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MESSAGE

We bring out this issue of the Consumer Advocate with special greetings to all our colleagues in the State Commissions and the District Fora on the occasion of the World Consumer Rights Day! As you are probably aware, this year the Consumers International, one of the leading consumer rights organisations is celebrating the Day with the theme "Our money, our rights", with emphasis on financial services.

With the assistance of the Department of Consumer Affairs, Government of India, the National Commission has been celebrating this Day by inviting the Presidents of the State Commissions and Secretaries to the State Governments in charge of Consumer Affairs to an annual conference to discuss and deliberate on all issues that need to be addressed in further accelerating the process of consumer grievance redressal. For, we believe, one of the best ways to give the consumer the value for her 'money' is to ensure that she is assisted in exercising her 'rights' more effectively through a process of disputes redressal that is responsive to the changing demands of the time. It is with this spirit that I look forward to meeting our colleagues in the States and engaging in productive discussions.

During October 2009 - February 2010, the National Commission has been able to dispose of 2,522 cases, as against institution of 2,238 new cases. In this process, we have been able to almost completely liquidate the arrears of revision petitions of upto 2005. The goal to dispose of the pending complaints and first appeals of upto 2005 is being pursued vigorously along with the attempt to dispose of as many of the later cases as feasible.

Since the beginning of this year, three of our esteemed colleagues, viz., Mrs. Rajyalakshmi Rao, Mr. B. K. Taimni and Dr. P. D. Shenoy have demitted office on completion of their tenures. We recall their immensely valuable contributions to the work of this Commission.

With this issue, the Newsletter makes a departure from the practice so far by concentrating on elucidating the law on 'medical negligence'. As the editorial comments clarify, this is one of the most important areas of consumer concern for there is probably no one who does not need to seek medical assistance at some point or the other. I am sure this thematic approach in dealing with important decisions of the Supreme Court and the National Commission would serve the aim of this Newsletter better.

I reiterate our wish to hear your reactions to this Newsletter. 'Silence' may be 'golden' in some situations but certainly not in a two-way dialogue that this Newsletter aims to establish!

(Ashok Bhan)

United Nations Priniciples / Guidelines for Consumer Protection

"Governments should provide or maintain adequate infrastructure to develop, implement and monitor consumer protection policies. Special care should be taken to ensure that measures for consumer protection are implemented for the benefit of all sectors of the population, particularly the rural population and people living in poverty."

"Paragraph 6"

EDITORIAL COMMENTS

With this issue of the Consumer Advocate, we make a departure from the practice so far. This is with the aim that fuller coverage of all the important decisions of the Apex Court (and, as necessary, the National Commission) on specific topics of consumer disputes would serve the aim of this Newsletter more effectively and bring the reader, even in a remote District Forum, up-to-date on the relevant law. We start with the topic of **medical negligence** because of the singular importance of the subject, affecting as it does the health and life of the people at large. In this issue, we cover, in chronological order, the judgments up to 1998, leaving the judgments thereafter to be covered in the next issue. We plan to round up the series on **medical negligence** with a summary of the currently ruling principles on (civil) medical negligence and a short discussion on the Regulations of the Medical Council of India.

2. The "law" mirrors the society. The growth of the jurisprudence on medical negligence reflects this adage. Thus, *only three medical negligence cases decided by civil courts in India appear to have come up for consideration of the Apex Court between 1964 and 1989*. And yet, dealing with the *Jacob Mathew* case in 2005, the Court noticed the "*large number of complaints ... against doctors*". This growth has come about not only because of the increasing public awareness of the patients' rights but also establishment of the Consumer Fora post-1986 for less expensive and (somewhat) speedier redressal of such grievances. Another significant cause has been the wide-ranging interpretation of the law by the Apex Court (and the National Commission) during the years after 1986.

3. (*a*) In the first case cited in the following pages (*Juggankhan - 1964*), *the principles enunciated were that while care should be taken before imputing (criminal) negligence to professionals like doctors in acts done as part of their profession, the latter must also not prescribe medicines without studying (being professionally aware of) the adverse effects on their patients*. These principles would also be generally applicable to cases of medical negligence involving only civil liability.

