EXCLUDING ADVOCATES FROM THE CONSUMER PROTECTION ACT, 2019: CRITIQUING THE SUPREME COURT'S REASONING IN *BAR OF INDIAN LAWYERS* V. *D.K. GANDHI* (2024 INSC 410)

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ABSTRACT

The Supreme Court of India recently ruled that the Consumer Protection Act, 2019 does not apply to legal professionals. The Court emphasized the unique and fiduciary nature of the legal profession, which cannot be equated with commercial services. This landmark judgment clarifies that services rendered by lawyers do not fall under the definition of "service" as provided in the Act. The Supreme Court of India's decision to exclude lawyers from the purview of the Consumer Protection Act, 2019 raises several concerns. The judgment potentially leaves clients vulnerable to substandard legal services. Ultimately, this decision impacts access to justice, as clients may find it more challenging to hold lawyers accountable, thereby undermining consumer rights and protections in the legal domain. This case comment examines the rationale behind the Court's decision and its potential impact on consumer rights and legal practice in India.

Keywords: *Consumer Protection Act, 2019, Legal Professionals*

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I. Introduction

India is a common law country that follows the adversarial model of administration of justice, wherein advocates[1]are expected to be dispassionate about the outcome and should work collectively to bring out the truth from the disputed facts. Hence, advocates are an indispensable constituent of the administration of justice and play a vital role in the justice delivery system. The advocates have been regarded with admiration and suspicion for centuries[2] and now questions have been raised about their liability towards litigants.

The liability of the advocates is threefold towards his client, i.e., contractual, tortious, and under consumer protection law.[3] Though contractual and tortious liability is certain but doubts have been raised with respect to their liability as service providers towards the litigants as consumers. It is to be realized that though litigants have the option of initiating disciplinary proceedings against the advocate for professional misconduct but an aggrieved litigant (consumer) who availed the services of an advocate would be more interested in the restitution for his personal injury rather than seeking punishment of the advocate for professional misconduct.

Recently, while addressing whether a complaint maintaining a claim of "deficiency in service" against practising advocates is maintainable under the Consumer Protection Act, 2019, the Court relied on the Statement of Objects and Reasons and issued sweeping observations. It concluded that neither the 1986 legislation nor the 2019 legislation was meant to cover professional services, and that professions such as law and medicine do not fall within "service" as defined in Section 2(42) of the 2019 Act. The soundness of the view expressed in *Indian Medical Association v. V. P. Shantha*[4]was doubted, and the case was referred to the larger bench for reconsideration.

A three-judge Bench, while deciding the reference arising from this judgement concluded that

> *"Since the Court had already concluded in unequivocal terms that the legal profession is sui generis and is not covered by the provisions of the Consumer Protection Act, the reference to a larger Bench was not necessary. The question as to whether the other professionals, excluding the legal*

[1]Though the Advocates Act describes lawyers as 'advocate' and other terms (barrister, pleader, vakil, mukhtar) are not used anymore, but for reader's convenience, the terms advocate and lawyer are used interchangeably.
[2] Stewart Macaulay, "Lawyers and Consumer Protection Laws", 14 *Law & Society Review*, 115 (1979).
[3]B. S. Venmugopal, "Civil Liability of Lawyers for Deficiency in Services: A Critical Analysis" 53 *Journal of Indian Law Institute*275 (2011).
[4](1995) 6 SCC 550

> *professionals, could be covered by the Consumer Protection Act, can be considered in an appropriate case, having a factual foundation for deciding the same."*[5]

Later on, while dismissing the review petition filed against the judgment, the Supreme Court made the following observation:

> *"Having perused the Review Petition and the connected papers with meticulous care, we do not find any justifiable reason to entertain the review petition."*[6]

Despite the subsequent orders effectively foreclosing a larger bench reconsideration, the observations made in the judgment require scrutiny. The judgment takes away the protective net of the lakhs of litigants who avail legal services, and they have been pushed to file suit in the regular civil court instead of seeking a quick and inexpensive remedy in the Consumer Commissions.

At this juncture, it is to be noted that when approaching the Courts for relief, litigants cannot be described as consumers because the administration of justice by the States cannot be described as offering service to the litigants. However, the advocates are primary beneficiaries of the judicial system as they make their living by offering their services to the litigants.

Barring some circumstances, the litigants usually approach lawyers in overwhelming, sudden, unforeseen circumstances. They do so with mental confusion and transient cognitive decline to make a rational decision. They have no previous exposure to court proceedings and awareness of legal processes. In such a situation, the litigants are completely dependent on the lawyers for their legal advice. Only the lawyers know as to what amount and degree of legal advice and representation is required for a litigant. The bargaining capacity of litigants is heavily affected by their lack of knowledge of the matter's complexity, the time required, the risks involved, and the case's likelihood of success. Hence, this issue needs to be examined from a consumer expectation perspective, i.e., what reasonable expectations litigants should have from the advocates, and what will be the remedy if those minimum reasonable expectations are not fulfilled?

