CHAPTER IV

LIABILITY UNDER THE CONSUMER PROTECTION ACT

4.1. India

4.1.1. Introduction

The advent of consumer law came about in the early 20th century, with a series of scandals over contaminated food which led to the passage of the Pure Food and Drug Acts and a number of other measures designed to protect consumers. Prior to regulations of the sales industry, companies could include any ingredients they liked, including known toxins, and they could make a wide range of claims about their products without facing legal penalties. Companies could also use consumer information however they desired, and many governments have grew concerned about the possibility for exploitation of a system without any boundaries. Much of consumer law is concerned with product safety and labeling. Products from cars to food need to pass safety tests and adhere to basic safety standards, and manufacturers must have recall systems in place in the event that safety issues are identified. Consumer protection laws also include concerns about labeling. Health claims must be evaluated by government agencies, ingredients and nutritional information must be clearly listed on foods, and product labels may need to provide information about who manufactured a product, where it was manufactured, and how consumers can contact the company to make complaints. Consumer transaction means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible thing to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. Consumer law is a legal area that focuses on giving protection to the consumer when they buy a product or service. This part of the legal system is designed to make sure that consumers buying a product or service are protected against issues such as fraud and miss-selling, this legal area also makes sure that consumer markets work in a fair and equitable manner. There are various elements of consumer law that protect consumer rights and that can be used to help them solve a case against a retailer or sales
company. The Consumer Protection Regulations is a field of law which is designed to protect consumers and to provide them with formal legal means of obtaining reparations for damage caused by faulty products or service. A wide variety of topics are covered in consumer law, including warranties, quality standards, consumer privacy, and certain types of contracts. The goal of such law is to ensure that consumers have rights which are clearly spelled out, and that who sell products and services are clearly aware of their responsibilities under the law.

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.

The Indian parliament enacted the Consumer Protection Act in 1986 to be safeguard the consumer interest in compliance with these UN guidelines. By passing such legislation the Legislature has proposed speedy solution of the disputes of the consumer for the benefit of the people at large.

Since the enactment of Consumer Protection Act there was a lot of confusion in the Indian judiciary as well as the medical fraternity regarding the application of Act in cases of medical negligence. The definition of service, consumer, as well as the medical fraternity, contained in the Act and their relevance in the context of medical practitioner was not clear. Various high courts also reached different conclusions.

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In *Dr. A.S. Chandra v. Union of India* before District Forum it was argued that professional services rendered by medical practitioners do not fall within the purview of "complaint" under Section 2(b) of the Consumer Protection Act, 1986. The expression "service" as defined by Section 2(o) of the Act excludes professional services rendered by members of the medical profession. If the services rendered by a doctor for consideration are to be brought within the purview of Section 2(o) of the Act, it was contended that the same would be unconstitutional being violative of Article 14 of the Constitution; the consumer forum is not the proper forum to decide the question since the allegations levelled by the fourth respondent constitute a tortious act, the adjudication of which requires receiving of elaborate evidence and consideration of complicated medical norms. Hauling up of doctors before consumer protection forums in respect of the professional services rendered by them for consideration would be violative of Article 19(1) (g) of the Constitution. The learned judge negatived all the pleas and dismissed the writ petition holding that the bodies entrusted with the administration of the Act consist of and presided over by persons with matured judicial training. The choice of the personnel itself indicates that there are inbuilt safeguards. Except where services were rendered free of charge or under a contract of personal service, all the other services are comprehended, according to the learned judge by Section 2(o) of the Act. Merely because the provisions of the Indian Medical Council Act provide for disciplinary action against an erring medical practitioner there is nothing to hold that the jurisdiction of the District Forum is ousted under the provisions of the Act.

Against this decision The Indian Medical Association, Andhra Pradesh sought a writ of prohibition directing all the District Forums in the State not to proceed further with the enquiries relating to allegations against members of the medical profession. It was averred that one of the objects of the Indian Medical Association is to protect the interests of the medical science and medical profession in the State of Andhra Pradesh and it is the duty of the Association to maintain the honour and dignity of the noble profession. Several instances came to the notice of the Association that patients after availing of medical treatment from the doctors are approaching the consumer disputes redressal
agencies claiming damages and compensation for alleged deficiencies of the services rendered by the doctors. Neither the district forums nor the State Commission have jurisdiction to entertain such complaints. The service rendered by the doctors is "personal service" outside the purview of Section 2(o) of the Act and, therefore, the Act does not govern them. Doctors sometimes have to take "snap decisions" and if their actions are to be questioned on the ground that the services rendered by them were deficient, it would be violative of Article 19 (1) (g) of the Constitution since they would not be in a position to practice their profession. The Andhra Pradesh high court held that the Consumer Protection Act does not exclude Private Medical Practitioners and Nursing Homes from the purview of the Act if they had rendered service for consideration.²

Some other judgments create further confusion. In Dr. C.S. Subramanian v. Kumarasamy and another, 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' under Section 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 medical 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 Para-medical 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.³

The National Commission by its judgment and order 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.4
Whereas in another case 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.5

The National Commission in *Cosmopolitan Hospitals and another v. Smt. Vasantha P.
Nair*,6 and in the judgment dated November 16, 1992 in First Appeal No. 97 of 19917
observed 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. The view of the state commission of
Haryana8, Karnataka,9 Delhi,10 Punjab,11 and Rajasthan12 was that medical services in a
Government run hospital cannot be considered as services under the Act. Whereas the
state commission of Orissa expressed the opposite view.13 In *Indian Medical Association
v. V.P. Shantha* the Supreme Court cleared all those confusions.14 The Court held that:

(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

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8 *Birbalsingh v. ESI Corporation*, 1993(2) CPJ 1028.
10 *Prem Chand Sharma v. The Director, CGHS*, 1992(2) CPR 51( Del. SCDRC).
12 *Hanuman Prasad Darbanv. Dr. C. S. Sharma*, 1991(1) CPR 63 (Rajasthan SCDRC).
13 *Smt. Sukanti Behera v. Dr. Sashi Bhusan Rath*, II (1993)CPR 633 (Ori. SCDRC)
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 'contract 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 personal
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.

4.1.2. Applicability of the Consumer Protection Act to medical practitioner

4.1.2.1. Consumer

According to Section 2(d) of the Consumer Protection Act, 1986 Consumer means any
person who;

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

2) (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 service other than the person who
(hires or avails of) the services 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 but does not include a person who avails of such services for any commercial purposes.

