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Indian Medical Association Vs V.P. Shantha and Others

Civil Appeal No. 688 of 1993 Etc. Etc.

Court: Supreme Court of India

Date of Decision: Nov. 13, 1995

Acts Referred:
Constitution of India, 1950 â€" Article 265#Consumer Protection Act, 1986 â€" Section 10, 12, 13, 14, 14(1)

Citation: AIR 1996 SC 550 : (1996) 1 BLJR 281 : (1996) 98 BOMLR 343 : (1996) 86 CompCas 806 : (1996) 1 CTC 119 : (1995) 2 GLR 1806 : (1995) 8 JT 119 : (1996) 6 KarLJ 689 : (1996) 1 LW 206 : (1996) 112 PLR 1 : (1995) 6 SCALE 273 : (1995) 6 SCC 651 : (1995) 5 SCR 110

Hon'ble Judges: S. C. Agrawal, J; Kuldip Singh Singh, J; B. L. Hansaria, J

Bench: Full Bench

Advocate: H.N. Salve, Rajeev Dhavan, P.S. Poti, C. Sitaramiah, M.N. Krishnamani, P.N. Lekhi, Rajiv Dutta, G. Prakash, L.K. Pandy, M.P. Vinod, Pramod Kumar, Gopal Singh, Naresh Mathur, Krishan Mahajan, A.D.N. Rao, A.S. Rawat, T.G.N. Nair, Shailendra Bhardwaj, L.R. Singh, Vimla Sinha, Meenakshi Grover, Yunus Malik, K.R. Nambiar, R.C. Verma, S.R. Setia, M.K. Garg, Rajiv Dhavan, P.H. Parekh, Fazl, Lucy, M. Karanjawala, P. Narasimhan, Gopal Singh, Rakesh Luthra, M.K.D. Namboodiry, K.J. John, Chandra Shekhar, Indu Malhotra, Anil Makhija, G. Prabhakar, D. Bharathi Reddy, Rani Chabbra, Prashant Bhushan, K.S. Bhati, S. Balakrishnan, S. Prasad, P.V. Yogeshwaran and Shoba R, for the Appellant;

Final Decision: Disposed Of

Judgement

S.C. Agrawal, J.
Leave granted in SLP (C) Nos. 18497/93 and 21755/94. Delay condoned and leave granted in SLP(C) Nos. 18445-

73/94.

2. These appeals, special leave petitions and the Writ Petition raise a common question, viz., whether and, if so, in what circumstances, a medical

practitioner can be regarded as rendering "service" u/s 2(1)(o) of the Consumer Protection Act, 1986 (hereinafter referred to as "the Act").

Connected with this question is the question whether the service rendered at a hospital/nursing home can be regarded as ''service'' u/s 2(1)(o) of

the Act. These questions have been considered by various High Courts as well as by the National Consumer Disputes Redressal Commission

(hereinafter referred to as ''the National Commission'').

3. In 952720 , a Division Bench of Andhra Pradesh High Court has held that service rendered for consideration by private medical practitioners,

private hospitals and nursing homes must be construed as ''service'' for the purpose of Section 2(1)(o) of the Act and the persons availing such

services are ''consumers'' within the meaning of Section 2(1)(d) of the Act.

4. In Dr. C.S. Subramanian v. Kumarasamy and Anr. (1994) 1 MLJ 438, a Division Bench of the Madras High Court has, however, taken a

different view. It has been held that the services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment,

both medicinal and surgical, would not come within the definition of ''service'' u/s 2(1)(o) of the Act and a patient who undergoes treatment under a

medical practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical, cannot be considered to be a ''consumer'' within

the meaning of Section 2(1)(d) of the Act; but the medical practitioners or hospitals undertaking and providing paramedical services of all kinds

and categories cannot claim similar immunity from the provisions of the Act and that they would fall, to the extent of such paramedical services

rendered by them, within the definition of ''service'' and a person availing of such service would be a ''consumer'' within the meaning of the Act.

C.A. Nos. 4664-65/94 and Civil Appeal arising out of SLP(C) No. 21775/94 filed by the complainants and Civil Appeals arising out of SLP(C)

Nos. 18445-73/94 filed by the Union of India are directed against the said judgment of the Madras High Court.

5. The National Commission by its judgment and order dated December 15, 1989 in First Appeal No. 2 of 1989 has held that persons who avail

themselves of the facility of medical treatment in Government hospitals are not ""consumers"" and the said facility offered in the Government hospitals

cannot be regarded as service ""hired"" for ""consideration"". It has been held that the payment of direct or indirect taxes by the public does not

constitute ""consideration"" paid for hiring the services rendered in the Government hospitals. It has also been held that contribution made by a

Government employee in the Central Government Health Scheme or such other similar Scheme does not make him a ""consumer"" within the

meaning of the Act. Civil Appeal arising out of SLP(C) No. 18497/93 has been filed by Consumer Unity Trust Society, a recognised consumer

association, against this judgment of the National Commission.

6. By judgment dated April 21, 1992 in First Appeal Nos. 48 and 94 of 1991, the National Commission has held that the activity of providing

medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression ''service'' as

defined in Section 2(1)(o) of the Act and that in the event of any deficiency in the performance of such service, the aggrieved party can invoke the

remedies provided under the Act by filing a complaint before the Consumer Forum having jurisdiction. It has also been held that the legal

representatives of the deceased patients who were undergoing treatment in the hospital are ''consumers'' under the Act and are competent to

maintain the complaint. C.A. Nos. 688/93 and 689/93 filed by the Indian Medical Association and SLP (C) Nos. 6885 and 6950/92 filed by M/s.

Cosmopolitan Hospital are directed against the said judgment of the National Commission. The said judgment dated April 21, 1992 was followed

by the National Commission in its judgment dated November 16, 1992 in First Appeal No. 97 of 1991 (Dr. Sr. Louie and Anr. v. Smt. Kannolil

Pathumma & Anr.). SLP No. 351/93 has been filed by Josgiri Hospital and Nursing Home against the said judgment of the National Commission.

