

How to Avoid Litigations in Medical Practice

Compensation in Medical Negligence; Time to bring some Rationality

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In the last issue we discussed, how CPA act and consumer courts work in India. In this issue we will try to understand what is the current scene of awarding compensation in case of medical negligence.

If we try to understand the rules and system to award compensation in cases of medical negligence you will feel, society and law is waiting to pounce upon you at the slightest mistake and you will be treated worse than a habitual criminal. Things have taken a paradigm shift during last two decades and probably worst are yet to come, we need to wake ASAP and start dialogue with appropriate authorities to correct the course and save the medical profession.

How things started..

Consumer Protection Act came into force in 1986 in the country. Initially there was an ambiguity whether medical services are "Services" or not, so it was not clear if Medical services will come under CPA. Various courts and Tribunals gave different views at times totally opposite to each other.

The controversy was laid to rest in 1996 when hon'ble Supreme Court ruled that Services rendered by medical profession will come under preview of CPA.

However, essence of the ruling was that only obvious cases, which need no further investigations, will be taken the consumer courts, the cases, which require further investigation and expert opinions, will be dealt by the Civil Courts. Compensation thus awarded to complainant was not supposed to be a punishment to the doctor or reward to the complainant. It was simply meant to financial aid to the complainant for the damages occurred to the patient.

How things stand today..

- Over a period of time things change drastically. Now even most complicated cases, which require experts opinion are being dealt with by consumer courts.
- Basic essence of compensation of being neither punishment nor reward has gone. It totally focuses on finding fault and punishing the doctor.
- Huge, mindboggling and arbitrary compensations are being awarded.
- Maximum penalty for frivolous complaint is just 10,000 Rs.
- There is a spurt in cases against doctors..

Delhi Medical Council almost 25 cases every month.

15% of all cases in Consumer courts are against doctors.

Calculation of compensation..

'Multiplier Method' from MACT act is being used to calculate compensation for medical negligence.

The 'multiplier method' was created to facilitate awarding compensation in relation to motor vehicle accidents to calculate "no-fault" liability. Therefore, it accounts for the loss of income of the victim only.

This sum is calculated by taking into account the

"**multiplacand**," that is, the victim's salary minus the amount he spends on himself, and the "**multiplier**," that is, the total number of years that the victim would have earned his salary. The usual formula utilized in calculating compensation is ((70-age) x annual income + 30% for inflation - 1/3 for expenses).

It essentially equates a driver with a doctor without considering the facts that motor vehicle drivers often injure or kill healthy people due to drunken or rash driving. On the other hand doctors are dealing with sick people with high mortality and their intent is always to save the life of the patient.

The irony is that the honorable courts have refused to restrict compensation to the multiplier method. They have added other dimensions to the calculation of compensation like

- The medical costs incurred by the victim during the litigation,
- Cost of future medical expenses,
- Compensation toward mental agony and physical pain, and
- Compensation toward loss of consortium and
- Cost of litigation.

NALSA Guidelines, 2018.

If we take a look at the recent guidelines from NALSA about compensation for women victims of crime, the maximum compensation for heinous crime leading to death of women is not more than Rs 10 lacs, for face disfigurement due to acid attack is Rs 8 lacs, pregnancy due to rape is 4 lacs and grievous physical or mental injury requiring rehabilitation if just Rs 2 lacs, indicates doctors are treated worse than rapist and murderers

Problems with present system- for patients

- Takes lot of time because of slow pace justice delivery in our country, lots of appeals and protracted ligations.
- Uncertain outcome, high cost of litigations, has to file cases in various courts.
- Discriminates poor from rich people.

Problems with present system - for doctors

- Settlement of compensations are mostly arbitrary, subjective, totally on discretion of Court, so are perceived as unfair and huge by medical professionals.
- Favors litigants and punishes professionals.
- Variable compensation for same fault. 'Unpredictable' as it varies hugely across different cases, courts. Even the *Supreme Court* has noted...

"The lack of uniformity and consistency in awarding compensation has been a matter of grave concern... If different tribunals calculate compensation differently on the same facts the common man will be confused, perplexed, and

bewildered. If there is significant divergence among tribunals in determining the quantum of compensation on similar facts, it will lead to dissatisfaction and distrust in the system.”

- Causes significant mental trauma and harassment.
- Damage to a doctor's reputation is immediate, but acquittal may take a decade or more.
- Compensation on a humanitarian basis in spite of no negligence is leading spurt in frivolous cases.
- Every patient seen as potential litigant by doctors, so they are avoiding serious patients

Financial Impact of huge and arbitrary compensations..