II. Summary of Arguments

[5] *Bar of Indian Lawyers* v. *D. K. Gandhi*, Civil Appeal No. 2646 OF 2009. Decided on 7th Nov. 2024.
[6] *Medico Legal Society of India* v. *Bar of Indian Lawyers* Review Petition (Civil) @ Diary No(S). 57132/2024 in C.A. No. 2646/2009. Decided on 12th Feb, 2025.

The arguments are threefold – first, the distinct character of the legal profession; second, it is different from the medical profession; and lastly, it is ousting the jurisdiction of the consumer forums.

It was before the Supreme Court that the legal profession is *sui generis*. There is the inherent complexity of legal issues due to intricate statutes, case laws, and regulatory frameworks. The complexity escalates when disputes draw in multiple parties with adverse interests. There remains a high degree of uncertainty with no control over the outcome and working environment.

The legal profession stands distinguished from the medical profession as no objective care benchmark can be used to assess a lawyer's negligence. Whereas scientific standards of care exist to adjudicate medical negligence issues.

Though the Consumer Protection Act provides quick and inexpensive remedies but the beneficial legislation may be misused by disgruntled litigants not for pursuing redress for bona fide complaints of professional misconduct but for vexatious and speculative claims. Also, the Advocates Act, as a special statute, takes precedence over the general Consumer Protection Act providing remedies to consumers. Also, a distinction was sought to be created between lawyers whose services are availed on the basis of *vakalatnama* and those lawyers who are engaged without *vakalatnama* contending that the former will not fall within the purview of the Consumer Protection Act whereas the law will be applied only on the latter.

III. Points of Determination

The Division Bench formulated three questions for determination. These are as follows:

(i) "Whether the Legislature ever intended to include the Professions or services rendered by the Professionals within the purview of the CP Act 1986 as re-enacted in 2019?

(ii) Whether the Legal Profession is sui generis?

(iii) Whether a Service hired or availed of an Advocate could be said to be the service under "a contract of personal service" so as to exclude it from the definition of "Service" contained in Section 2 (42) of the CP Act 2019?"[7]

IV. Opinion of Justice Bela M. Trivedi

With respect to Q.1, it was held that as recast in 2019, the Consumer Protection Act, 1986, was intended only to shield consumers against unfair trade practices and unethical business practices. *'Professions'* and *'services rendered by professionals'* cannot be equated with

[7] para. 7

'business/trade' or *'services rendered by the businesses/traders'.* There is nothing in the record to show that Parliament meant to cover "professions" or "professionals" under this Act. If all professional services were brought under it, the consumer commissions would see a large spike in cases, mainly because the process here is quick and low-cost. These bodies were not created to manage broad professional-negligence disputes. It was also suggested that *the larger bench should revisit Indian Medical Association v. V. P. Shantha*.[8]

With respect to Q.2, referring to various precedents, it was observed that the legal profession is not like other traditional fields. It is not a commercial trade. It is service-oriented and seen as a noble calling. Advocates are central to how justice is delivered. Courts and clients rely on them at every step. Their duties go beyond earning fees. They carry ethical and public responsibilities. Taken together—the role, status, and duties—show that the legal profession is *sui generis.* It is unique in character. It does not fit easy comparison with any other profession.[9]

With respect to Q.3, it was observed that advocates are commonly viewed as their clients' agents and act on their behalf. Advocates must seek instructions from the client and must not exceed the authority given. They cannot make concessions or give undertakings to the Court without the client's express say-so. On this footing, it follows that the client exercises significant, direct control over how an advocate performs services during the engagement. Consequently, the services engaged from an advocate are in the nature of a contract of personal service and therefore fall outside the definition of "service" in Section 2(42) of the Consumer Protection Act, 2019.[10]

V. Opinion of Justice Pankaj Mithal

Justice Pankaj Mithaj largely concurred with the opinion of Justice Bela M. Trivedi and brought home one more point in his reasoning. He opined that the consumer protection laws across the globe are based on the resolution passed by the General Assembly of the United Nations. Referring to laws of several countries, he further observed that a trend of excluding lawyers from the purview of consumer laws is noticeable. Since, India is also a common law country and enacted the law based on the same resolution, India should also follow the same trend. On this basis, he also came to the same conclusion that advocates are excluded from

[8]para. 18 – 20
[9] Para. 29 – 30
[10]para. 41

the purview of the Consumer Protection Act, 2019, and a complaint for deficiency of services will not be maintainable against them under the Consumer Protection Act.[11]

VI. Critical Analysis of the Judgment

The Consumer Protection Act of 2019 is a beneficial piece of legislation. The main purpose of introducing this law was to provide quick and inexpensive remedies to the consumers as a class. It has been interpreted liberally to achieve the desired aim of widening the net of consumer laws over the goods and services offered to the consumers and to extend the protective net as widely as possible. Also, this law is not in derogation of rather in addition to other laws.[12]

One of the aims of consumer laws across the globe, as per Guidelines for Consumer Protection, is "to assist countries in achieving or maintaining *adequate protection* for their population as consumers"[13] and "to encourage *high levels of ethical conduct* for those engaged in the production and distribution of goods and *services to consumers."*[14]

