4 Circumstantial Evidence :

Section 27[228] provides, "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

This section provides ample space for relevance of medical evidence.

In **Digambar v. The State of Maharashtra**[229] T.V. Nalawade, J. held, "There were reasons for false implication of Accused and such probability could not be ruled out - In rape case, prompt F.I.R. was expected as many kinds of medical evidence could become available when there was prompt F.I.R. - In absence of corroboration and peculiar facts and circumstances of present case, it was not possible to believe prosecutrix and her father - When there was no reason for not recording statement of prosecutrix under Section 161 of CrPC, to create record of her version, some explanation was expected from prosecution - Such explanation was not available - When statements under Section 161 of CrPC, were recorded after inordinate delay and delay was not explained, then delay could create suspicion and lead to inference that version of witness was after thought or witness was tutored - Thus, on one hand such record helped prosecution to preserve versions of witnesses and on other, if record was not created immediately, inference against prosecution witnesses could be drawn - Appellant was entitled to benefit of doubt - Order of trial Court was set aside - Accused was acquitted of both offences - Appeal allowed"

In **Apurba Ghosh v. State of Jharkhand and Ors**.[230] Hari Shankar Prasad and R.K. Merathia, JJ. Held, "No contradiction in medical evidence with

[228] *Supra Note*, 60, chapter 1, page 18
[229] 2013(2) Bom CR (Cri) 450.
[230] 2005(2)BLJR1463

ocular evidence- Identification at Court reliable-Not a case of withholding evidence-Delay of two years in holding test-identification parade not a substantive piece of evidence-Identification parade is for corroboration only-Chance witness also reliable"

3.5 Medical Evidence and Dying Declaration :

Section 32[231]: Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant. –Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:

1. when it relates to cause of death. –When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

2. or is made in course of business. –When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

3. or against interest of maker. –When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would

[231] *Supra Note*, 60, chapter 1, page 18

expose him or would have exposed him to a criminal prosecution or to a suit for damages.

4. or gives opinion as to public right or custom, or matters of general interest– When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

5. or relates to existence of relationship– When the statement relates to the existence of any relationship by blood, marriage or adoption] between persons as to whose relationship by blood, marriage or adoption] the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

6. or is made in will or deed relating to family affairs– When the statement relates to the existence of any relationship by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

7. or in document relating to transaction mentioned in section 13, clause (a)– When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (a).

8. or is made by several persons, and expresses feelings relevant to matter in question– When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

In **State v. Kumari Mubin Fatima & Ors.** AND **Gulbeg Ali v. State**[232]**,** the court held in paragraph 152 "It is well settled that dying declaration is a substantive piece of evidence which can be relied on, provided it is established that the same was made voluntarily and truthfully by a person who was in a fit state of mind. If so made, conviction can be based on the dying declaration. Medical evidence and surrounding circumstances cannot be ignored and kept out of consideration by the court placing exclusive reliance upon the testimony of a person recording the dying declaration".

In **M. Sarvana @ K.D. Saravana v. State of Karnataka**[233]**,** Swatanter Kumar and Fakkir Mohamed Ibrahim Kalifulla held that medical evidence supported by dying declaration is sufficient to prove a fact.

Section 45: Opinion of experts "When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwritingor finger impressions are relevant facts. Such persons are called experts".

In **State of Himachal Pradesh v. Jai Lal and Others**[234] the Supreme Court held, "if witness made special study of subject or acquired special experience - person must be skilled and has adequate knowledge of subject - person must undergo training for particular subject - report submitted by expert does not ipso facto go in evidence - expert must be examined as witness and has to face cross examination".

In **Jitender Kumar v. State of Haryana**[235] the court held "Whether there was inordinate and unexplained delay in lodging FIR - Whether time of occurrence could not be validly related to expert medical evidence. Held, merely because an Accused had not been named in FIR would not necessarily result in his acquittal - An accused who had not been named in FIR, but to whom a definite

[232] (2013) DLT 608
[233] 2013(2) B.L.J. 321
[234]1999(3) ACR 2215 (SC),AIR 1999 SC 3318
[235]AIR 2012 SC 2488

role had been attributed in commission of crime and when such role was established by cogent and reliable evidence and prosecution was also able to prove its case beyond reasonable doubt, such an Accused could be punished in accordance with law, if found guilty".

3.6 DNA as Medical Evidence under Section 112 of the Indian Evidence Act, 1872 :

Section 112 of the Indian Evidence Act, 1872 deals with the proof of legitimacy of offspring if they are born during wedlock or within a certain period of the dissolution of marriage. In many ways it is a unique section. On the one hand, it establishes the fact of marriage as conclusive proof of the legitimacy of the children and at the same time mentions that the conclusive proof of legitimacy (i.e. marriage) can be avoided if the parties could not have begotten the child as the spouses had no access to each other.[236] The obvious purpose behind such a section would be to prevent the unnecessary bastardization of illegitimate children and the condemning of their mothers and unchaste. However, with the advent of DNA fingerprinting analysis some problems have arisen. The problem that is being referred to came up for consideration by the Supreme Court in case of **Kamti Devi v. Poshi Ram**[237]. In the facts of this case the respondent was the husband of the appellant. Fifteen years after marriage the appellant gave birth to a child. The respondent filed a civil suit for declaration that he was not the father of the said child. Though the issue was not directly in issue in the instant case, the Supreme Court opined that even a DNA test that indicated that the respondent was not the father of the child would not be enough to rebut the conclusiveness of the marriage as proof of legitimacy of the child. The Court held that the only way of rebutting the conclusive proof provision would be to adduce evidence of non–access.

---

[236] Section 112 of Indian Evidence Act – Birth during Marriage. Conclusive Proof of Legitimacy:" The fact that any person born during the continuance of the valid marriage between his mother and any man, within two hundred and eighty days after his dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, in AIR 2001 SC 2226 it can be shown, that the parties to the marriage had no access to each other at any time when he could be begotten.

[237] 2001 (5) SCC 311.

So, in light of the fact that Section 112[238] was drafted at a time when even the discovery of DNA had not been contemplated, the section should be amended. What would be ideal is that another outlet apart from proof of non–access be provided in the form of evidence of a DNA test to rebut the conclusive proof provision in Section 112[239]. The Bombay High Court has also lamented the absurdity of having only proof of non–access when DNA evidence can decide the matter in a more scientific manner.[240]

The raison deters under the Indian Evidence Act, 1872 is against the legitimization of a child and is based on public policy and that a child should not suffer on account of lapses of parents. It is also the normative legislative intention that when certain fact is considered as conclusive proof of another fact, the judiciary generally disables the party in disrupting in such proof. The only exception provided in Indian Evidence Act is in the form of an outlet to a party, who wants to escape from the rigor of that conclusiveness. In such cases, it's the DNA test, which helps the Courts to decide on the contentious issue, based on aspect of conclusiveness.[241]

Many a times, questions have been raised before the Courts in cases of DNA fingerprinting, creating a hindrance to the investigating agencies, and they are: whether a suspect, or for that matter anybody can be forced to give a blood sample for testing? And whether such a testing would be considered a violation of Article 20(3) of the Constitution of India, which protects every citizen from providing self–incriminating evidence? And whether an order forcing an individual for DNA testing would be violation of his right to privacy? And if the

[238] *Supra Note*, 60, chapter 1, page 18
[239] Ibid.
[240] *Sadashiv Mallikarjun Khedarkar v. Nandini Sadashiv Khedarkar*, 1995 Cri. LJ 4090 (Bom) at 4093 R.J. Vidyanath J. Observed as under –'There may be instances where the husband and wife are living together and the wife may have gone astray and then delivered a child through illicit connection. But in the view of legal presumption under Section 112 of Indian Evidence Act the husband cannot be allowed to prove that the child is not born to him since husband and wife are living together, even if it is proved that wife had some illicit relationship with another person. What should be done in such a case is a question death has cropped up in my mind … but if we go by rigor or presumption under Section112 of the Evidence Act no husband can be permitted to prove that the child born to the wife is not his, if the husband and wife were together even if wife is proved to be living in adultery'.
[241] *Gautam Kundu v. State of West Bengal*, (1993) 3 SCC 418.

person refuses to submit himself/herself to such test whether adverse the Court can draw inference or presumption?

Justice Jagganatha Rao, Chief Justice of the Kerala High court pointed the lacunae in this regard in 1995 in a verdict of the paternity dispute, Justice Rao pointed out in his judgments two facts:[242]

(i) DNA testing is, as yet, not considered a conclusive proof under Section 112 of the Evidence Act, 1872, and

(ii) Law has not been passed by the Parliament for such testing.

Section 112[243] uses the words, "conclusive proof and refers to non–access as the sole exception. Therefore, as the language of the section stands, no other evidence is permissible except non–access, to prove that a person is not the father. This was held in several decided cases and also recently by the Supreme Court in **Kanti Devi v. Poshi Ram.**[244] That case concerned DNA evidence but the Supreme Court refused to permit the evidence on the ground that except non–access no other evidence is permissible to prove that a person is not the father. Judgment of the Supreme Court in 1993 also highlighted the fact that there is no provision in Indian laws to force or compel people to undergo blood tests or any other type of DNA testing.

Bombay High Court in the case of **Sadashiv Malikarjun Kheradkar v. Smt. Nandini Sadashiv Kheradkar**[245]**,** held that the Court has power to direct blood examination but it should not be done as a matter of course or to have a roving inquiry. The Bombay High court even felt that there should be a suitable amendment by the Legislature and after nothing that nobody can be compelled to give blood sample, it was held that the Court can give a direction but cannot compel giving of blood sample.

---

[242] "Though the Indian Evidence Act Proposed Bill 2003 apart from the sole exception of 'non–access" other exceptions by way of blood–group tests, but subject to very stringent conditions.
[243] *Supra Note*, 60, chapter 1, page 18
[244] AIR 2001 SC 2266: 2001 Cri LJ 2615.
[245] 1995 Cri LJ 4090

In a recent case of **Mrs. Kanchan Bedi v. Shri Gurpreet Singh Bedi**[246], where the parentage of the infant was in question, and the application filed by the mother for conducting DNA the father contending that it would violate his rights vehemently opposed test. Hon'ble Vikramjit Sen, J. held that: "it appears to me to be difficult to resist that the law, as it presently stands, does not contemplate any impediment or violation of rights in directing persons to submit themselves for DNA test, especially where the parentage of a child is in controversy for the grant of maintenance. It was further held that where the parentage of a child is in controversy for the grant of maintenance, parties submitting themselves for the DNA test is not violation of rights. He relied on the decision of the Hon'ble Supreme Court in the case of **Geeta Daha v. NCT of Delhi (DB)**[247]**,** where a Division Bench of Hon'ble Supreme Court had ordered that a DNA test be conducted on a fetus of a rape victim. Hon'ble Vikramjit Sen. J. distinguished this case from the case of **Gautam Kundu v. State of West Bengal**[248]**,** where it was held that "wife cannot be forced to give blood sample and no adverse inference against her for this refusal". In **M/s. X v. Mr. Z**[249] **case**, a single Judge of Delhi High Court had allowed a similar application and had directed that at the cost of husband, the Pathology Department of All India Institute of Medical Sciences should conduct the DNA test. The DNA test was to be conducted of a fetus.

3.7 The Indian Penal Code, 1860 :

Most relevant for Medical Evidence is part XVI wherein offences against body have been provided.

Section 299[250] - Culpable homicide – Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

---

[246] AIR 2003 Delhi 446
[247] 1997(1) JCC 101
[248] 1993 Cri LJ 3233: AIR 1993 SC 2295
[249] 96 (2002) DLT 254, I (2002) DMC 448.
[250] *Supra Note*, 64, chapter 1, page 21

Section 300 [251] – Murder– Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or–

(Secondly) –If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or–

(Thirdly) –If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or–

(Fourthly) –If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Culpable homicide by causing death of person other than person whose death was intended.– If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Section 304A [252] – Causing death by negligence– 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.

Section 304B[253] - Dowry death –

[251] *Supra Note*, 64, chapter 1, page 21
[252] Ibid.
[253] Ibid.

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. Explanation.–For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

Section 305[254] - Abetment of suicide of child or insane person.–If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or imprisonment for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

Section 306[255] - Abetment of suicide.–If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 307[256] - Attempt to murder.–Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore

[254] *Supra Note*, 64, chapter 1, page 21
[255] Ibid.
[256] Ibid.

mentioned. Attempts by life convicts.–When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Section 308[257] - Attempt to commit culpable homicide.–Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Illustration A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

Section 309[258] - Attempt to commit suicide.

Section 310[259] - Thug.–Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

Section 312[260] - Causing miscarriage.

Section 313[261] - Causing miscarriage without woman's consent.

Section 314[262] - Death caused by act done with intent to cause miscarriage.

Section 315[263] - Act done with intent to prevent child being born alive or to cause it to 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

[257] *Supra Note*, 64, chapter 1, page 21
[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid.
[262] Ibid.
[263] Ibid.

causing it to die after its birth, and does by such act prevent that child from being born alive, or causes 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.

Section 316[264] - Causing death of quick unborn child by act amounting to culpable homicide. –Whoever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Illustration A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section. classification of offence Punishment– Imprisonment for 10 years and fine–Cognizable–Non-bailable–Triable by Court of Session–Non-compoundable.

Section 317[265] - Exposure and abandonment of child under twelve years, by parent or person having care of it.

Section 318[266] - Concealment of birth by secret disposal of dead body.

Section 319[267] - Hurt –Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt.

Section 320[268] - Grievous hurt. –The following kinds of hurt only are designated as “grievous”:–

(First) – Emasculation.

(Secondly) –Permanent privation of the sight of either eye.

[264] *Supra Note*, 64, chapter 1, page 21
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.

(Thirdly) – Permanent privation of the hearing of either ear,

(Fourthly) –Privation of any member or joint.

(Fifthly) – Destruction or permanent impairing of the powers of any member or joint.

(Sixthly) – Permanent disfiguration of the head or face.

(Seventhly) –Fracture or dislocation of a bone or tooth.

(Eighthly) –Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Section 321[269] - Voluntarily causing hurt.–Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Section 322[270] - Voluntarily causing grievous hurt.–Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt". Explanation.–A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing he to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind. Illustration A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which cause Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt. comments Explanation The offence of grievous hurt is not caused unless the offender both causes grievous hurt and intends, or knows himself to be likely, to cause grievous hurt[271];

[269] *Supra Note*, 64, chapter 1, page 21
[270] Ibid.
[271] *Ramkaran Mohton v. State,* AIR 1958 Pat 452

Section 323[272] - Punishment for voluntarily causing hurt.

Section 324[273] - Voluntarily causing hurt by dangerous weapons or means.

Section 325[274] - Punishment for voluntarily causing grievous hurt.

Section 326[275] - Voluntarily causing grievous hurt by dangerous weapons or means.

Section 327[276] - Voluntarily causing hurt to extort property, or to constrain to an illegal act.

Section 328[277] - Causing hurt by means of poison, etc., with intent to commit an offence.

Section 329[278] - Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

Section 330[279] - Voluntarily causing hurt to extort confession, or to compel restoration of property.–Whoever voluntarily causes hurt for the purpose of extorting from the sufferer or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Illustrations

(a) A, a police-officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this section.

(b) A, a police-officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

[272] *Supra Note*, 64, chapter 1, page 21
[273] Ibid.
[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.

(c) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

(d) A, a zamindar, tortures a raiyat in order to compel him to pay his rent. A is guilty of an offence under this section. classification of offence Punishment–Imprisonment for 7 years and fine–Cognizable–Bailable–Triable by Magistrate of the first class–Non-compoundable.

Section 331[280] - Voluntarily causing grievous hurt to extort confession, or to compel restoration of property.

Section 332[281] - Voluntarily causing hurt to deter public servant from his duty.

Section 334[282] - Voluntarily causing hurt on provocation.

Section 334[283] - Voluntarily causing hurt on provocation.

Section 335 - Voluntarily causing grievous hurt on provocation.

Section 336 - Act endangering life or personal safety of others.

Section 337 - Causing hurt by act endangering life or personal safety of others.

Section 338- -Causing grievous hurt by act endangering life or personal safety of others.

Section 339 - Wrongful restraint.–Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

(Exception) –The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an

[280] *Supra Note*, 64, chapter 1, page 21
[281] Ibid.
[282] Ibid.
[283] Ibid.

offence within the meaning of this section. Illustration A obstructs a path along which Z has a right to pass. A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

Section 341[284] - Punishment for wrongful restraint.

Section 342[285] - Punishment for wrongful confinement.

Section 343[286] - Wrongful confinement for three or more days.

Section 344[287] - Wrongful confinement for ten or more days.

Section 345[288] - Wrongful confinement of person for whose liberation writ has been issued.

Section 346[289] - Wrongful confinement in secret.

Section 347[290] - Wrongful confinement to extort property, or constrain to illegal act.

Section 348[291] - Wrongful confinement to extort confession, or compel restoration of property.

Section 349[292] - Force.–A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling: Provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion,

[284] *Supra Note*, 64, chapter 1, page 21
[285] Ibid.
[286]Ibid.
[287] Ibid.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Ibid.
[292] Ibid.

change of motion, or cessation of motion in one of the three ways hereinafter described.

(First) – By his own bodily power.

(Secondly) –By disposing any substance in such a manner that the motion or change or cessation of motion takes place without any further act on his part, or on the part of any other person.

(Thirdly) – By inducing any animal to move, to change its motion, or to cease to move.

Section 350[293]- Criminal force.–Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

Section 351[294] - Assault.–Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault. Explanation.–Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Section 352[295] - Punishment for assault or criminal force otherwise than on grave provocation.

Section 353[296] - Assault or criminal force to deter public servant from discharge of his duty.

Section 354[297] - Assault or criminal force to woman with intent to outrage her modesty.

[293] *Supra Note*, 64, chapter 1, page 21
[294] Ibid.
[295] Ibid.
[296] Ibid.
[297] Ibid.

Section 355[298] - Assault or criminal force with intent to dishonour person, otherwise than on grave provocation.

Section 356[299] - Assault or criminal force in attempt to commit theft of property carried by a person

Section 357[300] - Assault or criminal force in attempt wrongfully to confine a person.

Section 358[301] - Assault or criminal force on grave provocation.

Section 359[302] - Kidnapping.–Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.

Section 360[303] - Kidnapping from India.

Section 361[304] - Kidnapping from lawful guardianship.

Section 362[305] - Abduction

Section 363A[306] - Kidnapping or maiming a minor for purposes of begging.–

(1) Whoever kidnaps any minor or, not being the lawful guardian of a minor, obtains the custody of the minor, in order that such minor may be employed or used for the purpose of begging shall be punishable with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever maims any minor in order that such minor may be employed or used for the purposes of begging shall be punishable with imprisonment for life, and shall also be liable to fine.

[298] *Supra Note*, 64, chapter 1, page 21
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.

(3) Where any person, not being the lawful guardian of a minor, employs or uses such minor for the purposes of begging, it shall be presumed, unless the contrary is proved, that he kidnapped or otherwise obtained the custody of that minor in order that the minor might be employed or used for the purposes of begging.

(4) In this section,–

(a) 'begging' means–

(i) soliciting or receiving alms in a public place, whether under the pretence of singing, dancing, fortune-telling, performing tricks or selling articles or otherwise;

(ii) entering on any private premises for the purpose of soliciting or receiving alms;

(iii) exposing or exhibiting, with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal;

(iv) using a minor as an exhibit for the purpose of soliciting or receiving alms;

(b) 'minor' means–

(i) in the case of a male, a person under sixteen years of age; and

(ii) in the case of a female, a person under eighteen years of age.

Section 364[307] - Kidnapping or abducting in order to murder.–Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. Illustrations

(a) A kidnaps Z from India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

[307] *Supra Note*, 64, chapter 1, page 21

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

Section 364A[308] - Kidnapping for ransom, etc.

Section 365 [309] - Kidnapping or abducting with intent secretly and wrongfully to confine person.

Section 366[310] - Kidnapping, abducting or inducing woman to compel her marriage, etc.

Section 366A[311] - Procuration of minor girl.

Section 366B[312] - Importation of girl from foreign country.

Section 367[313] - Kidnapping or abducting in order to subject person to grievous hurt, slavery, etc.

Section 368 [314] - Wrongfully concealing or keeping in confinement, kidnapped or abducted person.

Section 369[315] - Kidnapping or abducting child less than ten years with intent to steal from its person.

Section 370[316] - Buying or disposing of any person as a slave.

Section 371[317] - Habitual dealing in slaves.

Section 372[318] - Selling minor for purposes of prostitution, etc.

Section 373[319] - Buying minor for purposes of prostitution, etc.

Section 374[320] - Unlawful compulsory labour.

---

[308] *Supra Note*, 64, chapter 1, page 21
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Ibid.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Ibid.
[319] Ibid.
[320] Ibid.

Section 375[321]– Rape –

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:–

(First) – Against her will.

(Secondly) –Without her consent.

(Thirdly) – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) –With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(Fifthly) – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly) – With or without her consent, when she is under sixteen years of age.

Explanation.– Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) –Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

In **Mohd. Zuber Noor Mohammed Changwadia v. State of Gujarat**[322] the court relied on medical evidence and observed, "Penetration Mere absence of

[321] *Supra Note*, 64, chapter 1, page 21
[322] 1999 Cr LJ 3419 (Guj.)

spermatozoa cannot cast a doubt on the correctness of the prosecution case" In the case of **Prithi Chand v. State of Himachal Pradesh**[323]**,** same was reiterated.

Section 376[324] - Punishment for rape.

Section 376A[325] - Intercourse by a man with his wife during separation.

Section 376B[326] - Intercourse by public servant with woman in his custody.

Section 376C[327] - Intercourse by superintendent of jail, remand home, etc.

Section 376D[328] - Intercourse by any member of the management or staff of a hospital, with any woman in that hospital.

Section 377[329] - Unnatural offences.–Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, 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. Explanation.–Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

The above mention provisions of Indian Penal Code, 1960 relating to criminal act needs witnesses or evidence to prove the offence. The gravity, force, mens rea, mental health, injuries etc. of the offence are proved easily with the help of medical evidence.

3.8 The Code of Criminal Procedure, 1973 :

The provisions relating to evidence under the Criminal procedure Code have been provided under chapter XXIII[330]: evidence in inquiries and trials

[323] (1989) Cr LJ 841; AIR 1989 SC 702
[324] *Supra Note*, 64, chapter 1, page 21
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Ibid.
[329] Ibid.
[330] *Supra Note*, 62, chapter 1, page 19

A - Mode of Taking and Recording Evidence :

Section 272 [331] - Language of Courts:- The State Government may determine what shall be, for purposes of this Code, the language of each Court within the State other than the High Court.

Section 273[332] - Evidence to be taken in presence of accused:- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

Explanation - In this Section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Section 274 [333] - Record in summons-cases and inquiries:-(1) In all summons-cases tried before a Magistrate, in all inquiries under Sections 145 to 148[334] (both inclusive), and in all proceedings under Section 446[335] otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the Court:

Provided that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made in writing or from his dictation in open Court.

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record.

Section 275[336] - Record in warrant-cases:-(1) In all warrant-cases tried before a Magistrate, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or by his

[331] *Supra Note*, 62, chapter 1, page 19
[332] Ibid.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Ibid.

dictation in open Court or, where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Where the Magistrate causes the evidence to be taken down, he shall record a certificate that the evidence could not be taken down by him for the reasons referred to in sub-section (1).

(3) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion take down or cause to be taken down, any part of such evidence in the form of question and answer.

(4) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

Section 276[337] - Record in trial before Court of Session:-(1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the presiding Judge himself or by his dictation in open Court, or under his direction and superintendence, by an officer of the Court appointed by him in this behalf.

(2) Such evidence shall ordinarily be taken down in the form of a narrative, but the presiding Judge may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record.

Section 277. Language of record of evidence:- In every case where evidence is taken down under Sections 275[338] and 276[339]:-

(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;

[337] *Supra Note*, 62, chapter 1, page 19
[338] Ibid.
[339] Ibid.

(b) if he gives evidence in any other language, it may, if practicable, be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record;

(c) where under Clause (b) evidence is taken down in a language other than the language of the Court, a true transaction thereof in the language of the Court shall be prepared as soon as practicable, signed by the Magistrate or presiding Judge, and shall form part of the record:

Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties, the Court may dispense with such translation.

Section 278[340] - Procedure in regard to such evidence when completed.- (1)As the evidence of each witness taken under Section 275 or Section 276 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or presiding Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands.

Section 279[341] - Interpretation of evidence to accused or his pleader :

[340] *Supra Note*, 62, chapter 1, page 19
[341] Ibid.

(1) Whenever any evidence is given in a language not understood by the accused, and he is present in Court in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

Section 280 [342] - Remarks respecting demeanour of witness:-When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Section 281[343] - Record of examination of accused :

(1) Whenever the accused is examined by a Metropolitan Magistrate, the Magistrate shall make a memorandum of the substance of the examination of the accused in the language of the Court and such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate other than a Metropolitan Magistrate, or by a Court of Session, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full by the presiding Judge or Magistrate himself or where he is unable to do so owing to a physical or other incapacity, under his direction and superintendence by an officer of the Court appointed by him in this behalf.

(3) The record shall, if practicable, be in the language in which the accused is examined, or if that is not practicable, in the language of the Court.

[342] *Supra Note*, 62, chapter 1, page 19
[343] Ibid.

(4) The record shall be shown or read to the accused, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) It shall thereafter be signed by the accused and by the Magistrate or presiding Judge, who shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person in the course of a summary trial.

Section 282[344] - Interpreter to be bound to interpret truthfully:- When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

Section 283[345] - Record in High Court:- Every High Court may, by general rule, prescribe the manner in which the evidence of witnesses and the examination of the accused shall be taken down in cases coming before it, and such evidence and examination shall be taken down in accordance with such rule.

Section 284[346] - When attendance of witness may be dispensed with and commission issued :

(1)Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may

[344] *Supra Note*, 62, chapter 1, page 19
[345] Ibid.
[346] Ibid.

dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this chapter:

Provided that where the examination of the President or the Vice-President of India or the Governor of a State; or the Administrator of a Union Territory as a witness is necessary for the ends of Justice, a commission shall be issued for the examination of such a witness.

(2) The Court may, when issuing a commission for, the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution.

B - Commissions for Examination of Witnesses :

Section 285[347] - Commission to whom to be issued :- (1) If witness is within the territories to which this Code extend the commission shall be directed to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found.

(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission, shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.

(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission as the Central Government may, by notification, prescribed in this behalf.

Section 286 [348] - Execution of commissions:- Upon receipt of the Commission, the Chief Metropolitan Magistrate, or Chief Judicial Magistrate, or

[347] *Supra Note*, 62, chapter 1, page 19
[348] Ibid.

such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials or warrant cases under this Code.

Section 287[349] - Parties may examine witnesses :-(1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission, is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

(2) Any such party may appear before such magistrate, Court or Officer by Pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

Section 288[350] - Return of Commission:- (1) After any commission issued under Section 284[351] has been duly executed, it shall be returned, together with the deposition of the witness examined there under, to the Court or Magistrate issuing the commission, and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by Section 33 of the Indian Evidence Act, 1872 (1 of 1872), may also be received in evidence at any subsequent stage of the case before another Court.

Section 289[352] - Adjournment of proceeding:- In every case in which a commission is issued under Section 284[353], the inquiry, trial or other proceeding

[349] *Supra Note*, 62, chapter 1, page 19
[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] Ibid.

may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

Section 290[354] - Execution of foreign commissions:- (1) The Provisions of Section 286[355] and so much of Section 287[356] and Section 288 as relate to the execution of a commission and its return shall apply in respect of commissions issued by any of the Courts, Judges or Magistrates hereinafter mentioned as they apply to commissions issued under Section 284[357].

