

SHOULD LAWYERS BE BROUGHT UNDER COPRA: A REJOINDER

Anuj Bhuwania*
P.K. Prabhat*

The Apex Court in *Indian Medical Association v. V.P. Shanta*¹ has authoritatively settled the law that Medical Professionals are within the purview of Consumer Protection Act, 1986.² However, the issue whether Legal Professionals are also covered by COPRA is still open to debate. The preceding article seeks to establish a case for excluding lawyers from the ambit of COPRA. The rejoinder endeavours to critically counter the arguments set forth by the learned authors by problematising every contention advanced by the authors and exposing their inherent fallacies. In a nutshell our effort is to establish that any suggestion to take lawyers out of the purview of COPRA is grotesque and misconceived.

INCLUSION OF LEGAL PROFESSIONAL IN THE DEFINITION OF SERVICE

The authors have relied on Jackson and Powell in order to say that "in matters of professional liability, professions differ from other occupations for the reason that professionals operate in spheres where success cannot be achieved in every case..."³ However, the authors have glossed over the specific rejection of this argument in *Shanta's case* where Agrawal, J. recognised the devising of a rational approach to professional liability which provides proper protection to the consumer while allowing for the factors mentioned above. The approach of the courts requires professionals to possess a minimum degree of competence and to exercise reasonable care in the discharge of their duties. Immunity from judicial proceedings on part of certain professions can be justified on the grounds of public interest. However, the trend is towards the narrowing of such immunity, and it is no longer available to architects and medical practitioners.

The authors have argued that in the lawyer client relationship develops an intimacy that is required of a contract of personal service. The contract of service has been defined as a master-servant relationship where the servant must obey orders as to the work to be performed and manner of performance.⁴ If we use the

* III Year B.A., LL.B. (Hons.), National Law School of India University.

1 (1995) 6 SCC 651 (Hereinafter *Shanta's case*).

2 Hereinafter COPRA.

3 See, footnote 5 of their article.

4 *Stroud's Judicial Dictionary* 540, Cited with approval in *Simmons v. Health Laundry Co.*, (1910) 1 KB 543; *Dharangadhara Chemical Works v. State of Saurashtra*, AIR 1957 SC 264; and in *Indian Medical Association v. V.P. Shanta* (1995) 6 SCC 651.

analogy from *Shanta's case* it can safely be said that the relationship between a lawyer and a client carries within it a certain degree of mutual confidence and trust. Therefore, the services rendered by the lawyer can be regarded as services of personal nature. However, since there is no relationship of master and servant between the lawyer and client, the contract between lawyer and client cannot be treated as a contract of personal service. It is a contract for services and the service rendered by the lawyer to his client is under such a contract and is not covered by the exclusionary part of the definition of 'service' contained in S. 2(1)(o) of the Act.

HOW UNIQUE IS THE LEGAL PROFESSION?

The authors have relied on two decisions of House of Lords regarding the immunity enjoyed with respect to negligence by barristers. However, in *Rondel v. Worsley*⁵ the House indicated that at any rate *some kinds of work* done by a barrister would no longer attract immunity from liability for negligence. This is further elucidated by Lord Diplock in *Saif Ali v. Sydney Mitchell & Co.*⁶ where it was said, "Each piece of before trial work should ... be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice ... "

Thus the immunity was limited to those aspects of his work which are intimately connected to his activity in court. In *Shanta's case* Agrawal, J. tracing the above development said, "Earlier, barristers were enjoying complete immunity but now even for them the field 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."⁸

However in India the law is well settled by statutory provision and judicial decision, which the authors have conveniently chosen to ignore. S. 5 of the Legal Practitioners (Fees) Act, 1926 provides that no Legal Practitioner who has acted or agreed to act shall by reason only of being a legal practitioner be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duty. After adverting to the provisions of the Act, the Supreme Court in *M. Veerappa v. Evelyn Sequeira*,⁹ held that an advocate who has been engaged to act is clearly liable for negligence to his client.

5 [1967] 3 All E R 993.

6 [1978] 3 All E R 1033 at p. 1046.

