

GATT AND THE INDIAN MEDICAL ASSOCIATION

Indian Consumer Protection Act

As in other countries, physicians in India are subject to the civil law of torts in respect of professional negligence, and can also be charged under the criminal law in cases involving the death of a patient. In 1986 Indian Parliament enacted a Consumer Protection Act to protect consumer interests and to provide a rapid remedy against the provision of sub-standard goods and services by traders and others. Although the drafters of the Act have admitted that it had not been their intention that it should be applied to physicians, the National Consumer Forum, set up under the Act and presided over by a High Court Judge, has decreed that physicians are subject to the provisions of the legislation.

The Indian Medical Association (IMA) considers the application of the Act to physicians to be against both the long term interests of patients and the dignity of the medical profession. Therefore, the IMA appealed to the Supreme Court in India seeking to have the decree of the National Consumer Forum set aside, but the Supreme Court has upheld the decree.

Definitions

GATT (General Agreement of Tariffs and Trade) is a treaty which lays down rules for the conduct of international trade, GATT was established in 1948 with 23 members and at present it covers 117 countries which account for 80% of world trade. The main purpose of GATT is to remove trade barriers among member countries and promote world trade. It is a

platform for resolving trade disputes among its members.

Periodically member countries meet to reconsider existing rules and regulations and suggest modifications according to their needs. Such meetings are referred to as a 'round'. The 'eighth round' of talks (popularly known as the Uruguay Round) was started in 1986 and has been the most difficult round because it covered four new areas: (a) agriculture and services including banking, (b) insurance and telecommunications, (c) intellectual property rights, and (d) protection of investments linked to trade.

The Government of India enacted the Consumer Protection Act (1986) to provide for better protection of the interest of consumers and to promote and protect the rights of consumers, such as :

- (a) The right to be protected against the marketing of goods and services which are hazardous to life and property;
- (b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices;
- (c) The right to be assured, wherever possible, of access to a variety of goods and services at competitive prices;
- (d) The right to be heard and to be assured that consumers interest will receive due consideration in an appropriate forum;
- (e) The right to seek redress against unfair or restrictive trade practices or unscrupulous exploitation of consumers; and
- (f) The right to consumer education.

As per the definition in section 2(1) (1 c) of the Act, an allegation shall constitute a complaint where:

- (i) An unfair or restrictive trade practice has been adopted by any trader;
- (ii) The goods bought by him or agreed to be bought by him suffer from one or more defects;
- (iii) The service hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

- (iv) A trader has charged for the goods mentioned in the complaint a 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;
- (v) Goods which could be hazardous to life and safety when used, are being offered for sale to the public in contravention of 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.

With a view to obtaining any relief provided by or under this Act.

The term “Consumer” has been defined in Section 2(1) (d) as 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 include 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 or such person, but does not include a person who obtains such goods for resale or for any commercial purpose or

(ii) Hires or avails 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 service 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.

“Commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning livelihood, by means of self employment.

The term “Service” is defined in Section 2(i) (1c) to mean service of any description which is made available to 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 the rendering of any services free of charge or under a contract of personal service.

“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 services.

The Basic Question is whether The Act Covers Medical Professional and Medical Services or Not.

Objections concerning the application of the Act to the Medical Profession

- (1) The majority of people in India are poor. They live in villages where medical facilities are inadequate and primitive. Modern techniques are lacking and are not yet fully welcome. Medical health facilities provided by the government are limited. 70% of healthcare in India is provided by the private sector. Practitioners of modern systems of medicine generally take the maximum care and caution, often rendering services at enormous risk in order to safeguard their reputation, and the fee charged is very low.
- (2) The relationship between the doctor and his/her patient is of a personal nature and not that of a seller and a buyer. To refer to a patient sick person as a consumer is wholly unjustified.
- (3) While the medical profession is committed to provide quality care for the patient at every point, doctors show a competent degree of skill and accept accountability for the patient. The application of the Act to services rendered by the medical profession seriously affects the dignity of the profession, which is considered noble, damages doctors' status and reputation, jeopardizes the harmony and seriously undermines the doctor-patient relationship which is based on faith, mutual trust and confidence.
- (4) The application of the Act to the medical profession results in adverse

consequences which will not be in the interests of the patients as it warrants unnecessary diagnostic investigations, multiple consultations, medical protection insurance etc. This means that the patient has to bear a higher cost for treatment.

(5) If the Act is enforced:

- (i) The medical profession would suffer in terms of its professionalism and nobility. The doctor would be held negligent because of the risk inherent in an operation or in a matter of opinion as to whether he had made an error of judgement. The medical man not an insurer. He cannot be held liable in unforeseen results or consequences. His act of commission or omission must be judged not by ideal standards or in the abstract, but against the background of the circumstances in which the treatment to the patient is given.
- (ii) Similarly, drugs from various pharmaceutical companies have different therapeutic potentials and bio-availability. Individual idiosyncrasies of drugs are well-known and call for due notice to be taken of their side effects.
- (iii) A doctor examining a patient or a surgeon operating in a theatre would need to be constantly on their guard against actions for negligence or deficiency of service.
- (iv) The Act may lead to denial of right which society allows sick people, including medical services and discretionary treatment in an emergency.
- (v) Medical science has conferred great benefit on mankind but these benefits are attended by considerable risk. Every advance in technique, modality of surgical operation or medical treatment is associated with hazards, unforeseen complications, inherent risk, morbidity and mortality. It is easy to be wise after the event and condemn as negligence what is only a mishap, misadventure or a chance result attributable to unexpected or unforeseeable complications or an honest error of judgement.

