Review Article:
No medicolegal case against doctors after 3 years of treatment

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Abstract

MCI stipulates to keep medical records for a period of 3 years. Once the medical records are disposed, the defence of medical professionals in any kind of medicolegal case is reduced to zero. Therefore, the implication and existing MCI guidelines are clear that no medicolegal case can be entertained after 3 years of treatment as 3 years is more than sufficient to know ill effects of any kind of treatment. However, in the absence of clarification to this effect from MCI (that no medicolegal case can be entertained after 3 years of treatment), a lot of doctors are being harassed and traumatized by frivolous litigations which are filed against them after 3 years of treatment. *A clarification of the existing guidelines is needed urgently from MCI and various state medical councils specifying that any kind of medicolegal case cannot be filed against a medical professional after 3 years of treatment especially in cases where the entire defence is dependent on medical records. In case, a litigation is still filed against a medical professional after 3 years of treatment and medical records are not available in that case, then the presumption would be raised in favour of the medical professional that all the records were correct and were in order.* Though health is a state subject, but a clarification from MCI would help state medical councils to issue such clarification in their respective states. In the absence of such a clarification, the sword of Damocles would always be hanging on every medical professional of the country throughout their lives as a lot of rogue elements are eager to misuse this shortcoming to exploit medical professionals for their petty gains.

Introduction :

Proper maintenance of medical records is vital for both patients and medical professionals. The medical record keeping is necessary mainly for two reasons :

1. Patient care
2. Alleged medical negligence

First, in patient care, the medical records are needed for providing continuing patient care, analysing the effect of treatment, pursuing clinical research and making guidelines at regional or national level.

Second, the medical records are of paramount importance in medicolegal cases. Whenever a medical negligence or irregularity is alleged against a doctor, the legal system relies mainly on the documentary evidence (medical records). The latter is often the only evidence which leads to the acquittal of the doctor. Therefore, this well-known saying is so pertinent *"Poor medical records mean poor defense, no records mean no defense"*[1].

Due to these reasons, the maintenance and proper upkeep of medical records is vital for a doctor's defense in any kind of medicolegal case whether the case is of alleged negligence, error in judgement, improper consent or any other consent related issues, deficiency in providing service etc.

Different countries have different guidelines on this but most countries have a statute of preserving medical records between two to five years. In India, under MCI Regulations, 1.3.1 of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002, "Every physician shall maintain the medical records pertaining to his / her indoor patients for a period of 3 years from the date of commencement of the treatment" [1].

When the destruction of medical records

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makes the medical professional so vulnerable to conviction in any alleged medicolegal case, then why should the medical records be destroyed at all? Why a tenure of 3 years is prescribed for safekeeping medical records? It becomes important to understand the rationale behind this. The reasons for fixing a tenure for medical record keeping are :

1. It is logistically not possible to maintain records of so many patients for very long times.
2. The period of 3 years is more than sufficient for manifestation of any ill effect of any medical or surgical treatment. In fact, the ill effects of almost all kinds of treatment is known with in 3-6 months. Therefore a period of 3 years is fixed so as to safely cover all kinds of rarest circumstances.
3. For the purpose of peace and proper functioning of healthcare system in the country, it is necessary that a medical professional should not be kept under continuous apprehension that he may be prosecuted at any time particularly when the rate of false litigations is on the rise.

Therefore, the tenure of medical record keeping (3 years in India) is fixed implying clearly that no medicolegal case should be entertained after the period of this tenure. As these rules are framed by Medical Council of India (MCI), many legal professionals are not aware of this technicality. Therefore, there are FIRs being lodged and cases being filed in medicolegal cases even after 3 years of medical treatment.

What are the issues :

Notwithstanding, there have been judgements in Supreme Court and High Courts where the cases have been dismissed on this ground only (that the case has been filed after the tenure of medical record keeping has elapsed) [2].

It would be prudent to discuss the Limitations Act, along with Section 468 of the Criminal Procedure Code.

"Section 468 of the Code of Criminal Procedure lays down the period of limitation for taking cognizance of an offence. According to this Section, if an offence is punishable with fine only, the period of limitation shall be six months and if the offence is punishable with imprisonment for a term that does not exceed one year, the period of limitation is one year. Section 468, further makes it clear that if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years, the period of limitation shall be three years. However, this Section does not lay down the period of limitation for offences punishable with imprisonment exceeding three years. Meaning thereby there is no outer limit qua the limitation in relation to the offences having punishment for three years or more. Thus, Section 473 of the Code of Criminal Procedure enables the Court to take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to do so in the interests of justice".

