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MEDICAL NEGLIGENCE VERSUS DEFICIENCY IN SERVICES: CRITICAL APPRAISAL IN VIEW OF JUDGMENTS OF CONSUMER FORUM

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ABSTRACT

Legislations were pending before the appropriate bodies or authorities for fastening the tight hold of Law regarding practice of medicine. Few were Clinical Establishment Act, amendments in PCPNDT Act, Human Organ Transplantation Act, amendments of MCI in the list of Infamous conduct and many more to check the legal and ethical conduct of the practicing physicians. This article aims at retrospection into the existing scenario through the catena of judgments of National Consumer Redresser Forum.

KEYWORDS: Medical negligence, consumer forum, law related to medical practice.

INTRODUCTION

According to Lord Denning, "it would be a great disservice to the community at large, if we impose liability on the doctors for each and everything that goes wrong".[1]

In the past era the doctors were treated like God, that means a faith and sanctity is attached to them. They were healer of the distress of the sufferer and their fees is mere a feeling of gratitude shown towards their deeds. The doctors were strictly bound by the ethical codes as it is a divine profession, hence realization is secondary and the primary aim is to serve the God and humanity at a large.

Due to inclusion of the hospitals as an industry there is rush of private financers and corporate business units with no medical background. In the wake of this change the medical profession is becoming totally commercialized and a money generation unit, thus it clad the clothes of luxurious service providers.

This change in industrial sector starts reflecting in shifting of the image of the doctor from ethical duty bound personality to a business person in the society.

Earlier doctors were covered by various laws, i.e. the Law of Torts, IPC etc but in addition to this the medical service is included under the purview of the Consumer Protection Act in 1986 giving a legal sanctity to doctor-patient relation as consumer-service provider relationship.

Public awareness in India is growing, society is more conscious towards their rights, resulting into increase of litigation of medical negligence cases into court of Laws on part of consumers and increase in the practice of 'defensive medicine' on part of service providers.

As the profession involves the idea of an occupation requiring purely intellectual skills or of manual skills controlled by the intellectual skill of the operator, as distinguished from an occupation which is substantially production or sale or arrangement for the production or sale of commodities.[2] And medicine is a highly complex domain, making it difficult for consumer laws to review medical negligence cases with flawless technical clarity and accuracy.[3] Thus medical negligence is not purely a matter of consideration for judiciary but also the technical inputs of specialized experts in the field have substantial weight age while deciding the case of medical negligence against doctors. The present paper is devoted to introvert inspection of negligence in medical profession in the light of existing laws with more emphasis on the interpretation of consumer protection law by judiciary.

Civil law and negligence

Negligence is a tort as well as a crime may be used for the purpose of fastening the defendant with the liability

under the civil law and also under the criminal law. In jurisprudence no distinction may be drawn between negligence under civil and criminal law but *degree of negligence is high* to fasten the liability under criminal laws, essential element of *mens rea* cannot be discarded while fixing the liability in criminal case.[2]

Supreme Court in its judgment simplified negligence as the breach of a legal duty to care. It means carelessness in a matter in which the law mandates carefulness. A breach of this duty gives a patient the right to initiate action against negligence.[4]

The Hon. Court admits that no human being is perfect and even the most renowned specialist could make a mistake in detecting or diagnosing the true nature of a disease. The law expects a duly qualified physician to use that degree of skill and care which an average man of his qualifications ought to have and does not expect him to bring the highest possible degree of skill in the treatment of his patients, or to be able to guarantee cures.[5]

Thus as reflected from the various decisions of Supreme Court a doctor can be held liable for negligence only if