A consumer is a person who enters in a legal relationship with a seller or a supplier of goods or services. It is clearly obvious that consumer has a duty to pay consideration but it is not a matter of law which that consideration has been paid or promised or partly paid and partly promised or under any system of deferred payment.

As per Section 2 (d), a patient is a costumer when he goes to a medical practitioner or hospital and pays for his treatment. He can claim compensation if there is any deficiency in the service and suffer any damage. The term consideration refers to the fees paid or even promised to be paid by the medical professional or health care institution for receiving medical treatment. Fees may be paid in part (advance) or in full. It may be paid by patient himself or his relatives. Irrespective of the amount of money paid, all patients enjoy the status of consumers under the Act and are eligible to claim compensation for the deficiency in service.

The decision of Supreme Court of India to consider patients as consumer has not been welcomed wholeheartedly by the medical community of India. Various medical associations debated and disputed this point strongly, but were left with no other option but accept the decision of the Apex Court.

Beside the patients, beneficiaries of a service also considered to be consumers. In the spring Medows Hospital case, the Apex Court held that:

In the present case, we are concerned with clause (ii) of section 2(1) (d). In the said clause a consumer would mean a person who hires or avails of any services and includes any beneficiary of such services other than the person who hires or avails of the service. When a young child is taken to a hospital by his parents and the child is treated by the doctor, the parent would come within the definition of consumer having hired the services and the young child would also become a consumer under the exclusive definition being a beneficiary of such services.\textsuperscript{15}

\textsuperscript{15} Harjot Ahluwalia v. Spring Meadows Hospital, II (1997) CPJ 98 (NC).
If the parents are looking after their married daughter who is in a vegetative state and they spend for her medical treatment, their claim for compensation would be accepted even if the husband has not the lawsuit.\textsuperscript{16}

In the case of death of patient who is a consumer, legal heirs of the deceased patient will be considered as consumer.\textsuperscript{17} Donations collected from a patient are not treated as consideration for the professional services rendered by doctors.\textsuperscript{18}

The Rajasthan SCDRC has observed that a pensioner who avail the facility of free supply of medicines under Rajasthan State Pensioner’s Medical Concession Scheme, by making a monthly contributions at the rate prescribed while in service, has hired the service in exchange for the contributions, and is, therefore a consumer as per the Act.\textsuperscript{19}

Similarly, the beneficiary of ESI Corporation\textsuperscript{20} and CGHS\textsuperscript{21} were also received the right to sue the doctors working in ESI hospital and CGHS approved hospital and dispensaries even if the treatment is free of cost. This is in stark contrast to the earlier judgments wherein free treatment was considered outside the purview of Consumer Protection Act.\textsuperscript{22}

In opposite some other lawyer believe it is not contrast to the earlier judgments because it is not free of charge but the service rendered to an employee is on the bases of his condition of service and thus the judgment is complied with the meaning of the Act.\textsuperscript{23}

The same in \textit{Kishore Lal v. Chairman} Supreme Court held that wherever charge for medical treatment are borne under an insurance policy, it would be a services rendered


\textsuperscript{17} Cosmopolitan Hospital v. Smt Vasantha P. Nair, I (1992) CPJ 302(NCDRC).

\textsuperscript{18} C.V. Madhusudhana v. Director, Jayadeva institute of Cardiology. II (1992) CPJ 519 (Karnataka SCRDC).

\textsuperscript{19} Treasury Office and Member Security Pensioner Medical Fund v. G. K. Joshi, I (1996) CPJ22(Rajasthan SCDRC).


\textsuperscript{21} Jagdish Kumar Bajpai v. Union of India, 2007 MLR 175(NC).


\textsuperscript{23} Kumar Koley, Tapas, \textit{Medical negligence and the law in India}, 2010 new Delhi, India, p151.
within the ambit of Section 2(1)(0) of the Act, it means that the services are not free of charge.\textsuperscript{24}

The NCDRC, in a 1996 judgment, \textit{Additional Director, CGHS pune v. Dr. R. L. Butani}, had held that patients taking treatment from CGHS hospitals and dispensaries were not consumer under the Act. However in Jagdish Kumar Bajpai v. Union of India, the NCDRC logically held that both serving and retired employee of CGHS were covered under the Act, keeping in mind the judgment in \textit{Indian Medical Association v. V.P. Shantha},\textsuperscript{25} and \textit{LaxmanThamappaKotgiriv. G. M. Central Railway}.\textsuperscript{26}

In the cases of charges that are required to be paid by persons availing of services, but certain categories of persons who cannot afford to pay are rendered service free of charge, and where charges are required to be paid by persons availing of services, and services does not rendered to certain categories of persons who cannot afford to pay the services rendered by doctors and hospitals would be covered within the ambit of the service defined in the above provision of the Act, 1986.

\textbf{4.1.2.2. Service}

Depending upon the context of the word, the term service has various meanings. According to the procedure law it means the formal delivery of a subpoena, writ, or other legal notice or process, the delivery of a writ, summons and complaint, criminal summons, or other notice or order by an authorized server upon another. Proper service thereby provides official notification that a legal action or proceeding against an individual has been commenced. In the area of domestic relations it meant the doing of something useful or helpful for another individual or company in exchange for a fee. The term refers to the uncompensated work, guidance, and upkeep an injured or deceased family member previously provided for the family; the injury or death of the provider of these services means that the work will have to be obtained from another source and at a

\textsuperscript{24} Supra n 20.
\textsuperscript{25} Supra n14.
\textsuperscript{26} Supra n 21.
price. In this context the term traditionally was restricted to the "services" of a wife under the theory that the husband's duty was to provide support and the wife's duty was to provide service. After injury to his wife, a husband could bring an action on his own behalf against the responsible party for compensation of the loss of her aid, assistance, comfort, and society. The modern view holds that a wife may also sue for the loss of assistance and society of her husband. Under feudal law, tenants had a duty to render service to their lords in exchange for use of the land. The service required could take many forms: monetary payments, farm products, loyalty, attendance upon the lord as an armed horseman, carrying the king's banner, providing a sword or a lance, or plowing or other farm labor done for the king. The term refers to the time spent in the military, as in, Amir khan is in the service of Indian Army. Consumer Protection Act provides that:

"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. 27

The exclusionary part excludes 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 after pointing out that the said definition is in three parts 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' dictionarily 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 installments or payments on a

