

Consumer Protection Act Pertaining to Medical Service: An Analytical Approach

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1. Introduction:

Practice of medicine is as ancient as the existence of human race. In the earlier era Physician was treated as next to God. Gradually, his social status reduced from next to God to a friend, philosopher and guide and then to a respectable professional and today to a service provider to health consumers. Changes in the status of physician also affect the nature of punishment awarded to them if any wrong done by them. Nature of punishment changed from Crime to tort. Even though today also criminal law and traditional civil law applicable to the medical negligence cases, but most of the cases of medical negligence filed before Consumer Protection Act, which is more liberal law for patient as well doctor also. Consumer Protection has its deep roots in the rich soil of Indian civilisation, which dates back to 3200 B.C. In ancient India, human values were appreciated and ethical practices were considered of great importance. The rulers felt that the welfare of their subjects was the primary area of concern. They showed keen interest in regulating the social conditions and the economic life of the people, by establishing many trade restrictions to protect the interests of consumer.

Keyword: Consumer Protection, Law of Contract, litigant, penalized.

2. Consumer Protection Act and Medical Service:

In almost all the civilisations of the world, medical negligence has been considered a major crime against the humanity at large and the guilty is punished or penalised in some form or the other. In UK, USA, and in India medical negligence litigation is governed by the general principles of the Law of tort because of unawareness, lengthy and costly procedure a very few medical negligence cases were filed in India. However, the applicability of Consumer Protection Act to medical services changed the scenario dramatically. Probably India is the exclusive country, where patient treated as consumer and get the benefit of Consumer Protection Act for speedy disposal of their grievance. It is important to note that the word medical service no where mention under the text of Consumer Protection Act. It is judicial vision, which enlarges the scope of applicability of Consumer Protection Act and includes medical service under the area of Consumer Protection Act.

3. Astonishing Role of Judiciary in the inclusion of Medical Services under Consumer Protection Act in India: An Activist Approach.

Consumer Protection Act protects not only the interests of a consumer when he purchases goods and services for daily use, but also protects his interests when he goes for treatment to a medical practitioner. With the coming into force of the Consumer Protection Act 1986 and it being held to be applicable to the services rendered by medical professionals by the Supreme Court¹ an additional remedy has been made available to the patients. Remedy under the Consumer Protection Act is simple, cheap, effective and speedy. Unlike a civil suit under Law of Tort and Law of Contract where court fees is required to be paid, no court fee was required to be paid till recently under Consumer Protection Act but after the said Act having been amended w.e.f. 15.3.2003 only nominal fee will be required to be paid for filing a complaint under the said Act.

In the initial stage after the enforcement of the Act, there were various conflicting judgments of various courts regarding the application of said Act to medical negligence cases. The Andhra Pradesh High Court observed that private hospitals or private medical practitioners provide services for a consideration, i.e. for a fee. Hence, their service will be considered as service with the preview of consumer protection Act. Similarly, patient who avail these services will be considered as consumers.²

¹ Indian Medical Association v. V.P. Shantha AIR 1996 SC 550.

² Dr. A.S. Chandra v. Union of India(1992) 1 A L T 713.

Against this decision, Indian medical Association has filed writ petition in the Supreme Court of India. Thus the medical profession under the leadership of Indian Medical Association claiming immunity from the consumer Act. On the other hand Consumer activists and associations have been urging strongly and unambiguously with the Government to bring also the services rendered by doctors employed in Government hospitals and dispensaries within the ambit of said legislation.³

The Supreme Court of India had admitted the petition but the hearing has not yet started. Meanwhile in the case of *C.S Subramanian (Dr.) v. Kumaraswamy*⁴ Madras High Court had taken a different view. It had been held that the medical services would not fall within the provision of the said Act but the medical practitioner or hospital undertaking and providing para-medical services of all kinds and categories would fall within the provision of the Act. A person availing of such service would be a Consumer within the meaning of the Act.