- One can prove that she/ he is guilty of a failure to act with ordinary skills and fail to act with reasonable care.[4]
- An error of judgment constitutes negligence only if a reasonably competent professional with the standard skills that the defendant professes to have, and acting with ordinary care, would *not* have made the same error.[4]
- The principle of *res ipsa loquitur* comes into operation only when there is proof that the occurrence was unexpected, that the accident could not have happened without negligence and lapses on the part of the doctor, and that the circumstances conclusively show that the doctor and not any other person was negligent.[4]
- A doctor can be held to be negligent only if the complainant can prove that the standard of medical care given does not match the standards of care set up by the profession itself. It says a wrong outcome or recourse to one of several different methods available to treat a patient cannot be termed as negligence.[6]
- A simple lack of care, an error of judgment or an accident, even fatal, will not constitute culpable medical negligence. If the doctor had followed a practice acceptable to the medical profession at the relevant time, he or she cannot be held liable for negligence merely because a better alternative course or method of treatment was also available, or simply because a more skilled doctor would not have chosen to follow or resort to that practice.[7]
- Professionals may certainly be held liable for negligence if they were not possessed of the requisite skill which they claimed, or if they did not exercise, with reasonable competence, the skill which they did possess.[7]

Criminal negligence

Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both. The word 'gross' has not been used in Section 304A of IPC. However, as far as professionals are concerned, it is to be read into it so as to insist on proof of gross negligence for a finding of guilty.[7]

Also, certain elements must be established to determine criminal liability in any particular case, the motive of the offence, the magnitude of the offence and the character of the offender. The Supreme Court distinguished between negligence, rashness and recklessness as,

- A negligent person is one who inadvertently commits an act of omission and violates a positive duty.
- A person who is rash knows the consequences but foolishly thinks that they will not occur as a result of her/his act.
- A reckless person knows the consequences but does not care whether or not they result from her/his act.

Any conduct falling short of recklessness and deliberate wrongdoing should not be the subject of criminal liability. Thus a doctor cannot be held criminally responsible for a patient's death unless it is shown that she/he was negligent or incompetent, with such disregard for the life and safety of his patient that it amounted to a crime against the State.[4]

Supreme Court is of the view that as Article 21 of the Constitution of India provides for the protection of life and personal liberty. The right to life enshrined in this article includes right to health, and the right to live with dignity. No one can violate the right to life. If anybody including a medical professional causes harm and injury to any person without his consent, he commits a criminal wrong giving rise to criminal liability".[1]

Indian Penal Code, 1860 sections 52, 80, 81, 83, 88, 90, 91, 92 304-A, 337 and 338 contain the law related to medical malpraxis in India.

The legal avenues available to aggrieved patients to sue against health professionals are.

- Civil courts.
- Criminal courts.
- Consumer Redresser Forums.
- Medical Council of India and Dental Council of India.
- MRTP[17] (Monopolies and Restrictive Trade Practices Commission).

Consumer as per CPA

Under the Section 2(1) (o) of CPA the following categories of doctors/hospitals included under this Section and as interpreted by judiciary in different awards:

- All medical/dental practitioners doing independent medical/dental practice unless rendering only free service.
- Private hospitals charging all patients.
- All hospitals having free as well as paying patients and all the paying and free category patients receiving treatment in such hospitals.
- Medical/dental practitioners and hospitals paid by an insurance firm for the treatment of a client or an employment for that of an employee. It exempts only those hospitals and the medical/dental practitioners of such hospitals which offer free service to all patients.[5]
- A patient treated free of cost in a charity or other hospital will still be a consumer as per the Consumer Protection Act if the person buys medicines from the nursing home's pharmacy, the national consumer forum has ruled.[8]
- Persons who availed themselves of the facility of medical treatment in a Government Hospital are not "consumers" as defined in Consumer Protection Act and the said facility cannot be regarded as service "hired" for "consideration.[9]
- It was contended that direct and indirect taxes paid to the State by a citizen constituted "consideration" for the services and facility provided to a citizen by the State. The National Commission, making a distinction between "tax" and "fee" held that a tax is levied as part of common burden while fee is for payment of specific benefit or privilege. Unlike "fee" "tax" in its true nature is a levy made by the state for the general purposes of the Government and it cannot be regarded as payment for any particular or specific service.[9]
- On the question whether contributors to the CGHS Scheme and patients in a "paying ward" in a Government Hospital are "consumers" within the meaning of the Act, it observed that contribution to CGHS should be taken to be in lieu of free treatment in the diverse dispensaries, as well as the free provisions of medicines from these dispensaries. In regard to "paying wards", it further observed that these payments are specifically related to special rooms/beds for which the separate charge is made; the (free) medical facilities are common to all patients, inclusive of those in the paying wards, without discrimination.[9]

Pre-requisite before filing a case

The famous Bolam principle, which states that a doctor cannot be held liable when he acted as any other established and responsible medical man would act.[1]

In a Jacob Matthews Vs State of Punjab (*2005 Crl. L.J. 3710)* Supreme Court Judgment- gives guidelines are as mentioned under.

