act of medical negligence has suffered in a way which is recognised by the law - and by the public at large - as deserving compensation. This loss may be continuing and what may seem like an unduly large award may be little more than that sum which is required to compensate him for such matters as loss of future earnings and the future cost of medical or nursing care. To deny a legitimate claim or to restrict arbitrarily the size of an award would amount to substantial injustice. After After all, there is no difference in legal theory between the plaintiff injured through medical negligence and the plaintiff injured in an industrial or motor accident." [pp. 192-93] [Mason's Law and Medical Ethics, 4th Edn.]

We are, therefore, not persuaded to hold that in view of the consequences indicated by Lord Denning in Whitehouse v. Jorden (supra) medical practitioners should be excluded from the purview of the Act.

On the basis of the above discussion we arrive at the following conclusions:

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

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A 'contract of personal service' has to be distinguished from a 'contract for personal services'. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as service rendered under a 'contract of personal service'. Such service is service rendered under a 'contract for personal services' and is not covered by exclusionary clause of the definition of 'service' contained in Section 2(1) (o) of the Act. (4) The expression 'contract of personal service' in Section 2(1) (o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in Section 2(1) (o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/Nursing home or a medical officer employed in a hospital/Nursing home where such services are rendered free of charge to everybody, would not be "service" as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-Government hospital/Nursing



PETITIONER:

INDIAN MEDICAL ASSOCIATION
Vs.
RESPONDENT:
V.P. SHANTHA & ORS.
DATE OF JUDGMENT13/11/1995
BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
KULDIP SINGH (J)
HANSARIA B.L. (J)
CITATION:
1996 AIR 550 1995 SCC (6) 651
JT 1995 (8) 119 1995 SCALE (6)273
ACT:
HEADNOTE:
JUDGMENT:
J U D G M E N T
S.C. AGRAWAL, J. :
Leave granted in SLP (C) Nos. 18497/93 and 21755/94.
Delay condoned and leave granted in SLP (C) Nos. 18445-73/94.
These appeals, special leave petitions and the Writ Petition raise a common question, viz., whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering 'service' under Section 2(1)(o) of the Consumer Protection Act, 1986 (hereinafter referred to as 'the Act']. Connected with this question is the question whether the service rendered at a hospital/nursing home can be regarded as 'service' under Section 2(1)(o) of the Act. These questions have been considered by various High Courts as well as by the National Consumer Disputes Redressal Commission [hereinafter referred to as 'the National Commission'].
In Dr. A.S. Chandra v. Union of India, (1992) 1 Andhra Law Times 713, a Division Bench of Andhra Pradesh High Court has held that service rendered for consideration by private medical practitioners, private hospitals and nursing homes must be construed as 'service' for the purpose of Section 2(1)(d) of the Act and the persons availing such services are 'consumers' within the meaning of Section 2(1)(d) of the Act.

In Dr.C.S. Subramanian v. Kumarasamy & Anr., (1994) 1 MLJ 438, a Division Bench of the Madras High Court has, however, taken a different view. It has been held that the services rendered to a patient by a medical practitioner or by a hospital by way of diagnosis and treatment, both medicinal and surgical, would not come within the definition of 'service' under Section 2(1)(o) of the Act and a patient who undergoes treatment under a medical practitioner or a hospital by way of diagnosis and treatment, both medical and

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medical profession and hospitals the same may be declared as unconstitutional as being violative of Articles 14 and 19(1)(g) of the Constitution. As regards the first part of the prayer regarding the applicabilty of the provisions of the Act to the alleged deficiency in medical service, we have already considered the matter and found that the provisions of the Act are applicable to deficiency in service rendered by medical practitioners and hospitals and for the same reason the said prayer cannot be allowed. the other prayer sought for in the Writ Petition regarding the validity of the provisions of the Act is also without any substance. The ground on which the writ petitioners are seeking to assail the validity of the provisions of the Act is that the composition of the Consumer Disputes Redressal Agencies and the procedure to be followed by the said Agencies is such that it is not suitable for adjudication of the complex issues arising for consideration. We have already considered this grievance urged on behalf of the medical profession and have found that the composition of the Consumer Disputes Redressal Agencies as well as the procedure to be followed by them does not preclude a proper adjudication of the consumer disputes arsing out of complaints relating to deficiency in service rendered by medical practitioners and hospitals. In our opinion, on case is made out that the Act suffers from the vice of arbitrariness or unreasonableness so as to be violative of Articles 14 and 19(1)(g) of the Constitution. There is, therefore, no merit in the Writ Petition and it has to be dismissed.

