Viewpoint

Consumer Protection Act and Medical Profession

The Indian consumer movement in the health care sector is at crossroads. On the one hand public awareness has been increasing, while on the other hand, the standards of health care delivery have been deteriorating. The budgetary allocation for Health has been steadily declining over the years. The resurgence of diseases like malaria has brought to the fore a basic contradiction in our health policy, a vital policy which is decided without any participation from consumers of health care.

Many factors have contributed in making the prevalent situation in the health care field grim. The plight of the consumers of health care is peculiar. The consumer has to bear the adverse effects of many policy decisions but he has no say at all in the formulation of the policy. Moreover he has no forum to get his grievances redressed. The medical profession is the nodal sector of the health care "Industry". The contribution of the profession in the health care delivery system is vital.

The situation is complex in our country due to the different disciplines of medicine which have been traditionally and historically practised. Regulation of the different disciplines of medicines is very important. However, this aspect has remained neglected over the years. A plethora of medical colleges, mostly ill-equipped and started on capitation fees has complicated the situation further. The consumer is caught in catch-22 situation. On one hand, he had to deal with the powerful combine of an ill-equipped, uncontrolled, mercenary medical profession, a corrupt political leadership, defunct regulatory bodies, an overburdened legal system and on the other hand, he has to face a grim health situation and the various maladies arising out of it.

There is however, a glimmer of hope on the horizon. The discontent of the health care consumer has been provided an outlet by the new Consumer Protection Act. It has also generated intense controversy in the health care field.

The Consumer Protection Act (COPRA)

It is necessary to understand the **Act** first in order to realize its implications for the consumers as well as the medical profession. The Consumer Protection Act was enacted by the Parliament in 1986. This Act created Consumer Councils and other fora to settle consumer disputes. This Act seeks to promote and protect the rights of consumers such as:

1. The right to be protected against marketing of goods which are hazardous to life and property.
2. The right to be informed about the quality, quantitity, potency, purity, standard and price of the goods in order to protect consumers against unfair trade practice.
3. The right to be assured that consumer interest will receive due consideration with appropriate authority.
4. The right to be assured access to a variety of goods at competitive prices.
5. The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers.
6. The right to consumer education.

These objectives are sought to be promoted through the setting up of Consumer Councils at the central and state levels and Consumer Commissions and fora at the district, state and central level. These bodies, though quasijudicial, have powers of the Civil Courts for the purpose of this Act (Sec. 13). These include Section 193 and 228 of the Indian Penal Code and Section 195 and Chapter XXVI of Civil Procedure code consisting of:

Sec. 27 — Summons of defendents

Sec. 28 — Service of summons

Sec. 30 — Power to order discovery

Sec. 31 — Summons to witnesses

Sec. 32 - Penalty for default

Orders XII and XIX — Impounding documents, orders to file affidavit. Order and power to allow cross examination.

Under the Consumer Protection Act there is no court fee or stamp duty. The complaint can be filed, in a specific format, as a simple letter. There is a specific time frame in which the disposal of cases is allowed. After the complaint is registered the notice is sent to the respondent. The respondent has to file the reply within 45 days, failing which, exparte hearing can be held. Any appeal against the order of the forum as Commission has to be filed within 30 days. Provisions of Evidence Act and Limitation Act are applicable under this Act. In fact, it needs to be stressed that the procedures under this Act are judicial in nature.

The financial ceilings on damages for various bodies created under this Act are as follows: (;') District forum-Upto Rupees Five Lakh; (ri) State Commission-Upto Rupees Twenty Lakhs; and *(Hi)* National Commission-No Ceiling.

The National Commission is headed by either a sitting or retired Supreme Court Judge. It has four other members who are persons of ability, integrity, standing and have adequate knowledge or experience of or have a capacity to deal with problems related to economics, law, commerce, accountancy, industry, public affairs or administration. One of these members is a woman (Sec. 20). The State Commission has a sitting or retired Judge of High Court as President and two other members one of which is a woman (Sec. 16). Similarly, the District forum has a President, a sitting or retired District Judge, with two members, one of which, is a woman (Sec. 10).

As per the amendments enacted in 1993 the members of the State National Commission and the district fora are selected by a committee which includes Judge of the High Court for State and District fora and Judge of the Supreme Court for National Commission.

Definition of Consumer

Under COPRA the definition of 'consumer' is wide. Any person purchasing goods or indulging in the use of these goods is termed as consumer. If a toy is brought by parents for the child, the child becomes a consumer of the toy company by virtue of using the toy. Similarly, if a drug is bought by a patient and the payment is made by somebody else, either an employer or an insurance company, the patient is the consumer for the drug company.

