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# Healthcare disputes in India: Mediation by ADR as an ideal method in current scenario

**Sonu**
Associate Professor, Department of Law, Maharshi Dayanand University Rohtak, Haryana, India

**Abstract**
Alternative dispute resolution i.e., ADR means privilege of choosing one of two things. It does not mean the choice of an alternate court but something which is alternate to the court procedure. The whole system of ADR is backed with a sole objective to reduce litigation and make peaceful settlement between disputant parties with the help of designed techniques- Arbitration, Conciliation, Mediation and Lok Adalat. Human conflicts are unavoidable in any area; therefore, disputes are parallelly unavoidable in health sector as well. There is no denying the fact that the health care sector is suffering from over workload like courts; therefore, the errors in health care sector is becoming unavoidable feature now days. The cases in health care are multifarious and mainly pertain to medical negligence, breach of trust, malpractice and medical errors etc. The large number of litigations against health care department shows the increase of public awareness of users with regard to their safety and demand for transparency. But the maxim- 'justice delayed is justice denied' is no exception to these disputes also. Thus, to avoid the delay, the users and providers have started using ADR techniques due to its beneficial features. Contractual, tortious, rem and personam elements are generally found in medical disputes. What kind of disputes is referral to ADR techniques and capable of being adjudicated has been decided by the court of law in a number of health care cases. Arbitration, conciliation, mediation and Lok Adalat are all different ADR techniques, but which one is ideal and efficient method to resolve the health care disputes is a question to be answered with logical and reasonable point of view. This research paper will try to answer- which technique's nature is more collaborative and cooperative and can give best results for claims litigation in medical health. To critically evaluate the litigation model currently adopted in India, is also one of the objectives of this paper and for this, the researcher will look into the outcomes of medical negligence litigation which follows old standard of tests.

**Keywords:** Healthcare, ADR, litigation, courts

## Introduction

India, an overpopulated country witness dispute of every nature including medical malpractices, which usually are decided by the conventional system i.e., in the courts. Although, the conventional system burdened with many defects associated particularly with conventional system like- exorbitant cost, delayed decisions, formal and inflexible procedure, anonymous atmosphere etc. Among all these factors, the cost factor is most important factor. Generally, parties to the dispute look forward for grant of compensation in their dispute, so that the lawyer fee etc can be paid out of this amount. But the situation become challenging when only half of the expected compensation is ordered by the court, parties landed in neither living nor dying situation. Further, the effect of adversarial process also reflects upon the relations of the parties, especially in patient-doctor relationships, which again can have the same effects on the employer's health insurance programs. Doctors who got entangled in litigation process usually ends up in shun and lose all his confident and productive approach that ultimately affects his decisions making power and he becomes mannequin of mistakes. To avoid these consequences, avoidance of litigation and adoption of ADR processes especially mediation process is suggested.

## Medical malpractices and compensation

On one side, the contribution of medical field professionals can never be underestimated, they are not only curing the diseases but also busy in carrying out scientific research to find out solutions for incurable diseases by which the world is thriving. On the other side, some doctors are found to be involved in malpractice and bring disrepute to the medical profession. Whenever, any dispute occurs, to set the disputes that arise out of medical malpractice, the doctors and patients take the recourse of court system for handling such disputes. The hon'ble Apex court of India in Balram Prasad case [1] awarded a compensation of Rs. 11 crores, which private hospital involved in the case was required to be paid to the other party for a death that caused due to medical negligence.

In recent years, the mushroom growth of private hospitals is surfacing that are giving rise to medical malpractices cases. Thus, it become imperative to study the present scenario and to find out whether use of alternative mechanism in disputes resolution leading to reduction of such cases or do we need to evolve some other mechanism to tackle the medical malpractice disputes through some other innovative methods.

Party in Balram's case was successful in getting compensation, but not every case can achieve this kind of results due to drawbacks stiffen litigation process. Exorbitant fee, delayed justice, technical formalities are some of the factors that not only stressed but traumatised the parties and their families. Further, awarding high compensation in litigation is another point of debate, because paying compensation ultimately had potential to impact the cost to patients [2].

Taking into consideration the abovementioned points, it's beyond any doubt that the litigation process falls insufficient in dealing all related problems and the need of the hour is of less aggressive, argumentative process that resolve dispute in friendlier manner. And one such available method is intervention of mediator through mediation process in resolution of dispute.