Referring to the Preamble of the 1986 Act, the Supreme Court observed that"the use of the word 'protection' in the Preamble furnishes the key to the mind of the makers of the Act. Various definitions and provisions that elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control the otherwise plain meaning of a provision. *In fact, the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reason become illusory."*[15]

On another occasion, it was opined that"encouraged by the idea of providing an additional forum for the resolution of consumer disputes with the suppliers of goods and services, multiple quasi-judicial bodies/authorities/agencies were created. These bodies are not Courts, though invested with some of the powers of a civil court. *They render inexpensive and speedy remedy to consumers and are not intended to supplant but supplement the existing judicial system."*[16]

[11]para. 24 and 26.
[12]Consumer Protection Act, 2019 (Act 35 of 2019), s. 100.
[13] UN General Assembly, *Guidelines for Consumer Protection* GA Res 39/248, GAOR, UN Doc A/Res/39/248 (April 16, 1985).
[14]*Ibid.*
[15]*Lucknow Development Authority* v. *M. K. Gupta* (1994) 1 SCC 243
[16]*Laxmi Engineering Works* v. *P. S. G. Industrial Institute* (1995) 3 SCC 583.

The Consumer Protection Act, 2019 provides a well-structured adjudicatory mechanism for the resolution of consumer disputes. The Commissions at the district/State and National levels are presided over by District Judge/High Court Judge and Supreme Court Judge, respectively, who are veterans in the adjudication of legal disputes. Advocates would get an opportunity to be heard following the principles of natural justice. There are provisions of review[17] and appeal[18] so that the higher adjudicatory body may rectify any kind of error. In addition, the Supreme Court of India enjoys wide jurisdiction and powers, including special leave to appeal wherein an aggrieved person may approach the Supreme Court for requisite relief.[19]Advocates as a class should have complete faith in these bodies for adjudication of complaints against them.

a) Meaning of 'service'

The term *'service'* is defined under Section 2(42) of the Consumer Protection Act, 2019.With respect to medical professionals, in *Indian Medical Association v. V. P. Shantha*[20], an authoritative interpretation was given by the Full Bench of the Supreme Court for the definition of the term *'service'* which has been relied on since then. This judgment is also authoritative for other legal issues decided therein i.e. liability of medical professionals/doctors under the Consumer Protection Act, 1986.

With respect to legal professionals, *K Vishnu v. National Consumer Disputes Redressal Commission* provides an illuminating, informative, and explanatory judgment for holding the advocates liable for negligence. Placing reliance on the interpretation given in *Indian Medical Association Case,* it was held that where a legal practitioner is engaged to provide professional services for consideration—actual or promised—the arrangement is encompassed by Section 2(1)(o) read with Section 2(1)(d)(ii) of the Act.[21]

Similarly, Madras High Court in *Srimathi v. Union of India* observed that the language in clause (ii) of Section 2 (1) (o) is very wide as it uses the expression *"avails of any service for consideration." "That will not certainly exclude the services rendered by an Advocate. The*

[17]The Consumer Protection Act, 2019 (Act 35 of 2019), ss. 40, 50 and 60. [for the review jurisdiction of the District Commission, State Commission and National Commission respectively]
[18]The Consumer Protection Act, 2019 (Act 35 of 2019), ss. 41, 51 and 67. [for appeal against the orders of the District Commission, State Commission and National Commission respectively]
[19] The Constitution of India, 1950, art. 136.
[20](1995) 6 SCC 550.
[21]LNIND 2000 AP 528.

first part of the definition makes it clear that service of any description will fall within the scope of the Section. That will undoubtedly include the service of a lawyer to his client."[22]

The Supreme Court has interpreted the word 'service' widely on several occasions. For instance, the statutory body providing for constructed houses to the people was held to be a service provider for housing construction.[23] Similarly, a builder offering housing construction service was held to fall within the ambit of the Consumer Protection Act for failing to provide completion certificate.[24]Most recently, it was authoritatively observed that mere repeal of the 1986 Act by the 2019 Act, without anything more, would not result in exclusion of 'health care' services rendered by doctors to patients from the definition of the term "service".[25]

b) Disciplinary Action and Burden of Proof

Professionals are governed by respective statutory bodies and advocates are no exception to it. The Advocates are governed by the Advocates Act, 1961. The Bar Council of India is the statutory authority regulating the conduct of the legal profession. Section 35 provides the punishments which may be awarded to an advocate once he is found to be guilty of professional misconduct.

It is to be noted that the disciplinary proceedings under the law regulating legal professionals and consumer laws have different goals, processes, and responses. These laws widely differ in their scope and operation. Disciplinary proceedings are aimed at inculcating minimum required ethical standards which are short of committing offenses and also include anti-competitive practices.

With respect to professional misconduct, in *P, an Advocate, In re,*[26] the Constitution Bench of the Supreme Court has ruled that "mere negligence or error of judgment on the part of an Advocate would not amount to professional misconduct. It was further held therein that error of judgment cannot be completely eliminated in all human affairs, and mere negligence may not necessarily show that the Advocate who is guilty of it can be charged with misconduct." Similarly, in *T.A. Kathiru Kunju v. Jacob Mathai,*[27] the Supreme Court opined that "gross negligence would render the advocates liable for professional misconduct."

