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MEDICAL NEGLIGENCE AND CONSUMER PROTECTION ACT: A CROSSROAD OF TWO DIFFERENT PATHS

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ABSTRACT

If you as a consumer subscribe for any service for example of a transport agent for your package to be delivered from your home to your workplace, and in that transportation your parcel gets spoilt because it was not kept properly in that transportation bus. Then can you claim compensation from that transportation company/person for the loss you suffered because of the negligence of them. Absolutely yes, every consumer of any product or a service has this right guaranteed under Consumer Protection Act, as the sole purpose of bringing this act is to protect the rights and interest of consumers in the market which are dominated by the businesses or the sellers. But what if in place of a transportation service, a person avails the Professional service of a Doctor or to say any other medical practitioner, and then there is some sort of deficiency or irregularity in that service, then can that person bring a claim against that person under the consumer protection act? Answer to this question is not that simple. Neither the inclusion nor the exclusion of medical service is expressly mentioned in the act. Therefor their inclusion under the ambit of the act was very uncertain and ambiguous, this led to the supreme court stepping in to fill this vacuum in a landmark case. The topic again got sparked up when the old Consumer Protection Act of 1986 was repealed and replaced with a new act of 2019, where this topic again notably did not find its inclusion even after longstanding guidelines of the judiciary. In this article we will dwell deep into the topic about its introduction, what has happened as the time of commencement of the act, judicial take on the topic and what is the current position of the cases of medical negligence under Consumer Protection act.

Keywords: *Medical, negligence, consumer, protection, services.*

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Introduction

When a new Consumer Protection Bill was tabled in the parliament for consideration and to repeal and replace the old consumer protection act of 1986, there was optimism all around that the latest Act will solve the problems that the old legislation was struggling with, because the markets, businesses, transactions, and buying and purchasing of goods and services are ever increasing, developing or expanding with the coming of new goods/services and new players in the market and that the old act has become ineffective in certain aspects. It was a much-needed step in the field of Consumer Protection. While making a new legislation to remove the old one, legislators have to take special care to understand why there is need to bring a new Law, what are the problems that the old law was facing, what can be the possible solution to these problems, how the new legislation will fill in the Vacuum/ ambiguity that were existing earlier. The new Consumer Protection Act of 2019 fulfills the reason for which it was brought and also to an extent satisfies the need which was persisting in the field for bringing reforms in laws. But there is still an unturned page in the Consumer Protection i.e., The Cases of Medical Negligence and its relation to Consumer Protection Act. This has been a gray area since the enactment of The Consumer Protection Act in 1986 and there has always been confusion and ambiguity on this topic. This confusion and ambiguity were removed by the judiciary through some landmark decisions where they tried to answer the questions which the act failed to answer. But the topic again gained fuel when the New Consumer Protection Bill was placed in the Parliament for consideration and there was a news that new legislation has specific rules and regulations regarding the inclusion of Medical Services under the ambit of the services regulated under the act and that about the cases of Medical Negligence. But when the Act was finally passed by both the Houses and got its ascent from the president there was a notable omission from the final Act that is Term Medical Services and Medical Negligence. So, what are the Cases of medical Negligence? What is their current position in the Market? What law has to say about it? Will bring up of new legislation make the Judgements given by the judiciary regarding medical services inapplicable after 2019? Whether this topic should be codified under The Consumer Protection Act or should be left open for judicial interpretation? Let's read about all these questions in detail.

What is Medical Negligence?

