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Dr. Navtika Singh

Nautiyal



Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur, M.A, LL.M, Ph.D,

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Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

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More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda



BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LAW AND MEDICAL NEGLIGENCE

AUTHORED BY - J. PUGAZHENTHI

Introduction

If there is a right there must be a remedy. An adequate remedy which satisfies the individual makes the system of justice strong and independent. Powerful and effective enforcement system is necessary for the expeditious and cheap remedy under consumer law. Competent enforcement system is the main tool for implementation of 'rule of law' in a democratic society. Various enforcement systems are constituted in different countries. In India enforcement mechanism is mainly through three systems Common Law Courts, Medical council and Consumer Courts. For the convenience of study it is necessary to discuss each system one after another.

Enforcement Through Common Law Court:

Common law remedy is the conventional remedy available at all time. The civil law allows individuals redressal against each other when legal rights have been or are likely to be affected. The successful outcome to civil litigation is an order requiring or preventing an action (the injunction) or an award of money (damages). In a clinical negligence claim, the patient will seek monetary compensation for any loss that they have suffered. The legal consequence of any finding by the court is purely financial. There may, of course, be other consequences such as adverse publicity and damage to the practitioner's reputation. In broader terms, the threat of civil litigation may help to maintain and improve standards¹.

In England civil proceedings are dealt within the County court or the High Court, depending on various factors including the value of the claim and the area of law involved. Appeals from these courts of first instance are to the court of Appeal and then, if necessary, to the House of Lords.² Enforcement System is highly competent in England. In India, the criminal liability is enforced

¹ Peter Marquand B.S .Mrcp Solicitor, "Introduction to Medical Law", Butterworth, Heinemann Oxford Auckland Boston Johannesburg, Melbourne, New Delhi, 2002, p.234

² bid.

through the criminal court system. The civil liability is enforced through the civil court system and consumer liability is enforced through the consumer court. The common law enforcement under Tort law is being discussed below.

Enforceability under Tort Law:

The damages are awarded by the Civil Court. Every suit shall be instituted in the Court of the lowest grade competent to try it. A suit for compensation may be instituted at the option of the plaintiff either in the court within the local limits of whose jurisdiction the wrong is done, the cause of action arises or in the court within the local limits of whose jurisdiction the defendant resides, or carries on business, or personally works for gain.³ A huge amount of court fee is required to be paid in any suit for compensation on the allegation of medical negligence. Moreover a much quicker and cheaper remedy is available to the consumer of medical service under different Consumer Disputes Redressal Agencies established by the Consumer Protection Act 1986. Another common law enforcement system is through the Criminal Court.

Enforcement of Criminal Liability:

Criminal Liability is mainly enforced through the criminal court with respect to the provisions of Indian Penal Code and Criminal Procedure code. The extent of liability in tort depends on the extent of damages, but the extent of liability in criminal law depends on the amount and degree of negligence. Now unliquidated damages are awarded in criminal liability. This distinction between tort and crime has been reduced in England by giving power to the criminal courts to award compensation to the victims while passing judgment of conviction. By way of interpretation of s:357 of the Code of Criminal Procedure 1973, the Supreme Court has observed that the Criminal Court may order the accused to pay some amount by way of compensation to victim who has suffered by action of the accused. It may be noted that this power of criminal courts to award compensation is not ancillary to other sentence, but it is in addition thereto. In Harikrishnan's case⁴ the Supreme Court has directed all criminal courts to exercise the power of awarding compensation to victims of offences in such a liberal way, that the victims or their legal heirs may not have to rush to the civil court for

³ Section 19&20 of the Code of Civil Procedure Code, 1908

⁴ AIR 1988 SC 2127

compensation. By authorizing the Criminal Courts to award compensation on consideration of the nature of the crime, justness of claim of the victim, and ability of the accused to pay, the distinction between tort and crime has been reduced to a large extent, that the degree of negligence in Criminal liability is higher than that of negligence in tortious liability. But when we discuss Negligence in the context of criminal liability the expression Mensrea becomes relevant.