[22] AIR 1996 Mad 427.
[23]*Lucknow Development Authority* v.*M. K. Gupta*(1994) 1 SCC 243.
[24]*Faqir Chand Gulati* v. *Uppal Agencies (Pvt.) Ltd.*(2008) 10 SCC 345.
[25]*Medicos Legal Action Group* v. *Union of India* 2021 SCC OnLineBom 3696; *Vijil* v. *Ambujakshi T.P.* 2022 SCC OnLine Ker 863.
[26] AIR 1963 SC 1313.
[27] (2017) 5 SCC 755.

This may be examined from the standpoint of the burden of proof. The degree of proof significantly varies in civil and criminal proceedings. The burden is strict in criminal proceedings, and the allegation should be proved beyond reasonable doubt. Whereas in civil proceedings, the burden on the plaintiff is not that strict. Rather, it is to be discharged on the basis of balance of probabilities.

The Supreme Court has repeatedly observed that "the charges of professional misconduct must be clearly proved and should not be inferred from the mere grounds for suspicion, however reasonable, or what may be an error of judgment or indiscretion."[28]A similar observation was made in *T.A. Kathiru Kunju Case*, wherein it was opined that the burden is strict on the complainant when a complaint is filed against the advocate under the Advocates Act for disciplinary action to be taken against him. If the complainant is not able to prove the allegation beyond doubt, the advocate will not be held liable for professional misconduct.

From the above discussion, it may reasonably be inferred that though the complaint may be made to the concerned statutory authority, the strict burden of proof on the complainant will be an impediment in proving the misconduct of the advocate. Secondly, disciplinary action against the advocate will not be a complete redress to the consumer (litigant/client) who had already suffered losses in terms of time and money and their liability in the case.

c) Actionable Negligence or Gross Negligence

The lawyers' immunity was first established in *Rondel v. Worsley*[29]and later in *Saif Ali v. Sydney Mitchell & Co.*[30].The idea of immunity was based on public policy, i.e., it is not in the larger public interest to permit the claims to be raised as it would lead to re-litigation, i.e., opening up the matters that have already been decided by the courts. Other reasons in support of the immunity were said to be based on the idea of immunity accorded to all stakeholders in general who participate in the justice system, i.e., judges, lawyers, parties, and witnesses.

These judgments have shaped the jurisprudence of other countries, e.g., New Zealand and Australia[31], wherein the same immunity has been accorded to the advocates based on the same reasoning. Almost all commonwealth countries have retained immunity in favour of lawyers except Canada, wherein it was rejected in 1863, and no trace of immunity is found in the United States of America and countries of the European Union.

[28]*P. D. Khnadekar* v. *Bar Council of Maharashtra*(1984) 2 SCC 556.
[29] [1969] 1 A.C. 191.
[30] [1980] A.C. 198. In this case, the negligence alleged was failure to join (or advise the joinder of) the correct defendant to a running down claim before the expiry of the limitation period, and the issue of immunity arose on a third party claim by the defendant solicitors against counsel.
[31]*Giannarelli* v. *Wraith* (1988) 165 CLR 543.

Caution was also issued in these judgments. *McCarthy P*said that"the protection of the immunity should not be given any wider application than is absolutely necessary in the interests of the administration of justice."[32]*Lord Wilberforce*said that"in fixing the boundary of immunity from an action, which depends on public policy, an account must be taken of the principle that a wrong should not be without a remedy."[33]

The immunity accorded to lawyers was revisited in *Arthur J S Hall & Co (a firm) v. Simons*[34]whereinit was observed that

> *"The world has changed since 1967. The practice of law has become more commercialized; barristers may now advertise. They may now enter into contracts for legal services with their professional clients. They are now obliged to carry insurance. On the other hand, today we live in a consumerist society in which people have a much greater awareness of their rights. If they have suffered a wrong as a result of the provision of negligent professional services, they expect to have the right to claim redress."*[35]

Most judges have voiced their concern about revisiting immunity in light of the changing times, the changing role of the legal profession, and the perception of the common people. Granting immunity derogates from the fundamental principle of liability for negligence. Hence, the courts should be slow in awarding protection to law practitioners, particularly when similar protection is unavailable in other professions.

A long list of cases applying immunity and rejecting the claims of immunity to lawyers has been cited in the judgment[36], which clearly establishes that the immunity accorded to the lawyers is not absolute. Rather, it has been decided on a case-to-case basis. Many of the arguments raised in the present case were addressed in *Arthur J S Hall & Co.* case. It was observed that

> *"There would be benefits to be gained from the ending of the immunity. First and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against barristers. The mere doing of his duty to the Court by the advocate to the detriment of his client could never be called negligent. Indeed, if the advocate's conduct wasbonafide, which*

[32]*Rees* v. *Sinclair* [1974] 1 NZLR 180, 187.
[33]*Saif Ali* v. *Sydney Mitchell & Co.* [1980] AC 198, 214H
[34] [2002] 1 AC 615.
[35]*Id.* at 682.
[36]*Id.* at 635, 638 [para – 29 for admitted claims and para 30 for claims which were refused at respective page numbers].