(*b*) The second case (*Laxman Balkrishna Joshi - 1968*) is significant inasmuch as *it lay down, for the first time, three basic principles governing judicial determination of civil liability arising from medical negligence: (i) the person holding himself out as a practitioner of medicine must possess and bring to bear on his professional acts a reasonable degree of knowledge and skills pertaining to his profession, (ii) his level of knowledge and skills need not be of the highest order nor must it be very low, and (iii) such a professional owed a three -fold 'duty of care' to his patients, first a duty of care in deciding whether to undertake the case (i.e., whether the case lay within his area of professional knowledge and skills; if so), secondly, a duty of care in deciding the line of treatment and, thirdly, a duty of care in administering that treatment. A breach of any of these duties would constitute medical negligence*.

(*c*) In the third case (*A. S. Mittal 1989, arising out of a PIL)*, the Court recognised the possibility of a mistake being committed by a medical practitioner in the course of his professional acts and went on to distinguish *tortious medical negligence as a mistake which no reasonably competent and careful medical practitioner would have committed*.

(d) The 3-Judge Bench decision in the fourth case (*Indian Medical Association 1995*) is perhaps the Apex Court's most comprehensive and significant judgment on civil medical negligence in the 20th century, arising, *inter alia*, from an appeal against a judgment of the National Commission. The principles enunciated were the following:

(i) The test of negligence by a medical practitioner was that laid down by McNair, J in the case of Bolam v Friern Hospital Management Committee, viz., "the standard of the ordinary skilled man exercising and professing to have that special skill ... ... ordinary skill of an ordinary competent man exercising that particular act." The duty of care owed by a medical practitioner to his patient was that spelt out in the case of Laxman Balkrishna Joshi and a breach of that duty would amount to negligence, entitling the affected consumer to damages/compensation.

(ii) Consumer Fora were equipped to appreciate complex issues that might arise in cases of medical negligence and the constitution of the Fora was adequate to deal with such cases.

(iii) The summary procedure provided for in the Act was sufficient to deal with most such cases.

(iv) Service rendered to a patient by a medical practitioner (except where the service was free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of 'service' as defined in section 2(1)(o). Merely because medical practitioners belonged to medical profession and were subject to the professional/disciplinary control of the Medical Council of India and/or State Medical Councils would not exclude the services rendered by them from the ambit of the Act.

(v) A 'contract of personal service' was distinct from a 'contact for personal services' and only contracts of personal service were expressly excluded from definition of service in section 2(1)(o). In the absence of relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to a patient would be under a 'contract for personal services' and thus, within the purview of section 2(1)(o).

(vi) Medical practitioners and government as well as private hospitals/nursing homes fell into three categories: (a) where services were rendered free of charge to everybody; (b) where charges were required to be paid by everyone; and (c) where charges were required to be paid by persons availing of the services but certain categories of persons who could not afford to pay were rendered service free of charge. Only when everyone availing of the medical service of/from a medical practitioner/hospital/nursing home did so completely free of charge (a minor hospital/nursing home registration charge notwithstanding) would such service rendered by that medical

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practitioner/hospital/nursing home not amount to 'service' under section 2(1)(o). However, medical service rendered to a person without he being charged at all directly because of any medical insurance policy that he held or because his employer bore the charges under the terms of his employment would constitute 'service' under the Act.

(e). In the next case (*Achutrao Haribhau 1996*), the Court gave *two significant rulings*. The first was that *even the 'State' could be held liable for damages for the medical negligence of a doctor employed in a hospital run by the State because the latter function was a welfare activity and not one in exercise of the State's sovereign powers.* The second ruling, based on the House of Lords decision in *Sidaway* v *Board of Governors of Bethlem Royal Hospital (which, in turn, relied on the Bolam case), was that a doctor was not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art*. In this context the Court also approvingly referred to the ruling on 'duty of care' in the case of *Laxman Balkrishna Joshi*. However, the facts of this case were such that the Court applied the doctrine of *res ipsa loquitur* to hold the doctor negligent.

