

## Medical Services Vis-À-Vis Consumer Protection Act



Law

KEYWORDS :

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Consumerism is a movement or policies aimed at regulating the products or services, methods or standards of manufacturers, sellers and advertisers in the interest of buyer, such regulations may be institutional, statutory or embodied in a voluntary code adopted by a particular industry<sup>1</sup>. The contemporary era is an era of consumerism where consumers determine the sale of products and services. Especially in relation to services any professional rendering a service for a price can be made accountable for the deficiency in service which inter-alia include any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under law or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. India at the time of freedom from the colonial power inherited economy and development in a bad shape. In order to give an impetus to the economical growth, the local industrialists were given the chance to develop and grow which led to concentration of wealth and economic power in the hands of few. The traders and sellers became all powerful and started impinging upon the valuable rights of the consumers on whose purchasing power they were thriving<sup>2</sup>.

### Service oriented consumerism

Though there were plethora of legislations regulating products but their prime concern remained the quality and quantity of the products rather than consumers<sup>3</sup>. The exploitation of the consumers led to the passage of the Consumer Protection Act in 1986 which opened a golden era in the history of legislation in safeguarding the interest of the consumers. This piece of legislation is undoubtedly a people centric and people friendly movement which is a result of a long drawn battle.

The definition of the consumer as given in the aforesaid Act is wide enough to include any person who purchases any goods for himself or for any user except for commercial purpose; and also includes any person who hires or avails of any service for his personal use or any beneficiary. In addition to it, the definition of service is of wider amplitude as it includes service of any description which is made available to potential user except any service free of charge or under a contract of personal service<sup>4</sup>. The Supreme Court has elaborately discussed the scope of the definition of service in the case of Lucknow Development Authority v. M.K.Gupta<sup>5</sup>, wherein it is very rightly pointed out that the word 'any' in wider sense extends from one to all; and the word 'potential' includes not only actual users but those who are capable of using it and is applicable not only against statutory authorities but against private bodies whosoever provides 'service'.

However the most controversial issue relating to applicability of Consumer Protection Act is its enforcement against the professionals. The main argument put forth on behalf of all the professionals like Doctors, Engineers, Advocates, Accountant, etc., is that they are governed by their own

code of ethics and that they belong to respectable profession.

### Medical Service and Consumers

Medical profession is a profession of antiquity and the privileged one blessed with celestial powers enjoin this profession to bring smiles on the human faces fallen to miseries. The doctor- patient relationship in contemporary world has undergone a sea change and each and every instance of medical negligence strikes a death knell to this relationship. Declining credibility of medical professional has caused spurt in litigation for medical negligence<sup>6</sup>. The people are no more prepared to attribute the mishaps to destiny but to fight out the case administratively, politically and judicially.

### Determination of Medical Negligence

The standard for determination of medical ethical and working can be attributed to Hippocratic oath, charaksamhita and code of ethics prepared by the Medical Council of India<sup>7</sup> which pin point the do's and don'ts for the doctors. Since the medical professionals provide the service to the patient for a price, hence the patient being a consumer can sue the doctor in consumer forum in case there is any deficiency in rendering of the service to the patient. The standard prescribed for the doctors by Medical Council of India as well as the general standard of reasonable prudence serve as the yardstick in determining deficiency in service by the doctor.

In India the doctors are rendering service in the government hospitals where a token fee is charged as well as the doctors are rendering service in private clinics where a huge amount is charged. This paradoxical working methodology create doubts as to when their service can fall within the ambit of service<sup>8</sup>.

However, in one land mark judgment, it was held that

The services hired or availed of or agreed to be hired or availed by the patient.

The services should have been rendered by the medical practitioner to the patient.

The services should have been hired or availed for consideration.

The services hired or availed suffer from deficiency.

The services have not been rendered free of charge<sup>9</sup>.

The cleavage of judicial opinion was set at rest by the apex court in Indian Medical Association v. V.P. Shantha<sup>10</sup> wherein it held that services rendered at a Government Hospitals, Health centre or dispensary where services are rendered partially on payment of charges and partially free of charge, the persons rendering such services would fall

within the ambit of the expression "service" under sec 2 (1) (0) of the Act. The benefit of exclusion from the concept of service shall be available only when the service is provided free of charge.

The major area where the case of medical negligence often debated is the area concerning the surgical treatment wherein the recourse to the tests of *res ipsa loquitur* and reasonable prudence are made by the courts for determining the cases of medical negligence. Medical mistake could result in finding for medical negligence. The liability of a doctor does not arise when some sort of injury is being suffered by patient but it arise when that injury is the result of the conduct of the doctor due to lack of reasonable care. In order to prove the breach of duty on the part of doctor, the burden of proof is always on the complainant. Such burden can be discharged only by leading cogent and necessary evidence and it is not in all cases that such presumption can be drawn about negligent act of the doctor on account of unsuccessful operation<sup>11</sup>. Whether a patient suffered injury after there had been a departure from the orthodox course of treatment, the court had to take into consideration whether doctor had taken all proper factors into account prior to taking action in order to determine whether that departure was justified<sup>12</sup>.

#### Judicial Attitude

Judiciary has been assigned a place of eminence under Indian Constitution. It has opened new vistas on consumer Protection in the area of service provided to potential users. A perusal of cases demonstrates how issues concerning medical services have been responded to by different forums and courts of India.

In *Achutrao Haribhau Khodwa v State of Maharashtra*<sup>13</sup>, Supreme Court held that:

A medical practitioner has various duties towards his patient and he must act with reasonable degree of skill and knowledge and must exercise a reasonable degree of care. As long as doctor acts in a manner acceptable to the medical profession and attends on the patients with due care skill and diligence, it would be difficult to hold the doctor to be guilty of negligence; but if doctor acts negligently and carelessly, then in such a case an action would be maintainable.