Increased indemnity insurance cost

Till now 10 lakh or 20 lakh coverage was considered good enough, but suddenly we are seeing compensations in range of 5 crores to 10 crores. This figure could go up to 100 or 200 crores depending upon worth of the patient and discretion of the court

So how much indemnity insurance one should get

- If Indemnity insurance of Rs 10 lakh, premium is 3.5 k for a specialty.
- For 11.6 crore, it will be 5.75 lakh
- It comes to Rs 1597 per day that is almost 80 Rs per patient if one sees 20 patient a day
- And if doctor is not insured than to pay a compensation of 11.6 Crores Rs than he will have to charge 800 Rs extra from each patient (for next 20 years working 7 days a week)
- But is 11.6 cr enough? It could be 100 or even 200 crores. So imagine the financial burden. That is totally absurd and impractical. No doctor earns so much. So no doctor would be in a position to pay the amount

Scene elsewhere

Capping of compensation has been in place in various countries.. States in the USA have imposed caps on total or on noneconomic damages, or they impose restrictions on damages based on whether a wrongful death occurred, or if the hospital was a public or private.

What needs to be done..

- Restore confidence in medical community so that they can treat with free minds, not all the time wary of dangling sword.
- Consider doctors as humans not gods, who can't err.
- 🕒 Look at intent, not act

Aim is to create a system of compensation that is

- Fair
- Practical
- Fast
- Economical
- Less subjective and uniform

What can be done with present system

- Cap the amount of maximum compensation.
- *Fixed amount of indemnity insurance should be levied from doctors like third party insurance of vehicle.* Insurance premium is fixed for each brand of car and driver do not get insured themselves for variable amount of insurance. So the premium should be fixed for indemnity insurance of doctors irrespective of ultimate amount of compensation awarded.

Premium can fixed on the basis of specialty, type of hospital primary or tertiary, Govt or public etc.

- State can levy a premium or tax of fixed amount from doctors and state or insurance pays for compensation.
- Amend the CPA act, take medicos out of it, stop equating human body with TV or Fridge.

- Follow original SC saying that only obvious cases should be dealt in Consumer Courts.
- *Increase the penalty of frivolous complaint to 50% of compensation claimed.*

No-fault liability system..

Already in place in country like in New Zealand, Denmark, Sweden, Finland, Norway and two states of USA.

“An unconditional, minimum, fixed financial support to the victims of alleged medical negligence resulting in permanent disability or death at the commencement of any trial before any court without any finding(s) or bearing on the ultimate merits of the case”

The basis for no-fault liability is that medical errors are expected **phenomenon**, that are compensated for through, specially instituted **tribunals**, which assess the compensation payable to the victim **purely on the presence of a medical error**, without having to determine fault

Merits of No-fault liability system..

- *Will eradicate the defensive medicine* as doctors will be less fearful, thus in turn will reduce cost significantly
- *Errors will be reported and discussed freely*, will lead to decrease possibility of errors in future. Will reinforce the honesty and openness about Doctor - patient relationship.
- *Compensation will equitable* for same kind of injury, no scope of personal discretion.
- Will be equitable irrespective of the economic status of the patient or financial condition of the doctor.
- Compensation will be *quick and time bound*.

To Conclude..

- There is a **need to evaluate** the manner in which India chooses to address medical negligence.
- With most of India's healthcare being provided by the private sector, **predictability and uniformity** in the regulation of compensation in medical negligence is required for **good of both doctors and patients**
- Defensive medicine, increasing insurance premiums is **increasing cost of medical care**.
- It is time we are aware of the **inequity** in the present system.
- **Systemic deficiencies** such as heavy litigation costs, delayed and protracted litigation, as well as dependence on judicial discretion, do not provide effective justice to victims and could harm doctors and hospitals as well.
- In a country where there is (a) an abysmal investment in health, (b) the absence of human resources, (c) a huge gap between urban and rural health care, and (d) poor political will to improve the health sector, it would be wise to implement a **no-fault liability** system within the public health sector and also to have caps on compensations.
- The government needs to **act and invest in health care** before it is too late. India needs to overhaul the present system of addressing medical negligence using all of the above-mentioned solutions effectively.

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Ps. soon will start articles on medico-legal cases pertaining to various specialties. If you have any query related to your specialty please mail it to thearungupta1@gmail.com or whatsapp on 9811106056