In the result Civil Appeals Nos. 688/93 and 689/93, and S.L.P. (Civil) Nos. 6882/92 and 6950/92 are dismissed. The State Commission will deal with the complaints in the light of this judgment. S.L.P.[Civil] Nos. 331/93 and 21348-21349/93 and Writ Petition (Civil) Nos. 16/94 are also dismissed. Civil Appeal No. 254/94 is allowed and the judgment of the National Commission dated May 3, 199 is set aside and O.P.No. 93/92 is remitted to the National Commission for consideration in the light of this judgment. Civil Appeals Nos. 4664-65/94 and Civil Appeals arising out of S.L.P. (Civil) Nos. 21755/94 and 18445-73/94 are allowed and the judgment of the Madras High Court dated February 17, 1994 is set aside and the writ petitions disposed of by the said judgment of the High Court are dismissed and as a result the Consumer Disputes Redressal Agencies would deal with the complaint petitions covered by those writ petitions in the light of this judgment. Civil Appeal arising out of S.L.P. (Civil) No. 18497/93 is alos allowed and Complaint Case No. 1 of 1988 is remitted to the State Commission for consideration in the light of this judgment. No order as to costs.

surgical, cannot be considered to be a ‘consumer’ within the meaning of Section 2(1)(d) of the Act; but the medical practitioners or hospitals undertaking and providing paramedical services of all kinds and categories cannot claim similar immunity from the provisions of the Act and that they would fall, to the extent of such para-medical services rendered by them, within the definition of ‘service’ and a person availing of such service would be a ‘consumer’ within the meaning of the Act. C.A.Nos. 4664-65/94 and Civil Appeal arising out of SLP(C) No. 21775/94 filed by the complainants and Civil Appeals arising out of SLP(C) Nos. 18445-73/94 filed by the Union of India are directed against the said judgment of the Madras High Court.

The National Commission by its judgment and order dated December 15, 1989 in First Appeal No.2 of 1989 has held that persons who avail themselves of the facility of medical treatment in Government hospitals are not "consumers" and the said facility offered in the Government hospitals cannot be regarded as service "hired" for "consideration". It has been held that the payment of direct or indirect taxes by the public does not constitute "constitute "consideration" paid for hiring the services rendered in the Government hospitals. It has also been held that contribution made by a Government employee in the Central Government Health Scheme or such other similar Scheme does not make him a "consumer" within the meaning of the Act. Civil Appeal arising out of SLP(C) No.18497/93 has been filed by Consumer Unity Trust Society, a recognised consumer association, against this judgment of the National Commission.

By judgment dated April 21, 1992 in First Appeal Nos. 48 and 94 of 1991, the National Commission has held that the activity of providing medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression ‘service’ as defined in Section 2(1)(o) of the Act and that in the event of any deficiency in the performance of such service, the aggrieved party can invoke the remedies provided under the Act by filing a complaint before the Consumer Forum having jurisdiction. It has also been held that the legal representatives of the deceased patients who were undergoing treatment in the hospital are ‘consumers’ under the Act and are competent to maintain the complaint. C.A. Nos. 688/93

and 689/93 filed by the Indian Medical Association and SLP (C) Nos. 6885 and 6950/92 filed by M/s Cosmopolitan Hospital are directed against the said judgment of the National Commission. The said judgment dated April 21, 1992 was followed by the National Commission in its judgment dated November 16, 1992 in First Appeal No. 97 of 1991 [Dr. Sr. Louie & Anr. v. Smt. Kannolil Pathumma & Anr.]. SLP No. 351/93 has been filed by Josgiri Hospital and Nursing Home against the said judgment of the National Commission.

By judgment dated May 3, 1993 in O.P.No. 93/92, the National Commission has held that since the treatment that was given to the complainant's deceased husband in the nursing home belonging to the opposite party was totally free of any charge, it did not constitute 'service' as defined under the Act and the complainant was not entitled to seek any relief under the Act. C.A.No. 254/94 has been filed by the complainant against the said judgment of the National Commission.

Writ Petition No. 16 of 1994 has been filed under Article 32 of the Constitution by Cosmopolitan Hospital (P) Ltd., and Dr. K. Venogopolan Nair [petitioners in SLP(C) Nos. 6885 and 6950/92] wherein the said petitioners have assailed the validity of the provisions of the Act, insofar

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purveying of news or other information, but does not include rendering of any service free of charge or under a contract of personal service;"

The words "or avails of" after the word "hires" in Section 2(1)(d)(ii) and the words "housing construction" in Section 2(1)(o) were inserted by the Act 50 of 1993.