27 Consumer Protection Act, Section 2(1) (d).
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.28

Almost all types of services that a medical professional rendered are considered services but some of them are outside of purview of the Act. The Supreme Court of India in the case of Indian Medical Association v. V.P. Shantha clarified the situation the Court held that:

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. 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.29

The Supreme Court held that:

(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

29Supra n14.
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 are 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 centre/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 centre/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 where under 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' under Section 2(1) (o) of the Act.\(^{30}\)

\(^{30}\)Id.
Where the treatment that was given to the complainant is totally free of any charge, it does not constitute `service' as defined under the Act and the complainant was not entitled to seek any relief under the Act. In the case of Vijay H. Mankar v. Dr.(Mrs.) Mangla Bansod Complainant alleges medical negligence on the part of a lady doctor, she alleges that she paid charges for treatment, Opposite party denied that allegations and contended that she did not receive any fee because of close relationship. The court held that:

The preliminary objection of the opposite party is that she has not received any payment as consideration from the complainant and that ,therefore ,`service' rendered in the case is not covered by Section2(1)(0)of the Consumer Protection Act. However, in the order of the Supreme Court, Indian Medical Association v. V.P. Shantha&Ors., it has been inter alia stated that services rendered by 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 are rendered services free of charge would fall within the ambit of the expression 'Service' as defined in Section2 (1) (o) of the Act. It is true in the present case, opposite party's averment is that fees were not charges because the patient could not afford to pay. Although in their order, the Supreme Court have not distinguished a case of 'free' service of the kind as in the case of hand, the spirit of their order is that expenses incurred for providing service free of charge to certain patients are met out of income earned by the doctors and hospitals from services rendered to paying patients and in this view of the matter the non-paying patients are beneficiary of the services which are hired or availed of by the paying patients. That apart, the Supreme Court observed that all persons who avail of the services of doctors are to be treated on the same footing irrespective of the fact that some of them pay for the services and other avail the same free of charge. Also, the complainant had deposed that opposite party had not given receipt for fees paid and that opposite party told his mother-in-law on 31.5.1990 that she would give consolidated receipt for all payments, after delivery. The mother-in-law has filed an affidavit to this effect. In view of the aforesaid discussion, this point need not detain us from proceeding with the adjudication of the complaint on merits.

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

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32 Ibid.
33 Id.
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. Donations collected from a patient are not treated as consideration for the professional services rendered by doctors.

The Rajasthan SCDRC has observed that a pensioner who avail the facility of free supply of medicines under Rajasthan State Pensioner’s Medical Concession Scheme, by making a monthly contributions at the rate prescribed while in service, has hired the service in exchange for the contributions, and is, therefore a consumer as per the Act.

In the case of Indian Medical Association v.V.P. Shantha the Supreme Court most significant clarified the inclusion of medical services under Consumer Protection Act. The Supreme Court observed that it’s true 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 under Section 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. In this contention, Referring to the changing position with regard to the relationship between the

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35 C.V. Madhusudhana v. Director, Jayadeva institute of Cardiology,II (1992) CPJ 519 (Karnataka SCDRC).
medical practitioners and the patients, the Court rejected the argumentation merely because medical practitioners are belonging to profession.

‘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.\(^37\)

The actual definition of professional is of, relating to, engaged in or suitable for a profession like as lawyers, doctors, and other professional people. A professional is someone whose work conforms to the technical or ethical standards of a profession. The right to exercise independent judgment separates professional persons from non-professional person. The growth of the licensed professions has been caused the critical importance of professional regulation to protect the public interest and the integrity of the professions; and some of the factors critical to determining whether licensure is appropriate for a particular profession to guarantee public protection.\(^38\)

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.\(^39\)

Thus 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. This judgment caused majority of medical negligence cases in India filed in consumer court under the Act. In this respect the Court held that:

\(^{37}\) IRC v. Mass, (1919)1KB647;88LGKB752.


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…Immunity from suit was enjoyed by certain profession 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…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.40

4.1.2.3. Contract of personal service

There was some confusion about the nature of medical services. The question was about the nature of doctor-patient relationship, whether rendering medical service is excluded by exclusionary part of the definition of service as defined in Section 2 (1) (0) of the Act.

A patient approaching a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring relief to his medical problem. The legal relationship takes the shape of a contract retaining the essential elements of tort. A doctor owes certain duties to his patient and a breach of any of these duties gives a cause of action for negligence against the doctor. The doctor has a duty to obtain prior informed consent from the patient before carrying out diagnostic tests and therapeutic management.

The relationship between physician and his patient does not cover by provision of the law of employment contract because it is a relationship which organized around the

40 Supra n14.
completion of a once-off piece of work and is not such a continuous relationship and the
duty of care, arising from occupier’s liability. Patient as the employer is generally not
liable for the vicarious acts of independent contractors.

So it is not a contract for service but it is a contract of service. A contract may be express
or implied. An express contract is one, whose terms are stated in words. An implied
contract is one, the existence and terms of which are manifested by conduct. A unilateral
contract is one in which there is a promise to pay or give other consideration in return for
actual performance. A bilateral contract is one in which a promise is exchanged for a
promise.

In most cases contracts can be either written or oral, but oral contracts are more difficult
to prove and in most jurisdictions the time to sue on the contract is shorter. In common
law, to be legally binding as a contract, a promise must be exchanged for adequate
consideration, while exchanging of promises is not an element of contract according of
Iranian contract law. Adequate consideration is a benefit or detriment which a party
receives which reasonably and fairly induces them to make the promise/contract in
common law but Iranian contract law does not consider the adequacy of consideration an
essential to a contract. It is covered by the contractual privacy area.

Contracts are agreements that are legally enforceable. A contract may involve a duty to
do or refrain from doing something, and the failure to perform such duty is called a
breach of contract. The law provides remedies if a promise is breached, aiming to restore
the person wronged to the position they would occupy if the contract had not been
breached, rather than punish the breaching party.

Generally Employer – employee relationship is governed by labor law. This law applies
to every enterprise or establishment of industry, mining, commerce, crafts, agriculture,
non religious, whether they are of professional education or charitable characteristic as
well as the liberal profession, associations or groups of any nature whatsoever. This law
governs relations between employers and employee resulting from employment contracts.
Usually the contract of employment is a continuous relationship which resulted on a duty of care is owed to employees, as the employer is generally liable for the vicarious acts of employees, and this contract is under a Protective legislation.

