

Medical Services and COPRA

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ABSTRACT

The Consumer Protection Act was enacted to enable the consumers to fight against the malpractices which were rose with the rise of consumerism. The act got successful in dealing with these problems but as anything can't be perfect at the first instance, the COPRA wasn't an exception. Though the Act was comprehensive enough to deal with almost all the problems, the Act found some specific lacunas in dealing with the medico-legal cases. The very first problem was related to the aspect that whether the Act was competent enough to deal with the medical cases. In recent times, there has been escalating pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever-increasing complexity of therapeutic and diagnostic methods and all this together are responsible for the medical negligence. Hence this paper deals with the aspect of whether The Medical Services should come under the ambit of COPRA or not.

Keywords:

Introduction

The Consumer Protection Act was enacted to enable the consumers to fight against the malpractices which were rose with the rise of consumerism. The act got successful in dealing with these problems but as anything can't be perfect at the first instance, the COPRA wasn't an exception. Though the Act was comprehensive enough to deal with almost all the problems, the Act found some specific lacunas in dealing with the medico-legal cases. The very first problem was related to the aspect that whether the Act was competent enough to deal with the medical cases.

The consumer of the health care industry can't be excluded from the Act for it is not only doctors who are involved in the health care delivery but also the medical equipment companies, the pharmaceutical industry and other ancillary industries who are involved. If the patient is not considered as a consumer then the other sectors involved in health care can also elope the provisions of COPRA.⁶⁵

Defining Medical Negligence

According to present legal position, a medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through a judgment error in choosing one reasonable course of treatment in preference to another.⁶⁶ He would be liable only where his conduct falls below that of the standards of a reasonably competent practitioner in his field. For instance, the surgeon is liable, if he leaves surgical gauze inside the patient after an operation.

The definition of medical negligence hasn't changed over decades. "Failure to exercise reasonable skill as per the general norms and prevalent situation is known as medical negligence. The doctor-patient relationship cannot be termed as personal service. The doctor-patient relationship is a contract for service. A patient seeks a doctor's service for professional reasons.

However, in the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional's control.

Need for including medical negligence in COPRA

In recent times, there has been escalating pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever-increasing complexity of therapeutic and diagnostic methods and all this together are responsible for the medical negligence. The Supreme Court has also highlighted the

⁶⁵ ArunBal, *Consumer Protection Act and Medical Profession*, Economic and Political Weekly, Vol. 28, No. w .11

(Mar. 13, 1993).

⁶⁶ *Jacob Mathew vs State of Punjab &Anr on 5 August, 2005.*

need of inclusion of medical negligence in the context of the Act. The Apex court held that we are dealing with a problem which revolves around the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organizations who in the garb of doing service to the mankind have continued commercial activities and have been mercilessly extracting money from helpless patients and their family members and yet do not provide the essential services. It is a great mistake to think that doctors and hospitals are docile targets for the unsatisfied patient. It is indeed very tough to raise an action of negligence. Not only there are practical hardships in linking the injury sustained with the medical treatment but also it is still more difficult to establish the level of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country.

Relationship of the concept with Patient as Consumer and Medical Profession as Service Provider

Is the Relation between Medical Practitioner and patient - a contract for service?

In this case, it was urgently required that the relationship between the GP and the patient be credible and therefore the nature of the personal delivery contract and the service provided by the physician to the patient is not a service under Section 2 (1) (O) of the Act. This claim ignores the well-recognized distinction between the contract of employment and the contract of delivery. A service contract means a contract where one party undertakes to provide services, such as professional or technical services for another or another, whose performance is not subject to detailed management or control, but performs professional or technical skills and uses its own knowledge and discretion. A service contract means the relationship between a master and a servant and includes the duty to obey orders in the work to be performed and in terms of its mode and performance. The Court does not dispute that the Parliamentary Proposers were aware of this well-recognized distinction between the service contract and the contract of service and deliberately chose the term contract of employment instead of the express delivery contract in the exclusion part of the definition of service in Section 2(1)(O). This is because the employer cannot be considered as a consumer in accordance with the employment contract.

