Insurance and Consumer

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THE CONSUMER PROTECTION ACT & MEDICAL PROFESSION

The Consumer Protection Act, 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 Act "is a mile-stone in the history of socio-economic legislation… to meet the long felt necessity of protecting the common man from such wrongs for which the remedy under the common law for various reasons has become illusory."[1] The legislation, no doubt, has the unique distinction of being the only one in the country made exclusively for the 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 envisages a better legal frame-work within which an ordinary consumer can fight for his rights and get his grievances redressed. It provides for speedy and inexpensive settlement of disputes within a limited time-frame, as against civil suits which are costly and time-consuming. The provisions of the Act are in addition to and not in derogation of any other law for the time being in force and are compensatory in nature.

The Act provides for the establishment of Consumer Protection Councils at the Central, State and District levels "to promote and protect the rights of the consumers" and a three-tier quasi-judicial machinery at the district, state and national levels for "the settlement of consumer disputes". The composition of these authorities and their territorial and pecuniary jurisdictions, the procedure to be followed by them in disposing of the complaints and the relief that can be granted are specifically laid down under the Act. In the light of the experience gained during the initial years of its enforcement by the consumer courts, the Act has been marginally amended in 1991 and substantially in 1993 and 2002, with a view to make it more effective in bringing justice to the door steps of the consumers.

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[1] *Lucknow Development Authority* v. *M.K. Gupta*, AIR 1994 SC 787

The Act applies to all 'goods' and 'services' as defined under it, except those which are expressly excluded by the Central Government by notification.[2] The terms 'goods', 'service', 'consumer', etc have been defined under the Act.[3] The constitutional validity of the Act has been upheld by the Supreme Court in the landmark judgement of *Indian Medical Association* v. *V.P. Shantha*.[4] In this case, the court held that the medical services are covered under the definition of service which includes rendering of consultation, diagnosis and treatment, both medical and surgical.

The Act defines the term 'consumer' (of goods) to mean not only a person who buys any goods for a consideration but also any user of such goods with the approval of the buyer.[5] Similarly, a 'consumer' (of services) is a person who hires or avails of any services for a consideration and includes any beneficiary of such services when availed of with the approval of the hirer. In *M/s Spring Meadows Hospital* v. *Harjot Ahluwalia*,[6] the Supreme Court held that the child is a consumer being the beneficiary of the services hired by the parents. Similarly, in *Indian Medical Association* v. *V.P. Shantha*,[7] the court declared that the patients who are rendered free services in a hospital are the beneficiaries of the services hired by the patients who have paid for the services.

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[2] Section 1(4): Save as otherwise expressly provided by the Central Government by notification, this Act applies to all goods and services.

[3] Section 2(1)

[4] AIR 1996 SC 550

[5] Section 2(1)(d): "consumer" means any person who,-

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for nay commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid or partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.

[6] AIR 1998 SC 1801

[7] AIR 1996 SC 550

The term 'goods' has been defined with reference to its definition under the Sale of Goods Act of 1930[8] to mean any movable property (other than actionable claims and money) as distinct from immovable property, while the term 'service' has been given a wide meaning to cover 'service' of any description which is made available to potential users, excluding 'the rendering of any service free of charge or under a contract of personal service'.[9] However, certain facilities like banking, financing, insurance, transport, processing, supply of electricity or other energy, board or lodging or both, entertainment, amusement or purveying of news or other information, have been specifically mentioned by way of illustration to which 'housing construction has been added to by the 1993 amendment.

In ***V.P. Shantha's*** case[10] the Supreme Court held that services rendered to a patient by a medical professional are 'service' within the meaning of the Consumer Protection Act 1986 and persons who hire or avail of such service are, therefore, consumers as defined under the Act. However, where a doctor or hospital renders service free of charge to every patient or under a contract of personal service, a patient availing of such free services will not be a consumer. Citing with approval the interpretation given by the Supreme Court in *Lucknow Development Authority* v. *M.K. Gupta*,[11] the court explained the definition of 'service' thus: "The definition of 'service' in section 2(1)(o) of the Act can be split up into three parts – the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean *service of any description* which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing

[8] Section 2(1)(i): "goods" means goods as defined in the Sale of Goods Act, 1930 (3 of 1930)

[9] Section 2(1) (o) : "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with 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, but does not include the rendering of any service free of charge or under a contract of personal service.

[10] AIR 1996 SC 550

[11] AIR 1994 SC 787

construction, entertainment, amusement or the purveying of news or other information. The exclusionary part *excludes* rendering of *any service free of charge or under a contract of personal service."*[12]

In response to the contention of the doctors that the inclusive part of the definition of service did not include medical profession and as such the doctors are outside the purview of the Act, the court observed that the service of medical practitioners fell within the main part of the definition which was exhaustive. The court held that "the medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected." The Court further observed: "we are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by section 2(1)(o) of the Act."[13]

It was argued that 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 which was excluded from the definition of service. The court rejected the contention and held that there was a well-recognized distinction between a 'contract *of* service' and 'contract *for* service' and observed : A 'contract *for* services' implies a contract whereby one party undertakes to render services, e.g., professional or technical service, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A 'contract *of* service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance."[14]

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[12] AIR 1996 SC 550
[13] *Ibid*
[14] *Ibid*

Under the Act a complaint can be filed in respect of a defect in the goods or deficiency in the services. 'Deficiency' (of service) is defined to mean any fault, imperfection or shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. The Act provides for the establishment of a three-tier consumer disputes redressal machinery for the settlement of consumer disputes at the district, state and national levels to be knowns as the District Forum, the State Commission and the National Commission each consisting of a judicial member as the presiding officer and two members for the District Forum and the State Commission and four members for the National Commission with at least one of the members in each to be a woman. The President of the District Forum is required to be a "a person who is or has been, or is qualified to be a district judge" while that of the State Commission to be "a person who is or has been, a judge of the High Court." The President of the National Commission is required to be "a person who is or has been, a judge of the Supreme Court."

The Act also prescribes the pecuniary jurisdictions of these agencies. The jurisdiction of the District Forum is up to 20 lakhs, that of the State Commission is from 20 lakh to one crore and that of the National Commission is over one crore.

