



THE ROLE OF ADR IN RESOLVING DISPUTES RELATED TO MEDICAL NEGLIGENCE

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Abstract

In today's fast-paced world, a rapid rise in instances of Medical Negligence has been observed since the last decade. Cases of Medical Negligence happen when healthcare practitioners like doctors, and nurses, or when any hospital deviates from its standard duty of care, the consequence of which results in harm and injury to a patient. Due to the failure of medical professionals to exercise due care, individuals and their families may pursue recompense for the injuries suffered as a result of the misconduct and negligence exhibited by doctors, nurses, or other healthcare practitioners. The disputes related to medical negligence are generally settled by the traditional justice system i.e., Litigation which involves appearing before the Hon'ble Court and having a Judge decide on a particular dispute in question. In light of the protracted and costly nature of our nation's legal system, which often yields results that may not meet the parties' desired outcomes, alternative dispute resolution (ADR) mechanisms, including arbitration and mediation, have emerged as prominent approaches for resolving medical malpractice disputes involving healthcare practitioners. These ADR procedures are currently considered as feasible alternatives to the extended and expensive litigation procedure. ADR mechanism enables disputing parties to let them resolve their disagreements outside the court in a more cooperative as well as efficient manner. A mediator is a neutral third party that encourages conversation between opposing parties and eventually assists them in reaching an equitable settlement agreed upon by both disputing parties. In contrast, a neutral third person, known

as an arbitrator, participates in the arbitration court and listens to the evidence of the parties engaged in the dispute before making a binding judgment on the case's conclusion.

Keywords: Arbitration, Dispute Resolution, Healthcare, Mediation, Medical Negligence.

Introduction

Medical negligence can be defined as a deviation from the established standard of care or a failure by a healthcare practitioner to administer treatment in accordance with accepted medical norms, resulting in harm or injury to a patient. The matter at hand holds significant importance within the healthcare system, as it possesses the potential to yield extensive ramifications for patients, thereby undermining their confidence in healthcare providers and institutions. Medical negligence cases cover a diverse array of circumstances, spanning from errors in surgical procedures and incorrect diagnoses to issues with drugs administration and improper informed consent. The process of determining medical negligence often entails establishing that the activities of the healthcare professional strayed from the accepted standard of care and directly led to the occurrence of harm. The issue of medical negligence has not only legal implications, but also ethical considerations and concerns for patient safety. Its primary objective is to promote the provision of high-quality healthcare and secure justice for those who have been adversely affected. Alternative Dispute Resolution (ADR) is of significant importance in the resolution of medical negligence lawsuits. In the domain of healthcare,

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where a blend of trust, patient welfare, and intricate medical processes occurs, conflicts frequently emerge. ADR procedures, such as mediation and arbitration, provide a practical and less confrontational approach to settling such conflicts. Patients and healthcare professionals have the opportunity to engage in constructive dialogue, wherein they can address their issues, explore several potential solutions, and ultimately achieve mutually agreeable resolutions, thereby avoiding prolonged and expensive legal disputes. ADR not only facilitates the expeditious resolution of conflicts but also enables the implementation of tailored and adaptable solutions that consider the unique requirements of the concerned parties. In addition, it can contribute to the preservation of the doctor-patient relationship by establishing a medium for transparent dialogue and understanding, a crucial aspect within the realm of medical negligence claims.

The Role of ADR can be considered a very effective method for resolving disputes related to medical negligence. ADR can offer a faster solution to the dispute and is less costly as compared to the conventional litigation process which is much more expensive than the ADR mechanism. In many cases, ADR can help the parties reach a solution more quickly and with minimal cost as compared to litigation. Further, ADR can offer greater flexibility in crafting a resolution that meets the needs of all parties involved. ADR put forth a wider range of solutions among the parties whereas courts are only limited to monetary compensation or some specific remedies. A wider range of solutions herein means an agreement that includes an apology, an agreement to change policies or procedures, or may also include some other measures that help in preventing future medical negligence situations. Also, ADR can allow for greater privacy and confidentiality in resolving medical malpractice disputes. Litigation is a public process, with court filings and hearings often available for public review. ADR, on the other hand, can allow the parties to keep the details of the dispute and the resolution confidential, which may be important for maintaining professional reputations or protecting patient privacy.³