The definition of 'service' in Section 2(1)(o) of the Act can be split up into three parts - the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical of other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

The definition of 'service' as contained in Section 2(1)(o) of the Act has been construed by this Court in Lucknow Development Authority v. M.K. Gupta, 1994 (1) SCC 243. After pointing out that the said definition is in three parts, the Court has observed :

"The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude. The word 'any' dictionarily means; one or some or all', In Black's Law Dictionary it is explained thus, "word 'any' has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statue depends upon the context and the subject- matter of the statute". The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide. In Oxford Dictionary it is defined as 'capable of coming into being, possibility'. In Black's Law Dictionary it is defined "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users."

[p.255]

The contention that the entire objective of the Act is to protect the consumer against malpractices in business was rejected with the observations :

"The argument proceeded on complete

as they are held to be applicable to the medical profession, as being violative of Articles 14 and 19(1)(g) of the Constitution.

Shri K.Parasaran, Shri Harish Salve, Shri A.M. Singhvi, Shri Krishnamani and Shri S.Balakrishnan have addressed the court on behalf of the medical profession and the hospitals and Shri Rajeev Dhavan has presented the case of the complainants. Before we proceed to deal with their contentions we would briefly take note of the background and the scheme of the Act.

On April 9, 1985, the General Assembly of the United Nations, by Consumer Protection Resolution No. 39/248, adopted the guidelines to provide a framework for Governments, particularly those of developing countries, to use in elaborating and strengthening consumer protection policies and legislation. The objectives of the said guidelines include assisting countries in achieving or maintaining adequate protection for their population as consumers and encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services to the consumers. The legitimate needs which the guidelines are intended to meet include the protection of consumers from hazards to their health and safety and availability of effective consumer redress. Keeping in view the said guidelines, the Act was enacted by Parliament to provide for the better protection of the interests of consumers and for that purpose to make provision for the establishment of consumers councils and other authorities for the settlement of consumers' disputes and for matters connected therewith. The Act sets up a three-tier structure for the redressal of consumer grievances. At the lowest level, i.e., the District level, is the Consumer Disputes Redressal Forum known as 'the District Forum'; at the next higher level, i.e., the State level, is the Consumer Disputes Redressal Commission known as 'the State Commission' and at the highest level is the National Commission. [Section 9]. The jurisdiction of these three Consumer Disputes Redressal Agencies is based on the pecuniary limit of the claim made by the complainant. An appellees to the State Commission against an order made by the District Forum [Section 15] and an appeal lies to the National Commission against an order made by the State

Commission on a complaint filed before it or in an appeal against the order passed by the District Forum. [Section 19]. The State Commission can exercise revisional powers on grounds similar to those contained in Section 115 CPC in relation to a consumer dispute pending before or decided by a District Forum [Section 17(b)] and the National Commission has similar revisional jurisdiction in respect of a consumer dispute pending before or decided by a State Commission. [Section 21(b)]. Further, there is a provision for appeal to this Court from an order made by the National Commission on a complaint or on an appeal against the order of a State Commission. [Section 23]. By virtue of the definition of complainant in Section 2(1)(c), the Act affords protection to the consumer against unfair trade practice or a restricitive trade practice adopted by any trader, defect in the goods bought or agreed to be bought by the consumer, deficiency in the service hired or availed of or agreed to be hired or availed of by the consumer, charging by a trader price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods and offering for sale to public, goods which will be hazardous to life and safety when used, in contravention of the provisions of any law for

home where no charge whatsoever is made from any person availing the service and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/Nursing home would not alter the position.

(7) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by the persons availing such services falls within the purview of the expression 'service' as defined in Section 2(1) (o) of the Act.

(8) Service rendered at a non-Government hospital/Nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be "service" and the recipient a "consumer" under the Act.

(9) Service rendered at a Government hospital/health centre/dispensary where no charge whatsoever is made from any person availing the services and all patients (rich and poor) are given free service - is outside the purview of the expression 'service' as defined in Section 2(1) (o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a Government hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing such services would fall within the ambit of the expression 'service' as defined in Section 2(1) (o) of the Act irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be "service" and the recipient a "consumer" under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1) (o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under Section 2(1) (o) of the Act.

In view of the conclusions aforementioned the judgment of the National Commission dated April 21, 1992 in First Appeal No. 48 of 1991 [M/s Cosmopolitan Hospitals & Anr. v. Smt. Vasantha P. Nair] and the judgment dated November 16, 1992 in First Appeal No. 97 of 1991 [Dr. Sr. Louie & Anr. v. Smt. Kannolil Pathumma & Anr.] holding that the activity of providing medical assistance for payment carried on by hospitals and members of the medical profession falls within the scope of the expression 'service' as defined in Section 2(1) (o) of the Act and that in the event of any deficiency in the performance of such service the aggrieved party can

