SHOULD LAWYERS BE BROUGHT UNDER THE COPRA

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A three Judge bench of the Supreme Court in *Indian Medical Association v. V.P. Shanta*[1] affirmed the growing activity in the field of consumerism and consumer protection. The Court in this momentous decision resolved along standing confusion[2] by declaring medical practitioners were subject to the rules and mechanism of the Consumer Protection Act, 1986.[2a] This decision has not only evoked strong protests from the medical community, but also brought many legal issues to light. People today ask the question, if doctors can be made liable under the COPRA, why not lawyers? The article tries to show the impossibility of bringing lawyers within the ambit of the COPRA.

DEFINITION OF SERVICE UNDER S.2(1)(o) OF THE COPRA

If the lawyer's relationship with his client envisages a service under s. 2(1)(o) of the COPRA, then the client is a customer under s. 2(1)(d)(ii). He can therefore claim compensation under S.14 for a resultant "deficiency" of service under S. 2(1)(g) of the COPRA. Service is defined under s. 2(1)(o) as "service of any description which is made available to the potential users and includes the provision of facilities in connection with banking, financial insurance, transport, housing construction, entertainment, but does not include any rendering of service free of charge or under a contract of personal service".

As held in *Lucknow Development Authority v. M.K. Gupta*,[3] this definition has three parts - the main part, the inclusory part and the exclusory part. The inclusory parts are merely illustrative whereas the main part is expansive to cover any form of service. Though the Supreme Court in *I.M.A. v. Shanta*[3a] categorically ruled out any exemption to the medical profession as far as the definition of service is considered,[4] it should be noted here that there is a difference between an occupation and a profession.

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1 (1995) 6 SCC 651.

2 While decisions like *Dr. A.S. Chandra v. UOI*, (1992) 1 Andh. L.T. 713; *Cosmopolitan Hospitals v. V.P. Nair*, (1992) 1 CPJ 302; *Dr. Sr. Louie v. K. Palhumma*, (1993) 1 CPJ 30 (NC) were affirmed. *Consumer Unity and Trust Society v. St. of Rajasthan* (1992) 1 CPJ 259 and *Dr. C.S. Subramanium v. Kumaraswamy*, (1994) 1 MLJ (DB) are reversed.

2a Hereinafter COPRA.

3 (1994) 1 SCC 243.

3a (1995) 6 SCC 651.

4 In fact, the Supreme Court quoted US decisions like *Arizona v. County Medical Society*, 457 US 332 and English decisions like *Saif Ali v. Sydney Mitchell and Co.*, (1960) 1 AC 198.

According to Jackson and Powell,[5] 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, and very often success or failure depends upon factors beyond the professional's control. Relying on this in *V.P. Nair v. Cosmopolitan Hospitals (P) Ltd.*,[6] it was held that "the definition of service appearing in the main part is most comprehensive in nature." This comprehensiveness has to be compared with *K. Rangaswamy v. Jaya Vittal*,[7] a case involving professional misconduct by an advocate. It was held that according to s. 2(1)(o) of the COPRA, the service under a contract of "personal service" is excluded from the definition of the word service and since the advocate - client relationship falls in this category, it is automatically excluded from the definition of service. However, a later decision *C.K. Johnny v. Jaisundaram*[8] held, that a client is a consumer as he has availed the service of the advocate for appropriate consideration. Of the two decisions, the former seems to lease itself on the exclusionary part of the definition of service.

Though a contract of personal service usually envisages a master-servant relationship,[9] the Court in *I.MA. v. Shanta*[10] sought to give a wider meaning to it by quoting with approval cases which have held contracts involving civil servants, managing agents of a company and a professor of a university within the definition of personal service.

A lawyer is an agent of the client in many respects. He not only represents the client in court but according to law is also competent to act for his clients outside court in many instances thus giving the relationship a level of intimacy which is required of a contract of personal service. Though lawyers can be excluded from the definition of service merely on this ground, the following arguments strengthen the case against inclusion of lawyers under COPRA.

LAW AS A UNIQUE PROFESSION

Ronald v. Worsely[11] laid down immunity for barristers on the ground that "advocate does not owe a duty only to his client, he also owes a duty to the Court and must observe it, even if to do so might appear contrary to the client's interests."

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5 Jackson & Powell, *Professional Negligence*, Para 1-66 (3rd Edn). *See also,* Mason & McCall Smith, *Law and Medical Ethics*, p. 192 (4th Edn). Characteristics of profession include skilled work, moral commitment and professional associations.

6 (1991) CPJ 444.

7 (1991) CPJ 688.

8 (1995) CPJ 311.

9 *See, Halsbury's Law of England*, Vol. 16, para 501 (1976), and *D. Chemical Works Ltd, v. State of Saurashtra*, 1951 SCR 152.

10 (1995) 6 SCC 651.

11 [1967] 3 All ER 993.

Again, in *Saif Ali v. Sydney Mitchell and Co.*,[12] Lord Diplock argued that the true justification of the immunity was not the barrister's duty to the court, but rather the protection of the judicial process itself.

As Krishna Iyer J. in the *Bar Council of Maharashtra v. M.V. Dhabolkar*[13] put it, "The legal profession is not trade - nor merchandise, but a monopoly adhering to high traditions." This is closely aligned with the fact that the very concept of professional mis-conduct for lawyers has a moralistic element which necessarily involves disgrace or dishonour to the legal community[14] and which impedes the administration of justice and confidence of litigants.[15]

Lastly, it is an extremely skilled profession and as held in *Neel v. Magna*,[16] "if the client must ascertain malpractice at the moment of its incidence, the client must have a second lawyer to observe the first."

