

Briefing Paper



GRANIRCA 2/2011

Medical Services & Consumer Protection Act

This briefing paper evaluates the significance of the Consumer Protection Act (COPRA), 1986 in tune with Medical Services, which is now one of the basic needs of consumers in their day to day life. COPRA has always been a strong tool for consumers in fighting the menace of any service available to them. The Act is a milestone in the history of socio-economic legislation to meet the long felt necessity of protecting the common man from wrongs for which the remedy under the common law for various reasons has become illusory. Medical services is as important as any other service for consumers and like other services, consumers have been facing hardships in this area also. Therefore, this briefing paper is an effort to showcase Medical Services *vis-a-vis* COPRA highlighting duties and liabilities of doctors and hospitals, kinds of liabilities, status of private and government hospitals and other remedies available to consumers besides the COPRA.

Introduction

It is the duty of the government to provide the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution. Therefore, it is the duty of the state to provide to all citizens adequate and proper medical services.¹ The COPRA, 1986 was enacted 'to provide for better protection of the interests of the consumers'— the consumers of goods and services as defined under the Act. The legislation, no doubt, has the unique distinction of being the only one in the country made exclusively for consumers to protect their interests against defective goods and deficient services, even though a plethora of existing legislations do have provisions to deal with consumer rights in different degrees on specified matters. The Act has been marginally amended in 1991 and substantially in 1993 and 2001, with a view to making it more effective in bringing justice to the door steps of consumers.

Consumer protection tries to help consumer to participate actively in the market processes, not only when he goes to buy goods but also when he goes to a medical practitioner for treatment. It is quite clear that no person intends to go to a doctor or a court unless necessary but no matter how much a person is rich or poor he has to go to the court or to a doctor for the treatment of his ailment.

Consumer of Medical Services as under COPRA, 1986

Earlier, the patients aggrieved by medical negligence did not have any effective adjudicative body for getting their grievances redressed. The Indian Medical Council Act, 1956 as amended in 1964, provides that regulation made by the Council may specify conducts, whose violations shall constitute misconduct. Secondly, the Council was available only at the state headquarters, thereby making it hardly accessible to the majority of parties. Further, the Council has no power to award compensation to the patients for the injury sustained.

There are of course provisions in the Civil and Criminal law offering remedies to aggrieved patients. But the Criminal law was pressed into services mostly in case of death as if bodily injury lesser than death has resulted from negligence, then charge would be either simple hurt or grievous hurt. What the law calls criminal negligence is largely a matter of degree, it is incapable of a precise definition. To prove is like chasing a mirage. Further, courts have been very careful not to hold qualified physicians criminally liable for patient's deaths, resulting from a mere error of judgment in the selection and application of remedies.

There has been no dispute with regard to the jurisdiction of Civil Court to decide the case pertaining to medical negligence and award suitable damages to the aggrieved person. There are many instances, whereby a Civil Court has awarded damages in cases of proved medical negligence.

The National Consumer Disputes Redressal Commission (NCDRC) upheld a decision of the Kerala State Commission which said that a patient is a consumer and the medical assistance was service and therefore in the event of any deficiency in the performance of medical service, consumer courts can have jurisdiction. It was further observed that the medical officer's service was not a personal service so as to constitute an exception to the application of the COPRA.²

Justice V Bala Krishna Eradi, President, NCDRC, on April 21, 1992, delivered a landmark judgment in *Cosmopolitan Hospital and Anr. v. Vasantha P. Nair*³, where it was held that the activity of providing medical services for payment carried on by the hospital and members of the medical profession, falls within the scope of the expression 'service' as defined in Section 2(1)(o) of COPRA and in the event of any deficiency in the performance of such service, the aggrieved party could invoke the remedies provided under the Act by filing a complaint before the consumer forum having jurisdiction.