(f). In the *Poonam Verma* case (*1996*), the Court considered the implications of a medical practitioner, certified to practice only in the discipline of Homeopathy, prescribing allopathic medicines to his patient (who ultimately died) and ruled, on the basis of the statutory provisions of the relevant Acts and the certificate issued to the doctor thereunder, that such conduct amounted to *negligence per se*. In this, the Court drew upon the definition of *negligence per se* in Black's Law Dictionary. *This was the first time that the concept of "negligence per se" was applied by the Court to rule in a case of medical negligence.*

(g) The main ruling in the *Spring Meadows Hospital* case (*1998*) was the proposition that if a child (or, say, a dependant person) taken by his parents (or, say, the guardian or a close relative) to a hospital for treatment was the victim of medical negligence, both the 'hirers' of the services of the hospital (and its doctors/nursing staff), i.e., the parents/guardian/relative and the child/dependant person as the 'beneficiary' of that 'hiring' (or, 'availing') of such services could be held separately entitled to compensation under section 14 of the Act. Further, relying on the illuminatingly simple observations of the House of Lords in *Whitehouse v Jordan*, *the Court distinguished between a 'bona fide mistake' in medical treatment vis a vis 'medical negligence'*:

"The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence."

IMPORTANT DECISIONS
ON MEDICAL MEGLIGENCE

Supreme Court

Juggankhan v State of Madhya Pradesh [(1965) 1 SCR 14]
Date of Decision: 10.08.1964

The appellant, a registered Homoeopathic medical practitioner under the Madhya Pradesh Homoeopathic and Bio-chemic Practitioners Act, 1951, issued a pamphlet advertising that he *inter alia* treated "Naru" (guinea worm). Believing this, Smt. Deobi, aged about 20 years visited the appellant's clinic, along with some members of her family, for treatment. The appellant administered 24 drops of mother tincture stramonium and a leaf of dhatura. However, soon after taking the medicine, Deobi felt restless and ill and despite administration of antidotes, she died the same evening. ~~On~~ In the trial for murder under section 302 of the IPC, the appellant was convicted. When the matter reached the Apex Court, the Court considered whether, in view of the nature of the appellant's offence he was rightly convicted under s 302 of the IPC. The Court agreed with the lower Courts that Deobi's death resulted from poisoning. However, after considering the material, the Court found it could not be established that the administered dose was fatal or that the appellant had administered stramonium drops and dhatura leaf with the knowledge that it was likely to cause death. But the Court observed that stramonium and dhatura leaf were poisonous and in Homoeopathy a dhatura leaf was never administered as such. In fact, in no system of medicine, except perhaps Ayurvedic, was dhatura leaf given as a cure for guinea worms and that the appellant prescribed the medicine without thoroughly studying the effect of giving 24 drops of stramonium and a leaf of dhatura. The Court held that **it was a rash and negligent act to prescribe poisonous medicines without studying their probable effect. The Court also held that though it was true, as ruled in *John Oni Akerele v King [AIR (1943) 30 PC 72]*, that care should be taken before imputing criminal negligence to a professional man acting in the course of his profession, even then it was clear that the appellant was guilty of a rash and negligent act and hence liable for conviction under s. 304A, IPC.**

Dr. Laxman Balkrishna Joshi v Dr. Trimbak Bapu Godbole and Another [(1969) 1 SCR 206]

Date of Decision: 02.05.1968

The son of respondent 1 met with an accident, which resulted in the fracture of the femur of his left leg. After some nominal treatment by a local physician, the injured son was taken to Pune and ultimately to the appellant's hospital. The appellant prescribed two injections of morphia and Hyoscine Hydrobromide at an hour's interval but only one injection was administered. After the x-ray, the boy was taken to the operation theatre where his injured leg was put in plaster splints and then he was moved to a room. Subsequently, the boy developed difficulty in breathing and cough and his condition deteriorated. He expired the same night, in spite of the emergency treatment administered by the appellant. The appellant issued a certificate stating that the cause of death was fat embolism. Respondent no. 1 filed a case of tortious damage against the appellant surgeon *inter alia* alleging that his son's leg was put in plaster using manual traction and excessive force (with the help of three men) though such traction was never done under morphia alone but under proper general anaesthesia. The appellant denied the allegation of excessive force and submitted that given the patient's condition, general anaesthesia was not found to be desirable and that he had, therefore, decided to delay the reduction of fracture and instead carried out only immobilization of the leg for the time being with light traction. The Trial Court and, in appeal, the Bombay High Court gave concurrent findings in favour of respondent no. 1 and held that the appellant had undertaken reduction of the fracture without caring to give anaesthesia and that excessive force was used in the process which resulted in shock causing the patient's death and awarded damages. In appeal by special leave, the Supreme Court considered the evidence relied upon by the appellant and held that there was no ground for interference in the findings of the lower Courts. The Court also took into account that respondent no. 1 was himself a medical practitioner of standing though not an expert in surgery and would understand the treatment given, to which he was a witness