It states that in offences punishable with imprisonment exceeding three years, Section 468 and 473 enables the Court to take cognizance even after three years if the Court is satisfied that the delay has been properly explained. It is relevant to discuss whether this can be applied in medicolegal cases? Can the Court take cognizance in a medicolegal case after destruction of medical records (three years) assuming the imprisonment for the offence by the medical professional exceeds three years?

On Limitations Act, the Supreme Court had observed the following points as why delayed litigations lead to injustice [3].

Among the grounds in favour of prescribing the limitation may be mentioned the following:

1. As time passes the testimony of witnesses become weaker and weaker because of lapse of memory and evidence becomes more and more uncertain with the result that the danger of error becomes greater.
2. For the purpose of peace and repose it is necessary that an offender should not be kept under continuous apprehension that he may be prosecuted at any time particularly because with the multifarious laws creating new offences many persons at some time or the other commit

some crime or the other. People will have no peace of mind if there is no period of limitation even for petty offences.

3. The deterrent effect of punishment is impaired if prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of the persons concerned.
4. The sense of social retribution (punishment) which is one of the purposes of criminal law loses its edge after the expiry of a long period.
5. The period of limitation would put pressure on the organs of criminal prosecution to make every effort to ensure the detection and punishment of the crime quickly.

The Supreme court observed that as time passes by, the evidence becomes weaker and weaker and the chances of error becomes greater.

The same observations are made in UK laws [4]. The purpose and effect of statutes of limitations are to protect defendants. There are three reasons for enforcing the Limitation Act:

1. A plaintiff with a valid cause of action should pursue it with reasonable diligence.
2. By the time a stale claim is litigated, a defendant might have lost evidence necessary to disprove the claim.
3. Litigation of a long-dormant claim may result in more cruelty than justice.

Here the second point, that the defendant might lose necessary evidence to defend himself holds utmost relevance in medicolegal cases. Because after three years when the medical records have been destroyed, the doctors have lost all evidence to defend themselves.

In special circumstances (where there is Special Act on limitation), the Supreme Court has ruled that the limitation period may be followed as per the Special Act [3]. The Supreme Court observed that Merchandise Marks Act was a special. Section 15 of Merchandise Marks Act specified that no case can be lodged after 1 year of the discovery of the offence. Hence a case filed after 1 year of the offence was rejected on this ground. As Merchandise Marks Act was a Special Act and therefore it would take precedence over CrPC. Similarly, in medicolegal cases, though there is no Special Act as of now, the situation is definitely special because of MCI guidelines that the medical records be kept for 3 years from the date of commencement of treatment.

Therefore, against this background, the following conclusions can be drawn :

a. Medical Council of India regulations prescribe maintenance of medical records for three years from the date of commencement of treatment.
b. With passage of time, the right of defendant becomes prejudiced as the defence evidence becomes weaker and weaker. However, in medicolegal cases, where the only defense of medical professionals are the medical records, the defense of medical professional is lost completely after three years.
c. The Court can take cognizance even after three years if the Court is satisfied that the delay has been properly explained. However this is not applicable in situations where there is a Special Act as there the latter takes precedence. Medicolegal cases after three years also fall under this category.
d. Though Courts have dismissed medicolegal cases where the cases have been filed after the lapse of medical record keeping duration, still a lot of cases are pending due to lack of clear understanding and absence of a special Act on this. Therefore, a Special Act needs to be passed specifying that any kind of medicolegal case (alleged negligence, error in judgement, improper consent or any other consent related issues, deficiency in providing service etc.) is not entertainable after the lapse of period prescribed for preserving medical records. In case, a litigation is still filed against a medical professional after 3 years of treatment and medical records are not available in that case, then the presumption would be raised in favour of the medical professional that all the records were correct and were in order.
e. With increasing digitalization, the medical records can be safely and easily kept for much longer periods. In case the need is felt in future, the stipulated duration for preserving medical records can be increased to any time-frame but the litigation after the stipulated duration cannot

be entertained. Otherwise, the medical professionals all over the country can be held to ransom anytime by anybody and the healthcare system in the country would become ineffective.

Thus this point that a medicolegal case cannot be entertained after 3 years of treatment needs proper implementation in our country. In other countries like UK, there is a clear statute regarding this [5].The importance of this point is further illustrated by few examples(situations) listed below :

Case No 1

Mr A got severe infection in his left kidney. The kidney got damaged as it was filled with lot of pus. Mr A's status starts going downhill as the infection starts spreading in the blood to the whole body. The removal of the damaged kidney becomes imperative to save the life of the patient.

