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PROFESSIONAL VIS-A-VIS THE CLIENT UNDER CONSUMER PROTECTION ACT, 1986

By

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Is a professional such as Advocate, Medical Practitioner, Chartered Accountant liable for the loss caused to his client (or patient) on account of commission or omission in performing his duties towards his client under contract, Tort or otherwise? Is he covered by the provisions of Consumer Protection Act, 1986 (hereinafter referred to as 'CP Act')? Does he enjoy any professional immunity?

Profession :—The occupations regarded as professions have four characteristics (i) Nature of the work which is skilled and specialised 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) The professional association which regulates admissions and seeks to uphold the standards; (iv) high status in the community. Not only solicitors, barristers and medical practitioners but also architects, accountants, engineers and quality surveyors claimed professional status and immunity for negligence in the earlier days.

A profession differs from other occupations for the reason that profession operates in a sphere where success cannot be achieved in every case and every often success or failure depends upon the factors beyond the professional man's control. In devising rational approach to professional

liability which must provide proper protection to the client while allowing for the factors mentioned above, the approach of the Courts is to be require that professional men should possess 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 performance of services (*Jackson and Powell*). As Lord *Denning* puts it, "...A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility gratuitously without reward. In either case he is under one and the same duty to use reasonable care.....In one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty he is liable in damages; and those damages should be, and are, the same, whether he is sued in contract or in tort."

The immunity from suit enjoyed by barristers for some time, is narrowed down even in UK Absolute immunity to a barrister in a thing of the past.

Under Section 14(1)(d) of Consumer Protection Act, 1986, if a "consumer" proves the "deficiency of service" on the part of the

opposite party, including professional, he is entitled to compensation for the “loss or injury” caused due to the “negligence” of the party providing the services.

The word ‘service’ is defined in Section 2(1)(o) of CP Act:

“Service” means service of *any* description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or loading or both (“housing construction,”) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.”

The Supreme Court in *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787 held:

“The dictionary meaning of ‘any’ in the context it has been used in clause (o) of Section 2 (1) of the CP Act indicates that it has been used in wider sense extending from one to all.”

The Supreme Court ruled that the ‘house building’ was also a service covered by the definition though it was not specifically mentioned in the Section (it was, in fact, added later by Amendment Act, 1993). Justice *Sahay* observed, “it can be contractual, professional, public, domestic, local, statutory *etc.*”

The Supreme Court held in *Indian Medical Association v. V.P. Santa*, AIR 1986 SC 515, that service rendered by Medical Practitioner was not a contract of personal service, but was only a contract ‘for’ personal service explaining the difference between the two expressions as follows :

“Contract of service implies relationship of master and servant and involves an

obligation to obey the orders of work to be performed as to its mode and manner of performance. By affixing the adjective ‘personal’ to the word ‘service’, the nature of the contracts which are excluded is not altered. The adjective only emphasizes that what is said to be excluded is personal service only.”

In *Dr. A.S. Chandra v. Union of India*, 1992 (1) ALT 713, the Division Bench of A.P. High Court rejected the contention that the service of medical practitioners are not “hired”.

No direct decision involving chartered accountants under Consumer Protection Act is available. The principles laid down in the case of medical and legal professionals apply to tax practitioner as well and can be usefully referred to.

In *Indian Medical Association* case (supra) the Supreme Court held that the services rendered by the medical practitioners, clinical technicians, and Hospitals employing medical practitioners, technicians and staff are covered by the Act.

Legal Practitioner :—In *K. Vishnu v. National Consumer Disputes Redressal Commission, the High Court of A.P.*, 2000 (5) ALD 369, held that the services rendered by the advocates were also covered by the Consumer Protection Act.

When a client filed a consumer dispute under CP Act against his advocate claiming heavy compensation alleging that the advocate failed to extend services expected of him in ensuring implementation of interim orders passed by the Rent Controller and in conducting various cases pending in civil Courts, that he did not return the case records despite payment of settled fee, and that the refused to give no objection certificate, preventing him from conducting the case by other advocates, affecting his business, the Advocate approached High

Court of A.P. seeking a writ of *prohibition* prohibiting the Commission from proceeding with the case. Justice *Venkatram Reddy* rejected the plea and held “when a person engages legal practitioner for extending professional’s assistance on legal matters on payment of fee paid or promised to be paid, he avails of the professional service for a consideration and therefore, the provisions of the Act come into play. The Act does not exclude the services rendered by the professions.”

