Medical Negligence
(All in One)
Under
Consumer Protection Act 2019

Author:

Dr Prem Lata
(Ex- Member Judge, Consumer Commission)
Arbitrator,
Delhi International Arbitration Centre
High Court of Delhi.
Member, Rule making Committee,
Ministry of Consumer Affairs,
Government of India.

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PREFACE

During the last few years, number of issues have been raised by various NGOs regarding the scope of Consumer Protection Act, its definitions, and even the validity of the Act. Supreme Court as well National Commission through their judgments settled the issues judiciously and it is crying need of the day to communicate the consumers about the established law by now on all those glaring issues in simple language which can be understood by them without having legal background .

Protecting the rights of a consumer is not only a fundamental right, but it also emanates from the right to life and personal liberty enshrined in Article 21 in the Constitution of India. The Right to "life" does not mean just as animal existence, but it means meaningful life with dignity.

In this booklet my focus is mainly on the issue of Medical Negligence considered as Service under consumer Protection Act .This particular area has attracted a lot of attention of luminaries in the area of law and also judiciary. Controversies on medical negligence cases had come up during the first case on medical negligence in the matter of Indian Medical Association V/S V ,Shantha in 1995 which was settled by the Supreme Court holding that medical profession comes under Consumer Protection Act and set right the question of jurisdiction of consumer forum issue.But again a petition was filed before the National Consumer Disputes Redressal Commission New Delhi In this matter Of Dr. J.J. Merchant & Ors.V/S. Shrinath Chaturvedi, doctors prayed that complaint filed for alleged medical negligence be dismissed.According to them complicated questions of law and facts arise in medical cases which can best be decided by the Civil Court or in the alternative the proceeding be stayed during the pendency of criminal prosecution pending against them in criminal court at Mumbai.This petition was also rejected by the Commission.Matter now went to Supreme Court for adjudication which was decided on 12/08/2002 by the Bench: M.B. Shah, Bisheshwar Prasad Singh & H.K. Sema, Judgment Written by Shah, J.

Apex Court while deciding the above case referred to number of earlier decided cases and quoted Indian Medical Association v. V.P. Shanta [(1995) 6 SCC 651]

Court in the above case had observed

“If this contention raised by the learned counsel for the appellants is accepted, apart from the fact that it would be unjust, the whole purpose and object of enacting the Consumer Protection Act, 1986 (hereinafter referred to as the 'Act') would be frustrated. One of the main objects of the Act is to provide speedy and simple redressal to consumer disputes and for that quasi-judicial machinery is sought to be set up at the district, State and Central level.”

However the above situations have inspired me to write this book so as to reach to the common man in the country and consumers are clear on the issue of Medical Negligence matters and related complications on the subject. .

All possible efforts have been made to avoid this book to become a theoretically legal book so as to help the general public at large. But at the same time while parting with information about the legal position, all legal provisions have also been pinpointed for ready reference. Book is before you, it will be relevant when it really helps the people.

DR PREM LATA

AUTHOR

About the Author Dr Prem Lata

- Legal Advisor at Steel Authority of India Ltd

  1980-20019 (Voluntary Retired)

- Member Judge at Consumer Court

  2001-2006 (Five year term)

- Legal Expert at National Consumer Helpline

  2006-2008(Ministry of Consumer Affairs, Govt. Of India)

- Advisor Member to Script Committee (for creation of consumer Ads & serials on Landmark judgments)
  2011-2013(Ministry of Consumer Affairs, Govt. of India)
- Member Judge at Consumer Court

  2009-2014 (Five year term)

- Legal Expert at National Consumer Helpline

2014-2017 (Ministry of Consumer Affairs)

- Mediator at District Court ,Dwarka ,New Delhi
  2015-2017 (On panel with High Court of Delhi)
- Arbitrator at Delhi International Arbitration Centre (DIAC)
  High Court of Delhi (Life time)
- Arbitrator at Indian Council of Arbitration,Govt. of India
  (ICA) (Life Time)
- Arbitrator at FICCI,Ministry of Commerce ,Govt. of India
  (Life Time)

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Web-www.consumerawakening.com
You tube channel-Consumer Awakening Mission
Contact; 9891229625

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Healthcare matters are ‘service’ under Consumer Protection Act

Under what circumstances ,a medical practitioner can be regarded as rendering 'service' under the Consumer Protection Act, 1986 (The earlier Act) was the question before the Hon’ble Supreme Court in its first case on medical negligence in the matter of Indian Medical Association V/S V.Shantha SC,1995

Appeals against orders from various High Courts as well as by the National Consumer Disputes Redressal Commission [National Commission, PIL, Writ Petition) raised a common question-whether medical profession can be considered rendering service under Consumer Protection Act

Judgments that led the matter to Supreme Court connected with this question;

1. Dr. A.S. Chandra v. Union of India, (1992) a Division Bench of Andhra Pradesh High Court had held that service rendered for consideration by private medical practitioners, private hospitals and nursing homes must be construed as 'service' for the purpose of the Consumer Protection Act and the persons availing such services are 'consumers' within the definition of Consumer under the Act.
2. In Dr.C.S. Subramanian v. Kumarasamy & Anr., (1994) 1 MLJ 438, a Division Bench of the Madras High Court took a different view. The Court held that the services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment, both medicinal and surgical, would not come within the definition of 'service' under the Act and a patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment, both medical and surgical, cannot be considered to be a `consumer'; but the medical practitioners or hospitals undertaking and providing paramedical services of all kinds and categories would fall, to the extent of such para-medical services rendered by them, within the definition of `service' and a person availing of such service would be a `consumer' within the meaning of the Act
3. By judgment dated April 21, 1992 in First Appeal Nos. 48 and 94 of 1991, the National Commission has held that the activity of providing medical assistance for payment

carried on by hospitals and members of the medical profession falls within the scope of the expression `service' as defined in the Act and that in the event of any deficiency in the performance of such service, the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the Consumer Forum/Commissions having jurisdiction.

4. By judgment dated May 3, 1993 in O.P.No. 93/92, the National Commission again held in different facts and circumstances that since the treatment that was given to the complainant's deceased husband in the nursing home belonging to the opposite party was totally free of any charge, it did not constitute `service' as defined under the Act and the complainant was not entitled to seek any relief under the Act.
5. C.A.No. 254/94 has been filed by the complainant against the said judgment of the National Commission

Arguments extended before the Hon'ble Supreme Court in the First case on medical negligence titled as Indian Medical Association V/S V. Shantha, SC, 1995.

1. Validity of the provisions of the act regarding Jurisdiction-Petitioners assailed the validity of the provisions of the Act, being violative of Articles 14 and 19(1) (g) of the Constitution.Hon'ble supreme court after hearing the parties held that the word Services-'any services' include all 'potential user', hence none is out of the purview of Consumer Protection Act once fact of hiring services by making payment is confirmed.
2. Distinction between a Profession and an Occupation –It was contended that a person belonging to a profession does not fall within the ambit of the said provision and therefore, medical practitioners who belong to the medical profession are not covered by the provisions of the Act. Supreme court while making its observation , reference was made to the book by Jackson & Powell on Professional Negligence wherein authors have considered professional status to seven specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners and (vii) insurance brokers. Supreme Court agreed to the argument extended by the counsels from the other side that during the twentieth

century demarcation line between occupation and profession has almost vanished because professional expertise is now invited to all occupations.Supreme Court made an observation in the case that an increasing number of occupations have been seeking and achieving "professional" status and this has led to change in traditional features distinguishing the professions from other occupations.

3. Medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 -Argument was extended that Medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under Section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct.

   Supreme Court held that the Consumers enjoy the remedy of Removal of defect, return money, and pay compensation for mental agony under consumer Protection which is missing in Indian Medical Act

4. Medical profession deals with Complicated question of law and requires special knowledge -

   Supreme Court held that Consumer Courts are well equipped with wast powers and presidents heading these commissions are retired judges from Supreme court, High Courts and District Courts and are persons of ability, integrity and standing, having adequate knowledge or experience or, having shown capacity in dealing with, problems relating to economics, law, commerce.

5. The relationship between a medical practitioner and the patient is of trust and confidence -The relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is in the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not `service' under the Act. Supreme Court defined the words Contract of service & Contract for service and settled that contract between doctor and patient is a contract for service and in no way any personal service when payment receive .Therefore this argument was also turned down

finally law was settled in this case that Medical professionals render services to the patient under such patient when makes payment becomes consumer as defined under the Consumer Protection Act, Consumer Redressal Agencies can hear the matters related to healthcare, can order for relief in the form of refund, removal of deficiency along with compensation for the mental agony faced by the consumers.