> *dictated his perception of his duty to the court, there would be no possibility of the court holding him to be negligent.*

The Courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against barristers will be struck out.

> *It must be borne in mind that one of the functions of the tort law is to set external standards of behavior for the benefit of the public and it would be right to say while standards at the Bar are generally high, in some respects there is room for improvement. An exposure of isolated acts of incompetence at the Bar will strengthen rather than weaken the legal system. Thirdly and most importantly, public confidence in the legal system is not enhanced by the existence of the immunity."*

Though *Arthur J S Hall & Co.* does not directly deal with the issue of the advocates falling within the ambit of the consumer laws, the above observations answer almost all the concerns raised in the present judgment.

The basic principles for establishing negligence remain the same under the law of torts as well as consumer laws. The litigant would also need to establish the causal connection between the loss/injury caused and the negligent conduct of the advocate. It may be difficult to prove and may lead to a re-trial of the ongoing proceeding, which will result in the litigant being occupied in other protracted, lengthy legal proceedings.

According to Winfield,"negligence as a tort is a breach of a legal duty to take care of, which results in damage to the claimant." Three essential elements need to be fulfilled in order to make a person liable for negligence. The professionals constitute a distinct class and are separate from traders, manufacturers, and businesspersons. *Bolam test*is invokedto determine the liability of the professionals for their negligence. This test requires that "*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."*[37]

*Jacob Mathew v. State of Punjab*distinguished between simple negligence and gross negligence.[38]The Supreme Court in *P. D. Khnadekar*observed that "giving of improper legal advice is different from giving of wrong legal advice. While the former may amount to

[37]*Bolam* v. *Friern Hospital Management Committee* [1957] 1 WLR 582.
[38] (2005) 6 SCC 1.

professional misconduct, the latter may not be so."[39]Hence, the advocates cannot be held liable for a simple lack of care or error of judgment. An advocate cannot be held liable merely because the final verdict was not in favour of the party whom he represented. An advocate cannot be held liable for being negligent merely on the plea that a better strategy could have been adopted in the case.

Hence, it may be seen that there is a grey area between simple lack of care and gross negligence. Instances falling in this grey area may fall short of professional misconduct, not warranting initiation of disciplinary proceedings against the advocate, but may amount to civil/actionable negligence,and the advocates may be held liable for the same. For instance, when the suit or application is not filed within the period of limitation[40] or where the advocate did not appear in the court to represent the litigant after having accepted the brief and the fees and consequently, the suit is dismissed for default of non-appearance, and the application is moved for setting aside ex-parte decree under Order 9 Rule 13. Here precious judicial time is wasted and matter remain pending for years in the court and the litigants suffered loss or damage on the merits of the suit.[41]

Several instances may be found wherein the Supreme Court and High Courts have observed that a litigant will not suffer for the mistake/negligence of the lawyer. In these cases, the relief was granted to the litigants, and even cost was imposed on the plaintiff, but the question of awarding compensation for loss caused due to their deliberate negligence and in terms of wastage of judicial time was not considered against the erring lawyers. These are instances of deliberate negligence by the lawyers and dereliction of duty towards the client and court. In these circumstances, the negligence of the advocate may be quite manifest, and the aggrieved litigant may not be required to lead any evidence to prove it, and the Court may even invoke the doctrine of *res ipsa loquitur* and may hold the lawyer liable for civil negligence.[42]

The arguments with respect to the absence of an objective standard of care for determining negligence are manifestly inconsistent with the well–settled legal position as elaborated above. The dichotomy of the argument is evident, in that lawyers, as a class, admit

[39](1984) 2 SCC 556.
[40]*Ramlal* v. *Rewa Coal fields Ltd.* AIR 1962 SC 361; *Ram Kumar Gupta* v. *Har Prasad,* (2010) 1 SCC 391; *Man Singh Dead through LRs* v. *Gaon Sabha Jindpur & Ors.* (2012) 128 DRJ 611 (DB);*M/S Island Sports Emporium* v. *The Director, Directorate Of Postal Services* [decided by the State Consumer Dispute Redressal Commission, Andman Nicobar Island on 27th May, 2009; available at: https://indiankanoon.org/doc/198977750/ (Last visited on 3rd June, 2024)].
[41]*Bank of India* v. *Mehta Brothers,* AIR 1991 Del 194; *Badri Bhagat Jhandewalan Temple Society* v. *Delhi Development Authority*, AIR 2003 Del 351.
[42]*Ashok Kumar* v. *New India Assurance Co Ltd*. 2023 INSC 659.

that no objective standard of care exists to determine lawyers' negligence while simultaneously pleading for negligence claims to be filed as civil suits in ordinary civil courts, thereby ousting the jurisdiction of consumer forums, which are primarily beneficial to consumers for expeditious disposal of complaints and offer an inexpensive remedy.*If no parameter exists to determine a lawyer's negligence, how would a civil court be able to adjudicate the same?*

The Supreme Court drew a reasonable balance while deciding the liability of the medical professionals/doctors for negligence. However, complete immunity was accorded to the advocates in the present case without drawing any balance between the obligations of the advocates and the rights of the litigants as consumers.