the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods. The expression "complainant", as defined in Section 2(1)(b), is comprehensive to enable the consumer as well as any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or the Central Government or any State Government or one or more consumers where there are numerous consumers having the same interest, to file a complaint before the appropriate Consumer Disputes Redressal Agency and the consumer dispute raised in such complaint is settled by the said agency in accordance with the procedure laid down in Section 13 of the Act which prescribes that the District Forum [as well as the State Commission and the National Commission] shall have the same power as are vested in a civil court under the Code of Civil Procedure in respect of summoning and enforcing attendance of any defendant or witness and examining the witness on oath; discovery and production of any document or other material object producible as evidence; the reception of evidence on affidavits; the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source; issuing of any commission for the examination of any witness; and any other matter which may be prescribed. Section 14 makes provisions for the nature of reliefs that can be granted to the complainant on such a complaint. The provisions of the Act are in addition to and not in derogation of the provisions of any other law for the time being in force. [Section 3].

In this group of cases we are not concerned with goods and we are only concerned with rendering of services. Since the Act gives protection to the consumer in respect of service rendered to him, the expression "service" in the Act has to be construed keeping in view the definition of "consumer" in the Act. It is, therefore, necessary to set out the definition of the expression ‘consumer’ contained in Section 2(1)(d) insofar as it relates to services and the definition of the expression ‘service’ contained in Section 2(1)(o) of the Act. The said provisions are as follows :

"Section 2(1)(d) "consumer" means any person who, -

(i) omitted

(ii) hires [or avails of] any services
for a consideration which has been paid
or promised or partly paid and partly
promised, or under any system of
deferred payment and includes any
beneficiary of such services other than
the person who hires [or avails of ]
the service for consideration paid or
promised, or partly paid and partly
promised, or under any system of
deferred payment, when such services are
availed of with the approval of the
first mentioned person.
Explanation. - Omitted"
"Section 2(1) (o) : "service" means
service of any description which is made
available to the potential users and
includes the provision of facilities in
connection with banking, financing,
insurance, transport, processing, supply
of electrical or other energy, board or
lodging or both, [housing construction],
entertainment, amusement or the

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error of judgment is not negligent."
[p.658]

Relying on these observations learned counsel has painted a grim picture that if medical practitioners are brought within the purview of the Act the consequence would be huge increase in medical expenditure on account of insurance charges as well as tremendous increase in defensive medicine and that medical practitioners may refuse to attend to medical emergencies and there will be no safeguards against frivolous and vexatious complaints and consequent blackmail. We do not entertain such an apprehension. In the first place, it may be stated that the aforementioned observations of Lord Denning were made in the context of substantive law governing actions for damages on the ground of negligence against medical practitioners. There too the last sentence in the said observations that "an error of judgment is not negligent" has not been approved, in appeal, by the House of Lords. [See : 1981 (1) All. E.R. 267]. By holding that medical practitioners fall within the purview of the Act no change is brought about in the substantive law governing claims for compensation on the ground of negligence and the principles which apply to determination of such a claim before the civil court would equally apply to consumer disputes before the Consumer Disputes Redressal Agencies under the Act. The Act only provides an inexpensive and a speedy remedy for adjudication of such claims. An analytical study of tort litigation in India during the period from 1972 to 1983 made by Prof. Galanter reveals that a total number of 416 tort cases were decided by the High Courts and this Court, as reported in the All India Reporter, out of which 360 cases related to claims under the Motor Vehicles Act and cases relating to medical malpractice were only three in number. [See : Upendra Baxi and Thomes Paul, Mass Disasters and Multinational Liability, The Bhopal Case, PP. 214-218]. One of the factors inhibiting such claims is the requirement regarding court fee that must be paid by the plaintiff in an action for damages on the ground of negligence. Since no court fee is required to be paid on a complaint filed under the Act it would be possible for persons who have suffered injury due to deficiency in service rendered by medical practitioners or at hospitals/nursing homes to seek redress. The conditions prevailing in India cannot, therefore, be compared with those in England and in the United States.

As regards the criticism of the American malpractice litigation by the British judiciary it has been said :

> "Discussion of these important issues is sometimes clouded by an over-simplistic comparison between England and American "malpractice" litigation. Professor Miller noted in 1986 that malpractice claims were brought in the United States nearly 10 times as often as in England, and that this is due to a complex combination of factors, including cultural differences, judicial attitudes, differences in the legal system and the rules about costs. She points to the deterrent value of malpractice litigation and resent some of the criticisms of the American system expressed by the British judiciary. Interestingly, in 1989 the number of medical negligence claims and the size of medical malpractice insurance

purveying of news or other information,
but does not include rendering of any
service free of charge or under a
contract of personal service;"

The words "or avails of" after the word "hires" in Section 2(1)(d)(ii) and the words "housing construction" in Section 2(1)(o) were inserted by the Act 50 of 1993.