Mensrea in Negligence:

The expression mensrea is used to mean the mental state expressly or impliedly mentioned in the definition of crime charged. An act does not make a person guilty unless the mind is guilty. The mensrea in criminal negligence was defined by Lord Diplock⁵ in the following way “without having given any thought to the possibility of there being such risk or having recognised that there was some risk involved, had nevertheless gone on to take it.” In order for the act to amount to criminal rashness or criminal negligence one must find out whether that rashness has been of such a degree that injury must most likely to be occasioned thereby. The criminality lies in running the risk or doing such an act with recklessness and indifference to the consequences⁶.

In England majority of the numbers of GMC are registered medical practitioners with a minority being non- medical people. The members of the Council are made up of elected numbers. There are fifty- four doctors elected from the panel of doctors in England. Enforcement system through GMC was already discussed in chapter 1V, so we can proceed to the enforcement mechanism under the Indian Medical Council Act. There are so many provisions under the Medical Council Act to prevent unethical misconduct. The Medical Council of India desires to bring to the notice of the registered medical practitioners the offences and form of professional misconduct which may be brought before the appropriate Medical Council for disciplinary action in view of the authority conferred upon the Medical Council of Indian and/ or State Medical Council⁷, as provided under Indian Medical Council Act, 1956, or State Medical Council Acts, as may be subsequently amended.

The appropriate Medical Council may award such punishment, as deemed necessary. It may direct

⁵ R v. Lawrence [1981] 1 All ER 974, [1982] AC 510, [1981]2WLR 5249[HC]

⁶ Dr.Krishnaprasad v .State of Karnataka 1989(1) ACJ 393

⁷ Section 30 of Indian Medical Council Act

the removal altogether (professional death sentence) or for a specified period (penal erasure) ⁸from the Register the name of any registered practitioner, who has been convicted of any such offence as implied in the opinion of the Medical Council of India and/ or State Medical Councils. This can be done only after an enquiry, at which opportunity has been given to such registered practitioner to be heard in person or by pleaders.⁹ The appropriate Medical Council may also direct that any name so removed shall be restored.¹⁰

It must be clearly understood that the instances of offences and professional misconduct which are given in the Act do not constitute and are not intended to constitute, a complete list of the infamous acts, which may be punished by erasure from the Register, and that by issuing this notice the Medical Council of India and or State Medical Councils are in no way precluded from considering and dealing with any form of professional misconduct on the part of a registered practitioner. Circumstances may and do arise from time to time in relation to which there may occur questions of professional misconduct which do not come within any of these categories. Every case should be considered such that the code is not violated in letter or spirit. In such instances, as in all others, the Medical Council of India and or the State Medical Councils have to consider and decide upon the facts brought before the Medical Council of India/ or State Medical Council. A medical practitioner is entitled to appeal to the Central Health Ministry against the decision of the Medical Councils. The disciplinary actions of Medical Councils have been explained in detail in chapter IV. Moreover the consumer court is rather unique in rendering speedy and cheaper remedy as compared to the enforcement system we have looked in so far.

Composition and Power of Forums:

It is pertinent to mention that the consumer agencies as constituted under the Act are to comprise of one judicial member and others having adequate knowledge or experiences of, or having shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman. To deal with cases of medical negligence, expert knowledge of science is also required. It is advisable that the agencies should also

