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LIABILITY OF HOSPITALS IN TORT CASES

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INTRODUCTION

Law is a fundamental need of the society and it helps as well as affects different segments of the society including the hospitals and the beneficiary patients. According to legal perception, the wrongs are of two types: (i) Crime and (ii) Tort. The remedy for victim against hospitals is available both under the criminal law and in the civil law in the form of Tort.

DIFFERENCE BETWEEN TORT AND CRIME

The crime is a wrong in which the wrongdoer gets punishment. The victim has to simply inform the police and criminal justice system comes into action. The police reaches to the spot of crime, catches the offender and collects the evidence. Then the police files challan in court and after a trial, the wrongdoer gets punished. Victim generally gets nothing, but punishment deters such offenders to save the other persons of society. The informant to the police generally is victim or it may be a third person as well. Law on rights of victims in Criminal cases has been reformed. Victim is now entitled to a copy of FIR with all documents collected during Investigation.

The Tort on the other hand is a civil wrong in which the victim files a case against the wrongdoer for the legal injury he has suffered. The word 'tort' has been derived from the Latin word *'tortum'* which means 'twisted' or 'crooked', which in general sense means a wrong. **Salmond** has defined tort as a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of trust or other merely equitable obligation. On proof of his injury and violation of his legal rights, the civil court grants him compensation making the wrongdoer liable to pay it to the victim.

According to **Winfield**, "Tortious liability arises from breach of duty, primarily fixed by the law. This duty is towards persons generally and its breach is redressible by an action of unliquidated damages." As per this definition, the victim of tort has to prove three things in the civil court:

(i) Legal duty to take care,

(ii) Breach of duty by Defendant,

(iii) Loss suffered by victim, which has to be compensated.

The major difference between crime and tort is that of remedy. In crime, the remedy is punishment and the remedy in tort is compensation. This compensation is paid by the wrongdoer on the order of the civil court. The court expenses are to be borne by the victim. In this way, the remedy for tort is costly.

VICARIOUS LIABILITY

There is a concept of Vicarious Liability in Law of Torts. According to it, the master is liable for the tortious acts of its servant i.e. employees. To provide medical aid, the hospital has to employ many persons of medical profession and on any negligence done by such of the hospital's employees, the hospital authority will be held

vicariously liable to pay compensation to the victim. The liability of Hospitals for the tortious acts of their employees is based on principles of following two latin maxims:

(i) Qui facit per alium facit per se:

(ii) Respondeat superior

(i) **Qui facit per alium facit per se:**

The Hospital authorities have to employ different types of employees to run their medical activities like nursing staff, radiographers, technicians and skilled as well as unskilled workers. The meaning of maxim "Qui facit per alium facit per se" is that he who acts through another is deemed to have done that act himself. It means that he will be treated as the real actor. The owner of the hospital whether government or non-government will be treated as if he or she has committed that act. If the wrong act is done by any hospital employee, the owner of that hospital will be deemed to have done that wrong act. It is in the same way as a car owner is vicariously liable for any wrong done by his car driver.

(ii) **Respondeat superior:**

The maxim "Respondeat Superior" means that the superior be held liable. As per master and servant relationship, the hospital and hospital worker are two persons, out of which the first person
i.e. hospital is superior being financially sound and the worker is financially weak. Therefore, as per this maxim the superior i.e. Hospital authority must bear the responsibility of the tortious act committed by its staff/worker.

It was to a substantial extent a consequence of developments in the liability of hospitals for the negligence of their staff that dissatisfaction with the test of control developed. It has been held that radiographers[1], house-surgeons[2], whole time-assistant medical officers[3] and probably, staff anesthetists[4] are the servants of the Hospital authority for the purposes of vicarious liability. It has also been suggested that even visiting consultants and surgeons are servants for this purpose[5] . However, in many of the cases there has been a tendancy to treat the question of a hospital authority's liability not as one of vicarious liability only but also as one of the primary liability of the authority for breach of its own duty to the patient[6] . This approach has been made easier by the enactment of Consumer Protection Act, 1986 in India[7].

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1. Gold v. Essex County Council [1942] 2 K.B. 293.
2. Collins v. Hertfordshire County Council [1947] K.B. 598;
3. Cassidy v. Ministry of Health, [1951] 2 K.B. 343
4. Roe v. Ministry of Health [1954] 2 Q.B. 66.
5. Street, Torts, 5th ed. p. 416.
6. Cassidy v. Ministry of Health, [1951] 2 K.B. 343
7. Amended by the Consumer Protection [Amendment] Act, 2019.