7. By judgment dated May 3, 1993 in O.P. No. 93/92, the National Commission has held that since the treatment that was given to the

complainant''s deceased husband in the nursing home belonging to the opposite party was totally free of any charge, it did not constitute ''service''

as defined under the Act and the complainant was not entitled to seek any relief under the Act. C.A. No. 254/94 has been filed by the complainant

against the said judgment of the National Commission.

8. Writ Petition No. 16 of 1994 has been filed under Article 32 of the Constitution by Cosmopolitan Hospital (P) Ltd., and Dr. K. Venogopolan

Nair (petitioners in SLP (C) Nos. 6885 and 6950/92) wherein the said petitioners have assailed the validity of the provisions of the Act, insofar as

they are held to be applicable to the medical profession, as being violative of Articles 14 and 19(1)(g) of the Constitution.

9. Shri K. Parasaran, Shri Harish Salve, Shri A.M. Singhvi, Shri Krishnamani and Shri S. Balakrishnan have addressed the court on behalf of the

medical profession and the hospitals and Shri Rajeev Dhavan has presented the case of the complainants. Before we proceed to deal with their

contentions we would briefly take note of the background and the scheme of the Act.

10. On April 9, 1985, the General Assembly of the United Nations, by Consumer Protection Resolution No. 39/248, adopted the guidelines to

provide a framework for Governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection

policies and legislation. The objectives of the said guidelines include assisting countries in achieving or maintaining adequate protection for their

population as consumers and encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services

to the consumers. The legitimate needs which the guidelines are intended to meet include the protection of consumers from hazards to their health

and safety and availability of effective consumer redress. Keeping in view the said guidelines, the Act was enacted by Parliament to provide for the

better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other

authorities for the settlement of consumers'' disputes and for matters connected therewith. The Act sets up a three-tier structure for the redressal of

consumer grievances. At the lowest level, i.e., the District level, is the Consumer Disputes Redressal Forum known as ''the District Forum''; at the

next higher level, i.e., the State level, is the Consumer Disputes Redressal Commission known as ''the State Commission'' and at the highest level is

the National Commission. (Section 9). The jurisdiction of these three Consumer Disputes Redressal Agencies is based on the pecuniary limit of the

claim made by the complainant. An appeal lies to the State Commission against an order made by the District Forum (Section 15) and an appeal

lies to the National Commission against an order made by the State Commission on a complaint filed before it or in an appeal against the order

passed by the District Forum. (Section 19). The State Commission can exercise revisional powers on grounds similar to those contained in Section

115 CPC in relation to a consumer dispute pending before or decided by a District Forum [Section 17(b)] and the National Commission has

similar revisional jurisdiction in respect of a consumer dispute pending before or decided by a State Commission. [Section 21(b)]. Further, there is

a provision for appeal to this Court from an order made by the National Commission on a complaint or on an appeal against the order of a State

Commission. (Section 23). By virtue of the definition of complainant in Section 2(1)(c), the Act affords protection to the consumer against unfair

trade practice or a restrictive trade practice adopted by any trader, defect in the goods bought or agreed to be bought by the consumer, deficiency

in the service hired or availed of or agreed to be hired or availed of by the consumer, charging by a trader price in excess of the price fixed by or

under any law for the time being in force or displayed on the goods or any package containing such goods and offering for sale to public, goods

which will be hazardous to life and safety when used, in contravention of the provisions of any law for the time being in force requiring traders to

display information in regard to the contents, manner and effect of use of such goods. The expression ""complainant"", as defined in Section 2(1)(b),

is comprehensive to enable the consumer as well as any voluntary consumer association registered under the Companies Act, 1956 or under any

other law for the time being in force, or the Central Government or any State Government or one or more consumers where there are numerous

consumers having the same interest, to file a complaint before the appropriate Consumer Disputes Redressal Agency and the consumer dispute

raised in such complaint is settled by the said agency in accordance with the procedure laid down in Section 13 of the Act which prescribes that

the District Forum (as well as the State Commission and the National Commission) shall have the same power as are vested in a Civil Court under

the CPC in respect of summoning and enforcing attendance of any defendant or witness and examining the witness on oath; discovery and

production of any document or other material object producible as evidence; the reception of evidence on affidavits; the requisitioning of the report

of the concerned analysis or test from the appropriate laboratory or from any other relevant source; issuing of any commission for the examination

of any witness; and any other matter which may be prescribed. Section 14 makes provisions for the nature of reliefs that can be granted to the

complainant on such a complaint. The provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time

being in force. (Section 3).

11. In this group of cases we are not concerned with goods and we are only concerned with rendering of services. Since the Act gives protection

to the consumer in respect of service rendered to him, the expression ""service"" in the Act has to be construed keeping in view the definition of

consumer"" in the Act. It is, therefore, necessary to set out the definition of the expression ''consumer'' contained in Section 2(1)(d) insofar as it

relates to services and the definition of the expression ''service'' contained in Section 2(1)(o) of the Act. The said provisions are as follow:

Section 2(1)(d) ""consumer"" means any person who, -(i) omitted

(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 service for consideration paid or

promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the

first mentioned person,

Explanation. - Omitted

Section 2(1)(o) : ""service"" means service of any description which is made available to the potential users and 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

construction), entertainment, amusement or the purveying of news or other information, but does not include rendering of any service free of charge

or under a contract of personal service;

12. The words ""or avails of after the word ""hires"" in Section 2(1)(d)(ii) and the words ""housing construction"" in Section 2(1)(o) were inserted by

the Act 50 of 1993.

13. 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 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.

