

**THE CONSUMER PROTECTION ACT, 2009**

# To deal with medical negligence



KH KOHINUR AKTER

**E**VERY doctor has professional, legal and moral duty towards his patients. It is their duty to extend medical assistance to save the life of patients.

According to the World Medical association Declaration of Geneva, a member of medical profession shall solemnly pledge stating that health of the patient will be a his first consideration. On the other hand, medical negligence is a clear violation of right to health by a professional group who are actually on duty to protect when emergency strikes and the health rights are under threat.

In contrast, it connotes culpable carelessness in the field of medical science and it involves risk to the health and being of an individual who entrusts his well being into the hands of a medical professional. It is certainly a clear violation of the right to health and right to life guaranteed by the Constitution of Bangladesh under Article 18 and 32.

Medical negligence with special reference to the Consumer Rights Protection Act 2009 has the same sanctity of protection and enforcement of rights of patients. Now they can institute a suit under this Act because a medical patient is considered as a consumer and the medical institutions or professionals are as service provider under section 2, though it is not expressed stated in the Act but cases have been filed and accepted by the courts.

Section 45 of this Act has dealt with the punishment of not selling or delivering the promised product or service. It provides imprisonment for a term not exceeding 3 years, or with fine not exceeding 2, 00,000 taka, or both. Another punishment has

been provided of endangering life or security of the consumer in Section 52 where it is stated that whoever does any act violating the rules or regulation under this Act or law which can endanger the life or security of the consumer will be punished with imprisonment for a term not exceeding 1 year, or with fine not exceeding 50,000 taka, or both.

The section which can directly be connected to the medical negligence is section 53 which stated that if any service provider causes damage to money, health or life of service receiver by negligence, irresponsibility or carelessness, he will be punished with imprisonment for a term not exceeding 3 years, or with fine not exceeding 2,00,000 taka, or both. However these punishments are not adequate because the amount of fine may be sometimes inconsistent to the loss or injury occurred by the service providers.

Moreover, if a consumer under the Consumer Protection Act 2009 wants to lodge a complaint under section 60, first he has to lodge a complaint before the Director General or authorised person of the department within 30 days of accrual of the cause of action. And according to section 61 the magistrate will not take cognizance of any offence if charge sheet is not submitted within 90 days of lodging complaint. It means even if a consumer suffers from any loss, he can't file a complaint directly to the Magistrate and the Magistrate would not take cognizance until he gets the charge sheet from the authorised person within 90 days. So the consumer sometimes get frustrated or does not show his interest as this procedure is complex and seems inconvenient.

In cases of private sectors, the Director

General has the power to find out defects and lacking by checking the health-nursing care but cannot take any preventive measure. He will only inform the secretary, Health Ministry and the Director General of the Health Directorate. So it is a big obstruction in punishing medical professionals working in private sector that's why the occurrences of professional negligence in private clinics are increasing day by day.

The term 'medical profession' has not been inserted expressly in section 2 whereas in the Consumer protection Act of India 1986 the term has been added under section 2 (1) (o) in 1995. The Supreme Court in the case *Indian Medical Association v VP Shantha* (3 CPR (1995) 412) decisively included the health profession as a subject matter under Consumer Protection Act. Indeed, this term should be inserted in our Act so that it becomes definite that the victims' suffered through medical wrongs go to the consumer court and seek proper justice.

Though there is a criticism that whether medical care is to be regarded as merely a product or not but it has tremendously helped to tune some cases of medical negligence in our neighboring country India where medical negligence litigation is credited with bringing about safer practices in the health care provisions.

Therefore, amendments should be made in the Consumer Protection Act of Bangladesh to make it effective and adjustable to medical negligence litigation. So that the state can offer surety of improvement to the patients in health care delivery system addressing common good of the public health.

THE WRITER IS LECTURER OF LAW, SSHL, BANGLADESH OPEN UNIVERSITY.