Court Officer :—The A.P. High Court in *K. Vishnu’s* case (supra) held that the fact that the advocate can be regarded as officer of the Court or becomes part of the judicial system does not obliterate his basic role of doing service to his client for monetary remuneration.

“The Advocate, if he breaches an obligation to be honest and duteous towards his client, he cannot plead immunity. There may be good grounds of defence in an action for negligence, which may not be available to other professionals, but that is something different from immunity from the Civil Court, whether it be founded on the breach of contract or on tort.”

Disciplinary Control :—The doctors are disciplined by Medical Council Act; advocates by The Advocates Act, 1961; and the chartered accountants similarly by Chartered Accountants Act, 1949. Does the fact that these professional bodies exercise disciplinary control exclude the jurisdiction of the Consumer Forums? The Supreme Court answered it in negative in the same *Indian Medical Association* case.

“The medical liability under the consumers jurisdiction is on somewhat different thing and though in certain areas, the matter (consumer law and tort law) may, overlap, there is a clear distinction between the two. Medical liability within the consumer jurisdiction is only a species

of a genus of deficiency in service hired. The liability under consumer jurisdiction undoubtedly includes what is negligence in law of torts, and is somewhat greater.”

Section 2(1)(g) of CP Act defines the “deficiency in service” as follows:-

“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.”

Negligence :—‘Negligence’ may be defined as want of reasonable degree of care and skill or willful negligence on the part of the medical practitioner. There can be a *bona fide* error in the judgment or *bona fide* mistake. It is totally non-negligent. If the mistake is of such a nature as to imply absence of reasonable skill and care on his part, regard being to the ordinary level of skill in profession, practitioner can be held liable.

In case of medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. Doctor is not guilty if he has acted in accordance with the practice accepted as proper by a responsible body of medical men skilled in that particular act.

The person will be guilty of negligence if he undertakes a task which he knows, or ought to know, that he is not qualified to perform it. He owes a primary duty of care in deciding whether he should undertake the case and after undertaking the case, the next duty is of care in administration of treatment wherein he should use diligence, care, skill and caution. His failure to perform either of the above

two duties offers reasonable and valid ground to fasten liability based on negligence.

Spring Meadows Hospital v. Harjol (1998) 4 SCC 39.

Negligence per se :—

Conduct, whether of action or omission, which may be treated as negligence, without any argument, or proof as to the particular surrounding circumstances of the case, is negligence, *per se*. Because, it is violation of statute or because it is so palpably opposed to the dictates of any prudence, it may be said without hesitation or doubt, that no careful person could have been guilty of it. (*Black's Law Dictionary*).

Homeopath prescribing Allopathic drugs is negligence *per se* *Poonam Verma v. Dr. Aswini Patel* (1996) 2 CPJ 1 (SC).

Volunt non fit injuria :—

A patient is placed under the treatment of quak knowing his being a quak. His diagnosis and treatment ultimately proved fatal. Although, there is no negligence on the part of the said quak, it was held as deficiency in service. The principle of voluntary assumption of risk (*volunt non fit injuria*) cannot be invoked in the case of treatment by person without having requisite and recognised qualification. It is *per se* negligent act. *Dr. Moui Kannolil*, 1993 (1) CPR 422.

Bona fide Mistake :—One cannot rule out human fallibility. If it is a case of human fallibility medical negligence may be pardonable as being a *bona fide* mistake. Where mistake goes to the root *i.e.*, such a mistake can never be expected from a reasonably skilled medical practitioner, such a mistake would tantamount to negligence which is not impardonable. It becomes actionable wrong. *White House v. Jordan*, (1981) 1 All.ER 267.

Res ipsa loqui tur :—The principle is applicable to claims against professional for negligence.

A consultant would be negligent when he delegates the responsibility to his junior with the knowledge that the junior was incapable to perform his duties properly. *Spring Meadows Hospital v. Harjol Ahluwalia* (supra).

