



RESEARCH PAPER

Critical Analysis of Medical Malpractice Laws in Pakistan: An Expedition from Enactment to Opulent Enforcement

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PAPER INFO

Received:

January 31, 2021

Accepted:

March 01, 2021

Online:

March 15, 2021

Keywords:

Healthcare
Provider,
Infrastructure,
Liability,
Medical
Malpractice,
Negligence

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ABSTRACT

This paper aims to explicate that despite of legislative frameworks why medical malpractice is still rampant. The object of the study is to determine the question of jurisdiction of tribunals and courts pertaining to this felony and explains how effective mechanisms can be evolved for the proper enforcement of laws. The rationale of the study is to suggest that an exclusive and viable law on the subject must be enacted which shall conclusively lays down the parameter for determining the rights obligation and liabilities of all the stakeholders including healthcare providers and patients to uphold and implement the hopes trust and confidence associated with medical profession. The Research methodology involving qualitative, descriptive, analytical empirical and applied methods based on the rationale of the study. This research has highlighted some grey areas in the legislative and implementation mechanisms which are condition precedent for opulent implementation of laws.

Introduction

Medical profession is a noble profession whose reliability is dependent upon the persons who practice it. Health care providers and patients have a fiduciary relation which is based on trust and confidence, the decisions taken by the former and care and treatment offered effect the life of the later. The relationship between them is more of a contractual obligation; it must be based on a holistic approach, a blend of trust, confidence, and obligation (Cantor & Wadlington, (1994). History of medical professional is as old as history of man himself. A patient is almost totally vulnerable and dependent upon his doctor for therapeutic treatments, privacy, the right decision regarding treatment, financial aspect of the ailment and a lot of matters associated with it. This profession encompasses in it a lot of privileges and

social recognition but also good deal of expectation, remonstrance, and resentment (Pandit, 2009). Doctors like every human are prone to make mistake, however, the quantum, causes and intensity of the mistake in discharge of their duties varies from one situation to another. The primary obligation of a healthcare provider is the preclusion of harm that an individual can sustain when he comes to a doctor for treatment (Shah & Sheahan, 2016). Despite of the immense responsibility on health care provider, availability of reasonable infrastructure, proper education and laws governing the conduct of health care sector, the menace of medical malpractice and negligence is extensive in Pakistan. The grievances and anguish coming from the source which is considered as the resource of comfort is very upsetting and the torment, distress which a patient or his family endure, and which is caused by the carelessness, professional inability and malpractice of a doctor or paramedical staff is not at all justifiable.

This is also pertinent to mention here that no health system of the world is flawless or devoid of medical malpractices and negligence as human beings are prone to commit errors (Muhammad , 2017). Laws have always been enacted to regulate the conduct of the healthcare providers so that no one could transgress the limits within which they ought to discharge their duties. It has been aptly remarked that cases relating to medical malpractice have been reported from the developed countries like USA and UK too for instance between 44,000 and 98,000 fatalities occur in the United States every year due to medical malpractices and negligence (Sher, 2006).

The health system of Pakistan is analogous to the British health system being a colony to the British dominion. Like every other developing country, the state of healthcare delivery system in Pakistan is regrettable and since long is in the process of development (Rustad & Koenig, 1994). Besides major differences one of the most vital reason is allocation of meagre financial resources for health sector, want of effective checks and supervisory control, lack of proficient healthcare arrangement, want of political resolve and failure to consider the subject of health as a priority are the main consideration. Scarcity of trained and skill workers, massive brain-drain of skilled and competent doctors due to lack of social and economic viability, non-availability of incentives and poor implementation of laws pertaining to planning, financing, management, institutionalizing checks, monitoring, and supervising etc are the basic reasons of this feeble system of health care (Adejumo, 2020). as far as Infrastructure is concerned, Pakistan has a reasonable healthcare system. According to the report (WHO,2014) there are 5000 basic health units, 600 rural health units, 7500 first level care facilities, hospitals at tehsil and district level, while tertiary care hospitals are mainly situated in big cities and are allied with teaching and research organizations. In total, there are 989 public hospitals. According to a survey Pakistan has 169,696 registered general practitioners, 19,539 dentists (with basic BDS degree), and 1,090 Licentiate State Medical Faculty. Number of registered physicians and specialists is 210,490 while registered dental surgeons are 21,406.12.

