

Guest Submission

MEDICAL PROFESSIONALS UNDER CONSUMER PROTECTION ACT, 2019 - AN ANALYSIS

Vaibhav Goel Bhartiya¹ & Ana Sisodia¹

1. Faculty of Law, Subharti Law College Swami Vivekanand Subharti University Meerut, U.P., India

ABSTRACT

Negligence plays a pivotal role in law. The law of wrongs, popularly known as the law of torts is based on negligence. It was in 1986 when for the first time one such tort of negligence was covered through Consumer Protection Act (COPRA) to protect the rights of innocent consumers at large. However, in the statute the “health care” amenities were not in the preview of the act, but it was grasped through judicial pronouncements and since then healthcare was treated as a service under the act. After about 33 years of the enactment of COPRA, 1986, was replaced with Consumer Protection Act, 2019. When the bill for the Consumer Protection Act was placed before the houses of the parliament it created ruckus in the medical fraternity as in the bill the term “health care” was specifically included in the ambit of services. The doctors showed speculative apprehension of its mishandling which could undermine the entire community. This in turn forced the legislatures to drop the same from the bill. Therefore, this article is an attempt to compare the application of the acts. The scope of the comparison will remain limited to health care workers. The article focuses on real time execution of the statute and an effort for striking a balance between the liabilities of a doctor in case of any negligence in general and preventing health care workers from unnecessary accusations in particular.

Keywords: Consumer Protection Act, Health Care/Medical Professionals, Negligence, Liability

INTRODUCTION

“Health is a precondition for life and life is a precondition for ecological balance in whole”.

In 2021 health and healthcare issues have raised the alarm in the mind of the public at large in general and medical professionals in particular. This fact cannot be denied that

healthcare is one of the major state concerns where medical professionals including para-medical and other healthcare support staff is/are in need of hustle free work environment.

A medical profession can be defined as any person registered, licensed or certified to provide health care services to a natural person

Address for Correspondence:

Prof. Vaibhav Goel Bhartiya, Dean Faculty of Law,
Subharti Law College Swami Vivekanand Subharti University Meerut.
Mobile - +91-8958440240 Email – vaibhav.hnlu@gmail.com

Date of Receiving: 21 May 2021

Date of Acceptance: 15 June 2021

0970-1842/Copyright © JAS 2021

Meaning thereby, medical professionals include physicians, cardiologists, clinical dieticians, psychologists and other wide range of professionals in process of rendering health care services, which was eventually covered as “services” under Consumer Protection Act, 1986. Whereas healthcare services are broadly welfare services for noble social cause to heal the human soul from the emotional, psychological and physical stress and pain of a patient along with near and dear ones. This was in 1995,[1] when healthcare has been captured by the interpreters of the Indian constitution and kept it in legal claw under which medical professionals’ moral obligation was left no more moral but totally legal where healthcare has been attached with services.

Though, controversies and criticism were on the top, but no voice was sturdy enough and therefore, healthcare continued to be a deemed service under Consumer Protection Act, 1986, and dedicated healthcare professionals faced incongruity of the system. At the same time, it cannot be denied that due diligence is the core of medical profession and negligence may lead to fatal consequences. Few illustrations are there, where gross negligence in medical profession can be seen as well ashaming the noble profession. But before putting the burden on health care worker under the act, one has to ascertain that there is a gross negligence in contrast to the efforts with due diligence, which subsequently meet failure. The efforts /labours of majority of medical professionals cannot be on stake because of handful of mal practitioners and marginalised defaulters in the medical profession. Undoubtedly, an effort may raise an error, but the question is, whether the efforts of the saviour of mankind are to be protected or

they shall be backed by the legal sanction or (how legal sanction can be questioned, it has to be followed) coercive methods for no reason.

Recently, the Consumer Protection Bill, 2018, has been signed by the competent authority. It is essential to highlight that initially while introduction of the bill in the house, the word “healthcare” was given place in the list of services and the same was passed from the Lok Sabha. But during discussion and debates in the Rajya Sabha due to uninterrupted demands and presentations from various medical organisations and health care service providers the word “healthcare” was dropped out from the list of services. However, the language of the bill was amended before its enactment and the word ‘health care services’ was removed from the final definition of the services. The original bill defines “Services” under Section 2(42) which reads as-

“...service of any description which is made available to potential users and includes, the provision of facilities in connection with banking, healthcare, boarding or lodging or both...but does not include the rendering of any service free of charge or under a contract of personal service ...”[2]

BACKGROUND

Medical profession is one of the oldest professions in the world typically with in reference to with that of Indian culture, where doctors are given the place of God. However, with the advent of time, society had witnessed certain malpractices being carried out in medical profession as well. Therefore, application of certain degree of regulation and reform become essential to safeguard the interest of the people.

