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Role of ADR in the Healthcare Sector on resolving Medical Malpractice Disputes

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ABSTRACT

A growing portion of healthcare costs is attributed to medical litigation. ADR methods such as arbitration and mediation have become increasingly popular for helping to settle disputes and improve a patient's satisfaction with their healthcare provider. Recent years have seen the establishment in several provinces of Alternative Dispute Resolution processes in response to the growing number of medical disputes and a lack of trust between physicians and patients caused by the increasing number of medical disputes in India. In our study, we examined the role of alternative dispute resolution in resolving medical malpractice disputes in the healthcare sector. Report on recent legislation concerning medical malpractice litigation, including the challenges and successes faced by these ADR programs. In the aftermath of unexpected medical errors, communication is central to conflict resolution. It has been reported that apologizing and disclosing early can reduce litigation costs by 50% to 67% as well as reduce settlements by a significant amount. Approximately 75% to 90% of mediation claims are avoided through mediation, saving $50,000 per claim. 90 percent of parties who participate in mediation are satisfied. Mediation is viewed as more efficient and satisfying, but arbitration is less efficient and more time-consuming than litigation. Several recent court decisions have upheld pretreatment arbitration clauses in the current legal climate, which is favorable to ADR. National Practitioner Data Bank (NPDB) reporting requirements are the primary obstacle to ADR. As a result of ADR, the current tort system may be reformed in a way that reduces costs and increases satisfaction for both parties. Providing physicians with easier reporting requirements would enable ADR to be accepted more widely.

I. INTRODUCTION

As a result of the use of ADR techniques, numerous promising results have been achieved. ADR facilities that have implemented a disclosure mechanism initially implemented it after an adverse event was disclosed[2]. Disclosure is a crucial first step in the communication between

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[2] Stipanowich, T.J., 2004. ADR and the "Vanishing Trial": the growth and impact of "Alternative Dispute Resolution". *Journal of Empirical Legal Studies*, *1*(3), pp.843-912.

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patient and provider after an adverse event. Despite the disclosure not precluding or prohibiting court action, it may contribute to a faster, more cooperative mediation process rather than a longer, more involved, and more uncertain trial procedure. Through the transparency and resolution phase, healthcare services can identify problems and resolve them. As employees become familiar with a philosophy of openness, hospitals become learning institutions that are more efficient in developing their programs.

Due to the fact that ADR limits court costs for both parties and lowers payout rates, it can be economically beneficial[3]. A smoother settlement can be accomplished through mediation rather than litigation, which means less emotional stress on patients and caregivers. If a patient may avoid trial anxiety, he or she may be willing to have an unpleasant outcome and a respectful interaction with their practitioner.

As a result of the triangle of relationships in health care, patients and providers of health care, providers of healthcare and health insurance companies, and insurance companies and patients/insured persons all interact in some way. ADR could be used in any of these relationships to resolve disputes. ADR in medical malpractice disputes is, however, primarily discussed in relation to the relationship between the patient and the provider of healthcare[4].

II. ADR IN HEALTHCARE

The ADR process has an excellent track record of reducing overall costs, avoiding litigation, and increasing both plaintiff and defendant satisfaction[5]. Medical malpractice litigation, however, has not been embraced as swiftly as other fields of civil and commercial litigation. The various form of ADR are as follows:

(A) Early Disclosure and Apology

There is a spectrum of formal and informal forms of ADR. The most informal form is negotiation[6]. The meeting is merely an attempt by both parties to resolve their differences. Legislation or programs which facilitate apologies or which allow parties to discuss sensitive issues without fear that their information may be misconstrued or used as evidence of negligence at trial might facilitate such exchanges. A program like this is called an early

[3] Bernstein, L., 1992. Understanding the limits of court-connected ADR: a critique of federal court-annexed arbitration programs. *U. Pa. L. Rev.*, *141*, p.2169.
[4] Szmania, S.J., Johnson, A.M. and Mulligan, M., 2008. Alternative dispute resolution in medical malpractice: a survey of emerging trends and practices. *Conflict Resolution Quarterly*, *26*(1), pp.71-96.
[5] Weinzierl, M.E., 1994. Wisconsin's New Court-Ordered ADR Law: Why It Is Needed and Its Potential for Success. *Marq. L. Rev.*, *78*, p.583.
[6] Enshassi, A. and Abu Rass, A., 2008. Dispute resolution practices in the construction industry in Palestine. In *International Conference on Multi-National Construction Projects. China*.