The Court observed that **a person who held himself out ready to give medical advice and treatment impliedly undertook that he was possessed of the skill and knowledge for the purpose. Such a person owed to his patient certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or (*and - sic*) a duty of care in the administration of that treatment. A breach of any of these duties gave a right of action for negligence to the patient. The medical practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, was what the law required: (cf. Halsbury's Laws of England, 3rd ed. vol. 26 p. 17). A doctor no doubt had discretion in choosing the treatment that he proposed to give to the patient and such discretion was relatively ampler in cases of emergency**. But this question was not relevant in the present case in view of the factual findings. The surgeon's appeal was dismissed with costs.

A.S. Mittal and Another v State of U.P. and Others [(1989) 3 SCC 223]

Date of Decision: 12.05.1989

In a public interest litigation filed under Article 32 of the Constitution, the Apex Court considered the mishap in an 'Eye Camp' at Khurja, Uttar Pradesh organised by the Lions Club with permission of the State Government in which one Dr. R.M. Sahay of Sahay Hospital, Jaipur and his team of doctors performed ophthalmological surgeries. About 108 patients were operated upon, of which 88 underwent cataract surgery. However, at least 84 persons suffered permanent damage to their operated eyes. It was said that in a similar camp conducted by the same team of doctors in Moradabad, there were 15 casualties. Two inquiries were conducted by the State Government and reports produced before the Court. It was found that the mishap was due to a common contaminating source i.e. 'normal saline' used on the eyes at the time of surgery. These were brought by Dr. Sahay who claimed to have purchased them from a Jaipur-based firm. The Court observed that a criminal case had been registered against Dr. Sahay under section 338 IPC. It accepted the doctor's submission that the Court in the present proceedings need not comment on the question of culpable rashness or negligence on the part of doctors, etc. **However, the Court went on to observe that a mistake by a medical practitioner which no reasonably competent and careful practitioner would have committed was a negligent one.** It also referred to the concept of 'reasonable man' and that the law recognised the dangers which were inherent in surgical operations and also referred to the decision in the case of ***Dr. Laxman Balkrishna Joshi v Dr. Trimbak Bapu Godbole and Another [****(1969) 1 SCR 206]* amongst others. In view of the foregoing, the Court confined the proceedings to whether the State Guidelines prescribing norms and conditions for the conduct of 'eye-camps' were sufficiently comprehensive to ensure protection of the patients who were generally drawn from the poorer sections of the society and the relief to those affected. The Court noted that during the pendency of the matter, the Central Government had brought out revised Guidelines which were found to be sufficient. **However, the Court emphasised the need to maintain sterile aseptic conditions in hospitals to prevent infections and prior testing of drugs and deprecated the deterioration of standards.** On the question of relief, the Court observed that though it would not entertain any plea for monetary claims based on State action in these PIL proceedings, on humanitarian grounds it directed the State Government to pay a further sum of Rs. 12,500/- to each of the victims in addition to Rs. 5,000/- already paid by the Government.