The definition of ‘service’ in Section 2(1)(o) of the Act can be split up into three parts - the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical of other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

The definition of ‘service’ as contained in Section 2(1)(o) of the Act has been construed by this Court in Lucknow Development Authority v. M.K. Gupta, 1994 (1) SCC 243. After pointing out that the said definition is in three parts, the Court has observed :

"The main clause itself is very wide. It
applies to any service made available to
potential users. The words ‘any ’ and
‘potential’ are significant. Both are of
wide amplitude. The word ‘any’
dictionarily means; one or some or all’,
In Black’s Law Dictionary it is
explained thus, "word ‘any’ has a
diversity of meaning and may be employed
to indicate ‘all’ or ‘every’ as well as
‘some’ or ‘one’ and its meaning in a
given statue depends upon the context
and the subject- matter of the statute".

The use of the word ‘any’ in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other

word ‘potential’ is again very wide. In Oxford Dictionary it is defined as ‘capable of coming into being, possibility’. In Black’s Law Dictionary it is defined "existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing; for example, the future product of grain or trees already planted, or the successive future instalments or payments on a contract or engagement already made." In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users."
[p.255]
The contention that the entire objective of the Act is to protect the consumer against malpractices in business was rejected with the observations :
"The argument proceeded on complete

Companion to Law, P. 1134]. A 'contract of service' implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. [See : Stroud's Judicial Dictionary, 5th Edn., P. 540; Simmons v. Heath Laundry Co. (1910) 1 K.B. 543; and Dharangadhara Chemical Works (supra) at p. 159]. We entertain no doubt that Parliamentary draftsman was aware of this well accepted distinction between "contract of service" and "contract for services" and has deliberately chosen the expression 'contract of service' instead of the expression 'contract for services', in the exclusionary part of the definition of 'service' in Section 2(1)(o). The reason being that an employer cannot be regarded as a consumer in respect of the services rendered by his employee in pursuance of a contract of employment. By affixing the adjective 'personal' to the word "service" the nature of the contracts which are excluded is not altered. The said adjective only emphasizes that what is sought to be excluded is personal service only. The expression "contract of personal service" in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service from the ambit of the expression "service".

It is no doubt true that the relationship between a medical practitioner and a patient carries within it certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in Section 2(1)(o) of the Act.

Shri Rajeev Dhavan has, however, submitted that the expression 'contract of personal service' contained in Section 2(1)(o) of the Act has to be confined to employment of domestic servants only. We do not find any merit in this submission. The expression 'personal service' has a well known legal connotation and has been construed in the context of the right to seek enforcement of such a contract under the Specific Relief Act. For that purpose a contract of personal service has been held to cover a civil servant, the managing agents of a company and a professor in the University. [See : The High Commissioner for India v. I.M.Lall, (1948) L.R. 75 I.A. 225; Ram Kissendas Dhanuka v. Satya Charan Law, (1949) L.R. 77 I.A. 128; and Dr. S.B. Dutt v. University of Delhi, 1959 SCR 1236]. There can be a contract of personal service if there is relationship of master and servant between a doctor and the person availing his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the expression 'service' under Section 2(1)(o) of the Act by virtue of the exclusionary clause in the said definition.

The other part of exclusionary clause relates to services rendered "free of charge". The medical practitioners, Government hospitals/nursing homes and private hospitals/nursing homes (hereinafter called "doctors and hospitals") broadly fall in three categories :-

i) where services are rendered free of charge to everybody availing the said services.

misapprehension of the purpose of Act
and even its explicit language. In fact
the Act requires provider of service to
be more objective and caretaking."
(p.256)
Referring to the inclusive part of the definition it
was said :
"The inclusive clause succeeded in
widening its scope but not exhausting
the services which could be covered in
earlier part. so any service except when
it is free of charge or under a
constraint of personal service is
included in it." [p.257]
In that case the Court was dealing with the question
whether housing construction could be regarded as service
under Section 2(1)(o) of the Act. While the matter was
pending in this Court, "housing construction" was inserted
in the inclusive part by Ordinance No. 24 of 1993. Holding
that housing activity is a service and was covered by the
main part of the definition, the Court observed :
"..... the entire purpose of widening
the definition is to include in it not
only day to day buying and selling
activity undertaken by a common man but
even such activities which are otherwise
not commercial in nature yet they
partake of a character in which some
benefit is conferred on the consumer."
[p.256]
In the present case the inclusive part of the
definition of "service" is not applicable and we are
required to deal with the questions falling for
consideration in the light of the main part and the
exclusionary part of the definition. The exclusionary part
will require consideration only if it is found that in the
matter of consultation, diagnosis and treatment a medical
practitioner or a hospital/nursing home renders a service
falling within the main part of the definition contained in
Section 2(1) (o) of the Act. We have, therefore, to
determine whether medical practitioners and
hospitals/nursing homes can be regarded as rendering a

"service" as contemplated in the main part of Section 2(1)(o). This determination has to be made in the light of the aforementioned observations in Lucknow Development Authority (supra). We will first examine this question in relation to medical practitioners.