Law lay down by Supreme Court on medical negligence; V.Shantha V/s Indian Medical Association SC 1995

How medical practitioner come under consumer definition under consumer protection act:

!) The word Services in the act is sufficient to bring medical profession under services like any other profession -'any services' include all 'potential user', hence none is out of the purview of Consumer Protection Act once fact of hiring services by making payment is confirmed .

!!)Though Indian Medical Council Act has provisions to control the medical practitioners and take disciplinary action against erring doctors, Consumer Courts are additional remedy to the consumer under Consumer Protection Act and get compensated. Consumer Protection Act provides remedy to the consumer with Removal of defect, return money, pay compensation for mental agony etc. which is missing in Indian Medical Act Medical profession is technical in nature but it cannot be said that the members of the forum are not capable to deal with such matters .They are equipped with power to call expert opinions on the subject, medical literature and other reports from eminent people from the society, judges or retired judges. Three members can be expert of three subjects only and if it is expected them to know every subject, it will be an impossible situation in all the courts for handling matters on various subjects.

!!!)Though medical PROFESSION is different from other OCCUPATIONS, but commercialization has already taken place when services are given by payment though it is still a noble profession based on faith and trust. In the context of the law relating to Professional Negligence reference was made to the book by Jackson & Powell on Professional Negligence wherein authors have considered professional status to seven

specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners and (vii) insurance brokers. Supreme Court held that during the twentieth century, demarcation line between occupation and profession has almost vanished because professional expertise is now invited to all occupations .An increasing number of occupations have been seeking and achieving "professional" status and this has led to change in traditional features distinguishing the professions from other occupations.

Theory of res ipsa loquitur [a thing speaks of itself]

!)Where deficiency is obvious like removal of wrong lib , performance of operation on wrong patient , giving injection without allergic test, use of wrong medicine or leaving swabs or other items inside the body during operation ,in such a situation there no need to further prove the negligence and this theory is recognized as res ipsa loquitur

Who can file case for medical negligence?

!) Where medical services are rendered by receiving payment as part of the terms and conditions of the services, this would amount to rendering services as defined under the Consumer Protection Act and patient is a consumer for filing case of medical negligence before the Consumer Forum

Payment theory

!) All private hospitals, clinics, Doctors are service providers when receive payment.

!!) All charitable hospital, clinics are service providers when hospitals/clinics are funded by some persons in charity.

!!!) All Government hospitals are service providers when receive money from employer for providing medical facility to their employees.

!V) All government hospitals are service providers if they receive money from insurance company and not from the patient

V) All Government hospitals are service provider if receive payment from some private persons for providing private services but not receiving from all patients.

V!) Government hospital is not a service provider if not charging from any one

When doctor is negligent

!) Damage to organ due to negligence

!!) Wrong treatment due to wrong diagnosis

!!!) When treatment not chosen as per accepted and established norms / medical research/available medical literature.

When doctor is not negligent

!) If five methods available for treatment, one chosen, doctor not negligent

!!) Doctor not guarantor for curing the ailment.

!!!) Error of judgement different from wrong diagnosis

Three steps to be observed by the doctor :

!) To decide whether he has to take up the case or not.

!!) If taken up the case, he is to decide what treatment is to be given.

!!!) Whether the treatment given as per the diagnosis made.

Complaint for deficiency in Paramedical services

!) Money receipt if refused

!!) Prescription or case history if refused on request

!!!) Discharge summery or test reports when not provided

!V) Equipments short causing damage to patient or interrupt medical services

V) Infrastructure not up to mark

V!) Staff, doctors, nurses not available

A person cannot be a consumer if payment not made

(Case Law)

In a case before National Commission in the matter of of Dr Hema, Dr Sulekha Dr Sethunath v/s S.Jayan & Others .11(2016) CPJ 306 NC has held that complainant do not fall within the purview of Consumer Protection Act. Here was the question of making payment for the services hired and a Government hospital SAT Hospital not charging from the patients and hence are not rendering services to the consumers under Consumer Protection Act. In this case, Sat Hospital is a Govt. Hospital, who had not charged from the patient and had not been charging from any other patient for the treatment .A Child Patient was brought to the causality on 11.10.2000, was kept in ICU. After one week from admission, surgery was conducted at the left hand and ultimately resulted into amputation of a portion of left forearm. It was alleged that post operation care was not given to the child as the child developed gangrene due to the negligence of the doctors .While coming to the facts of the case, complainants have no where pleaded in the complaint that any consideration was paid by them for obtaining services of the hospital neither could they press that hospital was charging from any other patients.

We may need to go back to the landmark judgment of apex court, the Supreme Court of India in the case of V.Shantha V Indian Medical Assocation In 1995

The word medical negligence has not been defined in the Consumer Protection Act. It has been covered in the services rendered and hence come under the head of deficiency in services while rendering medical services .Medical services rendered negligently has been explained in various judgments given by the Supreme Court right from the first case of V.Shantha V/S Indian Medical Assocation in 1995.Thereafter number of cases have been decided on the same footing namely Harjot Ahluwalia V Spring meadows 1998,Achyut Rao Haribhau Khodwa V State of Mahrashtra[1996] J.J.Merchant V Shri Nath Chaturvedi 2002.,.Jacob Mathew V State of Punjab &others 1995 CTJ 1085 SC{CP} Malay Kumar Ganguli&Dr Kunal Saha V Dr Sukumar Mukherjee and others delivered on various occasions .

Payment for services: jurisdiction issue: Various issues have already been discussed in the above cases. Still cases are coming before the courts on the point of jurisdiction when patient gets treatment from the Govt. Hospital .Judgments on this issue differ from case to case because all Govt. hospitals are not outs from the jurisdiction of consumer courts for the following reasons-

Govt. Hospital is answerable before the Consumer Court

- If contribution from the employee's salary deducted on account of medical facility.
- Payment by insurance company amounts to payment made by the consumer.
- Charitable hospitals come under the act because someone is paying for it in charity.
- Govt. hospital not charging from the consumer but had been charging from some other patients. Fee/consideration is a must for falling under definition of consumer in any form or by anyone other than the treated person

But when Government hospital gives services completely free of cost and no charges are taken from one and all patients, in that case patient is not a consumer. In the matter of V.Shantha V/S Indian Medical Association this theory of liability of doctor as a service provider was explained in details which are the guideline till date for bringing a medical negligence case under the purview of Consumer Protection Act. While considering doctors in Govt. hospitals employees of the hospitals and not service providers, a distinction was made between the word 'contract of service' and 'contract for services'

"No doubt that Parliamentary draftsman was aware of this well accepted distinction between "contract of service" and "contract for services" and has deliberately chosen the expression `contract of service' instead of the expression `contract for services', in the exclusionary part of the definition of `service' in Section 2(1)(o). The reason being that employer hospital cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. Therefore services rendered by employed doctors of the hospital are service rendered by virtue of their employment and not towards the patients coming to the hospital ".

It is true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship

between the doctor and the patient by virtue of accepting payment for services, doctor is a service provider to the patient.

However the medical practitioners, Government hospitals/nursing homes and private hospitals/nursing homes (hereinafter called "doctors and hospitals") broadly fall in three categories:-

i) Where services are rendered free of charge to everybody availing the said services. (Govt. Hospitals) Patient is not a consumer under this category.

ii) Where charges are required to be paid by everybody availing the services, clearly consumer.

iii) Where charges are required to be paid by persons availing services but certain categories of persons who cannot afford to pay are rendered service free of charges. Patient is a consumer

Doctors and hospitals who render service without any charge whatsoever to every person availing the service would not fall within the ambit of "service" under the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such doctors and hospitals.

As far as the second category is concerned, since the service is rendered on payment basis to all the persons they would clearly fall within the ambit of the Act

The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients. The service rendered by such doctors and hospitals to paying patients undoubtedly fall within the ambit of the Act.

But unfortunately in the above referred case of Dr Hema,Dr Sulekha Dr Sethunath v/s S.Jayan & Others .11(2016)CPJ 306 NC complainant failed to put any evidence that hospital had been charging any money from any patient

To conclude, we may say that while taking services from the Govt. hospitals, we need to check the facts and issue of payment for the services received as discussed above. Court delivers judgment on the bases of facts and circumstances of the case.

Law lay down by Supreme Court through various judgments

Achute Hari Bhau Khodwa V State Of Maharashtra Sc 1996

Law lay down

Medical Professional to follow three steps carefully before treating the patient –

1. Take decision carefully whether he should take the case in hands for treatment.
2. Decide what treatment he has to give to the patient.
3. Whether he has given the treatment what was chosen by him.

During the operation, Mop left in the body, formation of pus resulting into damage or death amounts to negligence.

Poonam Verma V Ashvin Patel Sc 1996

Law lay down

Giving medicine without knowledge i.e. homeopathic doctor prescribing allopathic medicine amounts to medical negligence.

Harjot Ahluwalia V Springmeadows 1998 Sc

Laws lay down

1. Wrong injection by the untrained nurse, leaving the case to junior doctor without explaining the case amounts to negligence on the part of doctor as well as nursing home.