A patient can seek redressal from a consumer court for medical services under the following circumstances:

- i. the services should have been hired or availed of or agreed to be hired or availed of by the patient
- ii. the services should have been rendered or agreed to be rendered by the doctor to the patient
- iii. the services of the doctor should have been or availed of or agreed to have been hired or availed of for consideration
- iv. the services of the doctor so hired or availed of or agreed to be hired or availed of suffer from deficiency in any respect
- v. the services have not been rendered free of charge or under a contract of personal service⁴

A patient who pays up for the treatment, or promises to do so with a consideration can seek redressal in a consumer court. This has been settled by the landmark judgment of the Supreme Court in the case of *Indian Medical Association vs. VP Shantha & others*.⁵ The Madras High Court gave its judgment that any patient seeking treatment under a government or private hospital can seek redressal under a consumer forum. This judgment was over ruled by the Supreme Court as:

- i. Service rendered to patient by a medical practitioner except where doctor render service free of charge to every patient or under a contract of personal service by way of consultation, diagnosis & treatment, both medicinal & surgical would fall within the ambit of "service" as defined in Section 2(1)(o) of the COPRA.
- ii. The fact that medical practitioners belong to medical profession and are subject to the disciplinary control of the Medical Council of India and state medical councils but this would not exclude the service rendered by them from the ambit of the COPRA.
- iii. The service rendered by a doctor was under a contract for personal service and not covered by the exclusionary clause of the definition of service contained in the COPRA.
- iv. Service rendered free of charge to everybody, would not be service as defined in the Act.
- v. The hospitals and doctors cannot claim it to be a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service condition.⁶

Negligence: A Tort and a Crime and Deficiency in Medical Services

In common parlance, negligence means carelessness, lack of proper care and attention. In law, negligence becomes actionable, when it results in injury or damage. Negligence is treated as a tort as well as a crime. As a tort, it is actionable under the civil law and as a crime under the criminal law. Actions for damages in tort are filed in civil courts and after coming into force of the COPRA 1986, in consumer forums also. Criminal complaints are filed

Patient has the right to quality healthcare

In the case of *Pravat Kumar Mukherjee vs. Ruby General Hospital & Ors*⁷, the patient was brought to Ruby General Hospital and it was an emergency case beyond any doubt. The doctors assisted the patient but as there was no guardian and a passerby admitted the patient, the doctors contended that as there was no consent for paying up the requisite fees for medical help so it was stopped hence forth. The patient was also in a condition to be moved to another hospital but no such action was taken. This led to the death of the young boy. At that moment, the passerby, who admitted the patient, was not in a position to pay ₹15000. But as a doctor, the person is supposed to know his mission and on humanitarian grounds should have started providing the medical treatment. Further, when the treatment started, it would mean that the patient has hired the service and would have paid back the required sum in due course of time.

under the relevant provisions of the Indian Penal Code and Criminal Procedure Code alleging rashness or negligence on the part of the persons concerned. Negligence is also a deficiency in service and actionable, whether committed by an individual doctor, a hospital, a lawyer, an architect, a builder or any individual.

Duties and Liabilities of a Doctor

A doctor owes to his patient 'to bring to his task a reasonable degree of skill and knowledge and to exercise a reasonable degree of care.' And, he is not guilty of negligence 'if he acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art.' The skill of medical practitioners may differ from one doctor to another. There may be more than one course of treatment which may be given for treating a particular disease. Medical opinion may differ with regard to the course of action to be taken for treating a patient. As long as the doctor acts in a manner which is acceptable to the medical profession and he treats the patient with due care and skill, the doctor will not be guilty of negligence even if the patient does not survive or suffers a permanent ailment. Some of the important duties are to:

- ◆ exercise a reasonable degree of skill and knowledge and a reasonable degree of care;
- ◆ exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment;
- ◆ extend his service with due expertise for protecting the life of the patient and stabilise his condition in emergency situations;
- ◆ attend to his patient when required and not to withdraw his services without giving him sufficient notice;
- ◆ study symptoms and complaints of the patient carefully and administer standard treatment;
- ◆ carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis;
- ◆ advise and assist the patient to get a second opinion and call a specialist if necessary;
- ◆ obtain informed consent from the patient for procedures with inherent risks to life;
- ◆ take appropriate precautionary measures before administering injections and medicines and meet emergency situations;
- ◆ inform the patient or his relatives the relevant facts about his illness;
- ◆ keep secret the confidential information received from the patient in the course of his professional engagement; and
- ◆ notify the appropriate authorities of dangerous and communicable diseases.

The doctor, thus, has a discretion in deciding whether to undertake the case or not and has also a discretion in choosing the treatment which he proposes to give to the patient and such discretion is very wide in emergency situations. At the same time, he has a duty to stabilise the condition of the patient in emergency situation. *In Parmanand Katara vs Union of India*,⁸ the Supreme Court declared that 'every doctor whether at a government hospital or otherwise has the professional obligation to extend his service with due expertise for protecting life.' The Court directed that the decision should be given wide publicity so that every doctor wherever he is within the territory of India should forthwith be aware of this position. This Supreme Court's verdict led to addition of Section 134 in Motor Vehicles Act, 1988.