Mr A contacted a surgeon,Dr S. The surgeon operated Mr A, removed the damaged infected kidney and Mr A's life was saved. The damaged kidney was sent for histopathology examination which confirmed that the kidney was grossly damaged and infected. The patient was discharged and recovered fully. The patient's file (containing the description of patient's clinical condition, ultrasound and CT scan reports showing swollen damaged kidney, operative findings mentioning enlarged damaged left kidney, histopathology report describing the damaged kidney and all duly signed consent documents) was archived. After 3 years, the full file was disposed of as per MCI guidelines.

After 11 years of surgery, Mr A happened to meet Mr B, who had animosity with the surgeon, Dr S. Mr B incited Mr A to file a criminal case against the surgeon accusing Dr S of "taking out Mr A's kidney with deceit (by giving him offer of Rs 10 lakhs) and selling (transplanted) his kidney to some other person". So in nutshell, the complaint was that Dr S took out Mr A's normal kidney by deceit and then didn't pay any money to Mr A. The police filed a FIR against Dr S under sections IPC 417, 420 and The Human Organ Transplant Act (THOTA),1994. The police got a medical examination of Mr A which showed an incision (cut scar) on the left side of the tummy corroborating with a kidney removal operation. The ultrasound and CT scan was done which showed that the left kidney was missing.

The patient, Mr A, didn't produce any of his medical records for obvious reasons and the doctor, Dr S, had none available with him (as they were disposed of several years back) to prove his innocence. The charge sheet was filed and the trial is on. The surgeon, Dr S, has no ways or means to defend himself. He is busy fighting a legal battle and his hard earned reputation of years is in tatters.

Summary : *Patient developed life-threatening Pyonephrosis - Timely operated (Damaged kidney removed) by surgeon successfully - Patient recovered well - Surgeon disposed all patient records after 3 years - After 11 years of operation, patient under influence of surgeon's enemy filed a police complaint that surgeon removed his kidney by deceit and sold it - FIR lodged - Police on investigation found a kidney operation scar and no kidney found on ultrasound - Surgeon charge-sheeted as he had no evidence to defend himself.*

Case No-2:

A Model, Ms M wanted to compete in a national fashion competition. She talked to her friend, another model, Ms N. Ms N encouraged her to participate in the competition, however she advised her that her nose was not that aligned. If she got her nose corrected, then she would look even more beautiful and her chances of winning would become very high. On being asked as where to get her nose surgery done, Ms N recommended the name of her friend, a Plastic Surgeon, Dr P. Ms M went to Dr P for nose beautification surgery. Dr P explained her clearly that the results of cosmetic surgery were never guaranteed and sometimes there could be a mismatch between the results and the expectations. At times, the final appearance might worsen after surgery. These are well known hazards of any surgery. Ms M understood all that and then signed the written consent.

The surgery was carried out. Ms M was satisfied with the surgery and thanked Dr P profusely. She however didn't win the national competition but her friend Ms N won that competition. Incidentally, after 4 years, she participated in another competition where she lost in the first round. One of the fellow participant commented to her that her nose was not that beautiful and that was the only reason she lost. Ms M got really perturbed and seriously started believing that her 'not so beautiful' nose which was due to

'botched up' surgery was the reason for her failure.

She started blaming Dr P for the bad surgery done. Along with that, she also felt that her friend Ms N conspired with Dr P to make her look 'ugly' so that Ms N could win the competition. She filed a police complaint against her friend, Ms N of brainwashing her to go for surgery and Dr P of taking improper consent (that he never explained that there is a possibility that the nose could also become worse after surgery) and conspiring with Ms N to make her ugly.

The police filed a FIR under sections IPC 417, 326 and 120-B. Since disfigurement of nose (face) comes under grievous injuries (section IPC 320) and surgery involves sharp 'weapon' (knife), so police justified section IPC 326.

Dr. P had destroyed the medical records containing all signed consent forms as 4 years had elapsed after the surgery.Dr P had no defense available, his bail was rejected and he spent 9 months in jail before he could get bail. Dr P's lawyer argued that "a medicolegal case cannot be entertained after 3 years as the defendant has no documents available with him to show that proper written consent explaining all aspects of surgery was taken from the patient". The Magistrate countered this by saying that the 3 year period in Limitations Act can be waived off at Court's discretion. The defence lawyer further argued that "MCI(Medical Council of India)guidelines stipulates that medical records be kept only for 3 years. After that the doctor has no defense left with him". The Magistrate countered this by saying that neither there were any specific guidelines from MCI nor was there any special Act which says that a medicolegal case cannot be entertained after 3 years.The doctor's reputation and professional career has suffered a major dent and the trial is going on.