Negligence – A Tort and a Crime

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 the coming into force of the Consumer Protection Act 1986, in consumer courts also. Criminal complaints are filed under the relevant provisions of the Indian Penal Code alleging rashness or negligence on the part of the persons concerned. More and more consumers are resorting to consumer courts established under the Consumer Protection Act for the redressal of

their grievances. Negligence is actionable whether committed by a doctor, a lawyer, an architect, a builder or any individual.

Negligence "is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which originally regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do".[15]

To constitute negligence one has to prove a duty to take care, breach of that duty and the resulting damage. Therefore, the essential components of negligence are :

- The existence of a duty to take care which the defendants owes to the plaintiff;
- The breach of that duty towards the plaintiff and
- Damage or injury by the complainant as a result of such breach.

Who has a duty to take care of whom?

The legal proposition as laid down by the House of Lords is that a person has a legal duty to take care of his 'neighbour' and the 'neighbours' are those persons who are so closely and directly affected by his act that he ought reasonably to have them in mind as being so affected when he is directing his mind to the acts or omissions which are called in question. Thus, for a driver driving a vehicle on the highway, all those persons who are using the highway as drivers and pedestrians are his neighbours. If the driver injures a pedestrian due to his carelessness (rash and negligent driving) he will be liable to the latter in damages. So is the case with a manufacturer, a builder, or a doctor. A manufacturer is liable to his ultimate consumer, a builder to the occupier of the building and a doctor to his patient because they are all their 'neighbours' – not literally but legally.

In Donoghue v. Stevenson,[16] the House of Lords held that a manufacturer has a duty to take care of his ultimate consumer (who is his 'neighbour') and if the latter suffers an injury because of the negligence of the former, the manufacturer will be liable in tort (despite the non-existence of a contract between them). In this case,

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[15] Ratanlal & Dhirajlal: *Law of Torts* (24th Edn., 2002) (at pp. 441-42)

[16] (1932) AC 562

a youngster purchased two bottles of ginger beer from a retail shop to treat his girl friend. The bottles were opaque and as such the contents of the bottles were not visible. The girl drank from one of the bottles and when she took the second helping, she found the remains of a snail in the bottle. She suffered gastro-enteritis and sued the manufacturer for damages. The manufacturer denied liability on the ground that there was no privity of contract between him and the girl.

The House of Lords held the manufacturer liable for negligence under the law of tort holding that he had a legal duty to take care of this ultimate consumer (his neighbour), there was a breach of that duty (the presence of the remains of a snail inside the bottle) and the breach had resulted in injury (gastro-enteritis).

Duties of a doctor

Doctors generally have certain duties towards their patients. Some of the important duties are:

- to exercise a reasonable degree of skill and knowledge and a reasonable degree of care ;
- to exercise reasonable care in deciding whether to undertake the case and also in deciding what treatment to give and how to administer that treatment;
- to extend his service with due expertise for protecting the life of the patient and to stabilize his condition in emergency situations;
- to attend to his patient when required and not to withdraw his services without giving him sufficient notice;
- to study the symptoms and complaints of the patient carefully and to administer standard treatment;
- to carry out necessary investigations through appropriate laboratory tests wherever required to arrive at a proper diagnosis;
- to advise and assist the patient to get a second opinion and call a specialist if necessary;
- to obtain informed consent from the patient for procedures with inherent risks to life;

- to take appropriate precautionary measures before administering injections and medicines and to meet emergency situations;
- to inform the patient or his relatives the relevant facts about his illness;
- to keep secret the confidential information received from the patient in the course of his professional engagement;
- to notify the appropriate authorities of dangerous and communicable diseases;

Medical Negligence

A doctor has a legal duty to take care of his patient. Whenever a patient visits a doctor for treatment there is a contract by implication that the doctor will take reasonable care to treat him. If there is a breach of that duty and if it results in injury or damage, the doctor will be held liable. In the context of doctor-patient relationship, a valid contract can be created either by entering into a written contract or on oral terms. Generally there is no written contract between them. The doctor must exercise a reasonable degree of care and skill in his treatment; but at the same time he does not and cannot guarantee cure. In other words, a doctor is only required to ensure due care in treating the patient. It may be mentioned here that liability in case of medical negligence arises not when the patient has suffered an injury but when the injury has resulted due to the conduct of the doctor which has fallen below the standard of reasonable care. 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.

Doctor's duty to take care

Doctors owe to their patients a duty in tort and in contract.

In *Laxman Balkrishna Joshi (Dr.)* v. *Trimbak Babu Godbole*,[17] the Supreme Court held: "A person (doctor) who holds himself out ready to give medical advice and treatment impliedly undertakes that:

- he is possessed of skill and knowledge for that purpose;
- he owes a duty of care in deciding whether to undertake the case;
- a duty of care in deciding what treatment to give and
- a duty of care in the administration of that treatment.

A breach of any of these duties gives a right of action for negligence to the patient.

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 stabilize the condition of the patient in emergency situations. In *Paramanand Kataria* v. *Union of India,*[18] 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 be within the territory of India should forthwith be aware of this position."

In this case, in a news item published by the Hindustan Times entitled, '*the Law Helps the Injured to Die'*, it was reported that a scooterist, who was knocked down by a speeding car was picked up by a person, who was on the road and took him to the nearest hospital. The patient was profusely bleeding but the doctors refused to attend on the injured and directed that the patient to be shifted to another hospital handling the medico-legal cases. By the time the victim was taken to the other hospital, is succumbed to his injuries. The petitioner, a human activist filed an application under Art. 32 of the Constitution praying for a direction by the court to the Union of India that every injured citizen brought for treatment should instantaneously be given medical aid to preserve life and

[17] AIR 1969 SC 128
[18] AIR 1989 SC 2039

[19] (1957) 1 WLR 582

thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death. The court held that "All Government Hospitals, Medical Institutes should be asked to provide immediate medical aid to all the cases irrespective of the fact whether they are medico-legal cases or otherwise. The practice of certain Government institutions to refuse even the primary medical aid to the patient and referring them to other hospitals simply because they are medico-legal cases is not desirable. However, after providing the primary medical aid to the patient, the patient can be referred to the hospital if the expertise facilities required for the treatment are not available in that Institution".