'Service' under COPRA means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport processing, supply of electrical or other energy, boarding and lodging, entertainment. However, there are two exclusion clauses: (i) Any service which is availed free of cost; and *(it)* Service of personal nature (contract

of service). These two types of services are excluded from the ambit of the COPRA.

Is Patient' a Consumer? Is Medical Service a "Personal Service"?

The answer to the first question is an unequivocal yes. The consumer of the health care industry cannot be excluded from the Act. It is not only the doctors who are involved in health care delivery but also the pharmaceutical industry, medical equipment companies and other ancilliary industries. If the patient is not taken as a consumer, then the other sectors involved in health care can also escape the provisions of COPRA.

The answer to the second question is NO. The doctor patient relationship cannot be termed as personal service. Contract of Service denotes a master-servant relationship. Can anyone honestly say that doctor-patient relationship is of this type? A patient seeks a doctor's service for professional reasons. In this relationship the patient cannot control or dominate the relationship. In the case of a master-servant relationship a servant can be hired or fired at the master's will. Is the patient in a position to do such hiring and firing? To claim that is so is to ignore the socio-economic realities in society.

Definition of Medical Negligence

The definition of medical negligence has not changed over decades. Failure to exercise reasonable skill as per the general standards and prevalent situation is termed as medical negligence. Therefore failure to cure, occurrence of infection, complication, even a death, cannot be taken in isolation and termed as medical negligence. Law does not expect each medical practitioner to exercise highest skills. The doctor has no doubt a discretion in choosing treatment which he proposes to give to a patient and such discretion is relatively ampler in case of emergency. (L.B. Joshi vs. T.R. Godbole 1968 Act 183 p. 187).

It would be worthwhile to quote here a ruling given by Lord Denning in Roe vs. Minister of Health (1954 2 QB. 66): One final word. These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their •own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals arid doctors have to Work. We must insist on due care for the patient at every point but we must not condemn as negligence that which is only a misadventure.

A practitioner can only be held liable in this respect if his diagnosis is so palpably wrong as to prove negligence, that is to say if his mistake is of such nature as to imply absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the profession (Nathan Medical Negligence 1957, pp 43-44).

Lord Denning in Hucks vs. Cole (1968, 118 New L.J. 469) said: A charge of professional negligence against a medical man was serious, it stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave, so should the proof be clear. With the best will in the world, things sometimes went amiss in surgical operations or medical treatment. A doctor was

not to be held negligent simply because something went wrong. He was not liable for mischance or mis-adventure; or for an error of judgement. He was not liable for taking one choice out of two or for favoring one school rather than another. He was only liable when he fell below the standard of a reasonably competent practitioner in his field so much so that his conduct might be deserving of censure or inexcusable (Ram Biharilal vs Dr. J.N. Shrivastava, AIR, 1985, MP 150, pp 157-158).

Counsel for the plaintiff put it in this way, in the case of a medical man negligence means failure to act in accordance with the standards of a reasonably competent medical man at the time. That is a perfectly accurate statement as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.

Any failure to perform an emergency operation for want of consent amounts to negligence (Dr. T.T. Thomas vs Smt. Elisa, AIR, 1987). A defendent doctor charged with negligence can clear himself if he shows that he acted in accordance with general and approved practice. It is not required in discharge of his duty of care that he should use highest degree of skill. Even mere deviation from normal professional practice is not necessarily evidence of negligence (Usha vs Dr. Namboodiri, 1986 ACJ, 141).

In the Judgement in Amlia Flounders vs Clement Pereira the court has enunciated the basic principle of the law of medical negligence: The law on the subject is really not in dispute. The plaintiff has to establish first that there had been a want of competent care and skill on the part of the defendant to such an extent as to lead to a bad result. The plaintiff has also to establish the necessary connection between the negligence of the defendent and the ultimate death of the plaintiff's son.

In an action for negligence against **a** doctor the plaintiff has to prove: *(i)* That the doctor was under a duty to take reasonable care to avoid or not to cause damage; *(it)* That there was breach of duty on the part of the defendent doctor; and *(Hi)* That the breach of duty was the real cause of damage or such damage was reasonably forseeable. There is no ambiguity as regards the establishing medical negligence. The burden of proving negligence is on the complainant (Patient).

What are the Prevalent Avenues of Redressal for Patients?