Summary : *A model wanted a nose-alignment cosmetic surgery- On friend's recommendation, got operated successfully by a Plastic Surgeon- Patient recovered well and was happy with surgery - Surgeon disposed all patient records after 3 years- After 4 years of operation, patient felt that her nose was not looking good - Suspects a conspiracy to make her ugly by her friend - Filed a police complaint that her friend conspired with the plastic surgeon to disfigure her and the surgeon didn't explain the results of surgery properly - FIR lodged that surgeon didn't take proper consent - Patient didn't show any medical record and surgeon had disposed it off - Surgeon charge-sheeted under section 326 (grievous injury) as he had no evidence (medical records) to defend himself.*

These are examples of two case scenarios as how the failure to simply extrapolate the significance of MCI guidelines spoilt the careers of two medical experts. There are several examples like this all over the country. This 'evil needs to be stopped in the bud' otherwise it can open pandora's box. The rogue elements in the society take a clue from such cases and instigate innocent patients to file more and more frivolous cases against doctors. Any doctor can be blackmailed, harassed, his hard-earned reputation reduced to ashes and he be made to suffer for prolonged periods due to absence of clear clarification of guidelines by MCI. Incidentally, there is clear law in UK on this topic [5,6].

UK Law on this topic [5,6]

The general time limit for medical negligence and personal injury claims is 3 years from the date of the alleged negligence. This means that Court proceedings must be started by way of issuing a Claim Form at Court within 3 years. However, there are circumstances where the 3 year time limit will not start to run until later. The most common of these exceptions are:

1. Children

Children cannot bring a claim themselves and require a 'Litigation Friend', who is typically a parent or close relative, to bring a claim on their behalf. The three years does not start until the child reaches the age of 18, which gives the child the opportunity to bring a claim as an adult (as long as someone has not brought a claim on their behalf before). This means that the limitation period expires on the child's 21st birthday .

2. Date of knowledge

There are circumstances where it is difficult to identify the exact date when the negligence occurred and therefore when the 3 year time limit begins to run. In this situation the limitation period starts to run from the 'date of knowledge' of the injured person. There are 3

main requirements to be satisfied before a claimant can be said to have 'knowledge':

A. That the injury in question was significant;

B. That the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty;

C. The identity of the defendant.

A patient is unlikely to be aware that there is a significant injury, until they are actually diagnosed and this can be months or even years later. Therefore, the later date would be the date of knowledge and they would have 3 years from that date to bring a claim .

3. Mental capacity

There are circumstances where the injured person lacks mental capacity to understand or bring a claim, and the law recognises how these individuals could be unjustly penalised by the 3 year time limit.

A. Where the injured person lacks capacity, the 3 year time limit will not begin until the injured person regains capacity. It may be the case that the injured person never regains capacity, which means that the 3 year time limit will never start and a claim can be brought at any time by their Litigation Friend.

B. If the injured person loses capacity at some time after they were injured, the 3 year time limit applies and proceedings must be commenced from the date of the negligence or the date of knowledge.

4. Death

In the unfortunate cases where the injured person dies within the three year limitation period, the 3 year period is extended to 3 years from either the date of death or the date of knowledge of the deceased, whichever is later. This allows the deceased's estate to bring a claim on their behalf.

In some cases, an individual may seek to make a claim for damages caused by the negligence of a medical professional under the Human Rights Act 1998, which would have to be made against a public body or authority such as the armed forces or the NHS. In this circumstance, the time limit would be 1 year from the date that their rights were breached .

Also the bigger damage is the long-term negative impact such cases have on the society as a whole. Rising indemnity insurance and litigation costs to doctors leads to increase in treatment charges of the doctors and the hospitals. So the whole healthcare system not only becomes more costly and unaffordable for common people but also the bitterness and frustration amongst medical professional become quite high. The yellow journalism and media sensationalism adds fuel to the fire. Due to tarnishing of the image of medical professionals, the trust levels between the doctors and the public takes a dip. The list goes on and on. Thus these frivolous litigations should be curbed at the early stage, otherwise their repercussions are far and wide and quite disastrous for the society.

Conclusions :

To conclude, it is high time that MCI and state medical councils pass clarification of the existing guidelines that no medicolegal cases can be entertained after 3 years of treatment. In case, a litigation is still filed against a medical professional after 3 years of treatment and medical records are not available in that case, then the presumption would be raised in favour of the medical professional that all the records were correct and were in order. MCI is the lighthouse for medical policy making in the country. Once MCI issues the clarification of the existing guidelines, then it would become easier for the state medical councils to issue such clarification.

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