14. The definition of ''service'' as contained in Section 2(1)(o) of the Act has been construed by this Court in 286553 . After pointing out that the

said definition is in three parts, the Court has observed:

The main clause itself is very wide. It applies to any service made available to potential users. The words ''any'' and ''potential'' are significant. Both

are of wide amplitude. The word ''any'' dictionary means; one or some or all''. In Black''s Law Dictionary it is explained thus, ""word ''any'' has a

diversity of meaning and may be employed to indicate ''all'' or ''every'' as well as ''some'' or ''one'' and its meaning in a given statute depends upon

the context and the subject-matter of the statute"". The use of the word ''any'' in the context it has been used in Clause (o) indicates that it has been

used in wider sense extending from one to all. The other word ''potential'' is again very wide. In Oxford Dictionary it is defined as ''capable of

coming into being, possibility''. In Black''s Law Dictionary it is defined ""existing in possibility but not in act. Naturally and probably expected to

come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the

successive future instalments or payments on a contract or engagement already made."" In other words service which is not only extended to actual

users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential

users.(p.255)

15. The contention that the entire objective of the Act is to protect the consumer against malpractices in business was rejected with the

observations:

The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of

service to be more objective and caretaking. (p.256)

16. Referring to the inclusive part of the definition it was said:

The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except

when it is free of charge or under a constraint of personal service is included in it. (p.257)

17. In that case the Court was dealing with the question whether housing construction could be regarded as service u/s 2(1)(o) of the Act. While

the matter was pending in this Court, ""housing construction"" was inserted in the inclusive part by Ordinance No. 24 of 1993. Holding that housing

activity is a service and was covered by the main part of the definition, the Court observed:

...the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but

even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the

consumer. (p.256)

18. In the present case the inclusive part of the definition of ""service"" is not applicable and we are required to deal with the questions falling for

consideration in the light of the main part and the exclusionary part of the definition. The exclusionary part will require consideration only if it is

found that in the matter of consultation, diagnosis and treatment a medical practitioner or a hospital/nursing home renders a service falling within the

main part of the definition contained in Section 2(1)(o) of the Act. We have, therefore, to determine whether medical practitioners and

hospitals/nursing homes can be regarded as rendering a ""service"" as contemplated in the main part of Section 2(1)(o). This determination has to be

made in the light of the aforementioned observations in Lucknow Development Authority (supra). We will first examine this question in relation to

medical practitioners.

19. It has been contended that in law there is a distinction between a profession and an occupation and that while a person engaged in an

occupation renders service which falls within the ambit of Section 2(1)(o) the service rendered by a person belonging to a profession does not fall

within the ambit of the said provision and, therefore, medical practitioners who belong to the medical profession are not covered by the provisions

of the Act. It has been urged that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of

Medical Ethics made by the Medical Council of India, as approved by the Government of India u/s 3 of the Indian Medical Council Act, 1956

which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or

State Medical Councils against a person for professional misconduct.

20. While expressing his reluctance to propound a comprehensive definition of a ''profession'', Scrutton L.J. has said """'profession'' in the present

use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture,

or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement

for the production or sale of commodities. The line of demarcation may vary from time to time. The word ''profession'' used to be confined to the

three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning"" (See : Commissioners of Inland Revenue v.

Maxse, 1919 1 K.B. 647.

21. According to Rupert M. Jackson and John L.Powell the occupations which are regarded as professions have four characteristics, viz.,

(i) the nature of the work which is skilled and specialized and a substantial part is mental rather than manual;

(ii) commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a

particular client or patient;

(iii) professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters

of conduct and ethics; and

(iv) high status in the community.

22. The learned authors have stated that during the twentieth century an increasing number of occupations have been seeking and achieving

professional"" status and that this has led inevitably to some blurring of the features which traditionally distinguish the professions from other

occupations. In the context of the law relating to Professional Negligence the learned authors have accorded professional status to seven specific

occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical

practitioners and (vii) insurance brokers. (See : Jackson & Powell on Professional Negligence, paras 1-01 and 1-03, 3rd Edn.).

23. In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success

cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man"s control. In devising a

rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above,

the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should

exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to

exercise reasonable care in giving advice or performing services. (See : Jackson & Powell (supra), paras 1-04, 1-05 and 1-56). Immunity from

suit was enjoyed by certain professions on the grounds of public interest. The trend is towards narrowing of such immunity and it is no longer

available to architects in respect of certificates negligently given and to mutual valuers. Earlier, barristers were enjoying complete immunity but now

even for them the field is limited to work done in court and to a small category of pre- trial work which is directly related to what transpires in

court. (See : Jackson & Powell, (supra), para 1-66; Saif Ali v. Sidney Mitchell & Co. (1980) 1 A.C. 198; Rees v. Sinclair (1974) 1 N.Z.L.R.

180 and Giannarelli v. Wraith (1988) 81 A.L.R. 417. Medical practitioners do not enjoy any immunity and they can be sued in contract or tort on

the ground that they have failed to exercise reasonable skill and care.

24. It would thus appear that 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.

25. Referring to the changing position with regard to the relationship between the medical practitioners and the patients in the United Kingdom, it

has been said:

Where, then, does the doctor stand today in relation to society? To some extent, he is a servant of the public, a public which is widely (though not

always well) informed on medical matters. Society is conditioned to distrust paternalism and the modern medical practitioner has little wish to be

paternalistic. The new talk is of ''producers and consumers'' and the concept that ''he who pays the piper calls the tune'''' is established both within

the profession and in its relationships with patients. The competent patient''s inalienable rights to understand his treatment and to accept or refuse it

are now well established. (pp. 16-17)

Consumerism is now firmly established in medical practice and this has been encouraged on a wide scale by government in the United Kingdom

through the introduction of ''charters''. Complaint is central to this ethos - and the notion that blame must be attributed, and compensated, has a

high priority. (p. 192)

(Mason & McCall Smith : Law and Medical Ethics, 4th Edn.)

26. In Arizona v. Maricopa County Medical Society 457 US 332 : 73 L.Ed. (2d.) 48, two Arizona county medical societies formed two

foundations for medical care to promote fee-for- service medicine and to provide the community with a competitive alternative to existing health

insurance plans and by agreement amongst the doctors established the schedule of maximum fees that participating doctors agreed to accept as

payment in full for services performed for patients insured under plans. It was held that the maximum fee agreement, as price fixing agreements, are

per se unlawful under the Sherman Act. It was observed:

Nor does the fact doctors - rather than non-professionals - are the parties to the price-fixing agreements support the respondents'' position.... The

respondents claim for relief from the per se rule is simply that the doctors'' agreement not to charge certain insureds more than a fixed price

facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for customers to pay does

not distinguish the medical profession from any other provider of goods or services. (pp. 348-49, 61-62)

27. 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.