For long time, people did not have an appropriate body to adjudicate the issue as per their complaints. This was only after the amendment Act of 1964 (IMC Act 1956), that the Indian Medical Council Act, highlighted the regulations to address such problems and issues. Therein, the misconduct of a medical professional can be punished by suspension or deletion from the roll.

However, it came to light that this action was insufficient as it does not have desired deterrent effect. Also, impartiality of the council was questioned along with the fact that there lies no power to grant compensation to the injured patient. The relief by recourse to various criminal and civil remedy were available but they had a low success rate due to prolonged hearings and rigidity of procedure.

The Consumer Protection Act, 1986 came as a savior to many aggrieved patients by creating consumer dispute redressal agencies, popularly referred to as C.D.R.As. However, as speculated, the applicability of the act was challenged by the doctors mainly on the grounds of the kind of relationship shared by the doctors and the patients who rested more on trust and faith rather than a trading service aiming solely at profit.

HEALTH CARE FACILITIES & SERVICES UNDER THE ACT OF 1986 ACT :

In the case of *Indian Medical Association v. V.P. Shantha & Others*,^[1] the three-judge bench of Hon'ble Supreme Court held that medical practitioner who gives services to a patient in the nature of patient-doctors consultation,

analysis-finding and conclusion on the basis of diagnosis to treat the patient, would surely come within the ambit of the term 'services' by virtue of Section 2(1) [3] (o) of the Consumer Protection Act, 1986. It is peculiar to note that to come within the ambit of the term 'services' by virtue of Section 2(1) [4] (o) of the Consumer Protection Act, 1986, it has to be a "contract for service" and not "contract of service". The conceptual difference between the two is that the former denotes a contract where one party provides services to the another, eg., a professional or technical service, the latter is a contract in the nature of a master and servant relationship.

Whether "Free" Medical Services are covered Under Consumer Protection Act:

The Apex Court in, the case,^[5] formulated a shrunken adaptation to demarcate as to what will comprise in 'free medical care'. It segregated the services in general like offering free of cost to everyone & the services availed on payment; and services for which fee is charged but are made available free of cost to the persons who cannot meet the expense.

The Court held that the services provided against payment, along with services to those who cannot afford but are not free in nature, are the subject matter of this act and none other.

WHAT CONSTITUTES MEDICAL NEGLIGENCE?

Literally speaking, negligence means failure to take proper care than as expected. Winfield and Jolowicz in one of the writings clarified that due

care is the responsibility of every service provider and this is backed by the legal obligation. When there is a lapse of the legal duty to take care which results in damages is called negligence. Winfield himself classified negligence as a tort which may have the right to initiate legal action only when there is a breach of legal duty to take care along with damages to the plaintiff.[6]

In *Poonam Verma v. Ashwin Patel & Ors.*,[7] this was decided by the hon'ble Apex Court that the word negligence has many expressions and may have different implications, it may be direct or indirect, deliberate or through casual approach, vigorous, collateral, relative, absolute, contemporaneous, criminal/hazardous where all are neither will full nor punishable. Only wilful or reckless negligence are the Negligence per se.”[8]

In *Jacob Mathew v. State of Punjab & Another* [9] the Hon'ble Apex Court observed, *“Any sensible person inflowing into a business or occupation or profession....to be called a professional of that discipline, impliedly affirms the person dealing with him that the minimum required skills of the profession and for which he professes to possess shall be employed and such deployment of the sills will be furthermore with the utmost good faith inclined with reasonable degree of care and caution.....the only guarantee which such a specialized one can give...that he is holds the minimum requisite skill of that branch of practice in which he is engaged and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence.”*[10]

To establish a case of negligence following elements have to be fulfilled:

1. Duty of Care to the plaintiff,
2. Breach of Duty,
3. Damage.

STANDARD OF CARE:

In the leading English case under law of tort, *Bolam v.Friern Hospital Management Committee*,[11] certain rules were laid down for those cases that involved skilled professionals such as doctors so as to determine the reasonable care in cases involving negligence. This rule, popularly known as Bolam test, states that if a skilled professional reaches the standard of care and diligence, they are not acknowledged to be negligent. However, Bolam test was discarded in the 2015 Supreme Court decision of *Montgomery v. Lanarkshire Health Board*. [12]

In Indian perspective, the principle of 'Standard of care' was laid down by the Hon'ble Supreme Court in the case of *Dr. Laxman Balakrishna Joshi v. Dr. Trimbark Babu Godbole* [13] and *A.S Mittal v. State of U.P.*[14]

DRAWBACKS OF CONSUMER PROTECTION ACT, 1986:

Before the enactment of COPRA, 1986 there were certain enactments providing relief to the consumers indirectly, such as Food Adulteration Act, Essential Commodities Act, etc. However, relief granted under these statutes were only in the nature of punishment provided to the accused, but no direct benefits were granted to the victim/consumer. Hence COPRA, 1986 emerged as a blessing to various consumers of goods and services that

Medical Professionals under Consumer Protection Act

provided compensatory relief. Nevertheless, still there were many inadequacies attached to it, such as, the 'services' for which some fee is charged was the only subject matter of dispute under this Act. The doctors who rendered services free of cost and the hospitals where services are given free of cost are not within the realm of this act. Also, the act does not vest the Consumer Redressal Forum with the power to entertain the cases suo-moto. Moreover, the

major problem that lies behind the operation of the act is the uncertainty and default in execution of the orders passed by the Consumer Court. One such major loophole lies in the fact that all the rights of the consumers in the act, talk about the right to choose, right to safety etc., which do not appear justifiable thus degrading the very spirit of the act. The act also failed to include services through e-commerce in its dealings.

COPRA 1986 v. 2019: A COMPARITIVE ANALYSIS:

KEY POINTS	OLD ACT	NEW ACT
Domain	Goods and Services for Consideration. (except free and personal services)	All goods and services, (including telecom and housing construction), and all modes of transactions such as online, teleshopping, etc., for consideration. Free and personal services are still excluded.
Pecuniary Jurisdiction	District forum (upto 20 lacs) State commission (from 20 lacs to 1 crore) National commission (from 1 crore and above)	District forum (upto 1 crore) State commission (from 1 crore to 10 crore) National commission (from 10 crore and above)
Territorial Jurisdiction	Where seller has office	Where complainant resides or work.
Regulatory Body	No Provision	Central Consumer Protection Authority to be formed.
Mediation^[15]	No Provision	Court can refer for mediation under Section 80.
Price to decide Jurisdiction	Earlier MRP	Now discounted or actual price.
E-Commerce	No Provision	All provision applicable to direct sellers to extend to E-Commerce as well.
Penalties	If a person does not comply with orders of the Commissions, he may face imprisonment between one month and three years or fine between Rs 2,000 to Rs 10,000, or both.	If a person does not comply with orders of the Commissions, he may face imprisonment up to three years, or a fine not less than Rs 25,000 extendable to Rs one lakh, or both.

CONCLUSION

The fact, that the doctors are the savour and the hope of this world cannot be marginalised, especially when a new disease or health problem occurs, and medical science is silent on the issue. Under such circumstances doctor can neither say no nor can he affirm that he has the capabilities and specialities to treat the issue. Prevalent Covid-19 pandemic may be considered one of the examples of the same. Here medical professionals have to work on the basis of the experiences and probability. Though the maxim of probability has no space in the maxim of due care or in term of holding the minimum level of required skills. This may lead to two opposite positions either to say no to treat or to make efforts in good faith. Furthermore, this cannot be denied that present advancement and development of the medical science and research is also based on the idea of the experiences and probability. Here in present legal system if health care professional will be kept under the clutches of law, this will lead to wholesome unforeseen adverse effect.

