ALTERNATIVE DISPUTE RESOLUTION IN MEDICAL MALPRACTICE DISPUTES IN INDIA

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ABSTRACT

Medical profession is known as an esteemed profession. However, the health workers have often been put under scrutiny because of the rise in medical malpractice cases. Studies have found that medical disputes frequently emerge as a consequence of lack of communication. The major purpose to sue a doctor by the patient is to perceive what went wrong, not to get money. Litigation does not promote open dialogue. On the contrary, ADR is observed as a "therapeutic resolution" of a disagreement that allows parties to explain or receive explanations, apologize or forgive, and have closure and rebuild connections. Many studies demonstrate that ADR approaches including early apology, mediation, or arbitration are not only cost-effective, but also enhance patient or family satisfaction. At the same time, substantial issues regarding the appropriateness and legality of using ADR in medical malpractice cases may arise, since it may encroach upon the human right – "recourse to justice". This article aims to analyze the suitability of different approaches of ADR in the medical disputes area. It will examine their benefits and shortcomings in such cases, and focus on how they may clash with the constitutionally protected right to access to justice.

1. Introduction

Medical profession is known as an esteemed profession. However, even the healthcare providers, especially physicians have time and again been put under scrutiny because of the rise in medical malpractice cases. Medical malpractice means "commission or omission of an act of negligence by a medical provider which should not have been committed owing to his/ her professional skills in that field."

Like the former years, the medical sector is neither heavily subsidized by the government nor affordable to the common man. The medical costs have shoot up like never before not only in respect of treatment but also insurance and litigation process.[1] It has been alleged by the healthcare and insurance companies that the prime reason behind the high cost is medical malpractice tort system; the income being transferred from doctors to lawyers.[2] In this sector, the tort litigation system can be considered a lottery for it provides big payouts to some patients and their attorneys, while society as a whole bears the brunt of the costs; the patients suffer for paying increased premiums.

This shows the expensive nature of fighting a medical malpractice claim. Yet, research shows 70% of these claims do not bring off compensation to the plaintiff[3]. According to Ashwini Kumar Choubey, Minister of State for Health and Family Welfare, the Medical Council of India sanctioned 69 cases of medical negligence, i.e. 44% of the cases reported to MCI by state medical boards, in 2017. Then, in 2018, MCI penalized physicians in 28 percent of instances reported to it by state medical councils, or 40 cases, while in the first half of 2019, MCI fined doctors in 46 percent of cases, or 28 doctors.[4]

The above statistics exposes the fact that so much of our financial means and assets are expended on tedious legal methods instead of the actual need in healthcare sector.

2. Existing Legal Provisions for Medical Malpractice Cases

[1] Edward Premdas Pinto, *The jurisprudence of emergency medical care in India: an ethics perspective*, 2 IJME (2017), http://ijme.in/articles/the-jurisprudence-of-emergency-medical-care-in-india-an-ethics-perspective/?galley=html (last visited Aug 9, 2021).
[2] MEDIATION: THE CURE FOR THE AILING HEALTHCARE SECTOR, , THE IMW POST (2019), https://imwpost.com/mediation-the-cure-for-the-ailing-healthcare-sector/ (last visited Aug 9, 2021).
[3] Sv Joga Rao, *Medical negligence liability under the consumer protection act: A review of judicial perspective*, 25 INDIAN J UROL 361 (2009).
[4] Justice denied: Why medical negligence goes unpunished in India, what can be done, , THE NEWS MINUTE (2020), https://www.thenewsminute.com/article/justice-denied-why-medical-negligence-goes-unpunished-india-what-can-be-done-115783 (last visited Aug 9, 2021).

Since awareness is being created among the masses for their rights, people are demanding fruitful recourses to challenge, and thus the medical malpractice cases have been on the rise. Under the Indian legal regime, the aggrieved patient can choose any recourse among the variety of options against a healthcare provider who has negligently handled the case. The provisions are:-

- A suit for damages can be brought under the Code of Civil Procedure ;[5]
- A complaint for negligence under the Code of Criminal Procedure[6] ;
- Redressal of grievances under the Consumer Protection Act[7]; or
- Disciplinary action under the rules of Medical Council of India[8]

Nevertheless, it should be noted that the above recourse emphasizes only on the attempt to correct mistakes that already prevail in the tort system or seeks the need for a more equitable compensation model in situations of healthcare negligence in order to protect patient safety.

It has been observed that litigation acts as an opponent by imposing strict processes on an otherwise sensitive situation of medical damage. Due to a lack of adherence to complicated processes defined in case legislation thought to be the panacea of medical litigation, cases of pure medical negligence based on prima facie evidence do not even have the potential to get to the trial stage.

Though medical litigation has proved to be successful in the certain cases such as *Dr. Balram Prasad v. Dr. Kunal Shah and Ors.*[9], it is beset by a slew of issues including the unpredictability of compensation calculations, time delays, process expenses, and, most significantly, the distress and reliving the trauma of sufferers, their relatives, and the professionals involved.