At present the patient as a consumer has only three avenues for redressal of his grievances-the civil court, the criminal court and the Medical Council. As far as the civil and criminal courts are concerned, inordinate delays and cumbersome procedures have resulted in the denial of justice to the consumers. The third avenue is the Medical Council. Under Medical Council Act, 1956, Central and State level medical councils have been created. However, these councils are ridden with corruption and vested interests. They are defunct and are a disgrace to the medical profession. Moreover, the Medical Council Act has no provision for compensation. Take for instance, the Maharashtra Medical Council. This statutory body did not hold elections even though its term got over. The office bearers claim that the council has no funds to update the voters rolls. However, thousands of rupees have been spent on court cases amongst the members. There have been open allegations about corruption amongst the members of the council. Thus the present avenues have totally failed to offer any relief to the consumers.

What is the Prevalent Situation in the Medical Profession?

Any profession in a civilised society has some social obligations. One of these is to create an efficient system of self regulation. In the absence of self regulation, the professions reputation and credibility can be damaged. This is what has happened to the medical profession in India today. Apathy and indifference of the members to ethical standards have led the profession into the quagmire in which it finds itself. Professional organizations like the Indian Medical Association have neglected vital issues and only shown interest in arranging medical conferences in collusion with the pharmaceutical industry. Such associations have never raised their voice against malpractices in the profession. They have paid only lip service towards ethical issues. Flourishing rackets have fleeced consumers. An association like the Medical Consultant Association have done little to devise a system to control such rackets. Indeed it has indulged in arranging seminars on dubious subjects like "Management of Arab Patients"! Never has such empathy been seen for Indian patients! It is obvious that the uncontrolled profession has almost run amuck. It has acquired a distinct mercenary attitude. There is no self regulation and not even a iota of effort towards self regulation.

What are the Objections of the Medical Profession Against COPRA?

The medical profession has perceived COPRA as a threat. Concerted efforts are being made to persuade makers to exclude the medical profession from the ambit of COPRA. Various irrational, illogical arguments are put forward in support of the medical profession's case. It is necessary to refute all these allegations and arguments in the long term interest of consumers, listed below:

1. *"Doctors are not 'traders' and the profession is based on trust, faith, etc."*

The medical profession historically has been given a high status and members of the profession have been accorded high respect. Doctors are solely responsible for destroying the trust on which the profession was based decades ago. Doctors indulge in various rackets and extract "commissions" from each other. Is this any different from traders? Consumers have to suffer because of the effects of commercialisation of the profession. Trust and faith cannot be only one sided. Any healthy relationship based on trust and faith has to be mutual and exclusive.

2. *"Medical cases are highly technical and judges cannot make fair decisions".*

Under COPRA all the procedures of the civil procedure code are applicable. The burden of proof is on the complainant (Patient). The doctor can produce his expert witnesses as well as cross-examine the complainant's witnesses. All over the world, even in the developed countries like USA and UK, medical negligence cases are decided by judges who have no medical, expertise. These decisions are taken as per the evidence produced. Even before COPRA was enacted, cases of medical negligence were decided in civil and criminal courts where judges have no medical expertise.

3. *"There is no court fee, stamp duty, so there can be frivolous complaint".*

The purpose of COPRA is to provide avenues for a fair, speedy redressal of consumer disputes. A 10% court fee/ stamp duty, can deny the consumer the opportuntiy to seek redressal. COPRA is being amended to provide punish-

ment to the complainant for frivolous complaint. Moreover, COPRA is for all the consumers. For example, if a doctor wants to seek redressal as a consumer for a defective vehicle or equipment costing Rs 4-5 lakhs, he would have to pay Rs. 50,000/- as court fee/stamp duty. Will doctors accept this?

4. *"If the complaint made by the patient fails, should the doctor be compensated by the patient".*

Eye for an eye type of justice is an anathema to any civilised society. It is also necessary to take into account the percentage of malpractices as compared to the percentage of complaints under COPRA or other laws. As per the amendment enacted in 1993 frivolous complaints are punishable with a fine of Rs 10,000/-

5. *"Trial under COPRA is "Summary Trial" and COPRA courts are kangaroo courts".*

As explained before, trial under COPRA is speedy trial and not a summary trial. All the procedures of the Civil Court are followed and this trial has all the sanctity of judicial procedure. The COPRA Courts are headed by proper judicial authority and hence cannot be called kangaroo courts.