It has been contended that in law there is a distinction between a profession and an occupation and that while a person engaged in an occupation renders service which falls within the ambit of Section 2(1)(o) the service rendered by a person belonging to a profession does not fall within the ambit of the said provision and, therefore, medical practitioners who belong to the medical profession are not covered by the provisions of the Act. It has been urged that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under Section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct.

While expressing his reluctance to propound a

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widen the social experience represented by the decision makers. Prof. White says that apart from their breadth of experience, the key role of lay members would be in ensuring that procedures do not become too full of mystery and ensure that litigants before them are not reduced to passive spectators in a process designed to resolve their disputes. [See : Prof. Robin C.A. White : The Administration of Justice, 2nd Edition, P. 345].

In the matter of constituion of the District Forum, the State Commission and the National Commission the Act combines with legal competence the merits of lay decision making by members having knowledge and experience in dealing with problems relating to various fields which are connected with the object and purpose of the Act, namely, protection and interests of the consumers.

Moreover, there is a further safeguard of an appeal against the order made by the District Forum to the State Commission and against the order made by the State Commission to the National Commission and a further appeal to this Court against the order made by the National Commission. It cannot, therefore, be said that the composition of the Consumer Disputes Redressal Agencies is such as to render them unsuitable for adjudicating on issues arising in a complaint regarding deficiency in service rendered by a medical partitioner.

As regards the procedure to be followed by these agencies in the matter of determination of the issues coming up for consideration it may be stated that under Section 13(2)(b), it is provided that the District Forum shall proceed to settle the consumer disputes (i) on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party denies or disputes the allegations contained in the complaint, or (ii) on the basis of evidence brought to its notice by the complainant where the opposite party omits or fails to take any action to represent his case within the time given by the Forum. In Section 13(4) of the Act it is further provided that the District Forum shall have the same powers as are vested in the civil court under the Code of Civil procedure while trying a suit in respect of the following matters:

> "(i) the summoning and enforcing attendance of any defendant or witness and examining the witness on oath;
> (ii) the discovery and production of any document or other material object producible as evidence;
> (iii) the reception of evidence on affidavits;
> (iv) the requisitioning of the report of the concerned analysis or test from the appropriate laboratory or from any other relevant source;
> (v) issuing of any commission for the examination of any witness and
> (vi) any other matter which may be prescribed."

The same provisions apply to proceedings before the State Commission and the National Commission. It has been urged that proceedings involving negligence in the matter of rendering services by a medical parctitioner would arise complicated questions requiring evidence of experts to be recorded and that the procedure which is followed for determination of consumer disputes under the Act is summary in nature involving trial on the basis of affidavits and is not suitable for determination of complicated questions. It

comprehensive definition of a ‘profession’, Scrutton L.J. has said " ‘profession’,in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of commodities. The line of demarcation may vary from time to time. The word ‘profession’ used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning". [See : Commissioners of Inland Revenue v. Maxse, 1919 1 K.B. 647 at p.657].

According to Rupert M. Jackson and John L.Powell the occupations which are regarded as professions have four characteristice, viz.,

i) the nature of the work which is skilled and specialized and a substantial part is mental rather than manual;

ii) commitment to moral principles which go beyond the general duty of honesty and a wider duty to community which may transcend the duty to a particular client or patient;

iii) professional association which regulates admission and seeks to uphold the standards of the profession through professional codes on matters of conduct and ethics; and

iv) high status in the community.

The learned authors have stated that during the twentieth century an increasing number of occupations have been seeking and achieving "professional" status and that this has led inevitably to some blurring of the features which traditional distinguish the professions from other occupations. In the context of the law relating to Professional Negligence the learned authors have accorded professional status to seven specific occupations, namely, (i) architects, engineers and quantity surveyors, (ii) surveyors, (iii) accountants, (iv) solicitors, (v) barristers, (vi) medical practitioners and (vii) insurance brokers. [See : Jackson & Powell on Professional Negligence, paras 1-01 and 1-03, 3rd Ed.1.].