Bearing in mind the ineptness of adversarial system in healthcare disputes, this paper tries to convince the need to shift to a less confrontational method of conflict resolution. This is where Alternative Dispute Resolution emerges as a reliable mechanism. This study will try to analyze the most suitable method such as arbitration, mediation etc. under ADR or any models adapted by different countries that can be implemented in India to reduce medical malpractice cases.

3. Analyzing the Suitability of ADR in Medical Malpractice Disputes

[5] Code of Civil Procedure, 1908, Act No. 5, Acts of Parliament, (1908).
[6] Code of Criminal Procedure, 1973, Act No. 2, Acts of Parliament, (1973).
[7] Consumer Protection Act, 1986, Act No. 68, Acts of Parliament, (1986).
[8] Indian Medical Council Act, 1956, Act No. 102, Acts of Parliament, (1956).
[9] Dr. Balram Prasad v. Dr Kunal Shah and Ors. (2014) 1 SCC 384.

The methods or techniques used to resolve a dispute without relying on onerous court procedures is termed as 'Alternate Dispute Resolution' (ADR). In India, ADR includes Arbitration, Conciliation, Mediation and Lok Adalats.[10] ADR can be said to be in its growth stage in India and is taken resort to for family or commercial disputes. It is known for its speedy and inexpensive nature.

Owing to the advantages ADR provide, it seems to be appropriate for healthcare disputes. Medical litigation has proven to be highly expensive along with undesirable outcomes for every party involved. Moreover, it also diminishes the quality of patient care since the onus to prove the malpractice claim lies on the plaintiff. He must prove the following elements:-

- There existed a doctor-patient relationship and so the healthcare provider owed a duty of care
- The required standard of care was breached by the doctor by providing proofs such as demonstrations by attesting witness or evident faults.
- The harm caused was the result of negligence by the doctor
- And the suffering of patient resulted in particular damages

In the absence of rigid set of rules and procedural law to be followed, ADR facilitates the concerns of patients by taking into account the factors which are not only incidental but also ancillary to the doctor-patient relationship.

India has favored ADR mechanism for its quick disposal of cases and with the rise in medical litigation cases, it must consider healthcare disputes to be resolved through it too. According to the findings of a survey conducted by the National Law School of India University (NLSIU) in 2015, consumer awareness has resulted in a 400 percent surge in medical lawsuits.[11] Out of the various techniques of ADR, we will try to analyze the different strategies that can alleviate the medical malpractice cases in India.

(a) Mediation

Mediation is a voluntary, party-centered, and structured discussion process in which a neutral third party uses specialized communication and negotiating skills to help the parties in amicably

[10] Code of Civili Procedure Code, § 89, (1908).
[11] www.ETHealthworld.com, *Medical litigation cases go up by 400%, show stats - ET HealthWorld*, ETHEALTHWORLD.COM , http://health.economictimes.indiatimes.com/news/industry/medical-litigation-cases-go-up-by-400-show-stats/50062328 (last visited Aug 11, 2021).

settling their disagreement.[12] The characteristics of mediation are: informal process, more party autonomy, non-binding, time and cost effective, and flexible.

A study shows that on an average, mediation provides 90% satisfaction to the parties, by preventing the cost of around $ 50,000 per case and achieving 75-90% rate of success by avoiding litigation process.[13] Along with monetary compensation, the parties may also achieve other benefits such as the cause of negligence and closure from the traumatic experience.

Being informal and flexible in nature, the parties can decide upon the way they want to resolve this dispute and the type of compensation to settle on. This is beneficial since litigation would only provide for monetary compensation which might not what the aggrieved party wanted. Mediators being facilitators increase the communication between parties to reach to an amicable settlement. However, they cannot sanction or force any party to settle and the parties can anytime leave the mediation as them deem fit.

Mediation aims to provide a forum for open discussion and valuable conversation, viable and versatile solutions, retain the relationship and thus increase the chance for achieving closure for both the parties. Henceforth, in a way, mediation tends to get its goal aligned with the ultimate purpose of medicine, which is to heal people.[14]

Henceforth, mediation is viewed as a "therapeutic solution"[15] where parties can freely explain and clarify their point of view, apologize and forgive for personal satisfaction and retain relationships.

Mediation vs. Conciliation

Many people confuse mediation with conciliation and use the terms interchangeably. However, both of them are really varied concepts. Mediation is comparatively an informal process that

[12] The Definition of Mediation as a Problem Solving Process, , PON - PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL (2021), https://www.pon.harvard.edu/daily/mediation/mediation-as-problem-solving/ (last visited Aug 12, 2021).
[13] David Sohn & Bhajanjit Bal, *Medical Malpractice Reform: The Role of Alternative Dispute Resolution*, 470 CLINICAL ORTHOPAEDICS AND RELATED RESEARCH 1370–8 (2011).
[14] MEDIATION, *supra* note 2.
[15] Nirav Sudhir Padia, *ARBITRATION, MEDIATION OR NEGOTIATION IN MEDICOLEGAL ISSUES- A MEDICAL DISPUTE RESOLUTION*, SAPPHIRE & SAGE (2020), https://www.sapphireandsage.in/post/arbitration-mediation-or-negotiation-in-medicolegal-issues-a-medical-dispute-resolution (last visited Aug 13, 2021).

requires a mediator to facilitate the process. On the other hand, conciliation is a formal process involving legal representation and thus making it costlier that mediation.

