

Limitation Period in Medical Negligence Cases: A Critique of Discovery Rule!

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Abstract

From a legal stand point of view, “Limitation Period” (hereinafter ‘LP’) connotes both a legal right and a duty. It is a legal right for a person against whom legal proceedings are instituted (broadly in civil proceedings, in criminal proceedings different set of rules pertaining to Limitation are envisaged under Code of Criminal Procedure, 1973). Such person has legal right to challenge the very institution of civil proceedings, if the case is filed beyond limitation. It is a matter of legal duty for a person who has a right to seek legal remedy to institute civil proceeding within the envisaged limitation period. The law governing limitation period is governed under the Limitation Act, 1963. In select statutes, like Consumer Protection Act, 2019 a separate limitation period is envisaged.

In the realm of medical negligence cases filed before Consumer Commissions, what is the limitation period for filing original Complaint? How do we compute such limitation period is the most crucial issue. This Article elucidates the law and critically evaluates the Supreme Court’s guidance in the form of Discovery Rule.

Generally, the limitation period for initiating any civil suit or proceeding is 3 years from the date of occurrence of cause of action. With a view to ascertain the specific input in this regard, one needs to examine the Schedule appended to the Limitation Act by looking into the pertinent subject matter. This general limitation law is not applicable to the Complaints filed before Consumer Commissions as the Consumer Protection Act, 2019 (hereinafter COPRA, 2019) envisages a different limitation period.¹

In other words, within 2 years from the date of cause of action a Complaint needs to be filed before the concerned Consumer Commission having competent jurisdiction. Generally, in medical negligence cases, cause of action emanates from death, disability, injury, infirmity, second or multiple surgeries, prolonged hospitalization and the like.

The moot question is how and on what basis the LP requires to be computed? For instance, either after administering an Intravenous Injection, post-surgical procedure or while conducting a surgery, a patient may die. In this respect, the death is construed as a matter of cause of action and accordingly from the date of such death within two years the Complaint requires to be filed before the concerned Consumer Commission. It is necessary to clarify at this juncture that the issue as to whether death in above

1 S. 69 Consumer Protection Act, 2019

circumstance indicates negligence or not is beyond the scope of this article. Because the examination of that issue depends upon various other legal principles and benchmarks.

Be that as it may, under COPRA, 2019 it is clearly provided that it is a matter of judicial discretion on the part of concerned Consumer Commission to condone any delay beyond LP for filing the Complaint subject to certain exceptional circumstances. By and large, a marginal delay of couple of weeks and months is generally condoned subject to specific circumstances.

Let us examine, the following instances with a view to understand and evaluate the basis of computation of Limitation Period:

- a. X, a married woman of 30 years of age with two children has undergone Tubectomy. After four years of such operation, she conceives again and carries the full-term baby and delivers the baby in a different hospital. Thereafter, X files a Complaint before competent Consumer Commission and claims compensation on the ground of medical negligence;
- b. Y, an Engineering College student met with an accident. He was taken to a nearby tertiary care hospital wherein after relevant diagnostic examination the treating doctors advised him to undergo surgery in his leg more particularly, the implantation. After due discussions with his parents, the surgery was completed and accordingly discharged with advice for review follow up. Even after months of that surgery, he could not get back to normalcy. Despite that, he continued to attend his classes with the help of his father and completed almost two years. Thereafter, while paying heed to his close family members visited another hospital and consulted a specialist Ortho Surgeon. After detailed examination, such doctor told him and his parents that the implant was broken and consequently, the entire part of the leg has been seriously infected and advised a second surgery which they have agreed to undergo. After second surgery, he almost came back to normalcy after couple of months. Considering the agony that was experienced, the parents have filed a Complaint before District Commission;
- c. Z, a widow of 62 years old complained severe pain in her right breast. Her son took her to a corporate hospital, wherein, post relevant diagnostic examination came to a conclusion that she is suffering from advanced stage of breast cancer. Accordingly advised surgical removal of breast and also 4 cycles of chemotherapy. After surgery, nearly for a period of one year or so she was undergoing chemotherapy with intermittent breaksowing her co-morbidities. By looking at her suffering because of continued chemo cycles, son felt the need for seeking a second opinion. Approached a senior Onco surgeon at a government hospital who, after a detailed evaluation of medical reports told him that she does not have a cancer at all. Quite intrigued by such a revelation, he stopped chemo. After taking medications from the second Doctor, she improved a lot and in the process completed 6 to 9 months. Feeling quite happy about the turnaround, however, to seek accountability from the first hospital, the son filed a Complaint before the State Consumer Commission as he has spent all his savings which comes to more than 50 lakhs.