ADR is not always appropriate for every medical malpractice dispute. Like, in some cases there is an urgency of court decisions as disputes between the parties

involve complex legal issues or questions of liability which can only be best interpreted by the court. Apart from this ADR can be a very valuable mechanism in resolving any type of medical negligence and in today's time it is increasingly used as a way to promote greater efficiency, flexibility, and cooperation in resolving these types of disputes related to medical negligence. The role of ADR in resolving the disputes arising out of medical negligence is becoming very significant as it offers the best alternative to the traditional process of dispute resolution i.e., Litigation and also provides quick, more cost-effective and less adversarial measures.

ADR Mechanism and the Suitable Medical Negligence Disputes

Medical negligence disputes arising out of misconduct by any medical professional lead to multiple challenges faced by the patient or the sufferer and this negligence sometimes can be very emotional and complex in nature, this chapter describes the suitable disputes related to medical negligence which can be resolved through ADR mechanisms such as Arbitration and Mediation.

Some of the suitable disputes that may be addressed through ADR mechanisms are as follows: Negligence during Surgery: The recurrence of this form of negligence is commonly associated with healthcare professionals, particularly evident in the context of surgical procedures, resulting in future legal conflicts. In order to enhance efficiency and effectiveness in resolving conflicts, the parties involved have an opportunity to opt for mediation and arbitration as alternative methods. The utilization of ADR methods provides expedited and cost-efficient resolutions, allowing the involved parties to rapidly reach a mutually agreeable outcome, without enduring disruptions to the pursuit of justice.

Diagnosis Error: Disputes may arise as a result of negligence occurring throughout the diagnostic process. In certain circumstances, these errors may exceed the immediate responsibility of the healthcare practitioner. Nevertheless, it is incumbent upon the healthcare practitioner to guarantee the appropriate operation and calibration of the diagnostic apparatus employed. Neglecting to adhere to this requirement could potentially lead

3. Haan, S. E., O'Connell, J., and Hoffman, D. A., *The Role of Alternative Dispute Resolution in Resolving Medical Malpractice Disputes: A Review of Literature*, 9 JOURNAL OF HEALTH AND BIOMEDICAL LAW 1, 18 (2013).

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to the occurrence of medical negligence on the part of the individuals involved.

Negligence due to Medication: Medical negligence can also be attributed to reckless advice or the prescribing of improper medications or dosages. Instances of this nature have the potential to place strain on the doctor-patient relationship. In order to facilitate the prompt resolution of these conflicts and reinstate confidence, the involved parties may contemplate adopting ADR techniques, including Mediation and Arbitration. These procedures have the potential to successfully mitigate these challenges, facilitating prompt and harmonious resolutions to the disputes under consideration.

Wrong or negligent Treatment: This particular type of negligence occurs when any medical professional fails in his duty of providing proper/appropriate treatment or is unable to take any required follow up after the medication and this results in many complications and further injury to the patient.

Negligence in obtaining Consent: If any medical professional fails to obtain informed consent from a patient which is a prior requirement before starting any particular procedure or treatment and any mishap happens then a legal dispute may arise between the parties and the adverse action of this negligence results in legal action against that practitioner.

These are some instances of prospective cases of medical negligence where ADR mechanisms play a pivotal role in speedy and amicable dispute resolution. Traditional conflict resolution systems are frequently marked by inefficiency, as they tend to include prolonged proceedings and extended schedules for execution.⁴ On the other hand, the utilization of ADR techniques demonstrates notable efficacy and cost-efficiency in promptly resolving disputes related to medical negligence.⁵ The utilization of alternative dispute resolution (ADR) techniques provides a more efficient and expeditious pathway to achieve mutually acceptable resolutions.