Though both of them are consensual, confidential process involving a neutral, separate third party facilitate them to reach to a consensus, mediation is viewed as a facilitative process while conciliation is considered an advisory process. Furthermore, conciliation is considered as a right-based approach where legal rights of the parties are given more preference over the underlying interest.[16] On the contrary, mediation is widely accepted as an interest-based approach for resolving a dispute. This method prioritizes the focus on the underlying interest of the parties rather than just their legal rights; considerate about the parties' emotions and search for innovative ways to settle the issue.[17]

The above differences prove that mediation is more suitable over conciliation in healthcare disputes owing to its advantages like lower costs, more party autonomy and zero interference of mediator, free space to express their real emotions and identify the actual problem and lastly to preserve the doctor-patient relationship by facilitating effective communication based on the real interests of the parties and not just focusing on legal rights.

(b) Negotiation accompanied by Early Apology and Disclosure

Negotiation is an informal dispute resolution mechanism where two parties having opposing interests communicate back and forth in order to reach a consensus.[18] It is a simple process that aims to persuade the parties to agree to a common solution.

In cases of medical malpractice or medical negligence, the person or the beloved ones to whom the damage is caused is perceived as a personal tragedy. In such cases, the grieving relatives desire for the truth that led to such loss over monetary compensation. They require assurance that other patients would be safe in future.

The process of negotiation can facilitate programs related to early apology and early disclosure that can help achieve patient satisfaction. It can reduce the anguish and distress of the aggrieved

[16] Valeria Quartarone et al., *Mediation for medical malpractice actions: an efficient approach to the law and veterinary care*, 01 OJAS 61–64 (2011).
[17] *Id.*
[18] What is Negotiation?, , PON - PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL (2020), https://www.pon.harvard.edu/daily/negotiation-skills-daily/what-is-negotiation/ (last visited Aug 12, 2021).

party by offering a friendly and secured place to communicate facts without being afraid of them being used against the negligent party as evidence in the court.

To encourage healthcare providers to accept their mistakes and show accountability for their negligent act, the law must protect their admission of fault along with apology. States such as Colorado protect both: admission of fault along with apology.[19] Certain states like Nevada, New Jersey, and California make the provision subject to conditions; apologies of physicians protected only if they disclose the facts of negative events earlier.[20]

Oregon, a state in U.S., enacted a new law "Early discussion and resolution" that can redress for patient injury and also enhance communication between the parties.[21] This program does not aim to prove negligence of the doctor. Rather it to assist patients to understand what went wrong, to empower providers to improve healthcare delivery, and to allow the parties to talk about fair financial recompense. It can be said to have a combination of early disclosure of unfortunate healthcare outcomes and an undisclosed discussion between the injured party and healthcare professionals.

A study based on U.S. healthcare system has shown success rate of 50 to 67% for choosing early apology and disclosure over litigation along with substantial reductions of cost per claim.[22] Therefore, early apology and disclosure program as a part of negotiation process is an effective alternative to attain the real-interests of the parties, especially the injured party.

Conclusion

Undoubtedly, the courts are indispensable part of the civil justice system. However, certain civil disputes could be better solved without courts with more appropriate forum. These methods could prove to be both cost and time effective for all the parties involved.

The Alternative Dispute Resolution mechanism in India has been adopted for certain areas such as family and commercial matters. It is time to check its suitability and legality in the medical arena where malpractice and negligence cases are on the rise. Through this article, certain

[19] Stuart McLennan, Leigh E. Rich & Robert D. Truog, *Apologies in medicine: Legal protection is not enough*, 187 CMAJ E156–E159 (2015).
[20] Flauren Fagadau Bender, *"I'm Sorry" Laws and Medical Liability*, 9 AMA JOURNAL OF ETHICS 300–304 (2007).
[21] Lydia Nussbaum, *Trial and Error: Legislating ADR for Medical Malpractice Reform*, 76 63.
[22] Sohn and Bal, *supra* note 13.

methods such as mediation and negotiation have been discussed with respect to medical malpractice cases.

The research has found that mediation is the most preferable option for the parties for it facilitates party autonomy, friendly environment and a forum for open discussion. A comparative analysis between mediation and conciliation proves that mediation is an interest-based approach that is more suitable for the patient as well as the healthcare provider to attain satisfaction and closure.

Many studies have found that in most cases, the patients' family want is to find the truth behind the damage caused and the acceptance of the negligent act. Here, monetary compensation would not suffice and thus litigation is not the means to provide justice to such wronged parties. The best approach as discussed in the article is negotiation followed by an early apology or disclosure of the full matter that would also provide mental peace and satisfaction to the relatives.

Henceforth, this study tried to convince that there is a scope of ADR mechanism: mediation and negotiation with early apology and disclosure, in medical malpractice cases which would reduce the burden on the courts at the same time satisfy the parties by achieving their interested goals.