- A complaint against a doctor is not to be entertained unless the allegation against him is supported by a credible opinion given by another doctor. If the doctor feels that negligence on the part of the medical practitioner has resulted to the loss of well being of the plaintiff, then the complaint may be registered.
- The investigating officer before proceeding against the accused ought to get a medical opinion from a competent doctor, preferably in the government services, qualified in that field of medical sciences who can give an impartial opinion.
- The arrest of the accused should be withheld unless it is believed by the investigating officer unless he believes that it is necessary to arrest the accused so as to further the investigation of the case. It may further be withheld unless it is believed that the accused doctor will not make himself available to face the prosecution unless he is arrested.

However, the court specified that these provisions will be active till the Government in consultation with the Medical Council of India frame statutory rules regarding the same.[1,7]

- In an earlier order, the apex court had held that courts must make it a practice to refer cases of medical negligence to an expert or panel of doctors in the same field of medicine to opine on the merits of the case.[6]
- In “Savita Garg Vs. Director, National Heart Institute” [(2004) 8 SCC 56], the Supreme Court observed:- “The patients once they are admitted to hospitals, it is the responsibility of the said hospital or the medical institutions to satisfy that all possible care was taken and no negligence was involved in attending the patient. The burden cannot be placed on the patient to implied all those treating doctors or the attending staff of the hospital as a party so as to substantiate his claim. Since the burden is on the hospital, they can discharge the same by producing that doctor who treated the patient in defense to substantiate their allegation that there was no negligence. In fact it is the hospital who engages the treating doctor thereafter it is their responsibility.”[10]

Burden of proof and chances of error

- The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant.
- The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish her/his claim against the doctor.
- In Calcutta Medical Research Institute vs Bimalesh Chatterjee it was held that the onus of proving

negligence and the resultant deficiency in service was clearly on the complainant.

- In Kanhaiya Kumar Singh vs Park Medicare & Research Centre, it was held that negligence has to be established and cannot be presumed. Even after adopting all medical procedures as prescribed, a qualified doctor may commit an error.
- The National Consumer Disputes Redressal Commission and the Supreme Court have held, in several decisions, that a doctor is not liable for negligence or medical deficiency if some wrong is caused in her/his treatment or in her/ his diagnosis if she/he has acted in accordance with the practice accepted as proper by a reasonable body of medical professionals skilled in that particular art, though the result may be wrong. In various kinds of medical and surgical treatment, the likelihood of an accident leading to death cannot be ruled out. It is implied that a patient willingly takes such a risk as part of the doctor-patient relationship and the attendant mutual trust.[4]
- Sections 80 and 88 of the Indian Penal Code contain defences for doctors accused of criminal liability. Under Section 80 (accident in doing a lawful act) nothing is an offence that is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution. According to Section 88, a person cannot be accused of an offence if she/ he performs an act in good faith for the other's benefit, does not intend to cause harm even if there is a risk, and the patient has explicitly or implicitly given consent.[4]

Law of limitation and CPA

In the Supreme Court of India civil appellate jurisdiction Appeal No 8983 of 2010 the facts regarding limitation period for suit to be submitted under CPA are discussed as follows.

Sec 24A of CPA gives Limitation period as.– (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in subsection (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period.