CONSUMER PROTECTION LAW

Resolution of disputes relating to, what is commonly called, medical negligence and related matters, is most vexed, perplexing, complicated and indeed a difficult task. It would be legitimate to generalize that having regard to the nature of service expected of from the medical profession, which has been based fundamentally on intellectual and special skills and expertise, to be practiced with a recognized standard of skill and ability compared to other professions like, Advocates, Engineers, Architects, Chartered Accountants etc, the Society expects high standard of care and duty from the medical profession. It survives on trust and confidence. The influence exerted by it in the Society is unique.

Enactment of Consumer Protection Act in 1986, by the Central Government of India was a landmark event. It is one of the most comprehensive and progressive piece of legislation enacted for consumers, who are supreme and sovereign. It also provides for mechanism for settlement of consumer disputes, expeditiously, free of charge and providing easy access, eschewing technicalities of procedure. As poised by the Hon'ble Supreme Court in one of its landmark judgement that the Consumer Protection Act, 1986 meets the long felt necessity of protecting the common man from hazards of exploitation as remedy available under the ordinary law for various reasons become illusory. It is heartening to note that the Apex Court in its number of pronouncements has constructed and interpreted various provisions of the said beneficent Act, serve and advance the interest of the consumer, expanding the ambit and scope of service, virtually bring in the sweep of the Act, for every service. Needless to say that Medical profession is one such service as brought under the purview of Consumer Protection Act.

There is apprehension entertained about the provisions of the Act and the principles laid down in various decisions by the Court from certain quarters. However, the same is based with due respect, on misconceptions which are unwarranted. Medical negligence is not something that has come along with enactment of the Consumer Protection Act. There were various other statutes, for disputes relating to medical negligence taken to the Courts. But process being very intricate, time consuming and expensive, the victims preferred to suffer rather than face the ordeal of lengthy and time consuming Court procedures. Consumer Fora, established and functioning under Consumer Protection Act, are at par with Courts and exercise judicial powers and statutory authority. At the same time, the Supreme Court and the National Commission have also laid down guidelines to be observed by the Consumer Fora while discharging their functions.

By the Consumer Protection (Amendment) Act, 2019, the jurisdiction of the Consumer Fora has been incressd to control the deficiency in service as under :

i. District Consumer Disputes Redressal Commission -Deficiency in service upto Rupees one crore.
ii. State Consumer Disputes Redressal Commission - Deficiency in service from one crore to ten crore Rs.
iii. National Consumer Disputes Redressal Commission - Deficiency in service above Rs. ten crores.

Besides the above jurisdiction, the State Commission also hears the appeal against the decision of district commission and the appeal against the decision of State commission which will be heard by National Commission. The last appeal can be against the decision of the National commission which will be heard by the Supreme Court. Now that Doctors are very much under purview of Consumer Protection Act, it is high time that they themselves, as experts, come out with norms and modalities in maintaining treatment records of a patient, accurately and objectively. They would do well to realize that solution to any problem lies in ensuring that the problem does not arise at all, for prevention is better than cure.

MEDICAL SERVICES AND CASE-LAW

The cases arising in the relationship of patient (Consumer) and Hospital are discussed herewith as under;
In a significant ruling in **Vasantha P. Nair v. Smt. V.P. Nair**[8] , the National Commission upheld the decision of the Kerala State Commission which said that a patient is a "consumer" and the medical assistance was a "service" and therefore, in the event of any deficiency in the performance of medical service, the consumer courts can have the jurisdiction. It was further observed that medical officer's service was not a personal service so as to constitute an exception to the application of the Consumer Protection Act.
The controversy has been set at rest and the Supreme Court in its landmark decision in **Indian Medical Association v. V. P. Shantha and others**[9], it has held that patients aggrieved by any deficiency in treatment, from both private clinics and Govt. hospitals, are entitled to seek damages under the Consumer Protection Act. The judgment of the Madras High Court was thus set aside by the Supreme Court. It was held that-

i. Service rendered to patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of 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 Consumer Protection Act.

ii. 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 would not exclude the service rendered by them from the ambit of Consumer Protection Act.

iii. A service rendered free of charge to everybody, would not be service as defined in the Act.

iv. The hospitals and doctors cannot claim it as a free service if the expenses have been borne by an insurance company under medical care or by one's employer under the service condition.