Types of Liabilities

If the doctor is negligent in the performance of his duties, he is open to both criminal and civil liability. The liability may arise under the Indian Medical Council Act of 1956 (professional misconduct), under the Indian Penal Code (criminal liability) or under the Indian Contract Act of 1872 or under the Law of Tort (civil liability). Medical practitioners are accountable to their own colleagues in the profession in case of violations of the code of medical ethics, to the society for criminal negligence and to the victim for tort and breach of contract.

Liability for Professional Misconduct

The Indian Medical Council established under the Indian Medical Council Act, 1956 and the state medical councils established under the state acts deal with cases of professional misconduct of registered medical practitioners. They are empowered to take disciplinary actions against medical practitioners for misconduct and remove their names from the Medical Register if they are found guilty of professional misconduct. Similarly, the Dentists Act, 1948 empowers the Dental Council of India to prescribe standards of professional conduct and etiquette or code of ethics for dentists. The regulations made under the Act provides for taking action against professional misconduct including removal of names of such professionals from the Register.

Section 20 of Indian Medical Council Act labelled "professional conduct" prescribes standards of professional conduct and etiquette and a code of ethics for medical practitioners.

The Council by virtue of powers conferred under Section 20A made regulations relating to the professional conduct, etiquette and ethics for registered medical practitioners. These are broadly categorised as:

- A. Code of Medical Ethics
- B. Duties of physicians to their patients
- C. Duties of physicians in consultation
- D. Responsibility of physicians to each other

- E. Duties of Physician to the public and to the paramedical profession
- F. Unethical acts
- G. Misconduct
- H. Punishment and disciplinary action

Criminal Liability

A criminal liability arises, when it is proved that the doctor has committed an act or made omission that is grossly rash or negligent, which is the proximate, direct or substantive cause of patient's death.

There are multiple sections in the Indian Penal Code, 1860 under which a person aggrieved due to any deficiency in service can file a case against the relevant person or authority. Section 304-A has come to the fore quite often in cases of medical negligence as the same deals with "causing death by negligence". The Section reads as thus – *Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

Apart from this, sections 319-338 speaks about causing hurt and grievous hurt, voluntarily or even accidentally for that matter. Sections 312-316 further lay down the punishments for miscarriage, which can be specifically brought under medical law.

In cases, where the intention to murder is clearly made out, then the doctor can even be held liable for murder under Section 302. IPC also speaks of certain defences that can be availed by the accused, one extremely important defence in this regard is one of consent, sections 87, 88, 89, 90 and 92 explicitly mention that in cases where the act is done with the consent of the person, then that particular act would fall under the general exceptions thereby reducing the liability of the person.

Similarly, Section 357 of the Code of Criminal Procedure 1973 provides for compensation that can be ordered in cases a doctor is held criminally liable for any offence.⁹

Another law is Indian Evidence Act, 1872. The reason why this particular Act assumes importance in the present context is because of the requirement of expert opinions in cases of medical negligence, the reason why such an opinion is needed is mainly because sometimes the judges are to decide upon certain technical issues in the field of medicine in which no person except an expert has knowledge. But the problem with this is that there is no standard available so far in this particular area. Section 45 of the Indian Evidence Act is titled "opinion of experts" and reads as thus – *When the Court has to form an opinion upon a*

point of foreign law, or of science, or art, or as to identify of handwriting (or finger impressions), the opinion upon that point of persons (experts), who are especially skilled in such issues are relevant facts.

In *Jaggankhan vs. State of MP*, a homoeopathic doctor gave to his patient, who was suffering from guinea worms, 24 drops of stramonium and a leaf of *datura* without contemplating the reaction such a medicine could cause, resulting in the death of the patient. The doctor was held guilty of criminal negligence for committing the offence under this section. Recently the Supreme Court in *Dr Suresh Gupta vs. Government of NCT* has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high that it can be described as 'gross negligence' or 'recklessness' and be made criminally liable for offence under Section 304-A IPC.

The medical services which are excluded from the purview of COPRA are:

1. Under the contract of personal service, i.e. where a medical professional, in the capacity of an employee renders some professional service to his employer. In other words, wherever there is master and servant relationship between the recipient of the medical treatment and the doctor, the same would fall outside the purview of the definition of service under the Act.
2. At a government or non-government hospital/health centre/dispensary where no charge what so ever is collected from any patients whether rich or poor would fall outside the purview of service under the Act.