Now, coming to Arbitration procedures, it is much more suitable than traditional litigation methods to resolve disputes as going through Arbitration has been proved to be a quicker amicable solution than the traditional system. Arbitration is also suitable because in this mechanism parties can agree on their own rules and regulations for resolving the disputes among themselves ultimately which can be considered to be less adversarial and more cost-effective than that of the traditional system. Whereas the mechanism of Mediation procedure it is suitable mainly for disputes of medical negligence in which the parties to dispute want to maintain a healthy relationship in the near future and also want to work together in the near future, so the process of resolving disputes through mediation can help the parties to reach the parties to disputes to a mutually acceptable solution and preserve their relationship for near future.

With the aim of advancing the practice of resolving healthcare disputes through ADR processes in India, appropriate provisions must be included in admission agreements signed by healthcare providers and facility users. Further, if a situation arises where there is a disagreement between the parties then such agreement between the parties to disputes must contain a clause which requires mediation, negotiation, or arbitration. The ADR method should be governed by a set of standards as well, but these guidelines must be fair, equitable, and respect the morality of the parties before a conflict arises.⁶

Effectiveness of ADR Methods in Resolving Disputes

A crucial component of the law is the adage “justice delayed is justice denied.” Any society must place a high importance on having an efficient legal system. Conflicts of many kinds—civil, business, familial, etc.—are common in a society like this. The best course of action is to take these conflicts to court in order to resolve them. Due to this, there are currently 4.4 crore

4. Arti Sharma, *Role of ADR in the Healthcare Sector on resolving Medical Malpractice Disputes*, 4 INT’ JOUR’ OF LAW MANAG’ AND HUM’S 119, 121(2021).

5. *Id.*

6. LEXPEEPS, <https://lexpeeps.in/alternative-dispute-resolution-in-indian-healthcare-system/> (last visited on Dec. 4 2022).

cases in India, an increase of 19% over the previous year.⁷ This suggests that using an ADR procedure was the most effective way to take action. In the case of *P. Sreekumar v. State of Kerala*⁸, the Supreme Court of India highlighted the use of ADR in matters involving medical negligence. The court observed that ADR might provide a quicker, cost-effective, and less adversarial way to resolve disputes between patients and healthcare providers. In order to encourage the use of ADR in situations concerning medical negligence, the court ordered all Indian states to establish pre-litigation mediation cells. However, court only ordered to establish pre-litigation cells for use of ADR mechanism, but Hon'ble court failed to specify the procedure for establishing these pre-litigation mediation cells and also did not put forth any guiding rules for proper function of these cells. The court in this court mainly focused on mediation processes to resolve the disputes arising out of medical negligence.

There is a lot of discussion about the continuing healthcare crisis in numerous countries, including India. This tragedy has an impact on both the nation's healthcare system and the general economy. These prices are directly responsible for patients' dissatisfaction with the healthcare industry. An important part is played in this situation by ADR, which is quick and economical. ADR is another name for a settlement reached outside of court. It is a technique for settling a dispute without going to court. There exists much number of healthcare professionals who are trying their best to use ADR mechanisms like arbitration and mediation in order to cut down on the high expense of litigation.⁹

It is an accepted truth that our country's legal system is considered to be one of the oldest in the world, but one cannot ignore that it has failed many times to handle the backlog and pendency of cases that are still pending from a long period of time in Indian courts because of their overflowing with many number of unresolved disputes that have been pending for a very long time.

The graph indicates that despite the formation of more than a thousand fast-track Courts that have already processed millions of cases, the problem is still far from being fixed as new cases continue to be filed.

ADR mechanism, which settles disputes in a way that is acceptable to all parties to the dispute, can be an effective way to address this particular kind of problem. ADR is a fast-growing field that is changing the way one thinks about resolving disputes. Some of the ADR methods that can be used to resolve disputes outside of the traditional courts include mediation, negotiation, and arbitration¹⁰.