 **YOUR ADVOCATE**

**This week Your Advocate is Barrister Omar Khan Joy, Advocate, Supreme Court of Bangladesh. He is the head of the chambers of a renowned law firm, namely, 'Legal Counsel', which has expertise mainly in commercial law, corporate law, family law, employment and labor law, land law, banking law, constitutional law, criminal law, IPR and in conducting litigations before courts of different hierarchies.**

**Query**  
We are a service provider company and we receive cheque payments from many of our customers. One of our clients is not paying us regularly. His cheques are frequently bouncing. We have requested him many times to make timely payments and to ensure that his cheques are honoured. We would now want to take legal action regarding the cheque bounce. Thank You.  
**Anonymous Dhaka**

**Response**  
Thank you for query. We understand your position. Unfortunately, now-a-days we see many situations when cheques are not honoured. In most of the transactions, be it re-payment of loan or payment of fees/price for business purpose, payments are made by cheque. These cheques sometimes remain unpaid and are returned by the bank on which they are drawn. If the cheque is not honoured by the Bank for some reasons, the same may amount to criminal offence on the part of the person issuing the cheque. Section 138 of the

Negotiable Instruments Act, 1881, popularly known as NI Act, provides for such punishment.

As per section 138 of the NI Act, where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or part, of any debt or other liability, is returned by the bank unpaid because of the amount of money standing to the credit of that account in insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and be punished with imprisonment for a term which may extend to one year, or with fine which may extend to thrice the amount of the cheque, or with both.

It is worth noting that offence of dishonour of cheque as mentioned in section 138 of the Act is considered as a criminal offence. The law has been designed to punish and not to recover an amount due. The section, however, keeps the possibility of recovery as the

holder of the cheque may be paid by the court an amount up to the cheque amount from any fine that is recovered. If someone wishes to recover unrealized money then he or she can file a civil suit for recovery of money. However, in reality it has been found that filing a criminal proceeding under s.138 has been the most effective form of recovery of money. Most of the times, the drawers pay the amounts due when cases under NI Act are commenced in the anticipation of conviction.

There are certain procedures that need to be complied with before you can proceed with filing a criminal prosecution. Firstly, present the cheque before the bank for encashment within the validity of the cheque. A cheque is valid for 6 months from the date of the cheque. In a situation when, the cheque if not honoured, you will receive a bank memo stating the reason for return of the cheque. After getting the information from the bank send your client (the drawer of the cheque), if the reason is 'insufficient fund' or 'instruction from the issuer' then you can start the process under the NI Act. You need to send a notice within 30 days from the date you have received such information from the bank to the issuer requesting payment allowing him to pay within 30 days of the receipt of the notice. Such notice shall be served by personal delivery, by registered post with A/D or may be by publication in the widely circulated newspaper. If the drawer fails to pay within this period, then a cause of action will arise against him. In such scenario, you must file a case before the Court of Judicial Magistrate of First Class within the next 30 days from the date when such cause of action arose. Maintaining the timeframe state above is the key to file action under the NI Act.

FOR DETAILED QUERY CONTACT: OMAR@LEGALCOUNSELBD.COM.

# In search of Dumbledore

SYED JAWAD QUADER

**F**OR the cover of the latest edition of his popular book called Constitutional Law of Bangladesh, Mr. Mahmudul Islam, who is a former Attorney General of Bangladesh, chose a tastefully grim and grey picture of the Supreme Court building taken against the backdrop of an overcast sky. In his forewords to the edition, he mentions those dark clouds as he laments the present state of the constitution and how it is being practiced and applied.

The practice of law for a junior as a first generation lawyer can perhaps be compared to that of the travails of a stray puppy abandoned in the streets at birth. If it manages to survive, the puppy will not travel much, but will rather concentrate all its efforts into acclimatising and habituating itself with the surroundings of the street he was abandoned in. It will try to claw through bullies, ward off and avoid lurking dangers and meal through leftovers in a desperate attempt to, over time, be accepted by, ironically, the bullies among it's own species. Just as the abandoned puppy hopes in vain to find the caring shelter of a guardian, a junior lawyer desperately seeks the mentoring guidance of a senior. Many junior lawyers I know working under seniors are still scouring around for that elusive mentoring guidance.