The National Commission held that persons who avail the medical services in Government hospitals are not consumers and such services cannot be regarded as service hired for consideration. The payment of direct or indirect taxes by the public does not constitute consideration for such service. Likewise, payment made by a government employee in the central government Health Scheme or such other similar schemes does not make him a consumer within the meaning of the Act.⁵

whereas in another case the National Commission has held that the hired medical service falls within the scope of the expression service as defined under Section 2(1) (0) of the said Act and in the event of any deficiency in the performance of such service, the victim or legal representative of the deceased patient may file a complaint before the Consumer Forum having jurisdiction.⁶

In *Cosmopolitan Hospitals and anr. v. Vasantha P. Nair*⁷ Commission had brought the services rendered by the Private medical professionals, hospitals and nursing homes within the ambit of the consumer protection Act 1986. Commission observed that medical service rendered by hospitals and members of medical profession for consideration falls within the scope of term definition of Service according to said Act. Again in judgment dated May 1993 the National Commission had held that if, service provided by medical professional is free of charges it did not constitute service as defined under the Act. According to state commission of Haryana⁸, Karnataka⁹, Delhi¹⁰, Punjab¹¹, and Rajasthan¹⁹³ medical services in a government run hospital cannot be considered as service under the consumer protection Act.

Whereas, the state commission of Orissa¹⁹⁴ expressed the contrary view.¹² All these contradictions regarding the scope of the Consumer Protection Act regarding the inclusion of medical service were solved by the Supreme Court in the landmark judgment of IMA case. In this case Supreme Court held that services rendered to a patient by a medical professional are service within the meaning of Sec 2 (1) (0) of the consumer protection Act 1986, and persons who hire or avail of such services are therefore Consumers as defined under the Act, but the doctor or hospital renders services free of charge to every patient or under a contract of personal service a patient availing of such free of charge services will not be a consumer.¹³

3.1. Medical Services under Consumer Protection Act

1. The argument in favour of the doctors regarding this Act is that the doctors are of the opinion that they are constantly dealing with human beings. Their job is to look after the welfare of the mankind. They are serving the human beings with the motive of service to them and hence they should not be compared with traders or businessmen whose job is

³ Dr. G. Singh, *The law of consumer protection in India justice within reach* p. 190, (Deep and Deep Publications, new Delhi)

⁴ (1994) 2 CTJ 294

⁵ National Commission judgment and order dated December 15, 1989 in first Appeal No.2 of 1989.

⁶ Judgment dated April 21, 1992 in First Appeal Nos 48 and 94 of 1991.

⁷ 1992(NCDRC)

⁸ Birbal Singh and Others v. ESI Corporation and Others, 1993(2) CPJ 1028.

⁹ Sowbhagya Prasad v. State of Karnataka I(1994) CPJ 402(Kar.SCDRC).

¹⁰ Premchand Sharma v. The Director, CGHS, 1992(2) CPR 51(DEL SCDRC).

¹¹ Harbhaian Singh v. Dayanand Medical College and Hospital and ANR.1996(3) CPJ.

¹² R.K. Bag, *Law of Medical Negligence and Compensation*, 34(2nd ed., 2001).

¹³ Indian Medical Association v. V.P. Shantha AIR 1996 SC 550

a profit making activity. This argument had acceptance only when the value system in India was based on moral values. In the present time the people do not work with the same sincerity and with social awareness and hence this argument is not supported by common man today. It is also observed in the present days that whenever a patient visits a doctor he recommends certain tests and also insists a particular laboratory where the tests are to be carried out. It appears that there is some kind of a business tie up or a link between the doctor and the particular laboratory owner. In recent years, the medical profession, which was once considered to be one of the noblest professions in the society, has been characterised by a vast amount of commercialisation.