Vicarious Liability of Hospitals

Hospitals and nursing homes are equally liable for the negligence of the paramedical staff and doctors working under them. In case of negligence by the doctor or the professional staff, the patient can claim damages either from the doctor or from the hospital under the doctrine of vicarious liability.

Explaining the liability of the hospital, in one of the judgments, the court said that 'whenever the hospital authorities accept a patient for treatment they must use reasonable care and skill to cure him of his ailment. The hospital authorities could not, of course, do it by themselves; they have no ears to listen through the stethoscope and no hand to hold the surgeon's knife. They must do it by the staff which they employ, and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else, who employs others to do his duties for him.'

Status of Government Hospitals under COPRA

As far as the settled law is concerned, the patients of the government hospitals cannot maintain a suit in the consumer forum under COPRA, as such services do not have any considerations for the service rendered as those are free of cost. A patient cannot claim of availing of paid medical services in a government hospital just because of the tax he pays. The patients, who approach for treatment in a government hospital are not entirely treated free of cost. There is cost for the bed, medicines and the food that is being offered to the patient and all surgeries done on a patient are not always free of cost. Only the services that a doctor renders as regular visits and checkups may be regarded as free of cost. But that do not imply that a patient is being treated without any consideration. But all the patients, who seek treatment in government hospitals, are considered to have availed medical services free of cost. They are not consumers under the COPRA as the service they are offered is not hired for consideration.

In the case of *Paramjit Kaur vs State of Punjab*,¹⁰ the patient was operated upon in Punjab Government Hospital free of charge for family planning. Subsequently, she conceived and gave birth to a girl child. She filed a suit against State of Punjab and the doctor, who performed the operation, to claim compensation of ₹2 lakh for negligence in performing the operation. The complaint was dismissed as she was treated free of cost.

In another case of *Additional Director, CGHS, Pune vs. Dr. R.L. Bhutani*,¹¹ where the complainant was a retired government servant, who paid ₹9 per month to Central Government Health Scheme (CGHS) and he and his family were beneficiary of the same. His wife suffered from some ailment for which she was treated upon and a surgery was conducted but as a result she got paralytic. The complainant claimed reimbursement of the amount paid for treatment in a private nursing home. The National Commission reversed the decision of the State Commission in this case saying that the service provided under CGHS is rendered free of cost and under a contract of service. Therefore, the complainant was not a consumer as defined under Section 2(1) (d) of the COPRA.

The services provided by Employees' State Insurance (ESI) hospitals cannot be regarded as free service and persons who get treated over there under an insurance scheme are rightly qualified as consumers under COPRA as the issuer bears the charges. ESI scheme is an insurance scheme and contributes for the service rendered by the ESI hospitals/dispensaries, of medical care in its hospital/dispensaries, and as such service

given in the ESI hospital/dispensaries to a member of the scheme or his family cannot be treated as gratuitous. Section 56 of ESI Act is a specific section, which has reference to the medical benefits available to an insured person or to his family member whose condition requires medical treatment and attendance and they shall be entitled to receive medical benefit."

Section 59 of the same Act obligates the corporation to establish and maintain in a State such hospitals, dispensaries and other medical and surgical services as it may think fit for the benefit of the insured persons and their families. From the provisions of the ESI Act, it is clear that the corporation is required to maintain and establish the hospitals and dispensaries and provide medical and surgical services. Service rendered to the insured person or his family member in the hospital for medical treatment is not free, in the sense that the expense incurred for medical service rendered in the hospital would be borne from contributions made to the insurance scheme by the employer and the employee."

It is a matter of common knowledge that the patients in a government hospital are regarded to be treated free of cost but as a matter of fact, the x-rays or other pathological tests that are required to be performed are not done in the government hospital but the patients get those done from outside/private clinics. As has earlier been mentioned the medicines are not being provided free, which they need to buy from outside from dispensaries which is not free of cost. So, free of cost service is not actually free of cost.