28. Shri Harish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression "which is made available to

potential users" contained in Section 2(1)(o) of the Act, medical practitioners are not contemplated by Parliament to be covered within the

provisions of the Act. He has urged that the said expression is indicative of the kind of service the law contemplates, namely, service of an

institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also

been placed on the word "hires" in Sub-clause (ii) of the definition of "consumer" contained in Section 2(1)(d) of the Act. We are unable to uphold

this contention. The word "hires" in Section 2(1)(d)(ii) has been used in the same sense as "avails of as would be evident from the words "when

such services are availed of in the latter part of Section 2(1)(d)(ii). By inserting the words "or avails of after the word "hires" in Section 2(1)(d)(ii)

by the Amendment Act of 1993, Parliament has clearly indicated that the word "hires" has been used in the same sense as "avails of. The said

amendment only clarifies what was implicit earlier. The word "use" also means "to avail oneself of. (See : Black"s Law Dictionary, 6th Edn., at p.

1541). The word "user" in the expression "which is made available to potential users" in the definition of "service" in Section 2(1)(o) has to be

construed having regard to the definition of "consumer" in Section 2(1)(d)(ii) and, if so construed, it means "availing of services". From the use of

the word "potential users" it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament

to be covered within the expression "service" as contained in Section 2(1)(o).

29. Shri Harish Salve has also placed reliance on the definition of the expression "deficiency" as contained in Section 2(1)(g) of the Act which

provides as follows:

Section 2(1)(g) : ""deficiency"" means any fault, imperfection, 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;

30. The submission of Shri Salve is that under the said clause the deficiency with regard to fault, imperfection, shortcoming or inadequacy in

respect of a service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical

services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said

to have been covered by the expression ""service"" as defined in Section 2(1)(o). We are unable to agree. While construing the scope of the

provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions contained in Section 14 of the Act

which indicate the reliefs that can be granted on a complaint filed under the Act. In respect of deficiency in service, the following reliefs can be

granted:

(i) return of the charges paid by the complainant. [Clause (c)]

(ii) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the

negligence of the opposite party. [Clause (d)]

(iii) removal of the defects or deficiencies in the services in question. [Clause (e)]

31. Section 14(1)(d) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the

negligence of the opposite party. A determination about deficiency in service for the purpose of Section 2(1)(g) has, therefore, to be made by

applying the same test as is applied in an action for damages for negligence. The standard of care which is required from medical practitioners as

laid down by McNair J. in his direction to the jury in Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582, has been accepted by

the House of Lords in a number of cases. (See : Whitehouse v. Jordan (1981) 1 WLR 246; Maynard v. West Midlands, Regional Health

Authority (1984) 1 WLR 634 and Sidaway v. Governors of Bethlem Royal Hospital 1985 AC 871. In Bolam (supra) McNair J has said:

But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or

not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary

skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is

sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular article (p. 586)

32. In an action for negligence in tort against a surgeon this Court, in 290883 , has held:

The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly

undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a

duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of

that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a

reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care

and competence judged in the light of the particular circumstances of each case is what the law require. (p.213)

33. It is, therefore, not possible to hold that in view of the definition of ""deficiency"" as contained in Section 2(1)(g) medical practitioners must be

treated to be excluded from the ambit of the Act and the service rendered by them is not covered u/s 2(1)(o).

34. Another contention that has been urged by learned Counsel appearing for the medical profession to exclude medical practitioners from the

ambit of the Act is that the composition of the District Forum, the State Commission and the National Commission is such that they cannot fully

appreciate the complex issues which may arise for determination and further that the procedure that is followed by these bodies for determination

of issues before them is not suitable for the determination of the complicated questions which arise in respect of claims for negligence in respect of

the services rendered by medical practitioners. The provisions with regard to the composition of the District Forum are contained in Section 10 of

the Act which provides that the President of the Forum shall be a person who is or who has been or is qualified to be a District Judge and the other

two members shall be persons of ability, integrity and standing, having adequate knowledge or experience or, or having shown capacity in dealing

with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration and one of them shall be a woman.

Similarly, with regard to the composition of the State Commission, it is provided in Section 16 of the Act that the President of the Commission shall

be a person who is or who has been a Judge of a High Court appointed by the State Government in consultation with the Chief Justice of the High

Court and that the other two members shall be persons of ability, integrity and standing, having adequate knowledge or experience of, or having

shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, and one of

them shall be a woman. The composition of the National Commission is governed by Section 20 of the Act which provides that the President of

the Commission shall be a person who is or who has been a Judge of the Supreme Court to be appointed by the Central Government after

consultation with the Chief Justice of India and four other members shall be persons of ability, integrity and standing having adequate knowledge or

experience of, or having shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or

administration and one of them shall be a woman. It will thus be seen that 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 has, however, been submitted that in case there is difference of opinion, the opinion of the majority is to

prevail and, therefore, the President may be out-voted by the other members and that there is no requirement that the members should have

adequate knowledge or experience in dealing with problems relating to medicine. 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. The said

knowledge and experience would enable them to handle the consumer disputes coming up before them for settlement in consonance with the

requirement of the Act. To say that the members must have adequate knowledge or experience in the field to which the goods or services, in

respect of which the complaint is made, are related would lead to impossible situations. At one time there will be two members in the District

Forum and they would have knowledge or experience in two fields which would mean that complaints in respect of goods or services relating to

other fields would be beyond the purview of the District Forum. Similarly in the State Commission there may be members having knowledge or

experience in fields other than the fields in which the members of the District Forum have knowledge or experience. It would mean that the goods

or services in respect of which the District Forum can entertain a complaint will be outside the purview of the State Commission. Same will be the

position in respect of the National Commission. Since the goods or services in respect of which complaint can be filed under the Act may relate to

number of fields it cannot be expected that the members of the Consumer Disputes Redressal Agencies must have expertise in the field to which

the goods or services in respect of which complaint is filed, are related. It will be for the parties to place the necessary material and the knowledge

and experience which the members will have in the fields indicated in the Act would enable them to arrive at their findings on the basis of that

material. It cannot, therefore, be said that since the members of the Consumer Disputes Redressal Agencies are not required to have knowledge

and experience in medicine, they are not in a position to deal with issues which may arise before them in proceedings arising out of complaints

about the deficiency in service rendered by medical practitioners.