Use of wrong drug or wrong gas leads to imposition of liability *Spring Meadows* (supra)

Illustrative cases

Following were held to be negligence and compensation was awarded against Doctors/Hospitals:

- (1) Prescription of drugs without examining the patient (*Dr. C.J. Subramanya v. Kumaraswamy*, 1994 CCJ 475 (Cons).
- (2) Conducting surgery on a patient having high blood pressure of 150/100 mm Hg associated and STT changes in anterolateral leads in ECG (doctors were held jointly liable to pay compensation of Rs.4,15,000/-). *Arun Ben D. Kothari v. Navadeep Clinic*, 1996 (2) CPR 20.
- (3) Keeping of hot water bottle under the baby's legs during surgery which led to severe burns. (Compensation of Rs.5,00,000/- was granted.) *P.M. Ashwini v. Manipal Hospital* (1) 1997 CPJ 238.
- (4) Wrong blood grouping and cross matching resulting in death *S.K. Abdul Suku v. State of Orissa* (2) 1991 CPJ 202.
- (5) Leaving a surgical sponge in the abdomen of the patient during caesarean operation. *Smt. Aliamma Varghees v. Dr. Vaerghes*, 1997 (1) CPR 310.

- (6) Leaving forceps into the abdomen during surgery. *SAU Madhuri v. DR. Rajendra* (3) 1996 CPJ 75 (NC).
- (7) Penetrating vital organs causing permanent danger to gallbladder uterus and kidney during caesarean operation. *Joseph v. Dr. B. Elizabeth* (1) 1997 CPJ 96.
- (8) Conducting operation for removing appendicitis in an ill-equipped Hospital without necessary investigation preparing patient and on finding the appendicitis to be normal, making another incision and removing gallbladder without consent *Rambiharilal v. Dr. J.N. Srivastava*, AIR 1985 MP 150.

Where a boy of 13 years being treated for suspected epilepsy was prescribed Zepton and later epton leading to increased convulsions and in a short span, five injections were given, rendering patient unconscious and then shifted to ICU for treatment of pneumonia and was put on oxygen but nobody treated or attended to him resulting in his death, compensation of 3 lakhs by the Hospital and Rs.50,000/- by the doctor were ordered to be paid. *Muralidharan Eknath Mesane v. Sushruta Citizens Co-op. Hospital Limited* 1995 (1) CPR 606.

Misconduct :—

We may also refer to the cases of 'misconduct' dealt with by the disciplinary authorities and to take guidance for considering 'deficiency in service' and 'negligence' under CP Act.

A.P. High Court, held "an advocate who accepted Vakalatnama primarily is bound to appear and conduct his case in the absence of an agreement to the contrary, and the absence was considered as misconduct. AIR 1958 AP 116.

Madras High Court found fault with the advocate for not appearing and conducting the case without issuing notice to the client, though part of the fee remained unpaid by the client. AIR 1958 Mad. 122.

The Supreme Court in AIR 1972 SC 46, held that when an advocate demands money from the client on false representation that it was required for Court purposes and misappropriated the same, it is a professional misconduct.

In AIR 1964 AP 158, it was held that withdrawal of money from Court without authority or consent of client and appropriating towards fees alleged to be due was professional misconduct.

In AIR 1958 Calcutta 449, the High Court, dealing with the case of a chartered accountant held that charging fee on percentage basis was misconduct.

The Supreme Court in AIR 1989 SC 249, observed of negligence simplicity may or may not amount to misconduct depending on facts of the case.

Quoting the ruling in *Hussainara Khatoon's* case (1980 (1) SCC 81) that the litigants have fundamental right to speedy justice, the Supreme Court in 1994 (5) SCC 557, found fault with the advocate's requesting for repeated adjournments and stalling proceedings.

Boycott by Advocates :—

The Supreme Court in a very recent case *Ramon Services (P) Limited v. Subhas Kapoor*, (2001) 1 SCC 118, reiterated that an advocate would be answerable for consequences suffered by a party on account of non-appearance of an advocate even in pursuance of a strike call given by the Bar Council. It observed "...litigant who suffers entirely on account of his advocate's non-

appearance in Court has also the remedy to sue the advocate for damagesIn all cases, where the Court is satisfied with the *ex parte* order passed in the absence of the advocate in pursuance to a strike call could be set aside on terms, the Court can as well permit the party to realise costs from the advocate concerned. In that case, the Supreme Court adopted the course of awarding costs realisable from the advocate observing that the client's "remedy would remain unaffected by the course adopted in this case."