6. *"There should be a panel of doctors to give an opinion which should be accepted by the COPRA courts"*

A basic principle of any civilised judicial procedure is its openness and the opportunity given to both the parties to prove their case. A close ended system like a statutory advisory panel is against the basic principle of law. Also, it is impractical. Under COPRA there are District, State and National level courts. There are approximately 460 districts in India and 27 states. So 500 statutory panels will be required for all these districts and states. How practical is it to set up so many panels? It would make procedure unwieldy and leave scope for corruption and malpractice:

7. *"Doctors will be forced to resort to defensive medicine leading to an increase in the cost of health care".*

This is purely a defensive reaction on the part of doctors. The law on medical negligence is very clear. It does not require that any doctors do such and such test. (Unnecessary investigation is justiceable as unscrupulous exploitation of consumers under COPRA). It does not question the doctor's judgement in given circumstances, unless it is way beyond the reasonable limit.

8. *"Like USA there will be cases of compensation of millions of rupees ruining the medical profession and creating legal rackets"'.*

In USA decisions of courts at the preliminary level are jury decisions. They are given wide publicity. However, many of these decisions are reversed in appeal. Consumer courts have financial ceilings and they cannot award any compensation beyond these ceilings.

9. *"The Medical Council Act already exists".*

Medical Council Act was enacted in 1956. In the last 36 years the profession has not done anything to amend it to make it more effective. Now that COPRA has been enacted, consumer organizations welcome amendments of the Medical Council Act. If the Medical Council Act becomes more effective and offers better avenue for redressal than COPRA, then the consumer will take advantage of it. There are numerous examples of dual legal statues for the same complaint.

The profession has suddenly realized

the need for amending the Medical Council Act because the vested interests who control the Medical Councils feel their power centers are threatened.

The percentage of malpractices is very low compared to the percentage of cases under COPRA or any other Act. Moreover, many of the cases arise due to failure of communication between doctors and patients or their relatives. Doctors are still accorded high respect in our society and indulging in litigious behavior is considered a social stigma. The Indian consumer is not materialistic like the Western consumer.

Patient's Rights and Consumer Protection Act

Rights of patients as consumers of health care are practically unknown in our country. Most rights, which are recognized all over the world, are trampled upon with impunity. Patients' Rights have a vital relationship with COPRA, because COPRA can be used for the effective implementation of Patients' Rights.

The American Hospital Association has devised the Patient's Bill of Rights which is accepted in many hospitals in America. There is need for developing such a Bill of Rights, suitable to our socio economic situation in India as well.

The basic principle of 'autonomy' of the patient is central to the concept of Patients' Rights. During the last decade this concept has gained recognition. Historically speaking there have been four models of the patient-doctor relationship. In the interest of society it is necessary to cultivate a health care system which promotes the Deliberative model. It would be worthwhile to quote a passage from Laws by Plato, which is still very much relevant to our situation. "A physician to slaves never gives his patient any account of his illness... the physician offers some orders gleaned from experience with an air of infallible knowledge in the brusque fashion of a dictator... The free physician, who usually cares for free men, treats their diseases first by thoroughly discussing with the patient and his friends his ailment. This way he learns something from the sufferer and simultaneously instructs him. Then the physician does not give his medications until he has persuaded the patient; the physician aims at complete restoration of health by persuading the patient to comply with his therapy."

The Deliberative model fosters the patients' basic rights as a consumer. For example, the right to information. In fact, failure of the doctor-patient relationship is the root cause of many disputes. If this communication can be improved by adopting the Deliberative Model of Doctor-Patient relationship, then many of the disputes can be resolved at the preliminary level. It is necessary to ingrain in student doctors, importance and skills of communication **to** improve health care delivery. Even the most uneducated, backward, socially undeveloped person can be communicated the facts of his/her illness, if the will to do so is present in the doctor. At present such a will is conspicuously absent. A system of patients' counsellors can be created to improve communication to the patients.

There is also a need to educate patients as consumers regarding their responsibilities. Exercising rights without responsibilities can be harmful.

Amendment Required for Consumer Protection Act

No legal act is full proof. COPRA has some deficiencies which need to be rectified in the interest of consumers as well as society.

Under COPRA, goods purchased and used for profit/commercial purposes are

excluded from the Act. This provision needs to be corrected because it excludes all medical equipment used in hospitals. Defective equipment can cause harm to the consumer, leading to complaints against doctors. However, as per this provision the manufacturer goes scot free.

Service hired free of cost is excluded from the ambit of COPRA. This, in one stroke excludes government/municipal doctors. This provision is being amended.