In *Bolam* v. *Friern Hospital Management Committee,*[19] the House of Lords held that "a doctor is not guilty of negligence if he acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular art." This principle has been upheld by the House of Lords in *Sidaway* v. *Board of Bethlem Royal Hospital,*[20]

Standard of care and degree of care

Medical negligence basically means negligence resulting from the failure on the part of the doctor to act in accordance with the medical standards in vogue which are being practised by a reasonably competent medical man practising the same trade. In other words, a doctor will be guilty of negligence only when he falls short of the standard of a reasonably skilful medical man.

The law does not condemn the doctor when he only does that which many a wise and reasonable doctor so placed would do. He is not guilty of negligence if he acts in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular task. It only condemns him when he falls short of the accepted standards of that great profession.

A doctor is required to exercise a reasonable degree of care. Reasonable degree of care is that degree of care and competence which "an ordinary member of the profession who professes to have those skills would exercise in the circumstances in question."

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[19] (1957) 1 WLR 582
[20] (1985) AC 871

There is, however, a difference between 'standard of care' on the one hand and 'degree of care' on the other. In the case of a doctor, the standard of care expected of him remains the same in all cases, but the degree of care will be different in different circumstances. Thus, while the same standard of care is expected from a generalist and a specialist, the degree of care would be different. A higher degree of skill is expected from a specialist when compared to that of a generalist.

What amounts to reasonable care changes with the advancement of science and technology. A doctor has to constantly update his knowledge in tune with the changing time with a view to improve the standard expected of him. At the same time, it may not be necessary for the doctor to know all the developments that have taken place in the field as he is supposed to have only reasonable knowledge.

Doctor's liability

Thus, 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 responsible body of medical men skilled in that particular art." The law recognizes the dangers which are inherent in surgical operations and that mistakes may occur on occasions despite the exercise of reasonable skill and care. This aspect has been made very clear by Lord Denning in *Hatcher* v *Black:* "When a person who is ill goes in for treatment, there is always some risk, no matter, what care is used. Every surgical operation involves risks. It would be wrong and indeed bad law to say that simply because a misadventure or mishap occurred, the hospital and the doctor are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient or a surgeon operating on a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger – for an action for negligence against a doctor is for him like unto a dagger. His professional reputation is as dear to him as his body, perhaps more so, and an action for negligence can wound his reputation as severely as a dagger can his body."

The court pointed out that a doctor should not be held negligent simply because something happens to go wrong; if for instance one of the risks inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgment: "You should only find him guilty of negligence when he falls short of the standard of a reasonable skillful medical man. In short, when he deserve censure – for negligence in a medical man is deserving of censure," the court said.

Explaining the concept of medical negligence and the complexities associated with it, Lord Denning cautioned: "A medical man should not be found guilty of negligence unless he has done something of which his colleagues would say: 'He really did make a mistake there. He ought not to have done it.'[21] His Lordship further observed "We should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of the patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patients at every point, but we must not condemn as negligence that which is only a misadventure."[22]

However, in cases where the doctor is found guilty of negligence he will be held liable in damages. In *A.S. Mittal* v *State of U.P.*[23] irreparable damage was caused to the eyes of some of the patients who were operated upon at an eye camp. The court awarded compensation to the victims and held: "A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one." Similarly, the courts have fixed liability on the doctor/hospital in cases where a cotton wad or gauze or surgical instrument was left in the body of the patient at the time of the operation. Thus, in *Achutrao Hari*

[21] Lord Denning : *The Discipline of Law* (1979)
[22] *Roe* v. *Ministry of Health* [1954] 2QB 66
[23] AIR 1989 SC 1570

Bhau Khodwa v. *State of Maharashtra*[24] where a mop was left in the body of the patient resulting in the formation of pus and eventually in the death of the patient, the court awarded damages.

Negligence will also arise in cases such as injecting a wrong medicine to the patient, failure to make appropriate inquiries about the patients' ailment, failure to give clear and proper instructions to his subordinates, failure to monitor the work assigned by him to his assistants, removal of the wrong limb/organ of the patient, performing the operation on a wrong patient, giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning, use of wrong gas during the course of anaesthetic or giving prescriptions which cannot be properly read or failure to make arrangements to meet with emergency situations.

Vicarious liability of hospitals

Hospitals and nursing homes are equally liable for the negligence of the paramedical staff and doctors working under them. In a 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. In *Gold* v *Essex County Council,*[25] the court held the hospital liable for the negligence of its professional staff. In this case, a girl who had warts on her face went to a hospital for treatment. Her face was badly burnt and disfigured because of the negligence of the Radiologist employed by the hospital. The court awarded damages to the girl and the hospital was asked to pay.

In *Cassidy* v *Ministry of Health*,[26] a man with two stiff fingers went to the hospital for treatment. He was put in splint but when the splint was removed instead of two stiff fingers he had four stiff fingers. The trial judge dismissed the case on the ground that the plaintiff could not prove negligence on the part of any particular individual on the staff. The Court of Appeal reversed the decision and held the hospital liable. The court observed: "If a man goes to a

[24] AIR 1996 2377
[25] [1942] 2 KB 293
[26] [1951] 2 KB 343

doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment of him; and that is so whether the doctor is paid for his services or not." Explaining the liability of the hospital 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 hands 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."

In this case the court pointed out that the hospital authorities had accepted the plaintiff as a patient for treatment and as such it was their duty to treat him with reasonable care. They selected, employed and paid all the surgeons and nurses to look after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill then the hospital authorities must be held responsible for it. Once the patient had established that he had suffered an injury during treatment, it raised a prima facie case against the hospital authorities and then it was the responsibility of the hospital authorities to explain how it could have happened without any negligence.

Error of judgment

Error of judgment on the part of a doctor (e.g. wrongful diagnosis) would tantamount to negligence if it is an error which would not have been made by a reasonably competent professional medical man acting with ordinary care. Very often, in a claim for compensation arising out of medical negligence, a plea is taken that it is a case of bona fide mistake. This may be excusable under certain circumstances but a mistake which would tantamount to negligence will not be pardoned.