2. Another important argument made by the doctors is that whenever they treat a patient they are always making decisions which are for the benefit of the patient. But finally they are also human beings and can commit error which does not happen on purpose. They also have to state that medical science is very complicated and that a common man fails to understand these complications and hence the doctors are blamed for the negligence by the professionals. For instance, when obstetrician conducts a delivery in a labour room, she has to take many instant decisions, such as in foetus distress. At that time her prime duty is to save the mother as well as the child but sometimes she is to follow the principle of a 'bird in hand is worth two in the bush'. Therefore, she alters her decisions and devotes her entire energy in saving either the mother or the foetus, whichever is more viable. Similarly, she is to decide instantly whether to conduct normal delivery, forceps delivery or caesarian, keeping in view the condition of the mother as well as of the child.
3. Further according to doctors, every surgical operation involves risk, it would be wrong, and indeed a bad law to say, simply because a mishap occurred, the hospital and the doctors are thereby liable. In most cases, patients and their family members misunderstand the whole issue due to lack of medical knowledge. The doctors argue that the medical science is a complicated science, which cannot be easily understood. According to them, it would, therefore, be disastrous for the society if doctors are held liable for negligence even in cases of decisions taken by them in good faith.
4. Another argument in favour of the doctors is that, the doctors who follow this profession have to be very careful about their reputation. They are much aware that it takes a long time to build such a reputation but it can be spoiled in no time in case they exhibit any kind of negligence. So they are of the opinion that doctors will never be negligent in their task on purpose. The common man as they visit a particular doctor only out of trust which a doctor has earned over a period of time. Thus he must not be held negligent simply because something happens to go wrong and if, for instance, one of the risks inherent in an operation actually takes place or if in a matter of opinion, he makes an error of judgment. He should, therefore, be found guilty of negligence only when he falls short of the standard of a reasonably skilful medical man. On this front, the consumer advocates argue that the expert medical evidence shall definitely go in favour of the practitioners who had made the timely decision notwithstanding that it proved fatal. On the other hand they suggest that the 1986 Act should only bring those doctors to book who act negligently without showing any regard to the patient's deteriorating conditions. Consumer activists have been expressing similar views in connection with the government hospitals and are lobbying for their inclusion within the ambit of the 1986 Act.
5. Another argument advanced by the doctors is that if medical services are included in the consumer protection act 1986, they may begin to look upon every patient as a 'potential litigant' and instead of trust based relationship would turn adversarial and that it will be disastrous for both doctors and patients. The costs, even of a minor treatment could rise manifold as no doctor would like to take the risk of treating any patient on mere symptoms and without a complete clinical diagnosis. This will press very highly on poor patients. The consumer activists dismiss this argument by suggesting that if a doctor out prices himself, he will only end up putting himself out of practice.
6. Finally, the most important argument in favour of bringing the medical profession within the ambit of the 1986 Act is connected with the cultural, ethical and religious beliefs of the Indian society. Notwithstanding considerable advancement of civilisation and increased industrialisation, the cultural, ethical and religious beliefs of a vast majority of people in India have remained substantially unaltered and continue to remain so. The dead are still worshipped in India and religious ceremonies are performed in their memories. Therefore, it appears to be little beyond thinking that a family would like to encash the dead or even the injured. For instance, if a member of a particular family meets an accident and is hospitalised where, despite the best efforts of doctors, he succumbs to his injuries, it seems a little unbelievable that the family shall sue the doctors for any negligence.¹⁴

From the angle of the medical profession, the Consumer Protection Act, 1986 aims at bringing only the careless, incorrigible, negligent and unethical professionals to the book. The genuine and selfless professionals engaged in rendering dedicated services to a vast number of ailing people should not bother about it.