Employee within the meaning of law is a person who has signed an employment contract in return for remuneration, under the director and management of another person, whether that person is a natural person or legal entity, public or private. To clearly determine the characteristics of an Employee, one shall not take into account the jurisdictional status of the employer nor that of the Employee, as well as the amount of remuneration.

In respect to these confusions the Court held that:

There is a well recognized distinction between a `contract of service' and a `contract for services'. 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. 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. 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 is 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".

It is no doubt true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and,

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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… 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\(^44\), the managing agents of a company\(^45\) and a professor in the University.\(^46\) 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' under Section 2(1) (o) of the Act by virtue of the exclusionary clause in the said definition.\(^47\)

### 4.1. 3. Deficiency in service

Deficiency means inadequacy to the quality or state of being deficient, an amount that is lacking or inadequate, a shortage of substances necessary to health. For example; the disease may be caused by nutritional deficiencies. There are several deficiencies in his plan. The accident was caused by deficiencies in the engine. In consumer law terminology “deficiency” means any fault imperfection, short coming 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. Employing an unqualified nurse maybe considered as deficiency in service. In a case the nurse had not only misread the doctor’s prescription but had administered the wrong medicine without even a test dose and without the supervision of a doctor. Worse, she had given a dosage

\(^{44}\) The High Commissioner for India v. I.M.Lall, (1948) L.R. 75 I.A. 225.
\(^{46}\) Dr. S.B. Dutt v. University of Delhi, 1959 SCR 1236.
\(^{47}\) Supra n14.
that was three and a half times the dosage required for a child of two years. The commission said that:

We feel it is high time that hospital authorities realized that the practice of employing non-medical practitioners, such as those specializing in the unani system, who do not possess the required skill and competence to give allopathic treatment, and allowing them to treat patients is gross negligence.48

The health service has been influenced over the last few years by the need for “quality care” as part of the clinical governance structure. At the same time, public confidence in the quality of care delivered by healthcare practitioners has been diminished by a series of events. A doctor, qualified in one form of medicine, cannot practice another, and anyone who does that would be held guilty of negligence per se, and there was no need for any further proof of negligence. The Supreme Court in fact had gone so far as to describe such persons as quacks and pretenders. In a case, a doctor, qualified in the system of homoeopathy, had administered allopathic medicines to a patient, eventually resulting in his death. A hospital employed a doctor and despite knowing that he did not possess the necessary skill and competence to give some special treatment, put him in charge of treating such special treatment is liable for the injuries to the patients, hospitals that employ unqualified persons they would be held accountable for their actions. The law may be an effective scrutinizer and regulator, but that it also has its limitations in determining what is “quality care” and “good practice” because of the complex multifaceted nature of much medical decision making. Healthcare practitioners owe a duty of care to their patients and, if they break that duty and harm results, then liability may accrue in the tort of negligence. Indian law does not only impose obligations in negligence upon the individual medicinal but, in addition, the organization may itself be held to be liable in the tort of negligence through “direct liability” for failure to provide a “safe system”.49 “When a patient is admitted to a hospital, it is done with the belief that the treatment given in the hospital is being given by doctors qualified under the Indian Medical Council Act. It is not within the knowledge of the relatives that the patient is

49 Robertson v. Nottingham HA. [1997].
being treated by a unani specialist."\(^{50}\)

Deficiency in medical services gives the patient as a consumer the right to claim compensation.\(^{51}\) Section 2(f) defines “deficiency” as follows;

deficiency” means any fault imperfection, short coming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

The legal standard of care in India which healthcare practitioners owe to their patients has been rooted in professional practice, the well known Bolam test, which, as stated by Judge McNair, provides that a doctor “…is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men.”\(^{52}\) This approach was followed over several years in other areas of healthcare litigation such as consent to treatment.\(^{53}\) While in a few cases judicial adherence to the “party line” waivered slightly and the English courts confirmed their ability to scrutinize the standard of professional practice,\(^{54}\) such cases were the aberration, not the rule. Admittedly, the professional practice standard itself is not static so that, for example, over the last decade in the area of consent to treatment there has been a gradual trend towards broader disclosure of information to patients highlighted through professional practice guidelines. However, it is still a professionally based standard. Nonetheless today there is greater judicial willingness to scrutinize the opinion expressed by the body of professional practice. “In particular where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible. The judge however emphasizes that

\(^{50}\) Supra n19.


\(^{52}\) Bolam v. Friern Hospital Management Committee [1957] 1 WLR 587.


in my view it will be very seldom right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable.”55

Overturning the responsible body of professional opinion is, in practice, likely to be quite difficult. The issue of disclosure of risk has latterly applied to diagnosis and treatment. “if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk if the information is needed so that the patient can determine for him or herself as to what course that she should adopt.”56 Here is indicative of a willingness to scrutinize standards of professional opinion.57 “No reasonable doctor would fail to disclose a risk regarded as significant by a reasonable patient.”58

A doctor possesses the requisite skill in the medical profession which he is practicing and undertaking the performance of the task entrusted to him. He would be exercising his skill with reasonable competence as a supplier. If he was not possessed of the requisite skill which he professed to have possessed, then he will be under persecution of criminal law and when he did not exercise, with reasonable competence in the given case, the skill which he did possess, he may be held liable for negligence. Every doctor “has a duty to act with a reasonable degree of care and skill”.59 “Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill”.60 Sellers or service suppliers such as professionals should provide the goods or services in a reasonable and proper condition. Those goods and services should also be safe for consumption. Such persons have created a legal relationship with the seller or the service supplier after entering into some legal relationship with them.