In the case of *Whitehouse* v *Jordan,*[27] an obstetrician had pulled too hard in a trial of forceps delivery and had thereby caused the plaintiff's head to become wedged with consequent asphyxia

[27] [1981] All ER 267

and brain damage. The House of Lords held that the obstetrician was guilty of negligence. The court observed: "The true position is that an error of judgment may or may not be negligent; it depends on the nature of the error. If it is the one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care might have made then it is not negligence."

In *M/S Spring Meadows Hospital* v *Harjot Ahluwalia*,[28] the Supreme Court observed that gross medical mistake would always result in a finding of negligence. "Use of wrong drug or wrong gas during the course of anaesthetic will frequently lead to the imposition of liability and in some situations even the principle of *res ipsa loquitur* can be applied. Even delegation of responsibility to another may amount to negligence in certain circumstances. A consultant can be negligent where he delegates the responsibility to his junior with the knowledge that the junior was incapable of performing his duties properly."

Thus, a doctor who is charged with negligence can absolve himself from liability if he can prove that he acted in accordance with the general and approved practice. He will be held liable only if the judgment is so palpably wrong as to imply an absence of reasonable skill and care on his part.

If a doctor fails to perform the duties of a reasonably skilful medical practitioner of his category or if he does something which he is prohibited from doing, he will be guilty of negligence and will be open to both civil and criminal liabilities. Thus, an act of omission or commission on the part of the doctor might result in negligence.

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

[28] AIR 1998 SC 1801

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 victims 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 to 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 the names of such professionals from the Register.

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 grossly negligent which is the proximate, direct or substantive cause of patient's death. Under Section 304 A of the Indian Penal Code, a doctor is punishable for criminal negligence. Under this section, "whoever causes the death of any person by doing any rash or negligent act amounting to culpable homicide is punishable with imprisonment for a term that may extend up to two years or with fine or with both." This offence is cognizable, bailable and non-compoundable. It is cognizable in the sense that the offender can be arrested by a police officer without warrant. However, the police officer cannot act unreasonably as he is required to take an objective decision on the basis of either reasonable suspicion or credible information. It is a bailable offence and as such the doctor who is arrested is entitled to be released on bail as a matter of right. It is non-compoundable in the sense that the offence can not be

compounded by compromise between the suspected offender and the victim or his representative.

In *Jaggankhan* v. *State of M.P.,*[29] a homoeopathic doctor gave to his patient who was suffering from guinea worms, twenty-four 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.

In another case, the Supreme Court awarded Rs.1 lakh as compensation to the minor child of a woman who died as a result of an abortion carried out by a homoeopathic doctor. The case was registered under Section 314 of the Indian Penal Code which defines death caused by act done with intent to cause miscarriage. The High Court had passed an order of conviction and passed a sentence of imprisonment for four years and a fine of Rs. 5,000/-. The Supreme Court enhanced the fine to Rs. 1 lakh, but reduced the term of imprisonment.

Recently the Supreme Court in *Dr. Suresh Gupta* v. *Govt. of NCT* [30] has declared that for fixing criminal liability on a doctor or surgeon, the standard of negligence required to be proved should be so high as can be described as "gross negligence" or "recklessness". The court, in this case, held : "Where a patient dies due to the negligent medical treatment of the doctor, the doctor can be made liable in civil law for paying compensation and damages in tort and at the same time, if the degree of negligence is so gross and his act was so reckless as to endanger the life of the patient, he would also be made criminally liable for offence under Section 304-A IPC."

The court further clarified that where a patient dies due to negligent medical treatment of a doctor, if the degree of negligence is so gross and the act of the doctor was so reckless as to endanger the life of the patient, the doctor would be made criminally liable, in addition to any civil liability in tort.

In this case, the patient was operated by the appellant plastic surgeon for removing his nasal deformity resulting in the death of the patient. It was alleged that the death was due to '*asphyxia*

[29] AIR 1965 SC 831
[30] (2004) 6 SCC 422

resulting blockage of respiratory passage by aspirated blood consequent upon surgically incised margin of nasal septum'. The court held that the carelessness or want of due attention and skill alleged in this case cannot be described to be so reckless or grossly negligent as to attract criminal liability.

The principle laid down in *Dr. Suresh Gupta's* case[31] has been upheld in *Jacob Mathew* v. *State of Punjab*,[32] where the court observed: "To prosecute a medical professional for negligence under criminal law, it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent." As an illustration, the court said that a doctor who administers a medicine known to or used in a particular branch of medical profession impliedly declares that he has knowledge of that branch of science and if he does not, in fact, posses that knowledge, he is *prima facie* acting with rashness and negligence.

Rejecting the charge of criminal negligence, in the present case, the court held that the averments made in the complaint, even if held to be proved, did not make out a case of criminal rashness or negligence on the part of the accused appellant. The court further observed: "It is not the case of the complainant that the accused appellant was not a doctor qualified to treat the patient whom he agreed to treat. It is a case of non-availability of oxygen cylinders either because of the hospital having failed to keep available a gas cylinder or because of the gas cylinder being found empty. Then, probably the hospital may be liable in civil law or may be not, but the accused-appellant cannot be proceeded against under S. 304-A IPC."[33]

In this case, it was contended by the respondent that the death of his father has occurred due to the carelessness of doctors and nurses and non-availability of oxygen cylinder and also because of the fixing up of an empty cylinder on his mouth due to which his breathing had totally stopped.

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[31] *Ibid*
[32] (2005) 6 SCC 1
[33] *Ibid*

Making a distinction between occupational negligence and professional negligence the court observed that to infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations applied. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgement or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he can not be held liable for negligence merely because a better alternative course of method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed.

The court further clarified that a professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess.

The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of *mens rea* must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

The Court issued the following guidelines which should govern the prosecution of doctors in future :

- A private complaint may not be entertained unless the complainant has produced *prima facie* evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.
- The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying

the *Bolam test* to the facts collected in the investigation.