(2) The Courts, Judges and Magistrates referred to in sub-section (1) are-

(a) any such Court, Judge or Magistrate exercising jurisdiction within an area in India to which this Code does not extent, as the Central Government may, by notification, specify in this behalf;

(b) any Court, Judge or Magistrate exercising jurisdiction in any such country or place outside India, as the Central Government may, by notification, specify in this behalf, and having authority, under the law in force in that country or place, to issue commissions for the examination of witnesses in relation to criminal matters.

Section 291[358] - Deposition of medical witness:- (1) The deposition of a civil surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under this chapter, may be given in evidence in any inquiry, trial or other proceeding under this code, although the deponent is not called as witness.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such deponent as to the subject-matter of his deposition.

---

[354] *Supra Note*, 62, chapter 1, page 19
[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Ibid.

Section 292[359] - Evidence of Officers of the Mint : - (1) Any document purporting to be a report under the hand of any such Gazetted Officer of the Mint or of the Indian Security Press (including the Officer of the Controller of Stamps and stationery) as the Central Government may, by notification, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

(2) The court may, if it thinks fit, summon and examine any such officer as to be the subject-matter of his report:

Provided that no such officer shall be summoned to produce any records on which the report is based.

(3) Without prejudice to the provisions of Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), no such officer shall, except with the permission of the Master of the Mint or the Indian Security Press or the Controller of Stamps and Stationery, as the case may be, permitted,

(a) to give any evidence derived from any unpublished official records on which the report is based ; or

(b) to disclose the nature or particulars of any test applied by him in the course of the examination of the matter or thing.

Section 293[360] - Reports of certain Government scientific experts-:-(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this Section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any, inquiry, trial or other proceeding under this Code.

[359] *Supra Note*, 62, chapter 1, page 19
[360] Ibid.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court, and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This Section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government

(b) the Chief Inspector of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director Haffkeine Institute, Bombay ;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government.

Section 294[361] - No formal proof of certain documents:-Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this

[361] *Supra Note*, 62, chapter 1, page 19

Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

Section 295[362] - Affidavit in proof of conduct of public servant:- When any application is made to any Court in the course of any inquiry, trial or other proceedings under this Code, and allegations are made therein respecting any public servant the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts to be given.

Section 296[363] - Evidence of formal character on affidavit:- (1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summons and examine any such person as to the facts contained in his affidavit.

Section 297[364] - Authorities before whom affidavits may be sworn:- (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before,-

(a) any Judge or Judicial or Executive Magistrate, or

(b) any commissioner of Oaths appointed by a High Court or Court of Session, or

(c) any notary appointed under the Notaries Act, 1952 (53 of 1952).

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has

[362] *Supra Note*, 62, chapter 1, page 19
[363] Ibid.
[364] Ibid.

reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

Section 298[365] - Previous conviction or acquittal how proved:- In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force,-

(a) by an extract certified under the hand of the officer having the custody, of the records of the Court in which such conviction or acquittal was held, to be a copy of the sentence or order; or

(b) in case of a conviction, either by a certificate signed by the officer in charge of the Jail in which the punishment or any part thereof was undergone, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

Section 299[366] - Record of evidence in absence of accused:- (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial, such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

[365] *Supra Note*, 62, chapter 1, page 19
[366] Ibid.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

Further, it must be observed that there are provisions under the Code of Criminal Procedure, 1973 wherein, if any exigency arises police and accused both are empowered for the medical examination.

Section 53[367] - Examination of accused by medical practitioner at the request of police officer.-

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

Explanation.- In this section and in section 54, "registered medical practitioner" means a medical practitioner who possesses any recognized medical qualification as defined in clause (h) of section 2 of the Indian Medical Council

[367] *Supra Note*, 62, chapter 1, page 19

Act, 1956,(102 of 1956) and whose name has been entered in a State Medical Register.

Section 54[368] - Examination of arrested person by medical practitioner at the request of the arrested person.-

When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which will establish the commission by any other person of any offence against his body, the Magistrate shall, if requested by the arrested person so to do direct the examination of the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of justice.

3.9 Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 :

The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, was enacted and brought into operation from 1st January, 1996, in order to check female foeticide.

Subsection 3 of section 4 of the Act provides, "(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:-

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals; (iv) the pregnant woman

[368] *Supra Note*, 62, chapter 1, page 19

has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;

(v) any other condition as may be specified by the Central Supervisory Board.

In Dr. (Mrs.) Suhasini Umesh Karanjkar, through her Constituted **Attorney Dr. Umesh Murlidhar Karanjkar v. Kolhapur Municipal Corporation through its Health Officer and Appropriate Authorities and The District Collector**[369], the court held that under Section 30 of the Act includes power to search, seize and seal an ultrasound machine or any other machine or equipment, if Appropriate Authority or Authorised Officer has reason to believe that it may furnish evidence of the commission of an offence punishable under the Act .Held, bare perusal of the Act and Rules makes it clear that person conducting ultrasound has to maintain records in manner prescribed in Rules and deficiency or inaccuracy in maintaining such records would amount to an offence".

In **Marcus CONANT case** [370] SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges held that The history of the litigation demonstrates that the injunction is not intended to limit the government's ability to investigate doctors who aid and abet the actual distribution and possession of marijuana 21 U.S.C. § 841(a). The government has not provided any empirical evidence to demonstrate that this injunction interferes with or threatens to interfere with any legitimate law enforcement activities. Nor is there any evidence that the similarly phrased preliminary injunction that preceded this injunction, **Conant v. McCaffrey** [371] , which the government did not appeal, interfered with law enforcement. The district court, on the other hand, explained convincingly when it entered both the earlier preliminary injunction and this permanent injunction, how the government's professed enforcement policy threatens to interfere with expression protected by the First Amendment.[372]

[369] 2011(4) ALL MR 804.
[370] 309 F.3d 629
[371] 172 F.R.D. 681 (N.D.Cal. 1997).
[372] Ibid

The Narcotic Drugs and Psychotropic Substances Act, 1985 is also among the Acts wherein medical evidence plays a role of decisive nature.

The medical opinion has great bearing and is of great assistance in the trial of criminal cases. It greatly helps the prosecution in establishing its case by soliciting corroboration from it by showing that the injuries could have been caused by the alleged weapon of offence by the accused persons in the manner alleged. The accused persons with the assistance of medical evidence try to demolish the prosecution story by showing that the injuries could not have been caused by the alleged weapon of offence or the death could not have occured in the manner alleged by the prosecution.

The medical opinion is merely of advisory nature. It is based on the observations made by the medical officer of the body of the injured and the corpse after the occurrence has taken place. In certain ways, medical opinion can be said to be direct evidence as by the colour of the injuries, the presence/absence of rigor mortis in the corpse, the presence of the tattooing marks, state of nature of the food digested/semi-digested/or undigested noted by the medical officer immediately after the incident. The time of the occurrence, is determined.[373]

Since witnesses are the eyes and ears of justice, the oral evidence has primacy over the medical evidence. If the oral testimony of the witnesses is found reliable, creditworthy and inspires confidence, the oral evidence has to be believed, it cannot be rejected on hypothetical medical evidence.

The medical opinion pointing to alternative possibilities cannot be accepted as conclusive. Unless the medical evidence completely rules out the prosecution story, the oral evidence if otherwise reliable cannot be rejected.

The medical officer being an expert witness, his testimony has to be assigned great importance. However, there is no irrebutable presumption that a

[373] J.T.R.I. JOURNAL, First Year, Issue–3, Year July–September, 1995

medical officer is always a witness of truth, his testimony has to be evaluated and appreciated like the testimony of any other ordinary witness[374].

Thus, we see that expert evidence helps the courts to draw logical conclusions from the facts presented by experts, which are based on their opinions derived by their specialized skills acquired by study and experience. Hence, experts are routinely involved in the administration of justice particularly in criminal courts.

It may be concluded that medical evidence if made applicable and admissible, has a vast role to play and can lead us to truth.

[374] *Supra Note*, 160, chapter 3, page 125

CHAPTER–IV

RELEVANCE OF MEDICAL EVIDENCES IN CIVIL LAW– LEGISLATIVE PRINCIPLES AND DOCTRINES

The necessity and requirement of medical evidence has now-a-days been increased and increasing day by day, so much so, that it left behind the opinion of "Third Person" in the civil matters. Medical evidence plays a very significant role in the detection of any crime; it acts as an aid/tool to the investigation process. It's a science through which all physical evidences are collected and tested by forensic experts. It has been viewed as alas many of the cases and the reports of medical reports play a very important role not only in terms of criminal justice system but also in terms of civil and other matters. Physical evidences should be collected from the scene of crime in a proper manner, so that experts should be able to conduct the test of physical relevant evidences in the laboratories with proper reports.

There are many categories of medical science which includes Forensic medicine, Ballistics, Fingerprints, Question Documents, Voice Analysis, Narco-analysis, etc. There are various forensic laboratories wherein, all the tests are conducted. A year back in New Delhi, a former minister's wife was found dead in a hotel in an unstable condition. In this case, medical experts have played a very vital role; they have tested all the physical evidences, mainly, toxicology and pathology.[375] Thereby, it can be said that forensic science plays an important role as an aid to the courts to arrive to justice.

Under Hindu law, Muslim law, Transfer of Property Act, 1882. Contract law and the recent legislations like Consumer Protection Act, 1986, Competition Act, 2002 and the like, "medical evidence" is proving a helping hand to the needy, for example, if the consumer has become ill by consuming defective and contaminated good, he can only get relief if he has made "medical evidence" as his only supporter and helper. Hence, an attempt has been made under this chapter

[375] Maithil B. P., Physical Evidence in Criminal Investigation and Trials, 1st Edition, Selective and Scientific Books, Delhi, India, (2012) pp. 5-45.

to discuss the relevancy of medical evidence with reference to civil matter and issues.

Civil Procedure Code, 1908 may be read along with Evidence Act, 1872. Since the definition, relevancy and admissibility are discussed in the Evidence Act, for the purpose of evidentiary value the said may be considered, but for the other procedural aspect such when evidence can be produced and when it is denied, may be decided by considering the Civil Procedure Code, 1908. There are provisions and cases which deal with medical evidence namely:

4.1 Order XVI : Summoning and Attendance of Witnesses:

Rule 1. List of witnesses and summons to witnesses[376]

1. On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

2. A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

3. The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

4. Subject to the provisions of sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

[376] Substituted by Act No. 104 of 1976, for former rule 1, w.e.f. 1st February, 1977.

Rule 1A. Production of witnesses without summons[377]

A Subject to the provisions of sub-rule (3) of rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.]

Rule 2. Expenses of witness to be paid into Court on applying for summons

1. The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

2. **Experts**- In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

3. **Scale of expenses**- Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

4. **Expenses to be directly paid to witnesses**- Where the summons is served directly by the party on a witness, the expenses referred to in sub-rule (1) shall be paid to the witness by the party or his agent. [378]

Rule 3. Tender of expenses to witness

The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

[377] Substituted by Act No. 104 of 1976, for former rule 1A, w.e.f. 1st February, 1977.
[378] Inserted by Act No. 104 of 1976, w.e.f.. 1st February, 1977.

Rule 4. Procedure where insufficient sum paid in

1. Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

2. Expenses of witnesses detained more than one day- Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the removable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Rule 5. Time, place and purpose of attendance to be specified in summons

Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Rule 6. Summons to produce document

Any person may be summoned to produce a document, without being summoned to give evidence, and any person summoned merely to produce a

document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Rule 7. Power to require persons present in Court to give evidence or produce document: Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Rule 7A. Summons given to party for service[379]

(1) The Court may, on the application of any party for the issue of a summons for the attendance of any person, permit such party to effect service of such summons on such person and shall, in such a case, deliver the summons to such party for service.

(2) The service of such summons shall be effected by or on behalf of such party by delivering or tendering to the witness personally a copy thereof signed by the Judge or such officer of the Court as he may appoint in this behalf and sealed with the seal of the Court.

(3) The provisions of rules 16 and 18 of Order V shall apply to a summons personally served under this rule as if the person effecting service were a serving officer.

(4) If such summons, when tendered, is refused or if the person served refuses to sign and acknowledgement of service or for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in the same manner as a summons to a defendant.

(5) Where a summons is served by a party under this rule, the party shall not be required to pay the fees otherwise chargeable for the service of summons.

[379] Inserted by Act No. 104 of 1976, w.e.f.. 1st February, 1977.

Rule 8. Summons how served

Every summons [under this Order, not being a summons delivered to a party for service under rule 7A,[380] shall be served as nearly as may be in the same manner as a summons to a defendant and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

Rule 9. Time for serving summons

Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Rule 10. Procedure whose witness fails to comply with summons

(1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons[381], the Court-

(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named

[380] Substituted by Act No. 104 of 1976, w.e.f. 1st February, 1977.
[381] Substituted by Act No. 104 of 1976, for former rule 1, w.e.f. 1st February, 1977.

therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which. may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

Rule 11. If witness appears attachment may be withdrawn

Where, at any time after the attachment of his property, such person appears and satisfies the Court,-

a) that he did, not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and

b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend, the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

Rule 12. Procedure if witness fails to appear

a. The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case[382], and may order his property, or any part thereof, to the attached and sold or, if already attached under rule 10,

[382] Rule 21 renumbered as sub-rule (1) of that rule by Act No. 104 of 1976, w.e.f. 1st February, 1977.

to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

b. Notwithstanding that the Court has not issued a proclamation under sub-rule (2) of rule 10, nor issued a warrant nor ordered attachment under sub-rule (3) of that rule, the Court may impose fine under sub-rule (1) of this rule after giving notice to such person to show cause why the fine should not be imposed.[383]

Rule 13. Mode of attachment

The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached were a judgment-debtor.

Rule 14. Court may of its own accord summon as witnesses strangers to suit

Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary [to examine any person, including a party to the suit][384] and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed, and may examine him as a witness or require him to produce such document.

Rule 15. Duty of persons summoned give evidence or produce document

Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for

[383] Inserted by Act No. 104 of 1976, w.e.f.. 1st February, 1977.
[384] Substituted by Act No. 104 of 1976, w.e.f. 1st February, 1977.

that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

Rule 16. When they may depart

1. A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

2. On the application of either party and the payment through the Court of all necessary expenses (if any), the. Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

Rule 17. Application of rule 10 to 13

The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

Rule 18. Procedure where witness apprehended cannot give evidence or produce document: Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

Rule 19. No witness to be ordered to attend in person unless resident within certain limits:

No one shall be ordered to attend in person to give evidence unless he resides-

a) within the local limits of the Court's ordinary original jurisdiction, or

b) without such limits but at a place less than [one hundred][385] or (where there is railway or steamer communication or other. established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than [five hundred kilometers][386] distance from the court-house :

[Provided that where transport by air is available between the two places mentioned in this rule and the witness is paid the fare by air, he may be ordered to attend in person.][387]

Rule 20. Consequence of refusal of party to give evidence when called on by Court: Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Rule 21. Rules as to witnesses to apply to parties summoned:

Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable.

4.2 Legal Issues:

Invention of medical technology has been found to be extremely useful in civil proceedings. Some of the areas in which medical evidence has rendered great help are:

4.2.1 Law relating to Parentage related Issues- Paternity and Maternity:

Parentage identification deals with paternity/maternity, legitimacy of the child etc. in child abandonment cases DNA test is necessary to prove child's maternity. Property disputes, inheritance, maintenance, rape and many other

[385] Substituted by Act No. 104 of 1976, for the words "fifty", w.e.f. 1st February, 1977.
[386] Substituted by Act No. 104 of 1976, for the words "two hundred miles", w.e.f. 1st February, 1977.
[387] Inserted by Act No. 104 of 1976, w.e.f.. 1st February, 1977.

issues. DNA is necessary to reach the finality and justness of the issue. It is, however, not clear whether DNA test can be used in cases governed by Section 112 of the Indian Evidence Act, 1872.

The Rule of Law based on the dictates of the Justice has always made the Courts incline towards upholding the legitimacy of the child, unless the facts are so conclusive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such the legitimacy of the child is rank justice to the father. Courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender material, which will have the effect of branding a child as a bastard and his mother as unchaste women.[388] In view of the provision of Section 112 of the Evidence Act, 1872, there is no scope of permitting the husband to avail of blood test for dislodging the presumption of legitimacy and paternity arising out of the section.[389] Blood group test to determine the paternity of a child born during wedlock is not permissible.[390]

The Hon'ble Supreme Court in **Gautam Kundu v. State of West Bengal**[391], laid some guidelines regarding permissibility of blood tests to prove paternity:

1. That the Courts in India cannot order blood test as a matter of course.
2. Whenever applications are made for such prayers in order to have roving inquiry, the prayer for the blood test cannot be entertained.
3. There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of Indian Evidence Act, 1872.
4. The Court must carefully examine as to what would be the consequences of ordering the blood test.
5. No one can be compelled to give sample for analysis.

---

[388] *Smt. Dukhtar Jahan v. Mohammad Farooq*, AIR 1987 SC 1049.
[389] *Gautam Kundu v. Shaswati Kundu*, Criminal Revision No. 800/92 (Cal).
[390] *Tushar Roy v. Shukla Roy*, 1993 Cri LJ 1659 (Cal).
[391] AIR 1993 SC 2295.

As compared to position in England, where keeping pace with modern thinking on the continuing and shared responsibility of parenthood, the Family Reforms Act, 1969 was replaced by the Family Reforms Act, 1987 which enabled the judiciary to determine the parentage rather than paternity.

4.2.2 Adultery-

Section 497 of Indian Penal Code, 1860 deals with adultery. In cases of adultery, if the married woman got conceived, suppressed this fact of pregnancy from her husband so on so forth, the husband could easily get confirmed of such pregnancy of his wife through her paramour. Further to know the chastity of the women and the sacredness of the nuptial contact, the DNA is very much needed to ascertain the truth or otherwise of such suspected pregnancy and infidelity of the wife, the husband can take the very extreme step of killing her. Hence to avoid such unfortunate incidents, DNA test can prove helpful.

4.2.3 Inheritance and Succession :

Under Hindu Marriage Act, 1955 an illegitimate child (legitimized by the virtue of Section 16) inherits the property of his parent's property in which the father is the coparcener.[392] Thus, under such circumstances to establish the legitimacy or illegitimacy of such children and to inherit the property, the DNA test is the only perfect medical evidence for in heritance or non-inheritance of the properties.

4.2.4 Maintenance :

Section 125 of the Code of Criminal Procedure, 1973 states that it's the duty of the man to maintain his wife, legitimate or illegitimate children, parents as long as they can't maintain themselves. So the man can take the defence that the children doest belong to him. So in these situations DNA test provide the ultimate conclusive remedy to determine the paternity and maternity of the child, so that he can claim maintenance.

[392] *Perumal Gounder v. Pachappan*, AIR 1990 Mad 110.

All these legal issues are solved with the help of medical science and medical evidences.

4.3 The Consumer Protection Act, 1986 :

The Consumer Protection Act, 1986 sought to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

It also sought, inter alias, to promote and protect the rights of consumers such as-

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers: and

(f) right to consumer education.

These objects were sought to be promotes and protected by the Consumer Protection Council to be established at the Central and State level.

To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central level. These quasi-judicial bodies will observe the principles of natural justice and have

been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided.

Section 2 (1) (d)[393] deals with the term 'consumer' which reads as follows;

"(d) "consumer" means any person who, -

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose;

(g) deals with the term "*Deficiency*" which means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service; and 2 (o)[394] defines 'service' which reads as follows ;

"service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking,

[393] Consumer Protection Act, 1986.
[394] Ibid.

financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service; "spurious goods and services" mean such goods and services which are claimed to be genuine but they are actually not so.

4.3.1 Duties owed by Medical Practitioner :

In general, a professional man owes to its client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. Medical practitioners from all fields of medicine such as Allopathic, Homeopathy, Naturopathy can be liable under the Consumer Protection Act. Duties which a doctor owes to his patient are clear.

1. A duty of care in deciding whether to undertake the case.
2. A duty of care in deciding what treatment to give.
3. A duty of care in the administration of that treatment.
4. A breach of any of these duties gives a right of action for negligence to the patient.

The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judge in the light of the particular circumstances of each case is what the law requires.

4.3.2 Services Covered- When does a Medical Service Fall under the Consumer Protection Act :

A medical service falls under the purview the Consumer Protection Act in the following cases:

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.

Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services.

Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge, irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be “service” and the recipient a “consumer” under the Act.

Service rendered at a Government hospital/health center/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be “service” and the recipient a “consumer” under the Act.

Service rendered by a medical practitioner or hospital/nursing home if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company.

Where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute service.

4.3.3 Services Not Covered- When does a medical service not fall under the Consumer Protection Act :

A medical service does not fall under the purview of the Consumer Protection Act in the following cases:

Where service is rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing

home where such services are rendered free of charge to everybody. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

Where a service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service. The payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.

4.4 Remedies :

4.4.1 Remedies available in case of Medical Negligence :

A consumer has the option to approach the Consumer Forums to seek speedy redressal of his grievances or file a criminal complaint.[395]

In **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.[396],** the Supreme Court of India has an occasion to examine the issue relating to medical negligence based on the medical evidence. The court observed the difference between the civil and criminal liability and has observed "For criminal prosecution of a medical professional for negligence, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. *Whereas in civil law burden of proof is not so strict.(Italics supplied.)*

In **Qamar Jahan and Ors. v. Nisar Ahmad Tyagi and Ors.[397],** the Supreme Court of India relied on evidence regarding the issue of medical negligence and observed, "It can be seen from the order dated 26.7.2010 that the right to file rejoinder was closed, and right to file affidavit in chief examination was also closed. The question of affidavit in chief examination arises only after

[395] HELPLINE LAW LEGAL SOLUTIONS WORLDWIDE
[396] AIR 2010 SC 1162.
[397] 2015 (2) RCR (Civil) 641.

the pleadings are complete. On the date of passing the impugned order dated 26.7.2010, apparently, the pleadings were not complete. Therefore, on that day, the National Commission could have, at best, forfeited the permission to file rejoinder or passed an order to the effect that in the absence of any rejoinder, pleadings are deemed to be complete, and then an opportunity should have been granted to the Appellants to lead evidence. Even thereafter, in case, there is no evidence, instead of dismissing the appeal for want of evidence, an opportunity of hearing to the Appellants on the basis of the material already available on the record of the case should have been given by the National Commission, and then should have decided the complaint on merits. No doubt, the complaint is of the year 2000 but the fact remains that service was affected on Respondent Nos. 3 and 4 only towards the end of the year 2009, and they filed their written statement on 14.1.2010".[398]

4.4.2 Recent Supreme Court Judgment :

The recent judgment pronounced in **Martin F. D'Souza v. Mohd. Ishfaq**[399] by the Hon'ble Supreme Court of India quite explicitly addresses the concerns of medical professionals regarding the adjudicatory process that is to be adopted by Courts and Forums in cases of alleged medical negligence filed against Doctors.

In March 1991, the Respondent who was suffering from chronic renal failure was referred by the Director of Health Services to the Nanavati Hospital in Mumbai for the purpose of a kidney transplant. At that stage, the Respondent was undergoing hemodialysis twice a week and was awaiting a suitable kidney donor. On May 20, 1991, the Respondent approached the Appellant doctor with a high fever, but he refused hospitalization despite the advice of the Appellant. On May 29, 1991 the Respondent who still had a high fever finally agreed to get admitted into the hospital due to his serious condition. On June 3, 1991, the reports of the urine culture and sensitivity showed a severe urinary tract infection due to Klebsiella species (1 lac/ml) sensitive only to Amikacin and Methenamine

[398] Ibid
[399] 2009; (2) Supreme Court 40

Mandelate. Methnamine Mandelate cannot be used in patients suffering from renal failure. Since the urinary infection was sensitive only to Amikacin, an injection of Amikacin was administered to the Respondent for 3 days (from June 5, 1991 to June 7, 1991). Upon treatment, the temperature of the Respondent rapidly subsided. On June 11, 1991, the Respondent who presented to the hemodialysis unit complained to the Appellant that he had slight tinnitus (ringing in the ear). The Appellant has alleged that he immediately told the Respondent to stop taking the Amikacin and Augmentin and scored out the treatment on the discharge card. However, despite express instructions from the Appellant, the Respondent continued taking Amikacin until June 17, 1991. Thereafter, the Respondent was not under the treatment of the Appellant. On June 14, 1991, June 18, 1991, and June 20, 1991 the Respondent received hemodialysis at Nanavati Hospital and allegedly did not complain of deafness during this period. On June 25, 1991, the Respondent, on his own accord, was admitted to Prince Aly Khan Hospital. The Complainant allegedly did not complain of deafness during this period and conversed with doctors normally, as is proved from their evidence. On July 30, 1991, the Respondent was operated upon for a transplant and on August 13, 1991, the Respondent was discharged from Prince Aly Khan Hospital after his transplant. The Respondent returned to Delhi on August 14, 991 after his discharge.

On July 7, 1992, the Respondent filed a complaint before the National Consumer Disputes Redressal Commission, New Delhi claiming compensation of an amount of Rs.12,00,000/- as his hearing had been affected. The Appellant filed his reply stating, inter alia, that there was no material brought on record by the Respondent to show any co-relationship between the drugs prescribed and the state of his health. The National Consumer Disputes Redressal Commission passed an order on October 6, 1993 directing the nomination of an expert from the All India Institute of Medical Sciences, New Delhi (AIIMS) to examine the complaint and give an unbiased and neutral opinion. AIIMS nominated Dr. P. Ghosh who was of the opinion that the drug Amikacin was administered by the Appellant as a life-saving measure and was rightly used. It is submitted by the Appellant that the said report further makes it clear that there has been no

negligence on the part of the Appellant. However, the National Commission has come to the conclusion that the Doctor was negligent.

4.3.3 Supreme Court's Appreciation with Regard to Medical Negligence Liability :

According to the Supreme Court, cases both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals complaining of medical negligence against doctors, hospitals, or nursing homes, hence the latter would naturally like to know about their liability. The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decisions of this Court in **Jacob Mathew *v.* State of Punjab and Anr[400].** However, difficulties arise in the application of those general principles to specific cases. For instance, in paragraph 41 of the decision, it was observed that: "The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires". Now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care. To give another example, in paragraphs 12 to 16 of Jacob Mathew's case (Supra), it has been stated that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. For civil liability only, damages can be imposed by the Court but for criminal liability the Doctor can also be sent to jail (apart from damages that may be imposed on him in a civil suit or by the Consumer Fora). However, what is simple negligence and what is gross negligence may be a matter of dispute even among experts.

The law, like medicine, is an inexact science. One cannot predict with certainty an outcome in many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge who is hearing the case. However, the broad and general legal principles relating to

[400] (2005) 6 SCC 1.

medical negligence need to be understood. Before dealing with these principles two things have to be kept in mind:

1. Judges are not experts in medical science, rather they are laymen. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges usually have to rely on the testimonies of other doctors, which may not be objective in all cases. Since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand for a Judge, particularly in complicated medical matters, and

2. a balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counter-productive and are no good for society. They inhibit the free exercise of judgment by a professional in a particular situation.

4.5 The Reasoning and Decision :

In the words of the Supreme Court, the facts of the case reveal that the Respondent was suffering from chronic renal failure and was undergoing hemodialysis twice a week as treatment. He was suffering from a high fever but he refused to get admitted into the hospital despite the advice of the Appellant. The Respondent was also suffering from a severe urinary tract infection that could only be treated by Amikacin or Methenamine Mandelate. Since Methenamine Mandelate cannot be used for patients suffering from renal failure, an injection of Amikacin was administered. A perusal of the complaint filed by the Respondent before the National Commission shows that his main allegation was that he suffered from a hearing impairment due to the negligence of the Appellant who allegedly prescribed an overdose of Amikacin injections with no regard for the critical condition of the Respondent who did not warrant such heavy dosage.