The cases that are being reported reveal that these incidents are on the rise, but the remedies offered to the aggrieved persons are not up to the mark for number of reasons (Rustad & Koenig, 1994) The red-tapism and complexities of the legal system and want of financial resources to put up the litigation expenses, lack of awareness, therefore, the number of actual cases is far high than the ones being reported. These are accredited to two glaring reasons: medical malpractices and negligence. As stated, Waraich, (2018) that medical malpractice is an illegal act by an unqualified person impersonating as a healthcare provider and negligence is an act by a capable and skilled healthcare provider who departs from efficient practices and standards, resulting in injury to his/her patients. According to Section 2(xii), Punjab Healthcare Commission Act, 2010. Medical negligence is a case where a patient sustains injury or dies because of improper treatment in a healthcare establishment.

Legal Framework in Pakistan for Dealing with Medical Malpractice and Negligence

The Right of life as enunciated in Article 9 envisages in it a fundamental guarantee that it is the duty of the state being a welfare state to ensure the optimum enforcement of right of life; and right of life as laid down by the Supreme Court that the word life covers all means of human existence, all such services and amenities that a person is entitled to enjoy legally and constitutionally. It includes medical care too as a right to have proper health care facilities as medical care in all intents and purposes are meant for the protection of life. Laws have been made to regulate medical profession and to control the acts of health care providers, rules and regulations have also been formulated policies, however, due to obvious lacunas and dearth of effective mechanisms to keep a supervisory check and control check (Scott & Macklem, 1992).

Laws are instruments of purposive social change. As has been aptly remarked by honourable Supreme Court of Pakistan that Law could bear and stay effectual if it was only theoretical and socially unrelated; it became all the more lasting and efficient if it pulsed from the soil and reflected indigenous conditions around. Therefore laws do not grow in isolation, in order to comprehend the law of Pakistan dealing with medical malpractice, it is required to have a look over the prevalent healthcare system, where the norms of medical profession are developed and practiced and from where the malpractice comes out. (Cantor & Wadlington, 1994). We need to understand the prevalent norms and practices of society and general attitude towards the enforcement of law. After 18th Amendment in the Constitution of Pakistan as stated by health and matters ancillary to it including planning, financing, implementation, management, oversight, supervision, monitoring, regulation, medical education and training have become provincial subjects to legislate upon (Waraich, 2018).

Evolution and Monitorization of Standards of Healthcare

In Pakistan various laws have been made to regulate, evolve and monitor standards of health care and to ensure the implementations of the spirit of laws. On the parameters of liabilities it confers, laws have been categorized into following forms i.e.

1. Pakistan the Pakistan Medical Commission (PMC) Act 2020.
2. Pakistan Medical Commission (PMC) Regulations.
3. Medical Tribunal Act 2020
4. Laws entailing Civil liabilities under law of Torts and Code of Civil procedure 1908 Section 19.
5. Under Consumer protection regime following laws are enacted on the subject.
6. Criminal liability under Pakistan Penal Code 1860
7. Liability under code of Criminal Procedure
8. Disciplinary Action under Health Care Commission Acts.

From the perusal of the entire enactments one thing which is perplexing is that most of the enactment aims to regulate the medical education and organizational setup dealing with medical colleges and healthcare providing Institutions. As stated that History of different laws enacted over time had one object in common and that is to manage the affairs of medical education as well as recognition of medical and dental qualifications traced (Waraich, 2018). it is reiterated in another case that the preamble of the Act XVI of 2010, from which it alludes that it was enacted for improving the quality of healthcare services. The laws pertaining to determination of the rights and liabilities and the modus operandi to confer liability on the doctors, paramedical staff and healthcare providing institutions on the account of their negligence and medical malpractices, has yet to be developed. The Health care Commissions Acts 2010 were enforced in the province of Punjab, Sindh, Khaberpakhtounkhawah after the accumulations of the enormous cases of medical malpractices across the country .From perusal of all these above stated enactment it is evident that although there are sufficient provisions in the statutes governing the conduct of medical healthcare providers, however, owing to poor understanding of the procedure, lack of proper mechanisms for implementation, these remedies against negligence and medical malpractice are not implemented in true letter and spirit. This area has been so badly neglected at the altar of technicalities and red-tapism inbuilt in the system. The core purpose of these laws to guarantee the application of the generally acknowledged principles of wellbeing of patient have been lost.