The negligence of medical professional comes within the expression of deficiency in service. In view of the law on the subject as the doctors have performed their duties to the

55 Bolitho v. City and Hackney Health Authority. [1997] 1 WLR 1151.
59 State of Haryana v. Smt Santra, AIR 2000 SC.
best of their ability and with due care and caution, it cannot be held that there is deficiency in service. It meant that where doctors did not performed their duties to the best of their ability and with due care and caution hence service is equal to performance duties to the best of ability and with due care and caution. There are cases which 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 outpatient card containing the warning.\textsuperscript{61} In this respect court held that:

It is submitted that when the incident occurred there was no standby anaesthetist on call in the SICCU. By the time Dr. Jain who was called from outside the hospital, the patient's brain was dead. This is once again an obvious illustration of the deficiency of service and negligence of the hospital and its entire staff... It is in evidence that Dr. Kadam, Dr. Vaid and Dr. Mangal Jain failed to intubate lesser size of tubes despite repeated attempts and trying serially. This cannot be termed as either negligence or deficiency in service. The patient was on ventilatory support system with all organs having failed and during the last stages had shallow respiratory effort and was wholly uncooperative which made the intubation difficult till the time the death occurred... in substance, for establishing negligence or deficiency in service there must be sufficient evidence that a doctor or a hospital has not taken reasonable care while treating the patient. Reasonable care in discharge of duties by the hospital and doctors varies from case to case and expertise expected on the subject, which a doctor or a hospital has undertaken. Courts would be slow in attributing negligence on the part of the doctor if he has performed his duties to the best of his ability with due care and caution.\textsuperscript{62}

The current legal standard of care imposed upon doctors, hospitals nurses and other medical professionals is one where the medical practitioner must not fall below the ordinary skill of an ordinary practitioner exercising and professing to have the particular skill in issue. The relevant standard and the level of skill is that practiced and accepted by a responsible body of medical persons skilled in the particular area of medicine in question. It is the medical profession that, in effect, determines the standard of care among medical practitioners. The definition of reasonable standard of care, or duty of

\textsuperscript{61}\textit{Chinkeow v. Government of Malaysia}, (1967) 1 WLR 813 P.C.

\textsuperscript{62}\textit{Mrs. ShantabenMuljibhai Patel v. Breach Candy Hospital}, I (2005) CPJ 10 NC.
care, however, presents complications in all its own right as well. The subjective nature of a reasonable standard of care is defined carefully during a tort case involving medical malpractice through expert witness testimony. Judges are assumed to have little or no working background of knowledge in regard to medical practices in most cases, and plaintiffs, as well as defendants, will produce expert witness testimony to promulgate or refute claims entered into the courts, as well as establish the guidelines for the duty of care necessary in a given medical malpractice claims case. For example in a case the complainant suffering from recurring pain in her abdomen was advised operation for the disease diagnosed as Cholesystitis. Operation by means of the method of Laproscopic Chelecystectomy was done and the patient was discharged after 2 days. The complainant patient was continuously complaining of swelling and severe pain on the spot of the operation. The Doctor treated her for post-operative inflammation for a period of two months. However, there was no evidence that the inflammation was because of any deficiency and that Doctor did not try to control the inflammation. The patient’s case that a piece of gauze had been left inside and that a large piece of gauze came out from within her abdomen from the spot of operation, was not proved by producing any evidence to show that this act had caused subsequent inflammation. The District Forum although disbeliefed the complainant’s version of gauze, it found some negligence on the part of the Doctor and awarded Rs. 50,000 as compensation payable by the Doctor. In appeal, the State Commission set aside the order of the District Forum holding that a case of medical negligence has to be proved by proper medical expert evidence and cannot be based on mere statements of the patient. The National Commission dismissed the complaint holding that there was neither any deficiency nor negligence in this case.\[^{63}\] But in some cases the court may decide that a generally accepted practice among medical practitioners is a negligent one, however general in the profession. The legal standard for medical negligence varies from place to place, but generally requires an evaluation of the physician's conduct either against that of a hypothetical "reasonable physician," or else against professional custom. The first element necessary to expose medical negligence in

\[^{63}\]SikhaNayak \textit{v.} Dr. ManabeshPramanick, No.2462 of 2004.
tort claims is establishing that defendants and plaintiffs entered into an agreement that required a healthcare professional to offer a duty of care, which is also known as a reasonable standard of care. For patients that have become victims of medical malpractice, the act of allowing a medical professional to examine, treat, or operate on their body leaves healthcare professionals liable for any actions or incidents that would deviate from a reasonable standard of care or duty of care. Where the use of a new device involves a significant departure from traditional modalities of care, and a bad clinical result follows, questions may arise about whether the legal standard for negligence has been violated. For judges and policymakers, the implication is that traditional legal concepts and doctrines may need to be re-examined and fine-tuned, in recognition that those rules may sometimes have unintended consequences that reach beyond any discrete malpractice dispute or occurrence of medical injury. An important example of this kind of problem involves the relationship between medical malpractice and new technology adoption. Negligence and malpractice doctrine generally make it clear that standards of care are evolutionary rather than static and those providers have an obligation to stay abreast of new techniques and developments.\textsuperscript{64} For instance childbirth in spite of a sterilization operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous re-canalization. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3\% to 7\% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons dehorns and negligence of the surgeon. Legal ambiguity around what the standard of care in this kind of circumstance implies that physicians may genuinely not

know the degree of negligence liability risk that is associated with adopting a new clinical technology. By itself, that may present a problem for judges after the fact, in determining appropriate rules and incentives for apportioning liability fairly. More important, though, is the potential for far-reaching effects on physicians (and other care providers) in their willingness to adopt new technologies, given ill-defined but perceived malpractice liability risks associated with doing so.65 In most medical negligence cases, the duty prong is fairly straight forward. When a physician actually provides medical services to a patient, a professional duty of care is thereby established.66 The damages and causation prongs in medical negligence are also frequently straight forward e.g., where a surgical error clearly results in a patient's injury or disfigurement. The most important and complex legal requirement for negligence is breach i.e., not only that a physician owed a duty of care to her patient, but that by her actions she somehow violated that duty. Establishing whether a breach has taken place requires a comparison between the physician's actions and a legal standard of care, which represents what physicians are obligated by law to do in providing medical services to their patients. Determining how the legal standard of care applies to a particular clinical situation is sometimes ambiguous, and it usually involves tapping the expertise, opinions and testimony of other physicians.67

“A Doctor, in essence, needs to be inventive and has to take snap decisions especially in the course of performing surgery when some unexpected problems crop up or complication sets in. If the medical profession, as a whole, is hemmed in by threat of action, criminal and civil, the consequence will be loss to the patients. No doctor would take a risk, a justifiable risk in the circumstances of a given case, and try to save his patient from a complicated disease or in the face of an unexpected problem that confronts him during the treatment or the surgery. It is in this background that this Court has cautioned that the setting in motion of the criminal law against the medical profession

67 Ben A. Rich, Medical Custom and Medical Ethics: Rethinking the Standard of Care, 14 CAMBRIDGE Q. HEALTHCARE ETHICS 27, 27-28 (2005).
should be done cautiously and on the basis of reasonably sure grounds. In criminal prosecutions or claims in tort, the burden always rests with the prosecution or the claimant. No doubt, in a given case, a doctor may be obliged to explain his conduct depending on the evidence adduced by the prosecution or by the claimant. That position does not change merely because of the caution advocated in Jacob Mathew in fixing liability for negligence, on doctors.”