2. Doctors are not negligent if out of five methods established in the medical science, doctors adopt one method for treatment which does not bring expected results or treatment does not prove to be very effective
3. It is expected from a doctor to have a reasonable skill and knowledge and reasonable degree of care.
4. Doctor is not negligent unless he has done something which he ought not have done OR has not done something which he should have done

Jacob Mathew V State Of Punjab Sc 2005

Law lay down

Act of negligence to be viewed as criminal negligence inviting criminal prosecution would have to be of a gross negligence and must fulfill two tests:

!)Doctor did not possess the necessary skill required or if possessed the required skill, did not exercise with reasonable competence

!!)The act committed ought to be such that no medical professional in ordinary sense would have committed.

!!!) Test of Medical negligence in criminal case and under consumer protection act are to be judged on different parameters

!V) Every professional including advocates, charted accountants, Doctors etc who provides professional service. by receiving payment is a service provider under Consumer Protection Act

V) In appropriate case, expert opinion may be obtained and the matter is left to the discretion of Consumer Forums and Commissions"

Martin D'souza V Mohd Ishfaq 2009 SC delivered on 27th Feb 2009

"Whenever a complaint is received against a doctor or a hospital by a consumer forum or by criminal court then before issuing a notice to the complainee doctor or hospital, it should be referred to a competent doctor or committee of doctors, specialized in the field to which the medical negligence relates, and only thereafter if there is a prima facie case that a notice be issued to the concerned doctor/hospital."

Malay Kumar Ganguli&Dr Kunal Saha V Dr Sukumar Mukherjee and others delivered on 7th August 2009

"A court is not bound by the evidence of the expert which may be advisory in nature .The court must derive its own conclusion upon considering the opinion of experts which may be adduced by both the sides ,cautiously and upon taking into consideration the authorities on the point which he deposes "

V Krishna Rao V Nikhil Super Speciality Hospital &others (8th March 2010) holding

"Expert opinion is needed to be obtained only in appropriate cases of medical negligence cases and the matter may be left to the discretion of the consumer forums especially when the retired judges of Supreme court and High courts are appointed to head the National Commission and State commission''

"The general directions given in Para 106 in D'Souza case to have an expert evidence in all cases of medical is not consistent with the principle laid down by the larger bench accepted as position that only in appropriate case ,expert opinion may be made and the matter is left to the discretion of consumer forums and commissions"

. "If the general directions of Martin D'souza case are to be followed then the doctrine of Res Ipsa Liquatur which is applied in England and in Indian Medical Association V V.P.Shantha & others case would be redundant and shall be contrary to the three judges bench order wherein it was held that there may be cases which do not raise much complicated question and deficiency of service may be due to obvious faults which can be easily established such as removal of

wrong limb, performance of operation on wrong patient ,giving injection or drug to allergic patient without test, leaving swabs or other surgical item in the body during operation ”

“Before forming an opinion that expert evidence is necessary under the act, must come to a conclusion that the case is complicated enough to require the opinion of an expert or the facts of the case are such that it cannot be resolved by the members of for a without the association of expert opinion If decision is taken to take to obtain expert opinion in all cases and medical negligence is proved on the basis of expert evidence ,the efficacy of remedy provided under this act would be illusory”

Smt. Savita Garg vs The Director, National Heart ... on 12 October, 2004Author: A Mathur Bench: B.N.Agrawal, A.K.Mathur CASE NO.:Appeal (civil) 4024 of 2003 DATE OF JUDGMENT: 12/10/2004

An error of non-joinder of necessary the party cannot result in dismissal of the original petition for non-joinder of party.

“The National Commission shall, in the disposal of any complaints or any proceedings before it, have the power of a civil court and can direct the parties to disclose the name and other particulars of treating doctor if not known to the complainant So far as the law with regard to the non-joinder of necessary party under Code of Civil Procedure, Order 1 Rule 9 and Order 1 Rule 10 of the CPC no suit shall fail because of mis-joinder or non-joinder of parties.Even if after the direction given by the Commission the concerned doctor and the nursing staff who were looking after the deceased have not been impleaded as opposite parties, it cannot result in dismissal of the original petition as a whole.”

Since the burden is on the hospital to prove not guilty, they can discharge the same by producing that doctor who treated the patient in defense to substantiate their allegation that there was no negligence

The hospitals are institutions, people expect better and efficient service, if the hospital fails to discharge their duties through their doctors being employed on job basis or employed on

contract basis, it is the hospital which has to justify and by not imp leading a particular doctor will not absolve the hospital of their responsibilities.

State of Punjab V Shiv Ram and Ors AIR 2005 SC 3280

t "Merely because a woman having undergone a sterilization operation becoming pregnant and delivering a child thereafter, the operating surgeon or his employer cannot be held liable on account of the unwarranted pregnancy or unwanted child".

The causes of failure may be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part the surgeon. Authoritative text books on gynaecology and empirical researches which have been carried out recognize the failure rate of 0.3% to 7% depending on the technique chosen out of several recognized and accepted ones. Failure due to natural causes, no method of sterilization being foolproof or guaranteeing 100% success, would not provide any ground for a claim of compensation.

State Of Haryana & Ors. Y. Smt. Santra, Jt 2000 (5) Sc 34,

Doctor negligently operated only the right fallopian tube and had left the left fallopian tube untouched. The patient was informed that the operation was successful and was assured that she would not conceive a child in future. This negligence when results into birth of an unwanted child to a woman, was considered a case of medical negligence.

Dr J.J.Marchant case, a turning point.

(Supreme Court Verdict)

It was Dr. J.J. Merchant & Ors.Vs. Shrinath Chaturvedi case wherein doctors prayed that complaint filed for alleged medical negligence be dismissed because it involves complicated questions of law and facts which can best be decided by the Civil Court. The proceeding also be stayed during the pendency of criminal prosecution pending against them in criminal court at Mumbai. This was Miscellaneous Petition No.53 of 2000 filed before the National Consumer Disputes Redressal Commission New Delhi

That application was rejected by the Commission.

Hence, an Appeal (civil) 7975 of 2001 came up before the Supreme Court which was decided on 12/08/2002 by the Bench: M.B. Shah, Bisheshwar Prasad Singh & H.K. Sema, Judgment Written by Shah, J.

In the present case, complainant, respondent here before this court alleged that his son aged 21 years was admitted to the Breach Candy Hospital, Mumbai on 4.8.1992 for operation of slip disc as he was suffering from backache. He had returned from USA in the month of June, 1992 after obtaining degree in Business Management. He died on 29th August, 1992 in the hospital due to medical negligence of doctors

Apart from defending their case on merits, Doctors extended several arguments challenging the jurisdiction of Consumer Dispute Redressal Agencies stating therein that-

(a) There was inordinate delay in disposal of the complaint

(b) Complicated question of law and facts involved in this case.

(c) Summary procedure is not proper remedy for deciding such issues depending upon medical expert's opinion; hence complainant should be directed to approach the Civil Court

d) Judges of the commissions are not having knowledge of medical field, hence should not hear such matters

Apex Court while deciding the above case, referred to number of earlier decided cases and quoted Indian Medical Association v. V.P. Shanta [(1995) 6 SCC 651] wherein delay in deciding the case was made an argument for dismissing the case .The facts of the case revealed the reasons for delay were :

!) Delay in making appointment of the Chairman and Members of the Forum or Commission including National Commission;

!!) Not providing adequate infrastructure;

!!!) Delay because of heavy workload and there is only one Bench of the National Commission or the State Commissions for deciding complaints;

!V) Delay in procedure;

Delay in disposal of the complaint would not be a ground for rejecting the complaint or directing the complainant to approach the Civil Court.

Court in the above case had observed

“If this contention raised by the learned counsel for the appellants is accepted, apart from the fact that it would be unjust, the whole purpose and object of enacting the Consumer Protection Act, would be frustrated. One of the main objects of the Act is to provide speedy and simple redressed to consumer disputes and for that quasi-judicial machinery is sought to be set up at the district, State and Central level.”

Hence court instead of agreeing to send the matter to civil court for given reasons, issued directions to the Government to rectify the defect and remove the hurdles coming in the way in speedy disposal of cases which is the basic purpose of law

Therefore, Another earlier decided case of Charan Singh v. Healing Touch Hospital and Others [(2000) 7 SCC 668] was also referred in which court had observed that complainant cannot be left unheard after waiting for six long years and advised to take necessary steps for speedy disposal of complaints-

"The Consumer Forums must take expeditious steps to deal with the complaints filed before them and not keep them pending for years. It would defeat the object of the Act, if summary trials are not disposed of expeditiously by the forums at the District, State or National levels. Steps in this direction are required to be taken in the right earnest".