In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be

achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liabilty which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. [See : Jackson & Powell (supra), paras 1-04, 1-05 and 1-56]. Immunity from suit was enjoyed by certain profession on the grounds of public interest. The trend is towards narrowing of such immunity and it is no longer available to architects in respect of certificates negligently given and to mutual valuers. Earlier, barristers were enjoying complete immunity but now even for them the filed is limited to work done in court and to a small category of pre-trial work which is directly related to what transpires in court. [See : Jackson & Powell, (supra), para 1-66; Saif Ali v. Sidney Mitchell & Co., (1980) 1 A.C. 198; Rees v. Sinclair (1974) 1 N.Z.L.R. 180; Giannarelli v. Wraith (1988) 81 A.L.R. 417]. Medical

customers to pay does not distinguish the medical profession from any other provider of goods or services." [pp. 348-49, 61-62]

We are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(o) of the Act.

Shri Marish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression 'which is made available to potential users' contained in Section 2(1)(o) of the Act., medical practitioners are not contemplated by parliament to be covered within the provisions of the Act. He has urged that the said expression is indicative of the kind of service the law contemplates, namely, service of an institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also been placed on the word 'hires' in sub-clause (ii) of the definition of 'consumer' contained in Section 2(1)(d) of the Act. We are unable to uphold this contention. The word 'hires' in Section 2(1)(d)(ii) has been used in the same sense as 'avails of' as would be evident from the words 'when such services are availed of' in the latter part of Section 2(1)(d)(ii). By inserting the words 'or avails of' after the word 'hires' in Section 2(1)(d)(ii) by the Amendment Act of 1993, Parliament has clearly indicated that the word 'hires' has been used in the same sense as 'avails of'. The said amendment only clarifies what was implicit earlier. The word 'use' also means 'to avail oneself of'. [See : Black's Law Dictionary, 6th Edn., at p. 1541]. The word 'user' in the expression 'which is made available to potential users' in the definition of 'service' in Section 2(1)(o) has to be construed having regard to the definition of 'consumer' in Section 2(1)(d)(ii) and, if so construed, it means 'availing of services'. From the use of the word 'potential users' it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament to be covered within the expression 'service' as contained in Section 2(1)(o).

Shri Marish Salve has also placed reliance on the definition of the expression 'deficiency' as contained in Section 2(1)(g) of the Act which provides as follows :

"Section 2(1)(g) : "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;"

The submission of Shri Salve is that under the said clause the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression "service" as defined in Section 2(1)(o). We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions

practitioners do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care.

It would thus appear that medical practitioners, though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.

Referring to the changing position with regard to the relationship between the medical practitioners and the patients in the United Kingdom, it has been said :

"Where, then, does the doctor stand today in relation to society? To some extent, he is a servant of the public, a public which is widely (though not always well) informed on medical matters. Society is conditioned to distrust paternalism and the modern medical practitioner has little wish to be paternalistic. The new talk is of 'producers and consumers' and the concept that 'he who pays the piper calls the tune' is established both within the profession and in its relationships with patients. The competent patient's inalienable rights to understand his treatment and to accept or refuse it are now well established." (pp.16-17)

"Consumerism is now firmly established in medical practice - and this has been encouraged on a wide scale by government in the United Kingdom through the introduction of 'charters'. Complaint is central to this ethos - and the notion that blame must be attributed, and compensated, has a high priority." (p.192)

[Mason & McCall Smith Law and Medical

Ethics,4th Edn.]

In Arizona v. Maricopa County Medical Society, 457 US 332 = 73 L.Ed. (2d) 48, two Arizona county medical societies formed two foundations for medical care to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans and by agreement amongst the doctors established the schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed for patients insured under plans. It was held that the maximum fee agreement, as price fixing agreements, are perse unlawful under the Sherman Act. It was observed :

"Nor does the fact doctors - rather than non-professionals - are the parties to the price fixing agreements support the respondents' position. ... The respondents claim for relief from the per se rule is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan. But the claim that the price restraint will make it easier for

is no doubt true that sometimes complicate questions requiring recording of evidence of expets may arise in a complaint about deficiency in service based on the ground of negligence in rendering medical services by a medical parctitioner; but this would not be so in all complaints about deficiency in rendering services by a medical practitioner. There may be cases which do not raise such complicated questions and the deficiency in service may be due to obvious faults which can be easily established such as removal of the wrong limb or the performance of an operation on the wrong patient or giving injection of a drug to which the patient is allergic without looking into the out patient card containing the warning [as in Chinkeow v. Government of Malaysia, (1967) 1 WLR 813 P.C.] or use of wrong gas during the course of an anesthetic or leaving inside the patient swabs or other items of operating equipment after surgery. One often reads about such incidents in the newspapers. The issues arising in the complaints in such cases can be speedily disposed of by the procedure that is being followed by the Consumer Disputes Redressal Agencies and there is no reason why complaints regarding deficiency in service in such cases should not be adjudicated by the Agencies under the Act. In complaints involving complicated issues requiring recording of evidence of experts, the complainant can be asked to approach the civil court for appropriate relief. Section 3 of the Act which prescribes that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force, preserves the right of the consumer to approach the civil court for necessary relief. We are, therefore, unable to hold that on the ground of composition of the Consumer Disputes Redressal Agencies or on the ground of the procedure which is followed which by the said Agencies for determining the issues arising before them, the service rendered by the medical practitioners are not intended to be included in the expression 'service'as defined in Section 2(1)(O) of the Act.