The position as it has emerged in various cases concerning medical negligence is also discussed hereunder :

Sterilisation operation

In a case where child was born even after Sterilisation operation in government hospital, the State Government was held liable. In **State of Haryana v. Smt. Santra**[10], the patient Smt. Santra was a poor labourer woman, who already had seven children, got herself sterilised. Due to medical negligence, the operation was unsuccessful. She got pregnant again and gave birth to another child which happened to be a girl. She being a poor person, was already under considerable monetary burden. The unwanted child (girl) born to her had created additional financial burden for her. She was held entitled to claim full damages from the State Government to enable her to bring up the child atleast till she attained puberty.

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8. I (1991) CPJ 685; The Madras High Court had held that medical practioners do not come within the purview of the CPA. : C.S. Subramanian v. Kumaraswamy, (1994) CPJ 509 (DB).
9. III (1995) CPJ 1 (S.C.): AIR 1996 S.C. 550.
10. I (2000) CPJ 53 (S.C.).

In **Dr. N. Lalitha Krishna v. Mrs. Deepa Nair**[11], the complainant approached the opposite party for Medical Termination of Pregnancy (MTP) and the purported MTP was performed on her on 1.7.1997. Several Tests on 8.7.1997 revealed that the foetus was intact and it was continuing to grow. The complainant then approached another doctor- Dr. Sumalatha on 17.7.1997 and got abortion successfully performed on 18.7.1997. She then filed a complaint aginst the opposite party-appellant (Dr. N. Lalitha Krishna) before the Ranga Reddy District Forum and claimed exemplary damages to the tune of Rs. 2,00,000 for severe trauma, mental agony and physical pain. The District Forum held that there was deficiency in service on the part of the appellant and the same was upheld by the State Commission. The appellant was held liable to pay compensation of Rs.7,650/- to the complainant.

In **Smt. Jaiwati v. Parivar Seva Sanstha**[12], the complainant got laparoscopic sterilisation operation done at the clinic of the opposite party on 26.5.1992. On 15.10.1992 the complainant was found to be pregnant and she was stated to have conceived on 1st July, 1992. She claimed compensation of Rs. 3,00,000 on account of the failure of the operation. On the basis of the medical studies it was held by the Delhi State Commission, that certain failure rate in every kind of female sterilisation. The risk of failure of operation cannot be obviated despite due care and caution. The complaint was dismissed as there was no negligence of the opposite party.

In **Dr. N. Sandhya Rani v. M. Kalpana**[13], the complainant got herself tubectomy operation on 15.7.89. After about two and half years, on 14.3.92, on a medical check up, she was found to be pregnant. The opposite party hospital, which conducted the said operation was directed by the District Consumer Forum to pay Rs. 65,000 as compensation and costs of Rs.1000- to the complainant on the ground the doctor concerned was negligent in conducting the operation. On appeal against the order of the District Forum, the State Commission held the pregnancy occurred after two and half years of the operation. There could be possibility of reunion might have occurred because of that natural process. Unfortunately, the State Commission observed that complainant could not establish that the operation was conducted negligently. The order of the District Forum was, therefore, set aside by the State Commission, and the complaint was dismissed[14].

Mismatching of blood - Kidneys Damage by wrong transfusion is deficiency in service.

In **Jaspal Singh v. P.G.I., Chandigarh**[15]**,** the complainant's wife, Smt. Harjit Kaur suffered 50% burn injuries accidently from stove. After a short treatment at Daya Nand Medical College, Ludhiana she was admitted to P.G.I. Chandigarh. Her blood group was A+, but she was transfused B+ group blood. Due to wrong transfusion of blood, her kidneys failed and she died. The State Commission held that the complainant is entitled to compensation for the death of his wife due to negligent transfusion of blood at the P.G.I. Chandigarh. Against the order of the State Commission, the P.G.I. Chandigarh filed an appeal before the National Commission [**PGI, Chandigarh v. Jaspal Singh**][16] .

The appellant, P.G.I., contended that the complainant had brought the blood himself and that he should be blamed for bringing the wrong blood since he had the knowledge of the right blood group of his wife. The National Commission rejected the above argument, because it is the duty of the hospital to transfuse the matching blood group. In the above case because of wrong transfusion

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11. I (2000) CPJ 340 (Andhra Pradesh SCDRC).
12. III (1999) CPJ 167 (Delhi SCDRC).
13. III (1999) CPJ 6 (Andhra Pradesh SCDRC).
14. III (1999) CPJ 436 (Tamil Nadu SCDRC).
15. II (2000) CPJ 439 (Chandigarh SCDRC).
16. III (2000)No32 (NC)

of blood the patient's urine contained red blood and kidney, liver and blood levels got affected and ever since the condition of the patient deteriorated. There being serious deficiency of service on the part of the PGI and its attending doctors/staff, the decision of the State Commission was upheld and the appeal filed by the PGI was dismissed in *limine*.