Indian Medical Association v V.P. Shantha and Others [(1995) 6 SCC 651]

Date of Decision: 13.11.1995

A three-Judge Bench of the Apex Court considered the important question whether and, if so, in what circumstances, a medical practitioner could be regarded as rendering 'service' under section 2(1)(o) of the Consumer Protection Act, 1986 and whether the services rendered at a hospital/nursing home could also be regarded as 'service.' Relying upon its decision in *Lucknow Development Authority v M.K. Gupta, (1994) 1 SCC 243* (where it was held that the definition of 'service' in the Act was very wide), the **Court rejected the argument that only 'occupation' and not 'profession' was covered within the term 'service' and so services rendered by medical practitioners were outside the purview of section 2(1)(o)**. It also rejected an alternate argument that 'service' contemplated under the Act was of the "*institutional type which was really a commercial enterprise open available to all who seek to avail thereof.*"

Referring to section 14(1)(d) and section 2(1)(g), **the Bench held that compensation for deficiency in service was to be awarded applying the same test as in an action for damages for negligence. It went on to observe that the standard of care that was required of medical practitioners was laid down in the English decision in *Bolam v Friern Hospital Management Committee [(1957) 2 All ER 118]*** which had been accepted by the House of Lords and applied in a number of cases. Reference was also made to the Court's earlier decision in *Dr. Laxman Balkrishna Joshi v. Dr. Trimbak Bapu Godbole and Another [(1969) 1 SCR 206]*.

The Supreme Court repelled the contention that the Consumer Fora were not equipped to appreciate complex issues which might arise in cases of medical negligence and observed that these Fora were presided over by Judges/retired Judges who were well versed in law and, combined with lay decision making by members with knowledge and experience in various fields, the constitution of the Fora was adequate to deal with cases of medical negligence. Further, the safeguard of appeal against the orders of the Fora was available. **The Court also did not agree that the summary procedure provided for in the Act was not sufficient to deal with such cases and observed that not every complaint would raise complicated questions**. It also observed that in complaints involving issues requiring recording of expert evidence, the Fora could ask the complainants to approach the civil court. It also noted that very few cases of medical malpractice had been filed till 1985, one of the reasons of which was the court fee payable in an action for damages (before civil courts) but no court fee was required to be paid under the Act.

Holding that medical practitioners, government hospitals / nursing homes and private hospitals / nursing homes fell into three categories: (i) where services were rendered free of charge to everybody; (ii) where charges were required to be paid by everyone; and (iii) where charges are required to be paid by persons availing of services but certain categories of persons who could not afford to pay were rendered service free of charge, **the Court laid down the following criteria:**

(i) **Service rendered to a patient by a medical practitioner (except where the doctor rendered service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medical and surgical, would fall within the ambit of 'service' as defined in section 2(1)(o).**

(ii) **Merely because medical practitioners belong to medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils would not exclude the services rendered by them from the ambit of the Act**.

(iii) **A 'contract of personal service' was to be distinguished from a 'contact for personal services' (as only contract of personal service are expressly excluded from definition of service in section 2(1)(o)). In the absence of relationship of master and servant between the patient and the medical practitioner, the service rendered by a medical practitioner to the patient would be under a 'contract for personal services' and thus, is not outside section 2(1)(o)**.

(iv) The expression 'contract of personal service' in section 2(1)(o) of the Act could not be confined to contracts for employment of domestic servants only and the expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. However, such service would be outside the purview of section 2(1)(o).

(v) **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 were rendered free of charge to everybody would not be 'service' as defined in section 2(1)(o). The payment of a token amount only for registration purpose at the hospital/nursing home would not alter the position.**

(vi) **Similarly, service rendered at a non-Government hospital/nursing home where no charge whatsoever was made from any person availing of the service and all patients (rich and poor) were given free service was outside the purview of the expression 'service.' The payment of a token amount only for registration purpose ~~only~~ at such a hospital/nursing home would not alter the position.**

(vii) **Service rendered at a non-Government hospital/nursing home where charges were required to be paid by all persons availing of such services fell within the purview of the expression 'service' as defined in section 2(1)(o).**

(viii) **Service rendered at a non-Government hospital/nursing home where charges were required to be paid by persons who were in a position to pay and persons who could not afford to pay were rendered service free of charge would fall within 'service' as defined in section 2(1)(o). Free service rendered to those who could not pay would also be 'service' and the recipient a 'consumer' under the Act. In arriving at this conclusion, the Court opined that (a) the protection envisaged under the Act was for consumers as a class; (b) otherwise, it would mean that the protection of the Act would be available to only those who could afford to pay and not to the poor, although the poor required the protection more; and (c) else the standard and quality of service rendered at an establishment would cease to be uniform.**

(ix) **Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever was made from any person availing of the services and all patients (rich and poor) were given free service was 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.**