35. Discussing the role of lay persons in decision making, Prof. White has referred to two divergent views. One view holds that lay adjudicators

are superior to professional judges in the application of general standards of conduct, in their notions of reasonableness, fairness and good faith and

that they act as "an antidote against excessive technicality" and "some guarantee that the law does not diverge too far from reality". The other view,

however, is that since they are not experts, lay decision makers present a very real danger that the dispute may not be resolved in accordance with

the prescribed rules of law and the adjudication of claims may be based on whether the claimant is seen as deserving rather than on the legal rules

of entitlement. Prof. White has indicated his preference for a Tribunal composed of a lawyer, as Chairman, and two lay members. Such a Tribunal,

according to Prof. White, would present an opportunity to develop a model of adjudication that combines the merits of lay decision making with

legal competence and participation of lay members would lead to general public confidence in the fairness of the process and widen the social

experience represented by the decision makers. Prof. White says that apart from their breadth of experience, the key role of lay members would

be in ensuring that procedures do not become too full of mystery and ensure that litigants before them are not reduced to passive spectators in a

process designed to resolve their disputes. (See : Prof. Robin C.A. White : The Administration of Justice, 2nd Edition, p. 345).

36. In the matter of Constitution of the District Forum, the State Commission and the National Commission the Act combines with legal

competence the merits of lay decision making by members having knowledge and experience in dealing with problems relating to various fields

which are connected with the object and purpose of the Act, namely, protection and interests of the consumers.

37. Moreover, there is a further safeguard of an appeal against the order made by the District Forum to the State Commission and against the

order made by the State Commission to the National Commission and a further appeal to this Court against the order made by the National

Commission. It cannot, therefore, 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.

38. As regards the procedure to be followed by these agencies in the matter of determination of the issues coming up for consideration it may be

stated that u/s 13(2)(b), it is provided that the District Forum shall proceed to settle the consumer disputes (i) on the basis of evidence brought to

its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or (ii)

on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case

within the time given by the Forum. In Section 13(4) of the Act it is further provided that the District Forum shall have the same powers as are

vested in the civil court under the CPC while trying a suit in respect of the following matters:

(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;

(ii) the discovery and production of any document or other material object producible as evidence;

(iii) the reception of evidence on affidavits;

(iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;

(v) issuing of any commission for the examination of any witness and

(vi) any other matter which may be prescribed.

The same provisions apply to proceedings before the State Commission and the National Commission. It has been urged that proceedings

involving negligence in the matter of rendering services by a medical practitioner would raise complicated questions requiring evidence of experts to

be recorded and that the procedure which is followed for determination of consumer disputes under the Act is summary in nature involving trial on

the basis of affidavits and is not suitable for determination of complicated questions. 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 in 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 (as in Chinkeow v. Government of Malaysia (1967) 1

WLR 813 or use of wrong gas during the course of an anesthetic 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. 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. We are, therefore, unable to hold that on the ground of composition of the

Consumer Disputes Redressal Agencies or on the ground of the procedure which is followed by the said Agencies for determining the issues

arising before them, the service rendered by the medical practitioners arc not intended to be included in the expression "service" as defined in

Section 2(1)(o) of the Act.

39. Keeping in view the wide amplitude of the definition of "service" in the main part of Section 2(1)(o) as construed by this Court in Lucknow

Development Authority (supra), we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical

practitioner from the ambit of the main part of Section 2(1)(o).

40. We may now proceed to consider the exclusionary part of the definition to see whether such service is excluded by the said part. The

exclusionary part excludes from the main part service rendered (i) free of charge; or (ii) under a contract of personal service.

41. Shri Salve has urged 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 and the service rendered by the medical practitioner to the patient is not ''service'' u/s 2(1)(o) of the Act.

This contention of Shri Salve ignores the well recognised distinction between a ''contract of service'' and a ''contract for services''. (See: Halsbury''s

Law of England, 4th Edn., Vol. 16, para 501 and 280046 . A ''contract for services'' implies a contract whereby one party undertakes to render

services e.g. professional or technical services, 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. (See : Oxford Companion to Law, p. 1134). 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. (See : Stroud''s Judicial Dictionary, 5th Edn., p. 540; Simmons v. Heath Laundry Co. (1910) 1 K.B. 543 and

Dharangadhara Chemical Works (supra) at p. 159). We entertain no doubt that Parliamentary draftsman was aware of this well accepted

distinction between ""contract of service"" and ""contract for services"" and has deliberately chosen the expression ''contract of service'' instead of the

expression ''contract for services'', in the exclusionary part of the definition of ''service'' in Section 2(1)(o). The reason being that an employer

cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the

adjective ''personal'' to the word ""service"" the nature of the contracts which are excluded is not altered. The said adjective only emphasizes that

what is sought to be excluded is personal service only. The expression ""contract of personal service"" in the exclusionary part of Section 2(1)(o)

must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the

ambit of the expression ""service"".

42. It is no doubt true that the relationship between a medical practitioner and a patient carries within its 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.

43. Shri Rajeev Dhavan has, however, submitted that the expression ''contract of personal service'' contained in Section 2(1)(o) of the Act has to

be confined to employment of domestic servants only. We do not find any merit in this submission. The expression ''personal service'' has a well

known legal connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act.

For that purpose a contract of personal service has been held to cover a civil servant, the managing agents of a company and a professor in the

University. (See : The High Commissioner for India v. I.M. Lall (1948) L.R. 75 I.A 225; Ram Kissendas Dhanuka v. Satya Charan Law (1949)

L.R. 77 LA. 128 and 280744 . There can be a contract of personal service if there is relationship of master and servant between a doctor and the

person availing his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the

expression ''service'' u/s 2(1)(o) of the Act by virtue of the exclusionary clause in the said definition.

44. The other part of exclusionary clause relates to services rendered ""free of charge"". 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.

There is no difficulty in respect of first two categories. Doctors and hospitals who render service without any charge whatsoever to every person

availing the service would not fall within the ambit of ""service"" u/s 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 third category of doctors and hospitals

do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis.