- A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been leveled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

In *Poonam Verma* v. *Ashwin Patel*,[34] where a registered medical practitioner in homoeopathy was held guilty of negligence *per se* for prescribing allopathic medicines to a patient resulting in her death, the court ordered the Medical Council of India and the State Medical Council to consider the feasibility of initiating appropriate action under Section 15 (3) of the Indian Medical Council Act, 1956 for practising allopathic system of medicine without possessing the requisite qualifications.

Other provisions in the Indian Penal Code which may be relevant are Section 312 (causing miscarriage), Section 313 (causing miscarriage without woman's consent), Section 314 (deaths caused by act done with intent to cause miscarriage), Section 315 (act done with the intent to prevent the child being born alive or to cause it to die after birth), Section 316 (causing death of quick unborn child by act amounting to culpable homicide), Section 337 (rash or negligent act resulting in simple hurt) and Section 338 (rash or negligent act resulting in grievous hurt).

Criminal liability may also arise under a number of other statutes such as the Indian Medical Council Act, 1956, the Dentists Act, 1948, the Medical Termination of Pregnancy Act, 1971, the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, the Transplantation of Human Organs Act, 1994 and other penal laws enacted by the Parliament and State legislatures from time to time.

Civil liability

Civil liability in the case of medical service may arise for a breach of contract or the commission of a tort. Under the law of

[34] AIR 1996 SC 2111

contract liability arises when the doctor fails to exercise reasonable care in the course of his examination and treatment resulting in damage for which compensation is claimed by a patient who has paid for the service.

Under the law of tort (a wrong that is independent of contract), liability arises for negligence on the part of the doctor in diagnosing the disease or treating the patient. In cases of proven negligence, doctors are held liable in tort to pay compensation to the patient whether the patient has paid for his services or not. However, the doctor is only required to exercise reasonable skill and care. In other words, the doctor will be held liable only if the course adopted by him is one that no professional of ordinary skill would have taken. He will be guilty only when he falls short of the standard of a reasonably skilful medical man.

In cases where action is taken against a doctor for professional misconduct or criminal negligence, he will be punished if found guilty. However, the patient who has suffered by way of physical and mental injury do not get any relief or benefit in the form of monetary compensation. He may have a mental satisfaction that the person who has been responsible for his suffering has been punished; but nothing more than that. As a victim of negligence, he is more interested in getting compensation/damages for the injury suffered by him, mentally and physically. He might have suffered physical pain, mental agony, inconvenience, loss of enjoyment and monetary loss by way of hospital and medical expenses, loss of wages due to forced absence from work, loss of pleasure etc. In such cases the victim can seek relief by way of compensation from civil courts under the law of tort.

Liability under the Consumer Protection Act

Civil courts have been entertaining complaints of medical negligence from patients or their representatives and have been awarding compensation/damages to them for the injury suffered by them. However, the procedure in civil proceedings is tardy, expensive and time-consuming. Because of this, many of the aggrieved consumers stayed away from the ordinary courts and suffered in silence. Consumers who went to the courts for relief generally had to wait for years to get justice and that too after spending heavily on advocates and towards court fees. Apart from

this, most of the pre-1986 legislations dealing with consumer's interest are fragmented in their approach to consumers' problems having scattered provisions with limited remedies. The procedure is also cumbersome and time-consuming making litigation costly and troublesome for ordinary consumers who constitute the majority of the population. The Consumer Protection Act was enacted to remedy this situation by providing a simple, inexpensive and expeditious mechanism for redressing the genuine grievances of consumers – consumers of goods and services.

After the Consumer Protection Act, 1986 (hereinafter 'the Act') came into force, some of the consumer courts in various states started receiving complaints from patients or their representatives regarding deficiency in service on the part of hospitals and doctors. The complainants generally argued, *inter alia*, that

- the patients who paid for the services of doctors/hospitals/ nursing home are consumers as defined in the Act;
- the definition of the expression 'service' under the Act that "service means service of any description which is made available to potential users" is wide enough to cover services rendered by hospitals and doctors also;
- the Act provides for payment of compensation to the consumers (patients) for the injury suffered by the consumer due to the negligence of the opposite party (doctors/hospitals).

The doctors/hospitals on the other hand argued, *inter alia,* that:

- the Act does not cover the service rendered by the medical professionals as the inclusive part of the definition does not speak about medical profession;
- the services rendered by the medical professionals are specifically excluded from the purview of the Act as the exclusive part of the definition specifically excludes 'the service rendered under a contract of personal service' and that the services rendered by them are under a contract of personal service;
- the consumer courts (the District Forum, the State and National Commission) are not competent to judge the issue of negligence in connection with medical services as they are not a body of professionals having expertise in medical services.

These arguments along with a host of other issues were taken up before the apex court by the Indian Medical Association for a final decision. The Supreme Court in a landmark judgment delivered in *Indian Medical Association* v. *V.P.Shantha*[35] clarified the various points raised before it. The court upheld the constitutional validity of the Consumer Protection Act and held that doctors/hospitals and nursing homes (subject to some exceptions) fell within the scope of the Act as the services rendered by them including the rendering of consultation, diagnosis and treatment – both medical and surgical – would come under the definition of service under the Act.

The court held:-

- Medical Practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.
- It is no doubt 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 of master and servant between the doctor and the patient, the contract between the Medical Practitioner and his patient cannot be treated as a contract of personal service but 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.
- A 'contract *for* service' implies a contract whereby one party undertakes to render services i.e. professional or technical services, to or for another in the performance of which he is

[35] AIR 1996 SC 550

not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A 'contract *of* service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance.

- It is no doubt true that sometimes complicated questions requiring recording of evidence of experts may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical practitioner; but this would not be so in all complaints about deficiency rendering services by a medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning or use of wrong gas during the course of an anaesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act.
- It cannot be said that the composition of the Consumer Disputes Redressal Agencies is such as to render them unsuitable for adjudicating on issues arising in a complaint regarding deficiency in service rendered by a Medical Practitioner.
- The President of the District Forum is required to be a person who is or who has been or is qualified to be a District Judge and the President of the State Commission is required to be a person who is or who has been the judge of the High Court and the President of the National Commission is required to be a person who is or who has been a Judge of the Supreme

Court, which means that all the Consumer Disputes Redressal Agencies are headed by a person who is well versed in law and has considerable judicial or legal experience.