Uterous removed without justification

In **Lakshmi Rajan v. Malar Hospital Ltd.**[17], the complainant a married woman aged 40 years noticed development of a painful lump in her breast. She went to the opposite party hospital for thorough examination, diagnosis and treatment. The lump had no effect on the uterous, but her uterous was removed without any justification. The complainant's hope for child had thereby ended. It was held to be a case of deficiency in service on the part of the doctor, for which he was held liable to pay compensation of Rs. 2,00,000/- to the complainant. The complainant's consent for the operation was taken but it was also held that the complainant's consent, who is a lay person, does not mean that there was necessity for the operation.

Brain damage to a child

In **Harjot Ahluwalia v. Spring Meadows Hospital**[18] **,** Harjot Ahluwalia, the complainant, a minor, the only child of his parents, who had high fever was brought to the Spring Meadows Hospital, East of Kailash, New Delhi. He was administered certain medicines, and intravenous chloroquine injection by an unqualified nurse without prior test. Immediately thereafter, the child collapsed and suffered cardiac arrest. No oxygen was given as gas cylinder was not available. The child suffered irreparable brain damage, rendering the child into a "vegetable state" for the rest of his life. The National Commission held that there was deficiency in service on the part of the Opposite Party. It awarded compensation of Rs. 12.5 lacs to the minor child, Harjot Ahluwalia and Rs. 5 lacs to his parents.

In a landmark judgment on 26.3.98 the Supreme Court upheld the decision of the **National Commission**[19] and dismissed the appeal preferred by the appellant, Spring Meadows Hospital, who were held guilty of negligence of their staff and were ordered to pay compensation of Rs. 12.50 lacs to the minor child for brain damage caused to him and Rs. 5 lacs to the parents of the child. A significant part of the decision is that it was held that the parents of the child, who had suffered brain damage, were consumers having hired the services, and the child was a 'consumer' as the beneficiary of such services.

Anesthetist not accompanying patient in transit

A patient who developed an intra-operative complication, presumably due to some anesthe-sia related cause, required an urgent transfer to an ICU. This particular patient was accompanied in the ambulance by the Gynaecologist with the Anesthetist following the ambulance in his car. The Anesthetist's act of not accompanying the patient in the ambulance was considered deficiency in the services of the Anesthetist by a recent judgement of the Maharashtra State Consumer Disputes Redressal Commission. The Anesthetist was ordered to pay a compensation of Rs. 4,10,000 to the husband of the patient.

This judgement for the first time casts a responsibility on the Anesthetist to accompany a patient who had an intra-operative catastrophe and was being transferred to another Institution.

17. III (1998) CPJ 586 (Tamil Nadu SCDRC).
18. II (1997)CPJ 98 (NC)
19. Spring Meadows Hospital v. Harjot Ahluwalia AIR 1998 SC 1801 : (1998) 4 SCC 39.

A complaint was lodged with the Maharashtra State Consumer Disputes Redressal Commis-sion by one Mr. Shakil Mohammed Vakil Khan, the husband of one Mrs. Salma Khan, for negli-gence against an Obstetrician, an Anesthetist, and the Parsi Lying-In Hospital. The allegations were that Mrs. Salma became a vegetable (brain dead) when she was in their custody.

The facts were that on 4th December 1994 at 11.00 p.m., Mrs. Salma Shakil Khan was ad-mitted with labour pains to the Hospital with a complaint of a possibility of absent foetal move-ments. The Obstetrician examined the patient and found her general condition to be good and the foetal heart sounds. audible. On 5-12-1994, at around 8.00 a.m. the patient's membranes ruptured spontaneously and there was meconium stained liquor indicating foetal distress. Caesarean section was decided upon and the Obstetrician sent a message to one anesthetist - Dr. Gada, who arrived at

9.00 a.m. but could not anaesthetize the patient as the Consent Form was not signed by a male member and no male members were present until 10.00 a.m. by which time Dr. Gada left. At 10.00

a.m. the father-in-law of the patient gave the consent for the section and then it took further time to find another anesthetist.

The Anesthetist against whom the present complaint was filed was then contacted, who around 11.15 a.m. after due examination decided to administer spinal anesthesia. Delivery of the baby was quick, baby cried well and placenta was expelled. While suturing the lower segment, the Obstetri-cian noticed blood to be dark and immediately informed the Anesthetist about the same. The Anes-thetist assured the Obstetrician that the patient's condition was good and told her not to worry and that he was taking necessary measures. But soon the Anesthetist was found struggling to feel the pulse. The patient was immediately intubated after which the pulse was found to be satisfactory. After extubation normal breathing did not return and the patient was found to be in coma. The

Obstetrician felt that the patient should be shifted to an ICU in any good hospital and informed the relatives of the serious condition of the patient. Thereafter, the Obstetrician shifted the patient to the ICU of the Breach Candy Hospital.