In *Dr. M. P Subramaniam v Dr. B Krishnarao*<sup>14</sup>, the National commission held that when there are genuinely two possible schools of thought about management of clinical situation, the court could do greater disservice to the community or the advancement of medical science than to place a hallmark of totality upon one form of treatment.

In *C. Shivakumar v Dr. Jatin Arthur*<sup>15</sup>, the court held the doctor liable as his organism had been cut off and only a stump has been left resulting in permanent impotency. In *Dalbir Singh v, State of Haryana*<sup>16</sup>, Supreme Court observed that all professionals must be kept under constant reminders of their duty to adopt utmost care and also of the consequences be falling them in cases of dereliction. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness, when he is attending to his duties.

In *Rishi v Pushpa*<sup>17</sup>, organ of the pregnant woman was removed during termination of pregnancy, it was held to be a case of criminal negligence. In another case where fifty two persons were operated for cataract in a free eye camp and out of which fourteen person lost their vision due to

negligence of doctor, staff and defective functioning of equipment used for operation, the doctor concerned and hospital were held jointly and severally liable<sup>18</sup>. In *M. Chinnayan v. Sri Gokulam Hospital*<sup>19</sup>, the complainant was suffering from bleeding uterus and was given two unit of blood transfusion before hysterectomy which was found to be contaminated with HIV virus. The negligence and deficiency in service was proved beyond doubt. In *Marpin F. D' Souza v Mohd. Ishfaq*<sup>20</sup>, supreme court issued directions to the consumer courts, "Whenever a complaint is received against a doctor or hospital by the consumer fora or by criminal court then 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 a committee of doctors specialized in the field relating to which medical negligence is attributed and only after that doctor or committee reports that there is a prima facie case of medical negligence, should issue notice to the concerned doctor or hospital".

However, a subsequent Bench of Supreme Court through an illuminating judgment<sup>21</sup>, came to the rescue of the consumers by holding that the general directions issued in *D' Souza* case are, with great respect, inconsistent with the directions given in *Mathew*<sup>22</sup> case, which is a larger bench and also inconsistent with the principle laid down in another landmark case of *Indian Medical Association*<sup>23</sup>. The cases of medical negligence can be exemplified by leaving of foreign body in abdomen<sup>24</sup>, Child born after sterilization<sup>25</sup>, non-removal of kidney stone as advised<sup>26</sup>, legs of child burnt<sup>27</sup>, Loss of leg<sup>28</sup>, Kidney damaged by wrong transfusion<sup>29</sup>, Scissors found in body on cremation<sup>30</sup>, sponge left in abdomen<sup>31</sup>, uterus removed without justification<sup>32</sup>, etc, and the list is endless. A perusal of these cases make it amply clear that the medical professionals have not been given a free rein to do as they please and the treatment of the doctors at par with other human beings instead of giving them special privilege<sup>33</sup>.

In *State of Punjab v. Shiv Ram*<sup>34</sup>, where the birth of a female child despite tubectomy took place, the supreme court over-ruling the decisions pronounced by the high court and the courts below opined that they were wrong in making assessment and awarding damages. However the court gave the suggestion that the State government should popularize family planning programmes and should provide some solace to the people.

In *Kusum Sharma v. Batra Hospital*<sup>35</sup>, the Supreme Court quoted with approval the points in determination of medical negligence as under:

- I. The medical professional is expected to bring a reasonable degree of skill and knowledge and not very high or a very low degree of care.
- II. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field.
- III. In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

IV. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/her suffering which did not yield the desired result may not amount to negligence.

Relying on these observations the court upheld the decision of the national commission in dismissing the complaint of the appellant. In *Balram Prasad v. Kunal Saha*<sup>36</sup>, the supreme court justified the high compensation under loss of income on the ground that the deceased was a foreign national, the other expenses were determined depending upon the bills and vouchers produced and the past precedents by the court especially the compensation for pain and suffering.

### Conclusion and Suggestions

Supreme Court by upholding the constitutional validity to the Consumer Protection Act, 1986, has bestowed recognition and credibility to the adjudicatory process of consumer courts in settling consumer disputes<sup>37</sup>. The Consumer Protection Act is proving out to be double edged weapon for medical professionals. Proper judgment, precautions, patient detail, diagnostic test, treatment given and consent from patient or his guardian can save a doctor from litigation. Doctors are human being, hence can commit an error while examining patient. Doctors should not be frequently called upon to answer charges having criminal or civil consequences as it would frustrate and render ineffective the functioning of the medical profession as a whole and if the medical professionals are checked by threat of action, the consequences will be devastating for the people and no doctor would take a risk, a justifiable risk in the circumstances of a given case<sup>38</sup>. Furthermore these decisions have made the medical professionals extra-cautious and they are making the patients undergo multiple tests which is putting extra economic burden on the ever suffering patients. In fact a balance needs to be struck between the medical needs of the public and care and attention by the doctors. It has been rightly observed by the apex court<sup>39</sup> that it would not be conducive to the efficiency of the medical profession if no Doctor could administer medicine without a halter round his neck. The medical practitioners at times also have to be saved from such a class of complainants who use criminal process as a tool for pressurizing the medical professionals/hospitals particularly private hospitals or clinics for extracting uncalled for compensation. The interest and welfare of the patients have to be paramount for the medical professionals. State should immediately focus its attention towards accumulation of plethora of complaints against corporate and super specialty hospitals, fleecing the patients that are pouring in, relating to unethical, unfair and unprofessional practices and after taking stock of the situation initiate necessary remedial measures.

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