The case of the Appellant, however, is that the Complainant was referred to the Appellant by Dr. F.P. Soonawalla, the renowned Urologist of Bombay. Dr. Soonawalla is an eminent doctor of international repute and he would not have ordinarily referred a patient to an incompetent doctor. This is one factor that goes in favor of the Appellant, though of course it is not conclusive. After examining the Complainant, the Appellant found that the Complainant was a patient of chronic renal failure due to bilateral polycystic kidneys and the Appellant advised hemodialysis twice a week as an out-patient. The Complainant was also investigated to find a suitable kidney donor. The Appellant has alleged in his written statement filed before the National Commission that the Complainant was in a hurry to have a quick kidney transplant and he was very obstinate, stubborn, and short-tempered.

The Appellant was of the view that the Respondent's infection could only be treated by an injection of Amikacin, as Methenamine Mandelate could not be used due to his chronic renal failure. The Respondent's report also established his resistance to all other antibiotics. In our opinion, it is clear that the Respondent already had renal failure before the injection of Amikacin. Amikacin was administered after a test dosage only from June 5, 1991 and at this stage he did not complain of any side effects and his temperature subsided rapidly. On June 11, 1991, the Respondent complained to the Appellant of slight tinnitus or ringing in the ear. The Appellant immediately reviewed the treatment on the discharge card in possession of the Respondent and also asked his attendant i.e., his wife, to stop the injection of Amikacin and Cap. Augmantine verbally and also marked an X on the discharge card in his own handwriting on June 11, 1991 i.e., 3 days after discharge. Hence, as per the direction of the Appellant, the Respondent should have stopped receiving injections of Amikacin after June 10, 1991, but on his own he kept taking Amikacin injections. On perusal of the copies of the papers from the Cash Memo supplied by the Respondent as per annexure 4, it is in our opinion evident that the Respondent continued to take the medicine against the advice of the Appellant, and had unilaterally been getting injected as late as June 17, 1991, i.e., 7 days after he had been instructed verbally and in writing in the presence of his attendant i.e., his wife and staff members of the hospital to stop injections of

Amikacin/Cap. Augmantine because of tinnitus as early as June 11, 1991. From the above facts, it is evident that the Appellant was not to blame in any way and it was the non cooperative attitude of the Respondent and his continuing with the Amikacin injections even after June 11, 1991 that was the cause of his ailment, i.e., the impairment of his hearing. A patient who does not listen to his doctor's advice often has to face adverse consequences. It is evident from the fact that the Respondent was already seriously ill before he met the Appellant. There is nothing to show from the evidence that the Appellant was in any way negligent, rather it appears that the Appellant did his best to give good treatment to the Respondent to save his life but the Respondent himself did not cooperate.

Several doctors have been examined by the National Commission and we have read their evidence, which is on record. Apart from that, there is also the opinion of Prof. P. Ghosh of the All India Institute of Medical Sciences who had been nominated by AIIMS as requested by the Commission, which is also on record. The opinion of Dr. Ghosh was that there were many factors in the case of renal diseases that cause hearing loss and it is impossible to foretell the sensitivity of a patient to a drug, thereby making it difficult to assess the contributions towards toxicity by the other factors involved. He has also opined that the Amikacin dose of 500 mg twice a day for 14 days prescribed by the doctor was a life-saving measure and the Appellant did not have any option but to take this step. Life is more important than saving the function of the ear. Prof Ghosh was of the view that antibiotics were rightly given on the report of the sensitivity test that showed the organisms were sensitive to Amikacin. Hence, the antibiotic was not blindly used on speculation or as a clinical experiment. In view of the opinion of Prof Ghosh, who is an expert of the All India Institute of Medical Sciences, we are clearly of the view that the Appellant was not guilty of medical negligence but rather wanted to save the life of the Respondent. The Appellant was faced with a situation where not only was there kidney failure of the patient, but also urinary tract infection and blood infection. In this grave situation, which threatened the life of the patient, the Appellant had to take drastic steps. Even if he prescribed Amikacin for a longer period than is normally done, he obviously did it to save the life of the Respondent. We have also seen the evidence from other doctors as

well as the affidavits filed before the National Commission. No doubt some of the doctors who have deposed in this case have given different opinions, but in cases relating to allegations of medical negligence, this Court has to exercise great caution. From these depositions and affidavits it cannot be said that the Appellant was negligent. In fact, most of the doctors who have deposed or given their affidavits before the Commission have stated that the Appellant was not negligent.

We see no reason to disbelieve the above allegations of the Appellant that on June 11, 1991 he had asked the Respondent to stop taking Amikacin injections, and in fact this version is corroborated by the testimony of the Senior Sister Mukta Kolekar. Hence, it was the Respondent himself who is to blame for having continued Amikacin after June 11, 1991 against the advice of the Appellant. Moreover, in the statement of Dr. Ghosh before the National Consumer Dispute Redressal Commission it has been stated that it is by no means established that Amikacin alone can cause deafness. Dr. Ghosh stated that there are 8 factors that can cause loss of hearing. Moreover, there are conflicting versions about the deafness of the Respondent. While the Respondent stated that he became deaf in June 1991, most of the Doctors who filed affidavits before the Commission have stated that they freely conversed with him in several meetings much after 21st June and in fact up to the middle of August 1991.

The National Commission had sought the assistance of AIIMS to give a report about the allegations of medical negligence against the Appellant. AIIMS had appointed Dr. Ghosh to investigate the case and submit a report and Dr. Ghosh submitted a report in favor of the Appellant. Surprisingly, the Commission has not placed much reliance on the report of Dr. Ghosh, although he is an outstanding ENT specialist of international repute. We have carefully perused the judgment of the National Commission and we regret that we are unable to concur with the views expressed therein. The Commission, which consists of laymen in the field of medicine, has sought to substitute its own views over that of medical experts, and has practically acted as super-specialists in medicine. Moreover, it has practically brushed aside the evidence of Dr. Ghosh, whose opinion was sought on its own direction, as well as the affidavits of several other doctors

(referred to above) who have stated that the Appellant acted correctly in the situation he was faced. The Commission should have realized that different doctors have different approaches, for instance, some have more radical approaches while some have more conservative approaches. All doctors cannot be fit into a straight-jacketed formula and cannot be penalized for departing from that formula.

While this Court has no sympathy for doctors who are negligent, it must also be said that frivolous complaints against doctors have increased by leaps and bounds in our country particularly after the medical profession was placed within the purview of the Consumer Protection Act. To give an example, earlier when a patient who had a symptom of having a heart attack would come to a doctor, the doctor would immediately inject him with Morphia or Pethidine injection before sending him to the Cardiac Care Unit (CCU) because in cases of heart attack time is the essence of the matter.

However, in some cases the patient died before he reached the hospital. After the medical profession was brought under the Consumer Protection Act vide **Indian Medical Association v. V.P. Shantha**[401]**,** doctors who administer the Morphia or Pethidine injection are often blamed and cases of medical negligence are filed against them. The result is that many doctors have stopped giving (even as family physicians) Morphia or Pethidine injections even in emergencies despite the fact that from the symptoms the doctor honestly thought the patient was having a heart attack. This was out of fear that if the patient died the doctor would have to face legal proceedings. Similarly, in cases of head injuries (which are very common in road side accidents in Delhi and other cities) earlier the doctor who was first approached would started giving first aid and apply stitches to stop the bleeding. However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications.

[401] 1995 (6) SCC 651.

Hence, Courts and Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view that would be in fact a disservice to the public. The decision of this Court in **Indian Medical Association v. V.P. Shantha**[402] should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact, in the aforementioned decision, it has been observed that (vide para 22): "In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control".

It may be mentioned that the All India Institute of Sciences has been doing outstanding research in Stem Cell Therapy for the last 8 years for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc., though not yet with very notable success. This does not mean that the work of Stem Cell Therapy should stop, otherwise science cannot progress.

We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State, or National) or by the Criminal Court, before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court 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. Only after that doctor or committee reports that there is a prima facie case of medical negligence should a notice be issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action.

---

[402] (1995) 6 SCC 651.

In the present case, the Appellant was faced with an extremely serious situation. Had the Appellant been only suffering from renal failure, it is possible that a view could be taken that the dose prescribed for the Appellant was excessive. However, the Respondent was not only suffering from renal failure but he was also suffering from urinary tract infection and blood infection i.e., septicemia, which is blood poisoning caused by bacteria or a toxin. He also had extremely high urea. In this extremely serious situation, the Appellant naturally had to take a drastic measure to attempt to save the life of the Respondent. The situation was aggravated by the non cooperation of the Respondent who seems to be of an assertive nature as deposed by the witnesses. Extraordinary situations require extraordinary remedies. Even assuming that such a high dose of *Amikacin* would ordinarily lead to hearing impairment, the Appellant was faced with a situation between the devil and the deep sea. If he chose to save the life of the patient rather than his hearing surely he cannot be faulted. The allegation against the Appellant is that he gave an overdose of the antibiotic. In this connection it may be mentioned that antibiotics are usually given for a minimum of 5 days, but there is no upper limit to the number of days for which they should continue and it all depends on the condition of the patient. Giving a lower dose of the antibiotic may create other complications because it can cause resistance in the bacteria to the drug, and then it will be more difficult to treat. With regard to the impairment of hearing of the Respondent, it may be mentioned that there is no known antibiotic drug without side effects.

Hence, merely because there was impairment in the hearing of the Respondent that does not mean that the Appellant was negligent. The Appellant was desperately trying to save the life of the Respondent, which he succeeded in doing. Life is surely more important than side effects.

For example many anti-tubercular drugs (e.g., Streptomycin) can cause impairment of hearing. Does this mean that TB patients should be allowed to die and not be given the anti-tubercular drug because it impairs hearing? Surely the answer will be negative.

The courts and Consumer Fora are not experts in medical science and must not substitute their own views over that of specialists. It is true that the medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic Oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples. It must be remembered that sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is. On the facts of this particular case, we are of the opinion that the Appellant was not guilty of medical negligence.[403]

4.6 The Prevention of Food Adulteration Act, 1954 :

Food is one of the basic necessities for sustenance of life. Pure, fresh and healthy diet is most essential for the health of the people. It is no wonder to say that community health is national wealth.

Adulteration of food-stuffs was so rampant, widespread and persistent that nothing short of a somewhat drastic remedy in the form of a comprehensive legislation became the need of the hour. To check this kind of anti-social evil a concerted and determined onslaught was launched by the Government by introduction of the Prevention of Food Adulteration Bill in the Parliament to herald an era of much needed hope and relief for the consumers at large.[404]

Laws existed in a number of States in India for the prevention of adulteration of food- stuffs, but they lacked uniformity having been passed at different times without mutual consultation between States. The need for Central legislation for the whole country in this matter has been felt since 1937 when a Committee appointed by the Central Advisory Board of Health recommended this step. ‘Adulteration of food-stuffs and other goods’ is now included in the

[403] http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2779962

[404] http://www.medindia.net/indian_health_act/the-prevention-of-food-adulteration-act-1954-introduction.htm

Concurrent List (III) in the Constitution of India. It has, therefore, become possible for the Central Government to enact and all India legislation on this subject. The Bill replaces all local food adulteration laws where they exist and also applies to those States where there are no local laws on the subject. Among others, it provides for

(i) a Central Food Laboratory to which food samples can be referred to for final opinion in disputed cases (clause 4),

(ii) a Central Committee for Food Standards consisting of representatives of Central and State Governments to advise on matters arising from the administration of the Act (clause 3), and

(iii) the vesting in the Central Government of the rule-making power regarding standards of quality for the articles of food and certain other matters (clause 22).[405]

In **Nestle India Limited v. Shri A.K. Chand, Food Inspector and Anr**[406] wherein the Legality of proceeding under Food Adulteration Act, 1954 was challenged. Applicant challenged legality of proceeding pending in SDJM whereby SDJM took cognizance of offence punishable under Section 16(1)(a)(i), a (ii) of Act. The Cerelac Wheat was manufactured in August, 1992. Package contained a declaration that Cerelac would be fit for consumption within 9 months from date of manufacture. Outer limit would extend to end of May, Sample was collected on 18-9-1992. Prosecution report was prepared on 4.09.1993, and complaint was instituted in Court of Sub Division Judicial Magistrate, on 10.08.1993. Since report itself was prepared and complaint lodged long after period of fitness of consumption as indicated in sample packet itself. Therefore, Petitioner's valuable right conferred under Section 13(2) of Act had been prejudicially affected and continuance of proceeding would serve no useful purpose. However, Section 37-B (2) (iv) purpose of Rule 37-B, weaning food was not included in Infant formula, Infant milk food, special Infant food referred

[405] Statement of objects and reasons .
[406] 1995 CriLJ 3053.

to in Rule 37-B (1). Use of expression mother milk was indicative of legislative intent that weaning food for purpose of Rule 37-B was not considered as partial or total replacement of breast milk. Hence, views of Directorate General of Health Services in its fetter were not necessary or permissible to do. The Application was allowed. Based on the medical evidence the court held, "Food Adulteration is one of the most heinous crimes".

4.7 The Cigarettes and other Tobacco Products (Prohibition) Act, 2003 :

They said was passed in the background of the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly and urged Member States to consider in their tobacco control strategies plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco.

Section 2 (n) provides (n) " smoking", means smoking of tobacco in any form whether in the form of cigarette, cigar, beedis or otherwise with the aid of a pipe, wrapper or any other instruments.

If we go through the Act and the objects of the said Act, it is clear that that it is basically an Act which relies on medical evidence.

4.8 The Biological Diversity Act, 2002 :

The Act was enacted to meet the obligations under Convention on Biological Diversity (CBD), to which India is a party[407]. Biodiversity has been defined under Section 2(b) of the Act as "the variability among living organisms from all sources and the ecological complexes of which they are part, and includes diversity within species or between species and of eco-systems". The Act also defines, Biological resources as "plants, animals and micro-organisms or parts

[407] "Environmental legislation", The Statesman, *19 January 2017*

thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value, but does not include human genetic material."[408]

The two main ambiguities in the Act's regulatory mechanism are: (a) what is regulated; and (b) who are obligated to share benefits under the Act. These two issues have been brought before various adjudicatory forums by the user companies who have challenged the legality of the show-cause notices issued to them by different State Biodiversity Boards.

In late 2013 and early 2014, about 13 petitions were filed before the Central Zone Bench of National Green Tribunal by a number of companies against the show-cause notices issued to them by the Madhya Pradesh SBB[409]. The notices stated that since companies are commercially utilising biological resources when extracting oil or brewing or distilling alcohol, they should be sharing monetary benefits gained from these activities with the SBB[410]. These litigations prompted the Ministry of Environment, Forest and Climate Change (MoEFCC) to notify the Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014 (2014 Guidelines). These Guidelines explicitly provided for an obligation of sharing benefits with the SBBs[411] which was otherwise not specified in the BD[412] Act or the Rules. Thereupon, the NGT[413], without looking into the merit of the contentions, disposed of all these petitions stating that the SBB[414] is at liberty to look at the issue afresh after taking into account the scheme of the BD[415] Act, the Rules and the 2014 guidelines.

Later, interestingly, the AYUSH companies filed a writ petition before the Nagpur bench of the High Court of Bombay, inter alia, challenging the

[408] Section 2(c) of Biological Diversity Act, 2002
[409] State Biodiversity Boards
[410] Ibid.
[411] Ibid.
[412] Biological Diversity
[413] National Green Tribunal
[414] *Supra Note*, 35, chapter 4, page 157
[415] *Supra Note*, 38, chapter 4, page 157

constitutionality of the 2014 guidelines. The writ petition sought for a declaration that the 2014 Guidelines do not apply to Indian entities not trading in any biological resources with non-Indian entities and that they are ultra vires the BD[416] Act and thus unconstitutional. This writ petition was prompted by the show cause notices issued by the Maharashtra SBB[417] to these companies demanding monetary benefit sharing. The Court is still hearing the substantial issues but has restrained the Respondents from taking any coercive action against the Petitioners.

In another series of cases before the Uttarakhand high court, eight writ petitions were filed by paper manufacturing companies in response to the notices issued by the Uttarakhand SBB[418] under the BD[419] Act and the 2014 Guidelines. These writ petitions were disposed of at the admission stage itself with a direction from the Court that no coercive action shall be taken against the companies as long as they inform the SBB[420] about the bio-resources obtained by them from within the territory of Uttarakhand.

While there have been numerous cases filed under the BD[421] Act as mentioned above, the provisions of the Act have not yet been substantially interpreted except in the Coal case. In the Coal case, the NGT[422] had passed a judgment holding that coal is not a biological resource. In all other instances, the judiciary has stopped short of interpreting the Act in any detail or depth. The Central Zone Bench while disposing of the thirteen petitions filed before it as regards the show-cause notices issued by the Madhya Pradesh SBB[423], clearly stated that they have not examined the issue on merits. Similarly, the Uttarakhand High Court while dealing with the writ petitions filed by the paper manufacturing companies, observed that it would only examine two of the prayers in the petitions and would not deal with the other eight players, which required looking into the

[416] Ibid.
[417] *Supra Note*, 35, chapter 4, page 157
[418] Ibid.
[419] *Supra Note*, 38, chapter 4, page 157
[420] *Supra Note*, 35, chapter 4, page 157
[421] *Supra Note*, 38, chapter 4, page 157
[422] *Supra Note*, 39, chapter 4, page 158
[423] *Supra Note*, 35, chapter 4, page 157

constitutionality of show cause notices issued by the Uttarakhand SBB[424], applicability of 2014 Guidelines to Indian entities and meaning of the terms 'biological resource' and 'value-added product'.

If we go through the Act and the objects of the said Act, it is clear that that it is basically an Act which relies on medical evidence. There are other Acts like Environment Protection Act, 1986, Indian Forest Act, 1927, National Green Tribunal Act, Prevention of Cruelty to Animals Act, Protection of Plant Varieties and Farmers' Rights Act, 2001, Wildlife Protection Act, 1972, Wildlife Prevention (Amendment) Act 2002, Competition Act, 2002, etc. also which heavily rely on the medical evidence. Care may be taken for the Acts which more or less require medical evidence for invoking the provisions of the Acts. Those Acts will be discussed into the Chapter VI which will deal with the judicial trends regarding the medical evidence.

[424] *Ibid.*

CHAPTER–V

COMPARATIVE STUDY WITH OTHER LEGAL SYSTEMS

"Comparison may lead to perfection" is an established principle of commercial world and products because it may brings quality, longevity and the term guaranty (condition) and warranty of goods are the glaring example of outcome of comparison. The same thing is applicable in the matter of laws because comparison with other country laws guides, helps and rather provide a fertile ground for information, reformation and transformation and partly for legislation and amendments. Hence, an attempt has been made under this chapter to study the importance of other country's law available on this topic and issue.

As an illustrative example, one may refer a case of United State of America, of the year 1923 i.e. **Frye v. United States**[425]**,** where the court established that the admissibility of medical evidence required "General Acceptance" in the scientific community, leading to the possible use of medical treatises under this condition of admissibility.

5.1 Federal Law in the United States of America :

Rule 702. Testimony by Expert Witnesses[426]

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

[425] 293 F1013 (DC Cir 1923).
[426] Article VII, Federal Ruls of Evidence.

Rule 703. Bases of an Expert[427]

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 705. Disclosing the Facts or Data Underlying an Expert[428]

Unless the court orders otherwise, an expert may state an opinion–and give the reasons for it–without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Comments: An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it is wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts.

---

[427] *Supra Note*, 2, chapter 5, page 160
[428] Ibid.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute". [429] When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[430]

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

5.2 Committee Notes on Rules 2002 Amendment :

Rule 702 has been amended in response to **Daubert v. Merrell Dow Pharmaceuticals, Inc.[431],** and to the many cases applying *Daubert*, including **Kumho Tire Co. v. Carmichael**.[432] In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the

[429] Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 418 (1952).
[430] 7 Wigmore §1918.
[431] 509 U.S. 579 (1993).
[432] 119 S.Ct. 1167 (1999).

admissibility of all expert testimony is governed by the principles of Rule 104(a)[433]. Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence.

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested – that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of nonscientific expert testimony, depending upon "the particular circumstances of the particular case at issue".[434]

No attempt has been made to "codify" these specific factors. *Daubert* itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to *Kumh*[435]*o*, the standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for

[433] Federal Ruls of Evidence, 2002.
[434] 119 S.Ct. at 1175
[435] Ibid.

purposes of testifying".[436]

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.[437] (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations.[438] (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).[439] (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting".[440] (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").[441]

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[442] (*Daubert's* general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy".[443] (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); (rejecting testimony based on "clinical ecology"

[436] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
[437] *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)
[438] *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994)
[439] *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C.Cir. 1996)
[440] *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).
[441] *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)
[442] *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1175 (1999)
[443] *Moore v. Ashland Chemical, Inc.*, 151 F.3d 269 (5th Cir. 1998) (en banc)

as unfounded and unreliable).[444]

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant.[445] ("We conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable"). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. , *e.g.,* **Heller v. Shaw Industries, Inc.[446],** ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules".); (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration").[447]

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system".[448] As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence". 509 U.S. at 595. Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert.[449] (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises").

---

[444] *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988)
[445] *Kumho*, 119 S.Ct. 1167, 1176
[446] 167 F.3d 146, 155 (3d Cir. 1999)
[447] *Supra Note*, 12, chapter 5, page 163
[448] *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996).
[449] *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999)

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise.[450] (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation*[451], proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable….. The evidentiary requirement of reliability is lower than the merits standard of correctness".[452] (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field".); ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance".).[453]

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate".[454] Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another".[455] Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied.[456] The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of

[450] *Heller v. Shaw Industries, Inc.*, 167 F.3d 146, 160 (3d Cir. 1999)
[451] 35 F.3d 717, 744 (3d Cir. 1994)
[452] *Supra Note*, 12, chapter 5, page 163
[453] *Ruiz-Troche v. Pepsi Cola*, 161 F.3d 77, 85 (1st Cir. 1998)
[454] 509 U.S. at 595
[455] *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).
[456] *Lust v. Merrell Dow Pharmaceuticals, Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*[457], "*any* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*".

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the fact finder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the fact finder on the principles of thermodynamics, or blood clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the fact finder on general principles. For this kind of generalized testimony, Rule 702[458] simply requires that:

(1) the expert be qualified;

(2) the testimony address a subject matter on which the fact finder can be assisted by an expert;

(3) the testimony be reliable; and

(4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gate keeping function applies to testimony by any expert.[459] ("We conclude that *Daubert's* general holding–setting forth the trial judge's general 'gatekeeping' obligation–applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge"). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who

[457] 35 F.3d 717, 745 (3d Cir. 1994),
[458] Article VII, Federal Ruls of Evidence, 2002.
[459] *Supra Note*, 25, chapter 5, page 165

is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist.[460] "It is exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique". Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. , *e.g.*, American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert* [461] , "Whether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field".

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

---

[460] *Watkins v. Telsmith, Inc*., 121 F.3d 984, 991 (5th Cir. 1997)
[461] 157 F.R.D. 571, 579 (1994)

Nothing in this amendment is intended to suggest that experience alone – or experience in conjunction with other knowledge, skill, training or education– may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.[462] (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail)[463]; (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches").[464] (Stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience")

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gate keeping function requires more than simply "taking the expert's word for it".[465] ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough"). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable.[466] (expert testimony based on a completely subjective methodology held properly excluded).[467] "It will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable".

---

[462] *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997)
[463] *Tassin v. Sears Roebuck*, 946 F.Supp. 1241, 1248 (M.D.La. 1996)
[464] *Supra Note*, 25, chapter 5, page 165
[465] *Supra Note*, 12, chapter 5, page 163
[466] *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994)
[467] *Supra Note*, 25, chapter 5, page 165

Subpart (1) of Rule 702[468] calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data". The term "data" is intended to encompass the reliable opinions of other experts. The original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence.

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702[469]. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703[470] is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703[471] requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a *sufficient* basis of information – whether admissible information or not – is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gate keeping function over expert testimony. [472] ("Trial courts should be allowed substantial discretion in dealing with *Daubert* questions; any attempt to codify procedures will likely give rise to unnecessary changes in

[468] Article VII, Federal Ruls of Evidence, 2002.
[469] Article VII, Federal Ruls of Evidence, 2002.
[470] Ibid.
[471] Ibid.
[472] Daniel J. Capra, The Daubert Puzzle, 38 Ga.L.Rev. 699, 766 (1998)

practice and create difficult questions for appellate review"). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under *Daubert*, and it is contemplated that this will continue under the amended Rule.[473], (discussing the application of *Daubert* in ruling on a motion for summary judgment)[474]; (discussing the use of *in limine* hearings)[475]; (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert". This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert". Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against the jury's being "overwhelmed by the so-called 'experts'". Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*[476], (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

GAP Report – Proposed Amendment to Rule 702.[477] The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 702:

1. The word "reliable" was deleted from Subpart (1) of the proposed amendment, in order to avoid an overlap with Evidence Rule 703, and to clarify that an expert opinion need not be excluded simply because it is based on hypothetical facts. The Committee Note was amended to accord with this textual change.

---

[473] *Cortes-Irizarry v. Corporacion Insular*, 111 F.3d 184 (1st Cir. 1997)
[474] *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 736, 739 (3d Cir. 1994)
[475] *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502–05 (9th Cir. 1994)
[476] 154 F.R.D. 537, 559 (1994)
[477] Article VII, Federal Ruls of Evidence.

2. The Committee Note was amended throughout to include pertinent references to the Supreme Court's decision in **Kumho Tire Co. v. Carmichael**[478]**,** which was rendered after the proposed amendment was released for public comment. Other citations were updated as well.

3. The Committee Note was revised to emphasize that the amendment is not intended to limit the right to jury trial nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise.

4. Language was added to the Committee Note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Evidence Rule 702[479].

5.3 Committee Notes on Rules 2011 Amendment :

The language of Rule 702[480] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Medical evidence was, in accordance with the provisions of United States Law was thoroughly examined in the well-known cases of **Daubert v. Merrell Dow Pharmaceuticals, Inc**. [481] , and **Kumho Tire Co., Ltd. v. Patrick Carmichael et al**.*[482]* and their holdings are collectively referred to as the *Daubert* standards or *Daubert* rules.

Daubert provided a non-exhaustive list of factors for a trial judge to consider when determining the admissibility of evidence from a witness qualified

[478] 526 U.S. 137 (1999)
[479] *Supra Note*, 53, chapter 5, page 171
[480] Article VII, Federal Ruls of Evidence, 2011.
[481] 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).
[482] 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

as an expert by knowledge, skill, experience, training or education. The purpose of examining these factors is a determination whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.

The four factors are-

1. Can the expert's theory or technique be, or has it been, tested;

2. Has the expert's theory or technique been subjected to peer review and publication;

3. Is there a "known or potential rate of error … and the existence and maintenance of standards controlling the technique's operation"; and

4. Is there widespread acceptance of the theory or technique within the relevant scientific community…

The inquiry is a flexible one, and focuses on the evidentiary relevance and reliability underlying the proposed submission, and not on the conclusions they generate…. The Daubert factors were intended to be flexible and were not intended to be a rigid standard applicable to every case.

5.4 Employer's Medical Evidence :

As a practical matter, the employer will generally offer medical evidence in opposition to any issue raised by the worker. As a legal matter, a competent medical report is only necessary when the employer contests the issue of permanent disability.