At Breach Candy Hospital various doctors examined the patient and they reported that proper care and attention was not provided and because of lack of oxygen there was permanent damage to the brain. Medical case papers showed that the patient went into prolonged hypertension during surgery, which resulted in the brain damage.

It was the case of the Complainant that the patient was now bed-ridden and the baby boy was deprived of the care and attention necessary for an infant. The patient had also three more chil-dren and all of them were deprived of mother's love for lifetime. The family was put to a permanent suffering for caring for a person who may never recover, thereby causing continuing permanent mental agony, tension and an unending financial liability.

The Complainant further claimed the cost of hospitalization/medical expenses - Rs. 8,00,000/, Rs. 2,00,000/- in damages and Rs. 10,000/- for mental torture and business losses suffered by him. The Complainant further claimed that the patient was only 30 years old with four children and he did not account for the loss of love from his wife to him and his children.

The Obstetrician submitted that she was vigilant in warning the Anesthetist no sooner a change in the colour of blood was noticed on two occasions and despite the assurance of Anesthetist she took the decision to shift the patient to an ICU. She denied any payment of money to her in the present case and claimed to have done her duty as an employee of the Hospital.

The Anesthetist pleaded that the condition of the patient was purely due to a medical mishap and not due to any medical negligence. He added that he is a distinguished, 70 years old anesthesiol-ogist practising since the last 40 years, who is generally requisitioned in supra-major or critical sur-geries. He further stated that in the instant case after the child was delivered, the patient had severe hiccups and started bringing out some stomach contents. Suspecting regurgitation and aspiration in the passages, he administered injections and passed a cuffed endotracheal

tube of adult size. At the end of the operation, even though all parameters were normal, the patient was confused and irritable. Patient was fully conscious and was no longer tolerating the endotracheal tube and was trying to pull out the same. He considered it safer to remove the tube so that catastrophe like patient biting on the tube and choking herself could be avoided.

In view of the acid regurgitation, he felt that she should be transferred to Breach Candy Hospital, which had a good ICU facility. He admitted following the ambulance in his car with all the neces-sary resuscitation equipment.

The Anesthetist further contended that he distinctly recalled that to his query as to whether the pa-tient had consumed anything orally just prior to being brought to the theatre, one of the relatives of the patient informed him that she was given a little holy water. It was the Anesthetist's case that due to consumption of holy water which mixed and stimulated the gastric secretion and under anesthesia, the stomach contents regurgitated into the air passages causing "Mendelson's Syndrome" or "Acid Aspiration Syndrome". He further clarified that the acidic stomach contents in the lungs caused hy-poxia and due to destruction of surfactant, caused collapse and hypertension.

The Anesthetist denied averments made by Obstetrician that the patient. suffered brain dam-age due to lack of oxygen during operation or that she was unconscious at the time of the operation. He reiterated that the patient's condition was stable and only then she was shifted to Breach Candy Hospital. The Anesthetist further admitted that oxygen was not administered to the patient while she was transported to the Breach Candy ICU as she was breathing spontaneously upon extubation at the hospital. He further added that the patient reached safely and without any complications to the Breach Candy Hospital.

The Hospital submitted that the Anesthetist sent in three different anesthesia notes pertaining to the same patient in respect of the same operation. It was their say that the Anesthetist manipulated the said record by either destroying or tampering with the original record to cover up his negligence in the said case.To the allegation that there were three anesthesia notes, the Anesthetist clarified that these reports were given at different times. The first one was the "Theatre Voucher Form" of the Obstetrician, which was not filled by him. The second one was a "Diet-History-Treatment Sheet" of the Hospital, which bore his detailed notes. The third document was one by which he had requi-sitioned some medicines and on the reverse of which some concise observations were noted by him. The Court found that there were three separate anesthesia notes on record and the Hospital also con-firmed that the Anesthetist tried to change his notes. The Anesthetist asking the Obstetrician to insert his papers into the indoor case papers cast a shadow of doubt with respect to the entire case. The first issue that the Court decided was whether it was just and proper on the part of the attending doctors to wait without treating the patient just because some male member had not given a written 'consent' for the operation. According to the Court the waiting was not proper and could not be a proper excuse in law as it is a settled law that the patient's consent is adequate and binding.