Further, the Supreme Court regarded legal practice as a noble, service-oriented, *sui generis* profession with duties to court and society. The uniqueness and *sui generis* character justify tailored standards of care, not categorical exclusion.

d) Contract of Service and Contract for Service

The question of determining the nature of employment/engagement has vexed the Courts several times. Earlier *control test* was applied for determining the nature of engagement, but it was suited to an agricultural society, prior to the Industrial Revolution. Though *control* is unquestionably an important factor, it is not the decisive factor for deciding the nature of engagement because the nature of employment and terms and conditions have undergone a tremendous transformation with the Industrial Revolution and the advancement in technology.

The Supreme Court held that…

> *"The test of supervision and control may be taken as a prima facie test for determining the relationship of employment. Since the nature or extent of control varied from business to business, it became impossible to define precisely the extent of* ***control*** *and* ***supervision."***[43]

The judicial reasoning holds that the greater the direct control over how services are rendered, the stronger the case for a contract of service. Conversely, the greater the professional's autonomy over method and judgment, the more it indicates a contract for services.

[43]*Shivnandan Sharma* v. *Punjab National Bank Ltd.* AIR 1955 SC 404; *Dhrangadhra Chemical Works Ltd.* v. *State of Saurashtra* AIR 1957 SC 264; *Silver Jubilee Tailoring House* v. *Chief Inspector of Shops and Establishments* (1974) 3 SCC 498.

There is no doubt that the legal profession is quite distinct from the medical profession. The Advocates Act, 1961 confers the right to practice on the Advocates. Also, there is no disagreement with the fact that advocates are generally the agents of their clients, owe fiduciary duties to them, and cannot make any concession without the express approval of their clients. However, it is to be understood that advocates are skilled in advocacy, which implies being skilled in the art of persuasion in order to seek the requisite relief for their clients.[44]*Clients are laypersons who do not know and understand the legal proceedings, formalities, and intricacies and, therefore, approach the advocates for legal advice and engage them to represent them in the Court and repose complete trust in them. In such circumstances, what meaningful oversight can a client exercise over an advocate?*

In addition to the forgoing, the argument draws a distinction: lawyers engaged without a *vakalatnama* and outside the court precincts would be covered by the Consumer Protection Act, whereas those engaged on a *vakalatnama* would not. Even when an advocate is engaged on a *vakalatnama*, he also handles straightforward, checkable tasks—filing before a deadline after taking fees, serving documents, sending a promised legal notice, drafting a specific contract, or returning escrow money. These are standard service jobs with clear benchmarks and paperwork to show what was or was not done. Hence, this framing is misconceived. Whether an advocate is engaged with or without a *vakalatnama* is not materially significant. In practice, a client exercises little to no control over how a lawyer works, beyond explaining the scope of the task.

Furthermore, the 2019 Consumer Protection Act expands "deficiency" to include negligence and the deliberate withholding of relevant information.[45] These are classic professional lapses. By targeting these behaviours, Parliament signaled that the Act is meant to address and redress advisory/transactional failures. Hence, the reasoning in holding the relationship of advocate-litigant as a contract of service and thereby falling under the exclusionary part seems to be manifestly flawed. It must also not be forgotten that the advocates are usually in a dominant position in the advocate–client (litigant) relationship and may easily influence and manipulate the litigants.[46]

e) Principles of Interpretation

[44]Sudipto Sarkar and Siddharth Sethi, *Hints on Modern Advocacy, Professional Ethics and The Art of Cross-Examination*, (LexisNexis, Delhi, 2023).
[45] The Consumer Protection Act, 2019 (Act 35 of 2019), s.2(11).
[46] The Indian Contract Act, 1872 (Act 9 of 1872), s. 16.

While enacting the law first in 1986, later amending it in 2002 and finally overhauling it in 2019, the Parliament was well aware of the definition of the service and the interpretation placed by the Supreme Court on the term 'service' and holding the doctors liable for medical negligence. Had the Parliament not intended to include the professional's liability, the exclusionary part of the clause would have expressly excluded the professional's liability.

Further, the Hon'ble Supreme Court leaned heavily on Objects & Reasons and the UNO guidelines to say *there was not a whisper about including professions*; from this, it inferred exclusion. There seems to be an incongruity in the judicial reasoning. The judgment infers a blanket exclusion of the legal profession from legislative silence, which cannot be reconciled with the breadth of "service" the Court itself acknowledges. It also appears not to have duly accounted for the expanded definition of "deficiency," which points toward coverage of service relationships, including professional engagements. Moreover, the Courts do not have the liberty to interpret the law as per their whims and fancies, ignoring the well-settled principles of interpretation in the absence of any specific exclusion clause.