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disclosure and an apology program.In medical malpractice cases, it is not uncommon for people wanting to hear an explanation and an apology to drive them to file a lawsuit, but the threat of litigation deters the same thing. A doctor's or hospital's apology might be interpreted as an admission of negligence by the plaintiff's attorney, and an open and honest discussion about what happened might just further empower their case.

(B) Mediation

Mediation is the facilitation of negotiations by a neutral third party. A trained mediator usually has a higher success rate than an attorney or retired judge. Both plaintiffs and defendants are extremely satisfied with mediation, approximately 90%[7]. It is understandably cathartic for both parties when the informal process allows them to speak for themselves. The medical profession appreciates the chance to express how frustrating it is to be sued when they are at fault and to describe how this negatively affects their treatment of other patients[8]. Additionally, mediation is a faster and more efficient process. One survey of 13 alternative dispute resolution organizations found that the average duration of a mediation is only 1 to 3 days with cases closing from beginning to end between 85 and 165 days. In contrast, a litigated matter may take up to 5 years to resolve. Additionally, attorney fees are significantly reduced. In the survey, attorneys reported that on average, they spent 36 hours preparing for trials, while for mediation, they spent only 2.5 hours[9].

(C) Arbitration

In ADR, arbitration is a formalized and binding process. Arbitration panels and arbitrators are typically staffed by attorneys who represent the opposing parties. A decision is then reached by the arbitrator. Arbitration differs primarily from other forms of dispute resolution in that the decision of the arbiter is usually binding. Both plaintiffs and defendants may be harmed by arbitration's binding nature, however[10]. As court outcomes have repeatedly shown, most lawsuits against physicians do not involve negligence. It may be advantageous for physicians to go to jury trial in order to clear their names and demonstrate they were not negligent[11]. When a physician agrees to bind arbitration, he or she forfeits this right and must go directly to an

[7] Welsh, N.A., 2001. The Thinning Vision of Shelf-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization. Harv. Negot. L. Rev., 6, p.1.
[8] Sacerdoti, R.C., Laganà, L. and Koopman, C., 2010. Altered sexuality and body image after gynecological cancer treatment: how can psychologists help?. *Professional Psychology: Research and Practice*, *41*(6), p.533.
[9] Hyman, C.S., Liebman, C.B., Schechter, C.B. and Sage, W.M., 2010. Interest-based mediation of medical malpractice lawsuits: a route to improved patient safety?. *Journal of health politics, policy and law*, *35*(5), pp.797-828.
[10] Rudolph Cole, S., 2017. The Lost Promise of Arbitration. *SMUL Rev.*, *70*, p.849.
[11] Bal, B. Sonny. "An introduction to medical malpractice in the United States." *Clinical orthopaedics and related research* 467, no. 2 (2009): 339-347.

arbitrator. It is unlikely that an arbitrator will award the plaintiff a large award despite either negligence or no negligence, despite the fact that they award much more modest awards than juries.

III. VARIOUS ADR MODELS

Healthcare providers in India can select and adopt various ADR models according to their functionality from many available globally as a precedent. The Chicago Rush Medical Center Model, developed to address the high legal costs and inconsistent jury awards associated with malpractice cases, is a popular ADR model across the globe that could be implemented in India[12]. Mediation agreement in this Model emphasizes the need for "early exchange of premeditation documents, quick presentations by both parties at the initial mediation conference, and caucus discussions". There are also provisions in this Agreement regarding expense, confidentiality, and mediator appointment. More than 50 cases have been mediated in the first five years and 82% of them have been resolved after three to four hours of Mediation[13].

The Pew Mediation and ADR Model is also used in India. The mediation model was implemented in Pennsylvania hospitals in 2002[14].Mediation of health disputes to optimise patient safety in Bangladesh. [15]An error model for medical care involves improving communication between patients and doctors and resolving such complaints through mediation and a fair settlement in the event of errors.

According to the Model:

- The medical community learns communication skills for disclosure conversations;
- Experts assist in planning, conducting, and debriefing disclosure conversations;
- In hospitals, doctors and hospital staff have the time needed to discuss disclosures;
- There is an apology from all parties involved, including the hospital's leaders and physicians;
- After an error or adverse event, debriefing and support for healthcare professionals;

  Potential claims are settled through mediation.