Let us now examine whether there is any guidance for the purposes of computing Limitation Period in above mentioned incidences.

Hon'ble Supreme Court in Shrikhande's Case² has explained about the guidance to be followed in computing Limitation Period.

What happened in this case?

On 26.11.1993, the Appellant performed 'open Cholecystectomy' to the respondent who was a Nurse in Govt. Hospital, Goa. She was discharged from the Appellant's Hospital on 30.11.1993. Despite having post-surgical abdominal pain of and on, for which she was taking pain killers and remaining on leave at regular intervals, the respondent had neither contacted the Appellant or any other doctor for about the next nine years after the said surgery. Later in September, 2002, the Respondent was admitted in the hospital and a CT of her abdomen was done on 23.09.2002. On the basis of findings in the said CT, the respondent had to undergo a surgery at Lilavathy Hospital on 25.10.2002. She had a smooth and uneventful recovery. The relevant Histopathology Report revealed that there was no evidence of tuberculosis or malignancy. However, the diagnosis indicated:

"Gauze Pieces within a mass in Epigastric Region Adherent to Liver - Foreign Body
Reaction Lymph Nodes - Reactive Sinus Histiocytosis."

Based on the above diagnosis made in the HP Report, the appellant wrote letters to the Appellant and demanded compensation alleging that due to his negligence gauze was left in her abdomen during the surgery done by the Appellant in November, 1993, for which she had to undergo a surgery at Lilavati Hospital in 2002. Thereby she had suffered physical, mental and financial stress.

The appellant inter alia claimed that at the time of discharge every patient is given instruction that in case of any problem he/she should meet him or at least write a letter or at least contact on phone, but the respondent never apprised him of her problem, though she was sending seasons greetings.

When the respondent failed to get any favourable response on the issue of compensation, the respondent file a Complaint before the concerned State Consumer Commission.

The State Commission dismissed the complaint as being barred by limitation stating that the cause of action accrued to the respondent on the date of discharge from appellant's hospital on 30.01.1993 and the complaint could have been filed within two years from that date. The National Commission reversed the order passed by State Commission holding that the cause of action had first arisen in November 1993 and continued thereafter when she had constant pain and she underwent surgery for the second time at Lilavati Hospital on 25.10.2002 at which time the gauze left by appellant was found.

Learned Senior Counsel Soli.J. Sorabjee argued on behalf of Appellant that the National Commission erred in its order while setting aside the order of the State Commission and remanding the matter for disposal of complaint on merits. Further argued that discovery of gauze pieces during surgery in 2002 did not give her fresh cause of action to the complainant after a time gap of 9 years.

The contention of Learned Counsel for Respondent, Shri.DevadattKamat was that the State Commission was wrong while dismissing the Complaint as time barred and supported the order passed by National Commission. The Respondent's Counsel relied on the 'Discovery Rule' evolved by American Courts and submitted that though the respondent was employed as a Nurse, she had no reason to suspect that gauze might have been left by the Appellant during her surgery performed in November, 1993. Hence the complaint filed in October 2004 was within limitation since it was filed within 2 years from the date of her knowledge obtained from the relevant Histopathology Report date 08.11.2002.

The Apex Court observed³:

2 VN Shrikhande vs. Anita Sen Fernandes, AIR 2011 SC 212.

In cases of medical negligence, no straitjacket formula can be applied for determining as to when the cause of action has accrued to the consumer. Each case is to be decided on its own facts. If the effect of negligence on the doctor's part or any person associated with him is patent, the cause of action will be deemed to have arisen on the date when the act of negligence was done. If, on the other hand, the effect of negligence is latent, then the cause of action will arise on the date when the patient or his representative complainant discovers the harm/injury caused due to such act or the date when the patient or his representative-complainant could have, by exercise of reasonable diligence discovered the act constituting negligence.

What precedents Hon'ble Supreme Court has examined?

In view of the fact that medical negligence claims of Complainants were getting defeated by strict adherence to limitation period, the Court in United States evolved the Discovery Rule whereby the period of limitation is deemed to commence from the date of discovery of injury. Thus, in Pennsylvania, in *Ayers v. Morgan*⁴ where a surgeon had left a sponge in the Patient's body when he performed an operation, it was held that the statute of limitation did not begin to run until years later when the presence of the sponge in the Patient's body was discovered. In a similar instance, discovery rule was applied in *Morgan v. Grace Hospital Inc.*⁵, wherein the court rejected the objection to limitation. The Discovery Rule was also followed in *Billings v. Sisters of Mercy of Idaho*⁶ where the Court held that the cause of action does not accrue until the Patient learns of, or in the exercise of reasonable care and diligence should have learned of the presence of such foreign object in his body.