4.1.4. Summary Procedures under the Act

As mentioned above the Indian Medical Association argued that the composition of the consumer forum is not appropriate for trial of medical negligence cases. However rejecting this contention, the Supreme Court observed that the members of consumer forum are very well versed with law and are well qualified to decide a medical negligence lawsuit, even if it is a complex nature. The medical negligence issues are often complex and for them civil courts may be more appropriate forum. However, consumer forums must scrutinize the evidence produced before them and decide cases accordingly. The Act sets up a three tier structure for the redressal of consumer grievances.

1. At the lowest level, i.e., the District level is the Consumer Disputes Redressal Forum known as `the District Forum';

2. At the next higher level, i.e., the State level is the Consumer Disputes Redressal Commission known as `the State Commission' and

3. At the highest level is the National Commission.69

69 Supra n 22, Section 9; Establishment of Consumer Disputes Redressal Agencies.- There shall be established for the purposes of this act, the following agencies namely:
a. a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government in each district of the State by notification;
Provided that the State Government may, if it deems fit, establish more than one District Forum in a district.

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In India, "Civil courts have been entertaining complaints of medical negligence from patients or their representative and have been awarding compensatory damages to them for the injury suffered by them. However, the procedure in civil proceeding is tardy, expensive and time-consuming. Because of this, many of the aggrieved consumer stayed away from the ordinary courts and suffered in silence. Complainants who went to the courts for relief generally had to wait for years to get justice and that too after spending heavily on advocates and towards court fees. The procedure is also, cumbersome and time-consuming making litigation costly and troublesome for ordinary person who constitute the majority of the population. The Consumer Protection Act, 1986 was enacted to remedy this situation by providing a simple, inexpensive and expeditious mechanism for redressing the genuine grievances of consumers of goods and services."70 District Consumer Forum, State Commission and National Commission are the respective adjudicating bodies for medical negligence complaints based on pecuniary jurisdiction.

Any person aggrieved by an order made by the National Commission may appeal against such order to the Supreme Court according to section 23 of the Act. A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum as per the procedure and rules prescribed in Section 12 of the Indian Consumer Protection Act. Section 13 of the Act prescribes Procedure to be followed by The District Forum on receipt of complaint. Procedure for Appeal is regulated by section 15 of The Act (Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed) Section 18 of the Act deals with Procedure applicable to State Commissions. Section 19 of the Act deals with procedure

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70 Supra n 22.
for appeal against the decision of State Commission to the National Commission and section 22 deals with procedure applicable for national Commission.

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 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. The State Commission can exercise revisional powers on grounds similar to those contained in relation to a consumer dispute pending before or decided by a District Forum and the National Commission has similar revisional jurisdiction in respect of a consumer dispute pending before or decided by a State Commission. Further, there is a provision for appeal to the Supreme Court from an order made by the National Commission on a complaint or on an appeal against the order of a State Commission.

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

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71 Supra n 27. Section 15; 15. Appeal.- Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed: Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

72 Id, Section 19; 19. Appeals.- Any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed: Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not finding it within that period.

73 Id, Section 15.

74 Id, Section 17(b) (b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

75 Id, Section 21(b). to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

76 Id, Section 23.
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 Code of Civil Procedure 1909 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 and 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.

77 Id., Section 14; Finding of the District Forum. - (1) If, after the proceeding conducted under Section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things.

78 Id, Section 3 Act not i derogation of any other law. - The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.
4.2. Iran

Managed health care has momentously changed the market for patients who must be consumers. Individuals are buying insurance with high deductibles that require patients to pay most medical costs out of pocket. This is supposed to induce patients to shop like consumers for good care at high prices. The market will spread decent products at reasonable prices before consumers, who will choose the right goods at the right rates. The key but unappreciated fact, however, is that the market for uninsured medical services is a calamity.\(^{79}\)

Patients can rarely amass enough information about services and prices to make good decisions about hiring doctors and buying care. Patients are frequently committed to their doctors, and their doctors normally decide which hospitals to use. Doctors and hospitals commonly require patients to sign contracts obliging them to pay whatever bills the provider cares to present. Providers regularly present and aggressively collect staggering bills unrelated to their costs or to the prices they negotiate with insurers. These are the matters of our economic life fact which they are not very concern to the legal area. In Iran, the professions are under pressure to conform to national competition policy, and the State and Territory governments have subscribed to a compulsory list price, which is reinforced by financial sanctions administered by the Government. The agreement involves adherence to a competition code which applies the scheme of the *Tazirat Houkomati* (تغذیرات حكومتی) legislation to all anti-competitive business practices. In that context, no business-profession dichotomy is recognized.\(^{80}\)

Law has its instruments which are concern to regulated society. It is necessary to understand the ‘Consumer Protection Act’ first in order to realize its implication on the consumer as well as the medical profession. The Iranian consumer Protection Act enacted by the Parliament in 2009, The Act now covers all kind of services and all kinds of consumer transactions whether made in cash or in kind. It protects the consumer from


\(^{80}\) *Tazirat Houkomat Darouva Darman* (تغذیرات حكومتی دارو و درمان).
the burden of restrictive and unfair trade practices and enables the consumer forums and commissions to award compensation not only for monetary loss in purchasing defective material or in buying deficient services but also for mental pain, suffering and harassment caused by defective goods or service. A consumer is defined in Iranian law as a natural or artificial person who buys goods or a service from someone whose business it is to sell goods or provide services. Deficiency refer to a problem with an item that consumer have bought, it is always the seller who should put things right. As a general rule, the seller can either repair or replace the item. Alternatively, they can refund the costs of the item or service to the consumer. The Act comprising five parts and a total of twenty two Articles deals with selected areas of the law not yet provided for in other statutes; it does not seek to repeal or replace existing law. However, by extending its protection only to consumers it inevitably had the effect of differentiating the operation of general law, most significantly the law relating to contracts and the law relating to the civil responsibility. The Act drew extensively from consumer protection statutes in other jurisdictions. Article seven of the Act is dealing with Misleading and Deceptive Conduct, False Representations, and Unfair Practices. Hence specific provisions pertaining to such conduct in relation to goods, services and employment support a general prohibition of misleading and deceptive conduct. A consumer who is not satisfied by article or services he has bought may talk to a manager of consumer protection organization. When the problem has not resolved then he may file a complaint with the SazemanTaaziratHokomati (سازمان تعزیرات حکومی) with its jurisdiction. Iranian Consumer law aims to ensure that consumers have enough information about prices and quality of products and services to make suitable choices on what to buy. Consumer law also aims to ensure that goods are safe and are manufactured to an acceptable standard. Consumers are entitled to information which protects them from false claims about goods, services and prices under the Consumer Protection Act 2009. Under the Act it is an offence for any retailer or professional to make a false or misleading claim