**Medical malpractice in India**

Till a few years back, getting treatment was accessible to every common man. But nowadays neither the poor nor the middle-class families are able to get treatment in private hospitals due to skyrocketing inflation in terms of costs, insurance and litigation charges attached with it. The major reason for this inflation is nothing else but the expenses incurred by hospitals on services and defending the medical malpractices disputes that have direct effect on the insurance and healthcare administration. To make up for the amount so spent, the healthcare administration enhances the charges for treatment and other health check-ups, ultimately borne up by the patients and their families. Thus, lawyers are awarded high pay-outs [3] while general public in large pays the price. In almost seventy percent of the disputes, the claims do not result in compensation to the plaintiff [4], shows the drainage of economic resources to delayed and cumbersome procedural formalities and it is not proving helpful at all to health care claims issues.

Even decision in Balram Prasad Casewas a prolonged process of almost fifteen years and during these years one of the respondents had even died and other lost his job and become unable to pay anything. Further, the payment of compensation in conventional system is very much uncertain. The compensation in medical negligence cases is calculated on the basis of common law principle of *restitution in integrum*, i.e., restoring the injured party to the position they could have been in, had the injury not occurred [5]. The amount of compensation is granted to victim for pain and sufferings he has undergone, incurred and any other future expenses, any other financial loss he suffered during the intervening period of injury and granting of compensation. Further, the amount of compensation is not consistent in each case, it depends upon facts and circumstances of every case before the court.

Therefore, immeasurable delays in conventional system, extensive possibilities for appeals, exorbitant cost in litigation, continuous mental stress during the pendency of case and reputational damage, all results in denial of justice to party even if compensation is granted in its favour.

**Healthcare lawsuits: a drift procedure**

As deliberated earlier also, filing of lawsuits is the most used technique in medical malpractices disputes. The prolonged use of conventional method restricts the disputant parties to think of any other available method, if any, in resolving their dispute. Though, parties suffer many types of loss due to flaws of litigation processes.

**Errors in conventional system**

Though, in recent years it has been comprehended that the litigation process suffers from many drawbacks and parties bear the loss of these flaws. In a survey [6], six flaws have been recognised with regard to conventional system-

a. Proceeding in an unfriendly environment
b. High cost on litigation
c. Very formal and inflexible proceeding
d. Due to technical procedure; delayed justice
e. Decision enforcement problems
f. No certainty with regard to compensation

Although, to sue in the court is the right invested to every citizen, whenever aggrieved, however, it is not so easy. Disputant party has to select a good lawyer and pay huge fee. The parties are required to pay for drafting, typing, process fee and court fee etc. If compensation is awarded to the party, then fifty percent of this compensation amount will be utilised to meet out these litigation charges.

**Adversarial Faults**

The confrontational character of litigation mechanism is highly inappropriate specifically for medical disputes. The litigation process not only causes anxiety and stress but it also put the disputant parties in winning and losing situation. Further, where disputant parties don't want acrimony before public eye, they cannot keep their dispute private as litigation is a public process. The high cost on litigation and delayed justice resulted in prolonged psychological effects and it adversely affects the patient-doctor fiduciary relationships where everything rests on trust. Patients who are already feeling vindicated by medical malpractice need less formal, less costly and speedier justice providing process. He needs someone who can listen to his views and feelings [7], therefore, innovative mechanism in the form of mediation process is the solution where parties can appoint his adjudicatory by himself. There are a number of reported incidents in the world where patients attacked the doctors out of frustration by holding them responsible. Due to litigation failure, same kind of trend is also becoming prevalent in India as well [8]. Further, due to adversarial nature of our legal system, stress is only on fact finding process rather than on finding lasting solution to the problems.

The adversarial system can be best suited to disputes, only where declaration of rights is required. In disputes of e.g. doctor-patients, need of resolution of disputes in friendly and peaceful manner is the need.

**Mediation: An appropriate alternate**

The innovative mechanism in the form of alternative dispute resolution process like mediation can be very helpful due to their huge potential. The procedure of mediation is less costly and mediators assist the parties by his sensitivity and also keep the prestige of the party. Mediators in mediation process are more dynamic and persuade the parties to come to an acceptable solution. Due to it's voluntary nature, parties participate in process for making settlement agreement. The whole focus of mediation process remains on retention of disputant parties' relationships, and it lays stress on communication, support and mutual trust.

Although the medical mediation requires same preparation as that of litigation like- presentations, discovery of documents, submission of evidences, arguments [9], but the goal of the process is completely different from litigation process. The medical mediation process not only helps in resolving the disputes but it also enhances the opportunities for restoration of relationships and improves communication between parties; provide solution for wide variety of disputes in more cost-effective manner [10]. Therefore, the ultimate goal of mediation is comparable to that of medicine i.e., healing. The litigation process on the other hand does not at all help in healing but instead re-traumatised the patient and their families. Therefore, mediation in medical healthcare issue provides solutions of wide variety.