⁸ Section 20 of Indian Medical Council Act

⁹ Section 24 of M.C.Act

¹⁰ Section 30 of Indian Medical Council Act

have at least one medical man to adjudicate such disputes.¹¹ In the alternative, Forums can also try cases of medical negligence with a panel of medical expert as a jury on special days in a week or month so fixed. One can also simplify the procedure by making it a condition precedent that every complaint shall be accompanied by an affidavit of a known expert in the field to the effect that it is a prima facie case of negligence, before the doctors or hospitals involved are noticed by the Consumer Forum.¹² Another alternative would be that in cases where the patient has lost his life during treatment the case summary should be sent to the Forensic Board of the State Government in the absence of a detailed autopsy report.¹³ Where, however, detailed autopsy or postmortem has been duly conducted, the Forensic pathologist may be requested to give expert opinion on the most probable cause of death and whether the pointer is in any manner towards the doctor. This composition of Forum is not competent to adjudicate medical negligence case. For the proper appreciation of medical evidence there should be an expert panel consisting of a competent doctor to evaluate complicated medical evidence submitted before the court, in a proper way. Only then can there be a meritorious decision from the courts. Otherwise every decision usually rendered by this court system will be specifically based on some expert opinions submitted by the panel of doctors appointed by the court. So there is no application of any judicial mind in this decision making process. In this context an expert Medical Tribunal constituted by legal expert and medical expert is highly necessary.

Powers of Consumer Agencies:

The agencies under the Act, though acting as quasi- judicial bodies, enjoy wide powers of both civil and criminal courts to adjudicate the disputes in a proper legal manner. They have been vested with the same powers as are vested in a civil court of competent jurisdiction under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:-

- (i) the summoning and enforcing the attendance of any defendant or witness and examining the witness on oath;
- (ii) the discovery and production of any document or other material object producible as evidence;
- (iii) the reception of evidence on affidavits;

¹¹ Section 10 of the Consumer Protection Act, 1986

¹² Section 10 of Consumer Protection Act, 1986

¹³ Section 16

- (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
- (v) Issuing of any commission for the examination of any witness; and (vi) any other matter which may be prescribed.¹⁴
- (vi) The proceedings are deemed to be judicial proceedings under the Indian Penal Code, 1860 and Forum is deemed to be civil court under the Code of Criminal Procedure, 1973. The mere filing of a complaint does not guarantee that the doctor is in trouble. One gets a fair chance to present his own version of the case. Even otherwise, the onus or responsibility lies on the patient or complainant to prove that the act complained of was a negligent one. This may require elaborate evidence which means examination by some expert in that particular field as a witness or citation of various treatises and authorities in the field of medicine, surgery, etc.

The fact that the conduct was approved as per prevailing practice and was the appropriate treatment for the ailment in question at the relevant time holds strongly in favour of the doctors. No relief can be granted without adducing evidence and proving the allegations. The aforesaid provisions have been enacted to expedite the judicial process and one should invoke the same during trial. In *Dr. C.J Subramania v. Kumarasamy*¹⁵ the Madras High Court has observed that court cannot speculate upon medical matters or come to conclusions or diagnosis which are not supported by some expert evidence on the basis of which courts must always be in a position to understand the situation before arriving at a conclusion on the question of liability of a medical practitioner for damages for negligence.

The expert evidence also has explanatory functions of explaining the technical issues as fully as possible in language comprehensible to laymen viz. the nature of patient's original condition, the manner of diagnosis and the nature of treatment given, the consequences of the treatment and how those consequences flowed from the treatment given. Further, the court should also have the assistance in deciding whether the acts or omissions of the defendant (doctor) really constituted negligence by explaining the opinion of experienced and skilled medical practitioner with the particular specialisation of the defendant, though ultimately it is for the courts only to decide on the

¹⁴ Section 20

¹⁵ [1994] CPJ 509

totality of the evidence, the issue before the court being a mixed question of fact and law. That is because, at times the treatment may involve diagnosing of a relatively uncommon case of a patient or a disease and that no exception could be taken to the action of the medical practitioner, if the method of cure adopted is found acceptable to widely respected body of professionals. That apart, medicine has not yet reached a stage and may be it never will, where the adoption of a particular procedure either medical or surgical will always produce a certain positive result. Having regard to all these factors a claim for compensation against a medical practitioner not only involves mere financial loss but also his professional reputation and future career would be at stake.