- The Punjab Healthcare Commission Act 2010 in Section 4 empowers the Commission that on application of any aggrieved person to hold enquiry and investigate into malpractice services by any healthcare provider and issue resulting orders and while doing so can exercise the powers of a civil court for the execution of its orders.

- Section 19 of the same Act defines medical negligence as a healthcare service provider may be held guilty of medical negligence when a healthcare provider does not exercise with due care and caution with rational proficiency the expertise which he or his employee did possess.
- Section 26 of both the enactments (Punjab and Sindh) Healthcare Commission Acts 2010 and 2013 respectively provides that where the conditions of a case permit action under any other law can also be taken, the Act empowers the Commission to refer any case to the executive authorities or law enforcing agencies for appropriate action under relevant laws. Meaning thereby that once an inquiry is completed by the Commission and the commission is of the view that it is proved by cogent evidence that charges levied against accused healthcare provider hold water then it may refer the case accordingly.
- Section 23 of the Act prescribe the procedure of the investigation to be followed by the commission and details the process required to be followed for filing a complaint.
- Section 28 confers jurisdiction on the Commission to adjudicate and impose fine up-to five hundred thousand rupees, keeping in view gravity of offence, but only after affording an adequate opportunity of hearing to a person to be fined. And in case the complaint is proved false, it could impose fine up-to two hundred thousand rupees upon the complainant.
- Under section 35, all administrative authorities of the Government have been directed to act in support of the Commission for executing the mandate given to it by Law.

It is relevant to mention here that laws and regulations have been made from time to time to curtail medical malpractice, however, the improper understanding of law and procedural hitches make their enforcement an impediment. There is a call to develop a system where the medical malpractices would be properly addressed and the wrong doer can be held accountable for, condemned and penalized. At the same time aggrieved persons should be provided with the equitable justice according to the rule of law. It is evident from the provisions of the Act that the law about medical malpractice and medical negligence is in place, however, its poor understanding and procedural hitches make it a complicated and redundant law. As it is interpreted that the only remedy available to an aggrieved person is the award of compensation which could extend to five hundred thousand and that jurisdiction of executive authorities or courts is out. This is absolutely a wrong concept, it clearly provides and has established through number of cases that that the modus operandi to be followed by the aggrieved person is to first file a complaint before the healthcare Commission for enquiry and investigation into matter malpractice and medical negligence and if accused is proved guilty of charges levied against him of the description mentioned in complaint which is amenable to fine, the commission shall impose fines/ and may revoke license, but if the allegation of gross negligence amounting to offence under criminal law or negligence under civil law is

made out, then the commission shall convey its report to the law enforcing agencies to deal with the matter in accordance with law. As stated by honourable Sindh High Court that when an aggrieved person decides to avail a remedy under some other law, and/or a different law has been set in motion, neither he would be non-suited, nor such law set at naught on the ground that there is a provision in the Act (Sec.29) proposing immunity to a healthcare service provider. It is categorically stated by the Court that Healthcare Commission could refer any case to the competent forum or law enforcement agencies for appropriate action under relevant laws.

It would amount to absolute pitiable understanding of law that these special enactments close the doors on the aggrieved party to have recourse to other remedies available in other laws. i.e. Pakistan Penal Code and Code of Criminal procedures. All the organs of the state must take upon themselves the responsibility to ensure the implementation of the basic rights in which health is most vital indispensable and evitable. Considering the above interpretation of law, it is crystal clear that original jurisdiction pertaining to matters of medical malpractice and negligence lies with Healthcare Commission and if after investigation it is proved that such allegations hold water and gives rise to any criminal offence or is amenable to the civil jurisdiction of law then same can be proceeded accordingly. It is relevant to mention here that the laws and regulations have been made from time to time to curtail medical malpractice, however, there is a call to develop a system where the medical malpractices would be properly addressed and the wrong doer can be held accountable for, condemned and penalized (Cantor &Wadlington, 1994). At the same time aggrieved persons should be provided with the equitable justice according to the rule of law. Mere revoking the lenience or condemning the wrong doer does not suffice. All the organs of the state must take upon themselves the responsibility to ensure the implementation of the basic rights in which health is most vital indispensable and evitable. The enactment of Healthcare Commission Acts in all the provinces of Pakistan is the evidence of the acknowledgment of these wrongs with the intention to evolve mechanisms to provide remedy. Following principles can be inferred from the perusal of these enactments.