Status of Private Practice under COPRA

The patients of private nursing homes, hospitals and private practitioners comes under the ambit of a consumer as explained in sub clause (ii) of clause (d) of sub Section (1) of Section 2 of COPRA. As the hiring or availing of the service of the doctor by the patients is for consideration which has been paid or promised, or partly paid and partly promised or may be under any scheme of deferred payment, therefore they or any other consumer association can claim for compensation in case of any deficiency from a consumer court. Service has been defined in clause (o) of sub Section (1) of Section 2 of COPRA, which means that 'service of any description made available to potential users'. Services which do not come under the purview of service as explained in COPRA are services, which are rendered free of cost and under a contract of personal service. The legislature did not want to restrict the ambit or the scope, so it has included insurance, purveying of news or other information within the scope of service as has been defined.

Conclusion

COPRA has been of immense help to all consumers of goods and services after it came into force in 1986. This is because the consumers can seek redress from the consumer forums in an economical, speedy and just manner. Medical services also come under the purview of service in the broader sense as formulated under the Act. The people are now confident enough while visiting doctors and getting treated and can rely on consumer forums to get fast redressal in case of any deficiency in service. The doctors also treat the patients with greater care and

caution than they earlier used to because of the existence of this law. The distinction between consumers of government hospital and private hospitals is unjust though. If looked into carefully, the patients at a government hospital are also made to bear some costs of treatment and just because there is no implied consideration for service, they should not be denied the social welfare for which this Act has been enacted. The issue needs to be looked into seriously. This Act, however, has got many positive aspects which have added to the social well-being for which it was enacted.

REFERENCES

- Singh, Avatar (2000), 'Law of Consumer Protection, Principles & Practice', 4th Edition, Eastern Book Co., Lucknow.
- Dr Agarwal, V K (2008), 'Consumer Protection, Law & Practice', 6th Edition, Bharat Publication Foreword by Justice D. P. Wadhwa, Landmark Judgments on Consumer Protection, Universal Law Publishing Co. Pvt. Ltd, 2003
- Adil, M S (2006), 'Consumer Protection, Law Practice & Procedure', JBA Publishers
- Desai, Shreyas (2006), Foreword by Justice M B Shah, 'Consumer Protection Law in India', Unique Law Publishers.
- Chaudhury RNP (2005), 'Consumer Protection Law: Provisions & Procedure', Deep & Deep Publications Pvt. Ltd, Delhi.
- Vasantha P. Nair vs. Smt.V.P.Nair, (1991) CPJ 685
- C. Sivakumar vs. Dr. John Arthur & Another, III (1998) CPJ 436
- Lakshmi Rajan vs. Malar Hospital Ltd., III (1998) CPJ 586
- Consumer Protection and Medical Profession-M K Balchandran
- Mehta Pradeep S (1998), '*Of Professionals and Medical Negligence*' in How to Survive As A Consumer, CUTS International, Jaipur
- Mehta, Pradeep S (1998), 'Numbers At What Cost?' CUTS-international, Jaipur
- Mehta, Pradeep S (2007) 'Consumer Protection Act and the Supreme Court' CUTS International, Jaipur

ENDNOTES

- 1 Dr. J.N.Barowala, Foreword by Justice M.B. Shah, "Commentary on the Consumer Protection Act", 3rd edition Universal Law Publishing Co.pg-236-237.
- 2 R.K.Bangia, "Law of Torts", Allahabad Law Agency, pg-603
- 3 Cosmopolitan Hospital and anr. v.Vasantha P. Nair (1992) CPJ 302 NC
- 4 *Ibid* 2 pg. 237-238
- 5 How to Survive As A Consumer by Pradeep S Mehta (Of Professionals and Medical Negligence, Page 35)
- 6 Indian Medical Association vs.V.P. Shantha & others, AIR1996 S.C.550
- 7 Pravat Kumar Mukherjee vs. Ruby General Hospital & Ors, 2005(3) CPR 95 Pgs.- 109& 119 (DB) (NC)
- 8 Pandit Parmanand Katara vs. Union of India, Supreme Court, 1989
- 9 Jagdish Singh, Vishwa Bhushan, Medical Negligence and Compensation, 69 (3rd edition 2004).
- 10 Paramjit Kaur vs. State of Punjab, II(1997) C.P.J.394
- 11 Additional Director, C.G.H.S , Pune vs. Dr. R.L. Bhutani, I (1996) C.P.J. 225

This Briefing Paper has been prepared by Deepak Saxena of and for CUTS Centre for Consumer Action, Research & Training (CUTS CART) as part of the project entitled, 'Grassroots Reachout & Networking in Rajasthan through Consumer Action' (GRANIRCA) with support from Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution, Government of India.

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