Allegation of negligence against a medical practitioner should be considered as a very serious one and the standard of proof of fault should also be of a high degree of probability. This procedure becomes very difficult and tedious as the patient doesn't have accessibility to any of the hospital documents. Thus the procedural complication prevents the patient from accessibility this court system. This Forum has some pecuniary jurisdictional limitation. The District Forums have jurisdiction to entertain complaints where the value of goods or services and the compensation, if any, claimed is less than Rs.20 lakh.¹⁶

The State Commissions have pecuniary jurisdiction where the value of goods or service and compensation, if any, claimed exceeds Rs.20 lakh but does not exceed Rs.1crore and if it exceeds Rs.1crore, then the National Commission has jurisdiction.¹⁷ About local or territorial jurisdiction, one should know that the complaint has to be filed before a District Forum within whose jurisdiction the opposite party or each of the opposite parties (in case of more than one) actually and voluntarily resides or carries on business or has a branch office or personally works for gain. One may also file the complaint at a place where cause of action, wholly or in part arises. In other words, where transaction is culminated or right to sue has accrued. In case one is careless about local limit of the District Forum, one may have to face some difficulty and may have to file it afresh at the Forum having jurisdiction¹⁸.

¹⁶ Section 11 of Consumer Protection Act

¹⁷ Section 11(2)

¹⁸ Section 21

Appeal and Revision:

As earlier stated, subject to the pecuniary limits, the District Forum is the first court in the hierarchy of agencies under the Act. ¹⁹The State Commission has jurisdiction to entertain appeals against the orders of any District Forum within the state. Any person aggrieved by an order of the District Forum may prefer an appeal to the State Commission within thirty days from date of the order. ²⁰ However, delay in filing an appeal may be condoned if sufficient cause is shown. Similarly, the National Commission has jurisdiction to entertain appeals against the orders made by a State Commission. ²¹Any person aggrieved by an order made by the State Commission may prefer an appeal to the National Commission within a period of thirty days from the date of the order. Delay in filing may be condoned, provided sufficient cause is shown for not filing an appeal within the time. Furthermore, any person aggrieved by an order made by the National Commission in exercise of its powers to entertain complaints may prefer an appeal against such order within thirty days to the Supreme Court. ²² Revisionary power is also allowed by this law.

Apart from appellate jurisdiction, the State Commission and the National Commission have been vested with powers of revision. ²³ There is no limitation period for filling a revision petition. These powers are analogous to those conferred on civil court of competent jurisdiction under section 115 of the code of Civil Procedure, 1908. In the Consumer Protection Act 1986, all the provisions are enshrined which regulate the adjudication of consumer disputes in accordance with established principles of law and statutory codes obviating any scope for arbitrariness, bias or non application of judicial mind. There are checks over the judgments of trial agencies by the superior Commission, wherever the question of jurisdiction has to be decided, so even under an Act which postulates summary trial, provisions have been incorporated to settle the law through a systematic hierarchy of courts. Although, a final judgment pronounced after hearing and evidence of the parties can be assailed by availing the remedy of appeal, some times even the final order may be affected by apparent jurisdictional questions, making way for a revision to be filed.

¹⁹ Section 17

²⁰ Section 15 of the CPA

²¹ Section 21(a) (ii)

²² under Section 21(a) (ii)