Provided that no such complaint shall be entertained unless the National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.".[11]

The *Discovery Rule*: In West Virginia, the Discovery Rule was applied in Morgan v. Grace Hospital Inc. 149 W.Va.783, 144 S.E.2d 156. In that case a piece of sponge had been left in the wound during a surgical operation but its presence in the body did not come to light until 10 years later. The Court rejected the objection of limitation and observed: "It simply places an undue strain upon common sense, reality, logic and simple justice to say that a cause of action had 'accrued' to the plaintiff until the X-ray examination disclosed a foreign object within her abdomen and until she had reasonable basis for believing or reasonable means of ascertaining that the foreign object was within her abdomen as a consequence of the negligent performance of the hysterectomy.".[11]

How much compensation to be paid

A US-based doctor was awarded a record compensation of Rs 1.73 crore in a medical negligence case by the NCDRC. The commission considered various factors, like compensation for mental agony, costs incurred in litigation and medical expenses, and concluded that the amount payable to claimant was Rs 1.73 crore.[12]

At the outset, the commission stated that they cannot take into account the system of award of compensation in other countries and it must necessarily confine the consideration of this question having regard to the law as has been settled by the Supreme Court through catena (series) of decisions and which is in vogue in our jurisdiction and has stood the test of time," the commission said.[12]

The view of the NCDRC as reflected through the catena of various judgments and awards

1. It is duty of the doctor, before prescribing a drug, to inform the patient about the side effects of a drug, particularly if such person is at risk to side effects of such drugs. Also the disease to be confirmed by proper pathological test. If it is not done it will be a deficiency in service.[13]
2. A consulting doctor cannot defend an apparent mistake in noticing a disease on the basis of sophisticated, technical investigation by contending that such investigation was taken by a senior resident doctor, despite the fact that the said report is endorsed by the consulting doctor by mentioning his interpretation of the disease. The consulting physician who signs the report is responsible for misreading or not reading/looking at the said investigation correctly. In such a case, this would be gross negligence. It is the duty of the consulting doctor to correct such errors.[14]
3. The State Commission, Chennai, arrived at the conclusion that the husband of the Petitioner died on the operation table when the patient was brought for simple biopsy. For this deficiency in service, the State Commission directed payment of compensation by the Opposite Parties. In such circumstances, the principle of 'res ipsa loquitur' would apply. The National Commission while upholding the decision observed that the Appellants

had omitted and failed to place the 'endotracheal tube' while administering general anesthesia, which had to be introduced prior to biopsy. Secondly, the required procedure for administration of anesthesia in upper respiratory tract obstruction was not followed by the Appellants while administering general anaesthesia.[15]

4. The issue involved in this case falls in a narrow matrix. A 25 years young lady who went to Hospital for encirclement of the cervix by making sutures at the mouth of uterus to retain the pregnancy and prevent miscarriage died in the same hospital within 24 hours of the procedure.

The Hon. Court considered following facts.

The panel of autopsy surgeons opined that the death was due to shock following spinal anesthesia.

A skin specialist administered anesthesia though he was not qualified to do so. Defendant pleads that skin specialist had undergone intensive training course for 3 months in anesthesia as he was deputed by the Government with full pay and the purpose to overcome the shortage of anesthetists. They are permitted to administer anesthesia for simple and straight forward cases. Cervical Encirclage is a simple straightforward operation. But the court contends that the purpose of the training was to reduce the shortage of anesthetists in government hospitals and it was not meant to reduce the shortage of anesthetists in private hospitals.

This Apex Body meeting convened in the Chamber of the Director of Health Services to discuss the case in CR No. 135/96 under Section 174 Cr.P.C. observed that "the terminal complications that developed later leading on to the death of the patient were managed according to the standard protocols. The death cannot be attributed directly to the surgical or the anaesthetic procedure. Hence there does not seem to be any negligence on the part of the treating doctors."

But the court contends that in connection with the pending criminal case, the Apex body meeting was held to examine the case to determine whether there was negligence of a criminal nature on the part of the treating doctors. This case was not referred to them by the consumer fora to look into the aspect of medical negligence under the Consumer Protection Act. These two types of negligence are distinguishable. Its members have also neither heard the complainant nor the doctor who performed the post mortem. Hence, much reliance cannot be placed on the conclusions drawn by the Apex Committee.