Arbitration is a formally recognized and legally binding mechanism in ADR. Advocates who represent the opposing parties frequently sit on arbitration panels and as arbitrators. The arbitrator then makes a decision. The main way that arbitration differs from other dispute settlement methods is that the arbitrator's ruling is often legally binding. However, the binding character of arbitration may be detrimental to both plaintiffs and defendants. Numerous court rulings have demonstrated that the majority of cases against doctors have nothing to do with negligence. In order to defend their identities and prove they were not negligent, doctors may find it useful to appear before a court. A doctor forfeits this option and must instead go straight to an arbitrator when they consent to a binding arbitration agreement between the parties.

Arbitration is considered to be one of the most cost-efficient ADR mechanisms that can be used by the parties for the resolution of the issue of conflict arising out of negligence. From many instances and precedents, it is observed that Arbitration procedure is much faster than that of the traditional court system as it involves very less procedural measures and the measures can be scheduled very quickly. When it comes to the outcome of this procedure one can say that the result of arbitration proceedings can be considered to be a more predictable and consistent resolution as the decision given

7. TIMES OF INDIA, <https://timesofindia.indiatimes.com/business/dontgetscammed/news/secure-your-festive-spirit-dont-let-fraudsters-ruin-your-diwali-with-online-shopping-con-trick/articleshow/105009952.cms>, (last visited on Oct. 7, 2023).

8. *P. Sreekumar v. State of Kerala*, (2018) 4 SCC 579.

9. S K Upadhyay and S Mittal, *Alternative Dispute Resolution: An Effective Mechanism for Resolving Medical Malpractice Disputes in India*, 42 INDIAN JOUR' OF COMM' MED' 174, 176 (2017).

10. LAWSENATE, https://www.lawsenate.com/publications/articles/Alternative_Dispute_Resolution.pdf (last visited on Oct. 7, 2023).

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by the arbitration after the proceedings will be binding and cannot be appealed.

A neutral third party facilitates and provides information during mediation. A qualified mediator often has a better track record than a lawyer or a former judge. Approximately 90% of plaintiffs and defendants are quite happy with the mediation process. When the informal method enables both sides to express themselves, it is understandable that this is beneficial for both. The opportunity to discuss the hassle it is to be accused when they are a mistake and how this negatively impacts how they treat other patients is appreciated by the medical community. Additionally, mediation is a quicker and more effective procedure.

According to a poll, mediations often last between one to three days, while cases typically take between 85 and 165 days for a conclusion from beginning to end.¹¹ In comparison, a case of litigation may take years to settle. In addition, there is a huge reduction in lawyer expenses. In the survey's findings, attorneys claimed that although they spent an average of 36 hours preparing for trials, they only spent 2.5 hours doing so for mediation.

Mediation is considered one of the most cost-effective ADR mechanisms for resolving disputes arising out of medical negligence. Many studies by research scholars have mentioned that mediation is less expensive than the traditional court system as it involves very minimal legal fees and court costs. The outcome of the dispute mediation process results in a more fruitful solution of disputes for all parties involved as in this procedure parties have more control over the result of the dispute and at the same time parties can also trailer the settlement to meet their specific demands.

Comparative Analysis of the Legal Frameworks and Policies Governing the Use of ADR

The examination of the legal frameworks and rules that regulate the use of ADR is crucial in the ever-changing landscape of this field. This chapter initiates a thorough comparative examination, exploring the intricate mechanisms that form the foundation of ADR methods on a global scale.

In the context of international relations, the comprehension of contrasting legal environments and policy structures is crucial in order to develop efficient and flexible ADR mechanisms. The coexistence of these frameworks facilitates a critical analysis of the merits, limitations, and advancements within each jurisdiction. This chapter endeavors to elucidate the varied methodologies employed by distinct legal systems in the realm of alternative dispute resolution on a global level. It seeks to navigate the complex interaction of laws and regulations, giving light on the regulatory processes that influence the landscape of this field.