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82 Id, Article 8.
83 Id, Article 14.
84 Id, Article 3.
about goods, services and prices. It is also an offence to sell goods which bear a false or misleading description. 85 Claims about the weight, ingredients and performance of goods must be stated truthfully. Also claims made about how items operate and where they were made must be true. Claims about the time, place or manner in which a service is provided and claims about the effect of a service and the service providers must also be true. 86 This act also covers claims about prices. Actual prices, previous prices and recommended prices of goods and services must be stated truthfully. Where a price is stated it should be clear what particular item it relates to. It should be the total price and there should be no hidden extras. If a retailer makes a mistake the buyer does not have the right to demand that the goods be sold to them at the marked price. The basic principles in consumer relations under this law are: the protection of life, health and security of the consumer; education and divulgence on the adequate consumption of the products and services; adequate and clear information on the products and services; effective prevention and repair of damages to the goods and intangible being of the consumer; access to the administrative bodies for assistance; providing of facilities for the defense of consumers rights; and protection against misleading and abusive publicity, coercive and unfaithful commercial methods as well as abusive or imposed clauses for contracting of services and products by consumers. Iranian modern system of law like most territories is under influences of today modern life. Most statutes of Iranian system of law emerged from Iranian traditional rules with laws identical in most aspects to that of the Islamic Shiite branch of law. This was so especially in relation to civil law. Part three of the Iranian Civil Code 1928 provides for the reception of the Islamic Shiite branch of law and statutes in areas of obligation law. However, the law to be imported is the law “as would be administered in modern law. Unless the Iranian Parliament enacts new laws or amends those inherited at the time of modern life, the Iranian law as at Civil Code 1928 will apply two statutes of great significance in consumer purchases are the Civil Code 1928 and the Iranian Mercantile Code 1932; both are part of private law. The roots of both these statutes can be traced to the 19th century ideal of equal bargaining power

85 Id, Article 2.
86 Id, Article 7.
between contracting parties and the maxim of freedom of contract. The Civil Code 1928
codified the Islamic Shiite branch of law pertaining to contracts and applies to all
contracts including those between producers and consumers. The Iranian Mercantile
Code 1932 is based on the modern mercantile law. The latter Act has itself been amended
on several occasions and added protection thereby given to consumers. However, the
enhanced rights conferred by the Iranian traditional law and economic experiences
through its history and subsequent amendments to it have not yet been included in the
Iranian Civil Code 1928. Hence, for instance, in the Malaysian context, the implied terms
that the goods match the description, be of merchantable quality, and be fit for their
purpose can be excluded by an express term of the contract.\textsuperscript{87} This situation remained
until the adoption of the Consumer Protection Act 2009.\textsuperscript{88} Iranian civil law does regulate
unfair contracts.\textsuperscript{89} Exclusion clauses are a feature of almost all consumer contracts.
Statutes have been introduced to govern the contracts of sale of real property developed
by the Iranian Registration of Immovable Property and Contracts Act 1931 to regulate
direct selling and hire-purchase. Each of these, to a different degree, regulates the
contract of sale involved and in some instances provides significant protection. This
essentially piecemeal approach meant that the protection was not uniform. This may has
been cured by the Consumer Protection Act 2009. The principal Act governing trade
descriptions is the Iranian Civil Code 1928.\textsuperscript{90} The Act does apply to movable and
immovable property including houses and is limited in its application to statements made
in the course of advertising a trade or business and does not include statements made by
professionals. It is a penal statute seeking to discourage false and misleading descriptions
of goods and services by imposing criminal sanctions. It does not impose a specific duty
to provide adequate description of the goods and services provided. Furthermore, it does

\textsuperscript{87} Iranian Civil Code, Article 220 - A contract not only binds the parties to execute what it explicitly
mentions, but both parties are also bound by all consequences which follow from the contract in accordance
with customary law and practice, or by virtue of a law.

\textsuperscript{88} Consumer Protection Act 2009, Article 8

\textsuperscript{89} Ibid, Article 438 - Trickery denotes conduct which causes the other party to the transaction to be misled.

\textsuperscript{90} Id, Article 342 - The quantity, type and nature of the object of the sale must be known and the fixing of
the quantity by weight, measure, number, length, and area or by inspection is made in accordance with the
local custom and usage.
provide for the victims of the misdescription to be compensated by the wrongdoer.\textsuperscript{91} Regulating on advertising comes in existence by consumer protection act 2009,\textsuperscript{92} the critical matter in regulating advertising is it does not contrivance to prevent unacceptable material from appearing in the first place, but if it appears regulators must be able to remove it swiftly from the media and consumers and other producers disadvantaged by the breach must be compensated. Generally speaking, Physicians under Iranian law are Independent contractors and consultants provide services to their patients. The relationship between physicians and patients is under article ten of Iranian Civil Code\textsuperscript{93} which requires that classify these service providers correctly and disclose their relationship with their patients before hiring. The differences between a Consultant and a Contractor can seem like you’re splitting hairs, but doing so is required under the law. Their relationship does not based upon the services but it is work to be provided, the person whom they wish to engage is a Consultant and not Contractor and they are not more properly classified as an employee. A Contractor relationship exists when a party has the right to control only the end result of a service, not the way it is performed. And, the party generally receives something, e.g., employee services such as programming services. So, though part of a Physician’s services may include advice, a Contractor is in the end a “doer.” in contrast to Physicians “doers”, or Physicians generally offer only advice or propose solutions to problems, but they do not direct, carry out, or implement solutions. Patients cannot control either the result of the Physician’s service or the way it is performed. A Physician requires little or no guidance in providing input. Their services are primarily advisory in nature requiring professional expertise to solve a clearly delineated problem. A Physician may provide advice, recommendations, analysis and resources based upon their background, education, experience, knowledge and expertise. They may not be given responsibility for any part of conduct of a sponsored

\textsuperscript{91} Supra n 89, Article 9 - If the seller practices trickery, the purchaser will have the right to cancel the sale, and similarly with the price paid by the purchaser, if the latter practices trickery.