(x) **Service rendered at a Government hospital/health centre/dispensary where services were rendered to some persons on payment of charges and also rendered free of charge to other persons would fall within 'service' as defined in Section 2(1)(o). Free service to those who could not pay would also be 'service' and the recipient a 'consumer' under the Act. Though Governmental hospitals may not be commercial in the sense of private doctors and hospitals, still Government hospitals could not be treated differently and in such a case the persons belonging to 'poor class' receiving free services would be the beneficiaries of the services hired/ availed of by the 'paying class.'**

(xi) **Service rendered by a medical practitioner or hospital/nursing home could not be regarded as service rendered free of charge if the person availing of the service had taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment were borne by the insurance company. It would fall within 'service' as defined in section 2(1)(o).**

(xii) **Similarly, where, as a part of the conditions of service, the employer bore 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 constitute 'service' under the Act.**

Achutrao Haribhau Khodwa & Others v State of Maharashtra & Others [(1996) 2 SCC 634]

Date of Decision: 20.02.1996

The Appellants' suit was that after a simple sterilisation operation performed by the respondent doctor, the patient developed high fever and acute pain and her condition deteriorated. On another surgeon reopening of the wound of the first operation, he found that a mop (towel) had been left inside which had led to formation of pus. Despite the second surgery, the patient died. The second surgeon was produced as the Appellants' witness. The trial Court decreed the suit. In Appeal by the State Government, the Bombay High Court dismissed the suit on the ground that in law the State could not be held liable for tortious act committed in a hospital maintained by it and that though the respondent doctor had been negligent in leaving the mop inside the patient's abdomen, it could not be proved that this was the cause of the death. Relying upon *State of Rajasthan v Vidhyawati [AIR 1963 SC 933]*, *N. Nagendra Rao and Co. v State of A.P. [(1994) 6 SCC 205]* and *State of Maharashtra v. Kanchanmala Vijaysing Shirke, [(1995) 5 SCC 659] and distinguishing Kasturi Lal Ralia Ram Jain v State of U.P, [AIR 1965 SC 1039], the Supreme Court held that running of hospital by the Government was a welfare activity and not a function carried out in exercise of its sovereign power.* ***The Court then referred to Bolam* v. *Friern Hospital Management Committee***, [(1957) 2 All ER118] (followed by the House of Lords in *Sidaway* v *Board of Governors of Bethlem Royal Hospital [(1985) 1 All ER 643]*) **where the English Court had laid down the test that a doctor was not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art**. The Court, however, observed that the Australian High Court had taken a somewhat different view in *Rogers v Whitaker [(1993) 109 ALR]*. The Court relied upon ***Laxman Balkrishna Joshi v Dr. Trimbak Bapu Godbole and Another*** *[(1969) 1 SCR 206]*, ***A.S. Mittal and Another v State of U.P. and Others*** *[(1989) 3 SCC 223]* and ***Indian Medical Association v V.P. Shantha and Others*** *[(1995) 6 SCC 651]* and went on to observe that **despite difference in medical opinions regarding the course of action to be adopted (in a particular case), as long as a doctor acted in a manner acceptable to (a responsible body of opinion in) the medical profession and exercised due care, skill and diligence, he could not be held negligent irrespective of the result**. **The Court, however, held that in this case, the doctrine of *res ipsa loquitur* was applicable as admittedly, the death occurred due to peritonitis which could have been only because of leaving of the mop in the patient's peritoneal cavity during the first surgery, an act of which no valid explanation had been given by the respondent-doctors**. The Court further observed that even if the peritonitis was considered to be due to the second surgery, still the second surgery had to be performed because of leaving the mop inside and that merely because it might not have been conclusively proved as to which of the doctors employed by the Government was negligent, it could not be a ground for denying the claim.

Poonam Verma v Ashwin Patel & Others [(1996) 4 SCC 332]

Date of Decision: 10.05.1996

Respondent 1 doctor had a Diploma in Homeopathic Medicine and Surgery. He administered allopathic drugs for viral fever and then typhoid fever to the patient who was subsequently shifted to a nursing home where he died. After the dismissal of the complaint, the complainant filed appeal to the Supreme Court. The Court found that respondent 1 was registered as a medical practitioner with the Gujarat Homeopathic Medical Council but not under the Allopathic system.