¹⁴ G.Singh , Law of Consumer Protection in India, p.95

A large number of cases filed against the doctors and dismissed at the district, state and national level bear ample testimony to the above argument. In addition, the Consumer Forums have also been expressing their concern for the genuine professionals and are assuring justice to them. On this Sandhawalia J.¹⁵ observed that: —Consumers now have obviously a right to seek redress in this beneficent jurisdiction and it is the duty of the redressal agencies too safeguard them against malpractices by medical professionals. Whilst this is patently laudable, it seems equally necessary to lay down that the ease and the inexpensive nature of the consumer jurisdiction is not allowed to become a vicious weapon in the hand of either the careless or unscrupulous patients to harass the medical professionals without good and adequate cause. One must keep and even keel, and maintain the nice balance between the consumer needs and the rights of the medical professionals.¹⁵ Likewise, V. Balakrishna Eradi J., President of the National Commission observed that, —we are not trigger-happy judges. The notion that our trials are summary is wrong. In fact, doctor's interests are safer with us than with civil courts. According to Justice Eradi, clear instructions have gone to all Consumer Forums to call for an expert medical opinion while deciding medical cases. Thus doctors are assured fair judicial treatment.

Above all, the Consumer Protection Act, 1986 has recently been amended by the Consumer Protection (Amendment) Act, 1993 and by virtue of this amendment; the Consumer Forums have now been authorised to order a party to pay up to Rs. 10,000 for filing false and frivolous complaints against the opposite party or parties. In addition, the Forums shall have the authority to impose costs on such litigants.

The society now demands accountability on the part of professionals, tool as of traders and businesspersons. Therefore, those who make use of the societal resources must be accountable to the society. Only then can our ancient value be saved from further erosion. The introduction of Consumer Protection Act 1986 has not affected many doctors because they believe that if a doctor is following his profession with honesty and transparency then he need not worry even if many more such acts are brought out.

It has been maintained as the outcome of the above discussion that neither the medical professionals are always at fault nor the consumers are blaming the doctors unnecessarily. It is the duty of every citizen to utilise the judiciary only for the welfare of the mankind.

4. Notion of Consumerism in the Context of Medical Negligence in India:

As stated above Consumer Protection Act applicable to Medical Services with some restrictions. So we have to analysis various concepts and definitions provided under said Act in the context of medical services.

4.1. Serviceis-a-vis Medical Service:

The Consumer Protection Act 2019 applicable to all goods and services.¹⁶ The term goods have not been defined in the said Act. Instead this term has been given the same meaning and definition in Section 2(1)(i) as given to it in the Sale of Good Act, 1930.¹⁷ However, the expression service¹⁸ has been specifically defined in Section 2(1)(o) of the said Act. The literal meaning of the word service¹⁹ is work done to meet some general need, an act of helpful activity, the supply of utilities as water, electricity, gas required by the public; supplying of public communications or public transport. The term service relates to particular skill or facility that someone has and can offer to others. The definition of the term service had already been kept very wide and now with the inclusion of the two terms housing and construction it has been further widened. Only two types of services have been kept out of the ambit of the Consumer Protection Act 1986. They are Services rendered free of charge and Services rendered under a contract of personal service.

The non –mentioning of services like education, health, housing, posts and telegraphs and telecommunications had presumably excluded from the ambit of the said Act. But Consumer Forums, brought all these services within the ambit

¹⁵ Sachin Aggarwal v.Dr.Ashok Arora., 1993(1) CPJ113.

¹⁶ Section 1(4) of the Consumer Protection Act 1986

¹⁷ Section 2(7) of the sale of Goods Act defines ‘Goods’ to mean every kind of movable property other than actionable claims and money, and includes stocks and shares, growing crops grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

¹⁸ Dr V.K. Agarwal ,*Consumer Protection Law And Practice* , p. 213 (4th Ed 2000).

¹⁹ According to clause (o) of Section 2(1) of the Act —Service means -

- a) Service of any description which is made available to potential users and
- b) Includes the provision of facilities in connection with banking, 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
- c) Does not include the rendering of any service free of charge or under a contract of personal service.¶

of the newly enacted Consumer Protection law. Thus the issues concerning the inclusion of services like housing²⁰, posts and telegraphs²¹ and telecommunications²² have been settled.