In view of the above observations made by the Supreme Court in earlier matters, Supreme Court again set the controversy at rest about the jurisdiction of consumer courts in medical negligence matters Court in this case also relying upon Shantha case, held that delay in disposal of the complaint would not be a ground for rejecting the complaint or directing the complainant to approach the Civil Court. and HELD:

"However, apart from the contemplated legislative action, it is expected that the Government would also take appropriate steps in providing proper infrastructure so that the Act is properly implemented and the legislative purpose of providing alternative, efficacious, speedy, inexpensive remedy to the consumers is not defeated or frustrated."

There is no complicated question of law involved, said Supreme Court observing that in the present case, the complainant's case is based upon the negligence of the Doctors in giving treatment to the deceased. Whether there was negligence or not on the part of the concerned Doctors would depend upon facts alleged to and in such a case matter cannot be said complicated.

Examination of expert opinion and cross-examination –"It is true that it is the discretion of the Commission to examine the experts if required in appropriate matter. It is equally true that in cases where it is deemed fit to examine experts, recording of evidence before a Commission may consume time. But this Act specifically empowers the Consumer Forums to follow the procedure which may not require more time or delay the proceedings. Only caution required is to follow the said procedure strictly. Under the Act, while trying a complaint, evidence could be taken on affidavits. It also empowers such Forums to issue notice to any Commission for examination of any witness. It is also to be stated that Rule 4 in Order XVIII of C.P.C. is substituted which inter alia provides that in every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence. It also provides that witnesses could be examined by the Court or the Commissioner appointed by it. As stated above, the Commission is also empowered to follow the said procedure. Hence, we do not think that there is any scope of delay in examination or cross-examination of the witnesses. The affidavits of the experts including the doctors can be taken as evidence. Thereafter, if cross-examination is sought for by the other side and the Commission finds it proper, it can easily evolve a procedure permitting the party who intends to cross-examine by putting certain questions in writing and those questions also could be replied by such experts including doctors on affidavits. In case where stakes are very high and still party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephone conference and at the initial stage this cost should be borne by the person who claims such video conference. Further, cross- examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time"

Regarding knowledge of medical field to the judges of the commission ,it was further clarified that Commission is also empowered to call for expert opinion, appoint expert local commissioner to assist the court, cross- examination can be taken by the Commissioner appointed by it at the working place of such experts at a fixed time" In case where stakes are very high and still party intends to cross-examine such doctors or experts, there can be video conferences or asking questions by arranging telephone conference and at the initial stage this cost should be borne by the person who claims such video conference.

Further, if this argument is entertained ,it will be impossible situation to run any court in the country because one judge of the court can be at the most know one subject. When civil courts can handle one and all type of cases effectively with help of experts, why cannot consumer courts do so with same powers and facilities?

Finally Court held in clear terms that consumer courts are very well competent to deal with medical issues like other matters

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Expert opinion not mandatory

(Supreme Court confirms)

There were continues efforts from healthcare agencies to somehow come out of the purview of Consumer Redressal quasi judicial system setup under Consumer Protection Act. In Dr J.J.Marchant case decided in the year 2002 by the Hon'ble Supreme court ,number of issues were again discussed referring to the first case of V. Shantha and also Jacob Mathew case and held that there is no such complicated question of law in medical cases which cannot be decided by consumer courts. It was a sudden jolt when in the year 2009, the same Supreme Court of two judges bench decided a medical case and relying upon argument extended by medical practitioners believed that it is gross injustice to the doctors if they are given notice without inviting medical expert opinion and prima facie case made by the expert panel.

This judgment was widely discussed among legal luminaries and found it not in consistent with the purpose of special law enacted for consumers. The issue had brought a flood of objections and appeals from the affected groups. But once the Supreme Court decided that no notice was to be given to doctors before expert opinion, it became binding for all lower courts. Now the same Apex court has reversed its stand by another pronouncement on 8th March 2010 in the matter of V Krishna Rao V/S Nikhil Super Specialty Hospital & others Civil Appeal No.2641_of 2010 (Arising out of SLP(C) No.15084/2009) GANGULY, J.
by holding that:

"Expert opinion is needed to be obtained only in appropriate cases of medical negligence and the matter may be left to the discretion of the consumer forums especially when the retired judges of Supreme Court and High courts are appointed to head the National Commission and State Commission"

Facts in the case in hands are;

Complainant is an officer in the Malaria department and he got his wife admitted in the Respondent No. 1 hospital on 20.07.02 as his wife was suffering from fever which was intermittent in nature and was complaining of chill. She was subjected to certain tests; test did

not show that she was suffering from malaria. She was treated for Typhoid. But when Widal test was conducted for Typhoid it was found negative.Even in such a situation the patient was treated for Typhoid and not for malaria. Complainant alleged that his wife was not responding to the medicine given. She was given Saline. Complainant had seen some particles in the saline bottle which was brought to the notice of the authorities but none cared to check it. She again complained of respiratory trouble, doctors gave artificial oxygen to the patient instead of checking the cause. The patient was finally shifted to Yashoda Hospital from the respondent No.1 where patient developed Brady cardia and died as the condition had deteriorated. The death certificate given by the Yashoda Hospital disclosed that the patient died due to "cardio respiratory arrest and malaria" A complaint filed by the husband alleging negligence on the part of hospital before the District Consumer Forum. District Forum relied on the evidence of Dr. Venkateswar Rao who was examined on behalf of the respondent No.1. Dr. Rao categorically deposed "I have not treated the case for malaria fever".Here objections were raised by the defending hospital that consumer is tried summarily and Evidence Act in terms has not been applied .But the court overruled this objection referring to the case of Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and others reported in (2009) 9 SCC 221 that provisions of Evidence Act are not applicable and the Fora under the Act are to follow principles of natural justice. Hence District Forum ordered that the complainant is entitled for refund of Rs.10, 000/- and compensation of Rs.2 lakhs and also entitled to costs of Rs.2, 000/-.

Matter came in appeal to the State Commission and Commission held that in the facts and circumstances of the case the complainant failed to establish any negligence on the part of the hospital authorities and the findings of the District Forum were overturned by the State Commission. In the order of the State Commission there is a casual reference to the effect that "there is also no expert opinion to state that the line of treatment adopted by the appellant/opposite party No.1 Hospital is wrong or is negligent".

State Forum has not held that complicated issues relating to medical treatment.

This appeal has been filed challenging the judgment and order dated 19.02.2009 of the National Consumer Disputes Redressal Commission, New Delhi which upheld the finding of the State Consumer Forum.

Supreme Court held-

1. “Expert opinion is needed to be obtained only in appropriate cases of medical negligence cases and the matter may be left to the discretion of the consumer forums especially when the retired judges of Supreme Court and High courts are appointed to head the national commission and state commission”
2. While saying so, the Apex court referred to the earlier decision of this court pronounced by the larger bench comprising three judges bench in the matter of Dr J.J. Marchant and others *v/s* Shrinath Chaturvedi 2002 CTJ 757SC[CP] and expressed its opinion that the general guidelines given in Martin D’souza case are contrary to the findings of the Supreme court’ larger bench. The court now notes:

   “The general directions given in Para 106 in D’Souza case to have an expert evidence in all medical cases is not consistent with the principle laid down by the larger bench accepted as position that only in appropriate case, expert opinion may be made and the matter is left to the discretion of consumer forums and commissions”
3. Not only this, the order has also been found contrary to the doctrine of ‘Res Ipsa Liquatur’ discussed in detail in the first landmark judgment pronounced by three judges bench in the matter of Indian medical association v/s V.P.Shantha & others 1995 CTJ 969SC{cp}Court in this case observed

   “If the general directions of Martin D’souza case are to be followed then the doctrine of Res Ipsa Liquatur which is applied in England and in Indian medical association *v/s* V.P.Shantha & others case would be redundant and shall be contrary to the three judges bench order wherein it was held that there may be cases which do not raise complicated questions and deficiency of service may be due to obvious faults which can be easily established such as removal of wrong limb, performance of operation on wrong patient, giving injection or drug to allergic patient without test, leaving swabs or other surgical items in the body during operation ”
4. The popular judgment which discussed elaborately on criminal as well as civil remedy available to consumers in Jacob Mathew v/s State of Punjab &others 1995 CTJ 1085 SC{CP}was also discussed while coming to the conclusion in the present case in hand. It was felt that the reference made to Jacob case in Martin D’Souza judgment was conceptually not taken in the proper spirit and opinion was not understood correctly. The

direction in Jacob case for consulting the opinion of another doctor before proceeding with criminal case investigation was confined only to criminal complaints and not to other cases. The larger bench did not equate the two in view of the jurisprudential and conceptual difference between cases of negligence in criminal and civil matters

5. In the case of Malay Kumar Ganguly v/s Dr Sukumar Mukherjee and others 2009 CTJ 1064 SC[CP],it was further held that expert opinion is a document in advisory nature and not conclusive . Courts have to adjudicate the matter based on many other factors and circumstances

In view of all observations above, the apex court in the present case disagreed with the general directions given by this court in Martin D'Souza case which had created much confusion and now by reversing the same holds, that there cannot be a mechanical or straight jacket approach that each and every case of alleged medical negligence must be referred to expert opinion. The parameters set and drawn in Bolam test are once again called for. The court emphasized that

"Before forming an opinion that expert evidence is necessary, the fora under the act must come to a conclusion that the case is complicated enough to require the opinion of an expert or the facts of the case are such that it cannot be resolved by the members of fora without the association of expert opinion. If decision is taken to obtain expert opinion in all cases and medical negligence is proved on the basis of expert evidence, the efficacy of remedy provided under this act would be illusory"

There still remains one doubt in the minds of many as to whether the Supreme court can go back on its previous decisions whereas there is nothing in the constitution of India which prevents Supreme court from departing from a previous decision, if court is convinced that such contradictory order are adversely affecting the general public, the error can always be rectified.