Referring to the decision in the case of *Indian Medical Association v V.P. Shantha and Others [(1995) 6 SCC 651]*, the Court noted that medical practitioners were covered under the Consumer Protection Act and that negligence as a tort was the breach of a duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do. To determine medical negligence, the Court referred to *Bolam v. Friern Hospital Management Committee [(1957) 2 All ER 118]* that the standard was that of the ordinary medical man professing to have that special skill and exercising it and noted that this ruling had been approved by the House of Lords/English Courts in *Whitehouse v Jordan [(1981) 1 All ER 267]*, *Maynard* v *West Midlands Regional*

Health Authority [(1985) 1 All ER 635], Sidaway v. *Bethlem Royal Hospital [(1985) 1 All ER 643] and Chin Keow* v *Government of Malaysia [(1967) 1 WLR 813 PC] as well as in the Court's own decisions in* ***Dr. Laxman Balkrishna Joshi v Dr. Trimbak Bapu Godbole and Another*** *[(1969) 1 SCR 206]* and ***A.S. Mittal and Another v State of U.P. and Others*** *[(1989) 3 SCC 223].*

Reviewing (i) the provisions of the Bombay Homeopathic Practitioners' Act, 1959 defining 'homeopathy' as the homeopathic system of medicine and that a practitioner registered under that Act shall practice homeopathy only, i.e., such a practitioner was entitled to treat patients only according to the homeopathic system of medicine; (ii) the allopathic system of medicine was regulated under the Indian Medical Council Act, 1956 which made practising modern/allopathic system of medicine without the requisite qualification/enrolment punishable; and (iii) the provisions of the Maharashtra Medical Council Act, 1965, which cast upon the respondent 1 doctor a statutory duty not to enter into any other field of medicine, breach of which made him liable for prosecution under the Indian Medical Council Act, **the Court concluded that in view of these statutory provisions, the doctor in this case was guilty of *negligence per se*, i.e., *violation of a public duty enjoined by law for the protection of person or property* (vide definition in Black's law Dictionary)**. While awarding damages, the Court also observed that none of the prescriptions advised necessary pathological tests for confirming/ruling out typhoid which was the usual practice of doctors dealing with suspected cases of typhoid and concluded that the doctor had prescribed medicines for typhoid without requiring the patient to undergo pathological tests for typhoid fever and the plea of advising the said tests orally was also contrary to the code of conduct of medical practitioners.

Spring Meadows Hospital and Another v Harjol Ahluwalia through K. S. Ahluwalia and Another [(1998) 4 SCC 39]

Date of Decision: 25.03.1998

In this complaint of the minor child through his parents before the National Commission, it was contended that the child was admitted to the appellant hospital as in-patient with diagnosis of typhoid. The nurse asked the child's father to purchase the injection Inj. Lariago recommended by the Senor Pediatrician to be administered intravenously. When the nurse administered the injection, the child collapsed immediately. The resident doctor found that the child had suffered cardiac arrest and he attempted to resuscitate the child by manual pumping. After half an hour, the Anaesthetist also reached the scene and started the procedure of manual respiration and the Senior Paediatrician also followed but there was no improvement in the child's condition. On advice, the child was shifted to the All India Institute of Medical Sciences (AIIMS). The doctors at the AIIMS informed the parents that the child was in a critical condition and even if he survived he would live only in a vegetative state having suffered irreparable damage to the brain. Sometime later, the child was discharged and again admitted to the appellant hospital. Based on the evidence, the Commission concluded that the child had suffered cardiac arrest because of intravenous injection of an excessive dose of the injection and that due to considerable delay in measures to revive the heart, the child's brain had been damaged. The Commission found that there was clear dereliction of duty on the part of the nurse and that the hospital was negligent in having employed an unqualified person as nurse and entrusting the child to her care. It also held that the resident doctor was negligent since he failed to follow the instructions of the Senior Paediatrician that the injection should be administered by a doctor. The Commission held that since the resident doctor and nurse were employees of the appellant hospital, the latter was liable and awarded compensation of Rs. 12.5 lakh to the child and of Rs. 5 lakh to the parents for acute mental agony.

