

Different Stokes CPA - Bane or Boon For Medical Profession

Background –

We have seen rise of legal jurisprudence in different spheres of our lives due to advent of market economics in various Nation – States of the world. Since 1960, various countries have been active in protecting consumes against the businesses in the market economies. (See Report of the Secretary, General of the United Nations Page 5 (27th May, 1983) .

In India it was in the year 1986 that the Consumer Protection Act came into force. The preamble to the Act states that it is an Act to provide for better protection of the interest of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer's disputes and the matters connected therewith. If one reads the definition of two important terms in the Consumer Protection Act, one finds that the term 'service' is defined as 'Service means service of any description which is made available to potential users but does not include the rendering of any service free a charge or under contract of personal service.' The word 'Consumer' is defined as "Consumer means any person who (1) buys any goods for a consideration and includes any user of such goods but does not include a person who obtains such goods for resale or for any commercial purpose, (2) Hires or avails of any services." The plain reading of the aforesaid terms, the intent of the legislature and the surrounding circumstances makes every one think that Consumer Protection act is essentially concerned with protection of the rights of consumers against businesses selling goods and / or services.

Gradually, however, the Forums and the Courts in this country have widened the scope of the Act, so also even the legislature recognized the need to widen the scope of the Act and therefore, made certain amendments in the year 1993. The Act is made applicable to certain extent to statutory function, educational activities, etc. A controversy, however, prevailed as to whether the Act is to be made applicable even to professions particularly to medical profession considering the distinguishing elements of professions with the businesses. The controversy about applicability of the Consumer Protection Act and the terms "Service" and "Consumer" to the profession and particularly to the medical profession had started after enactment of the Consumer Protection Act in the year 1986. There were contradictory judgements of different Forums and Courts in the Country. The legal fraternity and the public was, therefore, looking at the Supreme Court to resolve this controversy. The Supreme Court finally resolved this controversy in the Special Leave Petition between Indian Medical Association Vs. V.P. Shantha and others. The case is decided by a three

Bench of the Supreme Court consisting of Justice Kuldeep Singh, Justice Kuldeep Singh Justice S.C. Agarwal and Justice B.L. Hansaria. The judgement is unanimous one and is given by Justice S.C. Agarwal.

The Supreme Court Judgement :

After analyzing the judgements of the Forums in this country and the position in England and United States, the Supreme Court has now held in the aforesaid judgement that the term 'service' is defined in the Consumer Protection Act, 1986, should be made applicable to medical profession. Medical practitioner rendering service to patients by way of consultation, diagnosis and treatment both medical and surgical have been held to fall within the ambit of the term "service".

The Supreme Court has held that it is true that the relationship between medical practitioner and a patient carries within it certain degree of mutual confidence and trust and therefore, services rendered by the medical practitioner 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 the medical practitioner and his patient cannot be treated as contract of personal service but is a contract for service 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. As far as the aspect of rendering of service free of charge is concerned, the Supreme Court has held that wherever medical treatment is given free of charge to all the patients in a hospital, such consumer will not be able to file a complaint under the Consumer Protection Act as there is no consideration for rendering of such services. The payment of a token amount for registration purpose only, will not alter the position. The payment of taxed out of which such doctors / hospitals may be rendering the services also the Supreme Court says is too remote to make such doctors/ hospitals answerable to the Consumer Protection Act. However, doctors / hospitals who render free of charge services to some patients and service on payment to others are not exempted from Consumer Protection Act. Furthermore, it is held that when charges are borne by Insurance Company under medical policy or employer of a patient as part of condition of service, same can make such patient 'consumer' under the Consumer Protection Act though he himself is not required to pay anything. Such consumers are, therefore, entitled to file complaints under the Act or medical negligence.

Analysis of the Supreme Court Judgement :

This decision of the Supreme Court resulted in an uproar in the society particularly amongst the doctors. However, a careful and proper reading of the Supreme Court Judgement reveals that Supreme Court has really not come out with any new rule of law or any new rule imposing liability on the doctors. It is, therefore, necessary for us to understand the Supreme Court judgement in its proper perspective. From the following points, it will be clear that the Supreme Court has really not laid down any new rule of law while making the Consumer Protection Act applicable to the medical profession.