**Non-communication is suspicious**

The litigating lawyers commonly don't allow their client doctor to have any communication with aggrieved patients

to avoid their client making any incriminating statements [11]. This kind of attitude shut all avenues to resolve the dispute. However, this is not the problem with mediation process, as disputant parties directly interact with intervention of neutral third party and reach at an amiable settlement agreement in a friendly environment. Both parties write their own settlement terms with mutual consent. The questions by patients and answers by doctors not only abate the anger of patients but promote the chances of amenable solution.

**Maintenance of Relationship**

Non-adversarial nature of mediation process creates holistic environment for dispute resolution and parties without any doubt share all information, views and opinion due to high level of confidentiality in mediation process. The chances of surviving, doctor-patient relations are more in mediation process rather than in any other available process. This is an urgent requirement in cases of employee insurance plans.

Thus, it can be said that establishing again mutual trust by amiable settlement in medical malpractices disputes is more effective solution than decisions in litigation process, both in terms of long-lasting solutions and contentment of aggrieved parties.

**Legal development and obstacles to medical mediation in India**

Present legal scenario in our nation has not only accepted, but applying the different ADR processes in almost all fields of human life for settling the disputes. As per data of PRS Legislative Research, the pendency of cases increased by 2.8% annually in all courts between 2010 to 2020 and the number gets piled up over 4.5 crore cases upto September 15, 2021. The share of pending cases is 20% and 13% between high courts and subordinate courts respectively [12]. It should not be forgotten that it was the time the whole of the world was suffering from dreaded Covid 19. We have all witnessed the hard time, when all hospitals were busy in saving the life of patients, having no time to get involved in any kind of litigation.

The legislature has also taken steps to make mediation a necessary requirement. By Civil Procedure Code (Amendment) Act, 1999, section 89 was added that has taken effect only in the year of 2002. Section 89 mandated the parties to opt either of Arbitration, Conciliation, Mediation or Lok Adalat. In Afcons Infrastructure case [13], it was held to be necessary to choose anyone of the modes mentioned in section 89 of CPC. Further, if a referred case settled with any of the modes mentioned in section 89 of the Act, then deposited court fee will be refunded to the parties [14]. Delhi High Court very recently held that "*in cases which have been referred to mediation by the court at pre-evidence stage and where a compromise decree has been incorporated, an interpretation of the statute inuring to the litigant's benefit should be preferred, and if a plaintiff is able to demonstrate that the case falls within the requirements of Section 16 and a settlement has been arrived at, refund of the full amount of the court-fee ought to be granted* [15]."

Very recently, by Commercial Appellate Division of High Courts (Amendment) Bill, 2018, mandatory mediation prior to the institution of a commercial suit is passed, in matter which does not require interim relief immediately.

Finally, other bodies such as the Mediation and Conciliation Network, a consortium of non-profit and commercial initiative to provide ADR services, have started offering mediation services with regards to medical malpractice issues.

**Hindrances**

Though, achieving anything is not easy because there are problems along the way. And the way to mediation in medical malpractice is also not free from obstacles. The level of inequalities especially in healthcare sector and not providing full information to patients creates doubts in the minds of patients which ultimately have impact upon the mediation process and it become harder to re-conciliate in matters. The benefits of mediation are not dispensed with, so there is still scepticism. Many parties do not want to show themselves as weak party therefore, ignores to opt for mediation and prefer to go in litigation. Moreover, on failure of mediation process, denovo process may starts; it further weakens the process image.

**Conclusion**

The need of the hour is complete overhaul of the system. The problem of high cost on litigation, stress and anxiety involved in adversarial process, instead of solving problem of patients, further enhances their problems. Big health care sectors spending money on litigation, recover the same from their patients only. Answer to question, whether a doctor is at fault or not, doesn't benefit either of the party, rather moving in litigation, makes down the morale and confidence of the doctor and enhance his chances of making mistakes. The technical formalities involved in the litigation mechanism, doesn't ease the healthcare sector problems. In Indian situations, when we are facing a smaller number of courts problem, no sufficient infrastructure, cumbersome technical formalities etc. are deterrent factors in justice delivery system.

However, one of the real barriers is inadequate awareness and lack of knowledge about benefits of mediation process. By focussing on the need of people and interest of health sectors, involving all stakeholders while resolving the dispute will definitely help in reducing disputes from the society. The government must mandate the medical mediation through passing legislation, so that all the disputes see the resolution in peaceful manner. Education about mediation process and spreading of awareness is the dire need of the hour.

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