Insurance company when refuses to indemnify Negligent Doctor (Care Law)

Yet another dimension in medical negligence cases. Honorable National Commission gives no relief to erring doctor even when insurance company refused to indemnify the compensation who was found negligent while treating a patient and was slapped with an amount of Rs 2, 67,750 as compensation by a Consumer forum in west Bengal.

A complaint was filed by one Mr. Narayan Chandra Saha before a consumer forum in west Bengal against a doctor for negligence and succeeded in it. He filed an execution petition and after receiving the notice, doctor sent it to the insurance company for making the payment to the complainant as he had taken professional indemnity policy from New India Insurance Co. Insurance company refuses to pay the same as they were not informed by the doctor about the case filed against him, neither they were made party in the case.

Doctor after refusal by the insurance company comes before the consumer forum alleging deficiency in services on the part of insurance company .Consumer forum allowed the complaint. An appeal filed by the Insurance company against the order of consumer forum and State commission reverted the order of consumer forum favoring insurance company. Doctor now filed revision petition before the National commission

National commission in this matter of Tarunjit Roy(Dr) versus New India Insurance Company went into detail of the case,checked thoroughly the points discussed by the State commission also. National commission is of the view that the clauses referred as terms & conditions specified in the insurance agreement are of vital importance for dealing with the question as to whether insurance company is deficient in services by repudiating the claim of the doctor when the Doctor has taken professional indemnity policy and has paid the premium .Clause 8.1 to 8.3 of the policy require following acts to be done by the insured doctor;

> “The insured shall give written notice to the company as soon as reasonably practicable of any claims made against the insured and give all such additional information as the company may require. Every claim, writ, summons or process and all documents related

to the events shall be forwarded to the company. Further, company will have right but in no case obligation to participate in the proceedings .Company shall not have any obligation to make payment if insured settles the claim on his own."

In the present case, insured doctor sent the communication on 17.1.2008 in writing only after the award has been passed against him. No claim ,summons or notice was sent to the company neither it was a party to the proceedings which is a clear violation of the terms .By doing so, insured have deprived the company of his right to watch the proceedings in CF case no 39/99 or to know the manner case has been defended by the doctor. Not only this, insured doctor did not contest the case and order was ex-party against him .Further he did not file any appeal against the order passed by the forum .It was other OP in the same matter who filed an appeal no 233/A/2005 before the state commission and succeeded. After an appeal is filed no information about the award was given to the company. Further, when execution was filed by the complainant Narayan Chandra, Saha for realizing the awarded amount, insurance company was still kept in dark .Under the above circumstances, insurance is in no way deficient in services if they repudiate the claim at this stage, held National Commission.

Before dealing with the latest law lay down on the subject by the National Commission and then confirmed by the Supreme Court, it will be relevant to look into the background of the situation which had created concern for the legal lobbies of the country. It was a death case of a young and talented boy of sixteen year old, who died in 1996 due to medical negligence of doctors which came before the National commission for adjudication. The boy was given spinal anesthesia for performing operation whereas such anesthesia is not allowed to the person of this age as per the medical literature available on the subject this wrong application resulted into death of the boy. But no negligence could be proved in this case in 1996 because Insurance companies jumped in to picture for defense of doctors with battery of eminent lawyers and raised number of preliminary objection and father of the boy was forced to compromise ultimately. This was a very unfortunate situation where Insurance companies being party in defense defended the genuine case of the complainant with full force without considering the pains of a father who lost his young son.

There was a case again where the similar situation was before consumer redressal agencies and the crucial question was whether Insurance companies be allowed or not to be party in defense with the doctors.

The case of Gurudatta Puri Hospital Lithotripsy Center v/s Nusrat [2002] travelled from District Forum to State commission of Madhya Pradesh wherein Doctors remained absent for defending their case and it was only insurance companies present before the forum to defend the negligence of Doctors as defending parties .The case was decided against Doctors. An appeal was filed by Doctors as well as by insurance companies before the State commission. One of the issues before the commission was whether the Insurance Companies should be made party in defense in Doctor's medical negligence cases. State Commission held;

"The proper and final adjudication of the dispute can be made without imp leading the insurance company as a party .Moreover, the act or rules do not provide for imp leading the insurance company as a party.The plea that in case the insurance company denies to indemnify to the insured doctor under the contract of indemnity, the consumer is further dragged to litigation is not acceptable"

Hence, it was made clear by The State Commission of Madhya Pradesh that the case can be dealt and decided without the help of insurance companies with the records available with the idea that if insurance companies are brought in the picture, the consequences will be adverse for the consumers causing more delay and harassment by two big giants. Doctors too may also take the things easy if their responsibility is shared by insurance companies.

Thereafter National Commission had an occasion to deal with the similar situation while disposing off two revision petitions from Punjab State commission on different footing though the motive was to safe guard the interest of the consumers only. In those two Revision petitions New India Assurance Company Ltd. V/S Hardip Singh and others Revision petitions No 2640 AND 2648 Of 2002 arising out of two separate judgments from Punjab State Consumer Dispute Redressal Commission, the view taken by the National Commission was that if insurance companies are barred from making party, they will have a good case to go in appeal on this very ground. Even if they do not go for appeal, there may be another case by Doctors against insurance company for their claim wherein consumer is a sufferer if dragged in their litigation or not paid in spite of winning the case against the Doctors. National Commission with the intention to help the consumers allowed insurance companies to be imp leaded as party in defense but at

the same time defined the role of both ,Doctors as well as Insurance companies and held that doctors are to defend their cases on merit on their own .Insurance companies will be an agency who will tell about the validity of insurance made and its other relevant espects.i.e admissibility, period of the policy made etc.Any other objections if company has in respect of the policy can also be decided here it self.Further National commission also expressed its disapproval the way insurance companies had shown their conduct

'It is an abuse of the process of the whole system and simply because Insurance company has means to challenge each and every order without regard to the circumstances of the case and its obligation to pay the amount under the policy .It was neither necessary nor proper for the insurance company to take up the cause of the doctors to save its own liability.'

Further,

'It is the duty of the insurance company to see that frivolous cases are not filed so as to clog the wheels of justice"

This view of National commission was further confirmed by Honorable Supreme Court and now, may it be known to consumers that insurance companies if made party to the case with defendants, it is no more a matter to worry for them as both have to play their own roles and interest of consumer shall be taken care by the consumer protection agencies i.e. Forums and Commissions for getting them justice.

Consumer fears to fight against doctors

(Case Law)

(Doctors are the influential persons of the society)

Here is the news of the day -The Maharashtra Association of Resident Doctors (MARD) called an indefinite strike on 20th May, demanding increased security in hospitals, after two doctors, including a woman doctor, were allegedly beaten up by a patient's relatives. Zaida Sanaullah Sheikh (45), a resident of Mumbra, died who was being treated for a gall bladder ailment. At the state-run JJ Hospital and doctors were alleged responsible for the same

The question here arises as to what way the consumer's gains with this type of action and taking law of the land in hands .Instead, they weaken their case before the court of law by giving opportunity to the wrong doers to temper the documents well before time. It's high time now to realize and understand that after such high voltage drama, it is the law which has to ultimately deal with the things and we need to know the law for every situation. When we make hue and cry over an incident that some hospital refused to admit a pregnant women, we need to understand first what the law says on the issue .we are in no way in mood to favour erring doctors but surely warn the consumer to deal seriously with their case.

The Apex Court had an occasion to go into this question in the case of *Dr. Laxman Balkrishan Joshi* v. *Dr. Trimbak Bapu Godbole and Anr.,* AIR 1969 SC 128. In this context, with reference to the duties of the doctors to the patient this Court, in appeal, observed as follows:

> "The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, *viz.,* a duty of care in deciding whether to undertake the case, a duty of care in deciding whether treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient."