Laws can be divided into two sets: One set of laws are called substantive laws and the other procedural laws. Substantive laws lay down the rules of law and the principles on the basis of which rights and duties of the parties are determined. The Indian Contract Act, the Law of Torts, the Sale of Goods Act, The Indian Penal Code, etc. are substantive laws. The procedural laws on the other hand lay down a procedural which is to be adopted for enforcing the substantive laws in practice. The Civil Procedure Code, Criminal Procedural Code etc. are procedural laws. The Supreme Court has referred to this distinction between the laws and has pointed out that Consumer Protection Act is essentially only a procedural law. The Consumer Protection Act does not lay down any new rule of liability or create any new rights and duties amongst people. The foundation of the Act as far as its substantive portion is concerned, is very much in the Indian contract Act, the Sale of Goods Act and the Law of Torts. The Supreme Court, therefore, says that the Consumer Protection Act only provides a faster and cheaper procedural remedy as against the ordinary Civil Courts. It should, therefore, be clear that as far as substantive law relating to the medical negligence is concerned, the Supreme Court clearly holds that the Consumer Protection Act does not lay down any new principle of liability. It is ordinary law of negligence based on the Law of Torts and Contract which is to be made applicable for the purpose of determining medical negligence even under the Consumer Protection Act. There is, therefore, no reason for the medical fraternity to fear that something new has come out against them. What has come out against them is only a new procedure and a new remedy and not at all any new rule of law.

Another important aspect of the judgement is that there is no reason for the doctors to fear that they are discriminated quo other professions for applicability of the Consumer Protection Act. The Supreme Court has made it clear that the term 'service' is applicable to all the profession including medical profession. The Act is, therefore, applicable not only doctors but even to lawyers, chartered accountants etc. However, we cannot forget the differences between the other professions and the medical profession and

hence a proper assessment of the applicability of the Act to Medical profession is necessary.

The arguments of the Indian Medical Association and the doctors seems to be three fold:

- (a) Faster and cheaper remedy will result in false cases aimed at maligning the reputation of the doctors and / or extorting money.
- (b) The Consumer Forums are not proper for deciding the complicated medical issues.
- (c) The cost of the medical treatment will increase and doctors will be more about paper work than the patient.

As far as point No. (a) above is concerned, the Act itself provides for awarding of compensatory costs upto Rs. 10,000/- as a maximum limit in cases of frivolous or vexatious complaints. Though the ceiling of Rs. 10,000/- cannot be considered as sufficient for cases of medical negligence, the same can be raised through amendment. Again doctors can recover the entire costs incurred in such litigation. The Forums, however, in this country are not readily imposing such costs for frivolous or vexatious complaints because this may deter even genuine complainants to come to the Forum. This aspect of the matter needs to be clearly settled by the Supreme Court and the legislature. In my view the Indian Medical Association, other Bodies of Doctors and the Doctors should make efforts to get this aspect of the matter clearly settled meaning thereby that there should be proper guidelines for the Forum to impose costs and compensatory costs and the Forums should be empowered to award adequate amount depending on the facts and circumstances of the case and the maximum ceiling of Rs. 10,000/- may be deleted.

As regards point (b) that complicated medical issues cannot be decided in a faster mode, the Supreme Court has clearly held that sometimes complicated questions requiring recording of evidence of experts may arise but it would not be so in all complaints about deficiencies in rendering services by a medical practitioner. There may be simple cases relating to a cause which can be easily established such as removal of the wrong limb or performance of operation on a wrong patient or giving injection of a drug to which the patient is allergic without looking into out patient card containing the warning or use of wrong gas through the course of anaesthetic or leaving inside the patient's body swabs or other item or operating equipment after surgery. Such incidents are not uncommon.

This reminds me of the famous judgement delivered by the U.S. Supreme Court in Roe V/s. Wade wherein the U.S. Supreme Court had to decide whether women have right of abortion and at what point of time it starts if at all the women have this right. Justice Rhenquist who delivered this judgement went and stayed for some months in a very famous hospital at Rochester, New York, and studied medical science for the purpose of coming to the conclusion as to when exactly can it be said that there is a certainly viable life after conception. He came to the conclusion that life really beings after three months of the conclusion that life really begins after three months of conceiving and delivered his judgement on that basis. This case indicates that even most complicated, sensitive and delicate medical issues can be resolved with proper medical studies.

It may also be stated that the Consumer Forums are empowered with the powers of the civil Courts under the Code of Civil Procedure by which in complicated cases, evidence of experts can be led and assessed by the Forums. The Supreme Court, further says that in complaints involving complicated and time consuming issues, the complainant can be asked to approach the Civil Court. Consequently, this fear of doctors is also properly taken care of by the Supreme Court and the Consumer Protection Act.