It is also a matter of paramount consideration to determine the question of jurisdiction as far as the medical malpractice and negligence of healthcare provider are concerned. It has been repeatedly asserted by number of researchers that (Wariarch, 2018), Consumer courts of Pakistan has jurisdiction over the matters regarding malpractice and negligence of the healthcare provider; however, this is an obsolete idea now, after the promulgation of special laws on the subject the jurisdiction of the general law (Consumer Protection Act 2005) is oust. As has been stated by honourable Lahore High Court judge, Justice Farrukh Irfan that Section 29 of the Act barred proceedings under any other law which included the Punjab Consumer Protection Act, 2005. These short comings can be resolved through a revised and meticulous enactment exclusively dealing with conduct of healthcare provider including misfeasance, malfeasance, and negligence (Khowaja, K. 2009). It is stated in PLD 2019 Lah 429 that in the matters of medical malpractice and negligence the exclusive jurisdiction is of Punjab Healthcare Commission in Punjab

to investigate and impose penalty. It is further stated in 2011 C L C 463 that once it is decided by the Healthcare Commissions that doctor was guilty of malpractice and misconduct, criminal as well as civil law could be agitated against this felony.

Conclusion

It is well recognized standard of law that laws are the instrument of purposive social change in the society; Laws must confirm the societal need and must be based on the ideals upon which the edifice of the State's legal system is to be raised. Since time immemorial laws aim to regulate human conduct and ensure that individuals act within prescribed limits so that justice could be prevailed. Instead of finding the shortcomings of the legal system in Pakistan pertaining to medical malpractice, the important consideration in this research throughout has been to emphasize and suggest mechanisms to address the felony in question. It is suggested that there is a need to amend outdated redundant and obsolete unproductive laws which only tend to complicate the matters instead of addressing the issue. The government must keep a viable and effective check and control on the regulatory bodies having a mandate to execute laws. The universally accepted canons of medical practice must be introduced and implemented within the framework of our health system too (Jalal & Haq, 2014). All healthcare providers must be given proper training and equip with skills to meet the standard of care expected from them. It has always been a highly privileged, respectful, and highly rewarding profession. A very high level of implied trust, empathy, care, kindness, morality, and professional proficiency is expected from a doctor. Exclusive law must be made which clearly defines the provisions regarding medical negligence and medical malpractice and the liabilities in case of breach of such obligations. The measure to award monetary compensation must be clearly stated. There should be an accountability mechanism of regulatory bodies as well. The bureaucratic hurdles should be removed, and this area must be effectively separated from the bureaucratic shackles and control. The law must ensure the enforcement of the rights of patient as well as healthcare provider.

A doctor cannot overlook nor disregard the celestial role he is expected to have in the discharge of his duties and the standards a doctor must adhere to or is morally connected with regardless of any law watching over their deeds (Sher, 2006). The oath 'the undertaking' which a doctor swears on the very first day of his medical profession casts a heavy responsibility on his shoulder to uphold all the virtues associated with this profession the oath states will use those regimens which will benefit my patients according to my greatest ability and judgment, and I will do no harm or injustice to them (Shah & Sheahan, 2016). These aspirations when truly translated by the State legislature through efficacious enactments, by executive through viable policies and with opulent implementation by the judiciary, the entire healthcare regime can be progressed and revamped for addressing the concerns, for serving the mandate of laws and for enforcing the fundamental rights guaranteed by the Constitution.