Its ample clear from the above that doctor has to take care in deciding whether to undertake the case and that care involves the facts whether doctor or nursing home or hospital has proper infrastructure or expert doctor or proper arrangement for treatment of the particular ailment. In such situation admitting or refusing to admit the patient depends on the above factors, hence doctor not guilty if takes appropriate decision.

Why medical cases often fail before the court of law

Poor drafting, half hearted efforts put in preparing pleadings and deficient required documents.

Why medical cases often do not succeed before the court is a relevant question and the issue needs introspection. As per my experience as member on board in consumer court, out of total cases filed for medical negligence , many are actually not negligence cases but are :

- Result of lack of post operative care
- A notion that every treatment must bring a positive results otherwise doctors are the cause
- Consumers are allured by misguiding factors that a huge amount in compensation can be claimed through some settlement with doctors
- Poor drafting's, half hearted efforts put in preparing pleadings and deficient required documents.

It is true that engaging advocates is not essential for the consumers but it being a technical area, medical cases require good drafting. For giving full facts in chronological order, good drafting is the first requirement. Unfortunately in our country poor consumers are not in the position to shell out more money after they have lost their battle in fighting with the ailment .More so consumer think, consumer courts can take care of the things once they have filed the case and they miss active participation with full datas and documents before the court.

The other factor is the pre-conceived notion in the mind that once doctor has charged a huge amount and prescribed costly medicines, ailment must get cured irrespective of the fact that they approach the doctor when disease has crept deep into the body. Not only that ,there are many other factors like old age ,patient having high BP problem or

diabetes due to which certain medicines cannot be given which could otherwise be more effective. Medical practitioner is not an insurer and is not to be blamed every time something goes wrong in treating the patient as held by the Supreme Court in number of cases

Importance of expert opinion-

Its the medical man who can spell out what went wrong while treating the patient, hence expert opinion is an important document .If sequence of facts, medicines prescription and history sheet, discharge summery etc are not available by any reason, no opinion can be made out of half papers and this is also found a big drawback for failure of the case. Regarding reluctance of doctors to give opinion against doctor, I do not agree fully. It is not the patient who is always asked to bring expert opinion; it is the redressal agency also who send papers for expert opinion from Govt Hospitals and even from medical associations. At times, medical association have also given opinion unfavorable to their fellow doctors and terminated their license for several weeks or months. This practice is being followed by the redressal agencies and even where consumer and opposite parties both have arranged expert opinion, court on its own has asked for third opinion from reliable sources. So, it is the consumer to become more active and help the court by providing relevant papers

Medical Litrature

Similar is the situation in medical literature matter .There are articles referred from various medical journals before the redressal agencies in order to support their act by the doctors. Some of them are just articles, views, may not be established and recognized practice under the accepted norms under the medical science. Consumer must understand that Consumer forums do scrutinize all the material placed on record and such material may not draw much weigtage in compare to established norms.

Not revealing important facts to the Doctor

This is also observed that sometimes patient hides certain material facts from the doctor which if known to the doctor ,he could have chosen another method of treatment There is a unique case relevant to be referred to understand the situation. The case was filed by a retired doctor from defense on behalf of his wife alleging the doctor for negligence while doing plaster

surgery on the breast of his wife which was said to be small in size in compare to the other breast .Patient wanted it to be made of equal size and it was just a cosmetic surgery .Surgery was performed by inserting/implanting artificial breast to the short size and both the breasts were made of equal size successfully. After some time complainant complained about pain and irritation which gradually became unbearable. After a lot of discussions, allegation and counter allegation the fact came on the surface that the lady had undergone cancer operation on the breast sometimes ago which made one breast smaller. As per the medical advice, for doing another surgery on the same place, dead tissues are to be revived first by applying suggested medicines and then surgery could be performed. In this case the padding which was stuffed in the breast was not the correct padding under the circumstances as the actual fact of cancer operation was not known to the treating doctor. This was a case fought to the tooth and nail by a person who himself was a doctor and had plenty of literature but failed.

Insurance companies in protection of doctors;

The case Gurudatta Puri Hospital lithotripsy center vs Nusrat [2002] travelled from District Forum in Madhya Pradesh wherein Doctors remained absent for defending their case and it was only insurance companies present before the forum to defend the negligence of Doctors as defending parties .The case was decided against Doctors. An appeal was filed by Doctors as well as by insurance companies. before State commission One of the issues before the commission was whether the Insurance Companies should be made party in defense in Doctors medical negligence cases State Commission held ;

*The case can be dealt and decided without the help of insurance companies with the records available with the idea that if insurance companies are brought in the picture the consequences will be adverse for the consumers causing more delay and harassment by two big giants Doctors too may also take the things easy if their responsibility is shared by insurance companies *

National Commission dealt with the similar case while disposing off two revision petitions from Punjab State commission on different footing though the motive was to safe guard the interest of the consumers only In those two Revision petitions New India Assurance Company Ltd. V/S Hardeep Singh and others Revision petitions No 2640 AND 2648 OF 2002arising out of two separate judgments from Punjab state consumer dispute redressal commission ,the view taken by National Commission was that if insurance companies are barred from making party, they will

have a good case to go in appeal on this very ground Even if they do not go for appeal, there may be another case by Doctors against insurance company for their claim wherein consumer is a sufferer if dragged in their litigation or not paid in spite of winning the case. Against the Doctors. National Commission with the intention to help the consumers allowed insurance companies to be imp leaded as party in defense but at the same time defined the role of both ,Doctors as well as Insurance companies and held that doctors are to defend their cases on merit on their own .Insurance companies will be an agency who will tell about the validity of insurance made and its other relevant espects.i.e admissibility, period of the policy made etc.Any other objections if company has in respect of the policy can also be decided here itself.

This view of National commission was further confirmed by Honorable Supreme Court and now, may it be known to consumers that insurance companies if made party to the case with defendants, it is no more a matter to worry for them as both have to play their own roles and interest of consumer shall be taken care by the consumer protection agencies i.e. Forums and Commission for getting them justice.

Insurance company when refuses to indemnify negligent doctor

Honorable National Commission gives no relief to erring doctor who was found negligent while treating a patient and insurance company refused to indemnify the doctor who did not bother to inform the insurance company about the negligence case filed against him.

A complaint was filed by one Mr. Narayan Chandra Saha before a consumer forum in west Bengal against a doctor for negligence and succeeded in it; doctor was slapped with an amount of Rs 2, 67,750 as compensation by a Consumer forum in west Bengal... He filed an execution petition and after receiving the notice, doctor sent it to the insurance company for making the payment to the complainant as he had taken professional indemnity policy from New India Insurance Co. Insurance company refuses to pay the same as they were not informed by the doctor about the case filed against him, neither they were made party in the case.

Doctor after refusal by the insurance company comes before the consumer forum alleging deficiency in services on the part of insurance company .Consumer forum allowed the complaint. An appeal filed by the Insurance company against the order of consumer forum and State commission reverted the order of consumer forum favoring insurance company. Doctor now filed revision petition before the National commission

National commission in this matter of Tarunjit Roy(Dr) versus New India Insurance Company went into detail of the case,checked thoroughly the points discussed by the State commission also. National commission is of the view that the clauses referred as terms & conditions specified in the insurance agreement are of vital importance for dealing with the question as to whether insurance company is deficient in services by repudiating the claim of the doctor when the Doctor has taken professional indemnity policy and has paid the premium .Clause 8.1 to 8.3 of the policy require following acts to be done by the insured doctor;

"The insured shall give written notice to the company as soon as reasonably practicable of any claims made against the insured and give all such additional information as the company may require. Every claim, writ, summons or process and all documents related to the events shall be forwarded to the company. Further, company will have right but in no case obligation to participate in the proceedings .Company shall not have any obligation to make payment if insured settles the claim on his own."

In the present case, insured doctor sent the communication on 17.1.2008 in writing only after the award has been passed against him. No claim, summons or notice was sent to the company neither it was a party to the proceedings which is a clear violation of the terms .By doing so, insured have deprived the company of his right to watch the proceedings in CF case no 39/99 or to know the manner case has been defended by the doctor. Not only this, insured doctor did not file any appeal against the order passed by the forum .It was other OP in the same matter who filed an appeal no 233/A/2005 before the state commission and succeeded. After an appeal is filed no information about the award was given to the company. Further, when execution was filed by the complainant Narayan Chandra, Saha for realizing the awarded amount, insurance company was still kept in dark .Under the above circumstances, insurance is in no way deficient in services if they repudiate the claim at this stage.