In 1995 (3) SCC 619, the Supreme Court observed "some members of the profession have been adopting perceptibly casual approach to the practice of profession as is evident from their absence when the matters are called out, the filing of incomplete, inaccurate pleadings, many times even illegible and without final check and verification, the non-payment of Court fees and process fees, the failure to remove office objections, the failure to take steps to serve the parties *et al.* They do not realise the seriousness of these acts and omissions."

In 1984 (2) SCC 556, the Supreme Court held that the advocate stands in a *loco parentis* towards the litigants. He is expected to follow the norms of professional ethics and to protect the interests of the client in relation to whom he occupies a profession of trust."

In *Mahavir Prasad's* case (1999 (1) SCC 37) even in case of boycott call of a particular Court, the absence of advocate without entrusting the brief to another was held as misconduct.

In *Council of Institute of Chartered Accountants of India v. T.S. Ranganathan*, 2000 (100) Company Cases 302, where a chartered accountant certified a Profit and Loss Account of his client as correct, whereas there was an error of Rs.1,00,000/- on the

expenditure side of the account resulting in inadmissible reduction of income that led to short levy of Rs.78,213/- by way of tax. On finding out, the authorities levied penalty on the assessee. The Supreme Court held "when a chartered accountant prepares a profit and loss account from the books of account and certifies to that effect, the minimum that is expected of him is to verify the accuracy of the figures in the profit and loss account with reference to the relevant books of account. He cannot escape responsibility pleading that he did not audit it and verification was done by the staff. As part of his professional duty and responsibility, he was required to take reasonable steps to satisfy himself that the work was carried out in a proper, fair and efficient manner. The certificate issued by him and the professional relationship was between him and the client of Trust. Elementary verification of totalling would have been sufficient to notice the mistake. The failure to carry out such elementary verification amounts to gross negligence and carelessness. The skill, care and caution which the reasonably competent and cautious auditor was expected to exercise was not done."

The Delhi High Court in *Institute of Chartered Accountants of India v. B.L. Khanna*, 2000 (113) Taxman, 170, held that "misconduct implies failure to act honestly and reasonably either according to the ordinary and natural standard or according to the standard of a particular profession. But, the error or misinterpretation of law and specially one view or another over a debatable construction cannot be a ground for the allegation and finding of professional misconduct against a Chartered Accountant. Negligence is the omission to do something which a reasonable man, guided upon those considerations, which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do,

.....When a chartered accountant signs certificates, the minimum that he is expected to do is to verify the accuracy of the figures certified.”

If, after proceedings conduct under Section 13, the District Forum (State or National Commission) is satisfied that the services provided by the advocate, medical practitioner, chartered accountant or other tax practitioner suffers from “deficiency” as defined above, (in the light of principles

stated above), the District Forum, the State Commission, or the National Commission as the case may be, *shall* issue an order directing him to pay the said amount as may be awarded by it as compensation for any loss or injury suffered by the consumer (client) due to the negligence of the practitioner.

Thus a professional is very much under the purview of consumer protection Act and does not enjoy any immunity.

DEBASEMENT OF MORAL AND ETHICAL VALUES IN PUBLIC SERVICES

By

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Good administration is necessary not only for the healthy growth of our national economy, but also for preserving our country's freedom. It is the function of a democratic Government to secure reconciliation of the demands of the people and it is the function of the Parliament or a State Legislature to approve of the policies of the Central or the State Government, as the case may be. But those policies can be carried out only by the executive, which should be sturdy and independent.

(2) It is an admitted fact that, today, corruption has permeated all ranks of Government from top to bottom. It is growing in alarming proportions affecting Indian life very badly. It is difficult to get a licence or a permit or even a ration-card without paying extra for it. By corruption, we mean not only the illicit money gains, but mental or moral corruption, political corruption, nepotism and all deceitful practices, which warp the smooth course of

honest, impartial and evenly balanced administration. Corruption has presented insuperable obstacles in the way of all-out efforts to extirpate it.

(3) A corrupt administration cripples the activities of the Government. The Ministers are dependent on big businessmen for their election campaigns, for the party funds are not sufficient to meet the election expenses. Close links between those who are in power and those who have wealth have been forged. The statutory limits on election expenses have become a fiction. The Ministers start their political careers by sending fraudulent returns of their election expenses and get themselves tied up with rich men who never give aid without strings and never hesitate to tighten the strings to suit their own purpose. The dependence of these guardians of administration on their rich patrons is well known. The obvious remedy is to reorganise our electoral system in such a manner that heavy expenditure is kept down.