[12] Menkel-Meadow, C.J., Porter-Love, L., Kupfer-Schneider, A. and Moffitt, M., 2018. *Dispute resolution: Beyond the adversarial model*. Aspen Publishers.
[13] .Kelly, J.B., 2004. Family mediation research: Is there empirical support for the field. *Conflict Resol. Q.*, *22*, p.3.
[14] Hossain, M.R., 2021.
[15] *Australian Journal of Asian Law*, *21*(2), pp.119-136.

The ADR mechanisms used to address healthcare disputes show positive results similar to those discussed above. There are also external neutral mediators, the University of Michigan mediation model, and Veterans Affairs mediation model[16]. These cost-effective solutions are friendly to patients. As medical litigation has increased in India, such models can be used and customized to meet the needs of Indian law.

IV. RESOLUTION OF MEDICAL MALPRACTICE DISPUTES THROUGH ADR

ADR in general and in the context of medical malpractice cases may present a number of potential benefits and drawbacks[17]. Generally, ADR techniques promise confidentiality, more control over the course and outcome of a dispute resolution process, and an opportunity for more creativity in determining compensation. In some cases, medical experts may serve as guides through the ADR process and, sometimes, decide the matter on behalf of the parties in a medical malpractice dispute. Likewise, ADR has many potential disadvantages[18]. Throughout this chapter, we review one main benefit and one major disadvantage of alternative dispute resolution in medical malpractice disputes: on the one hand, its cost-effectiveness, and on the other, its potential conflict with human rights. Most healthcare providers accept the risk of malpractice suits as part of their daily routine. Every year, hospitals, offices, and individuals spend millions of dollars on mitigating that risk[19].

This leads to distrust, which is perhaps the most harmful aspect. As a rule, doctors should feel like their patients can trust them, and vice versa. There is always the fear of something going wrong. This is extremely important for the patient. Physicians are concerned about being sued. As a result, both can become distracted from their ultimate goal: providing the best care to their patients[20].

The alternative dispute resolution process, also called ADR, can provide both providers and patients with positive benefits instead of litigation. Disclosure, increased safety for patients, cost reduction, and protection for those they serve are just a few.

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[16] Meruelo, N.C., 2008. Mediation and medical malpractice: the need to understand why patients sue and a proposal for a specific model of mediation. *The Journal of legal medicine*, *29*(3), pp.285-306.

[17] Sclar, D.I. and Housman, M.G., 2003. Medical Malpractice and Physician Liability: Examining Alternatives in Defensive Medicine. *Harvard Health Policy Review*, *4*(1), pp.75-84

[18] Sanbar, S.S., 2007. Alternative dispute resolution. *American College of Legal Medicine Textbook Committee ed. Legal medicine, 7th edn. Philadelphia: Mosby Elsevier*, pp.305-13

[19] Katz, N.P., Birnbaum, H., Brennan, M.J., Freedman, J.D., Gilmore, G.P., Jay, D., Kenna, G.A., Madras, B.K., McElhaney, L., Weiss, R.D. and White, A.G., 2013. Prescription opioid abuse: challenges and opportunities for payers. *The American journal of managed care*, *19*(4), p.295

[20] George, M., Freedman, T.G., Norfleet, A.L., Feldman, H.I. and Apter, A.J., 2003. Qualitative research-enhanced understanding of patients' beliefs: results of focus groups with low-income, urban, African American adults with asthma. *Journal of Allergy and Clinical Immunology*, *111*(5), pp.967-973.

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Improved Disclosure

A physician or hospital may conceal its involvement in a medical procedure if something goes wrong to avoid lawsuits[21]. As patients press charges against them to find out what went wrong, this only promotes litigation.

A Few Pointers

It is obvious that your ILIT must be correctly structured in order to work properly. In addition to setting up at the right time, the event needs to be scheduled correctly as poorly timed events can have no effect. There are a number of factors to consider when establishing an irrevocable life insurance trust:

During ADR, parties, however, can share information so they can reach an agreement that is mutually beneficial. Arbitration, mediation, and other forms of ADR facilitate open and honest communication between doctors and patients by encouraging full disclosure. From there, a fair settlement can be reached.

Improved Safety for Patients

In addition to resulting in more open disclosure about an event, mediation and arbitration can also help prevent that same event from occurring again. The actions taken following an ADR can not only save healthcare providers money, but improve patient care and hospital conditions, thereby reducing the risks associated with certain procedures and improving patient safety[22].