Statutes should be read to give effect to what the legislature intended. Interpretations that produce obvious absurdities should yield to readings that advance the statute's purpose. Courts should, as far as possible, avoid constructions that make the legislature appear irrational, or that treat its words as redundant or superfluous. The preferred approach is to adopt an interpretation that gives every word practical meaning and effect rather than one that renders the enactment futile.[47]

A beneficial law has to be provided and receive a beneficial interpretation or meaning, which should serve the interests of those for whom it is meant and promote its object. If there are two or more constructions possible, a construction that is beneficial and protects the interests and favours those for whom the law was made is to be followed.

Further, it is to be noted that the Advocates Act, 1961 and the Consumer Protection Act, 2019 deal with two altogether different aspects. The Advocates Act, 1961 regulates the legal profession whereas the Consumer Protection Act, 2019 intends to protect consumers from various unethical business practices and provides various relief to them. The question of the Advocates Act, being a special legislation, does not arise at all and cannot be sustained in light of the present scenario.

Also, it must be clarified that Indian Courts may consider the foreign laws and precedents in order to appreciate the evolution of law and resolution of legal issues. However, these are

[47]*Tinsukhia Electric Supply Company Ltd.* v. *State of Assam* MANU/SC/0027/1990; *The Executive Engineer and Ors.*v. *Seetaram Rice Mill* MANU/SC/1334/2011.

of persuasive character and not binding at all on Indian Courts. Though the Supreme Court of India has followed foreign precedents on several occasions but it has also evolved its own jurisprudence, principles and tests for adjudication of legal disputes and determination of liability of the parties.[48] The Courts have been cautious in adopting and following the foreign precedents and have duly considered the socio-economic conditions of the country. Merely because India is also a common law country does not mean that advocates should be excluded from the purview of the Consumer Protection Act depriving lakhs of litigants from availing the benefit of the suing the negligent advocates.

f) Access to Justice

The present case may be examined from the human rights perspective of access to justice as enshrined in various international covenants and charters.[49]Access to justice in India flows from the Preamble's promise of social, economic, and political justice. It is concretised by Articles 14 and 21, which require fair, just, and reasonable procedure and effective remedies. Article 39A mandates equal justice and free legal aid. Denial of this right undermines public confidence in the justice delivery system. The Supreme Court has also observed that "access to justice is vital for the rule of law. Access to justice should not be seen only in the quantitative dimension. Access to justice in an egalitarian democracy must also be understood to mean qualitative access to justice."*[50]*

Access to justice means not just a door to court, but timely, affordable, and credible adjudication. The examination of the present pronouncement from the access to justice perspective becomes important due to peculiar reasons i.e. the awareness level of the Indian litigants, their economic capacity to engage lawyers in regular civil courts, and to pursue cases for several years due to the high pendency of cases in Indian courts.

It is humbly submitted that it will be very difficult for a litigant to engage another lawyer to represent him against a fellow lawyer. The litigant will be in a disadvantageous position, as he cannot compete with a lawyer. A lawyer is the master of the court proceedings and may easily sway the presiding judge with his persuasive arguments and leverage the situation to his advantage. Though the right has been given to the people to appear and present their case on their own[51] but, *would it be an effective alternative to seek justice, particularly when the common people are not aware of the complexities and formalities of the judicial process?*

[48]*M. C. Mehta* v. *Union of India*, AIR 1987 SC 1086. (popularly known as Oleum Gas Leak cases wherein the doctrine of absolute liability was propounded by the Supreme Court considering peculiar Indian circumstances)
[49] The International Covenant on Civil and Political Rights, 1966, art. 14(3).
[50]*Imtiyaz Ahmad* v. *State of U.P.* (2012) 2 SCC 688.
[51] The Code of Civil Procedure, 1908, (Act 5 of 1908) Order III Rule 1.

Would it not affect the delivery of justice and the faith of the common people in the judicial system?

The Hon'ble Supreme Court should not be oblivious to the fact of the huge pendency of cases in Indian courts. As on 7th July, 2024, 4,52,35,668 cases are pending in lower courts in India wherein 1,09,68,166 are civil cases.[52] In a reply recently filed in Rajya Sabha,[53] it was replied that as of 30.01.2024, 5,43,592 consumer cases are pending in all consumer commissions of the country. The pendency of cases in regular civil courts and consumer forums reflects the systemic and infrastructural challenges resulting in much delayed delivery of justice to the litigants, particularly to consumers. Though the pendency in Consumer Commissions is also on the rise, it is fairly low in comparison to the pendency of cases in civil courts.