In the appeal of the hospital, the Supreme Court observed that because the Consumer Protection Act was a beneficial legislation intended to confer speedier remedy on consumers, **its provisions should receive a liberal construction**. The Court commented that the relationship between a doctor and the patient was not equally balanced as the patient's attitude towards a doctor was poised between trust in the learning of another and the general distress of one in a state of uncertainty and further observed that it was difficult for a patient to successfully bring a medical negligence case against the doctor given the practical difficulties in linking the injury with the treatment and establishing the requisite standard of care. But it also noted that with the advent of the Consumer Protection Act, in a few cases patients had been able to establish the doctor's negligence. Relying upon a decision of the House of Lords in *Whitehouse v Jordan [(1981) 1 All ER 267]* the Court noted the ruling, "***The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence***" **The Court also indicated that use of wrong drug or gas during anaesthesia or delegation of responsibility knowing that the delegatee was incapable of performing his duties properly were some instances of tortious negligence**.

The Court also rejected the contention of the hospital that the child's parents were not covered within the definition of consumers in s. 2(1)(d) of the Act and could not be awarded compensation separately. **It held that when a child was taken to a hospital by his parents and the child was treated by a doctor, the parents would come within the definition of consumer having hired the services of the hospital/doctor and the child would also be a consumer under the inclusive part of the definition, being a beneficiary of such services. Therefore, both the parents and the child would be 'consumer' and could as such claim and be awarded compensation.**

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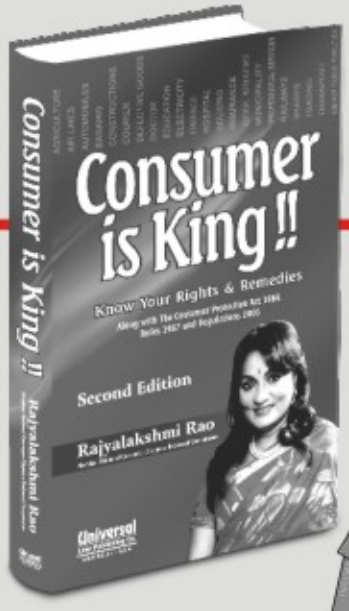

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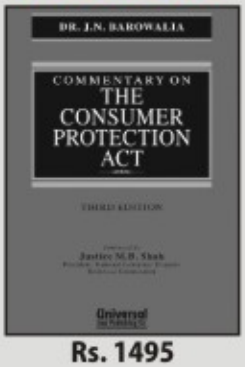

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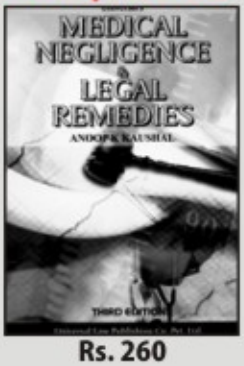

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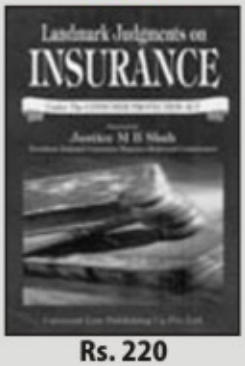

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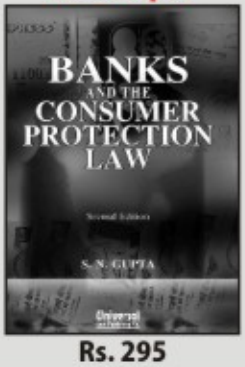

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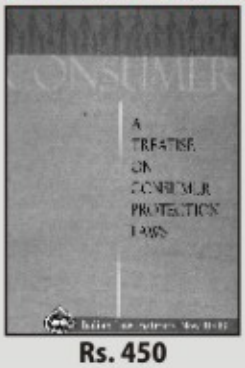

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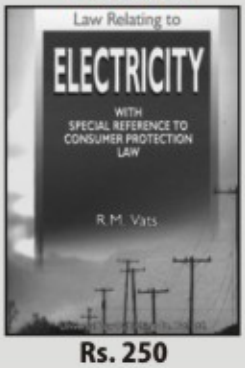

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