- It is no doubt true that the decisions of the District Forum as well as the State Commission and the National Commission have to be taken by majority and it may be possible in some cases that the President may be in minority. But the presence of a person well versed in law as the President will have a bearing on the deliberations of these Agencies and their decisions.
- As regards the absence of a requirement about a member having adequate knowledge or experience in dealing with the problems relating to medicine it may be stated that the persons to be chosen as members are required to have knowledge and experience in dealing with problems relating to various fields connected with the object and purpose of the Act, viz., protection and interests of the consumers.
- In our opinion, no case is made out that the Act suffers from the vice of arbitrariness or unreasonableness so as to be violative of Articles 14 and 19(1)(g) of the Constitution.
- 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;
  (ii) where charges are required to be paid by everybody availing the services; and
  (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.
- Doctor and hospitals who render service without any charge whatsoever to every person availing the service would not fall within the ambit of "service" under Section 2(1)(o) of the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such Doctors and hospitals. So 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 Section 2(1)(o) of the Act.

- The service rendered by the Doctors and hospitals falling in category; (iii) irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression "service" as defined in Section 2(1)(o) of the Act. We are further of the view that persons who are rendered free service are the "beneficiaries" and as such come within the definition of "consumer" under Section 2(1)(d) of the Act.
- The Government hospitals may not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act it would not be possible to treat the Government hospitals differently. We are of the view that the persons belonging to "poor class' who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the "paying class".
- There is no direct nexus between the payment of the salary to the Medical Officer by the hospital administration and the person to whom service is rendered. The salary that is paid by the hospital administration to the employee Medical Officer cannot be regarded as payment made on behalf of the person availing the service or for his benefit so as to make the person availing the service a "consumer" under Section 2(1)(d) in respect of the service rendered to him. The service rendered by the employee Medical Officer to such a person would, therefore, continue to be service rendered free of charge and would be outside the purview of Section 2(1)(o).
- There may, however, be a case where a person has taken an insurance policy for Medicare whereunder all the charges for consultation, diagnosis and medical treatment are borne by the Insurance Company. In such a case the person receiving the treatment is a beneficiary of the service which has been rendered to him by the Medical Practitioner, the payment for which would be made by the Insurance Company under the Insurance Policy. The rendering of such service by the Medical Practitioner cannot be said to be free

of charge and would, therefore, fall within the ambit of the expression 'service' in Section 2(1)(o) of the Act.

- In complaints involving complicated issues requiring recording of evidence of experts, the Complainant can be asked to approach the Civil Court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the Civil Court for necessary relief.

Sterilization Cases

In *State of Haryana v. Santra,*[36] the Supreme Court upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. In this case, it was found on facts that the doctor had 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. A case of medical negligence was found and a decree for compensation in tort was held justified. However, this case distinguished in a subsequent case, *State of Punjab v. Shiv Ram,*[37] where the court pointed out at that "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.

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[36](2000) 5 SCC 182

[37](2005) 7 SCC 1

Informed consent

The doctrine of informed consent requires that the consent of the patient should be obtained after disclosing all the information regarding the diagnosis, alternative methods of treatment with their relative risks and benefits and known material risks of procedure. The doctrine is well-established in countries like, USA, UK, Canada, Australia and Sweden. A doctor will be held liable, if he fails to obtain informed consent of a patient. In India, the concept is slowly developing. Under the Consumer Protection Act, the definition of the expression 'deficiency in service' might cover cases of lack of informed consent also, and cases are likely to come up in this area. The doctrine, however, has certain exceptions. They are :

Therapeutic Privilege

A doctor can invoke the protection of therapeutic privilege for non-disclosure in non elective treatment i.e. one that is essential from a therapeutic point of view, where there is no choice to the patient but to opt for it. In such cases, if the doctor believes on a reasonable assessment of the patient's condition that the disclosure will be detrimental to the patient's health, the doctor may exercise this privilege. This is known as therapeutic privilege. However, this cannot be extended to an elective treatment or a non-life threatening treatment like sterilization operation i.e one that a patient is free to choose.

Emergency

In circumstances of great urgency warranting immediate treatment to save the life of a patient and there is no time to disclose the risks, the nature of the proposed treatment and the alternative methods of treatment, the doctor can withhold the information with immunity from liability.

Waiver

A patient may repose his confidence on a doctor and request him not to disclose any information to him, in which case the doctor may get a privilege to withhold the information.

In case of person suffering from a notifiable disease, the consent may not be obtained. For instance, in the case of AIDS/HIV positive patients, the Supreme Court has held that wherever there is a danger of transmitting HIV infection to the 'would be spouse' the doctor/hospital would be under a duty to inform the person of the danger.[38] Not doing so would make the doctor/hospital *participiens criminis* under sections 269 and 270 of the IPC.

Conclusion

In conclusion it may be mentioned that the Consumer Protection Act does not cast any additional obligation on the medical profession. Even before the Act came into force, doctors and hospitals were held liable in damages for medical negligence by Civil Courts in a large number of cases. It is not the case of the medical profession that they are not accountable for medical negligence. Their main objection is that the consumer courts do not have the expertise in deciding cases involving medical malpractices and as such they are not competent to decide such cases. Further, they are governed by the Indian Medical Council Act and as such are subject to the disciplinary control of the Indian Medical Council/ the State Medical Councils and as such should be excluded from the purview of the Consumer Protection Act. Both these objections have been convincingly rejected by the Supreme Court.

As has been rightly observed by the Supreme Court "It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patients. It is worth reiterating that doctors and hospitals are not liable for everything that goes wrong to the patient. They are only required to exercise reasonable care and skill in their treatment of their patients. They will be held guilty of negligence only if they fall short of the standards of reasonably skilful medical practitioners. The Consumer Protection Act will be a standing reminder to the medical professionals of their duties and responsibilities to the patients and the consequences of the breach of such duties.

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[38]Mr X V Hospital Z, 1998 (7) JT 626

Annexure

MODEL FORM OF NOTICE, COMPLAINT, AFFIDAVIT AND REPLY

MODEL FORM-1 NOTICE BEFORE FILING THE COMPLAINT

Name and address

.....