Our holding in **Labarge v. Zebco, Okl.**[483]**,** only requires the issue of permanent disability to be proven or refuted by medical expert testimony. The issue decided by the trial court in the instant case concerned causation. This Court has never held medical testimony is essential for refuting causation. Rather, in **Special Indemnity Fund v. Stockton, Okl.**[484], we held that "[w]here the disability is of a character to require expert professional testimony to determine

[483] 769 P.2d 125 (1988).
[484] 653 P.2d 194, 199 (1982).

the cause and extent, the question is one of science and must be proved by expert testimony, the absence of which renders the evidence insufficient to sustain an award". (Emphasis added) This language was recently quoted in **Gaines v. Sun Refinery and Marketing, Okl**.[485], and speaks only to the sufficiency of evidence where a trial court has awarded compensation.[486]

The employer is not under an obligation to rebut medical causation evidence because the worker has the burden of proving compensability.

Oklahoma's jurisprudence does not impose upon an employer an affirmative obligation to prove by competent medical evidence that a causal relationship does not exist between an alleged injury and employment. Nonetheless, if (1) there is no competent evidence in the record to refute causation and (2) the claimant has met its burden on this issue, a trial court's finding that the injury did not arise out of employment cannot be sustained.[487]

5.5 Treating Physician Presumption :

There shall be a rebuttable presumption in favor of the treating physician's opinions on the issue of temporary disability, permanent disability, causation, apportionment, rehabilitation or necessity of medical treatment.[488]

According to 85 O.S. §17A2a offering the report of the treating physician raises a presumption in favor of the physician's opinions. This presumption may be rebutted by an opposing party's competent medical report, including one from a hired physician, or the report of an **IME. Conaghan v. Riverfield Country Day School.**[489]

The *Conaghan* case held the appointment of an IME pursuant to §17 is not the sole procedural remedy for a party objecting to the report of a treating physician. This provision does not specifically preclude other evidence. To allow

[485] 790 P.2d 1073 (1990).
[486] *Collins v. Halliburton Services*, 1990 OK 118, 804 P.2d 440.
[487] *Hughes v. Cole Grain Company*, 1998 OK 76, 964 P.2d 206.
[488] 85 O.S. §17A2a
[489] 2007 CIV APP P.3d 557.

a treating physician to exclusively determine a claimant's disability rating would usurp the court's authority. Due process of law commands a workers' compensation litigant–claimant or respondent–be allowed to introduce its own expert medical evidence.[490]

5.6 Objections to Medical Reports :

Failure to object to an opponent's medical report at the time of trial results in a waiver of any objection to such evidence. Once admitted, the report is regarded as part of the proof in the case **Stoner v. City of Lawton**[491] and **Brown v. Mom's Kitchen, LLC**[492]

The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming.[493] While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data".[494]

---

[490] *Public Supply Company v. Mucker,* 2007 CIV APP 48, 162 P. 3d 234.
[491] 1997 CIV APP 28, 934 P.2d 340;
[492] 2004 CIV APP 66, 96 P.3d 808.
[493] Ladd, Expert Testimony, 5 Vand.L.Rev. 414, 426–427 (1952).
[494] See also California Evidence Code §802; Kansas Code of Civil Procedure §§60–456, 60–457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L.Rev. 455 (1962).[495]

5.7 Persistent vegetative state/death bed without any hope :

In **Cruzan v. Director, Missouri Dept. of Health**[496] wherein In 1983, Nancy Beth Cruzan was involved in an automobile accident which left her in a "persistent vegetative state". She was sustained for several weeks by artificial feedings through an implanted gastronomy tube. When Cruzan's parents attempted to terminate the life-support system, state hospital officials refused to do so without court approval. The Missouri Supreme Court ruled in favor of the state's policy over Cruzan's right to refuse treatment.

Question

Did the Due Process Clause of the Fourteenth Amendment permit Cruzan's parents to refuse life-sustaining treatment on their daughter's behalf?

Conclusion

Decision: 5 votes for Director, Missouri Dept. of Health, 4 vote(s) against

Legal provision: Due Process

[495] Cornell education rules; Legal Institute
[496] 497 U.S. 261 (1990).

In a 5-to-4 decision, the Court held that while individuals enjoyed the right to refuse medical treatment under the Due Process Clause, incompetent persons were not able to exercise such rights. Absent "clear and convincing" evidence that Cruzan desired treatment to be withdrawn, the Court found the State of Missouri's actions designed to preserve human life to be constitutional. Because there was no guarantee family members would always act in the best interests of incompetent patients, and because erroneous decisions to withdraw treatment were irreversible, the Court upheld the state's heightened evidentiary requirements.

5.8 Medical Evidence in Litigation[497]:

The need to obtain and correctly use medical records is not limited to the personal injury lawyer or the medical malpractice attorney. Recently, one of my colleagues, who is an estate lawyer, successfully used medical records to prove that a transfer of real estate was invalid owing to the medical incompetence of one of the parties involved. In another example, a tax attorney used medical records to prove that his client lacked the mental capacity for fraud. And yet another colleague, an entertainment lawyer, successfully used medical records to disprove an insurance company's claim that his client was well aware of a disqualifying medical condition. No matter what area of law you practice, the time will come when the ability to obtain and use medical records will be crucial for the representation of your client.

Obtaining Medical Records :

Once you have determined that a person's medical history and medical records may be useful for your case, the first thing you must do is acquire a complete copy of the records.

If the person whose records you are trying to obtain is your client, the process is fairly easy. The client, or the client's relatives, will be able to tell you which health care organizations (e.g., hospitals, doctors' offices, clinics, etc.) provided the treatment, and you can proceed to obtain those records in a relatively

[497] By Brian McCaffrey:http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/medicalevidence.html

informal matter. If the records belong to an adversary or a non-party, however, you will need to rely on a court proceeding to obtain the information or obtain it through regular discovery in the lawsuit or pre-suit disclosure.

Regardless of whose records you are trying to obtain, you must submit a form that complies with the Health Insurance Portability and Accountability Act. Under HIPAA [498] patients and their legal and authorized representatives are entitled to review medical records pertaining to their own medical treatment. I normally prefer to have my clients attempt to obtain their own medical records because requests from patients themselves do not set off all the bells and whistles at the health care organizations that a letter from an attorney does. Once you have rung that bell, you will need to deal with excruciating delays and the possibility that defensive entries will now be made in the records.

Believe it or not, I have found that health care organizations still will ask for a HIPAA [499] form even when it is the patients themselves requesting information. Most bar associations have, in cooperation with the medical community, agreed upon standard HIPAA[500] authorization forms. For example, in New York State, the approved HIPAA[501] form can be found in the Supreme Court section of www.courts.state.ny.us/ attorneys/forms.shtml.

Every request for the release of medical records must follow certain guidelines:

1. The request should be written on letterhead stationery if it is a request from an attorney, or it must contain the complete name and address of the patient if the request comes directly from the patient.

2. The request should include the patient's signature; if the patient is deceased, incompetent, or a minor, a legally appropriate individual, such as the parent, estate administrator, or legal guardian, should sign.

[498] Health Insurance Portability and Accountability Act, 1996.
[499] Ibid.
[500] Ibid.
[501] Ibid.

3. The authorizing signature should be validated with the stamp of a current notary or commissioner of deeds. Although your HIPPA[502] form may not require such notarization, I recommend it in order to avoid having your request rejected. Some states require that the notary have a raised seal on the document.

4. The request should include a special release form (compliant with any state and federal requirements) for patients being treated for psychiatric illness or alcohol or drug abuse or for any patient whose medical records document any HIV[503]- or AIDS[504]-related information. The HIPAA[505] form approved by the New York State Bar specifically has a check off for those items, and failure to initial them will result in the provider excluding them from the record.

Don't limit your requests to hospitals. In many jurisdictions, doctors' practices keep copies of medical records for as long as six years. Also, be sure to send an appropriate request for medical records to the insurance carriers who paid for treatment.

The best resource for getting medical records and evaluating them is an experienced nurse paralegal or nurse attorney. There are also resource guides and websites available for the general practitioner.

Processing the Responses :

For each health care provider, set up a folder to store a copy of your request for records and a copy of the previously executed HIPAA[506] form. Organizing your documentation this way will make life a lot easier when the responses come back—most record responses will include medical records from other medical providers that became part of their own records.

---

[502] *Supra Note*, 74, chapter 5, page 177
[503] Human immunodeficiency virus.
[504] *Acquired immune deficiency syndrome.*
[505] *Supra Note*, 74, chapter 5, page 177
[506] *Supra Note*, 74, chapter 5, page 177

When you receive a response, you must review the record for completeness. Pay particular attention to the presence or absence of certain items that may be relevant to your case, such as a typed operative report or a pertinent laboratory report. If anything essential is missing, contact the medical provider. It may be possible that some items have been misplaced or not yet found. In such cases you should determine whether the provider's particular medical departments have maintained a log of tests performed and the results.

A typical medical record might have the following components (this is not an all-inclusive list): history and physical; physician's progress notes; physician's order sheets; nurse's notes (general and special care unit); graphic and flow sheets (pulse, temperature, respiration [PTR], intake and outtake [I&O], activities at daily rhythm [ADL]); medication records; nursing care plan; laboratory transfusion and X-ray reports; surgery documents; consultations; emergency department records; records of special health care disciplines (e.g., physical therapy); consent forms; discharge summaries; and autopsy reports.

5.9. Medical Evidence law in the United Kingdom:

The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 requires: written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved.

Section 81 of Police and Criminal Evidence Act 1984 provides;

Advance notice of expert evidence in Crown Court

(1) Criminal Procedure Rules may make provision for—

(a) requiring any party to proceedings before the court to disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings; and

(b) prohibiting a party who fails to comply in respect of any evidence with any requirement imposed by virtue of paragraph (a) above from adducing that evidence without the leave of the court.

In **R v. Smith**[507], where a defendant to murder by stabbing was permitted to call an expert to explain the effects of automatism, which he had been suffering from. It has been made clear that in cases where individuals are merely vulnerable or easily susceptible to suggestion, expert witnesses may not be called in order to testify to such characteristics.

In **R v. Walker**[508]where an individual accused of shoplifting attempted to adduce expert evidence of their condition, which it was claimed made them more vulnerable to threats of duress. While the case was described as borderline by the Court of Appeal, it was decided that such evidence could be properly admitted where it was not commonly found in ordinary individuals.

5.10 Medical Evidence in Rape Cases :

In the late 1970s and 1980s, trenchant criticism was voiced about almost every aspect of the forensic medical examination of sexual assault victims. Concern was focused on the lack of skill of some doctors in the performance of examinations which was leading to loss of vital evidence, on the location of examinations which were generally held in the unpleasant and ill-equipped facilities of the police station and on the attitude of doctors to rape victims which was found in some cases to be unsympathetic to the point of hostility. Police surgeons were mostly unfamiliar with the Rape Trauma Syndrome, which explains the impact of rape on victim.[509] This was the time when medical examination and medical witness were considered handy tools to settle the cases.

"It will often be of most use if the medical evidence is produced before the need for proceedings has arisen– for example during a sickness absence procedure, at an appeal or grievance hearing. Although a specialist medico-legal report is unlikely to be needed at this stage, a General Practitioner or treating consultant will often be willing and able to write a letter to an employer suggesting a possible date for a return to work and/or possible adjustments which

[507] [1979] 1 WLR 1445.
[508] [2003] EWCA Criminal 1837
[509] Jennifer Temkin: Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice: The Modern Law Review, Vol. 61, No. 6 (Nov., 1998), pp. 821-848

could be made to enable a return. Alternatively, a letter could point out that a disabled person has difficulty with one aspect of work and suggest a way of removing or reducing the disadvantage so caused. In some cases, evidence of this nature will allow matters to be resolved satisfactorily at the outset.

Even if the evidence does not persuade the employer to act in the desired fashion, it may still serve a useful role in preparing the ground for proceedings under the DDA[510].

The duty to make reasonable adjustments does not arise unless the employer knows or ought to know that a particular arrangement puts a disabled person at a substantial disadvantage (section 6(6) of the DDA[511]). It is important that any difficulty is drawn to the employer's attention. Whilst a letter from a doctor is not the only way of doing so, it is a very effective way. Secondly, if an employer fails to take into account medical evidence provided by or on behalf of the employee, it is unlikely to show that any less favourable treatment is justified for the purposes of Section 5[512]. Even where the employer has already obtained its own un-favourable medical advice, it will be at risk if it fails to consider the contrary viewpoint of another clinician or even ask its own medical adviser to consider that alternative approach.[513]

The fact that a particular adjustment is not suggested by an employee or the employee's doctor at the material time does not absolve an employer of responsibility for considering whether in fact any adjustments can be made.[514] Nonetheless, in practice it will often be easier for an employer to excuse a failure to make an adjustment in these circumstances. If the issue of adjustments is raised, representatives should consider whether all potential adjustments have been referred to in any medical evidence. If not, and if time allows, it will often be preferable for a particular adjustment to be raised with the General Practitioner or consultant to deal with it from the outset or in a follow up letter. If this is not

[510] Disability Discrimination Act , 1995
[511] Ibid.
[512] Ibid.
[513] *Jones v. Post Office* [2001] IRLR 384
[514] *Cosgrove v Caesar & Howie* [2001] IRLR 653

practical, the possible adjustments could be raised by or on behalf of the employee in writing.

A different approach needs to be taken in obtaining medical evidence for use at a hearing in the Tribunal. Doctors used to producing reports for personal injury claims may not appreciate what evidence will be useful in a DDA[515] case. This explains why much of the medical evidence placed before tribunals deals with matters that are not in dispute or which are not questions of medical opinion and also fails to deal with the real issues in the case. On occasions, evidence from expert witnesses has contained as much legal advice as medical opinion. For example, experts have stated that a particular activity was not a normal day to day activity or that they did (or did not) consider an applicant to be a disabled person within the meaning of section 1 of the DDA[516] because there was (or was not) a substantial adverse impact on such activities. In both **Vicary v. British Telecommunications**[517] and again in **Abadeh v. British Telecommunications**[518], the EAT[519] has pointed out that there are limits to the matters upon which a medical adviser can give useful or relevant evidence.

The EAT[520] emphasised that it is for the Tribunal to decide whether impairments had a 'substantial' adverse impact on normal day to day activities within the meaning of the Act. It is not for expert witnesses to express opinions on these matters. Instead, said the EAT[521], their evidence should be directed to matters such as the prognosis, the effect of medication and, if appropriate, their own observations of the applicant carrying out any relevant tasks or functions and the ease or otherwise with which they were carried out. In addition to the matters referred to by the EAT[522], the approach referred to above about disadvantages and potential adjustments could also be used in producing evidence for use at any hearing.

---

[515] *Supra Note*, 86, chapter 5, page 182
[516] Ibid.
[517] [1999] IRLR 680
[518] [2001] IRLR 23
[519] Employment Appeal Tribunal
[520] Ibid.
[521] Ibid.
[522] Employment Appeal Tribunal.

5.11 Rules of Evidence and Judicial Trends in various Countries :

Position in England and USA (vis-a-vis Indian Law) regarding the rules of Evidence and use of medical evidence can be understood by brief description given as under:

(i) England- Like India in England also expert opinion is accepted as an exception to the 'Opinion Rule'. An expert opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a Judge or jury.[523] Experts there are allowed to testify on any number of matters, the Courts are generally receptive to new varieties of expertise[524], however not all fresh developments are welcomed.

Like India it is for the Judge to determine whether the particular witness can demonstrate sufficient competence within his field to be treated as an expert and to be permitted to give evidence of his opinion. This implies that the witness will show the Court that he possessed relevant professional qualifications. But unlike India, Courts are not strict on this point. A classic example of this is the case if Silverlock[525], where a solicitor who whiled away his leisure hours in the private study of handwriting was allowed to testify as an expert in handwriting. Also when deciding whether to allow a particular witness to testify as an expert, the Courts will not necessarily refuses to admit an expert whose approach to his subject is contentious in the same sense that it does not coincide with the received wisdom in the field.[526] Thus, in England it is with ease that expert evidence is admitted however according to authors[527] this should not be of worry as the omissions are rectified when it comes to cross-examination of such witness.

An expert may only give an opinion in matters that fall within his particular field of skill. If a question falls outside the scope of a witness's

---

[523] Per Lawson LJ, Turner, (1975) QB 834 at 841.
[524] Per Lord Taylor J, Stockwell, (1993) 97Cr App Rep 109.
[525] (1894) 2 QB 766, also see Oakley, (1979) Crim LR 657, referred in 2006 Cri LJ, Journal Section, at 215.
[526] Robb, (1991) 93 Cr App Rep 161.
[527] Roderick Munday, Evidence, 2nd Edn., LexisNexis TM Butterworths

particular expertise, the opinion ought not to be received.[528] Also the experts' field of expertise must fall outside the ordinary knowledge of Court. Therefore, an expert's opinion will not be received on matters where it is felt that the Court is perfectly capable of drawing inferences for itself.[529]

Opinion of expert is accepted as evidence on the ultimate issue in a case. The Courts have departed from the common law doctrine of 'ultimate issue rules', thus, the law has gradually distanced itself from it. In Stockwell, the Court of appeal declared that whilst there was a school of thought which is considered that such a rule existed, 'if there is such a prohibition, it has long been more honoured in the breach than observance'. The rule today, then, is 'better regarded as a 'matter of form rather than substance'. This is, however, not accepted in India. Therefore, the doctrine of 'ultimate issue rule' is still accepted. Also in England experts may not only give his opinion but may also testify to matters of fact.[530]

(ii) Canada: In Canada the Canada Evidence Act, R.S.C.[531], 1985, c. C-5, also has provisions related expert opinion/ witness. Those provisions are following:

Section 1 This Act may be cited as the Canada Evidence Act.[532]

Application Section 2[533] This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction.

Witnesses

Interest or crime Section 3 A person is not incompetent to give evidence by reason of interest or crime.

Accused and spouse Section 4 (1)[534] Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may

[528] *Nightingale v. Buffin*, (1925) 18 BWCC 358
[529] *R v. Land*, (1999) QB 65 L.
[530] 2006 Cri LJ, Journal Section, at 215.
[531] The Royal Society of Canada.
[532] R.S., c. E-10, s. 1.Canada Evidence Act,1985.
[533] R.S., c. E-10, s. 2.Canada Evidence Act,1985.
[534] R.S., c. C-5, s. 4.Canada Evidence Act,1985

be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Spouse of accused Section 4 (2)[535] No person is incompetent, or uncompellable, to testify for the prosecution by reason only that they are married to the accused.

Communications during marriage Section 4 (3) [536]No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Failure to testify Section 4 (6)[537] The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

Incriminating questions Section 5 (1) [538] No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

Answer not admissible against witness Section 5 (2)[539] Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.

---

[535] R.S., c. C-19,(3rd Suppl.) s. 17.Canada Evidence Act,1985
[536] 2002, c. 1, s. 166; Canada Evidence Act,1985
[537] 2014, c. 25, s. 34, c. 31, s. 27; Canada Evidence Act,1985
[538] R.S., 1985, c. C-5, s. 5; Canada Evidence Act,1985
[539] 1997, c. 18, s. 116. Canada Evidence Act,1985

Evidence of person with physical disability Section 6 (1)[540] If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Evidence of person with mental disability Section 6 (2)[541] If a witness with a mental disability is determined under section 16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.

Inquiry Section 6 (3)[542] The court may conduct an inquiry to determine if the means by which a witness may be permitted to give evidence under subsection (1) or (2) is necessary and reliable.

Identification of accused Section 6.1[543] For greater certainty, a witness may give evidence as to the identity of an accused whom the witness is able to identify visually or in any other sensory manner.

Expert witnesses Section 7[544] Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding.

Handwriting comparison Section 8[545] Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute.

---

[540] R.S., 1985, c. C-5, s. 6; Canada Evidence Act,1985
[541] Ibid.
[542] R.S., 1985, c. C-9, s. 7; Canada Evidence Act,1985
[543] 1998, c. 9, s. 1. Canada Evidence Act,1985
[544] R.S., c. E-10, S. 7. Canada Evidence Act,1985
[545] R.S., c. E-10, S. 8. Canada Evidence Act,1985

Adverse witnesses Section 9 (1)[546] A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Previous statements by witness not proved adverse Section 9 (2)[547] Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

Cross-examination as to previous statements Section 10 (1)[548] On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.

[546] R.S., 1985 c. C-5, S. 9. Canada Evidence Act,1985
[547] 1994, c. 44, s. 85. Canada Evidence Act,1985
[548] R.S., 1985 c. C-5, S. 10. Canada Evidence Act,1985

Deposition of witness in criminal investigation Section 10 (2)[549] A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness.

Cross-examination as to previous oral statements Section 11[550] Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

Examination as to previous convictions Sec. 12 (1)[551] A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the *Contraventions Act*, but including such an offence where the conviction was entered after a trial on an indictment.

Proof of previous convictions Section 12 (1.1)[552] If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.

How conviction proved Section 12 (2) A conviction may be proved by producing

(a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable on summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the

[549] 1994, c. 44, s. 86. Canada Evidence Act,1985
[550] R.S., c. E-10, S. 11. Canada Evidence Act,1985
[551] R.S., 1985 c. C-5, S. 12. Canada Evidence Act,1985
[552] 1992, c. 47, s. 66. Canada Evidence Act,1985

conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and

(b) proof of identity.

Witness whose capacity is in question Section 16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

Testimony under oath or solemn affirmation Sec. 16 (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

Testimony on promise to tell truth Sec. 16 (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.

No questions regarding understanding of promise Sec. 16 (3.1) A person referred to in subsection (3) shall not be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

Inability to testify Sec. 16 (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

Burden as to capacity of witness Sec. 16 (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of

satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

(iii) United States of America: In the USA, it is accepted that Federal Rules of Evidence have been held to have superseded the test for admissibility of scientific evidence which required that the technique in question must have been generally accepted as reliable in relevant scientific community The trial Judge must ensure that any and all scientific evidence admitted is not only relevant, but reliable.[553]

In addition, the New Jersey Superior Court has held in the case of **Procida v. Mc. Laughlin**[554], that, scientific evidence is admissible if the proposed technique has sufficient scientific basis to produce uniform and reasonably reliable results and will contribute materially to the ascertainment of truth. Thus, the method must generally be accepted as reliable[555], the determination of general acceptance is primarily a question of fact for trial Court to determine.[556] Therefore, the party offering the novel form of evidence has the burden of demonstrating that such evidence has been accepted as reliable by the scientific community.[557]

With respect to expert opinion and its admissibility, the Court in the case of **Potomac Elec. Power Co. v. Smith**[558], has held that "In order to qualify as an expert witness, a minimum level of competence in the subject involved must be shown". Thus, qualifications of the witness must be affirmatively shown by the proponent of these evidences.[559] The Court may disqualify such a witness where it is shown that retention of an expert witness creates a conflict of interest.[560]

Bias or interest of witness does not affect his criterion, but only the validity which is to be given to his testimony.[561] Position in United States also

---

[553] *Daubert v. Merrell Dow Pharmaceuticals,* Inc. Cal., 509 US 579.
[554] 195 NJ Super 396.
[555] *Matter of Dass v. Mark S.*, 593 NYS 2d 142.
[556] NY Matter of M.Z.; 590 NYS 2d 390.
[557] *Mich-Kluckv. Borland,* 162 Mich App 695.
[558] 558 A 2d 768.
[559] *Conde v. Velsicol Chemical Corp.,* 804 F Supp 972.
[560] *Wis-Secura Ins. Co. v. Wiscosin Public Service, App*., 457 NW 2d 549.
[561] *Rodriguez v. Pacificare of Texas* Inc Md, 980 F 2d 1014.

differs on another ground that being, a skilled witness is permitted to state a fact not generally known, although it may involve an element of inference.[562] But the statement must not contain too much of objectionable reasoning or conjecture.[563] Therefore, it can be said that absolute certainty is not required of an expert before he can testify, mere estimation cannot constitute basis for expert opinion evidence.

Thus it must aid the court in understanding their problems.[564] An opinion creates no fact[565], it merely raises the issue of fact.[566]

The value or influence to be given to opinion evidence is, within the bounds of reason[567], entirely a question for the determination of the jury, the Court when trying a question of fact, or other of the facts.[568] Thus, the trier of facts should give opinion evidence such weight as it believes it is entitled to receive.[569]

Opinion evidence is entitled to weight only when consistent with probability and reason.[570] Thus of all forms of evidence, opinion evidence is said to be the weakest and least reliable.[571] However, it loses much of its weakness when supported by factual testimony.[572]

Expert evidence will often be useful and may even be essential. However, it will rarely be a complete substitute for direct evidence from the applicant about the impact which a condition has upon an applicant's day to day activities. This is particularly true in cases involving stress or depression, in which medical witnesses will not be able to give much direct evidence about the impact of the condition upon a particular applicant's normal day-to-day activities. Instead, they will often have to rely upon what they were told by the applicant during any examination. For this reason it will usually be best to ensure that the applicant

---

[562] *Cropper v. Titanium Pigment Co*., (1931) C.C.A. 8th Circ.47 Fed. (2) 1038, 1043, 78 ALR 737.
[563] *Kent v. Mahaffey*, 10 Ohio Cir. Ct. 204.
[564] *Johnson Group Inc v. Beecham Inc*, 952 F 2d 1005.
[565] *Leupe v. Leupe*, 21 Cal. 2d 145.
[566] *Carmichael v. Delta Drilling Co*., 243 SW 2d 227
[567] *S.M. Aycrigg et al., Plaintiffs v. United State of America*, 136 F Supp 244
[568] *United States of America v. Douglas W. Johnson*, 576 A 2d 1331.
[569] *Corp. v. Borland Inr'l*, Inc., 56 F Supp 83l.
[570] *Corp. Dobbins*, 616 F 2d 458 (10th Cr. 1980).
[571] *People v. Platt*, 124 Cal. App. 2d 123 (1954).
[572] Pa.-In re Meyers, 189 A 2d 852, referred in 2006 Cri LJ, Journal Section, at p. 216.

gives detailed evidence of the effect of the condition upon his or her day to day life, to confirm and explain the account given in any medical report. A combination of detailed factual evidence from the applicant and focused medical evidence which concentrates on the most relevant matters will allow the case to be put at its best".[573]

(IV) Other Countries: In countries such as **Holland**, **Germany, France** or **Austria** only individuals who have committed certain serious crimes are included in the DNA profiling.[574] The Scottish legal system presumes that illegally or improperly obtained probability deserves to be excluded from trial proceedings; however the police or other law enforcement authorities are primarily given the opportunity to rebut the irregularity by showing circumstances under which the 'improper acquisition of evidence' was necessary and consequently, justified. This principle developed out of the decision of the Court in the case of **McGovern v. H.M. Advocate**[575], where the Court held that "an irregularity in the manner of obtaining evidence is not necessarily fatal to its admissibility (but) irregularities of this kind always require being 'excused' or condoned. Whether by the existence of urgency the relative triviality of the irregularity, or other circumstances."

The Scottish law in this regard is thus widely built on human (Judges) discretion but the same must be carefully utilized bearing in mind the need for a balance between the interest of the citizens with regard to their personal security and a protection of their liberties and the interests of the State with regard to its duty to obtain evidence and ensure the carriage of justice through the Courts of law.[576]

While the former interest cannot be neglected or disregarded in an overzealous pursuit of evidence, the latter interest must not be thwarted by the suppression of evidence owing to a technical irregularity, which may be justified. It is this stage that the intention of the erroneous enforcement persons takes on a

[573] The role of medical evidence in disability discrimination cases.
[574] Schneider PM. DNA databases for offender identification in Europe - the need for technical, legal and political harmonization. Proceedings of the 2nd European Symposium on Human Identification. Madison, WI, USA: PromegaCorporation,1998.
[575] (1950) SLT 133 at 135.
[576] *Lawrie v. Muir*, (1950) SLT 39 at 39-40.

heightened importance because a general irregularity may be more readily excused than a situation where the misconduct was based on specific knowledge and deliberate intention. This is borne true by the case of **Fairley v. Fishmonger's of London**[577], where the police officers although acting in good faith and out of a well-founded sense of public interest, did so under a mistaken belief of certain powers and authority, thus staining their investigation procedure. The Court in that case however, held that since their actions were in good faith and to secure public interest, the same should be condoned and the evidence in question should be admitted for trial.