In *Lucknow Development Authority v. M.K. Gupta*²³ the Supreme Court has elaborately dealt with the definition of service'. The definition of service' in Section 2(1) (o) of the Act can be divided into three parts the main part, inclusionary and exclusionary part.²⁴ The main clause itself is very wide. It applies to any service made available to potential users. The words any' and _potential' are significant.²⁵

In the case of medical service, the inclusive part of the definition of service' is not applicable. The exclusionary part of the definition will require consideration and it exclude free services and contract of personal service. Therefore in the matter of consultation, diagnosis and treatment a medical practitioner or a hospital / nursing home renders a service with consideration then it will fall within the main part of the definition contained in Section 2(1) (O) of the Act.

4.2. Patient as a Consumer:

The definition of consumer is covering both consumer of goods as well consumer of Services. Similarly it includes not only person who buys any goods or hires any service for consideration but also any user of such goods or beneficiary of such service with the approval of buyer or hirer respectively. It includes anyone who consumes goods or services at the end of the chain of production.²⁶ According to the second part of the definition of consumer in order to that a person should fall within the scope of the definition it is necessary that –

i. The services should have been hired or availed of by such a person and ii. The hiring or availing of services must be for a consideration which has been paid or promised, or partly paid and partly promised, or under any system of deferred payment.

The term hired' has not been defined under the Act. Its Dictionary meaning is - to procure the use of services at a price. Thus the term hire' has also been used in the sense of avail' or use'. Accordingly, it may be understood that consumer means any person who avails or uses any service. What constitutes hiring has been an issue to be dealt with in many consumer disputes.²⁷ If it is established that a particular act constitutes hiring of service, the transaction falls within the net of the Consumer Protection Act, and vice versa.²⁸ Consideration is regarded necessary for hiring or availing of services. However, its payment need not necessarily be immediate. It can be in instalments. For the services provided without charging anything in return, the person availing the services is not a consumer under the Act.

A patient is a consumer when he goes to a medical Practitioner and pay consideration for the same. If there is any deficiency in service provided by medical practitioner and he suffers any damage, then he claims compensation. The term consideration refers to the fees paid or even promised to be paid by the patient to medical practitioner for receiving service i.e. medical treatment. Fees may be paid in part or in full. It may be paid by the patient himself or his relatives. Legal heirs of the deceased patient will be considered as consumers.²⁹

²⁰ U. P. A. E. Vikas parishad (housing and Development Board) v. Garima Shukla and others (1991) CPJ1 (NC)

²¹ K. Neelambaran V. Post Master Urukunnu And Others (1991) CPJ 666.

²² Union of India v. Nilesh Agarwal (1991) CPJ 203(NC 1994(1) SCC 243

²³ (1994) SCC (1) 243

²⁴ The main part is explanatory in nature. The inclusionary part expressly includes the services provided by banking, 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. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

²⁵ The word _any' used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word _potential' is also very wide. It means existing in possibility but not in act. It expected to come into existence at some future time, though not now existing. Thus service is not only extended to actual users but those who are capable of using it are covered in the definition.

²⁶ Section 2(1) (d) of the consumer protection act 1986.

²⁷ Commentary On Consumer Protection Act available at http://ncdrc.nic.in/bare_acts/1_1_2.htm last seen on 27-06-2018.

²⁸ E.g.1) A goes to a doctor to get himself treated for a fracture. Here A is hiring the services of the doctor. Thus he is a consumer. Similarly A passenger getting railway reservation after payment is hiring service for consideration.