7 *Ibid.*

8 At p. 666. *See generally, Rees v. Sinclair*, (1974) 1 NZLR 188; *Giannarelli v. Wraith*, (1988) 81 ALR 41.

9 AIR 1988 SC 506 at p. 514.

WHAT IS NOT "DEFICIENCY OF SERVICE" IN CASE OF LAWYERS?

The authors have argued that the test of a reasonable prudent man as laid down in *Donaghue v. Stevenson*¹⁰ is unknown to the legal profession. They have cited a number of cases in which the lawyers were held not liable for particular types of negligence.¹¹ It is very difficult to understand why the authors are unduly obsessed with lawyers' negligence. After all Consumer Protection Act, 1986 is not confined to only liability for negligence, and legal professionals can be held liable for a number of torts.¹²

The authors' conclusion on the basis of these cases is untenable because of two reasons. Firstly, these cases do not clearly establish that lawyers are immune from liability for negligence.¹³ Secondly, these cases held lawyers not liable for their professional misconduct, but did not confer any immunity from civil liability. They have argued that mere negligence, however gross, does not amount to misconduct: professional or otherwise.¹⁴

Even assuming they are not wrong, their contention is untenable because of two reasons. Firstly, their argument that mere negligence is not enough presupposes that negligence is ascertainable, contradicts their earlier stand that in the case of lawyers it is difficult to define what is negligence. Secondly, mere negligence may not be enough to amount to professional misconduct, but COPRA has nothing to do with professional misconduct. No amount of waxing eloquent by the authors can change this legal truism.

THE EXCLUSIVE JURISDICTION OF THE BAR COUNCIL

The authors have argued that in the light of Law Commission recommendations, the Supreme Court decisions, and considering the scheme of

10 (1932) A.C. 562.

11 See footnote Nos. 19-25 of the Article.

12 See *Pasley v. Freeman*, (1979) 3 Term Rep 51; *Llyod v. Grace Smith and Co.*, [1912] A.C. 716; *Bellairs v. Tucker*, (1884) 13 QBD 562; *Phosphate Sewage Co. v. Hartmont* (1877) 5 Ch D 394; and number of other cases where the solicitors were held liable for fraud. In *Symonds v. Atkinson*, (1856) 1 H&N 146 the solicitor was held liable for conversion. In *Johnson v. Emerson and Sparrow* (1871) LR 6 Exch 329 the solicitor was held liable for malicious prosecution.

13 There are number of cases in all jurisdiction making lawyers liable for negligence. An attorney who fails in his duty, causing actual loss to the client is liable for the damage sustained in American Jurisdiction (*Brosie v. Stockhome*, 105 Ariz 574, 468 P2d 933; *Fitch v. Scott*, 4 Miss 314; *Saving Bank v. Ward*, 100 US 195, 25 L Ed 621; *McCullough v. Sullivan*, 102 NJL 381; *McLellan v. Fuller*, 220 Mass 494; In UK it has been held that a solicitor is personally liable in tort (which includes negligence) where from his conduct it is clear that he has made himself a party to tort. See generally, *Barker v. Brahan and Norwood*, (1773) 2 Wm Bl 866.

14 But in recent case, the Disciplinary Committee of Bar Council of India held that, "It is well settled that gross negligence on the part of the advocate which leads to suffering and harassment of the client will amount to professional misconduct." B.C.I. TR. Case No. 104/1990, reported in 23 IBR 157 (1996).

Advocates Act, 1961, the Disciplinary Committee of Bar Council has *exclusive* jurisdiction to try an advocate. But the jurisdiction of Disciplinary Committee of Bar Council is limited to professional or other misconduct.¹⁵ The Disciplinary Committee of Bar Council has no jurisdiction to award compensation for torts committed. Also, the standard of proof before the Disciplinary Committee is very high and exacting¹⁶ unlike the civil proceeding in Consumer Protection Forum. In keeping with criminal justice analogy, disciplinary agencies primarily focus on punishment and deterrence. Compensation though allowed under limited circumstances remains a secondary goal.¹⁷ In *Shanta's case* while rejecting the argument based on exclusive jurisdiction of Disciplinary Committee, the court said, "The fact that they are governed by Medical Council of India and/or State Medical Council 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."¹⁸ The 75th Law Commission Report compares the autonomous nature of Bar Council with that of the Medical Council by citing All India Bar Committee Report given in 1953 which was given legislative effect by the Advocates Act, 1961. It reads, "the Medical men have their General Medical Council under the Medical Councils Act, 1953. So have the Chartered Accountants under the Chartered Accountants Act, 1949. It is required that lawyers have the same." When all these professionals are subject to their respective Disciplinary Councils and at the same time they are liable under COPRA for their negligence, how can it be argued that Bar Council exhausts the tortious remedy available?