The exclusion or condonation of improperly obtained evidence will also depend on collateral factors. For instance, the evidence in question will be less likely to be accepted if there were no circumstances to constitute an emergency[578] for which the improper action was imperative[579], where a specific procedure to be followed has been dictated by a statute[580], the evidence in question has been obtained by private individuals rather than public official (who are accountable to their superiors)[581]; where the enforcement authorities had the opportunity to act in compliance with legal requirements[582]; or where the improper conduct involves a serious violation like assault.[583] The contrary is also true, for instance, the evidence is less likely to be excluded if the accused is charged with a serious offence, which is very hard to detect.[584]

The Scottish system, while allowing a wide discretion to the Judges, provides the most crucial opportunity to the erroneous officers to defend their actions before the Court. With respect to the discretion, a large amount of uniformity is sought to be maintained by providing a large number of criteria, which determine the status of evidence, as mentioned earlier. The greatest advantage of the system however, is that it successfully fulfils one of the major

[577] (1951) SLT 54 at 58.
[578] 2003 Cri LJ, Journal Section at 273.
[579] *Hay v. H.M. Advocate*, (1968) SLT 334.
[580] *Supra Note*, 154, chapter 5, page 193
[581] Ibid.
[582] *Mc Groven v. H.M. Advocate*, (1950) SLT 133 at 135.
[583] *H.M. Advocate v. Turnbull*, (1951) SLT 409 at 411.
[584] *Hopes v. H.M. Advocate*, (1960) JC 104.

shortcomings of most other systems in this regard i.e. it ensures and necessitates the Continuing judicial scrutiny of police activities and transfers the burden of justifying the illegal actions into the erring parties.[585]

As a result, it is important to ensure that the medical experts are asked to deal with the correct issues in their reports or letters to the court, especially if they are not going to be called to give oral evidence. Some matters require particular attention.

Firstly, the question of diagnosis should be addressed. This is essential in cases of mental ill health, where applicants need to prove that their conditions are 'clinically well recognised illness', Schedule 1 paragraph 1(1). This can usually be done by the treating doctor providing a diagnosis cross referred to one of the recognised systems which classify psychiatric disease, either ICD-10 or DSM-IV. In **Rugamer v. Sony Music Entertainment UK Ltd. and Ors**[586] the EAT upheld two Tribunal decisions in which psychological overlay was held not to be a physical impairment for the purposes of the DDA[587]. Furthermore, as there was no satisfactory evidence to show that the applicants had a diagnosed or diagnosable clinical condition of a recognised type, they had also failed to show that they had a clinically well recognised illness.

Although an expert may not be able to give direct evidence as to what impact a disability has upon an individual's normal day-to-day activities, s/he may be able to state that the fatigue or pain or loss of memory etc referred to by the applicant are typical of, and/or likely to be linked to, the physical or mental disability in question. This may be particularly useful where someone has been dismissed for poor performance or inappropriate behaviour if the respondent denies that this was related to the disability for the purposes of Section 5(1) of the DDA[588]. If evidence of such a link is produced, a tribunal can only decide that there was no such link if it has and explains its reasons for rejecting the expert

[585] 2003 Cri LJ, Journal Section at page 274.
[586] [2001] IRLR 644
[587] *Supra Note*, 86, chapter 5, page 182
[588] Ibid.

evidence.[589]

If an applicant was still receiving treatment (such as medication or counselling) at the material time, the expert should be asked to say what effect the condition would have had (i) if no treatment had been provided and; (ii) if the treatment had stopped at the material time. Unless the continuing treatment had produced a permanent improvement at the time of the discrimination, the tribunal will be required to disregard the beneficial effects of the treatment in deciding whether the applicant is a disabled person, see Schedule 1 paragraph 6 of the DDA[590]. If it had produced a permanent (but incomplete) improvement, only the effects of the continuing treatment will be disregarded, see **Abadeh v. British Telecommunications** above.

Science appears in court as the handmaiden of justice and is, in that fundamental sense, subservient to juristic ends. Common law judges have consistently emphasized that trial with expert witnesses' input must never become trial by experts usurping the proper, constitutional role of lay fact-finders. Yet at the same time, it would seem rational for fact-finders to defer to expert knowledge presented to them, at least when it truly concerns matters within the witness's field of expertise, is pertinent to the determination of disputed facts and is not contradicted by counter-expertise. Enduring unresolved tensions between expertise and lay adjudication grow in practical significance as the courts' reliance on new and increasingly powerful forms of scientific evidence continues to expand.

Cutting-edge science tends to be somewhat experimental, and early enthusiasms may need to be curbed in the light of further, sobering, experience. The methodological credentials of some forms of forensic expertise have been challenged and exposed as 'junk science'[591]. Further difficulties arise in relation to

[589] *Edwards v. Mid Suffolk DC* [2001] IRLR 190.
[590] *Supra Note*, 86, chapter 5, page 182
[591] Redmayne M, Roberts P, Aitken C, Jackson G. 2011. Forensic Science Evidence in question. Crim. Law Rev., 347–356 & Redmayne M. 2001. Expert Evidence and Criminal Justice. Oxford, UK: Oxford University Press.

statistics and probabilities [592] . Even if experts present scrupulously sound testimony, there is no guarantee that lay fact-finders will crack experts' linguistic codes and be able to give scientific evidence the probative value it truly merits on the facts. [593] There have been instances of genuine experts overreaching the boundaries of their legitimate expertise and isolated allegations of phoney proffered expertise ('charlatanism'). Sometimes well-qualified experts disagree with one another, potentially leaving lay fact-finders in a quandary.[594] Psychiatric and psychological testimony poses additional problems, arising from the inherent difficulties of obtaining reliable information about mental states and conditions, and applying relevant legal (mens rea) concepts and criminal law defences to prove mental states (not to mention the propensity of some expert witnesses to pad out their reports with inadmissible hearsay and to stray into areas of normative appraisal properly reserved for the court.[595]

Medical evidence and other expert testimony should always be approached with circumspection. Investigators, prosecutors, defence lawyers and courts need to be attentive both to what specific fact or facts scientific evidence purports to prove (questions of relevance and materiality), and to the strength of the inferential conclusion to which the evidence points (the probative value or weight of the evidence). Medical evidence is capable of being dispositive of criminal proceedings, even in the absence of a contested trial. Defence counsel may be inclined to advise their clients to plead guilty if the (apparent) strength of the scientific case against the accused appears overwhelming. Whomever is assessing the quality and strength of expert evidence at whatever stage of criminal proceedings—whether forensic scientists advising police investigators, or prosecutors making decisions about charge or case progression, or defence lawyers advising on plea or devising a trial strategy, or trial judge's ruling on evidentiary admissibility, or juries deliberating on their verdicts- the same

[592] The Royal Statistical Society has published four thematic Practitioner Guides on this topic: see www.rss.org.uk/statsandlaw

[593] McQuiston-Surrett D, Saks MJ. 2008. Communicating opinion evidence in the forensic identification sciences: accuracy and impact. Hastings Law J. 59, 1159–1189.

[594] *R v. Henderson* [2010] EWCA Crim 1269; [2010] 2 Cr App R 24; *R v. Cannings* [2004] 2 Cr App R 7, CA.

[595] Roberts P. 1996. Will you stand up in court? On the admissibility of psychiatric and psychological evidence. J. Forensic Psychiatry 7, 63–78.

fundamental precept applies: forensic science and other expert testimony will advance the cause of justice only on condition that the evidence is methodologically robust in its own terms, addressed to legally pertinent issues, and communicated in a way that makes its evidential value for the instant proceedings transparent and intelligible to non-specialists.

Yet, there is considerable institutional resistance to sweeping change; some of the reforms that have been implemented have not had their intended effects (partly owing to cultural adaptations and neutralization, aided and abetted by the law of unintended consequences); and many of the same old problems apparently persist. We have a surfeit of diagnosis, but how much of it is sufficiently well informed about the normative frameworks and institutional environments of judicial adjudication to serve as a secure basis for intelligent prescription? If the patient keeps rejecting the medicine, or does not improve when remedies are administered, perhaps the initial diagnosis was faulty.

This comparison has sketched out some of the normative and jurisprudential context of expert evidence (Medical evidence) in India and other countries, with the aim of promoting better understanding of the institutional environment in which medical evidence must operate.

CHAPTER–VI

JUDICIAL APPROACH TOWARDS MEDICAL EVIDENCE

The success or failure of any legislation depends upon the attitude of the judiciary which is the ultimate guardian of the interests of the citizens of the country. It is the judiciary which can "make" or "mar" the result of an even beneficial legislation. Hence, an attempt has been made in this chapter to know that how Indian judiciary has acted while interpreting the legal provisions relating to Medical Evidence in Civil and Criminal Law of India. It is happy to point out here that Indian judiciary has acted in a cautious and alert manner from the time it got opportunity for interpretation and application, the legal provisions. The judiciary in India from the dawn of Independence in the country to the date has played a major role in evaluation of medical evidence. *Lie Detector Test, autopsy, Narco test and other latest medical tests* have been properly and fairly considered by the courts in the cases cam before them.

It is relevant here to mention that "It is a general rule that a witness is not to give his impressions, but to state the facts from which he received them and leave the judge to draw his own conclusions. But wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence".[596]

The above mentioned para rightly reveals the importance of medical evidence. Their Lordships of the Supreme Court in **Solanki Chimanbhai Ukabhai v. State of Gujarat**[597] observed:

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use, which the defence can make of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby

[596] Gibson J. cited VII Wigmore p.12 and Cross, Evidence, 329 (1958)
[597] AIR 1983 SC 484: 1983 Cr. L. 822

discredit the eyewitnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

It must be noted that medical evidence is corroborative evidence and supplements direct evidence or circumstantial evidence.

The Rule of Law simply means power of law that is law is supreme and all are under law. This basic rule of present jurisprudence casts upon the Court the duty to ensure that no injustice is done to one who comes to the Court for a remedy.

It makes the Court duty bound to examine the expert opinion and scientific evidence very closely, and to find out the basis upon which it was based. This is so because it is only opinion evidence and cannot be relied upon, unless the basis of opinion is found to be firm.[598] It has to be evaluated like any other evidence. It is thus for the Court to judge whether the opinion has been correctly reached on the data available and for the reasons stated.[599]

An expert is a witness of fact. His evidence is really advisory in character.[600] Thus, such opinion is not considered generally as conclusive.[601] No expert opinion or scientific evidence can be the sole basis of conviction in a criminal case. Therefore, the weight to be attached to the opinion of experts depends on its rationality and scientific worth and not on the length of the practice of expert.[602] The same holds good for scientific evidence as it also suffers from the same handicap as the latter, that is, of being secondary evidence.[603]

---

[598] *Srichand v. Ramrati Devi*, AIR 1980 All 294 at 296, referred in 2006 Cri LJ, Journal Section, at 213.
[599] *State of Orissa v. Kanhu Chand Barik*, 1983 Cri LJ 133 (On) (DB).
[600] Ratanlal and Dhirajlal, The Law of Evidence, 20thEdn. (2002), at p. 559.
[601] *Gopal v. State of Rajasthan*, 1989 RCC 125 (Raj) (DB).
[602] *Ram Prasad v. Shyamlal*, AIR 1984 NOC 77 (All).
[603] Relationship between 'Experts and Scientific Evidence'.

Thus, with respect to scientific evidence, in particular, in light of Section 293 of the Code of Criminal Procedure, no value can be attached to a bald report which does not state any reasons in support of conclusions.[604] Thus a Court is not bound to accept and act on a report as conclusive evidence of its contents.[605]

The value of scientific evidence and expert evidence is that it assists the Court in reaching a particular conclusion, where technical assistance is necessary. It does not help the Court in interpretation.[606] However, it cannot be laid down as a rule of law that where expert assistance is not available, and where a reasonable guess work can be made from whatever evidence, that is on record, the Court would be precluded from doing so only because such evidence is not led in a particular, case.[607] Thus, the credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.[608]

However, it is a general rule accepted by Courts that expert's opinion, if corroborated, can be relied upon[609], even though nowhere does the Evidence Act say that corroboration is essential for the same but the Courts have developed this rule to ensure that the award is free from any collusion.

It must be noted here that the. Court in the case of **Arshad v. State of Andhra Pradesh**[610], has drawn a distinction with respect to value of data evidence and opinion evidence by experts, it has held that the latter has greater value.

It would be appropriate over here to contemplate a circumstance where there is a conflict between experts and other witnesses giving direct evidence. In this regard is the case of **Dulal Chandra Adak v. Gunadhar.**[611] Thus, the position of law which emerges in this regard is that the "Evidence of expert

[604] *State of Kerala v. Shaju*, 1985 KLT 33.
[605] *Bhaskaran v. State of Kerala*, 1967 KLT 165.
[606] *Forest Range Officer v. P. Mohamad Ali*, AIR 1994 SC 120.
[607] S.V. Joga Rao, Sir John Woodroffe and Syed Amir Ali's Law of Evidence, at 2351, 17thEdn.
[608] *State of Himachal Pradesh v. Jai Lal*, AIR 1999 SC 3318.
[609] *Palania Pillai v. State*,1991 Cri LJ 1563.
[610] 1996 Cri LJ 2893 (AP).
[611] AIR 1998 Cal 150.

cannot outweigh direct evidence". So, thereby implying that generally in case of such conflict as contemplated above expert evidence, though not rejected, will not hold much weight for the simple reason that it is indirect form of evidence. However in the case of **Arshad v. State of Andhra Pradesh**[612], the Court has held that data evidence cannot he rejected, if it is inconsistent to oral evidence. Thereby implying that data evidence submitted by an expert cannot be rejected even if it is inconsistent with direct evidence, however the Court in the same case has laid down that the same is not true for opinion given by expert.

The Court in the case of **Jabbar Singh v. State of Rajasthan**[613], has held that evidence supporting eye-witnesses should be preferred to that of experts. It has also been held in this context in a different case that only where there is no direct evidence that expert evidence becomes relevant.[614] Also when there is direct evidence given and accepted, it is hardly necessary to consider expert opinion, though direct evidence can be appreciated in the light of expert evidence.[615] Thus, it can be concluded that where the testimony of the eyewitness inspires confidence and is trustworthy, normally, expert evidence should not be attached much weight.[616] The reasons for the same are lack of knowledge, inaccuracy of expression and partisanship[617] and therefore the Courts have treated it as the weakest form of evidence.

Forensic science, the familial of the law, is the application of scientific techniques to law. It can be considered as a discipline helpful for the effective enforcement of the laws and rules of conduct. It helps the criminal justice system by providing valuable information, which cannot be detected solely with the help of legal brain. In reality, there is no such separate discipline known as forensic science; it is rather a blend of various scientific branches like biology, physics, chemistry and other related scientific subjects. Though medicine, one of the major related disciplines in the forensic science does not come under the head, because it

[612] 1996 Cri LJ 2893 (AP).
[613] 1994 5CC (Cri) 1745.
[614] *Brij Basi v. Moti Ram*, AIR 1982 All 323 at 331.
[615] *Gulamad v. Kutch State*, AIR 1952 Kutch 4 at 5.
[616] *Hirottam Das v. Moot Chand*, 1982 All LJ 1049.
[617] Admissibility of Scientific Evidence and Expert Opinion, referred in 2006 Cri LJ, Journal Section, at p. 215.

is a distinct discipline known as legal-medicine or forensic medicine. Similarly, there are many other distinct disciplines known as forensic psychology, forensic pathology, forensic odontology etc. Nevertheless, we can say that forensic science is the genus and all other related disciplines are its species.

Scientific detective writer Sir Arthur Conan Doyle developed it use Forensic Science. He through his fictional character "Sherlock Holmes" shows how the criminal investigators successfully investigate crimes applying the principles of serology, finger printing, questioned documents and firearm identification. There are many other persons as well who can be called as the inventors in developing forensic science.

In **Mahmood v. State of U.P**.[618], the court held that it is highly unsafe to convict a person on the sole testimony of an expert. Substantial corroboration is required[619]. Thereby, it is very evident that conviction cannot be granted only on the basis of forensic report of an expert.

In **State of Maharashtra v. Damu Gopinath Shinde[620],** the Supreme Court has held that without examining the expert as a witness in the court, no reliance can be placed on expert evidence.

In **Malappa Sidappa Alakumar v. State of Karnataka[621],** if there is a conflict between medical and ocular evidence, than ocular evidence shall be preferred over the medical evidence, in case ocular evidence is acceptable, trustworthy and reliable.

In this regard, it is worthwhile to remember the observations' of Dr. Arijit Pasayat J., His Lordship very rightly observed, in the case of **Ram Swaroop** v. **State of Rajasthan[622]** that,

---

[618] *Sarkaria R.* (1976). *Mahmood v. State of U.P*. AIR SC 69, AIR , SC.
[619] *Singh K.* (1992). *Mohd. Isa Khan v. State of U.P. Criminal Law Journal*, 3987.
[620] *Thomas* (2000). *State of Maharashtra v. Damu Gopinath Shinde*, AIR SC 1691, AIR, SC.
[621] *Ashok B. Hinchigeri* (2009). *Malappa Sidappa Alakumar vs State of Karnataka*, AIR SC 2959, AIR, SC.
[622] *Singh B.P.* (2008). *Ram Swaroop v. State of Rajasthan*, AIR SC 1747, AIR, SC.

"A doctor is usually confronted with such questions regarding different possibilities or probabilities of causing injuries or post-mortem features which he noticed in the medical report may express his views one way or the other depending upon the manner the question was asked. But the answers given by witness to such questions need not become the last word on such possibilities. After all, he gives only his opinion regarding such questions. But to discard the testimony of an eye-witness simply on the strength of such opinion expressed by the medical witness is not conducive to the administration of criminal justice".

By keeping in view the above observations' and in view of the potential risk involved to an accuser's fair trial, the reference is given to a leading case of the Supreme Court of Canada, namely, **R. v. Mohan**[623] wherein, the Hon'ble Supreme Court of Canada drawn a criteria which must be considered before a witness may give expert opinion/evidence at the stage of trial; which in my understanding should be followed universally throughout the world.

Admission of expert evidence depends upon the following criteria[624]:

i. Relevance of the evidence;
ii. Necessity of the evidence;
iii. The absence of any exclusionary rule; and
iv. A properly qualified expert.

6.1 Medical Evidence vis-a-vis direct evidence :

In **Solanki Chimanbhai Ukabhai v. State of Gujarat**[625]**,** the Court observed that "Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its

[623] *Wikipedia* (1994). *R v. Mohan*, CanLII 80, SCC (Supreme Court of Canada), Canadian Criminal Law.
[624] *Brian Weingarten* (2016). Expert Evidence in Canada. http://www.bwdefencelaw.com/expert-evidence-Canada- Mohan, 02.04.2016.
[625] AIR 1983 SC 484.

turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence".

The principal reason which weighed with the learned Sessions Judge in acquitting the appellant was that one of the injuries found on the person of the deceased was of such a nature that it could not have been caused by a spear and under the circumstances medical evidence not only failed to support the case of the prosecution but rather ran counter to the prosecution case. In view of the medical report and medical evidence the learned Sessions Judge did not think it safe to rely on the testimony of eye witnesses. Besides, he found that these witnesses had tried to improve the case from stage to stage and that they were interested witnesses.

In the case of **Vijay Pal v. State (GNCT) of Delhi[626],** Dipak Misra and N.V. Ramana, JJ. observed as under;

"We are disposed to think so when we weigh the medical testimony vis-a-vis the ocular testimony. There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-a-vis the injuries appearing on the body of the deceased person and likely use of

[626] (2015) 1 MLJ (Crl) 722 (SC) 1003.

the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses".

The prosecution has been able to establish that the occurrence took place at 11.00 p.m. There is conclusive medical evidence that the deceased did not suffer the injuries because of accidental fire. There is no reason to disbelieve the testimony of the father of the deceased or to discard the medical evidence. On the contrary, the evidence is beyond reproach.

In the case of **State of Haryana and Ors. v. Ram Singh and Anr.**[627]**,** the Court while considering the significance of the evidence of the doctor observed that while it is true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-à-vis the injuries appearing on the body of the deceased person and likely use of the weapon therefore and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses.

The Court in **State of Rajasthan v. Bhanwar Singh**[628]**,** the court observed "though ocular evidence has to be given importance over medical evidence, where the medical evidence totally improbabilises the ocular version that can be taken to be a factor to affect credibility of the prosecution version".

The prosecution failed to prove its case on one more aspect. The prosecution alleged that the medical evidence corroborates their story. But the testimony of Dr. Sanjeev Jindal who did the medical examination of the deceased, does not support this fact. He stated that the internal injuries of the deceased were such that they may have been caused by a heavy stone kept on the chest, but he did not clearly establish the same, in his opinion. He merely said that the possibility cannot be ruled out. Also, if the incident occurred in the manner stated in the FIR, sufficient quantity of soil should have been found in the mouth of the

[627] 2002 CriLJ 987.
[628] Criminal Appeal No. 578 of 2004 (Arising out of SLP (Crl.) No. 2247 of 2004 and Crl. M.P. No. 219 of 1995), decided on 6.05.2004 in the Supreme Court of India.

deceased but PW-1 has categorically stated in his testimony that no soil was found in the mouth of the deceased. He had merely found some dust sticking to the face of the deceased which could be caused by merely throwing the dead body on the ground or even on a metalled road which is dust free.

In **State of Punja v. Bittu and Ors**.[629], Pinaki Chandra Ghose and R.K. Agrawal, JJ.observed, "All the above circumstances lead to the inference that the prosecution has failed to bring home its case. It appears that the testimonies of Narain Dass (PW-5) and Kashmir Chand (PW-7) are highly doubtful and do not inspire confidence. Though the motive has been well established by the testimony of PW-7, but it alone cannot be sufficient to convict the accused as it is not substantive evidence and is merely corroborative in nature. Even the medical evidence fails to support the prosecution version. Thus, the conviction of the accused cannot be sustained. In the light of the above discussion, the Court found no grounds to interfere with the judgment passed by the High Court. The appeals were, accordingly, dismissed.

6.2 Effect of contradiction between Oral and Medical Evidence in Criminal cases :

In **Narpal Singh v. State of Haryana**[630], the Supreme Court had observed that where there is any direct conflict between the curler and medical evidence, the Court has to reject the prosecution case.

In **Ram Barain v. State of Punjab**[631], it had been observed that where the direct evidence is not supported by the expert evidence, it would be difficult to convict the accused on the basis of such evidence.

A similar view was expressed by Rantnavel Pandian, J., as he then was, speaking for the Bench in Sivalingam In re[632].

---

[629] CRIMINAL APPEAL NOS. 548-551 OF 2013, decided on 16.12.2015, in the Supreme Court of India.
[630] 1977CriLJ642
[631] 1975CriLJ1500 (SC)
[632] 1986 MLW 75

The evidence of eye-witnesses is also in direct contradiction with the medical evidence and in such circumstances, Supreme Court in recent decision in **B.N. Singh etc. v. State of Gujarat**[633] observed that when the witnesses have gone to the extent of implicating one accused falsely and when the evidence of eye-witnesses is contradicted by medical evidence no conviction could be based on such evidence.

Hon'ble Supreme Court of India, wherein the Hon'ble Court has opined the necessity to strengthen the Forensic Science for detection of crimes; in the case of **Dharam Deo Yadav v. State of U.P.**[634], which is reproduced herein below: Para 30:

Criminal Judicial System in this country is at cross-roads, many a times, reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities. Judiciary should also be equipped to understand and deal with such scientific materials. Constant interaction of Judges with scientists, engineers would promote and widen their knowledge to deal with such scientific evidence and to effectively deal with criminal cases based on scientific evidence. We are not advocating that, in all cases, the scientific

[633] AIR 1990 SC 1628
[634] *Murtaza I.* (2014). *Dharam Deo Yadav v. State of U.P.*, 5 SCC 509, SCC

evidence is the sure test, but only emphasizing the necessity of promoting scientific evidence also to detect and prove crimes over and above the other evidence.

6.3 Medical Evidence in Rape Cases :

Forensic medical evidence obtained by examination of the victim is of crucial importance in the investigation and trial of rape offences. The outcome of a prosecution is likely to depend on it. In the 1970s, one aspect of the concern which began to be expressed in this country about the handling of rape cases by the criminal justice system, was the manner in which forensic medical examinations were conducted.' Measures intended to improve the situation were introduced in the 1980s but there has been very little research to confirm how successful they have been. The purpose of this article is, first, to consider the present arrangements for providing such examinations for rape victims in two different police areas viz., the Metropolitan Police District and Sussex2 and secondly, to examine and evaluate the practice and attitudes of a sample of doctors who conduct these examinations in each area.

The topic will look briefly at the background to the current situation. It will explain the methods used in this study and how data was analysed. It will then examine the arrangements made in London and Sussex to provide forensic medical examinations for rape victims and the problems raised by these arrangements. The examination of victims will next be considered by looking at each stage of this process and the attitudes and perceptions of doctors to each stage. The attitudes of doctors to their role and to the crime of rape will also be discussed. Finally, the policy implications of the study findings will be assessed.[635]

In **State v. Anwar Hussain**[636]Hon'ble Mr. Justice S. Ravindra Bhat and Hon'ble Mr. Justice S.P. Garg decided "The medical evidence contradicted the ocular version in this case. No independent public witness was joined during the

[635] Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice Author(s): Jennifer Temkin Source: The Modern Law Review, Vol. 61, No. 6 (Nov., 1998), pp. 821-848

[636] Crl.A.156/2011, decided on 5th March, 2012 in the Delhi High Court.

investigation. The prosecutrixs mother turned hostile. The accused was not named at the first instance. Hence, the acquittal by the lower court was correct.

In **Madan Gopal Kakkad v. Naval Dubey and Anr**[637]**,** this Court has held (vide para 23) that lack of oral corroboration to that of a prosecutrix does not come in the way of a safe conviction being recorded provided the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case medical evidence can be expected to be forthcoming, further the court observed, "The court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory".

In **Sadashiv Ramrao Hadbe v. State of Maharashtra and Anr.**[638], where the sole testimony is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable to belie the case set up by the prosecutrix, this Court held that Court shall not act on the solitary evidence of the prosecutrix. Thus, in light of the above the Court should not rely solely on the testimony of the prosecutrix. The statement in the present case requires corroboration as it has minor contradictions and is not corroborated by other prosecution witnesses. The two maternal uncles (PW-4 and PW-5) of the prosecutrix did not support her and were declared hostile.

In **Ram Narain Singh v. State of Punjab**[639]**,** this Court held that where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistics expert, it amounts to a fundamental defect in the prosecution's case and unless reasonably explained it is sufficient to discredit the entire case.

---

[637] [1992] 2 SCR 921.
[638] (2006) 10 SCC 92.
[639] AIR 1975 SC 1727

In **State of Haryana v. Bhagirath & Ors.**[640]**,** it was held as follows:-

"The opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject".

Drawing on Bhagirath's case (supra.), this Court has held that where the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant". Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive.

The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.[641]

---

[640] (1999) 5 SCC 96

[641] *Thaman Kumar v. State of Union Territory of Chandigarh,* (2003) 6 SCC 380; *Krishnan v. State* (2003) 7 SCC 56).

A similar view has been taken in **Mani Ram & Ors. v. State of U.P.**[642]**, Khambam Raja Reddy & Anr. v. Public Prosecutor, High Court of A.P.**[643] **and State of U.P. v. Dinesh**[644]**.**

In **State of U.P. v. Hari Chand**[645] this Court reiterated the aforementioned position of law and stated that, "In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy".

In an another case **Awadhesh v. State of M.P.**[646] again their Lordships of the Supreme Court observed, "Medical expert's opinion is not always final and binding".