Negligence is a Tortious Act i.e., a civil wrong done by a person upon another which results in causing injury to that person's legal right. Negligence as a tort implies that a person owed a *Duty of care* towards another person, which he fails to fulfill; this results in causing injury to

the right of such person. For example, if A keeps a flower pot in his balcony on the edge of the window, then he has a responsibility to look after the flower pot carefully and to ensure that it does not fall down from the window and harm someone walking just below that window. If that flower pot falls down and hits B, then we can say that there is a Breach of Care from A which resulted in injuring B, here the right of B which was at peril was his right to safety, right to bodily Protection etc. Winfield defined Negligence as, "*The breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.*"

But how to decide who can be held liable for any act done by him? What are the criteria of duty? how to see proximity between a person's act and the consequences barred by any other person? Who owes duty to whom? For this we can refer to the rule laid down in the case of **Heaven V. Pender**[1], the judge laid down the *Neighbor Principle* i.e., every person owes duty of care to their Neighbor. Neighbor here means everyone who is closely related to the act and will be directly affected by the act and that it must be reasonable to have them in contemplation as being so affected. The court observed*, "Proximity simply means that the parties must be sufficiently close so that it is reasonably foreseeable that one party's negligence would cause loss or damage to the other. This reasonable standard may be adjusted given the actual circumstances of the case. For example, if the claimant is vulnerable, such as being disabled or frail, it is reasonable to expect the defendant to have paid them special attention or taken extra care over them as compared to someone who is fit and healthy."*[2]

On this scale of duty, comes the duty of the medical/health care providers while they treat a person. They owe an absolute duty of care towards the patients as what is at stake is the life of the patient, he/she has their right to life, bodily safety and autonomy & right to Health. Health care services providers include hospitals, doctors, nursing staff, clinics, nursing homes, medical practitioners, nutritionists, dieticians etc. All these services are professional in their nature and anyone who provides professional services or advice should possess a certain minimum degree of competence and that there should be reasonable amount of care to be taken while discharging their services. Same is the case with medical services providers, as observed by the supreme court in the case of **Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole[3],** "A person who holds himself our ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose."

[1] Heaven V. Pender (1883) 11QBD 508 (UK).
[2] Heaven V. Pender (1883) 11QBD 508 (UK).
[3] Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, 1969 AIR 128; 1969 SCR (1) 206.

The court went on to held that, "*The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.*[4] *The doctor no doubt has a discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency*."[5] If there is any Breach of this duty of care by the health care service providers i.e., Negligence by healthcare services providers while rendering their services is known as the cases of *Medical Negligence.* Again, the same was held in the case of **Alias Pappachan v. Dr. George Moonjerly**[6] Where the court observed that, anytime a doctor takes a patient for treatment, he/she has a responsibility to treat the patient's illness/disease with a reasonable amount of care and skill, thus he/she should not be negligent in the act.

How to Decide Whether An act is Negligent or Not?

To answer this question the courts have brought certain test to determine if the act is Negligent or not. It started with the case of **Bolam v. Friern Hospital Management Committee**[7] Where the English Court laid down the ***Bolam Test***, according to this test whenever there is any case of medical Negligence the court should take a survey of certain other doctors to check what they would have done under similar circumstances i.e., the system of *Peer Review* and then decide whether the person should be held guilty of negligence or not. But this test was not very accurate as it became very hard to hold a doctor liable even if there is a clear case of Negligence. For this reason, then came ***Bolitho's Test*** in the case of **Bolitho v. City and Hackney Health Authority**[8] Where even if the court ascended to the *Peer Review* but courts also have to see if the act was reasonable and responsible, if not then doctor can be held liable even if it is against the result of Peer review. This is the most used test. Other than this test there are few more which are used of there is any need based upon the facts of the case, they are ***Informed Consent Test***, according to which it is the duty of the doctor to tell every possible alternative to the patients and of the risk involved, and let the patient decide what is to be done as they have their own bodily autonomy (**Mongomery V Lanarkshire Health Board)**[9]. Next is **Clinical Practice Guidelines Test,** according to which "*It is essential to follow clinical practice*

[4] Halsbury's Laws of England, lexis nexus, 3rd Edition, Vol. 26 pg.17.
[5] Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole, 1969 AIR 128; 1969 SCR (1) 206 (India).
[6] Alias Pappachan v. Dr. George Moonjerly, 1995 ACJ 253, AIR 1994 Ker 289 (India).
[7] Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582 (UK).
[8] Bolitho v. City and Hackney Health Authority (1996) 4 All ER 771 (UK).
[9] Mongomery v. Lanarkshire Health Board (2015) UKSC 11 (UK).

guideline- if there is clear cut guideline it must be followed. If not followed doctors are liable for negligence for carelessness." (**Maharaja Agrasen Hospital v. Master R)**[10].