²³ Section 17 (b) and Section 21 (b) of the CPA

However, revision may be the best remedy if during the pendency of a proceeding; either party is aggrieved of an order passed by Forum Commission. For example, if an application for summoning some medical record of a hospital is disallowed or some expert is not allowed to be summoned. Similarly, if the opportunity to cross-examine the witness is not granted. On the contrary, there may be circumstances where an elaborate trial is most effective method for adjudication but cannot be held before a forum. If such a request is declined, a revision may be filed seeking the relief to refer the matter to a civil court of competent jurisdiction. Revision may also be filed if a particular Forum erroneously exercises jurisdiction in the matter of its territorial or pecuniary limits or on admission of a time barred claim without condoning the delay or justifying the grounds for condonation of delay. Where no sufficient cause was established for condonation of delay, the appeal was dismissed in *Oriental Insurance Co. v. Bahadar Ram*. A complaint was dismissed in default because of absence of complainant and his counsel. An application was filed for restoration. Pendency of such application does not stop the time and appeal that must be filed within thirty days as in *Viraj Overseas Pvt, Ltd v. M/s. Hindustan Motors Ltd.*²⁴ Where an appeal itself is dismissed in default, another appeal is not maintainable before the State Commission. In *Ishwar Das v. Vinay Kumar Gupta*,²⁵ it has also been laid down that an autonomous Board or Cooperation is not more privileged than a private party, for praying for condonation of delay in filing an appeal. In another case²⁶ it was stated that when an order was passed by the District Forum in the absence of the appellant who received it by postal delay was explained in *Dynavox Electronic v. B.J.S . Rampura Jain College*²⁷. Limitation starts from the date of knowledge of the order and was referred in *Marikkar Motors Ltd. v. Mary Poulsoe*.²⁸ Ignorance of law is no excuse.²⁹ There is no appeal against an interlocutory order. It can be treated and disposed of as revision petition.³⁰ An appeal can be filed beyond limitation period with a plea for condonation on the ground that review petition was pursued, and dismissed as the Act has no provision for any review.³¹ Delay occasioned while the appeal papers are examined by various officers of the appellant cannot be condoned.³² Eventhough such speedy system is provided in the

²⁴ 11 (1992) CPJ 360 NC

²⁵ 1992 (1) CPR

²⁶ *Housing Board v. Dr. S.L. Chaudhary* 1991 (1) CPR 515

²⁷ 1991 (1) CPJ 440

²⁸ 1991 (11) CPR 251

²⁹ *Wheel World v. Dr. Smt. Janak Narendra* 1991 (11) CPR 632

³⁰ *Jaipur Stock Exchange v C.P.Mehta* 1991 (1) CPR 26

³¹ *Union of India v. Nadhu Shah Kapoor II* (1993) CPJ 1044

³² *Delhi Development Authority v. J.N. Luthra* 1993 II CPJ 934.

statute practically the court could not implement it in proper way. The court has power to issue stay order.

An order of the District Forum can be stayed in appeal.³³ Parties have to be very mindful about their conduct at the District Forum as well as they must be diligent enough to prefer an appeal within 30 days. If there is an irregularity in pending proceeding or decided matter, one can invoke the revisional jurisdiction. However, it is not just the delay that matters. Section 24 of the Act is very clear that every order of the District Forum, the State Commission or the National Commission shall be final if no appeal has been preferred against the order.³⁴

So parties have to be quick enough to agitate the cause in an appeal. One must appeal and settle the law. And at any stage of the proceedings, one can invoke the revisional jurisdiction in case the spirit of the Act is not properly formulated and jurisdiction is exercised without application of well settled judicial principle, as explained above. No appeal against the order of District Forum shall be entertained unless the appellant deposits 50% of the amount or twenty thousand whichever is less. Similarly, appeal to National Commission against the order of State Commission is entertainable only on depositing of 50% of amount or thirty five thousand whichever is less. Amendment to the Act³⁵ made before the deposit as a condition precedent for entertaining appeal by Supreme Court on depositing 50% amount or fifty thousand whichever is less. This was too much of a financial burden for patient who sought the shelter of law. It is pertinent to mention that not only the provision of appeal and revision enshrined in the Act elucidate the procedural credibility of the Act, but the orders passed by the District Forum, the State Commission or the

National Commission have the same sanctity as that of a regular court of competent jurisdiction. Section 25 of the Act equates the orders with a decree or order made by a Court in a suit pending therein and the execution of such orders is carried out in the same manner. In fact the orders can be sent to competent courts for execution. It is now abundantly clear that the Consumer Protection Act, 1986 provides redressal of consumer grievances with full legal force, jurisdiction, powers and cognizance like any other civil or criminal court but has to dispense with long drawn technical

³³ Avas Vikas Parishad v. Rajinder Kumar Jain 1 (1993) CPJ 372

³⁴ Sec: 24 of CPA

³⁵ Limitation Act, 1963

procedures, or also speedy redressal mechanism through consumer court is practically meaningless. Application of limitation period is also relevant here. A very important aspect of initiation and maintainability of legal proceedings is the law of limitation.