\textsuperscript{92} Id, Article 7.

\textsuperscript{93} Supra n 87, Article 10 - Private contracts shall be binding on those who have signed them, providing they are not contrary to the explicit Provisions of a law.
project. Physicians may not be given warranty in any health project or other document as other than "consultant" to the project. Medical disciplinary organization has the right to control the results and the manner of performance. Consumer is an individual who buys products or services for personal use and not for manufacture or resale. A consumer is someone who can make the decision whether or not to purchase an item at the store, and someone who can be influenced by marketing and advertisements. Any time someone goes to a store and purchases a toy, shirt, beverage, or anything else, they are making that decision as a consumer. According to Iranian contract law, service refers to an act or deed, rather than property. It is a duty or labor done by a laborer under the direction and control of the one for whom the service is performed. The term implies that the recipient of the service selects and compensates the laborer. It is the occupation, condition, or status of being a servant and often describes every kind of employment relationship. In addition, service may be used to denote employment for the government, as in the terms civil service, military service or the armed service, or public service and we doesn’t say medical service. A personal services contract is a legal agreement between an individual employee and an employer. This agreement clarifies the terms and conditions of the employment. The personal services contract is created by the employer and given to the employee. However, employees are not required to agree to the terms of the contract. Counter proposals can occur with a personal services agreement that the employee does not agree to. In cases where employee agrees to the terms of the contract, an employer hires a person because they agree to the terms. The distinctive feature of a personal service contract is that it must follow the person with the skills at the root of the contract. One of the most frequently used examples of the personal services contract is the sport contracts like as hockey, baseball, football etc. almost all employment contracts are personal services contracts."As a general proposition, contract rights and duties are assignable. Notwithstanding the general rule ... certain classes of contracts are inherently no assignable in their character, such as promises to marry, or engagements for personal services, requiring skill, science, or peculiar qualifications. When rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such
a relation of personal confidence that it must have been intended that the rights should be
exercised and the obligations performed by him alone, the contract, including both his
rights and his obligations, cannot be assigned without the consent of the other party to
such contract. That certain contractual rights and duties, such as those typically found in
personal services contracts, cannot be assigned without the consent of the other party is a
well-established rule of law.”

The talents of a person which are unusual, special or unique and cannot be performed
exactly the same by another. Personal contracts can include the talents of an artist, an
actor, a writer, or professional services. The value of personal services is greater than
general labor, so woodcarving is personal service and carpentry is not. “[A] personal
services contract contains obligations involving such a relation of personal confidence
that the parties intend performance solely by the party obligated. In a personal services
contract the personality of one of the parties is material. No party can perform except the
party named in the contract, unless the parties agree otherwise. Personal services are not
those that ”may be as well performed by others as by the individual with whom the
contract was made.”

Therefore, if an actor contracts to perform in a movie and fails to show, he will be liable
for damages based on the difficulty to replace him. An artist who contracts to paint a
picture cannot send a substitute, since he was retained for his unique ability and
product. A personal services contract is one resting on the skills, tastes, or science of a
party, that is, those contracts wherein personal performance by the promisor is the

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94 Re National Hydro v. Ac Industrial, 262 BR 781 (United States Bankruptcy Court, Arkansas, 2001).
95 Supra n 87, Article 238 - If the performance of some act has been undertaken under the terms of a
contract, and if it proves impossible to force the party who should perform the act to fulfill his obligation,
though they could be performed by some other person, the judge can at the expense of the person at fault
arrange for the performance of the act.
96 Sanfillippo v. Oehler, 869 SW 2d 159.
97 Supra n 95, Article 239- If it is not possible to force the fulfillment of an act by the person who should
perform it and if the act is of such a kind that no one else cancel the contract.
essence and the duty imposed cannot be done as well by others as by the promisor himself."\textsuperscript{98}

An understanding of the types of contracts between clients, agencies and contractors and employees is vital for a contractor to be able to determine whether they are working inside or outside of the contract. However, the debate over contracts of service and contracts for service has a long history in employment law, as has the employment status of agency workers. The fundamental difference is that: An employee-employer contract is a contract of service while a contractor-client contract is a contract for services. In each of these types of contract, both parties have specific rights and responsibilities, which differ according to the type of contract in place.

Finally medical service does not come under Consumer Protection Act under Iranian law. 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 meaning of "service" as defined in Consumer Protection Act and a patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment; both medical and surgical, cannot be considered to be a “consumer” within the meaning of the Act; but the medical practitioners or hospitals undertaking and providing paramedical services of almost kinds and categories cannot claim similar immunity from the provisions of the Act and that they would fall, to the extent of such Para-medical 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.

\textbf{Conclusion}

Doctor being persons of medical profession cannot be immune from duty of every citizen to help for justice. No one is above law and justice and it is duty of doctors to come before summoning authority and give their contribution without thinking it as wastage of time. Rather they should be model citizens before all. According to Iranian law Medical

\textsuperscript{98} Re National Hydro v Ac Industrial, 262 BR 781 (United States Bankruptcy Court, Arkansas, 2001).
activates seen in conjunction with fundamental right to dignified life and does not consider as service or a kind of service in which physician's skill and knowledge is used to advise and treat disease. Loss of eyesight due to medical negligence violates right to Life and Livelihood of patient. Every patient should be entitled to right against medical negligence and must have right to adequate compensation for proven medical negligence. Hence there is serious doubt about this category of medical activities falling within the meaning and scope of Consumer Protection Act. On the other hand in India the High Courts had different versions regarding whether medical profession falls within the ambit of Consumer protection Act, recent decision of Indian Supreme court in Indian Medical Association v. V.P. Shantha and Others held that medical services provided by all private hospitals and health centers except government hospitals are “contract for service” and fall within the ambit of CP Act.

Despite having several differences, the basis mechanism for reporting and adjudication of medical negligence complaints in both Iran and India seem to resemble in certain aspects like lack of separate Act to legally define and address the issue of medical negligence. They are different in application of Consumer Protection Act for all kinds of goods and services including medical negligence too. In India summary trial procedure to be followed while adjudication and decision of consumer tribunals ought to be reasoned, based on Due Process of Law and in compliance with rules of natural justice while there is not any procedure in Iran.

99 Supran 14.