Thus, in short, every medical provider owes Duty of care to the patients and medical negligence occurs when medical care providers fail to fulfill their professional obligations.[11]

It might sound quite obvious that it must be pretty easy that in these cases of Medical Negligence, the Health Care providers are rendering services to the people and that there is deficiency in the service provided by them thus the case can be filled before a consumer forum under the consumer protection act. But things are not as simple as they are on their face.

Since the enactment of the Consumer Protection Act in 1986 there has been ambiguity on the question whether the definition of services under the act includes the services of a medical practitioner or not. If it does not then the cases of Medical Negligence cannot be brought to the Consumer Forum for remedy under the Consumer Protection act, this does not mean that there is no remedy for these cases. If not in consumer protection the victim or the aggrieved person can still get a remedy under the law of tort as a tort under the tort of Negligence for civil remedy i.e., Compensation. But if the definitely does include Medical Services, then it will become very easy for the people to get the solution for their problems as the mechanism for remedy under the Consumer Protection Act is much easier and swift and saves the time as in normal trial at civil courts goes on for years.

In Consumer Protection Act of 1986, who is a consumer was defined under **Section 2(1)(d),** any person who purchases any Goods or avail any services for a consideration either full paid or partly paid or any person who uses the product other than the person who paid for it but with a prior permission of that person. Also, such purchase must be for consumption and not for the purpose of reselling it or for any other commercial purpose. Further What is a service was defined under **Section 2(1)(o),** as service rendered of any description to a person and it further make it clear that this definition includes "*banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information*" and the section clarifies that the scope of this definition is not limited to this list, it is *illustrative and not exhaustive*. But any service provided free of cost will not be considered under this definition. It is quite clear that the act neither expressly talks about inclusion of medical services nor it expressly keeps it out of the definition.

[10] Maharaja Agrasen Hospital v. Master R (2020) 6 SCC 501 (India).

[11] Adam Ramirez J.D; Medical Negligence: Legal Definition & Examples; Forbes Advisor (13th October 2022; 5:05 am) https://www.forbes.com/advisor/legal/medical-malpractice/medical-negligence/.

As the reach of the Medical Services started to expand with the time, the number of Medical Negligence cases also started to increase, and people started to approach Consumer Forums for remedy. But because of this ambiguity there was difficulty for the consumer forums to admit the cases and also uncertainty as different stands were taken by different forums. So, this led to filling of many petitions throughout India in High Courts to make it clear the intention of the act. All these petitions were clubbed and one case was then placed before the *Supreme Court of India* to decide the matter in the case of **Indian Medical Association Vs. V.P Shanta**[12]. In this landmark case the Supreme Court brought the Medical Services under the ambit of the definition of services and clarified the different stance taken by different High Courts and different Consumer Forums and settled the difference in the opinions. The court also held that the Bolam test should be adopted in order to decide whether the act is Negligent or not. (Now as Bolam test is replaced by Bolitho's Test, in India we do follow Bolitho's Test). But as the section defining the services mentioned that service rendered free of cost cannot be considered under this act same principle also applies to the medical services.