(of the trader, dealer, firm, company, etc.)

.....

(Complete address)

IN RE: (Mention the goods/services complained of giving details)

.....

Dear Sir,

This is to bring to your kind notice that 1 had purchased…….....from your ..... for a consideration of Rs……..... paid in cash vide your cash memo/Receipt/ Invoice No.....(or through cheque No .....dated..... drawn on .....bank for a sum of Rs .....

The said goods are suffering from the following defects:

(i) .....

(ii) .....etc

I have reported the above matter to you several times (give reference of earlier letters, if any) but despite all my pleadings you have not made good the defect in the goods (ordeficiency in services) which is indeed regrettable and highly unbusiness like. On account of your aforesaid dereliction of duty and failure and neglect to rectify the same I have suffered losses/incurred expenses

.....

.....

.....

.....

.....

(give details)

which you are liable to compensate to me.
You are hereby finally called upon to

(i) remove the said defects in the goods

and/or

(ii) replace the goods with new goods

and/or

(iii) return the price/ charges paid

(iv) pay compensation for financial loss/injury/interest suffered due to your negligence .....
(give details)

in the sum of Rs ..... with interest @..... % per annum within.....days of the receipt of this notice failing which 1 shall be constrained to initiate against you for redressal of my aforesaid grievances and recovery of the aforesaid amount such proceedings, both civil and criminal as are warranted by law, besides filing a complaint under the statutory provisions of The Consumer Protection Act, 1986 exclusively at your own risk, cost, responsibility and consequences which please note.

Place.....
Dated..... Sd/-
.....

Model Form –2 -The complaint

BEFORE THE HON'BLE DISTRICT CONSUMER DISPUTES
REDRESSAL FORUM AT .....
OR
BEFORE THE HON'BLE STATE CONSUMER DISPUTES
REDRESSAL COMMISSION AT .....
OR
BEFORE THE HON'BLE NATIONAL CONSUMER DISPUTES REDRESSAL
COMMISSION AT NEW DELHI
IN RE: COMPLAINT NO .....OF 20.....IN THE MATTER OF:
(FULL NAME)(DESCRIPTION)(COMPLETE ADDRESS)

..... Complainant

VERSUS

(FULL NAME)(DESCRIPTION)(COMPLETE ADDRESS)

..... Opposite Party/ Parties

COMPLAINT UNDER SECTION 12/SECTION 17/ SECTION 21 OF THE CONSUMER PROTECTION ACT, 1986.

RESPECTFULLY SHOWETH

INTRODUCTION

(In this opening paragraph the complainant should give his introduction as well as that of the opposite party/parties.

TRANSACTION

(In this paragraph complainant should describe the transaction complained of, *i.e*., particulars and details of goods/ services availed; items of goods/kind and nature of service; date of purchase of goods/ availing of service; amount paid as price/consideration, full or in part towards the goods/service; Photocopies of the bill/cash memo/ voucher or receipt should be attached and properly marked as Annexure – A,B,C and so forth or 1,2,3 and so forth.)

DEFECT DEFICIENCY

(In this paragraph complainant should explain the grievance, *i.e*., whether the loss or damage has been caused by some unfair trade practice or restrictive trade practice adopted by any trader or there is some defect in the goods or there has been deficiency in service or the trader has charged excessive price for the goods. One should elucidate the nature of unfair trade practice adopted by the trader, *i.e*., relating to the quality of goods/services; sponsorship; warranty or guarantee for such period promised. The nature and extent of defects in goods should be explained and so should the deficiency in service. In case of excessive price one should specify the details of actual price fixed by or under any law for the time being in force or as set out on goods and their packing vis-a-vis the price charged by the trader. Complaint can also be filed against offer for sale of goods hazardous to life and safety when used. You should narrate your grievance and rest assured it is being read /heard by compassionate and pragmatic judges. Photo-copies of relevant documents must be attached.)

RECTIFICATION

(In this paragraph complainant should highlight what attempts were made by him to set things right, *i.e*., personal visits or negotiations; communication in writing if any; whether any legal notice was got served and / or whether he has approached any other agency for redressal like, Civil or Criminal Court of competent jurisdiction; the stage of its proceedings, its outcome, if any, alongwith copies (certified preferably) of such proceedings. The nature of response got from the trader when irregularities were brought to his notice, should also be disclosed here).

OTHER PROVISIONS

(In this paragraph reference may be made to any other law or rules or regulations of particular procedure which is applicable to the case and/ or which has been violated by the trader and consumer's rights under the same. There are incidental statutory obligations, which traders must

fulfil and in case of their failure to do so the case in *prima facie* made out and Forum would take cognizance).

EVIDENCE

(In this paragraph complainant should give details of documents and/ or witnesses he will rely upon to substantiate his case. The documents attached as Annexures as stated above may be incorporated in a proper list and a list of witnesses (if any) may be filed similarly).The annexures should be attested as "True Copy".

JURISDICTION

(In this paragraph complainant should liquidate the claim in the complaint, *i.e*., upto 20 lakh; 20 lakh to one crore; or above and set out the pecuniary jurisdiction of the Forum/ State Commission/National Commission, as the case may be. The territorial Jurisdiction should be highlighted to obviate any formal objection).

LIMITATION

That the present complaint is being filed within the period prescribed under section 24A of the Act.

RELIEFCLAIMED

(In this paragraph complainant should describe the nature of relief he wants to claim. *i.e*., for removal of defects in goods or deficiency in service; replacement with new goods; return of the price or charges, etc., paid and/or compensation on account of financial loss or injury or detriment to his interest occasioned by negligence of the opposite party and elucidate how you have calculated the amount of compensation claimed).

PRAYERCLAUSE

It is, therefore, most respectfully prayed that this Hon'ble Forum/

Commission may kindly be pleased to ..... (Details of reliefs which complainant wants the Court to grant)

Place: ..... Dated: .....

Complainant Through .....
(Advocate or Consumer Association, etc.)

Verification.

I, ... the complainant above named, do hereby solemnly verify that the contents of my above complaint are true and correct to my knowledge, no part of it is false and nothing material has been concealed therein. Verified this ..... day of ..... 20 ..... at ..... Complainant.