In **Mayur v. State of Gujarat**[647] the Supreme Court observed, "Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth".

In **Baldev Raj v. Smt. Urmila Kumari Miglani**,[648] the court held that clear and direct evidence cannot be rejected just because of contrary medical evidence.

In **Ishwar Singh v. State of U.P.**[649]**,** the Supreme Court again observed, "It is the duty of the prosecution, and no less of the Court, to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon".

In **Roopram and Ors.v. State of M.P.** [650] **,** Rajeev Gupta, C.J. and Sunil Kumar Sinha, J. held, "where Appellants argued that the evidence of the eye-witnesses are contradictory and there are many omissions in their evidence,

---

642 1994 Supp (2) SCC 289
643 (2006) 11 SCC 239
644 (2009) 11 SCC 566
645 (2009) 13 SCC 542
646 AIR 1988 SC 1158: 1988 Cr.LJ. 1154 (Para 10)
647 AIR 1983 SC 5: 1982 Cr.L.J. 1972
648 AIR 1979 SC 879
649 AIR 1976 SC 2423
650 2011(3)CGLJ124

therefore, they are unreliable. We have considered the evidence of all the eyewitnesses. The minor omissions relating to manner of using the weapons by the accused persons and sequence of the incident would not make her evidence unreliable. On this account the versions of the above eye-witnesses are intact and are also corroborated by the medical evidence". [651]

In **Shudhakar v. State of M.P.[652],** Swatanter Kumar and F.M. Ibrahim Kalifulla, JJ. held, "Equally well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the testimony of a sole eyewitness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. These are the few principles which the Court has stated consistently and with certainty.

Having referred to the law relating to dying declaration, now we may examine the issue that in cases involving multiple dying declarations made by the deceased, which one of the various dying declarations should be believed by the Court and what are the principles governing such determination. This becomes important where the multiple dying declarations made by the deceased are either contradictory or are at variance with each other to a large extent. The test of common prudence would be to first examine which of the dying declarations is corroborated by other prosecution evidence. Further, the attendant circumstances, the condition of the deceased at the relevant time, the evidence , the voluntariness and genuineness of the statement made by the deceased, physical and mental fitness of the deceased and possibility of the deceased being tutored are some of

[651] 2011(3)CGLJ124
[652] (2012) 7 SCC 569

the factors which would guide the exercise of judicial discretion by the Court in such matters. In the case of Lakhan (supra), this Court provided clarity, not only to the law of dying declaration, but also to the question as to which of the dying declarations has to be preferably relied upon by the Court in deciding the question of guilt of the accused under the offence with which he is charged. The facts of that case were quite similar, if not identical to the facts of the present case. In that case also, the deceased was burnt by pouring kerosene oil and was brought to the hospital by the accused therein and his family members. The deceased had made two different dying declarations, which were mutually at variance. The Court held as under:

The doctrine of dying declaration is enshrined in the legal maxim nemo moriturus praesumitur mentire, which means "a man will not meet his Maker with a lie in his mouth". The doctrine of dying declaration is enshrined in Section 32 of the Evidence Act, 1872 as an exception to the general rule contained in Section 60[653], which provides that oral evidence in all cases must be direct i.e. it must be the evidence of a witness, who says he saw it. The dying declaration is, in fact, the statement of a person, who cannot be called as witness and, therefore, cannot be cross-examined. Such statements themselves are relevant facts in certain cases.

Acceptability of a dying declaration is greater because the declaration is made in extremity. When the party is at the verge of death, one rarely finds any motive to tell falsehood and it is for this reason that the requirements of oath and cross-examination are dispensed with in case of a dying declaration. Since the accused has no power of cross-examination, the court would insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court should ensure that the statement was not as a result of tutoring or prompting or a product of imagination. It is for the court to ascertain from the evidence placed on record that the deceased was in a fit state of mind and had ample opportunity to observe and identify the culprit. Normally, the court places reliance on the medical evidence for reaching the

[653] *Supra Note*, 60, chapter 1, page 18

conclusion whether the person making a dying declaration was in a fit state of mind, but where the person recording the statement states that the deceased was in a fit and conscious state, the evidence will not prevail". [654]

6.4 DNA as Medical Evidence :

The Indian forensic scientists are also faced with the task of solving puzzling and intriguing evidence that are sent for their analysis by the baffled investigating agencies. What follows will give an idea of what the forensic scientists have to deal with when they try to help the investigating agencies in tracing the criminal.[655]

An Iskon Sadhu was accused of having raped a female follower. Subsequently he committed suicide as a result of these allegations. Meanwhile the vaginal swab was sent to the Central Forensic Science Laboratory (CFSL) (Kolkata). Forensic tests found that semen found in the vaginal swab did not belong to the Sadhu, who, it turned out, was the victim of some internal conflict among the Iskon members.[656]

From Haryana two charred skeletons were sent to the Central Forensic Science Laboratory (Kolkata) for identification of the victims, who were burnt live. The identities of the victims were established by DNA finger-printing. Similarly all the eleven rapists of a lady in Meghalaya were identified by DNA profile made with the help of the vaginal swab. These are some of the instances where forensic science played a crucial role in solving the crimes.[657]

In **Mukhtiar Singh v. State of Punjab**[658], the Supreme Court accepted the forensic science expert's evidence, (produced by the prosecution) that the fired cartridges and missed cartridges found at the site of the occurrence were fired from the rifle recovered. In **Raghbir Singh v. State of Punjab**[659], the Apex Court

[654] *Sudhakar v. State of Madhya Pradesh,* AIR 2012 SC 3265.
[655] 2003 Cri LJ, Journal Section, at 43.
[656] Personal Information of the Author from CFSL (Kolkata).
[657] Ibid.
[658] AIR 1971 SC 1864 : 1971 Cri LJ 1298.
[659] AIR 1976 SC 91: l976 Cri LJ 172

said that the science oriented detection of crime is made a massive programme of police, for in 'our technological age nothing more primitive can be conceived of than denying the discoveries of the science as aids to crime suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only, thereby discouraging liberal use of scientific research to prove guilt'. In **Kashinath C. Jalmi v. Speaker**[660], the Court held that the 'evidence provided by the forensic science laboratory was reliable'. In **State of Karnataka v. Bhoja Poojari**[661], forensic scientist identified the decomposed body of the victim by skull superimposition. That evidence was held to be reliable by the Apex Court. In **Ammini v. State of Kerala**[662], the Court held that report signed by the Joint Director of the Forensic Science Laboratory is admissible in evidence. In **State of Rajasthan v. N.K**.[663], a girl of 16 years age was raped. One of the evidence on which the prosecution rested its case was the report of the Forensic Science Laboratory, which confirmed the presence of human semen on the *lehenga* of the prosecutrix. The Court accepted the forensic evidence and decided the case in favour of the prosecution. In **Pawan Kumar v. State of Haryana**[664], forensic evidence was accepted as reliable for convicting the accused for bride burning.

Thus, the Court has shown favourable attitude towards accepting opinion of the expert in deciding cases[665] as and when it got opportunity.

6.5 Foreign Judgments :

R (on the application of AM) v. Secretary of State for the Home Department[666], Lord Justice Rix, lord justice Moses, and Mr Justice Briggs had an occasion to examine the meaning of 'independent evidence of torture' and the correct approach to the analysis of medical reports.

---

[660] AIR 1993 SC 1873.
[661] AIR 1997 SC 3812 :l997 Cri LJ 4420.
[662] AIR 1998 SC 260 : 1998 Cri LJ 481
[663] AIR 2000 SC 1812 : 2000 Cri LJ 2205.
[664] AIR 2001 SC 1324 2001 Cri LJ 1679.
[665] 2003 Cri LJ, Journal Section, at 44.
[666] (2009) EWCA Civ 833.

Giving the leading judgment of the Court of Appeal, Rix LJ disagreed that the nurse was merely taking everything AM said at face value:

Her reports constituted independent evidence of torture. She was an independent expert. Expressing her own independent views. it is evident from her assessment that she believed that AM had suffered torture and rape and that those misfortunes had rendered her the "grossly traumatized" woman that she found her to be, with "feelings of deep and intense shame and self disgust", "feelings of shame and stigmatization", and a "fragile mental state". Those findings are … interpretation of what she found, they are not the mere assertions of AM.

Her belief was her own independent belief, even if it was in part based on AM's account. The judge was mistaken to suggest that such belief was merely as a result of 'taking everything she said at face value'… where the independent expert is applying the internationally recognised Istanbul Protocol… A requirement of "evidence" is not the same as a requirement of proof, conclusive or otherwise. Whether evidence amounts to proof, on any particular standard… is a matter of weight and assessment.

In my judgment, Ms. Kralj's reports constituted independent evidence of torture. Ms Kralj was an independent expert. She was expressing her own independent views. As the judge himself said, her scarring report provided independent evidence of AM's scarring, and that seven of the scars were consistent with deliberately inflicted injury. If they were deliberately inflicted, who had inflicted them? It may have been in theory possible that they were deliberately inflicted by AM herself, or even by another person for some reason other than torture, but that would not be likely. It was not a thesis that Ms. Kralj put forward. On the contrary, it is evident from her assessment that she believed that AM had suffered torture and rape and that those misfortunes had rendered her the "grossly traumatized" woman that she found her to be, with "feelings of deep and intense shame and self disgust", "feelings of shame and stigmatization", and a "fragile mental state". Those findings are Ms Kralj's interpretation of what she found, they are not the mere assertions of AM.

On the contrary, as Ms. Kralj repeatedly observed, AM was reticent and understated. As the judge himself rightly stated, Ms. Kralj "believed the claimant". That belief, following an expert examination and assessment, also constituted independent evidence of torture. Ms Kralj's belief was her own independent belief, even if it was in part based on AM's account. However, the judge was mistaken to suggest that such belief was merely as a result of "taking everything she said at face value". A fair reading of her reports plainly went very much further than that. If an independent expert's findings, expert opinion, and honest belief (no one suggested that her belief was other than honest) are to be refused the status of independent evidence because, as must inevitably happen, to some extent the expert starts with an account from her client and patient, then practically all meaning would be taken from the clearly important policy that, in the absence of very exceptional circumstances suggesting otherwise, independent evidence of torture makes the victim unsuitable for detention. That conclusion is a fortiori where the independent expert is applying the internationally recognised Istanbul Protocol designed for the reporting on and assessment of signs of torture. A requirement of "evidence" is not the same as a requirement of proof, conclusive or otherwise. Whether evidence amounts to proof, on any particular standard (and the burden and standard of proof in asylum cases are not high), is a matter of weight and assessment.

The only reason ultimately given by the judge for not accepting Ms Kralj's reports as independent evidence of torture is contained in the last sentence of his para 24, where he said: "But the report did not provide independent evidence that the claimant had been tortured because that depended upon accepting the claimant's account how they were caused" (emphasis added). If the judge was talking about Ms Kralj's belief, that was plainly independent evidence, even if it depended in part on formulating her opinion in the light of AM's account. If, however, the judge was referring to the "acceptance" by the Secretary of State, that is neither a matter of evidence, nor is it independent, and the judge would be adding a new requirement, not mentioned in the Guidance, to qualify the Secretary of State's policy.

In The Queen on the application of **Albertina Ferreira Malungu v. Secretary of State for the Home Department.**[667] The Hon. Mr. Justice Burnett held, "You further add that the new medical evidence will go to the core of the credibility of Ms. Malungu's case and assert that in providing objective evidence which supports her account, the findings must be challenged and the determination must be considered unsafe and the likelihood of risk on return reconsidered".

"The claimant has not established the facts necessary to support a claim for unlawful detention based upon the suggestion that the Secretary of State failed to apply his policy on detention. The principles in such cases are now conveniently collected together in particular in **SK Zimbabwe and R (WL Congo) v. Secretary of State for the Home Department.**[668] The Claimant submitted that any failure to comply with a public policy of the Secretary of State governing the circumstances in which he will exercise immigration detention powers would render the consequent detention unlawful, if the policy properly applied would have resulted in release. She further submitted that the question of whether a policy was complied with was a matter of fact for the High Court to determine.

Thus, in this case it would for be the Court to determine whether Miss Kralj's report provided independent evidence of torture and whether the claimant was mentally ill. Further, having determined those questions, if necessary, going on to decide as primary decision maker whether nonetheless detention was appropriate or whether the circumstances fell within the exception recognised by Paragraph 55.16 itself. The position is far from as straightforward as that, but it is unnecessary to explore the implications of these submissions given my conclusion that this application should fail even approaching the case of that basis. The claimant's detention between 10 October and 13 November, 2008 was lawful. The question of damages does not arise". [669]

[667] [2010] EWHC 684 (Admin)
[668] [2010] EWCA Civ 111.
[669] Ibid.

E (A Child) - Medical Treatment)[670] Sir James Munby, President of the Family Division observed, “These factors, in my judgment, point to a very clear conclusion. It is, in substance, that for which both Mrs Walker and Ms Thomson contend. The decision is not one I need to take or should take. I agree with Ms Thomson when she submits that, on the basis of all the medical evidence, there is no clear cut answer as to the right option at this stage, that it is a personal decision for carers, and that, as the decision can be left, it should be left to whoever is entrusted with E’s long term care. As Mrs. Walker puts it, and again I agree, the decision is such a significant one that it ought to be taken by whoever claims E and will be his parent”.

It is clear from the cases discussed above that ‘Medical Evidence’ is becoming more reliable day by day but still oral evidence holds primacy over medical evidence. The reason for the same is very apparent that medical evidence has not reached to the status where it can be said with certainty that there is no discrepancy in the sampling as well as the inference. Till the sanctity of the sampling is ensured, medical evidence will be on back seat.

[670] [2016] EWHC 2267

CHAPTER–VII

CONCLUSION AND SUGGESTIONS

No research work is complete unless it draws a proper conclusion of the problem researched, investigated and analysed by the researcher. Thus, the researcher has tried under this chapter to draw a result of the study and simultaneously made an attempt to mention few suggestions, which in the opinion of the researcher, may contribute in the field of law relating to evidence and specifically, medical evidence.

It can be said that the ultimate object of law is to provide justice and procedural law is substantial tool to achieve the same.

There may be debates and discussions about the substantive laws such as a certain acts or omissions may be declared as an offence or not or certain rights be given to citizens or not but procedural law is must since it leads us to justice and in particular Evidence is far more logical and important tool for access the truth.

The task becomes difficult when veracity of the direct evidence cannot be ascertained or where the direct evidence is not available and the task becomes difficult to get the direction in which the investigation or the inquiry should move.

Here comes the role of logic and science. Science has proved itself as best companion of the law and both together have done wonders, be it quality of life or inquest of truth or exalted truth.

There were times when science had not role in judicial proceedings. That was always the most important part of social life but whenever there was a competition between science and religion or mythology, science was compelled to fail measurably but now the times have changed and science has proved its mettle.

It has, coupled with technology, emerged as an asylum for truth and Medical Evidence is one of its illustrations.

There is a unanimity that medical and forensic evidence plays a crucial role in helping the courts of law to arrive at logical conclusions. Therefore, the expert medical professionals should be encouraged to undertake medico legal work and simultaneously the atmosphere in courts should be congenial to the medical witness.

This attains utmost importance looking at the outcome of the case, since if good experts avoid court attendance, less objective professional will fill the gap, ultimately affecting the justice. The need to involve more and more professionals in expert testimony has been felt by different organizations.

In the light of new developments in the forensic science, the home ministry, Govt. of India constituted a committee under the chairmanship of Dr. Justice V.S Malimath to suggest reforms in the criminal justice system. This committee suggested comprehensive use of forensic science in crime investigation. According to the committee DNA experts should be included in the list of experts given in Section 293(4) of Criminal Procedure Code, 1973.

It has been observed that, "The method of medical or scientific investigation is nothing but the expression of the necessary mode of working of the human mind. It is simply the mode in which all phenomena are stored out, rendered precise and exact. Scientific investigation in other words, aims at systemized accurate and verifiable knowledge needed to discover the truth, reality in a crime investigation. Such truths and reality will be eternal imperishable and unchanging". [671]

Objective of research:

The main focus of the present research has been to investigate the role of medical evidence in civil and criminal law. Another word we can say 'where medical science does stands in the evidentiary value in the civil and criminal administration?' For that in Indian evidence Act 1872, Section 45 describes the opinion of experts are accepted to be relevant when the court has to form an

[671]Thomas Henry in 'Crimes and Science'

opinion on the point of foreign law, or of science or of art, or as to identify the handwriting or the finger impressions. The courts have been accustomed to act on the opinion of experts from early times. The reasons are obvious, there are matters, which require professional or specialized knowledge, which the court may not possess and may therefore rely on those who possess it. For example, when court has to determine the reasons of the shipwreck or an air crash, there may be many technical causes behind it as in the remarkable case of **Folokes v. Chadd (1782)** and therefore the courts will need the assistance of technicians, they being better acquainted with such causes. Similarly there are numerous cases which are the milestones proving the evidentiary value of clinical, pathological, handwriting expert's reports, ossification test reports, test report of carbon-14-dating FSL[672] reports etc. Section 46[673] further quotes that facts, not otherwise relevant, if they support or are inconsistent with the opinion of the experts are relevant. Banerjee J. of the Supreme Court observed in **State of Haryana v. Ramsingh**[674] that although a post-mortem report by itself is not a substantive piece of evidence, the evidence of the doctor conducting the post-mortem can be no reason be described to be insignificant. The significance of the evidence of the doctor vis-à-vis the injuries appearing on the body of the deceased person and likely use of weapon therefore could not be ignored and it would be the prosecutor's duty and obligation to have the corroborative evidence available on the record from other prosecution witnesses.

So it is crystal clear that civil and criminal administration of justice is still lagging behind in India and is still untouched to the styles and new methodologies of medical science, which may prove fruitful to investigate crime, thus criminal administration has yet to enlarge its scope and ambit to make pace with everyday changing phenomena of medical science.

Research work on Role of medical science in administration of civil & criminal justice is most developing concept of present era. The Synopsis has been included with reference to the prevalent laws as well as some new trends

[672] Forensic Science Laboratory
[673] Indian Evidence Act, 1872.
[674] (2002) 1 Supreme 130.

including developments in medical science that are throwing a challenge to the present time for a competent approach that will help to clarify all aspects of relevancy and conclusiveness of medical evidence. Paternity test, organ transplantation, sex and operations, narco test & other medical innovations have caused serious challenges before law and legal procedure.

Many burning questions have been raised time to time like- Whether the present law is sufficient to cope with the developing medical scenario? Whether the provisions under the various Laws are sufficient or need redrafting, reframing? Whether recent judicial pronouncements are creating Judicial Activism for improving the old theories of relevancy of medical evidence? What efforts should be made to match developments of medical science in administration of justice? By the time this research work is completed, the scholar feels a new trend of medical evidence in India. So the Researcher would like to suggest some new amendments and redrafting in the present laws dealing with relevancy of medical science in administration of civil and criminal justice in India.

The researcher in **chapter I** has discussed the object of science, “Science has its own course and own way. Logics, arguments, counter arguments can certainly lead you to the highest logic but may be not the highest truth. It’s profoundly wrong that truth has many faces; rather it has many shades and expressions. Truth is fact, which can be deduced by logics or may be by facts itself. Logic is mental exercise, which is substantial but truth is realization.

He has discussed how law and science are different. It has been well settled that the ‘object of the law’ is different from ‘the nature of law’. At the same time it is also settled that both rely on the facts. Law evolves and revolves around the facts. Law, being an exercise of settling the issues and the problems, are psychological treatments, with facts.

If we go deep down in the dimensions of facts what they have done to the civilization, it will be breath taking but if we explore what Medical Evidence has done to the humanity is simply ‘unprecedented’.

This is for the first time in the development in the legal and judicial history that any tool is evolving like a sword, cutting the webs of ignorance so mercilessly and reaching the truth so fast.

Medical Evidence is not only rich in its pace as an investigative tool, rather it is turning out to be a champion method for predicting the future and settling the uncertain. It has challenged the logics, questioned arguments and reversed the judgments ruthlessly and uncompromisingly.

It has made the legal journey from possibility to probability quite easy. It has tried to take both the evidentiary concepts on the same side precisely.

Their Lordships of the Supreme Court in **Solanki Chimanbhai Ukabhai v. State of Gujara**t,[675] observed:-

"Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use, which the defence can make of the medical evidence, is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however, the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eye witnesses, the testimony of the eye witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. "

Further the medical evidence is usually opinion evidence **Duraipandi Thevar** v. **State of Tamil Nadu**[676]. The medical opinion by itself, however, does not prove or disprove the prosecution case, it is merely of advisory character.[677] In **Mayur v. State of Gujarat.**[678], their Lordships of the Supreme Court observed:

---

[675] AIR 1983 SC 484: 1983 Cr. L. 822
[676] AIR 1973 SC 659: 1973 Cr. L.J. 602
[677] *Stephen Seneviratne v. Kind,* AIR 1936 P.C. 289 at p. 298. 299 : (1936) 37 Cr.L.J. 963; *Anant ChintamanLagu v. State of Bombay*, AIR 1960 C 500 at p. 523: 1960 Cr.L.J. 682)
[678] AIR 1983 SC 5: 1982 Cr.L.J. 1972)

"Even where a doctor has deposed in Court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth".

In an another case **Awadhesh v. State of Madhya Pradesh,**[679] again their Lordships of the Supreme Court observed: "Medical expert's opinion is not always final and binding". As it may be observed that the 'Medical Evidence' is a part of 'opinion' fair enough. But it's fascinating how 'Medical Evidence' has turned the table.

The endeavor has been made to ascertain the dimensions and the expansion of the 'relevance of medical evidence'.

The researcher, in **Chapter II**, has discussed the provisions relating to medical evidence in Constitution of India. Articles 20(3), Article 21, Article 39, Article 48A and Article 51A.

In Chapter II, the researcher has dealt with the provisions relating to the Constitution of India, which are relevant with Medical Evidence.

Article 20(3)[680] imposes a duty on the state that, "No person accused of any offence shall be compelled to be a witness against himself". It is clear from the text that it is a mandate against the barbarous and brutal ways of implicating anybody and then proving the case against him. To avoid and to abridge the unbridled power of police the provisions were established in the Constitution of India. But the other side of coin is 'to what extent accused may be provided protection'. The main task before the higher judiciary was to interpret the clause in such a way that there should not be any conflict in law of evidence and the said clause.

In **M.P. Sharma and Ors. v. Satish Chandra, District Magistrate, Delhi and Ors**.[681], the court consisting of Mehr Chand Mahajan, C.J., B.

[679] AIR 1988 SC 1158: 1988 Cr.LJ. 1154 (Para 10)
[680] *Supra Note*, 1, chapter 2, page 32
[681] AIR1954 SC 300.

Jagannadhadas, B.K. Mukherjea, Ghulam Hasan, N.H. Bhagwati, Sudhi Ranjan Das, T.I. Venkatarama Aiyyar and Vivian Bse, J.J. held that a search and seizure under the provisions of the Code of Criminal Procedure was not a compelled production and hence was not violative of Article 20 (3)[682].

Thus the maxim '*nemotenetureselpsum accused*' (No man can be compelled to criminate himself) became an important principle of the English Law, which Coleridge, J., in R. v. Scott, [683]describes as "a maxim of our law as settled, as important, and as wise as almost any other in it". Having regard to the aforesaid history, it cannot be denied that the insistence on the maxim being observed rests more on grounds of humanity than on excluding perjured evidence from trials. We would, therefore, differ with respect from the decisions where it has been held that the guarantee against testimonial compulsion would not be available where the veracity of evidence sought to be excluded be assured.

It is equally well established that much earlier to the inauguration of the Constitution, the aforesaid maxim had received legislative recognition in this country; for Section 3 of Act. XV of 1852 had enacted that an accused in a criminal proceeding was not a competent or compellable witness to give evidence for and against him. Later Sections 203 and 204 of the Code of Criminal Procedure, 1973, had provided that no oath shall be administered to the accused, and that it shall be in the discretion of the Magistrate to examine him. Though the Indian Evidence Act of 1872 had repealed Section 3 of Act XV of 1852, Section 250 of the Criminal Procedure Code of the same year had made provision for a general questioning of the accused after the witnesses for the prosecution have been examined compulsorily, and Section 345 provided that no oath or affirmation should be administered by the accused.

The researcher has discussed **The State of Bombay v. Kathi Kalu Oghad and Ors[684],** wherein the Supreme Court consisting of eleven judge bench (**B.P. Sinha, C.J., A.K. Sarkar, J.R. Mudholkar, K.C. Das Gupta, K. Subba**

[682] *Supra Note*, 1, chapter 2, page 32
[683] (1856) Dears and B. 47.
[684]AIR1961 SC 1808.

Rao, K.N. Wanchoo, N. Rajagopala Ayyangar, P.B. Gajendragadkar, Raghubar Dayal, S.K. Das and Syed Jaffer Imam, JJ.) examined the matter thoroughly Question of law regarding interpretation of Article 20(3)[685] before Supreme Court 'whether act compelling accused to give his specimen handwriting or signature or impression of finger tips amounts to compelling him to be witness against himself within meaning of Article 20(3)[686] - mere questioning of accused person by police officer resulting in voluntary statement which may ultimately turn out to be incriminatory is not compulsion to be witness is not equivalent to furnishing evidence in its wide significance that is to say as including not merely making of oral or written statement but also production of documents or giving materials which may be relevant at trial to determine the guilt innocence of accused- to be a witness means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing made or given in Court or otherwise - to bring statement in question within prohibition of Article 20(3)[687] the person accused must have stood in character of an accused person at time he made statement and it is not enough that he should become an accused any time after the statement has been made.

This judgment reversed the decisions of High Courts of Kerala and Calcutta. It must be observed that this judgment open the floodgates for all kind of medical evidences expert evidence subject to the admissibility as provided under Law of Evidence.

Further in **People's Union for Civil Liberties and Anr. v. Union of India**[688], Supreme Court consisting of bench of S. Rajendra Babu and G.P. Mathur, JJ. By applying the judgment in Kathi Kalu Oghad held that Section 27 of Prevention of Terrorism Act, 2002 is constitutional. The bench observed, "A close reading of Section 27 [689] makes it clear that upon a 'request' by an investigating police officer, it shall only 'be lawful' for the Court to grant permission. Nowhere, it is stated that the Court will have to positively grant permission upon a request.

[685] *Supra Note*, 1, chapter 2, page 32
[686] Ibid.
[687] Ibid.
[688] AIR 2004 SC 456.
[689] The Prevention of Terrorism Act, 2002

It is very well within the ambit of Court's discretion. If the request is based on wrong premise, the Court is free to refuse the request. This discretionary power granted to the Court presupposes that the Court will have to record its reasoning for allowing or refusing a request.

This section is only a step in aid for further investigation and the samples so obtained can never be considered as conclusive proof for conviction. Consequently, the constitutional validity of Section 27[690] is upheld".

In this chapter, the researcher has discussed how the law is settled, as for admissibility is concerned.

In **Chapter III**, the researcher has discussed provisions relating to Medical Evidence provided in Criminal Laws.

For instance, under Chapter XII of the Code of Criminal Procedure, 1973 where police and magistrates has given powers to investigate through Section 174 [691] , Section 175 [692] and Section 176 [693] which afford a complete and autonomous code in itself for the purpose of inquiries in cases of suicide, accidental, suspicious, violent, sudden or unnatural deaths with the aid and assistance of medical examinations, analysis and practitioner's report. Not only this, Section 291[694] allows the examination of a civil surgeon taken and duly attested by a magistrate to be given in evidence in any inquiry, trial or other proceedings before a court. It does not in any way preclude the court from calling the civil surgeon and examining him. This was as a whole eminently expressed in **Rambharosey's case**[695] The same was more elevatedly described in the case of **Hadi Kirsani v. State**[696] where it was held that medical officer must be call upon to give evidence on matters which have a bearing on the question to be decided by the court and injury reports and post-mortem report is held to be admissible and relevant where such medical officer or Doctor is died or unavailable for

[690] *Supra Note 19,* chapter 7, page 226
[691] *Supra Note,* 62, chapter 1, page 19
[692] Ibid.
[693] Ibid.
[694] Ibid.
[695] AIR 1946 22 luck.
[696] 1966 CrLJ (45) Oripg.21

examination in the court. Section 293[697] makes provisions for accepting in evidence reports made by certain Government scientific experts. It applies to the reports of chemical examiner and Asstt. Chemical examiner.