What is the decision in this case?

After discussing the aforesaid Precedents on the Discovery Rule, the Apex Court however opined that the Discovery Rule cannot be applied to the facts of the case before it and observed:

“In the light of the above, it is to be seen whether the cause of action accrued to the respondent on 26.11.1993 i.e., the date on which the appellant performed `Open Cholecystectomy and the piece of gauze is said to have been left in her abdomen or in November, 2002 when she received Histopathology report from Lilavati Hospital. If the respondent had not suffered pain, restlessness or any other discomfort till September, 2002, it could reasonably be said that the cause of action accrued to her only on discovery of the pieces of gauze which were found embedded in the mass taken out of her abdomen as a result of surgery performed by Dr. P. Jagannath on 25.10.2002. In that case, the complaint filed by her on 19.10.2004 would have been within limitation. However, the factual matrix of the case tells a different story. In the complaint filed by her, the respondent categorically averred that after discharge from the appellant's hospital, she suffered pain off and on and it was giving unrest to her at home and at work place; that her sufferings were endless and she had spent sleepless nights and mental strain for almost 9 years. The respondent was not an ordinary layperson. She was an experienced Nurse and was employed in the Government Hospital. It was the respondent's case before the State Commission and the National

³ Para 18, Page 9, Shrikhande's case, supra

⁴ 397 Pa.282, 154A.2d 788

⁵ 149 W. Va.783, 144 S.E.2d 156

⁶ 86 Idaho 485, 389 P.2d 224; also see *Quinton v. United States*, 304 F.2d 234; *Josephine Flanagan v. Mount Eden General Hospital* LEXSEE, 24 N.Y. 2d 427 in this regard.

Commission that after the surgery in November, 1993, she was having pain in the abdomen off and on and, on that account, she was restless at home and also at work place and had to take leave including sick leave on various occasions. Therefore, it was reasonably expected of her to have contacted the appellant and apprised him about her pain and agony and sought his advice. That would have been the natural conduct of any other patient. If the respondent had got in touch with the appellant, he would have definitely suggested measures for relieving her from pain and restlessness. If the respondent was not to get relief by medication, the appellant may have suggested her to go for an X-ray or C.T. scan. In the event of discovery of gauze in the respondent's abdomen, the appellant would have taken appropriate action for extracting the same without requiring the respondent to pay for it. If the measures suggested by the appellant were not to the satisfaction of the respondent and the pain in her abdomen persisted then she could have consulted any other doctor for relief. However, the fact of the matter is that after the surgery, the respondent never informed the appellant that she was having pain in the abdomen, was restless and having sleepless nights. At no point of time, she contacted the appellant and sought his advice in the matter. Not only this, she did not consult any other doctor including those who were working in the Government Hospital where she was employed. Any person of ordinary prudence, who may have suffered pain and discomfort after surgery would have consulted the concerned surgeon or any other competent doctor and sought his advice but the respondent did nothing except taking some pain killers. If the respondent had been little diligent, she would have contacted the appellant and informed him about her sufferings. In that event, the appellant may have suggested appropriate medicines or advised her to go for X-ray or C.T. scan. If piece of gauze was found in the abdomen of the respondent, the appellant would have certainly taken remedial measures. The respondent has not explained as to why she kept quiet for about 9 years despite pain and agony. The long silence on her part militates against the bonafides of the respondent's claim for compensation and the Discovery Rule cannot be invoked for recording a finding that the cause of action accrued to her in November, 2002. The National Commission, in our considered view, was clearly wrong when it held that cause of action lastly arose to the respondent on 25.10.2002 when the second surgery was performed at Lilavati Hospital and the complaint filed by her on 19.10.2004 was within limitation.

Let us now evaluate the Discovery Rule as explained above while applying the same in the above instances with a view to compute the LP.

- a. In the case of Tubectomy, based on the Discovery Rule, the LP commences from the date on which she discovered that she is carrying pregnancy. From that date it continues for next two years;
- b. In the case of Ortho Surgery, the LP commences from the date on which the second surgery took place and naturally it continues from that date to the next two years.
- c. In the case of Cancer, LP commences from the date on which the Senior Onco doctor diagnosed that the patient is not suffering from breast cancer and it continues for a period of 2 years from that date.

However, it is necessary to keep in mind that the fact as to discovery must be proved by the Complainant in the light of cogent and acceptable evidence without which Discovery Rule cannot be invoked for seeking extension of LP.