Most of the countries possess various penal provisions in the domestic criminal jurisprudence to treat the issue if doctor is running beyond call and deliberately or carelessly treats the patient. The same has also been highlighted in the case of *Jacob Mathew v. State of Punjab*,^[16] the Court looked upon to decide the issues concerning criminal negligence of doctors under the Indian Penal Code. The court added that *Bolam case*^[17] principle should not be generalised. Even after the cautiousness expressed by the Hon'ble Supreme Court of India, false and frivolous cases are there against the doctors and it

cannot be denied that most of them are to extract the money from them or to flee from the liability of payment due to the hospital and doctors. This is also evident that in case of causality in the hospital, it becomes tough for health professionals and health care centres to save themselves from the violence caused by the caretakers of the patient. In such a situation the procedure of the criminal liability as explicitly elaborated by the court should be that the identification of the doctor responsible for lack of due care or as a prime suspect, should be done by referring such case to a senior government doctor of the same speciality or to the committee of doctors who would ascertain the correctness of the alleged lapses. Thereafter, only upon confirmation of negligence, a notice be issued against the concerned doctor.

However, there are many cases where the inclusion of medical services under the profound umbrella of "services" has proved to be a bane to the medical professionals

Due diligence is core and will remain so in the healthcare establishment. However, it is not easy to establish "lack of due diligence" for the petitioner or the applicant. Similarly, it is hard on the part of the medical professional to establish the presence of utmost due diligence. There is one inseparable line between success and failure of the case of critical care. Viewpoint of a patient and the caretaker of the patients has remained biased ever since and when healthcare professionals got captured in the clutches of the Consumer Protection Act 1986, this issue became furious and somehow, it turned out to be an act of blackmailing and money-making task for many. It is true to say that this is definitely, the misuse which was not

Medical Professionals under Consumer Protection Act

apprehended earlier but even after two decades of the 21st century when now medical professionals are working for various commercial gains, more specifically when healthcare services are not only technology based but also expensive beyond the common reach.

But at the same time, it is essential to keep an eye upon the malpractices gradually getting rooted in the medical sector thus resulting in escalating cases of medical negligence due to the mushrooming of the hospitals and diagnosing centres. It is evident from daily newspapers highlighting outrageous news of gross medical negligence such as doctors leaving behind surgical equipment inside the body of the patient, causing serious injuries and health issues, sometimes even resulting in the death of the patient.[18]

Therefore, the specific technical addition or deletion of the 'healthcare' under the ambit of "Services" either in COPRA 1986 or 2019 would not do any good to regulate the current scenario. A balance needs to be maintained to assure that doctors are not baselessly exploited or annoyed for any mishap considering the dynamic nature of the profession, but undoubtedly, any act of practitioners deviating from due diligence and standard of care cannot go unpunished. As it is an established principle that "he who seeks equity, must do equity".

REFERENCES

1. Indian Medical Association v. V.P. Shantha & Others, (1995) 6 SCC 651.
2. https://consumereducation.in/monographs/5_insurance_and_consumer.pdf
3. Definition of services in The Consumer Protection act 1986 where originally the

definition does not includes medical services

4. Definition of services in The Consumer Protection act 1986 where originally the definition does not includes medical services
5. http://www.ijsrp.org/monograph/Veracity_of_laws_relating_to_medical_malpractice_in_India.pdf, Indian Medical Association v. V.P. Shantha (1995) 6 SCC 651.
6. <http://www.lawyersclubindia.com>
7. (1996) 4 SCC 332
8. <https://amlegals.com/medical-negligence-can-it-be-pardoned-2/>
9. <https://amlegals.com/medical-negligence-can-it-be-pardoned-2/>
10. <http://www.legalservicesindia.com/article/1898/Medical-Negligence:-A-Specific-Tort.html> and <http://www.legalservicesindia.com/article/1898/Medical-Negligence:-A-Specific-Tort.html> accessed on 01.05.2021 at 16.00 Hrs at Subharti law College Subharti University.
11. [1957] 1 WLR 582.
12. [2015] UKSC 11.
13. AIR 1969SC 128.
14. AIR 1989 SC 1570.
15. <https://lawcirca.com/consumer-protection-act-1986-v-consumer-protection-act-2019/> accessed on 30.04.2021 at 13.00 Hrs at Subharti law College Subharti University.
16. (2005) 6 SCC 1
17. <https://www.lawteacher.net/cases/bolam-v-friern-hospital-management.php>
18. Didyala Amrita, "NIMS doctors leave scissors inside patient's stomach, remove it after 3months". The Times of India, 2019, Feb 10.