Keeping in view the wide amplitude of the definition of 'service' in the main part of Section 2(1)(o) as construed by this Court in Lucknow Development Authority (supra), we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical practitioner from the ambit of the main part of Section 2(1)(o).

We may now proceed to consider the exclusionary part of the definition to see whether such service is excluded by the said part. The exclusionary part excludes from the main part service rendered (i) free of charge; or (ii) under a contract of personal service.

Shri Salve has urged that the relationship between a medical practitioner and the patient is of trust and confidence and, therefore, it is in the nature of a contract of personal service and the service rendered by the medical practitioner to the patient is not 'service' under Section 2(1)(o) of the Act. This contention of Shri Salve ignores the well recognised distinction between a 'contract of service' and a 'contract for services'. [See : Malsbury's Laws of England, 4th Edn., Vol. 16, para 501; Dharangadhara Chemical Works Ltd. v. State of Saurashtra, 1957 SCR 152 at p. 157]. A 'contract for services' implies a contract whereby one party undertakes to render services e.g. professional or technical services, to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. [See : Oxford

customers to pay does not distinguish
the medical profession from any other
provider of goods or services." [pp.
348-49, 61-62]

We are, therefore, unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(o) of the Act.

Shri Harish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression 'which is made available to potential users' contained in Section 2(1)(o) of the Act., medical practitioners are not contemplated by parliament to be covered within the provisions of the Act. He has urged that the said expression is indicative of the kind of service the law contemplates, namely, service of an institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also been placed on the word 'hires' in sub-clause (ii) of the definition of 'consumer' contained in Section 2(1)(d) of the Act. We are unable to uphold this contention. The word 'hires' in Section 2(1)(d)(ii) has been used in the same sense as 'avails of' as would be evident from the words 'when such services are availed of' in the latter part of Section 2(1)(d)(ii). By inserting the words 'or avails of' after the word 'hires' in Section 2(1)(d)(ii) by the Amendment Act of 1993, Parliament has clearly indicated that the word 'hires' has been used in the same sense as 'avails of'. The said amendment only clarifies what was implicit earlier. The word 'use' also means 'to avail oneself of'. [See : Black's Law Dictionary, 6th Edn., at p. 1541]. The word 'user' in the expression 'which is made available to potential users' in the definition of 'service' in Section 2(1)(o) has to be construed having regard to the definition of 'consumer' in Section 2(1)(d)(ii) and, if so construed, it means 'availing of services'. From the use of the word 'potential users' it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament to be covered within the expression 'service' as contained in Section 2(1)(o).

Shri Harish Salve has also placed reliance on the

definition of the expression ‘deficiency’ as contained in Section 2(1)(g) of the Act which provides as follows :

"Section 2(1)(g) : "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;"

The submission of Shri Salve is that under the said clause the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression "service" as defined in Section 2(1)(o). We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions

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contained in Section 14 of the Act which indicate the reliefs that can be granted on a complaint filed under the Act. In respect of deficiency in service, the following reliefs can be granted :

i) return of the charges paid by the complainant. [Clause c)]

ii) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. [Clause (d)]

iii) removal of the defects or deficiencies in the services in question. [Clause (e)]

Section 14(1)(d) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of Section 2(1)(g) has, therefore, to be made by applying the same test as is applied in an action for damages for negligence. The standard of care which is required from medical practitioners as laid down by McNair J. in his direction to the jury in Bolam v. Friern Hospital Management Committee, (1957) 1 WLR 582, has been accepted by the House of Lords in a number of cases. [See : Whitehouse v.Jordan, 1981 (1) WLR 246; Maynard v. West Midlands, Regional Health Authority, 1984 (I) WLR 634 ; Sidaway v. Governors of Bethlem Royal Hospital, 1985 AC 871]. In Bolam (supra) McNair J has said :

> "But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art." [p.586]

In an action for negligence in tort against a surgeon this Court, in Laxman Balakrishna Joshi v. Trimbak Bapu Godbole & Anr., 1969 (1) SCR 206, has held :

> "The duties which a doctor owes to his patieint are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him 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 a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The 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

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