For my part, I was not lucky enough to be anchored under a senior for the better portion of my life as a practicing lawyer. Perhaps because I as a first generation lawyer did not realise how big a role they play shaping a junior's professional and personal life. It naturally came to me in the beginning to regard my senior as merely my employer, until I slowly realised that they may mean so much more.

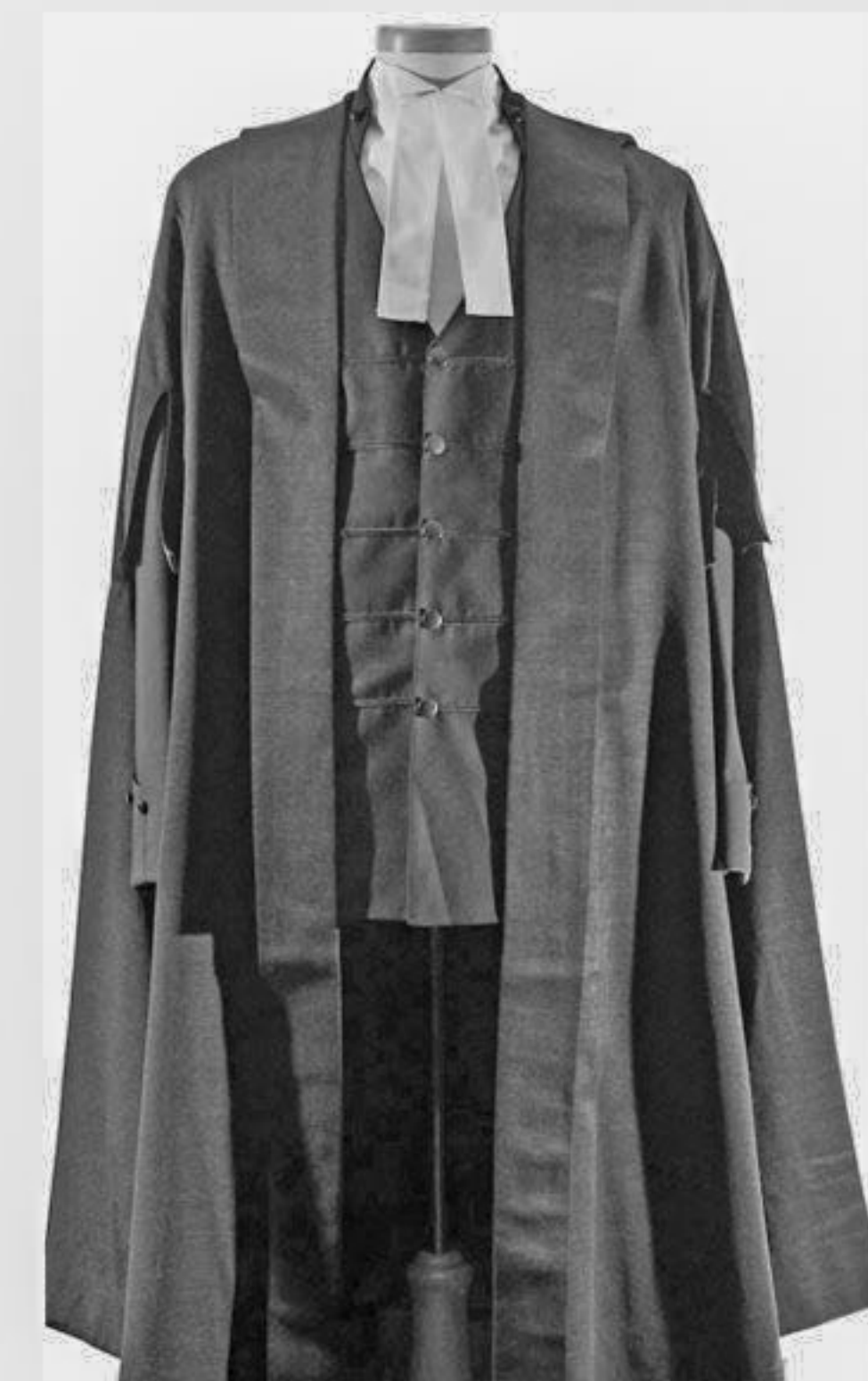
In a candid session that I once had with Anisul Huq Sir, he told me that a senior not only sets your direction in your professional life from the get-go, but also leaves his footprints on how you go about that path for the rest of your life. That the senior and his practice lives in through his juniors, that he is in essence a reincarnation of the professional life of Shahid Suhrawardi who mentored his father being the Late Advocate Serajul Huq. That others who we know to be unscrupulous in their trades are still carrying out the lessons of practice that were laid down before them by their respective seniors. He told me that his success in politics is due to his success in the practice of law, and his success in politics shall never define his success in the practice of law.