Cost Reductions

ADR reduces the likelihood of patients relying on malpractice suits to obtain answers and seek justice for themselves the more it is used to resolve medical disputes. Consequently, doctors will need less malpractice insurance, will spend less on defense of lawsuits, and will have fewer losses as a result of successful litigation[23].

As a result, not only do doctors save money, but also patients. In addition to costing money to both parties, litigation cannot guarantee a successful outcome. Patients and physicians both benefit financially when disputes can be resolved outside of court.

[21] Gallagher, T.H., Waterman, A.D., Ebers, A.G., Fraser, V.J. and Levinson, W., 2003. Patients' and physicians' attitudes regarding the disclosure of medical errors. *Jama*, *289*(8), pp.1001-1007.
[22] Tamuz, M. and Harrison, M.I., 2006. Improving patient safety in hospitals: contributions of high-reliability theory and normal accident theory. *Health services research*, *41*(4p2), pp.1654-1676.
[23] Quinn, R., 1998. Medical malpractice insurance: the reputation effect and defensive medicine. *Journal of Risk and Insurance*, pp.467-484.

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Doctors and Patients are Protected

Doctors and patients are both protected by alternative dispute resolution. As a result, it allows both parties to communicate while discouraging each other from attacking the other. In litigation, only one party can win, whereas in arbitration, both parties can benefit.

The ADR process needs to be handled effectively if it is to be effective. In the event that something goes wrong, ensure that your doctors and patients get the care they need by contacting Hart & David.

V. ACCESS TO JUSTICE MAY BE AT ODDS WITH THIS PROVISION

In terms of fundamental rights, the right to access to justice (proclamated, for instance, in Article 10 of the Universal Declaration of Human Rights and in Article 6 of the European Convention of Human Rights) is unquestionably one of the most fundamental. Since it is a prerequisite for the realization of other rights, it could be considered a very basic human right. In order to realize the right to a fair trial, access to the courts must be ensured[24]. A democratic society places importance on the right to justice; therefore, it must be interpreted broadly, according to the European Court for Human Rights. However, the use of ADR can effectively circumvent lengthy proceedings, a violation of Article 6 of the European Convention on Human Rights that is statistically the most commonly invoked, but does not ensure the standard of a formal court procedure. The plaintiffs might not get the full compensation that they would be entitled to in a lawsuit (and probably won't). Even arbitrators have a tendency to compromise in order to reflect opposite interests rather than the most accurate picture of events. The ADR process may not be satisfactory to a party that is certain about the facts.

VI. CONCLUSION

Further research is needed to understand the barriers to ADR and possible adverse consequences. Participant time and effort, as well as that of hospital staff and attorneys, are required for effective coordination and consultation. The value of a case can be more accurately determined by mediation than through arbitration even though, as mediators become more familiar with the terms used to settle cases, the valuation of those cases may increase over time. If other harmful outcomes are revealed, the number of lawsuits involving settlement (or litigation) might increase, as might the financial costs involved.

In the event that ADR is used voluntarily, none of these issues arise. In cases of mandatory

[24] Augenstein, D., 2013. Engaging the fundamentals: On the autonomous substance of EU fundamental rights law. *German Law Journal*, *14*(10), pp.1917-1938.

ADR, however, these arguments could easily support the allegations that the right to justice has been violated. The promise of technological advancements will not result in the disappearance of legal services, including ADR services; these services will continue to be delivered in different ways. Online technologies, as well as traditional ADR methods, will continue to enhance the potential of the legal industry as it embraces technology.

In the current, internet-fueled society, information is accessible to a wider audience, constantly presenting new challenges and opportunities. These challenges and opportunities are not unique to the legal industry, particularly in regard to claim or case resolution. From the standpoint of increased efficiency, a cyber solution for managing disputes will be attractive to an overburdened legal system beyond e-filing and docket management. Using ODR can make a judicial system more efficient and productive.

The parties should honestly discuss whether mediation is an appropriate option, regardless of whether it is "live" or virtual. Both parties must commit to resolving the conflict once they agree to move forward with mediation. This is in everyone's best interest. In order to maximize value, costs must be kept to a minimum, while risk and reward must be balanced, so that both sides feel fair assurance that they are benefitting from a negotiated solution.

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