At present COPRA does not provide any preliminary scrutiny of complaints before any notice is sent to respondent. An amendment is necessary to: *(i)* prevent COPRA courts from being burdened with unnecessary complaints; and *(ii)* prevent undue harassment of respondents. The Maharashtra State Commission has already adopted a procedure of preliminary scrutiny which has been helpful. Pre-trial publicity of cases should be avoided. It can hurt reputation of respondents. In this connection it is necessary to follow the guidelines of legal correspondents used in the High Court and Supreme Court.

In case of medical cases it must be mandatory for the Consumer Courts to either allow the concerned parties to present the expert evidence or refer the cases for expert opinion to the government medical colleges.

It is necessary to stress the need to avoid unnecessary litigation. If an informal reconciliation machinery can be formed with the help of consumer organizations, such a litigation can be minimized. Such a machinery exists in some countries. For example, in Japan, reconciliation is mandatory in cases under the Law of Torts. Cases are taken up by the courts only if reconciliation fails.

Patients complaints need to be resolved at the hospital level itself. This can be achieved by creating redressal committees at the hospital level. At present KEM and LTMG hospitals have such committees. However, they consist of only municipal employee. It is necessary to have outside representation on these committees.

What Should Medical Profession and Organizations Do?

It is time for serious introspection within the medical profession. It must accept the fact that it has failed miserably in self regulation. COPRA is not a calamity. The profession must adopt a positive attitude towards COPRA. In fact it is a blessing in disguise. The following suggestions are meant to strengthen ethical norms and health care delivery: *(/)* To lay down standards for the treatment of various diseases. This can be done by various professional associations of each speciality; *(ii)* To formulate an ideal informed consent for various procedures, treatments and operations; *(iii)* To set up ethical committees in each institution and professional association. These committees should have representatives from doctors, consumers and insurance companies. It should be publicised that patients can approach such committees for the redressal of their grievances; and *(iv)* To formulate a code and standards for private nursing homes. Private nursing homes should be graded as per the care they provide and this fact should be displayed. The nursing homes should be made to adhere to these standards. In this regard, something similar to the Baby Friendly Hospital scheme of UNICEF can be envisaged.

Assessment After Three Years of COPRA

The application of COPRA to the medical profession raised the hopes of consumer organizations. However, to some extent these hopes have been bellied. The functioning of Consumer Courts have been unsatisfactory. Apart from the delay extend-

ing upto 2-3 years, for completion of cases, there is no uniformity in their functioning. Association for Consumers Action of Safety and Health (ACASH) has come across some instance wherein the courts have used questionable procedure causing grave harm to the consumers as well as doctors. If urgent action to streamline the procedures is not taken, these courts are likely to degenerate to the level of co-operative courts and accident claim tribunals. The judgements of these courts need also to be scrutinized and analyzed by the consumer organizations.

The system of indemnity insurance needs to be streamlined. At present insurance companies are arbitrarily increasing the premium. Doctors as consumers of these companies should join hands with consumer organizations to correct the system, as the burden of higher premium will be passed on to the consumers.

Many hospitals deal with doctors, both full time and honorary, arbitrarily. This is not in the interest of consumers because, if doctors are penalized for non-professional reasons, it affects their patients. Most hospitals avail themselves of many tax concessions and are, therefore accountable to society. At present doctors and their organizations have failed to react out of fear or repraisals and a short term interest. This needs to be changed.

The medical profession must actively raise its voice against irregularities in medical education like capitation fee colleges. This is one of the root causes of deterioration in medical practice.

It is also important for the medical profession to inculcate good ideas and conventions. It is a right of the patient to ask for a second opinion regarding his illness. In fact it should be made mandatory in case of certain operations. This practice has been in existence in USA. Many of the studies have revealed that the incidence of unnecessary operations reduced after the provision for a mandatory second opinion was introduced.

Professional organizations should raise their voices against faulty, substandard equipment and hazardous drugs.

The system of group practice needs to be fostered to wean doctors away from malpractices. Many a physician would prefer to join a group practice than enter the profession on a wrong footing.

A patients bill of rights need to be devised in consultation with the various sections of the health care industry.

The COPRA is here to stay. The medical profession cannot wish it away. Doctors have been put on a pedestal in our country. Now that the process of demystification has started it seems to hurt the doctors. However, the profession needs to accept the change gracefully in its own interest as well as that of society. The COPRA is basically meant for system correction. The present controversy has proved that the system of regulation in the medical profession needs to be corrected. The process of system change must continue in the interest of society.

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