Before dealing with the latest law lay down on the subject by the National Commission and then confirmed by the Supreme Court, it will be relevant to look into the background of the situation which had created concern for the legal lobbies of the country. It was a death case of a young and talented boy of sixteen year old, who died in 1996 due to medical negligence of doctors which came before the National commission for adjudication. The boy was given spinal anesthesia for performing operation whereas such anesthesia is not allowed to the person of this age as per the medical literature available on the subject this wrong

application resulted into death of the boy. But no negligence could be proved in this case in 1996 because Insurance companies jumped in to picture for defense of doctors with battery of eminent lawyers and raised number of preliminary objection and father of the boy was forced to compromise ultimately. This was a very unfortunate situation where Insurance companies being party in defense defended the genuine case of the complainant with full force without considering the pains of a father who lost his young son.

It was in this background that the case Gurudatta Puri Hospital lithotripsy center vs Nusrat [2002] was dealt by the Supreme Court with utmost care and insurance companies are allowed to do their duty to the limited extend and consumers must know the law on the issue. and now, may it be known to consumers that insurance companies if made party to the case with defendants, it is no more a matter to worry for them as both have to play their own roles and interest of consumer shall be taken care by the consumer protection agencies i.e. Forums and Commissions for getting them justice.

We now hereby clarify a few things for consumers to understand and Consumers are not to fear any more –

- Regarding reluctance of doctors to give opinion against doctor is not the patient who is always asked to bring expert opinion. It is the redressal agency also who send papers for expert opinion from Govt. Hospitals and even from medical associations.
- If complete documents are not available with consumer, he may request the consumer forum to direct the doctoers or hospital to produce the relevant documents and disclose the name of treating doctor for making him party if not known to the consumer.
- Medical literature if produced before the court must be of established norms under the medical science and not mare views of any doctor.
- Patient must disclose every fact about the ailment in order to get right method of treatment.
- insurance companies if made party to the case with defendants, it is no more a matter to worry for them as both have to play their own roles and interest of consumer shall be taken care by the consumer protection agencies i.e. Forums and Commission for getting them justice.

- Getting panic and taking law of the land in hands weaken the case of consumer before the court of law by giving opportunity to the wrong doers to temper the documents well before time

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Law soon to ensure doctors prescribe cheaper generic drugs

(Professionals deviating from ethical values)

Law soon to ensure doctors prescribe cheaper generic drugs ensures Prime Minister.

We have no question as to how it will happen because if there is a will to do something, no one can stop it and it should finally be done now.

But at the same time we cannot limit our question to doctors. Professionals in all fields are deviating from their ethical values and courts on number of occasions pin pointed this issue. We believe, much more is required to be done by the parliament to make law and rules when we find orders by the courts could be binding only on particular case and others enjoy liberty to continue the same tune

The tie-up of Pharmacies and Doctors

A large quantum of income to the hospitals usually comes from in patients who are sold medicines at MRP at a very high profit margin whereas the same medicines are available at 100-400% less outside. But indoor patients are not allowed to get drugs or consumables from outside.

A study of medical trade practices in Mumbai sponsored by World Health Organization reveals the unethical and illegal trade practices of doctors and drug companies. Pharmaceutical companies sponsor Continuous Medical Education [CME] camps, where they develop personal bonds with the doctors, which they further strengthen with sponsored cocktail parties and then overseas trips. The net result of such favour ultimately burdens the patients admitted in the hospitals who are prescribed drugs from specific companies that may be much costlier than other brands available outside.

Observing these malpractices by the doctors, Insurance companies also short listed some of the hospitals from their panel and objected to their prescribing a number of laboratory tests, and recommending costly treatments and operations which insurance companies thought could be avoided. Subsequently insurance companies stopped cashless facilities in some of these private hospitals. But there was sharp retaliation to such move, and courts through various judgments warned the insurance companies not to step into the shoe of doctors. In number of

cases Hon'ble supreme court has held that it is doctor to decide what medicine should be given to the patient and not the insurance company .It was a context when insurance company rejected the claim on the ground that such expensive tests were not required in particular circumstances .Insurance company was not justified as far as claim of consumer was concerned As a matter of fact Apex court Supreme Court intended to safeguard the interest of consumers when insurance companies were rejecting their claims on the above plea but subsequently Doctors were set free from their responsibility to be honest to their profession.

Number of cases came up again before the Apex court by professionals from all the fields and the Hon'ble Supreme court while deciding the matter against medical professionals in a criminal case of Jacob Mathew v State of Punjab 2005 CTJ 1085 SC, held that

"In law of negligence, professionals, such as lawyers, doctors, architects and others are included in the category of persons professing some special skill and professional may be held liable for negligence."

But the efforts continued and advocates also came ahead for saving their skin from their clients whom they sometimes ditch in the midway of their case causing him great loss. Similar argument was extended this time also that they have their own body named bar council which can take care of the moral and ethical values which need to be preserved by the advocates.

While National Commission had held in the matter of D.K.Gandhi V M.Mathias 2007 CTJ 909 (CP) NCDRC that services rendered by an advocate to his client in the course of litigation is to be covered under the provisions of Consumer Protection Act, bench comprising Justice L.S Panta and Justce B Sudershan reddy stayed the ruling of Apex consumer commission holding that lawyers rendered legal assistance and not service to the client. In spite of a good reasoned order pronounced by National Commission after detailed discussion in the case of D K Gandhi v M Mathias on the issue, large number of advocate bodies ,bar of Indian lawers,Delhi High Court bar association and Bar Council of India approached the Hon'ble SC and got the order stayed .

Every profession is a noble profession if this could be the argument. Honorable Supreme Court had always been of the opinion that every professional should adhere to the ethical values of their profession. The Supreme Court again in another matter dealt by Justice Sathasivam in the matter of O.P. Sharma v. High Court of Punjab & Haryana, had the occasion to examine the rules regarding Professional Conduct of advocates. The case in hand dealt with the contemptuous

conduct of advocates before a magistrate, which resulted in suo moto initiation of contempt proceedings by the Punjab & Haryana High Court. The matter eventually reached the Supreme Court where the court has brought an end to the proceedings by accepting the unconditional apologies on behalf of the advocates. However, in doing so, the Supreme Court has spelled out the principles regarding duties and conduct of advocates.

A pleasant development is observed in other fields of professionals also. In the profession of teaching, too much money minting practices and commercialization has crept in during the last two decades. Educational bodies have also taken a note of it and UGC has issued certain guidelines for the educational institutes .A public notice was issued by UGC on 23.4.2007 with the following instructions-

"The commission is of the view that it would not be permissible for the institutions /universities, to retain the school leaving certificate, mark sheets, caste certificate and other documents in original."

It has been further directed that

"The entire fee collected from the student after a deduction of processing fee not more than Rs. 1000/- shall be refunded to the student /candidate withdrawing from the programme."

The similar notification has been issued by AICTE [All India council of technical education] on 19.4.2007 with the similar directions to the institutes/universities imparting technical education

in order to preserve ethical values in their profession, Insurance Regulatory and Development Authority had also issued a circular dot 20.9.2011 vide their reference no – IRDA/HLTH/MISC/CIR/216/09/2011 wherein certain guidelines have been issued for condoning the delay in claim intimation /documents submission with respect to all life insurance contracts and all non-life individual and group insurance contracts while settling the claims of the insurers. It is particularly pin-pointed that- "the current contractual obligation of the insured to intimate the company or submit the papers within specific time is for the purpose of investigation, loss assessment etc but this condition should not prevent genuine claims when delay is due to unavoidable circumstances". It further states that- "insurer's decision to reject the claim shall be based on sound logic and valid grounds, be noted such limitation clause does not work in isolation and is not absolute." At the end INSURERS are advised "to incorporate

additional wordings in the policy documents, suitably enunciating insurer's stand to condone delay on merits for delayed claims when delay is proved to be for reasons beyond the control."

The recent move of the Govt. to make law for Doctors is good news for the consumers and for building a nation with high morals and professional ethics. But we now expect much more to be done in other professional fields also.