There was poor post-operative care. It is clear from the records that several complications arose and patient was writhing in pain and agony after operation. Even then they did not summon any expert doctor for several hours after the operation. Nor did they suggest that she may be taken to another hospital for better management. If they could have not managed the case they should have referred the case to a nearby place, where there are many excellent hospitals, which they have not done. Thus the Forum declared deficiency in service and awarded compensation.[16]

5. It is the case of the Complainant that due to the negligence of the Doctors who performed a simple family planning operation, his wife lost her life. For the deficiency in service complaint is filed by him against all the three Doctors who were present at the time of the operation.

The learned counsel, appearing on behalf of Appellant submits that the Appellant has not performed the operation though she was called by Respondent No.3, owner of the Clinic when the condition of the patient, who was operated upon for the family planning, was serious.

The court gives the following remarks over this contention as it is unfortunate that doctors of the noble profession have gone down to such a extent that they are not prepared to disclose the events correctly. If the version of the Appellant is believed then it would mean that the operation was performed by the doctors who were admittedly not entitled to perform the operation, as contended by their learned counsel. It is to be stated that the Appellant never bothered to inform the Police about the misdeeds of Respondents that unqualified doctors performed the operation resulting in the death of the patient. She neither referred the matter to the Medical Council nor informed the State Medical Council for taking appropriate action against Opposite Parties.

The fact came out during proceedings is that, there was no Anesthetist in the operation theatre at the time of operation. Thus compensation is awarded for said negligence.[17]

6. The Petitioner is a Homeopath Doctor negligently administered allopathic treatment and left the patient when his condition deteriorated.

The national forum remarks that even if we assume that there is no connection with regard to the allopathic treatment given by the petitioner and the cause of death, in our view, there is a clear deficiency in service and negligence on the part of the Petitioner in giving allopathic treatment. Thus upheld the order of state commission.[18]

7. The complainant is a minor represented by his father. The case of the complainant in brief is that he was injured in a road traffic accident and suffered serious injuries to his left leg. He was taken Hospital and Diagnostic and Research Centre. X-ray and CT Scan were done and POP slab support was put on the fractured left leg. After shifting of the patient at

another hospital, treating surgeon informed the father of the injured that gangrene had set in and the left leg was required to be amputated to save the life of the injured. Treating physician also told father that if the injured had been treated for vascular injury soon after the accident, the left leg could have been saved.

The respondent submitted that father of the complainant had made a statement on the day of the accident that the complainant had suffered the injury due to self fall and has wrongly stated that it was road traffic accident. This shows that, the complainant had changed his stand to claim compensation from both the MACT and Consumer Fora. The NCDR forum states that pendency of the case before the MACT is not a bar in filing a case before the District Consumer Forum as the remedy provided under the Consumer Protection Act is an additional remedy as can be seen from Section 3 of the Act.

Compensation claimed before the MACT is for rash and negligent driving whereas the compensation claimed before the Consumer Fora is for negligence of the doctors.

The court concludes that it is clear that in such cases every medical man should be able to recognize the presence of severe vascular trauma in limb injuries so that urgent steps should be taken to shift the casualty to proper hospitals and save the limbs.

This shows clear negligence on the part of treating surgeon in not conducting the Doppler test and not referring the patient to vascular surgeon.[19]

8. The forum observes that it is high time that Doctors write correct notes in the operation record and discharge summary. These documents should be made available to the patient at any time without any hue and cry. When information is given orally, it becomes a matter of debate as to who is telling the truth. It is patient's right to know how his case has been dealt with by the treating Doctor. It will also enable him to follow the treatment prescribed for future and if required, sometimes, even to take a second opinion of an expert. It is the duty of the Doctor to state in the record all the details of the treatment given, medicines which are prescribed and the follow up advice, if any and give it to the patient for his reference. Patient has a right to get the medical record pertaining to him and he cannot be denied the same when he paid the Doctor/Hospital for his treatment and hired the services.

However, Petitioner has to pay costs for not maintaining the proper record, which amounts to deficiency in service. The cost is quantified in a very minimum amount in this case.[20]

9. Complainant himself is a Doctor (M.D., Ph.D.) Assistant Professor, Department of Paediatrics and Medical Microbiology, (Research Department) in State University of Ohio in the U.S.A.