(6) In most cases, treatment is provided by a team of doctors, anaesthetist, nurses, pharmacologists, technical and other staff in accordance with

generally approved modern practice. The doctor as the leader of the team may not be held entirely responsible for the results which flow from the joint group action of so many engaged in the process of treatment.

- (7) A similar Act is not legal in any other country. The majority of civilized countries depend on the law of torts to deal with medical liability cases. In addition to the civil court the medical council and professional associations adjudicate on complaints against doctors.
- (8) A government officer may also be held liable in tort if in the discharge of his official duties he acts maliciously with oblique motive or maleficent in the same way as a doctor may be said to have acted. However, the Act is not available for legal action against the officer either for negligence or for recovery of compensation. The remedy lies in the civil court.

Judgment of the Indian Supreme Court*

The Court has ruled:

“Service rendered to a patient by medical practitioners (except where the doctors renders service free of charge to every patient or under a contract of personal service) would fail within ambit of ‘service’ as defined in Section 2 (1) (0) of the Act”.

In interpreting the Act, the court has overlooked the vital difference between a seller or a manufacturer and a doctor. While the former is bound to attend to the customer’s complaint only during specified working hours, the medical man is at the beck and call of his patients round the clock particularly in private practice.

Indian Medical Association’s views

The IMA is not defending the indefensible. It does not advocate that a wrong-doer should go unpunished. Its plea is that its disciplinary jurisdiction provided an effective remedy for the speedy and proper redress to the grievance of the patient against the negligence or deficiency of

* Indian Medical Association vs. V. P. Shantha reported in 1995 (6) SCC 651.

service by the doctor. In addition, the aggrieved patient has the ordinary Civil Court remedy against the tort.

The enlargement of the scope, spirit and intent of the Act so as to include the professional field of medicine is unreasonable. It leads to anomalous results which are prejudicial to the interests of patients.

A patient cannot be characterized as a 'consumer' and he/she cannot be said to 'hire' a doctor. It is generally known that a patient, before choosing the doctor, makes a full and complete assessment of the competence and the general reputation of the doctor and goes to him for treatment on being convinced that he is capable of providing relief with regard to nature of his ailment. In such a situation the question of negligence or deficiency of service by the doctor would not arise but the widely interpreted scope of the Act holds him culpable.

Every doctor gives treatment which has stood the test of time and is known to yield the desired results. If due to supervening circumstances the patient does not derive the expected benefit, it would be unfair and unjust to hold the doctor, who has done his best, to be negligent and deficient in the service rendered, and therefore to sue him.

The medical man deserves better consideration, having regard to his skills, equipment and training, in the specialty and status he has acquired. As long as he exercises reasonable care and caution in giving bonafide treatment, he cannot be said to have acted negligently, or that there has been deficiency of service on his part as there is no agreed yardstick to measure the degree of skill expected of him.

The meaning of the word 'service' is unduly stretched to include a worthy profession. The relationship between a patient and a doctor is unique and special, based on mutual trust, faith and confidence. The extended application of the Act, strikes at the cordiality that exists between the patient and his doctor.

The doctor, while giving treatment is known to be inspired by a spirit of compassion and kindness to the patient, but in the background of an impending threat of speculative action for negligence or deficiency of service, creates for him an atmosphere of tension when he is expected to concentrate all his attention on the patient and the treatment being given. The result is the trust and confidence between the patient and the doctor

becomes destroyed, being substituted by distrust and vengeance.

Where the developed countries have taken a reasonable approach to the doctor/patient relationship, the provision of scope for litigation between them is unjust. It means that the patient will be deprived of the best medical treatment which can be obtained only in a congenial atmosphere.

The State must recognise the useful contribution of the Medical Science to society at large and mankind generally. It should appreciate the efforts of doctors to promote the welfare of the people and improve their quality of life, which is in keeping with the Indian Directive Principles and State policy enshrined in the Constitution. Instead, to threaten doctors with actions for negligence or deficiency of service, by giving a wide connotation and scope to those expressions within the application of the Act, means that the medical profession is discouraged from continuing its proud record of service with a consequent loss to society.

It is essential, therefore, in the interests of the community, that the medical profession and the services provided by doctors should be beyond the ambit of this Act.

Conclusion

The debate at the WMA Geneva Spring Meeting advised that a Consumer Protection Act was not applicable to doctors—it would contravene the dignity of the medical profession, as medicine is one of the learned professions and not primarily a commercial trade. According to a former Master of the Roll, Lord Dinning, negligence does not apply in the professions where several courses of action, equally correct, may be relevant.

Unlike traders and businessmen, a doctor is bound by specific ethical guidelines. Any judgement on a doctor's professional conduct or performance must take into account the view of the doctor's professional peers (the General Medical Council in the UK) who, by his training and experience, understands the complexity of the medical issues involved.

With regard to the issue of the Indian Consumer Protection Act, the Secretary General has written to the President of India, the Prime Minister, the Minister of Health and Family Welfare, and the Minister for Consumer Affairs, urging an amendment to the Act specifically to exclude medical practitioners from the provisions of the Act.