The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients, The service rendered

by such doctors and hospitals to paying patients undoubtedly fall within the ambit of Section 2(1)(o) of the Act.

45. The question for our consideration is whether the service rendered to patients fee of charge by the doctors and hospitals in category (iii) is

excluded by virtue of the exclusionary clause in Section 2(1)(o) of the Act. In our opinion the question has to be answered in the negative. In this

context it is necessary to bear in mind that the Act has been enacted ""to provide for the protection of the interests of ""consumers"" in the

background of the guidelines contained in the Consumer Protection Resolution passed by the U.N. General Assembly on April 9, 1985. These

guidelines refer to ""achieving or maintaining adequate protection for their population as consumers"" and ""encouraging high levels of ethical conduct

for those engaged in the protection and distribution of goods and services to the consumers"". The protection that is envisaged by the Act is,

therefore, protection for consumers as a class. The word ""users"" (in plural), in the phrase "potential users" in Section 2(1)(o) of the Act also gives

an indication that consumers as a class are contemplated. The definition of "complainant" contained in Section 2(b) of the Act which includes,

under Clause (ii), any voluntary consumer association, and Clauses (b) and (c) of Section 12 which enable a complaint to be filed by any

recognised consumer association or one or more consumers where there are numerous consumers, having the same interest, on behalf of or for the

benefit of all consumers so interested, also lend support to the view that the Act seeks to protect the interests of consumers as a class. To hold

otherwise would mean that the protection of the Act would be available to only those who can afford to pay and such protection would be denied

to those who cannot so afford, though they are the people who need the protection more. It is difficult to conceive that the legislature intended to

achieve such a result. Another consequence of adopting a construction, which would restrict the protection of the Act to persons who can afford to

pay for the services availed by them and deny such protection to those who are not in a position to pay for such services, would be that the

standard and quality of service rendered at an establishment would cease to be uniform. It would be of a higher standard and of better quality for

persons who arc in a position to pay for such service while the standard and quality of such service would be inferior for person who cannot afford

to pay for such service and who avail the service without payment. Such a consequence would defeat the object of the Act. All persons who avail

the services by doctors and hospitals in category (iii), are required to be treated on the same footing irrespective of the fact that some of them pay

for the service and others avail the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for

providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and

hospitals from services rendered to paying patients. 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 in such a situation 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"". We are, therefore, of opinion that 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"" u/s 2(1)(d) of the Act,

46. In respect of the hospitals/nursing homes (Government and non-Government) falling in category (i), i.e., where services are rendered free of

charge to everybody availing the services, it has been urged by Shri Dhavan that even though the service rendered at the hospital, being free of

charge, docs not fall within the ambit of Section 2(1)(o) of the Act in so far as the hospital is concerned, the said service would fall within the ambit

of Section 2(1)(o) since it is rendered by a medical officer employed in the hospital who is not rendering the service free of charge because the said

medical officer receives emoluments by way of salary for employment in the hospital. There is no merit in this contention. The medical officer who

is employed in the hospital renders the service on behalf of the hospital administration and if the service, as rendered by the hospital, does not fall

within the ambit of Section 2(1)(o), being free of charge, the same service cannot be treated as service u/s 2(1)(o) for the reason that it has been

rendered by a medical officer in the hospital who receives salary for employment in the hospital. 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"" u/s 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),

47. A contention has also been raised that even in the Government hospitals/health centers/dispensaries where services are rendered free of charge

to all the patients the provisions of the Act shall apply because the expenses of running the said hospitals are met by appropriation from the

Consolidated Fund which is raised from the taxes paid by the tax payers. We do not agree.

48. The essential characteristics of a tax are that (i) it is imposed under statutory power without the tax-payer''s consent and the payment is

enforced by law; (ii) it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax;

and (iii) it is part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay. (See : 277764 .

The tax paid by the person availing the service at a Government hospital cannot be treated as a consideration or charge for the service rendered at

the said hospital and such service though rendered free of charge does not cease to be so because the person availing the service happens to be a

tax payer.

49. Adverting to the individual doctors employed and serving in the hospitals, we are of the view that such doctors working in the hospitals/nursing

homes/dispensaries/whether Government or private - belonging to categories (ii) and (iii) above would be covered by the definition of ""service

under the Act and as such are amenable to the provisions of the Act along with the management of the hospital, etc. jointly and severally.

50. There may, however, be a case where a person has taken an insurance policy for medi-care 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. So also there may be cases where as a part of the conditions of service the

employer bears the expense of medical treatment of the employee and his family members dependent on him. The service rendered to him by a

medical practitioner would not be free of charge and would, therefore, constitute service u/s 2(1)(o).

51. Shri A.M. Singhvi has invited our attention to following observations of Lord Denning M.R. in Whitehouse v. Jordan and Anr. [1980] 1 All

E.R. 650:

Take heed of what has happened in the United States. "Medical malpractice" cases there are very worrying, especially as they are tried by juries

who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors insure but the premiums

become very high : and these have to be passed on in fees to the patients. Experienced practitioners are known to have refused to treat patients for

fear of being accused of negligence. Young men are even deterred from entering the profession because of the risks involved. In the interests of all,

we must avoid such consequences in England. Not only must we avoid excessive damages. We must say, and say firmly, that, in a professional

man, an error of judgment is not negligent.(p.658)

52. Relying on these observations learned Counsel has painted a grim picture that if medical practitioners are brought within the purview of the Act

the consequence would be huge increase in medical expenditure on account of insurance charges as well as tremendous increase in defensive

medicine and that medical practitioners may refuse to attend to medical emergencies and there will be no safeguards against frivolous and vexatious

complaints and consequent blackmail. We do not entertain such an apprehension. In the first place, it may be stated that the aforementioned

observations of Lord Denning were made in the context of substantive law governing actions for damages on the ground of negligence against

medical practitioners. There too the last sentence in the said observations that ""an error of judgment is not negligent"" has not been approved, in

appeal, by the House of Lords. (See : [1.981] 1 All E.R. 267). By holding that medical practitioners fall within the purview of the Act no change is

brought about in the substantive law governing claims for compensation on the ground of negligence and the principles which apply to

determination of such a claim before the Civil Court would equally apply to consumer disputes before the Consumer Disputes Redressal Agencies

under the Act. The Act only provides an inexpensive and a speedy remedy for adjudication of such claims. An analytical study of tort litigation in