Medical opinion V/S Legal opinion in Mediclaim cases

During the last five six years, it has been observed that almost each and every mediclaim has been turned down on one or the other pretext by the insurance companies except a few in which claimant manages to get the claim by providing warmth to the dealing man The claim is invariably rejected on the plea of pre-existing disease and for concealment of fact at the time of filling up the prescribed form. This has also been seen by the consumer forums that the questionnaires of the said form are framed in such a manner that there cannot be any straight answer is yes or no whereas the instructions are to reply in yes or no only. At times such forms are filled up by the agents of the insurance company who aims at bringing more and more cases/clients and they assure the insured to relax for everything and thousands of people are made to believe that they are totally secured once they have opted for medic aim policy. In this process, whatever information has been given by the insurer, at the time of settling the claim is said to be untrue by the insurance company and claim is rejected for giving wrong statement and concealment of material fact the claim made against whatever disease is said to be pre-existing at the time of giving information through form filled. If there is cough and cold at any point of time ,it is considered lungs problem pre-existing judging it by the symptoms for the said disease Uneasiness in breathing for any simple reason becomes heart ailment.If hospital writes in discharge summery patient having any problem for the last one or two years, any simple pain is co-related with some major disease without having any records of tests and diagnosis etc Generally patient at the time of admission is asked several questions about his health which he replies in casual manner and that statement is recorded in the discharge summery by the hospital .This is actually the statement of the patient and not the findings of the hospital on the bases of tests .The real findings are the diagnosis made by the doctors and medicines prescribed. Insurance companies made use of such statements in their favour to reject the genuine claims Apex court took a note of this and found consumers deprived of their claims, hence held in its judgment-“such summery from the hospital cannot be treated as cogent proof for declaring the disease pre –existing unless proved by medical tests or medicines taken in past for the said

disease having knowledge of the same “Supreme court in the matter between Asha Rani Goyal Vs National Insurance Company in 2002 categorically denied to admit such statement taken from the patient at the time of admission as an authentic evidence to the fact of pre-existing disease

However insurance companies do take medical opinion by the doctors on their panel in order to know whether any claim case can be treated as case of pre existing disease or not and doctors on panel on the bases of their experience in the field and looking into the case history, medicines prescribed and also some investigation from the reliable sources give their opinion. Recently it has been noticed by the consumer forums that doctors on panel with the insurance companies are going beyond their area of expertise and are giving legal opinion instead of medical opinion

In one such case in the matter of Dr Satya Paul Vs National Insurance Co. Ltd, claim of the complainant was rejected on the plea of pre-existing disease attracting provisions of clause 4.3 of the terms of insurance. While going through the terms and conditions of mediclaim policy, it was the opinion of the consumer forum that clause 4.3 is applicable in the cases where disease is pre-existing. Insurance company in the present case all the time referred to this clause stating that treatment was taken in the first year of the policy but never mentioned as to how it was pre-existing .Consumer Forum pinpointed the opinion of doctors on panel of insurance company which court found just not medical opinion.Dr`s report states as hereunder –

“ Diagnosis immature senile cataract, left-right. Mrs Sharma in this case has undergone cataract surgery within first year of the policy, such treatment is specifically excluded vide exclusion clause 4.3 of the policy Hence this claim is not admissible as per the terms of the policy’

Further another Dr x has also given medical opinion as under –

“This case in which patient was admitted in the hospital with IMSC for phacoemulification was justified for hospitalization But since policy of the claimant is in the first year, so according to the terms and conditions of medi-claim policy, this comes under exclusion clause, so case should be closed as no claim.All other papers in the file are in order and are of diagnosed disease.”

Both the doctors have nowhere said that this disease was pre-existing They have not mentioned about any previous history or any report from any doctor ,from any

hospital or referred to any medicines taken by the patient for the said disease before undergoing for the operation of the diagnosed disease. Without establishing the disease pre-existing, this clause is not applicable at all.Apart from this ,it is noted by the consumer forum that the doctors on panel are instead of giving medical opinion,are giving legal interpretation to the clauses which is actually to be done by the department concerned.This is the quasi-judiciary function to be done by either the legal department or personnel and administrative department and doctors on panel are in no way authorized to touch this area.It is the company to see whether the claim is tenable or not while interpreting the rules.Here it is seen that doctors are making legal opinions and interpreting the terms and taking the decisions also which doctors on panel are not supposed to do.Doctors are to give their professional/medical opinion about the disease,about the diagnosis,about the medicines taken, about the history of the ailment on the bases of their experience in the medical line Both the doctors have done nothing on their part and virtually decided the claim not tenable though they are no authority to do so. It was the observation of the forum that the words are put into their mouth and they have tried to authenticate the decision by a professional opinion.

A suggestion has been made for the doctors on panel by the Consumer forum to limit their opinion to their role and maintain the grace of the noble profession of doctors

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Medical negligence not limited to treatment only

Supreme Court in its judgment DT. 22.04.2014 in the matter of Ashish Kumar Majumdar v/s Aishi Ram Batra Charitable Hospital Trust & others 11(2014) CPJ 5(SC) explained the theory of Res Ipsa Loquitur and held that duty of the hospital is not limited to diagnosis and treatment but extends to looking after the safety and security of the patient, particularly those who are sick and under medication. In the present case patient was admitted to OP hospital who was suffering from high fever, had gone out of stroll in the middle of night being unable to sleep. He was found lying on the ground and sustained injuries...He had jumped out of the window of his room despite the presence his sister leading to the injuries suffered. Hospital was held liable for not maintaining the necessary vigil in the hospital premises to ensure safety of the patients.

New dimension in the field of Services

under

Consumer Protection Act

(Complaint against Life Cell India, an agency /stem cell bank.)

Facts of the case: Complainant hired services from LIFE CELL INDIA for preserving Umbilical Cord of new born baby for 20 years.

Agreement between the parties executed and payment of total amount of Rs 50,000/-agreed to be paid by the complainant .Ten percent (10%) of the total amount paid at the time of contract .Rest of the amount was agreed to be paid in one year in installments. Complainant had paid more than 10,000/-by now and EMI is being deducted from the bank regularly .Complainant now receives the letter from the agency alleging installments not paid. Agency informs to the complainant that service contract shall be terminated due to nonpayment of installments.

A request made by NCH (National Consumer Helpline) to the agency for not terminating the contract and for updating their record about the payment to them by the complainant.

Mass deaths due to shortage of oxygen –can govt. Hospital be held responsible

Govt. hospital/medical College in Gorakhpur remained in prime news during last month for mass deaths in the hospital due to non supply of oxygen.

Factual position and actual cause of death is a matter of investigation and without going into the details of the real story behind it, our concern is about the legal remedy available to the general public at large and law point so far established by the apex court under various situations.

Issue before us for discussion is –

1. What is the responsibility of hospital towards its patients
2. How Govt. hospital is different from private nursing homes if question of responsibility is to be settled
3. What is the role and responsibility of the doctor towards his/her patients while giving treatment?

On the first issue law is very clear that all infrastructures is to be provided by the hospital to the patient which includes medicines, doctors, nurses, beds, oxygen and all other surgical as well as clinical equipments, adequate serving staff. This subject was discussed in details in landmark judgment by the apex in the matter of Harjot Ahluwalia V Spring meadows 1998 Sc and was held-

'It is a case of non- availability of oxygen cylinder either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, the hospital may be liable in civil law but the accused appellant cannot be proceeded against under Section 304A IPC on the parameters of Bolam's test'

It further states-'cases where nurse is not trained ,case left to junior doctors without explaining case history, wrong medicine or wrong injection given causing damage to the patient ,doctors/hospital/nursing home negligent for medical treatment

On the basis of above opinion of the apex court, hospital can be held responsible under civil law/consumer law but cannot be preceded with criminal negligence. We must add here that govt. can always take action against its erring employees of Govt. hospital as permissible under rules and law.

Can govt. hospital get rid of the responsibility in case patient files case for compensation before the consumer forum/consumer commission? Here comes a clause in operation which requires payment of fee necessary for filing before consumer courts

For Fee/consideration there are three categories defined in the first landmark judgment V.Shantha V Indian Medical Association SC 1995 by the apex court on medical negligence-:

- GOVT. HOSPITALS;
  - Govt. Hospital liable if contribution from the employee's salary deducted and this is considered as fee
  - When hospital has added private rooms and private facilities and charging from some people for those facilities, in that case patient becomes consumer even if he has not paid fee.
  - Payment by insurance company amounts to payment made by the consumers.
  - All cashless facility cases wherein insurance makes payment come under Consumer Protection Act
- PRIVATE NURSING HOMES

  All Private nursing homes are answerable before consumer courts.
- CHARITABLE HOSPITALS

Charitable Hospitals are maintained by some rich persons and hence is paid by them in charity if not by consumer directly. In other words hospital is paid by someone other than consumer.These hospitals are answerable before consumer courts

DOCTORS WHEN Negligent **[**V.Shantha V Indian Medical Association SC 1995]

!) **When there is** Damage to organ due to negligence.

!!) Wrong treatment due to wrong diagnosis.

!!!) Money receipt or prescription or discharge summery or test reports when not provided.

!V) When treatment not chosen as per accepted and established norms in medical science/ medical research/available medical literature.

Three steps necessary to be observed by the medical practitioners [Achuterao Haribhau Khodwa V State of Maharashtra SC 1996]

- To decide whether he has to take up the case or not.

- If taken up the case, he is to decide what treatment is to be given.
- Whether the treatment given as per the diagnosis made.

WHEN DOCTOR NOT NEGLIGENT

- Doctors are not negligent if out of five methods established in the medical science, doctors adopt one method for treatment which does not bring expected results or treatment does not prove to be very effective
- Doctor not guarantor
- It is expected from a doctor to have a reasonable skill and knowledge and reasonable degree of care
- Doctor is not negligent unless he has done something which he ought not to have done OR has not done something which he should have done.