Supreme Court held in a case under Prevention of food adulteration act 1954 that accused had a right to call Public analyst to be examined and cross-examined and the fact that the certificate of Director of central laboratory supersedes the report of the public analyst is conclusive and final. It was so held in the case of **Ramdayal v. Municipal Corporation of Delhi**[698].

It will never be an exaggeration to say that due to such unavoidable assistance of medical science in criminology, the penelogical offences are comfortably becatagorised into different heads in the Indian penal code. This catagorisation is based on heinous nature, gravity, intensity and mode of criminal act done, which are nothing but a medical concept and scientific study of an act. As for instance Chapter XIV[699] relates of offences affecting public health, safety, decency and morals- Section 268[700] Public nuisances; section 269[701] Negligent act to spread infection of disease dangerous to life; Section 272[702] Adulteration of food or drink intended to sale; Section 274[703] Adultery of drugs.

Further in Penal code, in Chapter XVI[704] there are offences which affects the human body, therein the different kinds and modes of deaths are described as in Section 299[705] culpable homicide; Section 300[706] murder; Section 301[707] culpable homicide by causing death of person other than whose death was intended; Section 304A[708] death by negligence; Section 304B[709] dowry death;

[697] *Supra Note*, 62, chapter 1, page 19
[698] AIR1970 SC 366.
[699] *Supra Note*, 64, chapter 1, page 21
[700] Ibid.
[701] Ibid.
[702] Ibid.
[703] Ibid.
[704] Ibid.
[705] Ibid.
[706] Ibid.
[707] Ibid.
[708] *Supra Note*, 64, chapter 1, page 21
[709] Ibid.

Section 312[710] causing miscarriage and injuries to unborn child, of exposure of infants and of concealments of birth; Sections 349[711] and 350[712] ; Sections 363[713], 366[714] and others related to kidnapping and abduction; offences under Sections 375-377[715]. Moreover classification of injuries and hurt is also given in Section 319[716] that is of simple hurt and Section 320[717] of grievous hurt. Thus, the whole profile of Penal code is base on the medical analysis, reports, technical assistance and scientific knowledge, which facilitate the task of courts to search and investigate the crime.

In **Chapter IV** the researcher has made an attempt to discuss the provisions relating to medical evidence provided under civil laws. The researcher in this chapter has discussed The Code of Civil Procedure, Consumer Protection Law, etc. In Consumer Protection Law, the researcher has also discussed rights duties liabilities of Legal, Medical practioner. When does a medical service fall under the Consumer Protection Act.

A medical service falls under the purview the Consumer Protection Act in the following cases:

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.

Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services.

Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay and

[710] Ibid.
[711] Ibid.
[712] Ibid.
[713] Ibid.
[714] Ibid.
[715] Ibid.
[716] Ibid.
[717] Ibid.

persons who cannot afford to pay are rendered service free of charge, irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be “service” and the recipient a “consumer” under the Act.

Service rendered at a Government hospital/health center/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be “service” and the recipient a “consumer” under the Act.

Service rendered by a medical practitioner or hospital/nursing home if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company.

Where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute service.

Services Not Covered:

When does a medical service not fall under the under the Act ?

A medical service does not fall under the purview of the Consumer Protection Act in the following cases:

Where service is rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing home where such services are rendered free of charge to everybody. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

Where a service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service. The payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.

Remedies:

Remedies available in case of medical negligence:

A consumer has the option to approach the Consumer Forums to seek speedy redressal of his grievances or file a criminal complaint.

In **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and Ors.**[718]**,** the Supreme Court of India has an occasion to examine the issue relating to medical negligence based on the medical evidence. The court observed the difference between the civil and criminal liability and has observed "For criminal prosecution of a medical professional for negligence, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. Where as in civil law burden of proof is not so strict.

In **Qamar Jahan and Ors. v. Nisar Ahmad Tyagi and Ors.**[719]**,** the Supreme Court of India relied on evidence regarding the issue of medical negligence and observed, "It can be seen from the order dated 26.7.2010 that the right to file rejoinder was closed, and right to file affidavit in chief examination was also closed. The question of affidavit in chief examination arises only after the pleadings are complete. On the date of passing the impugned order dated 26.7.2010, apparently, the pleadings were not complete. Therefore, on that day, the National Commission could have, at best, forfeited the permission to file rejoinder or passed an order to the effect that in the absence of any rejoinder, pleadings are deemed to be complete, and then an opportunity should have been granted to the Appellants to lead evidence. Even thereafter, in case, there is

[718] AIR 2010 SC 1162.
[719] 2015 (2) RCR (Civil) 641.

no evidence, instead of dismissing the appeal for want of evidence, an opportunity of hearing to the Appellants on the basis of the material already available on the record of the case should have been given by the National Commission, and then should have decided the complaint on merits. No doubt, the complaint is of the year 2000 but the fact remains that service was affected on Respondent Nos. 3 and 4 only towards the end of the year 2009, and they filed their written statement on 14.1.2010".[720]

It has been observed that not only investigation in criminal cases but in civil cases also, medical evidence has provided a great help in attaining the truth.

Since the burden of proof and the gravity of proving the case differs in civil cases form criminal cases, it has come as quite handy tool for the same.

In **Chapter V** the researcher has made an attempt to compare laws of various countries. Researcher has discussed various legal systems wherein Medical Evidence has primacy. Most nations today follow one of two major legal traditions: common law or civil law. The common law tradition emerged in England during the middle ages and was applied within British colonies across continents. The civil law tradition developed in continental Europe at the same time and was applied in the colonies of European imperial powers such as Spain and Portugal. Civil law was also adopted in the nineteenth and twentieth century's by countries formerly possessing distinctive legal traditions, such as Russia and Japan that sought to reform their legal systems in order to gain economic and political power comparable to that of Western European nation-states.

To an American familiar with the terminology and process of our legal system, which is based on English common law, civil law systems can be unfamiliar and confusing. Even though England had many profound cultural ties to the rest of Europe in the Middle Ages, its legal tradition developed differently from that of the continent for a number of historical reasons, and one of the most fundamental ways in which they diverged was in the establishment of judicial

[720] *Supra Note*, 49, chapter 7, page 231

decisions as the basis of common law and legislative decisions as the basis of civil law. Before looking at the history, let's examine briefly what this means.

In this chapter, the researcher is discussed about the legal systems of the United States of America, United Kingdom, French Legal System and other important legal provisions of various legal systems.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference, which should be drawn from applying the specialized knowledge to the facts.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute". [721] When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.[722]

Expert evidence will often be useful and may even be essential. However, it will rarely be a complete substitute for direct evidence from the applicant about the impact which a condition has upon an applicant's day to day activities. This is particularly true in cases involving stress or depression, in which medical

[721] Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 418 (1952).
[722] 7 Wigmore §1918

witnesses will not be able to give much direct evidence about the impact of the condition upon a particular applicant's normal day-to-day activities. Instead, they will often have to rely upon what they were told by the applicant during any examination. For this reason it will usually be best to ensure that the applicant gives detailed evidence of the effect of the condition upon his or her day to day life, to confirm and explain the account given in any medical report. A combination of detailed factual evidence from the applicant and focused medical evidence which concentrates on the most relevant matters will allow the case to be put at its best".[723]

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education". Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values". The same was also the case in India.

It must be born in mind that 'Medical Evidence' is not only a legal perception and technique to explore the sanctity of the facts but it's also important for other aspects of society also; such as applied science.

In **Chapter VI** the researcher has discussed statutory provisions and case laws relating to Medical Evidence. "It is a general rule that a witness is not to give his impressions, but to state the facts from which he received them and leave the judge to draw his own conclusions. But wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence".

[723] The role of medical evidence in disability discrimination cases.

For instance, In **Solanki Chimanbhai Ukabhai v. State of Gujarat** [724]**,** the Court observed that "Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence".

The principal reason which weighed with the learned Sessions Judge in acquitting the appellant was that one of the injuries found on the person of the deceased was of such a nature that it could not have been caused by a spear and under the circumstances medical evidence not only failed to support the case of the prosecution but rather ran counter to the prosecution case. In view of the medical report and medical evidence the learned Sessions Judge did not think it safe to rely on the testimony of eye witnesses. Besides, he found that these witnesses had tried to improve the case from stage to stage and that they were interested witnesses.

In the case of **Vijay Pal v. State (GNCT) of Delhi** [725]**,** Dipak Misra and N.V. Ramana, JJ. observed as under;

"We are disposed to think so when we weigh the medical testimony vis-a-vis the ocular testimony. There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by

[724] AIR 1983 SC 484.
[725] (2015) 1 MLJ (Crl) 722 (SC) 1003.

eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis-a-vis the injuries appearing on the body of the deceased person and likely use of the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses".

In **Narpal Singh v. State of Haryana**[726], the Supreme Court had observed that where there is any direct conflict between the curler and medical evidence, the Court has to reject the prosecution case.

In **Ram Barain v. State of Punjab**[727], it had been observed that where the direct evidence is not supported by the expert evidence, it would be difficult to convict the accused on the basis of such evidence.

A similar view was expressed by Rantnavel Pandian, J., as he then was, speaking for the Bench in Sivalingam In re[728].

The evidence of eye-witnesses is also in direct contradiction with the medical evidence and in such circumstances, Supreme Court in recent decision in **B. N. Singh etc. v. State of Gujarat**[729] observed that when the witnesses have gone to the extent of implicating one accused falsely and when the evidence of eye-witnesses is contradicted by medical evidence no conviction could be based on such evidence.

It is clear from the cases discussed above that 'Medical Evidence' is becoming more reliable day by day but still oral evidence holds primacy over medical evidence. The reason for the same is very apparent that medical evidence has not reached to the status where it can be said with certainty that there is no

[726] 1977CriLJ642
[727] 1975CriLJ1500 (SC)
[728] 1986 MLW 75
[729] AIR 1990 SC 1628

discrepancy in the sampling as well as the inference. Till the sanctity of the sampling is ensured, medical evidence will be on back seat.

Suggestions:

Before recommending something, it is the utmost duty of the researcher to ensure the applicability of the research.

Since, it has already been established in preceding chapters that medical evidence is admissible in the court of law, that courts have reached the decisions solely on the bases of medical evidence, that medical evidence is one of the finest method to quest for truth, it is, now attempts are to be made to keep the medical evidence pious and pure.

As it has been observed that there is an apprehension about counting on medical evidence whenever it is in contradictory to direct evidence.

I. It must be noted that the task is not about admissibility of medical evidence. Lot of ink has already been flown on this subject. The question is how to make the whole process of medical evidence full proof so that chances of doctoring medical evidence can be mitigated.

II. Special provision must be inserted in Code of Criminal Procedure,1973 authorizing the court to supervise the entire procedure from the stage of collection to the disposal of bodily samples for the purpose of exact report of the incidents, place, human bodies and things used for commission of offence and this will be an additional help for the adjudicating authorities.

III. Some aspects should be improved in justice administrative like: -

   a. Discouraging routine summoning of doctors;

   b. Calling expert witness at pre-scheduled time;

   c. Recording expert’s testimony by alternative judicial officer in case of non-availability of the presiding officer the court that summoned him.

   d. Amending provision of criminal procedures to have admissibility of the medical records;

e. Recording of expert's testimony through video-conferencing.

IV. Manipulation is antithesis to medical evidence. The whole process, if medical evidence has to be relied on, must carefully be transparent, scientific and logical. Conclusions must be based on observations and they must comply with scientific principles.

V. Medical evidence, it must be noted that it neither favours prosecution nor favours defence. Rather, medical evidence is a device to come out with truth. If it fails to fulfill the objet, then there is no need to rely on the same.

VI. For more serious recognition of Medical evidence, laboratories must be established in each of the district headquarters. Sometimes it has been observed that evidence becomes redundant because of lack of facilities to take it in account.

VII. It is need of the time that to deal with the increasing number of paternity and handwriting cases, there should be an Independent Commission, with judicial and technical members as its member. This will reduce the burden of judiciary in India which is over burden by use of number of pending cases. It may be done on the line of Custom and Excise, Tribunal, Industrial Tribunal, etc.

VIII. The Family Courts Act, 1984 should be amended to provide a special chapter dealing with DNA parentage testing and adequate provisions should be made there under to ensure that parentage testing meets the highest technical and ethical standards, particularly in relation to consent to testing, protecting the integrity of genetic samples, and providing counseling. The parentage testing reports should be admissible in evidence only if made in accordance with the statutory requirements.

IX. Proximity is one of the most important deciding factors, if not most, to keep medical evidence intact. The adequacy of the method used to acquire and analyze samples in a given case bears on the admissibility of the evidence and should, unless stipulated, be adjudicated case by case. In this adjudication, the accreditation and certification status of the laboratory performing the analysis should be taken into account.

X. All the laboratories must be connected through internet so that communication can be made easy.

XI. A data management cell may be created to maintain the data received in all the labs in whole country.

XII. Data management centre can help in classifying the evidentiary value of the each medical evidence separately.

XIII. By establishing data management centre can help where the flaws are and how these flaws can be removed. We can take an illustration. Suppose Data centre reveals that cases relating to medical evidence of shot gun cases have succeeded some certain percent. Hence the cases wherein medical evidence has failed, the flaws may be discussed and rectified.

XIV. A system like Unique Identification (Like Aadhar Card) may be given to all the prisoners to have a data base so that the identification of prisoners may be mad easy, in case they are imprisoned again.

XV. However, a care may be taken so that this identification is not used as stigma for them. For ensuring this, it may be made mandatory that this unique identification may be activated as and when a person is jailed and will be used as device to verify a person in civil life.

XVI. Data management can also help improving the law and order situation of various states and districts.

XVII. Data management can reveal nature of offences committed in particular area and can help in reducing them by keeping the medical evidence intact and by ensuring that the evidence approaches the court without any manipulation.

a. To ensure the veracity of medical evidence human intervention must be reduced and things must be made automated.

b. It has been observed that medical science is ever evolving phenomena, it is necessary to keep the labs updated with latest and up to date apparatus.

c. Forensic labs must be accompanied with facilities of skilled staff.

d. It has been observed quite frequently that in India various labs differ drastically in same samples. This should be avoided with the skilled staff.

e. In addition to the above mentioned suggestions, efforts must be made so that medical evidence may be considered as evidence of worth considering and may sustain against direct evidence.

f. That can only be ensured by keeping the process intact, transparent, precise, and evaluated by skilled experts.

The analysis of the aforesaid reveals that Medical Evidence can contribute a lot for getting speedy justice to the society if the above said measure are taken care of for due and effective implementation. At present time, because of the fact that criminals are adopting new techniques for committing the crimes. Therefore, the importance of medical evidence is increasing fast in the present time because with the help of medical evidence and its new techniques the mystery of a crime can be easily and timely solved.

It can be suggested and recommended that the expert from the medical field should be encouraged to undertake medico-legal work. It has been seen above that the medical experts have played a very vital role as an aid to help the Courts to arrive at a logical and well-defined conclusion. And now, scientific experts/forensic scientists are also playing a crucial role especially in criminal matters and the testimonies of expert evidence have been relied upon by the Courts. The concern regarding the need to involve more professionals in expert opinion/testimony has been felt by various organizations[730].

Medical evidence is not only rich in its pace as an investigative tool, rather it is turning out to be a champion method for predicting the future and settling the uncertain issues. It has challenged the logical questions, arguments and reversed the judgments ruthlessly and uncompromisingly.

[730] Paranjape N.V., Criminology & Penology with Victimology, 15th Edition, Reprinted, Central Law Publications, Allahabad, India, (2012). Pp.642-660.

There is also a unanimity that medical evidence plays a crucial role in helping the courts of law to arrive at logical conclusions. Therefore, the expert medical professionals should be encouraged to undertake medico-legal work and simultaneously the atmosphere at court should be congenial to the medical witness. This attains utmost importance looking at the outcome of the cases, since if good experts avoid court attendance, less objective professionals will fill the gaps ultimately affecting the justice.

Law is a living process, which changes according to society, science, and ethics and so on. The legal system should imbibe developments and advances that take place in science. The use of medical evidence in criminal trials not only identifies the actual guilty but also prevent the innocent from being convicted wrongly. The principle of the Indian legal system is based on the fact that until proved guilty, a person is innocent and an innocent cannot be convicted even if a hundreds criminals are acquitted or free. There is urgent need for the compulsory application of medical evidence in the justice delivery system in India. The government must make a clear policy stand on medical evidence because what is at stake is India’s commitment to individual equity, freedoms and a clean justice system.

SUMMARY

Evidence is the soul, heart and body of a case whether civil or criminal. The success and failure of each and every case depend upon the availability of evidence and credibility of evidence. But the heartening development of the society is that, now a days, it is impossible to get “eye-witness” in a case because of humiliation, torture death may result to such a “witness”. Hence, the courts look for “other available evidences”. The medical evidence comes into the picture, on the issue of availability, reliability and credibility, which turns into the sole basis for decision beyond doubt. In some cases like paternity issues, hand-writing, finger prints, forgery, cyber offences, the medical evidence become a guiding star, rather than the only and sufficient evidence for establishing a fact. Thus, the medical evidence has left behind all other evidences today and thus become the life and blood of the socio legal structure.

Science has its own course and own way. Logics, arguments, counter arguments can certainly lead you to the highest logic but may not be the highest truth. It is profoundly wrong that truth has many dimensions; rather it has many shades and expressions. Truth is fact, which can be deduced by logical analysis or may be by facts itself. Logic is mental exercise, which is substantial but truth is realization.

‘Science of Law’ is not an exception to the above premises. It has been well settled that the ‘object of the law’ is different from ‘the nature of law’. At the same time it is also settled that both rely on the facts. Law evolves and revolves around facts. Law, being an exercise of settling the issues and the problems, are psychological treatments, with facts.

If we go deep down to the dimensions of facts what they have done to the civil and criminal proceedings, it will be breath taking, if we explore what medical evidence has done to the humanity is simply ‘unprecedented’. For the first time in development of the legal and judicial history that a tool is evolving like a sword, cutting the webs of ignorance so mercilessly and reaching the truth so fast.

Medical evidence includes documents written by a registered medical practitioner and other registered health or allied health professionals. This evidence should support the information which anyone provides in the medical details section for any claim. Statements about anyone's are condition written by him or his nominee is taken into account, but these are not considered medical evidence. This applies to information provided by any person who is not a registered health professional.

Medical evidence is not only rich in its pace as an investigative tool, rather it is turning out to be a champion method for predicting the future and settling the uncertain issues. It has challenged the logical questions, arguments and reversed the judgments ruthlessly and uncompromisingly.

Objective of the Research:

The object of this research is to study, analyze and find out the various dimensions of medical evidence in civil and criminal procedure. Followings are the objectives of the research study.

(1) To find out the latest trends of Medical developments in the Indian Jurisprudence vis-à-vis progressive society.

(2) To evaluate the constitutionality of various developed Medical Evidences in India.

(3) To understand the uses and impacts of medical evidence.

(4) To find out the importance of the evidence of medical expert in Civil and Criminal law of India.

(5) To find out the approach of Legislation to deal with role of medical evidence in administration of civil and criminal justice.

(6) The view of the Judiciary and legal luminaries on the present issue.

(7) Lastly, whether the provisions of ancient and modern legislations are sufficient to cover the various dimensions of relevancy of Medical Evidences in India.

Research Methodology :

Research methodology for this research study will be analytical and descriptive. First, historical and current data will be summarized to show the circumstances under which the need of medical evidence comes into light. The data suggest that the constant development of medical jurisprudence is helping the parties more and more to proceed towards their case. Therefore, drawing a direct nexus between the ancient, traditional explanations of the practice and the factors that can bring it about today can be misleading.

Analyses of the legal issues and implications persist while measuring trustworthiness and evidentiary value of these. Researcher will carry out this research work by analytical way, legislative provisions, International Conventions and various important Judicial Pronouncements relating to relevance of medical evidence in India. Besides this researcher will also evaluates the effectiveness of the administrative, legislative and judicial machinery in finding out the evidentiary value of these in various cases.

Further the analyses of the international development in medical jurisprudence and legal provisions concerned under legislations of various countries so as to recommend some uniform legal provisions and policies towards this issue.

Lastly, after analyzing the researcher's topic through all major headings some valuable suggestions will be given for the proper use and promotion of medical evidence in India.

It is to adopt doctrinal methods of research for the study. The study includes the historical aspect and methods, descriptive method and analytical method or exploring, probing the provisions relating to the Medical Evidence in Civil and Criminal Law of India. An analytical and critical study of various judicial pronouncements on the subject matter, the legislative provisions relating to Medical Evidence in Civil and Criminal Law of India and the work of different intellectuals and learned authors.

The methodology which has been adopted for the present research work is mainly based on doctrinaire as well as empirical analysis. The study is based on primary as well as secondary source of information. Efforts have been made to study the:

(1) Law, rules and regulations.

(2) Judicial pronouncements of the Supreme Court and High Court.

(3) Legal Commentaries and reports.

(4) Empirical studies for the Medical Evidence in Civil and Criminal Law of India.

And in order to make the study broad based, researcher has used the empirical method such as:

(1) collect data and material from the library of Delhi University;

(2) from library of University of Kota and Rajasthan University;

(3) from the library of the Institute of Development studies, Jaipur;

(4) from library of Indian Law Institute and Indian Society of International Law, Delhi;

(5) gather ratified questionnaires form Medical Evidence in Civil and Criminal Law in India activities also; and

The researcher has made a review of the literature available from the books of eminent authors, periodicals and articles published by standard institutions.

The research study comprises seven chapters. The chapterization is as follows:

The research study is about role of medical evidence in civil and criminal law of India and it is comprises in seven chapters. The first chapter is a Brief introduction relating to the concept of medical evidence has been discussed which is necessary as to understand the research work and the selection of this topic. The basic understanding about the research is sought by the researcher in this chapter.

Medical science and Law are inter-related. One is complimentary for the other as both cannot move/survive without one another. It is presumed that medical science is the only branch of science which takes all branches of science to common man and helps the justice system. The law of evidence defined many areas of medical evidence as “technical or other specialized knowledge”. It has evolved many domains of its own which include Fingerprints, Ballistics, Hand writing, DNA, Brain mapping, Narco Analysis, Polygraph etc. which are being analyzed and evaluated by courts under different standards of reliability. It helps courts in deciding questions of fact in civil and criminal trials.

In second chapter the researcher has discussed the provisions relating to medical evidence in Constitution of India. Articles 20(3) (No person accused of any offence shall be compelled to be a witness against himself), Article 21 (No person shall be deprived of his life or personal liberty except according to procedure established by law), Article 39, Article 48A and Article 51A. Various other provisions relating to ‘medical evidence’ in the Constitution of India will also be discussed in this chapter.

Though it is well settled that *there is no conflict between general burden, which shall always on prosecution and which never shifts, and special burden that rests on Accused to make out his defence.*

The medical evidence especially Narco-analysis, Brian-Mapping and polygraph, are held to be violative of fundamental rights, which they have no fixed content. It is well established that new scientific technology is helpful in detecting lie, crime and criminal, and it may be borne for justice system. The courts in India have yet not decided on its acceptability, but certainly this type of scientific test do provide some evidence or clue about the culpability of accused which may corroborate other oral testimonies. The courts should approve the legal use of narco- analysis, polygraph and brain mapping Brain fingerprinting and lie-detector test is not statement because it only discloses existence of knowledge about crime in brain. Though statement is given in narco- analysis test however it cannot be termed as involuntary.

The protection given by Article 20(3) gives protection from compulsory testimony that is no one is to be compelled to be witness against himself. So, as long as, the person is not compelled to give testimony protection of Article 20(3) is not available. Narco-analysis test is a step in aid of investigation. It forms an important base for further investigation as it may lead to collection of further evidence on the basis of what transpired during such examination. The use of above stated evidence is of particular relevance in the context of terrorism related cases, conspiracy to commit murder and other serious offences where the Investigating agencies do not have vital leads. The attempt of the courts should be to expand the reach and ambit of the fundamental rights by process of judicial interpretation. The fundamental rights have not been declared immutable, but these have to be kept in conformity with the changing conditions Constitution has to be kept young, energetic and alive.[731] If it is the duty of the judge to see no innocent is punished then he must also ensure that no guilty man escapes. Both are public duties[732] when security, protection and justice to the society is in conflict with the rights of accused, obviously first should get importance. Social security is more important the accused rights and moreover, these techniques are not at all unlawful. They will just help in investigation, courts of law will decide on that basis. It is respectfully submitted that by exaggerating rights of accused obstacles should not be put into the way of scientific, efficient and effective investigation into crime.

In third chapter researcher has focused on Various sections of the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872, Indian Penal Code, 1960, reveals the farsightedness of the legislators that they anticipated that in future, a time may come when medical evidence will dominate the criminal and legal jurisprudence of the country and the world. Hence, an attempt has been made under this chapter to study the principles and doctrines of medical evidences in the field of criminal matters and laws.

[731] *People's Union for Civil Liberties v. Union of India*, AIR 2003 SC 2363.
[732] *State of Punjab v. Karnail Singh*, (2013) 11 SCC 27.

Medical Evidence, as it has been seen, has become inevitable and there are fewer sorts of evidences which can match the accuracy of medical evidence. If the laws are to be examined, criminal law more specifically (though it cannot be said that the civil law does not have that requirement) it can be found that whatever the principle of the law is, medical evidence, wherever it is relevant, can be among the most trusted evidences, if not most trusted.

The medical opinion has great bearing and is of great assistance in the trial of criminal cases. It greatly helps the prosecution in establishing its case by soliciting corroboration from it by showing that the injuries could have been caused by the alleged weapon of offence by the accused persons in the manner alleged. The accused persons with the assistance of medical evidence try to demolish the prosecution story by showing that the injuries could not have been caused by the alleged weapon of offence or the death could not have occured in the manner alleged by the prosecution.

The medical opinion is merely of advisory nature. It is based on the observations made by the medical officer of the body of the injured and the corpse after the occurrence has taken place. In certain ways, medical opinion can be said to be direct evidence as by the colour of the injuries, the presence/absence of rigor mortis in the corpse, the presence of the tattooing marks, state of nature of the food digested/semi-digested/or undigested noted by the medical officer immediately after the incident. The time of the occurrence, is determined.[733]

Since witnesses are the eyes and ears of justice, the oral evidence has primacy over the medical evidence. If the oral testimony of the witnesses is found reliable, creditworthy and inspires confidence, the oral evidence has to be believed, it cannot be rejected on hypothetical medical evidence.

The medical opinion pointing to alternative possibilities cannot be accepted as conclusive. Unless the medical evidence completely rules out the prosecution story, the oral evidence if otherwise reliable cannot be rejected.

---

[733] J.T.R.I. JOURNAL, First Year, Issue–3, Year July–September, 1995

The medical officer being an expert witness, his testimony has to be assigned great importance. However, there is no irrebutable presumption that a medical officer is always a witness of truth, his testimony has to be evaluated and appreciated like the testimony of any other ordinary witness[734].

In fourth chapter researcher has analysed the provisions pertaining to medical evidence in Civil laws of the land such as Civil Procedure Code, 1908, Consumer Protection Act, 1986, Prevention of Food Adulteration Act 1954, Cigarettes and other Tobacco products (Prohibition) Act 2003, Biological Diversity Act 2002, Wildlife Prevention (Amendment) Act 2002, Competition Act, 2002. Since the civil law also relies on the evidence, it is pertinent to have some overlapping, which is good in a way for the through study of the subject.