CONCLUSION

On the one hand the authors have argued for the exclusion of lawyers from the purview of COPRA, and vesting Bar Council with exclusive jurisdiction,

15 S. 35 of the Advocates Act, 1961.

16 This rule was laid down long ago by the Privy Council in *A, a Pleader v. The Judge of the High Court of Madras* (AIR 1930 PC 144) where the court said, "before dealing with the charges it is right to state that, in their Lordship's opinion charges of professional misconduct must be clearly proved and should not be inferred from mere ground for suspicion, however reasonable. In another case *L.D. Jaisinghani v. Naridas N. Punjabi*, AIR 1976 SC 373 at p. 376, involving professional misconduct, a four Judge bench of the Supreme Court held that the evidence should be of a character which should leave no reasonable doubt about guilt. In a rather recent judgement *In Re: An Advocate*, AIR 1989 SC 245, the Apex Court has further reaffirmed this principle. Bar Council of India has also followed this approach consistently. Recently the Bar Council of India in one case observed, "The allegation of professional misconduct is of very severe nature and the same has to be proved by cogent and convincing evidence." (*A v. T, D.C. Appeal No. 9/1984, Order dated 9-7-1988, reported in 15 IBR 368 (1988).*)

17 David, B. Wilkin, *Who Should Regulate Lawyer?* 105 *Harv L. Rev* 799 (1992); See generally, Stephen G. Bene, *Why not Fine Attorney? An Economic Approach to the Lawyers Disciplinary Sanction*, 43 *Stan L Rev* 907 (1991). In England according to S. 46(1) of the Solicitors Act, 1974, disciplinary jurisdiction over members of the bar is in the hands of Disciplinary Committee formed by the Master of the Rolls from the members of the council of the autonomous body. In Italy also there is a Disciplinary Committee known as 'ordine degli Avvocati e procuratori'. But in all these jurisdiction lawyers are liable in civil court for their torts.

18 *Shanta's case* at p. 666.

while on the other hand there is another school of thought which makes out the need for setting up of consumer courts to either supplement or supplant the disciplinary committee of Bar Council of India.¹⁹ By holding that legal practitioners fall within the purview of COPRA, no change is brought in the substantive law governing claims for compensation. The grounds of negligence, and principles which apply to the determination of such a claim before the civil court, would equally apply to consumer disputes before the Consumer Disputes Redressal Agencies under COPRA. COPRA only provides an inexpensive and speedy remedy for adjudication of such claims as there is no court fees required under it. If the authors are not denying the existence of civil liability for lawyers then what can be the reason for excluding the more efficacious mode of redressal under COPRA under the same substantive principles. It follows that the authors do not want to do away with lawyers' civil liability but they are only interested in avoiding this more effective and convenient forum. Thus, in effect, rendering such liability unenforceable and enabling the lawyers to get away with tortious actions. This seems to be the only concern of the authors.

As the legal profession searches for ways to regain some measure of the public's respect, as overlap between the disciplinary and tort sphere would be a step in the right direction. By creating the Model Rules of Professional Conduct, the legal profession's governing bodies have provided comprehensive, accessible, and enforceable rules of conduct for the nation's exploding population of lawyers. The fact that these rules were designed specifically for application in the disciplinary context does not overcome the logic, feasibility and functional value of extending their application to the tortious context. At the very least, the provisions of Rules Governing Advocates²⁰ that relate to the facts of tortious suits should be admissible in helping to establish the proper standard of care.

19 M.K. Ramesh, *Consumer Interests in Legal Profession: Problems and Perspectives*, 13 CULR 425 (1989).

20 Part VI of the Bar Council of India Rules.