The legal framework to use the ADR mechanism differs from jurisdiction to jurisdiction to put forth an overview of the legal framework and governing policies for the use of the ADR mechanism in case of medical negligence¹² :

i. United States

In the United States, the ADR mechanism in cases related to medical negligence is governed by their respective state law. In the US some of the states have mandatory provisions for going to mediation and arbitration procedures before going to trial i.e. court, so basically in some states it is mandated to follow the arbitration proceedings but in some states, it is not mandatory to do so. The US government has encouraged the use of ADR mechanisms for resolving the disputes related to medical negligence cases by establishing the Centre for Alternative Dispute Resolution in the Department of Health and Human Service, the work of this centre primarily revolves around providing technical assistance and resources to parties of the dispute.

ii. Australia

In Australia, the mechanism of ADR in disputes related to medical negligence is governed by the state as well as territorial laws. There exist many states in the country which have a mandate to go for pre-trial ADR while others allow for the voluntary opt for ADR mechanism. In fact, Australian Medical Association has already established guidelines for the use of ADR mechanisms

11. Hyman, C.S., Liebman, C.B., Schechter, C.B. and Sage, *Interest-based mediation of medical malpractice lawsuits: a route to improved patient safety?*, 35 JOUR' OF HEALTH POLI', POLICY AND LAW 797, 807 (2010).

12. Abhishek Bhardwaj and Ishanee Kapoor, *A Diegesis of Alternative Dispute Resolution in Contemporary India*, 5 IJLMH 675, 680 (2022).

in disputes that arise due to medical negligence of the medical professionals.

iii. India

The Legal Services Authorities Act, which was passed in 1987, had the objective of promoting the use of alternative dispute resolution methods, namely out-of-court settlements. Subsequently, the Arbitration and Conciliation Act of 1996 was enacted to bolster the legal framework that underpins alternative dispute resolution. The practice of plea bargaining was implemented in 2005 via revisions to the Code of Criminal Procedure. It entails pre-trial conversations wherein the defendant enters a guilty plea in return for concessions offered by the prosecution. Lok Adalats, which can be translated as “people’s courts,” offer a less formal environment for resolving disputes, with a judge overseeing the proceedings and emphasizing dialogue rather than complex legal intricacies. The determinations rendered by Lok Adalats possess the characteristics of being ultimate, enforceable, and impervious to subsequent legal contestations. The regulation of ADR processes in India is primarily governed by legal regulations, most notably the Arbitration and Conciliation Act of 1996. The aforementioned legislation provides a comprehensive structure for the efficient facilitation of arbitration and conciliation processes, affording parties the autonomy to select from a range of dispute resolution methods, including mediation, arbitration, or conciliation. The importance of ADR in medical negligence cases has been highlighted by the Supreme Court of India. The court has emphasized the value of ADR in effectively addressing disputes that arise from the activities of medical practitioners.

Barriers to the Use of ADR Mechanism

The first and foremost barrier to this mechanism is the lack of awareness and understanding of the ADR mechanism among the patient and the medical practitioner, and through many observations, it can be seen that there is a lack of qualified ADR providers when it comes to particularly disputes related to medical negligence. Another barrier can also be said to be the slow rate of medical negligence cases and the nature of unpredictability in our present legal system.

Overall, there are many similarities in the legal framework for governing the ADR mechanism in Indian and USA and Australia, and there exist many unique challenges and barriers that must be overcome to increase the use of the ADR mechanism in disputes related to medical negligence.

Interpretations by Indian judiciary for various cases pertaining to ADR mechanism:

In, *Booz-Allen and Hamilton Inc v. SBI Finance*¹³ it was ruled that even though an issue may be addressed by arbitration and is covered by an arbitration agreement, it will not be arbitrable. All conflicts concerning rights in rem must be settled by courts and public tribunals since they cannot be resolved by private arbitration. Only issues involving rights in personam are considered to be subject to arbitration.

Using the aforementioned precedent as a guideline, disputes involving the removal or withholding of a patient from treatment, consent from the patient or family in the event of an emergency, or circumstances involving the doctor and family become internal matters because, in these situations, the impact of the decision or the dispute can only affect the aforementioned parties; consequently, the dispute can be settled amicably by arbitration.

The aggrieved party may pursue right in personam action against the party that breaks the contract in contractual concerns regarding the health care sector, such as insurance, employment contracts, or disputes involving payer and providers. These above-mentioned actions may be arbitrable. One can also say that Arbitration can also be a method for resolving commercial disputes in the healthcare industry if precise fulfillment of a contractual duty is required.