There are many categories of medical science which includes Forensic medicine, Ballistics, Fingerprints, Question Documents, Voice Analysis, Narco-analysis, etc. There are various forensic laboratories wherein, all the tests are conducted. A year back in New Delhi, a former minister's wife was found dead in a hotel in an unstable condition. In this case, medical experts have played a very vital role; they have tested all the physical evidences, mainly, toxicology and pathology.[735] Thereby, it can be said that forensic science plays an important role as an aid to the courts to arrive to justice.

Under Hindu law, Muslim law, Transfer of Property Act, 1882. Contract law and the recent legislations like Consumer Protection Act, 1986, Competition Act, 2002 and the like, "medical evidence" is proving a helping hand to the needy, for example, if the consumer has become ill by consuming defective and contaminated good, he can only get relief if he has made "medical evidence" as his only supporter and helper. Hence, an attempt has been made under this chapter to discuss the relevancy of medical evidence with reference to civil matter and issues.

In fifth chapter researcher has compared other Legal systems with Indian

[734] Ibid.
[735] Maithil B. P., Physical Evidence in Criminal Investigation and Trials, 1st Edition, Selective and Scientific Books, Delhi, India, (2012) pp. 5-45.

Legal System. The researcher has analysed the United States system, UK system, and European Countries. One of the instances shows that “There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute”. When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.

Medical evidence and other expert testimony should always be approached with circumspection. Investigators, prosecutors, defence lawyers and courts need to be attentive both to what specific fact or facts scientific evidence purports to prove (questions of relevance and materiality), and to the strength of the inferential conclusion to which the evidence points (the probative value or weight of the evidence). Medical evidence is capable of being dispositive of criminal proceedings, even in the absence of a contested trial. Defence counsel may be inclined to advise their clients to plead guilty if the (apparent) strength of the scientific case against the accused appears overwhelming. Whomever is assessing the quality and strength of expert evidence at whatever stage of criminal proceedings-whether forensic scientists advising police investigators, or prosecutors making decisions about charge or case progression, or defence lawyers advising on plea or devising a trial strategy, or trial judge’s ruling on evidentiary admissibility, or juries deliberating on their verdicts- the same fundamental precept applies: forensic science and other expert testimony will advance the cause of justice only on condition that the evidence is methodologically robust in its own terms, addressed to legally pertinent issues, and communicated in a way that makes its evidential value for the instant proceedings transparent and intelligible to non-specialists.

Yet, there is considerable institutional resistance to sweeping change; some of the reforms that have been implemented have not had their intended effects (partly owing to cultural adaptations and neutralization, aided and abetted by the law of unintended consequences); and many of the same old problems apparently persist. We have a surfeit of diagnosis, but how much of it is

sufficiently well informed about the normative frameworks and institutional environments of judicial adjudication to serve as a secure basis for intelligent prescription? If the patient keeps rejecting the medicine, or does not improve when remedies are administered, perhaps the initial diagnosis was faulty.

This comparison has sketched out some of the normative and jurisprudential context of expert evidence (Medical evidence) in India and other countries, with the aim of promoting better understanding of the institutional environment in which medical evidence must operate.

The chapter sixth is about Judicial approach regarding medical evidence has been discussed thoroughly. It has been observed that courts have travelled a lot in interpreting the medical evidence and its role. Since the advancement and sophistication has changed the whole course of investigation and has become fact rather than mere hypothesis, the researcher will try to make an attempt regarding the course and journey of courts that how they have interpreted the same. There are occasions where the courts have interpreted and observed circumstantial evidence as trustworthy then direct evidence.

The success or failure of any legislation depends upon the attitude of the judiciary which is the ultimate guardian of the interests of the citizens of the country. It is the judiciary which can “make” or “mar” the result of an even beneficial legislation. Hence, an attempt has been made in this chapter to know that how Indian judiciary has acted while interpreting the legal provisions relating to Medical Evidence in Civil and Criminal Law of India. It is happy to point out here that Indian judiciary has acted in a cautious and alert manner from the time it got opportunity for interpretation and application, the legal provisions. The judiciary in India from the dawn of Independence in the country to the date has played a major role in evaluation of medical evidence. *Lie Detector Test, autopsy, Narco test and other latest medical tests* have been properly and fairly considered by the courts in the cases cam before them.

It is relevant here to mention that “It is a general rule that a witness is not to give his impressions, but to state the facts from which he received them and

leave the judge to draw his own conclusions. But wherever the facts from which a witness received an impression are too evanescent in their nature to be recollected or are too complicated to be separately and distinctly narrated, his impressions from these facts become evidence".[736]

It is clear from the cases discussed above that 'Medical Evidence' is becoming more reliable day by day but still oral evidence holds primacy over medical evidence. The reason for the same is very apparent that medical evidence has not reached to the status where it can be said with certainty that there is no discrepancy in the sampling as well as the inference. Till the sanctity of the sampling is ensured, medical evidence will be on back seat.

Finally, in seventh chapter researcher has studied on above topic and given valuable suggestions in regard to medical evidence and the scope of the medical cases. At last researcher has made fruitful recommendations regarding the betterment of the use and relevance of medical evidence in the Indian Judicial/legal system in further study.

No research work is complete unless it draws a proper conclusion of the problem researched, investigated and analysed by the researcher. Thus, the researcher has tried under this chapter to draw a result of the study and simultaneously made an attempt to mention few suggestions, which in the opinion of the researcher, may contribute in the field of law relating to evidence and specifically, medical evidence.

It can be said that the ultimate object of law is to provide justice and procedural law is substantial tool to achieve the same.

There may be debates and discussions about the substantive laws such as a certain acts or omissions may be declared as an offence or not or certain rights be given to citizens or not but procedural law is must since it leads us to justice and in particular Evidence is far more logical and important tool for access the truth.

The task becomes difficult when veracity of the direct evidence cannot be

[736] Gibson J. cited VII Wigmore, p.12 and Cross, Evidence, 329 (1958)

ascertained or where the direct evidence is not available and the task becomes difficult to get the direction in which the investigation or the inquiry should move.

Here comes the role of logic and science. Science has proved itself as best companion of the law and both together have done wonders, be it quality of life or inquest of truth or exalted truth.

There were times when science had not role in judicial proceedings. That was always the most important part of social life but whenever there was a competition between science and religion or mythology, science was compelled to fail measurably but now the times have changed and science has proved its mettle.

Before recommending something, it is the utmost duty of the researcher to ensure the applicability of the research.

Since, it has already been established in preceding chapters that medical evidence is admissible in the court of law, that courts have reached the decisions solely on the bases of medical evidence, that medical evidence is one of the finest method to quest for truth, it is, now attempts are to be made to keep the medical evidence pious and pure.

As it has been observed that there is an apprehension about counting on medical evidence whenever it is in contradictory to direct evidence.

I. It must be noted that the task is not about admissibility of medical evidence. Lot of ink has already been flown on this subject. The question is how to make the whole process of medical evidence full proof so that chances of doctoring medical evidence can be mitigated.

II. Special provision must be inserted in Code of Criminal Procedure,1973 authorizing the court to supervise the entire procedure from the stage of collection to the disposal of bodily samples for the purpose of exact report of the incidents, place, human bodies and things used for commission of offence and this will be an additional help for the adjudicating authorities.

III. Some aspects should be improved in justice administrative like: -

a. Discouraging routine summoning of doctors;
b. Calling expert witness at pre-scheduled time;
c. Recording expert's testimony by alternative judicial officer in case of non-availability of the presiding officer the court that summoned him.
d. Amending provision of criminal procedures to have admissibility of the medical records;
e. Recording of expert's testimony through video-conferencing.

IV. Manipulation is antithesis to medical evidence. The whole process, if medical evidence has to be relied on, must carefully be transparent, scientific and logical. Conclusions must be based on observations and they must comply with scientific principles.

V. Medical evidence, it must be noted that it neither favours prosecution nor favours defence. Rather, medical evidence is a device to come out with truth. If it fails to fulfill the objet, then there is no need to rely on the same.

VI. For more serious recognition of Medical evidence, laboratories must be established in each of the district headquarters. Sometimes it has been observed that evidence becomes redundant because of lack of facilities to take it in account.

VII. It is need of the time that to deal with the increasing number of paternity and handwriting cases, there should be an Independent Commission, with judicial and technical members as its member. This will reduce the burden of judiciary in India which is over burden by use of number of pending cases. It may be done on the line of Custom and Excise, Tribunal, Industrial Tribunal, etc.

VIII. The Family Courts Act, 1984 should be amended to provide a special chapter dealing with DNA parentage testing and adequate provisions should be made there under to ensure that parentage testing meets the highest technical and ethical standards, particularly in relation to consent to testing, protecting the integrity of genetic samples, and providing

counseling. The parentage testing reports should be admissible in evidence only if made in accordance with the statutory requirements.

IX. Proximity is one of the most important deciding factors, if not most, to keep medical evidence intact. The adequacy of the method used to acquire and analyze samples in a given case bears on the admissibility of the evidence and should, unless stipulated, be adjudicated case by case. In this adjudication, the accreditation and certification status of the laboratory performing the analysis should be taken into account.

X. All the laboratories must be connected through internet so that communication can be made easy.

XI. A data management cell may be created to maintain the data received in all the labs in whole country.

XII. Data management centre can help in classifying the evidentiary value of the each medical evidence separately.

XIII. By establishing data management centre can help where the flaws are and how these flaws can be removed. We can take an illustration. Suppose Data centre reveals that cases relating to medical evidence of shot gun cases have succeeded some certain percent. Hence the cases wherein medical evidence has failed, the flaws may be discussed and rectified.

XIV. A system like Unique Identification (Like Aadhar Card) may be given to all the prisoners to have a data base so that the identification of prisoners may be mad easy, in case they are imprisoned again.

XV. However, a care may be taken so that this identification is not used as stigma for them. For ensuring this, it may be made mandatory that this unique identification may be activated as and when a person is jailed and will be used as device to verify a person in civil life.

XVI. Data management can also help improving the law and order situation of various states and districts.

XVII. Data management can reveal nature of offences committed in particular area and can help in reducing them by keeping the medical evidence intact and by ensuring that the evidence approaches the court without any manipulation.

a. To ensure the veracity of medical evidence human intervention must be reduced and things must be made automated.

b. It has been observed that medical science is ever evolving phenomena, it is necessary to keep the labs updated with latest and up to date apparatus.

c. Forensic labs must be accompanied with facilities of skilled staff.

d. It has been observed quite frequently that in India various labs differ drastically in same samples. This should be avoided with the skilled staff.

e. In addition to the above mentioned suggestions, efforts must be made so that medical evidence may be considered as evidence of worth considering and may sustain against direct evidence.

f. That can only be ensured by keeping the process intact, transparent, precise, and evaluated by skilled experts.

The analysis of the aforesaid reveals that Medical Evidence can contribute a lot for getting speedy justice to the society if the above said measure are taken care of for due and effective implementation. At present time, because of the fact that criminals are adopting new techniques for committing the crimes. Therefore, the importance of medical evidence is increasing fast in the present time because with the help of medical evidence and its new techniques the mystery of a crime can be easily and timely solved.

It can be suggested and recommended that the expert from the medical field should be encouraged to undertake medico-legal work. It has been seen above that the medical experts have played a very vital role as an aid to help the Courts to arrive at a logical and well-defined conclusion. And now, scientific experts/forensic scientists are also playing a crucial role especially in criminal

matters and the testimonies of expert evidence have been relied upon by the Courts. The concern regarding the need to involve more professionals in expert opinion/testimony has been felt by various organizations[737].

Medical evidence is not only rich in its pace as an investigative tool, rather it is turning out to be a champion method for predicting the future and settling the uncertain issues. It has challenged the logical questions, arguments and reversed the judgments ruthlessly and uncompromisingly.

There is also a unanimity that medical evidence plays a crucial role in helping the courts of law to arrive at logical conclusions. Therefore, the expert medical professionals should be encouraged to undertake medico-legal work and simultaneously the atmosphere at court should be congenial to the medical witness. This attains utmost importance looking at the outcome of the cases, since if good experts avoid court attendance, less objective professionals will fill the gaps ultimately affecting the justice.

Law is a living process, which changes according to society, science, and ethics and so on. The legal system should imbibe developments and advances that take place in science. The use of medical evidence in criminal trials not only identifies the actual guilty but also prevent the innocent from being convicted wrongly. The principle of the Indian legal system is based on the fact that until proved guilty, a person is innocent and an innocent cannot be convicted even if a hundreds criminals are acquitted or free. There is urgent need for the compulsory application of medical evidence in the justice delivery system in India. The government must make a clear policy stand on medical evidence because what is at stake is India's commitment to individual equity, freedoms and a clean justice system.

[737] Paranjape N.V., Criminology & Penology with Victimology, 15th Edition, Reprinted, Central Law Publications, Allahabad, India, (2012). Pp.642-660.

BIBLIOGRAPHY

LIST OF BOOKS :

1. Adrian Keane, Paul McKeown: *The Modern Law of Evidence,* Oxford University Press, 2014

2. Andersson N, Ajwani MK, Mahashabde S, Tiwari MK, Kerr Muir M, Mehra V, Ashiru K, and Mackenzie CD, *Delayed eye and other consequences from exposure to methyl isocyanate: 93% follow up of exposed and unexposed cohorts in Bhopal*. Br J Ind Med. 47, 553-558 (1990).

3. Armstrong BK, White E, and Saracci R., *Principles of exposure measurement in epidemiology,* Monographs on Epidemiology and Biostatistics 21, OUP Oxford (1992).

4. B.R. Sharma, *Forensic Science in Criminal investigation and Trials,* Universal Law Co. Fourth Edn., 2003.

5. B.S. Nabar, *Forensic Science in Crime Investigation*, 3rd Ed. 2010-11, Asia Law House, Hyderabad.

6. Bhargava DK, Verma A, Batni G, Misra NP, Tiwari UC, Vijayan VK, and Jain SK, *Early observations on lung function studies in symptomatic "gas" exposed population of Bhopal*, Indian J Med Res 86(S), (1987).

7. Clive Walker & Keir Starmer, *Miscarriages of Justice - A Review of Justice in Error*, Blackstone Press Ltd. 1999.

8. D.K. Ganguly, *Medical jurisprudence and toxicology (Principles, Practice & Procedure),* (2007), Dwivedi law agency, Allahabad.

9. Dhara R., *Health effects of the Bhopal gas leak: a review*, Epidemiologia-e-Prevenzione 52, (1992).

10. Dr. Avtar Singh, *Principles of the Law of Evidence*, 18th Ed., Central Law Publications, Allahabad 2010.

11. Dr. P.C. Shekharan, *Forensic Science in Criminal Investigation*, Encyclopedia of Police in India.

12. Dr. P.K. Bhattacharji, *Medico-Legal Companion*, 2nd Ed., Allahabad Law House, (1998).

13. Dr. Parikh, Dr. Mishra, *The Principles of medical jurisprudence, medical and forensic science, DNA test and toxicology*, 3rd Ed., CTJ Publications, Pune, 2007.

14. Edward Philips, *Brief Case, Law of Evidence*, Cavendish Publishing Ltd., 2nd Ed., 2000.

15. Edward Phillips, *Brief case on Law of Evidence Ist 1996*, Cavendish Publishing Limited, London.

16. Ejaz, *Medical Evidence and Gist on Non-Medical Evidence*, Pt. 14, 3rd Ed., Ashoka.

17. H.J. Walls, *Forensic Science an Introduction to Scientific Crime Detection*, Universal Law Publishing Co. Pvt. Ltd., New Delhi, First Indian Reprint 2002.

18. Joshi, *Medical jurisprudence and toxicology*, 2nd Ed., Kamal Publishers, new Dehli, 2011.

19 K.D. Gaur, *Criminal Law : Cases and Materials*, 6th Ed. , Lexis Nexis, Butterworths, Wadhwa, Nagpur.

20. Marc Stauch and Kay Wheat with John Tingle, *Text, Cases & Materials on Medical Law*, 5th Ed., Routledge, Oxon, OX14 4RN, 2006.

21. Pillai PSA, *Criminal Law*, 10th Ed., Lexis Nexis, Butterworths, India, 2008.

22. R. Bramley, *Quality in the Laboratory*, 43 Science and Justice, 2003.

23. R.S. Verma and Thockchom IBS, *Commentary on Rape, Kidnapping and Abduction*, 1st Ed. 1999, Verma Publication, Delhi.

24. R.V.Kelkar, *Lectures on Criminal Procedure*, 4th Ed., Eastern Book Company, Lukhnowm 2006.

25. Ratanlal and Dhirajlal, *The Law of Evidence*, 20th Edn. (2002).

26. Roderick Munday, *Core Text Series: Evidence*, 2nd Edn., LexisNexis Butterworths, 2006.

27. S.K. Sinha Ray, *Law of Evidence*, Vol-I&II, 1st Reprint Edn., Premier Publishing Company, Allahabad, 2007.

28. Sarita Jand, *Forensic Science & Law*, 1st Ed., Allahabad Law Agency, Faridabad, 2017.

29. Simon A. Cole, *Suspect Identifies- A History of Fingerprinting and Criminal Identification*, Harvard University Press, Cambridge, MA, 2001.

30. Singh MP, and Ghosh S., *Bhopal gas tragedy; model simulation of the dispersion scenario,* J Hazardous Materials 17, (1987).

31. Sirkar, *Law of Evidence*, 15th Edn., 1999,

32. Taylor, Alfred Swaine, 1806-1880: *The Principles and Practice of Medical Jurisprudence* (second edition, 2 volumes; Philadelphia: H. C. Lea, 1873)

33. V.D. Mahajan, *The Constitution of India*, 9th Edition (Entries 65 and 66 of the Union List).

34. Vepa P. Sarathi, *Law of Evidence*, 6th Ed., Eartern book company, Lucknow, 2006.

ARTICLES :

1. American Conference of Governmental Industrial Hygienists (1976) Methyl isocyanate. In Documentation of the TLV's in Workroom Air, p.167, 3rd edition, ACGIH Cincinnati.

2. American Thoracic Society, *Standardisation of Spirometry*, 1987 update, Am Rev Resp Dis 136, 1285-1298 (1987).

3. Boorman GA, Uraih LC, Gupta BN, and Bucher JR (1987) Two-hour methyl isocyanate inhalation and 90-day recovery in B6C3F1 mice. Environ Health Perspect 72, 446-456.

4. Brooks SM, Weiss MA, and Bernstein IL (1985) Reactive airways dysfunction syndrome (RADS): persistent asthma after high-level irritant exposure. Chest 88, 376-384.

5. Cone JE, Wugofski L, Balmes JR, Das R, Bowler R, Alexeef G, and Shusterman D (1994) Persistent respiratory health effects after a metam sodium pesticide spill. Chest 106, 500-508.

6. Dr. Jyotirmony Adhikary, Legislation on DNA Evidence – A proposal 2008 2 SCC J 24

7. Dutta KK, Gupta GSD, Mishra A, Joshi A, Tandon GS, and Ray PK (1988) Inhalation toxicity studies of methyl isocyanate (MIC) in rats: part I - pulmonary pathology and genotoxicity evaluation. Indian J Exp Biol 26, 177-182.

8. Fogarty FW, George PJM, Solomon M, Spiro SG, and Armstrong RF (1991) Long term effects of smoke inhalation in survivors of the King's Cross underground station fire. Thorax 46, 914-918.

9. Gupta BN, Rastogi SK, Chandra H, Mathur AK, Mathur N, Mahendra PN, Pangtey BS, Kumar S, Kumar P, Seth RK, Dwivedi RS, and Ray PK (1987) Effect of exposure to toxic gas on the population of Bhopal: part I - epidemiological, clinical, radiological and behavioural studies. Indian J Exp Biology 26, 149-160.

10. Harkonen H, Nordman H, Koshonen O, and Vinblad I (1983) Long term effects of exposure to sulphur dioxide. Lung function 4 years after a pyrite dust explosion,. Am Rev Resp Dis 126, 890-893.

11. Janice Du Mont and Deborah White, The uses and impacts of medico-legal evidence in sexual assault cases : A global review, publication 2007, World Health Organization, Sexual Violence Research Initiative, printed in Switzerland.

12. Jennifer Temkin: Medical Evidence in Rape Cases: A Continuing Problem for Criminal Justice: The Modern Law Review, Vol. 61, No. 6 (Nov., 1998),

13. Jones RN, Hughes JM, Glindmeyer H, and Weill H (1986) Lung function after acute chlorine exposure. Am Rev Resp Dis 134, 1190-1195.

14. Jones RN, Hughes JM, Glindmeyer H, and Weill H (1986) Lung function after acute chlorine exposure. Am Rev Resp Dis 134, 1190-1195.

15. K. Kumar, The Expert and the Law Court, 1987 4 SCC J 7

16. Kamat SR, Mahashur AA, Tiwari AK, Potdar PV, Gaur M, Kolhatkar VP, Vaidya P, Parmar D, Rupwate R, Chatterjee TS, Jain K, Kelkar MD, and Kinare SG (1985) Early observations on pulmonary changes and clinical morbidity due to the isocyanate gas leak at Bhopal. J Postgrad Medicine (India) 31, 63-72.

17. Kamat SR, Patel MH, Pradhan PV, Taskar SP, Vaidya PR, Kolhatkar VP, Gopolani JP, Chandarana JP, Dalal N, and Naik M (1992) Sequential respiratory, psychologic, and immunologic studies in relation to methyl isocyanate exposure over two years with model development. Environ Health Perspect 97, 241-253.

18. Mehta PS, Mehta AS, Mehta SJ, and Makhijani AB (1990) Bhopal tragedy's health effects; a review of methyl isocyanate toxicity. JAMA 264, 2761-2787.

19. Misra NP, Pathak R, Gaur KJBS, Jain SC, Yesikar SS, Manoria PC, Sharma KN, Tripathi BM, Asthana BS, Trivedi HH, Sharma VK, Malhotra Y, Verma A, Bhargava DK, and Batni G (1987) Clinical profile of gas leak victims in acute phase after Bhopal episode. Indian J Med Res 86(S), 11-19.

20. Misra UK, Nag D, Nath P, Khan WA, Gupta BN, and Ray PK (1987) A clinical study of toxic gas poisoning in Bhopal, India. Indian J Exp Biology 26, 201-204.

21. Naik SR, Acharya VA, Bhalerao RA, Kowli SS, Nazareth H, Mahashur AA, Shah S, Potnis AV, and Mehta AC (1986) Medical Survey of methyl isocyanate gas affected population of Bhopal. J Postgrad Medicine (India) 32, 185-191.

22. Nidhi Tondon, The Journey from One Cell to Another, Role of DNA Evidence

23. Nemery B, Dinsdale D, Sparrow S, and Ray AD (1985) Effects of methyl isocyanate on the respiratory tract of rats. Br J Ind Med 42, 799-805.

24. O'Hickey SP (1987) Manchester air disaster. Brit Med J 294, 1663-1667.

25. Pant SC, Srivastava RK, and Vijayaraghavan R (1987) Histomorphologic changes induced by methyl isocyanate in lungs of rats and rabbits. Bull Environ Contam Toxicol 38, 876-88.

26. Proctor NH, and Hughes JP (1978) Methyl isocyanate. In Chemical Hazards of the Workplace, pp 348-349. JB Lipincott, Philadelphia.

27. Sharma PN, and Gaur KJBS (1987) Radiological spectrum of lung changes in gas exposed victims. Indian J Med Res 86(S), 139-44.

28. Udwadia FE, Sunavala JD, and Shetty VM (1987) Lung function studies in healthy Indian subjects. JAPI 36, 1285-1296.

29. Union Carbide Corporation (1985) Bhopal methyl isocyanate incident investigation team report. Union Carbide, Danbury, Connecticut.

30. Vijayan VK, Pandey VP, Sankaran K, Mehrotra Y, Darbari BS, and Misra NP (1989) Bronchoalveolar lavage study in victims of toxic gas leak at Bhopal. Indian J Med Res 90, 407-414.

31. Weill H (1987) Disaster at Bhopal: the accident, early findings and respiratory health outlook in those injured. Bull Eur Physiopathologie Respiratoire 23, 587-590.

32. Weill H, George R, Schwarz M, and Ziskind M (1969) Late evaluation of pulmonary function after acute exposure to chlorine gas. Am Rev Resp Dis 99, 374-379.

REPORTS :

1. Indian Council for Medical Research (1990) Bhopal Gas Disaster Research Centre. Annual Reports, Bhopal India.
2. Indian Council of Medical Research (1985) Health effects of exposure to toxic gas at Bhopal; an update of ICMR sponsored researches. New Delhi, India.
3. Law Commission of India 172nd Report - Review of Rape Law Government of India, 2000, para 3.1.2
4. Medical Research Council. Respiratory Health Questionnaire. Medical Research Council, London.
5. State Government of Madhya Pradesh: Department of Relief and Rehabilitation (1989) Bhopal Gas Tragedy. Government of Madhya Pradesh, Bhopal, India.
6. The Malimath Committee Report on Reforms of Criminal Justice System 2003

NEWS PAPERS :

1. Hindustan Times
2. Financial Times
3. The Times of India
4. The Indian Express
5. The Economic Times
6. Rajasthan Patrika
7. Dainik Bhasker

ACTS :

1. Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
2. The Biological Diversity Act, 2002
3. The Cigarettes and other Tobacco Products (Prohibition) Act, 2003
4. The Code of Criminal Procedure, 1973

5. The Competition Act, 2002
6. The Constitution of India, 1950
7. The Consumer Protection Act, 1986
8. The Environment Protection Act, 1986
9. The Indian Evidence Act, 1872
10. The Indian Penal Code, 1860
11. The Prevention of Food Adulteration Act, 1954

JOURNALS :

1. All India Reporter
2. Asian Economic Review
3. Economic Weekly
4. India Quarterly
5. Indian Bar Review
6. Indian Economic Review
7. Indian Journal of Agricultural Economic
8. Indian Journal of Industrial Relations
9. Indian Journals of Economics
10. Indian Socio-legal Journal
11. Journal of Quantitative Economics
12. Journal of the Bar Council of India
13. Journal of the Indian law Institute
14. Journal of the Legal Studies
15. Judgment Today
16. Law and State
17. Rajasthan Law Reporter
18. Rajasthan Law Times
19. Reports of Law Commission of India
20. Service Law Reporter
21. Supreme Court Journal
22. Supreme Court Reporter
23. Supreme Today

DICTIONARIES:

1. Bakshi's : The Law Lexicon
2. Govt. of India- Ministry of Law and Justice : Legal Glossary
3. Sachdeva's Legal Glossary
4. P. Ramnatha Aiyer : The Law Lexicon
5. P. Ramnatha Aiyer : Concise Law Dictionary
6. Webster's Universal Dictionary and The Sources
7. Wharton's Law Lexicon

WEBSITES:

1. www.accesstolaw.com
2. www.britannica.com
3. www.crirninalistics.com/ABC/
4. www.en.wikipedia.org
5. www.iabourbureau.nic.in
6. www.ilo.org
7. www.in.news.yahoo.com
8. www.in.news.yahoo.com/USA/DNAacts.asp.
9. www.indiaexpress.com
10. www.indiankanoon.org
11. www.indianscience.org
12. www.indlaw.com
13. www.interpol.int/public/forensic/dna/default.asp
14. www.iosrjournals.org
15. www.judgment.nic.in
16. www.judicialreforms.org
17. www.judis.nic.in
18. www.legalcrystal.com
19. www.legalserviceindia.com
20. www.library.thinkquest.org
21. www.manupatrafast.com
22. www.supremecourtofindia.nic.in
23. www.theiai.org