As far as the aspect that the doctors are going to be extra careful and they will bother more about keeping proper records and sometimes call for even unnecessary tests, I feel the same is unavoidable. The market economies of the world and the society make such results unavoidable. This can result in high costs of medical treatment. The cost aspect can be taken care of through proper medical insurance of patient and malpractice insurance of doctors as is found in western countries. The insurance Companies in the West offer malpractice insurance to doctors which takes care of any liability that may be imposed on doctors due to any such litigation.

The Practical Side :

The practical side of the matter, however, is that an analytical study of ort litigation in India during the period of 1975 to 1985 made by Prof. Galanter shows that a total number of 416 tort cases were decided by the High Court and the Supreme Courts reported in AIR our of which 360 cases related to claims under the Motor Vehicle Act and cases relating to medical malpractice were only three in number. (See: Upendra Bakshi and Thooms Paul Mass disaster and multinational liability Bhopal case pp. 214-218). It is, therefore, clear that very few cases have really come up in this country in respect of medical negligence. The judgements of

the Forums also acknowledge the element of faith and confidence required to be put in doctors and the need to keep away from Doctors as far as possible.

RECENT AMENDMENTS :

The Consumer Protection Act has again was amended in the year 2002. The important relevant recent amendments are as under :-

1. Interim Orders can be passed during the pendency of the Complaint by the District Forum. This can include orders of the nature of seizure of the case papers in cases involving medical fraternity.
2. Jurisdiction of the District Form is now increases to Rs. 20/- Lacs, State Forum up to Rs. 1/- Crore and National Forum, Rs. 1/- Crore onwards.

SOME OTHER LANDMARK RULINGS

1. Dr. N.t. Subrahmanyam and another --- Appellants
Vs
Dr. B.Krishna Rao and another ---- Respondents

First Appeal No. 570 of 1993 – Decided on 21st June, 1996

Consume Protection Act, 1986 – sections 14 (1) (d) and 19 – negligence – medical – appeal – the principles regarding medical negligence are well settled . A doctor can be held guilty of medical negligence only when he falls short of the standard of reasonable medical care. A doctor cannot be found negligent merely because in a matter of opinion he made an error of judgement. It is also well settled that when there are genuinely two responsible schools of thought about management of a clinical situation the court could do no greater disservice to the community or the advancement of medical science than to place the hallmark of legality upon one form or treatment – various acts of deficiency of service and negligence are attributed to the Opposite Parties by the Complaints – held the Complainants have failed to prove that there was any negligence on the part of the Opposite Parties in the treatment of Smt. Rajalakshmi appeal dismissed with costs of Rs. 10,000.

2. MCI has new code o conduct for medicos

The Medical Council of India (MCI), in its revised guidelines for ethical conduct for doctors, has directed them not to conduct any sex-determination tests for aborting the female fetus . It has also asked doctors to clearly display the fees and other charges in their chambers.

These long – awaited revised guidelines cover various medical issues, which have come up since the last ethical code was issued in 1956. These include the following directions :

- Every physician will maintain a medical record of his patients for a period of three years from the date of commencement of treatment.
- Every physician, as far as possible will prescribe drugs using their generic names.
- Printing of one's own photograph, sketches and diagrams of human system on the letter head or the consulting room will be regarded as self advertisement and viewed as unethical conduct.
- Physicians will need to display their registration numbers in their consultation rooms, on letter heads and prescriptions.
- Clinical trials may be undertaken if they are initiated by the Indian Council of Medical Research, provided all ethical considerations are adhered to.
- Prescribing steroids or any other drug for inducing puberty in a child without of human rights and viewed as professional misconduct.
- Invitro fertilization or artificial insemination is not be done without taking informed consent.
- Medical practitioner will maintain a register of medical certificates issued by them.
- Treatment of patients by physicians with psychosomatic or communicable diseases or deteriorating vision is not to be allowed.

(Times of India, Pune Wednesday, 17th Oct, 2001)

3. It has been held by the Courts that giving of case papers to patients is compulsory.

CONSLUSION :

All in all, there is no point in debating as to whether application of Consumer Protection Act to Medical Profession is a Curse or Boon. Instead, it will be better for the medical fraternity to accept this application as it has firmly come to state at least for now. However, if reasonable degree of skill and care is used by Doctors, proper case papers are maintained by them, I do not see, how they should have any fear of the Act. Most of the cases arise due to lack of good communication between Doctors and Patients. Care needs to be taken, particularly by busy Doctors in this behalf. Lack of communication often leads to misunderstanding and ill feeling amongst the patients, which in turn ultimately can result in a case in the Consumer Forum.

AIR 1996 SC 550 : CPJ 1995 Vol. III SC 1