Therefore allowing Dr. Gada to leave just because some male member had not given consent was most improper especially when LSCS was indispensable.

According to the Court, the services of the Anesthetist were found to be deficient because:

1) He did not provide oxygen to the patient en-route to Breach Candy Hospital when the patient was in a state of unconsciousness.

2) He did not accompany the patient in the ambulance and instead traveled by his own car. The Complainant pleaded that the Anesthetist had abandoned the patient without oxygen and neces-sary medical care in the ambulance and obviously vital damage took place during transit.

3) He failed to monitor the patient.

4) He brushed aside the observation of the serious condition of the patient made by the Obstetri-cian. The Court felt that he took it lightly and failed to take corrective action even after the Obstetrician pointed out the impending seriousness in the condition of the patient.

5) He did not monitor the patient in the ambulance which he was professionally, morally and ethi-cally responsible to do as his presence in the ambulance would have ensured that no further dam-age could take place and he could have helped to resuscitate and revive the patient if need be.

6) The admission notes of Breach Candy Hospital showed that the patient was admitted in an unconscious condition with hypertension, severe respiratory distress without oxygen, not re-sponding to painful stimulants, pupils dilated etc. and comatose.

In view of all the above findings, the Court had no doubts in its mind that the Anesthetist was negligent in not providing oxygen to a patient in an emergency during the surgery and later on not accompanying the patient in the ambulance. Furthermore in transit the patient was not on oxygen and this surprised the Court.

The Court was of the opinion that the husband now had to keep 24 hours watch on his wife. The children were deprived of her love and care and she was now permanently separated from the husband. The husband had to maintain her present status permanently and the humanitarian and emotional responsibility was difficult to quantify. The Court further felt that the husband would have to engage preferably a female servant to attend to the household chores and to the upbringing of the children. This female servant's remuneration could not be less than Rs. 1000/- per month. This came to Rs. 12,000/- per annum. Taking a multiplier of at least 25 years, the amount came to Rs. 3,00,000/-. The Court awarded Rs. 50,000/ - for loss of marital pleasure for the husband, Rs. 50,000/- for loss of mother's affection for the children, Rs. 50,000/ for costs of medicine, etc.. and Rs. 10,000/- as costs. In all the complainant was awarded Rs. 4,10,000/ - by way of compensation to be paid by the Anesthetist alone.

Foreign matter left in the body

In Nihal Kaur v. Director, P.G.I., Chandigarh[20], Amrik Singh, aged 52 years was operated upon at the P.G.I., Chandigarh after Splenic Abcess was diagnosed. The family was informed that the operation was successful. The patient soon developed trouble and died. A 'Scissor' utilised by the surgeon was found in the last remains after Amrik Singh was cremated. There was thus negligence of the surgeon, i.e., deficiency in service, in allowing the scissor to remain in the body. Compensation of Rs. 1,20,000/- was granted to the complainant, i.e., the dependents of the deceased.

Burn injuries to a child

In **Master P.M. Ashwin v. Manipal Hospital, Bangalore[21]** a child aged two and half months was operated upon for hernia. The nurse had put extremely hot water bag under the child's legs while it was under anesthesia. His both legs were burnt. The wounds became worse due to 2nd and 3rd degree burns suffered by the body. Apart from enormous pain and suffering the baby had to suffer permanent scars on both legs and also permanent disability. Opposite parties were directed to pay compensation of 5 lacs and costs of Rs. 3500 to the complainants.

Services Rendered by Government Hospital

In **Prasanth S. Dhanaka v. Nizam's Institute of Medical Sciences, Hyderabad[22]**, the com-plainant, a 20-year-old Engineering student, suffered paralysis of lower parts of the body and both legs due to negligence in his treatment by the opposite party, a Government Hospital. The opposite parties had raised the question of the jurisdiction of the consumer fora as the Govt. hospital in this case was rendering services free of charge to certain patients.