The basis of the proposition is that when a person has suffered any wrong, he must not waste time which may signify laches on his part or even prove that he has waived his rights or has acquiesced the wrong.

The maximum period within which action must be initiated, i.e. suit, petition, application or a complaint must be filed, is the 'limitation' for such proceedings. Such period may be prescribed by an Act governing various proceedings in general, like the Limitation Act, 1963 which prescribes the time limit for initiating various proceedings.

It may also be prescribed in a particular Act to govern certain special actions. If that period expires then the remedy is time –barred, i.e unenforceable in law. The Limitation Act, 1963 prescribes the statutory period within which legal proceedings may be initiated for adjudication of various suits, petitions, appeals, applications, review, revision and such other legal actions.

The Consumer Protection (Amendment) Act, 1993 introduced a new section 24A prescribing the limitation period. It specifically provides that the District Forum, the State Commission and the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen. However, the delay may be condoned provided the reasons for condoning such delay are recorded³⁶. It is pertinent to mention that the words used in this section are 'shall not admit'. It has been held that the use of word 'shall' raises a presumption that the particular provision is imperative.

In *Govindlal Chagganlal Patel v. Agriculture Produce Market Committee*,³⁷ this word was interpreted by the court in negative meaning. These words are to be interpreted usually the mandatory, subject to the purpose intended behind the use of such words.

³⁶ 24A of Consumer Protection Act

³⁷ AIR 1976 SC 26

In *Bombay Union of Journalists v. State of Bombay*,³⁸ the court said that the word 'admits; as per the Legal Glossary means 'to accept for the purpose of consideration'. In view of the above, it may be understood that the words 'shall not admit' construe that the complaint may be dismissed at the threshold and even a notice need not may be issued to the opposite party. In case a claim could be settled under some special law relating to compensation, etc., the consumer court may enlarge the application of time prescribed therein and one may enjoy the privilege of being a consumer.

In *Apex Roller Flour Mills (P) Ltd v. Indian Overseas bank*,³⁹ it has been held that compliant in respect of which cause of action accrued before insertion of section 24A can be filed within three years under the general law of limitation.

The limitation cannot run unless cause of action is culminated and right to sue accrued in favour of the person initiating legal proceedings. The Act bars only the remedy which is time - barred without affecting the rights in respect of personal actions. But when time has commenced to run in any case, it will not stop by reason of any subsequent event which may be within the saving of the statute. The basis of determination of limitation is the form and substance of the plaint of suit and not the defence set up thereof. In case of complicated medical issues the patient is unable to identify the consequence of surgical defect immediately. So the limitation prevents accessibility to legal remedy. However law provides reprieve by providing for condonation of delay.

Section 3 of the Limitation Act clearly stipulates, inter alia, that subject to provisions contained in section 4 to 24, every suit instituted, appeal preferred, and application made, after the prescribed period, shall be dismissed, although limitation has not been set up as a defence. However, if the prescribed period expires on a day when the court is closed, then the aforesaid proceedings may be initiated on the day when the court reopens.⁴⁰

Even otherwise, condonation of delay may be allowed , provided sufficient cause is shown and for that matter if a person is misled by any order, practice of judgment of the High Court, in computing

³⁸ AIR 1964 SC 1617

³⁹ 1995 (1) CPR

⁴⁰ Section 4 of Indian limitation Act

the prescribed period, it may constitute 'sufficient cause' says explanation to section.⁴¹ Sections 6 and 7 deal with the legal disabilities in instituting the proceedings. Section 18 envisages that where before the expiry of the prescribed period for a suit or application, an acknowledgement of liability in respect thereof has been made, fresh period of limitation shall be computed from when the acknowledgment was so signed.