Note: Although it is not compulsory, complainant may file an affidavit in support of the complaint which adds to the truth and veracity of allegations and gives credibility to the cause. It need not be on a Stamp paper but one should get it attested from an Oath Commissioner appointed by a High Court. The format is just as simple.

Model Form –3- Affidavit in support of the complaint

BEFORE THE HON'BLE……...IN RE: COMPLAINT NO……..OF 20……...IN THE MATTER OF:

……

..... Complainant

.....

..... Opposite party

AFFIDAVIT

Affidavit of
Shri……..S/o. Shri .....
aged……years, resident of .....
.....

(l) That I am complainant in the above case, thoroughly conversant with the facts and circumstances of the present case and am competent to swear this affidavit.

(2) That the facts contained in my accompanying complaint, the contents of which have not been repeated herein for the sake of brevity may be read as an integral part of this affidavit and are true and correct to my knowledge.

Deponent

Verification:

I, the above named deponent do hereby solemnly verify that the contents of my above affidavit are true and correct to my knowledge, no part of it is false and nothing material has been concealed therein.
Verified this……day of…….. 20…….
at……..

Deponent

Model Form –4- Reply by the trader to the complaint

BEFORE THE HON'BLE ……..THE CONSUMER DISPUTES REDRESSAL FORUM/COMMISSION AT……

IN RE: COMPLAINT NO. ……..OF 20……..

IN THE MATTER OF:

.....Complainant

VERSUS

.....Opposite Party

DATE OF HEARING……

WRITTEN STATEMENT ON BEHALF OF RESPONDENTS TO THE COMPLAINT OF THE COMPLAINANT

RESPECTFULLY SHOWETH:

Preliminary Objections

1 That the present complaint is wholly misconceived, groundless and unsustainable in law and is liable to be dismissed as such. The transaction question was without any consideration and free of charge.

2 That this Hon'ble Forum/ Commission has no jurisdiction to entertain and adjudicate upon the dispute involved in the complaint in as much as it is not a consumer dispute and does not fall within the ambit of the provisions of the Consumer Protection Act,1986, hereinafter called the said Act and is exclusively triable by a Civil Court and as such the complaint is liable to be dismissed summarily on this score alone.

3. That the dispute raised by the complainant in the present complaint is manifestly outside the purview of the said Act and in any event, the Act is in addition to and not in derogation of the provisions of the..... Act. The proceedings initiated by the complainant under the Act are honest, null and void and without jurisdiction.

4. That the definitions of 'Complainant', 'Complaint' 'Consumer Dispute' and 'Service', as defined in Section 2(1) of the said Act do not cover the claims arising under the present dispute and that from the aforesaid definitions, the complainant is not' consumer' and the controversy involved in the complaint is not a 'consumer dispute'.

5. That the present complaint is baseless and flagrant abuse of process of law to harass and blackmail the answering respondent.

6. That the complainant has no *locus standi* to initiate the present proceedings.

7. That the complaint is bad for non-joinder of necessary and proper party and is liable to be dismissed on this score alone.

8. That the complainant has already filed a Civil Suit for ..... in a court of competent jurisdiction which is pending disposal in the Court of ..... and the present complaint has become infructuous.

9. That the present complaint is hopelessly barred by limitation.

10. That this Hon'ble Forum/Commission has no territorial or pecuniary jurisdiction in as much as the amount involved in the subject-matter exceeds/is less than the limit prescribed by Section 11(1) Section 17(1)(a)(i)/Section 21(a)(i) of the Act.
11. That the present complaint is frivolous and vexatious and liable to be dismissed under Section 26 of the Act.
12. That the present complaint has not been verified in accordance with law.

On Merits:

In these paragraphs respondent must reply each and every allegation made and contention raised by the complainant, factual and legal as well. In case one has already made good the defect or deficiency, elucidate steps taken. One may have, *inter alia,* following goods defences as well.

1. That the transaction entered between the parties to the above dispute is a commercial one and the complainant cannot claim any relief from this authority in as much as ..... (give details)
2. That the complainant had purchased the goods as a seller/retailer/distributor, etc., for consideration of resale and as such is barred from moving this Hon'ble Forum/Commission for the alleged defect/deficiency etc. in as much as ..... (give details)
3. That the complainant has already availed the warranty period during which the answering respondent has repaired/replaced the goods in question. The complainant is thus legally stopped from enforcing this complaint or to take benefit of his own wrong.
4. That the present complaint is an exaggeration beyond proportion despite the fact that the complainant is himself responsible for delay and laches in as much as he has on several occasions changed his option for class of goods/type of allotment scheme of flats/model of vehicle, etc ..... (give details)
5. That the answering respondent is well within his rights to charge extra price for the subject-matter of the above dispute in as much as time was not the essence of delivery thereof. The complainant is

liable to pay the increased price w.e.f ..... on account of escalation due to excise duty/budgetary provisions etc. in as much as….. (give details)

6. That the complainant has accepted the goods and/or service towards repair/replacement etc. without protest and the present complaint is merely an after thought.

7. That without prejudice the answering respondent as a gesture of goodwill is prepared to…… ..... (give details of rectification, if any, which can be done in case of minor or tolerable problems to avoid harassment to consumer and litigation problems)

The allegations of defect/default/negligence and/or deficiency in service are wholly misconceived, groundless, false, untenable in law besides being extraneous and irrelevant having regard to the facts and circumstances of the matter under reference.

Prayer clause with all the submissions made therein is absolutely wrong and is emphatically denied. Complainant is not entitled to any relief whatsoever and is not entitled Model Form costs.

Sd/-

(Opposite Party)

Place: .....

Dated: ..... through

(Advocate)

Verification

I, ... the above named respondent do hereby verify that the contents of paras ..... to ..... of the written statement on merits are true and correct to my knowledge. While paras ..... to ..... of preliminary objections and ..... to ..... of reply on merits are true to my information, belief and legal advice received by me and believed to be true while the last para is prayer to this Hon'ble Court. Verified at ..... this .....day of.....20.....

Sd/-

(Opposite party)