20. III (1996) CPJ 112 (Chandigarh SCDRC).
21. I (1997)CPJ 238 (Karnataka SCDRC).
22. (1999) CPJ 43 (NC).

Continuing wrong

The Supreme Court observed that the admission of a complaint filed under the Act should be a rule and dismissal should be an exception. But if the complaint is barred by time, the Forums are bound to dismiss it unless the complainant makes out a case for condonation under section 24-A

(2) of the Consumer Protection Act. In this case, a doctor performed an operation by "open chole-cysectomy" in the year 1993 leaving a piece of gauge in the abdomen of the patient. The patient categorically averred the after discharge from the appellant's hospital; she suffered from pain on and off and spent sleepless nights for 9 years. But she did not come back to the doctor to apprise him about her pain and agony. She was again operated upon to remove the gauge in 2002. A com-plaint was then filed. The Supreme Court ruled that a long silence on her part militated against the bona fides of her claim. It could not be said that the cause of action arose in 2002 on removal of the gauge.[23] The decision does not seem to be very logical. The cause of action arose when an extremely negligent act was done in leaving an unwanted material in the patient's body. It lingered on during her sustenance of pain may be because of hesitation. It survived up to the time of removal. Two years time should have been available from that moment. There should be no attribution of lack of bona fides to a suffering patient.[24]

Basic Facilities

Where the National Commission dismissed the claim for medical negligence against a hospital on the ground of non-joinder of necessary parties, the Supreme Court held that the summary dis-missal was not proper because private hospitals normally have a panel of doctors and it becomes difficult for claimants to give details of doctors who treated patients.[25] "In our opinion, if a hospital knowingly fails to provide some amenities that are fundamental for the patients, it would certainly amount to medical mal-practice. A hospital not having basic facilities like oxygen cylinders would not be excusable." The court also opined that even the so-called humanitarian approach in no way can be considered to be a factor in denying compensation for mental agony suffered by patients.[26] The Consumer Protection Act has a wide reach and the Commission has jurisdiction even in cases of service rendered by statutory and public authorities. Such authorities become liable to compensate for misfeasance in public office, i.e., an act which is oppressive or capricious or arbi-trary or negligent provided loss or injury is suffered by a citizen.[27]

The power and duty to award compensation does not mean that irrespective of facts of the case interest can be awarded in all matters at a uniform rate of 18% p.a. What is being awarded is com-pensation, i.e., a recompense for the loss or injury. It, therefore, necessarily has to be based on a finding of loss or injury and has to correlate with the amount of loss or injury.[28]

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23. V.N. Shrikhande v. Anita Sona Fernandes, AIR 2011 SC 212.

24. Ibid.

25. Savita Garg v Director, National Heart Institute, AIR 2004 SC 5088.

26. Cited with approval in Kunal Saha (Dr) v Dr. Sukumar Mukherjee, AIR 2010 SC 1162 at p 1197.

27. Ghaziabad Development Authority v. Balbir Singh, AIR 2004 SC 2141.

28. Ibid.

Deficient medical service

The case was that of serious surgery. But even so it was performed in the general ward instead of in the operation theatre. The senior doctor and Head of the Department were not present. Many pre-operation procedures were not done. The deficiency in procedure resulted in 75% permanent disability and impairment which was not likely to take any improvement. Compensation of Rs. 5,00,000/- was awarded.[29]

Where there was no proper service after the operation period with the result that urine accumu-lated and was not drained out throughout the day. The patient died. The patient was a healthy young man. He was admitted for minor surgery. He was earning about Rs. 30,000 to 50,000/- from personal business. He was allowed compensation of ten lakh rupees.[30]

A patient suffering from diarrhoea was admitted to a hospital. Doctor gave him a medicine without testing whether it may cause a reaction or not. Due to the reaction of the medicine, the movement of a hand, an arm and fingers was restricted and ultimately the whole arm had to be amputated due to the affect of gangrene. The doctor was held liable for medical negligence, defi-ciency in service was proved.[31]

Treatment by unauthorized practitioners

The patient alleged that that the homeopath was not qualified for practicing allopathy. He ad-ministered injections of piles to the patient resulting in severe complications. He avoided giving the prescription slip. When the patient was carried to another hospital, complications were diagnosed to have been caused due to "injection therapy of hemorrhoids at village". It was held to be an ap-parent case of medical negligence. The doctor was liable to pay compensation.[32]