The Act also has provided for provisions for better implementation of the Act. It provides for penal provisions for those who abuse the mechanism under the Act.

Penal Provision:

The Consumer Protection Act, 1986 like every other statute has the same sanctity for protection and enforcement of rights. It is not to be used as a tool to blackmail one's opponents or cultivate mercenary gains. As a law abiding citizen and as a healthy consumer, one should never abuse the process of this Act. Frivolous and vexatious complaints should be avoided.

Section 26 of the Act clearly stipulates that complaints found to be frivolous or vexatious shall face dismissal.⁴² It means that the court would definitely apply its mind to contemplate the bona fides of allegations, to test the truth and veracity of evidence and to ensure that relief claimed is not offered on a platter. And in case it appears that one has come to the court just for fun, one should be ready to be handed over the dismissal order. Imposition of cost, imprisonment and fine are used for this purpose.

One's conduct in the court would betray one's intentions and a chronic litigant or nuisance monger may not only be put out of court but may have to pay costs, which may extend to Rs. 10,000. Section 27 of the Act is a penal section prescribing punishment for flouting the orders passed under the Act. Noncompliance of any order made by the District Forum, the State or the National Commission warrants imprisonment from one month to three years and / or fine from Rs.2,000 to Rs.10,000. This is the last straw. It ensures that the Forums are not taken for granted.⁴³ It indisputably establishes the

⁴¹ Section 5

⁴² Section 26 of the Consumer Protection Act

⁴³ Section 27,

sanction of the law , no matter how simple the procedure it has adopted and how summary the trial. It proves that the Government has taken up consumer cause on a war footing.

It guarantees that nobody shall be spared if he is found guilty of abusing the consumers of the society and then with rampant impunity commits flagrant violation of the orders passed under it. Similarly, the complainant is duty bound to comply with the orders passed under the provisions of the Act. It is actuated with a design to ensure that the provisions are complied with. It is a stepping stone towards arming this Act with teeth. It will not be out of place to imagine that in the years to come, the jurisdiction, powers and machinery of the Consumer Protection Act, 1986 would be broadened and made more stringen.

The provisions enshrined under section 26 and section 27 of the Act ensures a statutory safeguard against false and chronic litigants. The arms of the law should not be twisted around an innocent neck. That is the principle. These provisions are intended to check harassing complaints and actions initiated with oblique motives to achieve unlawful gains and unearned income in the form of compensation by abusing the provisions of the social legislation. Perhaps the absence of payment of any court fee in these proceedings encourages adventurist litigation and ambulance chasing. However under the amended provisions the complainant has to pay court fee.... But the patient should keep in mind that doctors are not always at the receiving end, in case of a frivolous complaint. The physician should also practice their noble art without any unjustified fear of indictment.

Jurisdiction of the Supreme Court of India:

Supreme Court of India is the final Court of Appeal. Under section 23 of the Act, an appeal may be preferred against order of the National Commission passed in exercise of its original jurisdiction. A special leave petition under Article 136 of the Constitution of India also lies in certain cases. Writ jurisdiction is also used to enforce right of patient's from medical malpractice cases.

Writ Jurisdiction:

In so far as the writ jurisdiction under Article 226 of the Constitution of India is concerned, there is no limitation prescribed for filing a petition in the High Court. It is the peculiar facts and

circumstances of each case that would determine if the party invoking the jurisdiction under Article 226 is guilty of laches.

Conclusion:

These are the main draw backs in the enforcement system available in India. The consumer court provided some mechanism for enforcing the rights of patient's from malpractice cases. The above mentioned procedural systems are also incorporated under this legislation. But it is inadequate to solve the problem relating to medical negligence cases. The major drawbacks in the existing system are discussed below.