That candid session stayed with me. I could see an imprint of the few seniors I have worked with embedded in the way I think in a manner I did not see before. It also brought to the fore one of the only two regrets that I have over my professional life. That regret is that I never got an opportunity to work with Mahmudul Islam Sir yet.

The tales that I have heard about Mahmudul Islam Sir from all around are stuff that legendary folklore is made up of. I have, for instance, heard stories of him refusing to accept (and indeed, returning!) fees paid in excess of what his charges are by insistent clients. Such honour is above everything I have seen in the legal profession. The one time I wanted to hire him for a senior brief, I took his chamber's phone number off the net and called directly without any reference, expecting to fix up an appointment with Sir with an assistant or a clerk. I was bewildered for a second when Sir himself picked it up, and asked me about the case. After hearing it, he affectionately called me "bhai", politely informed me that he does not take any High Court briefs as he has confined himself to practice in the Appellate Division only, and pleaded with me to seek another senior. After noting the disappointment in my voice, he spent another 3 minutes over the phone giving me directions about how to go about in the case, which bench to take it before and who to seek for further guidance. I was humbled by the time I put the phone down. He didn't need to do that. Many seniors of his stature won't even have acknowledged me as a self-respecting human, much less a lawyer.

Being the vociferous deviant from and passionate arguer against the traditional sole-practitioner style of legal practice, I have always regarded Sir to be the epitome of that style of practice. He makes me want to let my ideals and morals be my sole driving forces through the pathways of law. He makes me want to romanticise law and write lofty novels on the nobility of this trade, something that I firmly believe has been long dead. Hearing about his life is to me like dipping my head into and losing myself in Dumbledore's Pensieve. Through his work and books, he has left an indelible impression in every Bangladeshi lawyer's life, and through his ideals and morals, in many Bangladeshi's hearts. The silver linings in those black clouds have not disappeared.

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 **FOR YOUR INFORMATION**

# Our right as consumers

The Constitution of the People's Republic of Bangladesh mentions about the States duty to ensure the rights of consumers. Art. 16 of the Constitution the People's Republic of Bangladesh provides that, "The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of a agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rules areas."

Article 18 of the Constitution also provides, "The state shall regard the raising of the level of the nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic, and other intoxicating drinks and of drugs which are injurious to health.

Consumer rights are recognised in the Consumer Rights Protection Act, 2009. The rights include:

1. Obtaining commodities or services at a price fixed by the authority or at a reasonable price.
2. Right to have safe and pure products.
3. Right to have necessary and correct information about products.
4. Right to be informed of the qualities or defects (if any) of a particular product.
5. Right to know the quantity of the product.
6. Right to know the utility, purity and price of the product.
7. Right to have products or services in right quantity and quality.
8. Right to have choice among product offerings.
9. Right to have defense against activities relating to purchase or sale of products by which life or property may be in danger.
10. Right to education about consumer rights and protection.
11. Right to have access to remedy in relation to violations of consumer rights.

SOURCE: A BOOKLET ON CONSUMER PROTECTION IN BANGLADESH, CAB