Healthcare

In **Medicos Legal Action Group v. Union of India (Through Secretary, Department of Consumer Affairs, Ministry of Consumer Affairs, Food and Public Distribution) a public In-terest Litigation (PIL) petition was moved by Medicos Legal Action Group**[33], a registered trust in Chandigarh seeking a declaration from the Court that services performed by healthcare service providers would not be governed by the Consumer Protection Act, 2019 and further seeking the Court's leave to direct all consumer fora to not register complaints filed under the 2019 Act against healthcare service providers. The petitioner submitted that the Consumer Protection Bill, 2018 before the 2019 Act had led to exclusion of 'healthcare' from the definition of the term "service" as defined in the Bill. It was further pointed out to the Court that the Minister for Consumer Affairs, Food and Public Distribution, had stated on the floor of the Parliament that 'healthcare' had been deliberately kept out of the 2019 Act which indicates the parliamentary intent of not including 'health care' within the definition of "service" in the 2019 Act. It was further argued that term 'health care' has not been included in the definition of "service", as defined by section 2(42) of the 2019 Act. The Bench proceeded to compare the term 'service' as defined under section 2(1)(o) of the 1986 Act and in section 2(42) of the 2019 Act and accordingly observed, "Reading the two defini-tions, we do not see any material difference between the two. Except inclusion of 'telecom' in sec-tion 2(42) of the 2019 Act, the terms of the definition are identical." It was further observed that although Section 2(1)(0) of the 1986 Act did not specifically include services rendered by doctors within the term "service", however such an inclusion was considered by the Supreme Court in its decision in Indian Medical Association v. V. P. Shantha. Further it was held by the Supreme Court that mere repeal of the 1986 Act by the 2019 Act, without anything more, would not result in**.**

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29. Om Prakash Lokre v. Registrar Christian Medical College & Hospital, AIR 2009 NOC 2055 (NCC).
30. Anita Nagindas Parekh v. Dr. Anil C. Pinto, AIR 2009 NOC 1691 Bom.
31. Lalit Mohan Sharma v Brij Kishore Sharma, AIR 2008 NOC 2263 (NCC).
32. Jallauddin Khan (Dr.) v. Indra Sen Verma, AIR 2009 NOC 2563 (NCC).
33. 2021 SCC OnLine Bom 3696.

exclusion of 'health care services rendered by doctors to patients from the definition of the term "service".

Accordingly, it was observed that petition was 'a thoroughly misconceived Public Interest Litiga-tion and petition was dismissed with costs of Rs 50,000.

Mental agony

In **Director Administration, P.D. Hinduja National Hospital and Medical Research Cen-tre v. Harsha Ashok Lala[34],** the complainant Harsha Ashok Lala (Consumer) came to the PD. Hinduja National Hospital (the petitioner/opposite party) for follow-up check-up after her spinal surgery. The petitioner alleged that she was very rashly and negligently wheeled from hospital corridor, on the ramp by an unidentified security guard without putting the seat belt, as a result of which she suffered 'head on fall' from the wheelchair and sustained fracture of left (ankle) lower end fibular tip. She further alleged that immediate first aid was not given, and she was made to stand in que for payment of X-Ray charges which caused further pain

and agony. It was further alleged that the incidence was reported immediately to the Hospital authorities but no avail. The Hospital wilfully avoided informing the police about such serious accident in their premises. The complainant further alleged that there was gross negligence and deficiency in service from the supportive staff at the hospital. Being aggrieved by the negligent care and conduct of the opposite party, she filed the consumer complaint before the district forum and claimed compensation of Rs. 16,00,000/-. She also filed one criminal complainant-FIR in the con-cerned police station. The district forum partly allowed the complaint and directed the petitioner hospital to pay Rs. 1,00,000/- as compensation and Rs. 10,000/- towards cost of legal proceedings to the complainant. The state commission dismissed the petitioner's appeal with costs of Rs. 25000 and directed it to pay Rs. 3,51,000/- to the complainant within one month, failing which 9% interest would be applicable. On appeal before the NCDRC, the NCDRC upheld the award of the state commission as just and equitable having regarded to the fact that patient underwent mental agony and physical trauma. No palpable crucial error in appreciating the evidence by the two fora below, no jurisdictional error, or legal principle ignored, or miscarriage of justice, is visible. Thus, the revision petition was dismissed.

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34. 2021 SCC OnLine NCDRC 194.

CONCLUSION

After discussing the case-law, it is concluded that there is a need to legislate for the tortious injuries suffered by the patients in Hospitals at the hands of their hospital staff, though the Consumer Protection Act after its amendment in 2019 has helped the suffering victims to get compensation through consumer fora for the injuries of their near and dear persons. The enactment for Tort Liability can be on the lines of Crown Proceedings Act of England passed in 1947. It can be in a reformed shape observing the Laws of other Countries as well.

It is said that medical profession is a classic example of a profession in which results are not guranteed and are not to be guaranteed. Nevertheless, there is duty cast upon the Hospital and Medical practitioner, to act at all times in the best interest of the patient. He owes a duty to exercise reasonable standards of professional skill and care in the treatment of his patient. It also embodies the exercise of warmth, compassion and understanding. Doctor is revered like a Demi God, next only to God. It is the Doctor who is a saviour, a custodian and a trustee of the life of his patient.