Recommendations and Suggestions

As has been remarked that the main objective of laws pertaining to medical negligence is to avert contravention and breach of rights of patients (Eisenberg & Berlin, 2002). From the above discussion we can conclude that a doctor patient relationship is a special case, and it cannot and should not be dealt as an ordinary contractual relationship. We cannot quantify the weight of obligation a doctor owes to its patient; however, we cannot bluntly and rigorously penalise doctors as that can only result in either defensive medicine by individual doctors or as collective response in the form of resistance to treat patients because of the fear of litigation. The foremost duty is of state to inculcate accountability mechanisms within the health system. Firstly, we need a collective comprehensive approach to tackle this problem from government level to hospitals, teaching institutions, teachers, and doctors working at duty stations and secondly the enforcement mechanisms must be strictly construed and implemented.

Revocation /cancellation of licence would not be an effective measure to be taken for medical malpractice, instead we need a progressive approach to deal with this felony like if a doctor is found negligent in his area of practice and affects the rights of the patients or persons associated with him then he must be put under strict surveillance of a specialist in the field to be appointed by the Authority. A person for whose education and training community has spent more than 10 million Rupees, it would be disservice to the community if we strip him of his licence. For the doctors practicing privately, it can be opted that a doctor should display a letter in his clinic listing his area of expertise, a letter issued by reliable source i.e., govt body or a senior consultant under whose supervision the doctor has got training. It could act as a deterrent effect if there is a direct liability of Healthcare service providing Institutions in case of failure to establish a proper healthcare management system, prompt handling of potential patients, proper and efficacious training of doctors and paramedical staff, adequate medicines and testing facilities, proper staffing levels.

A viable system must be developed to check the competency of its health care worker at regular intervals, while govt should develop means to check if the institutions are rendering continuous capacity building of its staff and the proficiency of institutions or not and some sort of rating criteria should be developed to enhance the competition among institutions. Infrastructure of hospitals should be made such that it should facilitate both the doctors and the patient (Acemoglu & Jackson, 2017). In most government hospitals of Pakistan, the torment of just getting necessary lab investigations done is worse than the actual pain of the patient itself. We need to strengthen basic health facilities and should enhance the capabilities of these basic health units. It would divide the burden on tertiary care hospitals. Duty hours of doctors should be regulated properly. It has been seen that most of the junior doctors are working for more than 32 hours continuously, which is humanly not possible to work for such long hours and deliver optimum service. It has been postulated by various forums that there should be an off post 24 hours of duty,

medical officers should be hired to divide the existing burden of work, however, no such guidelines have ever been complied with in letter and spirit.

Measures should be taken to divide the burdens of hospitals, by strengthening the Basic Health Units, by equal distribution of patients in major hospitals, and by enhancing the capacity and staff of hospitals. In most of the govt hospitals major specialities are divided into subunits i.e., medicine and surgery are major specialities, and they are subdivided into Unit 1, 2, 3, 4 etc. When the duties are distributed among Units, a single unit is working in Emergency, OPD on specific days. All the patients that visit on that day, that need to be admitted in hospital, will be taken up by only that specific unit which has duty in Emergency or OPD, no matter if this unit is already flooded with patients. This approach needs to be changed; all the patient load that needs admission should be distributed centrally, equally to all subunits. The doctors and paramedics should be taught and trained at their respective institutions strictly the course of conduct and about pitfalls that can result in negligence i.e., special emphasis upon emergency care, duty hours and human capacity, medical ethics, and limits of their practice.

Considering the observation stated above it is imperative upon the State legislature to enact laws which specifically deals with law relating to medical malpractice negligence and acts ancillary thereto. The separate independent tribunal must be constituted to deal with the cases of medical malpractice and negligence unlike Healthcare Commission which has quasi-judicial enactment. For the effective implementation of laws technically equipped adjudicators, an independent panel of experts must be appointed who are not only well versed with medical knowledge and skill but proficient in law too, mechanism must be evolved to collect forensic evidence and related records. This will make certain rapid disposal of cases in an efficient way. there is a dire need to refurbish the health system by assigning proper health care budget for health departments, by defining provision of adequate health facilities to the masses by the government as well as by the institutions providing health care facility and ensuring the continuous capacity building of its all staff including doctors, paramedics, and ancillary hospital staff, formulating guidelines and protocols by the government for health care institutions and healthcare providers.

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