By affixing the adjective *personal* to the word *service* the nature of the contracts which are excluded is not altered. The said adjective only emphasizes that what is sought to be excluded is personal service only. The expression *contract of personal service* in the exclusionary part of Section 2(1)(o) must therefore be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit the expression *service*.

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 practitioners can be regarded as services of personal nature. But since there is no relationship of master and servant between the doctor and the patient the contract between medical practitioner and patient cannot be treated as contract of personal service but it is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of – ‘service’ contained in **Section 2(1) (o)** of the Act Private Doctors services are also covered under the Act.

Enforcement Machinery

Medical profession is highly respected in the society in the society. Doctors in private practice or in hospital services try their best to treat patients with due care and diligence. Even then there are many medical negligence claims which come before consumer Courts and also before criminal and civil Courts. Now it has been covered under the Consumer Protection Act 1986.

Enforcement Mechanism under Indian Consumer Protection Act

The Consumer Protection Act, 1986 in India has opened a new quasi-judicial, cheap and convenient system of redress for the consumer of goods and services. The Act in section 2(1) (d) define who is consumer and in section 2 (1) (o) define what is service. The definition of service is not an exhaustive one, so if health service is not specifically mentioned in the provision it has been interpreted that the provision includes such services, inspite of existence of professional regulatory bodies.

The Supreme Court in **Indian Medical Association v. Shantha**⁶⁷ has been the first case in which the court has included health services in the definition of services under the Consumer Protection Act:

⁶⁷1995 (6) SCC 651.

1. Medical Services are treated as in ambit of “services” under Section 2(1) (o) of the Act.
 - It is not contract of personal service as there is absence of master servant relationship.
 - Contract of service in Section 2(1) (o) cannot be confined to contracts for employment of domestic servants only. The services rendered to employer are not covered under the Act.
2. Medical Services rendered by hospital/nursing home free of charge are not in the purview of Section 2(1) (o) of the Act.
3. Medical Services rendered by independent Doctor free of charge are under Section 2(1) (o) of the jurisdiction of the Act.
4. Medical Services rendered against payment of consideration are in the scope of the Act.
5. A medical service where payment of consideration is paid by third party is treated as in the ambit of the Act.
6. Hospital in which some person are charged and some are exempted from charging because of their inability of affording such services will be treated as consumer under of Section 2(1) (d) of the Act.

The Consumer Protection Act provides an inexpensive and speedy remedy for adjudication of such claims. No court fee is needed for any claim made before the consumer courts. Thus poor person who have been given deficient services by medical practitioners, hospitals or nursing homes can conveniently seek redress.

Conclusion

Doctors being persons of medical profession cannot be immune from duty of every citizen to help for justice. No one is above law and justice and it is duty of doctors to come before summoning authority and give their contribution without thinking it as wastage of time. Rather they should be model citizens before all. The very nature of the medical profession makes it vulnerable to civil and criminal suits. Many suits are filed to harass doctors, or are filed to evade the payment of bills. In the post V P Shantha era it is difficult for doctors to shun responsibility. It is also easier for people to force negligent doctors to Consumer Protection Forums.

It is important to punish guilty doctors. It is also important to protect doctors who act in good faith from harassment. The courts must strike a perfect balance. The Supreme Court once observed that the doctor's job is to protect life and the courts should assist in this cause as far as possible. It is also the duty of the courts to see that doctors are not harassed in the course of performance of such duty.

The Consumer Protection Act provides an inexpensive and speedy remedy for adjudication of such claims. No court fee is needed for any claim made before the consumer courts. Thus, poor person who have been given deficient services by medical practitioners, hospitals or nursing homes can conveniently seek redress. Hence after the consumer protection act has included the medical professional in its ambit it has proved to be double-edged sword for a doctor. Only proper and ethical judgment, precautions and proper documentation of all facts of the patient details, diagnostic tests and treatment given and informed consent from the patient or his guardian can save a doctor against any litigation. A doctor should give more importance to excellence in the treatment and patient care and not to the rapid globalisation and commercialisation which have engulfed our society today.