In this situation, directing the consumers to approach regular civil courts to seek remedies would be a travesty of justice. It should not be forgotten that access to justice is a fundamental right of every citizen under the Constitution of India. Unduly long delay brings about the blatant violation of the rule of law and adverse impact on the common man's access to justice.

g) Floodgate Argument

The "floodgates" argument contends that granting relief to one claimant will trigger a cascade of similar claims that could overwhelm the system. It is typically advanced as a prudential caution rather than a data-grounded prediction. English courts have not responded by barring entire categories of claims; instead, they have imposed narrow control mechanisms to calibrate entry. For instance, with respect to nervous-shock claims, in *McLoughlin v. O'Brian*, liability depended on a close tie of love and affection, proximity in time and place, and shock by direct perception.[54]*Alcock* reaffirmed that approach and distinguished primary from secondary victims.[55]

The same judicial reasoning may be applied to deal with present situation. Claims against advocates should not be categorically excluded; instead, liability should turn on a clear and

[52]The information was obtained from live dashboard of National Judicial Data Grid on 7th July, 2024. The figures quoted may vary in real time. Available at: https://njdg.ecourts.gov.in/njdgnew/?p=main/pend_dashboard (Last visited on 7th July, 2024).
[53]Available at: https://sansad.in/getFile/annex/263/AU66.pdf?source=pqars (Last visited on 16th May, 2024). The latest data on Consumer Cases shows a declining trend, i.e. number of cases pending in consumer commission came down from 5.55 lakh in December 2022 to 5.45 lakhs in September 2023. In 2023, the number of cases disposed was at 1.36 lakhs, which is higher than the number of filed at 1.26 lakhs. Available at: https://pib.gov.in/PressReleasePage.aspx?PRID=1962143 (Last visited on 16th May, 2024)
[54] [1983] 1 AC 410 (HL).
[55]*Alcock* v.*Chief Constable of South Yorkshire Police* [1992] 1 AC 310 (HL).

narrow standard: the claimant must prove fault and prove loss, and recovery should be limited to verifiable lapses in professional service. The judgment's floodgates worry is conjectural. No reliable Indian numbers show a flood of cases against lawyers, and none show that tailored liability would cause one. Clear, well-defined liability standards are a better policy choice than granting blanket immunity.

VII. Conclusion

The Hon'ble Supreme Court itself mentioned that an advocate is an officer of the Court, and he discharges important functions for the efficient administration of justice. By applying the same logic, *can it be argued that advocates as a class occupy a distinct position and deserve concession from being held accountable for their professional negligence in consumer forums? Will the prosecution of the lawyers for their negligence in the consumer forums undermine the discharge of their duties towards the court? Alternatively, will diverting litigants (as consumers) to regular courts help the lawyers in performing their responsibilities and discharging their duties? Can the Consumer Commissions, which are presided over by the judges of the District Court/High Court/ Supreme Court, be not trusted to strike out frivolous cases against the lawyers and to entertain and decide the genuine claims? Are the consumer forums not being undermined by this argument and judgment?*

The Consumer Protection Act, an extension of the law of torts, is a codified law that was enacted to provide quick and inexpensive remedies to aggrieved consumers. With the enactment of the law, awareness is being spread, leading to more cases being filed. The Consumer Protection Act 2019 has recently been overhauled and has incorporated several new concepts, e.g., product liability action, unfair contracts, misleading advertisements, and celebrity endorsement. In light of these legislative developments, the present judgment appears to be regressive and does not keep pace with the modern realities of the commercial world that affect consumers.

It is strongly suggested that blanket immunity to lawyers and other professionals from the Consumer Protection Act, 2019 will not serve any purpose. Rather, exclusionary rules or some other alternatives may be developed. The Odisha High Court suggested one such alternative in the form that costs may be imposed personally on the lawyer due to whose negligence the litigant suffered dismissal of the suit for default or non-appearance or for not taking appropriate steps within the period of limitation.[56]

[56] *Mohan Prasad Singh Deo* v. *Ganesh Prasad Bhagat* LNIND 1951 ORI 7

It would be too optimistic to suggest a consumer protection model for regulating lawyers as advocated in the United States.[57] However, mandatory insurance policy options may be implemented in India, which is widely prevalent in other countries, e.g., Australia, England, and Wales. In these jurisdictions, it has been made mandatory for lawyers to buy insurance policies to meet any claim for negligence against them in the future. The scope of coverage is well–defined, and these are managed by the Law Society.[58]

Making professional liability insurance in India mandatory will be a win-win solution for all the stakeholders, i.e., consumers will get compensation as decided by the adjudicatory bodies, lawyers will be held accountable towards their clients, and they will not suffer an immediate financial liability in case they are held liable. In the long run, this will achieve the twin objective of the law of torts, i.e., deterrence and distribution/shifting of losses.

The fear of paying compensation to the client for negligence will result in the rising cost of hiring legal services, but it will make the lawyers more responsive, attentive, and accountable, resulting in improved quality of legal service, timely adjudication of disputes, increased confidence in the justice system, and greater consumer satisfaction. The lawyer's community will be able to fulfill the aspiration of a new India, which will soon be the world's third-largest economy and require a strong and robust lobby of lawyers with high standards, professionalism, and accountability.

[57] Deborah M. Chalfie, "A Consumer Protection Model for Regulating Lawyers", 4 *Advancing the Consumer Interest* 24 (1992).
[58] Available at: https://www.scottishlegalcomplaints.org.uk/about-us/who-we-are/oversight-research/research-trends-in-practice/master-policy/ (Last visited on 3rd June, 2024)