One of the primary draw backs of consumer court is that they are not ready to provide remedy to patients from Government Hospitals and Health centers. As the government hospitals rendered "on-paid" service it will not come under the jurisdiction of Consumer Protection Act.⁴⁴ This problem can be cured through the tribunal system. They can adjudicate cases both from the government and private hospitals. The controversy regarding paid service and non-paid service can be settled through the Medical Tribunal System. Every patient irrespective of whether he is treated at a government or private hospital can approach this tribunal if he has genuine case. Every action under Consumer Protection Act begins with an aggrieved patient lodging a complaint in writing with the Consumer Forum alleging that the service hired or availed of by him suffer from deficiency in any respect. At this very primary stage the complainant is expected to furnish the form of Exhibits, certain documents pertaining to the case to establish a prima facie case.

However, the difficulty that arises for the patients is that they rarely have access to these medical documents, and these are generally not delivered to the patients, especially in cases where something goes wrong, on the pretext of confidentiality. Thus at this stage itself it becomes difficult for the patient to establish his case and many cases are dismissed summarily. The procedure that is followed after is also equally complex. The procedure includes submission of evidence in the form of affidavit, examination of documents, cross examination of witnesses and several other formalities. This procedure leads to unnecessary delay. The patient is unable to submit anything before the court. The

⁴⁴ Section 20 of CPA Act 1986

patient does not have any access to the hospital documents. The patient will not even get the copy of treatment chart from the hospitals. Thus the patient is unable to comply with the formalities laid down by the court. Change in this area is the need of the time.

The change that is being proposed in this scheme is dilution of standard of proof on the part of the patient. Under the current system there are two stages before a case is established. First the patient has to prove that there was a negligent act which led to physical or mental injury and in the next step he is required to prove the fault of the doctor and establish that the doctor was directly responsible for the injury. In the proposed system, patient would be required to establish only the first step but not the second. It must be the responsibility of the court to find whether it is due to the fault of the doctor.

The functioning of the consumer tribunal has not been commendable. This fact was admitted by the Supreme Court itself in a case of Dr. J.J. Merchant v. Srinath Chaturvedi.⁴⁵ This PIL questioned the functioning of the consumer courts and the Supreme Court commented that, “after enactment of the Act, appropriate steps have not been taken by the Government for ensuring that the National Commission or the State Forums function properly. Also the Consumer Dispute Redressal Agencies have not been fast enough in disposing cases. Several bottlenecks and shortcomings have also come to light in the implementation of the various provisions of the Act.”

The selection process of these judges and doctors should be according to the nomination by a selection committee. As far as the District and State Medical Malpractice Tribunal System is concerned the selection committee should be constituted by the Chief Justice of the concerned State, Secretary in charge of department of legal affairs and Secretary in charge of department of health of the concerned State. The selection committee has the power to nominate members. National Selection committee should be constituted under the Chairmanship of Chief justice of India, Secretary in charge of department of legal affairs in the Government of India and secretary in charge of department of health Government of India. The judges shall be trained in Medico-legal aspect. This is necessary for the subjective appreciation of evidence submitted before the court. There should be some mechanism for the proper appreciation of medical evidence that has been submitted before the court. There shall be

⁴⁵ (2002) 6 S CC 635 : AIR 2002 SC 2931

a District Medical Malpractice Tribunal System at the District Level, State Medical Malpractice Tribunal System at the State level and National Medical Malpractice Tribunal System at the National level. District Malpractice Tribunal System shall consist of two members. The President of the Tribunal constituted by District Judge, other person should be a Senior Professor of Medical Science from the Reputed Medical Collage relating to particular state. The State Medical Malpractice Tribunal System consists of two members. The president of this system shall be a High Court Judge and another person as the Senior Professor of Medical science from the reputed Medical Collage. The National Medical Malpractice Tribunal shall have two members. A person, who is the judge of Supreme Court, shall be the president. The judge shall be appointed by the Central Government after consultation with the Chief Justice of India. Other member should be a Senior Professor of Medical Science from the All India Institute of Medical Science. This system can provide expert quality remedy to those who are victims of medical negligence cases.