In the *Ayyasamy* case, it was noted that arbitration was only appropriate for resolving minor disputes or blatant fraud. The stance taken in this case makes it abundantly clear that the precise nature of the claim, which is of grave concern, cannot be resolved by arbitration at all and must instead be referred to the court itself because it must be in the public domain and falls under the ambit of the general public’s concern.

13. *Booz-Allen and Hamilton Inc v. SBI Finance*, (2011) 5 SCC 532.

Conclusion and Suggestions

The present escalation in conflicts has resulted in a significant increase in litigation, further aggravating the preexisting accumulation of cases and resulting in delays in the dispensation of justice. These circumstances exacerbate the difficulties previously examined in preceding segments, impeding the expeditious resolution of legal issues. The use of ADR mechanism in this situation as soon as is practical since the conventional method of resolving disputes has a number of drawbacks, the most notable of which is the absence of good communication between the parties. Although ADR (especially arbitration) is used to settle disputes involving economic issues, its application has to be widened.

ADR may be the most effective and fruitful way to resolve disputes in the medical business in the present and the future, depending on the specifics of the claims and losses involved. ADR can be utilized to resolve in-person disputes. The medical system must have a thorough strategy for resolving disputes. Further, ADR mechanisms such as mediation and arbitration may prove to be effective ways to resolve disputes arising out of medical negligence. ADR mechanism can help to reduce the time to reach an amicable solution and is also one of the most cost-effective measures when compared to traditional litigation methods. These mechanisms are also useful in conditions when parties to disputes want to maintain an ongoing relationship, i.e., a patient wants to receive medical treatment from the same practitioner. At the outset, the success of the ADR mechanism to resolve the dispute arising out of medical negligence depends on the willingness of parties to dispute to participate in the process of arbitration or mediation.

All of these problems do not exist if ADR is used voluntarily. However, in situations when required ADR is present, such justifications might convincingly support claims of justice-related rights violations. Legal services, including ADR services, will continue to be provided in a variety of methods, despite the promise of technological innovations. As the legal sector adopts technology, online technologies will continue to improve their potential along with more conventional ADR techniques.

As Jimmy Carter said, "No deal can be permanent until all sides win." The use of ADR procedures in the med-

ical field can result in a win-win situation where the interests of both parties are protected. According to this research and analysis, depending on the specific type of claims, the mechanism of ADR can be considered to be one of the most cost-effective and quicker procedures to resolve disputes arising out of medical negligence by the act of the medical practitioner. The mechanism of ADR can be very well utilized for settling disputes related to the right in personam. As a result, before any disputes can be resolved through ADR, the hospitals must first get signed agreements from the patients.

The following suggestions may be incorporated in order to ensure the efficient disposal of cases related to medical negligence through ADR:

- i. In a country like India where courts are overburdened with a number of cases it is very necessary to encourage medical practitioners, patients, and their families to opt for ADR mechanisms for resolving the disputes arising out of medical negligence.
- ii. The government must try to focus on efforts to make improved and quality ADR mechanism services for resolving disputes without any further complications and also include focusing on training and certification of mediators and arbitrators for the purpose of ADR mechanism.
- iii. Creation of a Separate Bar for Mediators/Arbitrators: A Different Bar/Registry for Mediators and Arbitrators may be formed on the lines of the Bar Council of India and Bar Associations for lawyers.
- iv. It has been observed that institutional ADR processes in India perform better than ad hoc ADR. Therefore, organizations may be created with administrative positions that might possibly manage the efforts to streamline the ADR mechanism in India to resolve the disputes.
- v. Use of IT Technology- It's not always necessary to settle disputes in a face-to-face conversation across the table. The need for IT technology is also necessary for effective communication between the parties, as well as between the parties and the arbitrators or mediators, which ultimately helps to settle the dispute. In reality, videoconferencing for the purpose of gathering evidence is accepted by the Indian judiciary. It

is possible to create a secure, private web-based network using cryptographic methods.

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