India during the period from 1975 to 1985 made by Prof. Galanter reveals that a total number of 416 tort cases were decided by the High Courts

and this Court, as reported in the All India Reporter, out of which 360 cases related to claims under the Motor Vehicles Act and cases relating to

medical malpractice were only three in number. (See : Upendra Baxi and Thomes Paul, Mass Disasters and Multinational Liability. The Bhopal

case, pp. 214-218). One of the factors inhibiting such claims is the requirement regarding court fee that must be paid by the plaintiff in an action for

damages on the ground of negligence. Since no court fee is required to be paid on a complaint filed under the Act it would be possible for persons

who have suffered injury due to deficiency in service rendered by medical practitioners or at hospitals/nursing homes to see redress. The conditions

prevailing in India cannot, therefore, be compared with those in England and in the United States.

53. As regards the criticism of the American malpractice litigation by the British judiciary it has been said:

Discussion of these important issues is sometimes clouded by an over-simplistic comparison between England and American ""malpractice

litigation. Professor Miller noted in 1986 that malpractice claims were brought in the United States nearly 10 times as often as in England, and that

this is due to a complex combination of factors, including cultural differences, judicial attitudes, differences in the legal system and the rules about

costs. She points to the deterrent value of malpractice litigation and resent some of the criticisms of the American system expressed by the British

judiciary. Interestingly, in 1989 the number of medical negligence claims and the size of medical malpractice insurance premiums started to fall in

New York, California and many other states. It is thought that this is due in part to legislation in a number of states limiting medical malpractice

claims, an in part to improved patient care as a result of litigation.

(Jackson & Powell on Professional Liability, 3rd Edn., para 6-25, p. 466)

54. Dealing with the present state of medical negligence cases in the United Kingdom it has been observed:

The legal system, then, is faced with the classic problem of doing justice to both parties. The fears of the medical profession must be taken into

account while the legitimate claims of the patient cannot be ignored.

Medical negligence apart, in practice, the courts arc increasingly reluctant to interfere in clinical matters. What was once perceived as a legal threat

to medicine has disappeared a decade later. While the court will accept the absolute right of a patient to refuse treatment, they will, at the same

time, refuse to dictate to doctors what treatment they should give, indeed, the fear could be that, if anything, the pendulum has swung too far in

favour of therapeutic immunity. (p. 16)

It would be a mistake to think of doctors and hospitals as easy targets for the dissatisfied patient. It is still very difficult to raise an action of medical

negligence in Britain; some, such as the Association of the Victims of Medical Accidents, would say that it is unacceptably difficult. Not only are

there practical difficulties in linking the plaintiffs injury to medical treatment, but the standard of care in medical negligence cases is still effectively

defined by the profession itself. All these factors, together with the sheer expense of bringing legal action and the denial of legal aid to all but the

poorest, operate to inhibit medical litigation in a way in which the American system, with its contingency fees and its sympathetic juries, does not.

It is difficult to single out any one cause for what increase there has been in the volume of medical negligence actions in the United Kingdom. A

common explanation is that there are, quite simply, more medical accidents occurring - whether this be due to increased pressure on hospital

facilities, to falling standards of professional competence or, more probably, to the ever-increasing complexity of therapeutic and diagnostic

methods. (p. 191)

A patient who has been injured by an act of medical negligence has suffered in a way which is recognised by the law - and by the public at large -

as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is

required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or

to restrict arbitrarily the size of an award would amount to substantial injustice. After all, there is no difference in legal theory between the plaintiff

injured through medical negligence and the plaintiff injured in an industrial or motor accident. (pp. 192-93)

(Mason"s Law and Medical Ethics, 4th Edn.)

55. We are, therefore, not persuaded to hold that in view of the consequences indicated by Lord Denning in Whitehouse v. Jorden (supra) medical

practitioners should be excluded from the purview of the Act.

56. On the basis of the above discussion we arrive at the following conclusions:

(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a

contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of "service"

as defined in Section 2(1)(o) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India

and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by

them from the ambit of the Act.

(3) A "contract of personal service" has to be distinguished from a "contact for personal services". In the absence of a relationship of master and

servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service

rendered under a "contract of persona] service". Such service is service rendered under a "contract for personal services" and is not covered by

exclusionary clause of the definition of "service" contained in Section 2(1)(o) of the Act.

(4) The expression "contract of personal service" in Section 2(1)(o) of the Act cannot be confined to contracts for employment of domestic

servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the

employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of "service"

as defined in Section 2(1)(o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a

hospital/Nursing home where such services are rendered free of charge to everybody, would not be ""service"" as defined in Section 2(1)(o) of the

Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-Government hospital/Nursing home where no charge whatsoever is made from any person availing the service and

all patients (rich and poor) are given free service - is outside the purview of the expression "service" as defined in Section 2(1)(o) of the Act. The

payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.

(7) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls

within the purview of the expression "service" as defined in Section 2(1)(o) of the Act.

(8) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay

and persons who cannot afford to pay arc rendered service free of charge would fall within the ambit of the expression "service" as defined in

Section 2(1)(o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such

services. Free service, would also be ""service"" and the recipient a ""consumer"" under the Act.

(9) Service rendered at a Government hospital/health center/dispensary where no charge whatsoever is made from any person availing the services

and all patients (rich and poor) are given free service - is outside the purview of the expression "service" as defined in Section 2(1)(o) of the Act.

The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a Government hospital/health center/dispensary where services are rendered on payment of charges and also rendered

free of charge to other persons availing such services would fall within the ambit of the expression "service" as defined in Section 2(1)(o) of the Act

irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be ""service

and the recipient a ""consumer"" under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person

availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are

borne by the insurance company and such service would fall within the ambit of "service" as defined in Section 2(1)(o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family

members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home

would not be free of charge and would constitute "service" u/s 2(1)(o) of the Act.