The question in discussion in this case is - Whether the Courts or the Consumer Fora can sit in appeal against the decision taken by the expert doctors with regard to administration of a particular dose of medicine? And the answer would be – **No.** It is to be judged in the light of particular circumstance of each case.

Jurisdiction of the Consumer Fora would be limited in case of apparent deficiency in prescribing dose of medicine, i.e. in cases where Doctors have not taken reasonable degree of care in prescribing a particular dose of medicine. Reasonable care is to be judged on the basis of the skill and knowledge expected from such practitioner.

- Claim in the complaint is in Crores i.e. Rs.77,76,73,500/- (Rupees Seventy Seven Crores Seventy Six Lakhs Seventy Three Thousand and Five Hundred) – Rare.
- Disease suffered by the wife of the Complainant was also - Rare – TEN (Toxic Epidermal Necrolysis) which affects only 1 or 1.3 persons, out of 10 lakhs.
- Diagnosis of such disease is difficult and not simple and depends upon expertise of the medical practitioner, particularly, a Dermatologist.

In such a case, can a patient or his relative expect from the medical practitioner that the patient in all cases should be cured. Medical literature states that mortality rate is 25% to 70% and there is no exact treatment for such disease. Obvious reply in such cases is, everything is uncertain and no guarantee can be given by anyone on the earth that treatment would cure the patient.

AMRI Hospital where the patient was admitted. Allegations against the Hospital are.

a) it was not having Burns ward.
b) vital parameters were not examined/noted by doctors during her treatment.
c) IV fluid was not administered in the Hospital despite it is considered to be a supportive treatment for TENs.

Thirdly, the complainant has filed complaint before the West Bengal Medical Council and the W.B. Medical Council has specifically arrived at the conclusion that there is no deficiency or negligence on the part of the doctors.

The forum also opined that the doctor no doubt has discretion in choosing treatment which he proposes to give to the patient and such discretion is relatively ampler in cases of emergency."

It is true that a doctor or a surgeon does not undertake that he will positively cure a patient nor does he undertake to use the highest possible degree of skill, as there may be persons more learned and skilled than himself, but he definitely undertakes to use a fair, reasonable and competent degree of skill. 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." Undisputedly: Hence, this complaint is dismissed. There shall be no order as to costs.[21]

But the Hon. Supreme Court revert back the case to National Forum and order to compensate.[22]

10. By judgement and order in original case State Consumer Disputes Redressal Commission, arrived at a conclusion that despite required "advance glaucoma filtering surgery" the appellant performed RKD Operation (Radial Keradiathermy) by which complainant lost sight in his right eye.

NCDR commented that it cannot be disputed that RKD operation, i.e. to say, operation for removing myopia so that spects may not be required is not must. As such filtering of water, i.e. glaucoma operation was required to be performed first. May be that appellant may be expert, but that would not give privilege in not maintaining or producing relevant record or preventing from admitting the mistake committed by him. Considering all these aspects the State Commission rightly arrived at the conclusion that there was deficiency in service and negligence in not performing the operation for glaucoma first and not producing the necessary record before the State Commission.[23]

CONCLUSION

Now at this juncture about 400-450 cases of alleged medical negligence have piled up in the Maharashtra council office in the past 12 years.[24] This has shown the gravity of the current situation.

If the FIR has been launched against any doctor then enquiry against the charges will enquired by Medical Superintendent, Professor Medicine and Professor Forensic Medicine as the permanent members of enquiry committee in medical institutes and at District hospital Civil surgeon and In charge Physician will be the permanent members and other members would be added as per the requirement of the case as per Decision taken by Maharashtra state.

Thus in the concluding note it must be remembered that the doctor should consider the medical profession as sacred one and should follow the optimum level of ethics while treating the patients with due value to human rights, then only this profession will be away from legal battles, in spite of the high level of technicalities in the profession. Also it is the responsibility of the whole profession at large to maintain the faith of peoples in medical profession as in prehistoric era.

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b. Indian Penal Code (IPC) 1860.
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d. The Dental Council of India Act 1948 and regulations 1976.
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f. Consumer protection Act 1986.

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