The 131st Law Commission Report, (1988) under the title of "Role of Legal Profession in Administrator of Justice" categorically stated that the duty of a lawyer to a client has to be looked at in the light of his duty to the Court, the Bar, and Society, thus strengthening the above proposition that in the case of law, the uniqueness lies in the fact that it is impossible to pinpoint a lawyer's duty to any specific person or institution.

WHAT IS "DEFICIENCY OF SERVICE" IN CASE OF LAWYERS?

The basic facet of the legal profession is the lack of a simplistic definition of negligence. The test of "a prudent man" laid down in *Donaghue v. Stevenson*[17] is unknown to the legal profession, and mere negligence as understood above, unaccompanied by moral deficiency does not constitute professional misconduct.[18] By way of illustrations in the matter of *V.K. Narasinga Rao*,[19] it was held by the AP High Court that negligence in filing the appeal does not amount to professional misconduct.

Again negligence in drafting the terms of a compromise decree was held not to be professional negligence.[20] A dictum of a special bench of the Madras

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12 [1978] 3 All ER 1033.

13 AIR 1976 SC 242: (1976) 2 SCC 291.

14 *See, George Grahamme v. A.G. Fiji*, AIR 1936 PC 224.

15 *Roma Banerjee v. Ushapati Bannerjee*, AIR 1958 Cal 692.

16 (1971) 6 Cal 3d 176.

17 (1932) AC 562.

18 *P.D. Khanderkar v. Bar Council of Maharashtra*, AIR 1984 SC 110; *See also, G. Satyanarayanamurthy, a Pleader*, AIR 1938 Mad 965, *In Re Pran Narain, Advocate*, AIR 1935 Cal 484, B, *Munnisami Naidu* AIR 1926 Mad. 568.

19 AIR 1959 AP 593.

20 *Sva Hla Pru v. S.S. Halkar*, AIR 1932 Rang 1.

High Court has clearly held that neglect of duties would not amount to professional misdonduct,[21] since the element of *moral deficiency* is the main ingredient of professional misconduct.

Cases of misappropriation or misuse of funds, purposeful delay to defeat the limitation period[22] and filling appeals without proper stamps inspite of repeated reminders[23] have been thought fit cases, because they are considered to be "immoral and shameful" and are supposed to "dishonour" the legal community at large. Hence the traditionally understood notion of negligence as is seemed to be required by the definition of deficiency of service in s. 2(1)(g) of the COPRA has no foundation in the profession of lawyers as was stated by Lord Esher, in *Re G. Mayor Geope*.[24] Mere negligence, however gross, does not amount to misconduct, professional or otherwise.

THE EXCLUSIVE JURISDICTION OF THE BAR COUNCIL

S.9 of the Advocates Act, 1961 allows the Bar Council to constitute one or more disciplinary committees for a State, consisting of three persons, the qualifications of whom are listed under S. 35 of the said Act. The disciplinary committees have the power to (1) reprimand the advocate, (2) suspend the advocate from practice for a time period and (3) remove the name of the advocate from the state roll of advocates.[25] It should be noted that prior to the Advocates Act, 1961, Ss. 13, 14 and 15 of the Legal Practitioners Act, 1879, and S.10 of the Indian Bar Council Act, 1926 provided for the jurisdiction of the High Court for such purposes. But with the passing of the 1961 Act, the jurisdiction now lies exclusively with the Disciplinary Committee and this has been endorsed by the Apex Court to be the right forum for the trial of advocates.[26]

In fact, the Law Commission was moved to prepare a report on the exclusive jurisdiction of the Bar Council[27] when complaints were received that the disciplinary committees for advocates were not functioning properly. The following lines are excerpted. "If there have been a few isolated incidents in which the aggrieved parties are dissatisfied with the action taken by the disciplinary body, that should not be regarded as constituting adequate justification for a change in the law. The brief historical survey given also shows that the trend of legislation in India has been gradually towards greater autonomy in the field of disciplinary proceedings against members of the legal profession." Hence with both the Apex Court and other juridical opinion being certain that

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21 AIR 1926 Nag 568.

22 *In Re a Pleader*, Tirupur, AIR 1945 Mad 55.

23 *C. Padmanabha Ayyangar*, Advocate, AIR 1939 Mad 1.

24 33 SJ 397 *c.f. supra*, n. 15 p. 243.

25 S. 35 (3) (b) (c) & (d)

26 *Devendra Bhai Shankar Mehta v. Rameshchandra Seth*, (1992) 3 SCC 473.

27 Law Commission of India, 75th Report, "Disciplinary Jurisdiction under the Advocates Act" (1978).

the jurisdiction lies exclusively with the Disciplinary Committee, it would not be right to vest jurisdiction in the Consumer Forums.

CONCLUSION

Putting aside for the moment the various legal arguments given above, there are innumerable practical difficulties in bringing lawyers under COPRA. Some may appear trivial - but it does seem rather incongruous to go to another lawyer in order to sue your former lawyer in the Consumer Court. Professional misconduct is an extremely serious allegation and therefore it is best to leave it to the specialised professional bodies themselves to address the issue. After the Supreme Court ruling in *I.MA. v. Shanta*,[28] a significant change in attitude has taken place concerning the medical profession. Doctors have becomes much more cautious and unwilling to take any risks at all while treating patients. Fear of being sued has led doctors to run a battery of tests for even a simple diagnosis. It is debatable whether patents have realised that the rising costs of health care can be traced to greater insurance policy cover for doctors in the wake of the Apex Court ruling.

Should the same situation be thrust on layers, innovativeness and creativity in legal thinking will be greatly reduced. Courts must devise a rational approach to professional liability. They must provide proper protection for the public, whilst allowing for factors beyond the professional man's control. Allowing lawyers to be sued under COPRA is not the answer to the problem.

28 (1995) 6 SCC 651.