57. In view of the conclusions aforementioned the judgment of the National Commission dated April 21, 1992 in First Appeal No. 48 of 1991

(M/s. Cosmopolitan Hospitals and Anr. v. Smt. Vasantha P. Nair) and the judgment dated November 16, 1992 in First Appeal No. 97 of 1991

(Dr. Sr. Louie &Anr. v. Smt. Kannolil Pathumma &Anr.) holding that the activity of providing medical assistance for payment carried on by

hospitals and members of the medical profession falls within the scope of the expression "service" as defined in Section 2(1)(o) of the Act and that

in the event of any deficiency in the performance of such service the aggrieved party can invoke the remedies provided under the Act by filing a

complaint before the Consumer Forum having jurisdiction, must be upheld and Civil Appeal Nos. 688/93 and 689/93 and SLP (Civil) Nos.

6885/92, 6950/92 and 351/93 filed against the said judgment have to be dismissed. The National Commission in its judgment dated May 3, 1993

in O.P. No. 93/92 has held that since the treatment that was given to the deceased husband of the complainant in the nursing home belonging to the

opposite party was totally free of any charge it does not constitute "service" as defined in Section 2(1)(o) of the Act. The Tribunal has not

considered the question whether services are rendered free of charge to all the patients availing services in the said nursing home or such services

are rendered free of charge only to some of the patients and are rendered on payment of charges to the rest of the patients. Unless it is found that

the services are rendered free of charge to all the patients availing services at the nursing home, it cannot be held that the said services do not

constitute "service" as defined in Section 2(1)(o) of the Act. Civil Appeal No. 254/94 has, therefore, to be allowed and the matter has to be

remitted to the National Commission for consideration in the light of this judgment. The judgment of the Madras High Court in Dr. C.S.

Subramaniam v. Kumaraswamy and Anr. (supra), holding that the services rendered to a patient by a medical practitioner or a hospital by way of

diagnosis and treatment, both medicinal and surgical, would not come within the definition of "service" in Section 2(1)(o) and a patient who

undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment, both medicinal and surgical, cannot be

considered to be a "consumer" within the meaning of Section 2(1)(d) of the Act cannot be sustained and Civil Appeals Nos. 4664-65/94 as well

as Civil Appeals arising out of SLP (Civil) Nos. 21755/94 and 18445-73/94 have to be allowed and the said judgment of the Madras High Court

has to be set aside and the writ petitions disposed of by the said judgment have to be dismissed. The judgment of the National Commission dated

December 15, 1989 in First Appeal No. 2 of 1989 holding that services rendered in Government hospitals are not covered by the expression

"service" as defined in Section 2(1)(o) of the Act cannot be upheld in its entirety but can be upheld only to the extent as indicated in conclusion

No. 9. Civil Appeal arising out of SLP (Civil) No. 18497/93 has to be allowed and the complaint has to be remitted to the State Commission for

consideration in the light of this judgment. SLP (Civil) Nos. 21348-21349/93 have been filed against the judgment of the Kerala High Court dated

October 6, 1993 in Writ Petitions filed on behalf of the hospitals claiming that the services rendered by the hospitals do not fall within the ambit of

Section 2(1)(o) of the Act. The said Writ Petitions were dismissed by the High Court having regard to the decision of the National Commission in

Cosmopolitan Hospital (supra) and the pendency of appeal against the said decision before this Court. Since the decision of the National

Commission in Cosmopolitan Hospital (supra) is being upheld by us, SLP (Civil) Nos. 21348-21349/93 have to be dismissed.

58. Writ Petition (Civil) No. 16/94 has been filed by the Cosmopolitan Hospital (P) Ltd. and Dr. K. Venugopalan Nair who have also filed SLP

(Civil) Nos. 6885/92 and 6950/92 against the judgment of the National Commission dated April 21, 1992. In the Writ Petition, the said writ

petitioners have sought a declaration that the provisions of the Act are not applicable to alleged deficiency in medical service and that if the said

provisions are held to be applicable to the medical profession and hospitals the same may be declared as unconstitutional as being violative of

Articles 14 and 19(1)(g) of the Constitution. As regards the first part of the prayer regarding the applicability of the provisions of the Act to the

alleged deficiency in medical service, we have already considered the matter and found that the provisions of the Act are applicable to deficiency in

service rendered by medical practitioners and hospitals and for the same reason the said prayer cannot be allowed. The other prayer sought for in

the Writ Petition regarding the validity of the provisions of the Act is also without any substance. The ground on which the writ petitioners are

seeking to assail the validity of the provisions of the Act is that the composition of the Consumer Disputes redressal Agencies and the procedure to

be followed by the said Agencies is such that it is not suitable for adjudication of the complex issues arising for consideration. We have already

considered this grievance urged on behalf of the medical profession and have found that the composition of the Consumer Disputes Redressal

Agencies as well as the procedure to be followed by them does not preclude a proper adjudication of the consumer disputes arising out of

complaints relating to deficiency in service rendered by medical practitioners and hospitals. 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. There is, therefore, no merit

in the Writ Petition and it has to be dismissed.

59. In the result Civil Appeals Nos. 688/93 and 689/93, and SLP (Civil) Nos. 6885/92 and 6950/92 are dismissed. The State Commission will

deal with the complaints in the light of this judgment. SLP (Civil) Nos. 351/93 and 21348-21349/93 and Writ Petition (Civil) No. 16/94 are also

dismissed. Civil Appeal No. 254/94 is allowed and the judgment of the National Commission dated May 3, 1993 is set aside and O.P. No. 93/92

is remitted to the National Commission for consideration in the light of this judgment. Civil Appeals Nos. 4664-65/94 and Civil Appeals arising out

of SLP (Civil) Nos. 21755/94 and 18445-73/94 are allowed and the judgment of the Madras High Court dated February 17, 1994 is set aside

and the writ petitions disposed of by the said judgment of the High Court arc dismissed and as a result the Consumer Disputes Redressal Agencies

would deal with the complaint petitions covered by those writ petitions in the light of this judgment. Civil Appeal arising out of SLP (Civil) No.

18497/93 is also allowed and Complaint Case No. 1 of 1988 is remitted to the State Commission for consideration in the light of this judgment.

No order as to costs.