In order to give patients, the required protection by granting them the position of consumer. the Supreme Court drew on a number of English judgements and academic publications to develop a reasonable approach to medical professional responsibility. concluded that, "The *Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis, and treatment, both medicinal and surgical, would fall within the ambit of service as defined in Section 2(1) (o) of the Act.*"

It is a common perception that if a law got repealed and replaced by a new act then the precedence related to that act, if are contradictory with the new act they will cease to apply. The new Consumer Protection Act, 2019 was brought into force because over the years markets have developed tremendously and that old law was not sufficient to deal with present market issues, thus there was a need for fresh laws that can regulate present markets and protect the interest of the consumer in the market. Even if the laws have been changed with the introduction of new act which have very wider scope than that of the old act, still if we look at it from the perception of services as defined and what it includes, it can be seen that there is no change in the section. The new act also keeps a silence on whether it includes medical services or not. So, the case of **Indian Medical Association Vs. VP Shanta** still holds good in the eyes of the law and will continue to exist as it does not contradict the section, but enlarges its

[12] Indian Medical Association Vs. V.P Shanta,1996 AIR 550, 1995 SCC (6) 651 (India).

meaning and application. The same guidelines were again reiterated by the supreme court in its recent judgment of **Nivedita Singh v. Dr Asha Bharti and Others**[13].

But why did the parliament not include Medical Services expressly even if they had a chance to do so? Especially at the time of Covid 19 pandemic it was felt that there is a need of guidelines in this regard under Consumer Protection Act.[14] What can be presumed from outside is that it is a good move not to limit the cases of Medical Negligence to a certain boundaries and that as the field of medical services are so large that it is almost impossible to codify everything, as there may be a new disease anytime, even every medicine affects every person differently, how could we codified such an enormous field within few sections. It will put unnecessary pressure on the doctors as people will sue doctors for every small thing even if there is no cause of action against them, for example if a codified act which says death due to Negligence of the doctor will be punishable, then even if a doctor tried his best to save a person but the patient still dies because of a severe disease, then also there is a possibility that he will be sued. It is very important to understand and was rightly observed by the Kerala High court in its recent order that, "*Every death of patient not medical negligence*" neither every time something wrong happens it is due to the Negligence of the doctor. [15] So, it is better that medical Negligence be uncodified and that in this case judiciary will have a very important role as now the courts or consumer forum will have autonomy to decide each case on its merits through the precedent of VP Shanta case. This will serve as balance between both the ends and will be good for all the parties i.e., medical services providers; patients and court/consumer Forums.

Conclusion

The Consumer Protection and Medical Services along with Cases of Medical Negligence are two very vast fields of which got intersected with each other because of the need of the Market and that of protection of the interest of people at large. Even if there existed some confusion and ambiguity at the time when the legislation of Consumer Protection was enacted and in few initial years of its enactment, about how far there can be an interpretation in statute so as to include something which is neither expressly included not expressly excluded in the act. This

[13] Anadi Tiwari; No consumer case against medical officers rendering free services for hospital: Supreme Court; Bar and Bench (11th December 2021 ; 12:56 pm) https://www.barandbench.com/news/no-consumer-case-against-medical-officers-rendering-free-services-for-hospital-supreme-court.

[14] Suveer Gaur; COVID-19 and Medical Negligence: The need for comprehensive guidelines; Bar and Bench (26th June 2020; 2:51 pm) https://www.barandbench.com/columns/covid-19-and-medical-negligence.

[15] Sara Susan Jiji; Every death of patient not medical negligence, death must be direct result of doctor's negligent act: Kerala High Court; Bar and Bench (7th February 2023; 1:17 pm) https://www.barandbench.com/news/litigation/every-death-patient-not-medical-negligence-death-must-direct-result-doctors-negligent-act-kerala-high-court.

all questions were settled in 1995 with the decision of the supreme court that brought medical services under the ambit of Consumer Protection. This was much needed and that it made it easier for the aggrieved person to claim for remedy as it is a much smoother process under the Consumer Protection Act than that for a Tort. The Parliament again kept the status of the act in this regard same even if it made so many changes in the act in 2019 and may be purposefully as this is the best possible way to settle things between two such vast and ever-expanding fields i.e., by letting the autonomy to decide with the Courts only. Thus, both parliament and judiciary has been working hard to protect the interest of consumers safe which is the whole and sole purpose of the act of Consumer Protection.