²⁹ A presented before the Sub-Registrar a document claim-ing it to be a will for registration who sent it to the Collector of Stamps for action. The matter remains pending for about six years. In the meantime A filed a complaint under the Consumer Protection Act alleging harassment by the Sub-Registrar and Collector and prayed for compensation. The National Commission held the view that A was not a —consumer under the CPA. Because there was no hiring of

Besides the patient, beneficiaries of a service are also considered to be consumers.³⁰

4.3. Deficiency In Service vis-a-vis Deficiency in Medical Service:

When a consumer of any goods or services is supplied defective goods or is rendered deficient services, he may maintain a legal action against the supplier of said defective goods / deficient services, before a specially constituted Consumer Courts.³¹

In the context of the medical profession, deficiency means that the treatment provided by the medical practitioner is not according to accepted medical standards. Deficiency in service under Consumer Protection Act is almost similar to medical negligence under Law of torts. There can be deficiency in service without any injury to patient. Deficiency in maintenance of records is considered as deficiency in service.³² Deficiency in service may also include treatment by using faulty instruments, lack of ICU or ambulance service, etc.

4.4. Complainant:

According to definition of complainant³³ it is not necessary that the complaint be made only by the aggrieved consumer himself. It can be made by any recognised consumer association even if that consumer is not the member of such association.

The Central Government or any state Government is also competent to make complaint under the Act. When a patient, who is aggrieved because of negligent treatment provided by medical practitioner, files a complaint in writing for claiming compensation, he becomes a complainant. Similarly, the legal heirs of a patient, parents of minor patient, or a consumer organisation can become complainants by lodging a written complaint.³⁴

6. Conclusion

From the above discussion it is clear that inclusion of medical service under the umbrella of Consumer Protection Act is prove to be cornerstone in the Indian legal history. Though Consumer Protection Act has its long history from ancient time, but for medical service it is applicable first time. This Act provides a forum to the victims of negligence or deficiency in medical services by providing cheap, speedy and efficacious remedy. The judges observed that the legal system has to do justice to both patients and doctors. The fear of medical profession should be taken into consideration while the legitimate claims of the patient. The significance of the Consumer Protection Act is reflected from its legal system, larger jurisdiction, and affordable judicial costs. The said forum is comprised of statutes pertaining to contracts as well as tort. The Consumer Forum has granted the liberty to stand and allows the consumers to move ahead under the Consumer Protection Act. The Central or the State Government is overall entitled to file complaints under the said act. The said liberty states that the weaker sections and uneducated consumers do not suffer and are given an opportunity of being heard. The structural, functional and normative dynamics of the Consumer Redressal Mechanisms at different

services by the complainant for consideration and because a Government official doing his duty as functionary of the State under law could not be said to be rendering a service to the complainant. [S.P. Goel v. Collector of Stamps (1995) III CPR 684 (SC)].

³⁰ Spring Meadows hospital case, (1998) 4 SCC 39. In this it was held that When a young child is taken to a hospital by his parents and the child is treated by the doctor, the parents would come within the definition of consumer having hired the services and the child would also become a consumer being beneficiary of such services. Likewise in *Nirmala R. Parab and another v. Dr. Kalpana Desai and others*, 1998(3) CPJ 527(Mah.SCDRC) it was held that if the parents are looking after a married daughter who is in a vegetative state and they spend for her medical treatment, their claim for compensation would be accepted even if the husband has not filed the case

³¹ According to Section 2(1) (g) of the Consumer Protection Act 1986, Deficiency 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.

³² *Dr. Paramjitsingh Grewal v. Charanjitsinghchawla* (NCDRC, 2006).

³³ According to Clause (b) of Section 2(1) of the consumer Protection Act complainant means—

- i. a consumer; or
- ii. any voluntary consumer association registered under the Companies Act, 1956 (1 of 1956) or under any other law for the time being in force; or
- iii. the Central Government or any State Government
- iv. one or more consumers, where there are numerous consumers having the same interest; v. in case of death of a consumer, his legal heir or representative; who or which makes a complaint

³⁴ Definition of complaint is provided under section 2(1)(C) of the Consumer Protection Act 1986.



levels enshrined in the CPA indicate that an alternative, compulsory and rapid redressal consumer mechanism has been constituted to deal with the consumer grievances, which ordinary civil courts are not in position to address.