

## LEGAL BARRIERS TO MEDICAL TOURISM IN INDIA

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### ABSTRACT:

Medical tourism as a concept refers to people leaving their own countries to seek different kinds of treatment. People approach countries to avail treatments and also to visit the country on a tour. This is a billion-dollar industry that generates such a large amount to our economy through foreign exchange revenue. People approach India for a simple Ayurvedic treatment to major medical procedures like knee replacement and heart valve replacement surgeries etc. There are various reasons why people choose India as a destination for medical tourism as compared to other developing countries like Bangladesh, Sri Lanka etc. India provides cheaper services at a good quality that is much better than most of these countries. People also choose India so that they can combine the treatment and a small vacation in India. Indian legal framework when it comes to medical tourism is very limited. There has hardly any discussion done on the legal consequences in case of any medical malpractice. The main aim of the research is to use doctrinal method of research to look into the present legal framework with respect to Medical Tourism in India and whether these laws are adequate and efficient to deal with the legal scenarios that can arise in the future. The main objective of the research would be to look into the Indian laws and check whether they are applicable to even foreigners who come to India as part of medical tourism. Another main area of concern is regarding the legal and ethical issues concerning this industry. The matter of jurisdiction when it comes to medico legal cases is also another matter that will be analysed by the researcher. Here we need to analyse whether the laws of the country you are visiting for treatment will apply or the laws of your home country.

**Keywords** - Medical tourism, legal framework, ethical, jurisdiction.

## Introduction:

Medical tourism as a concept refers to people leaving their own countries to seek different kinds of treatment. In the past we saw a trend where people from developing countries approaching more developed countries to avail treatment not available in their own countries. The trend however has shifted in the recent years we see a shift in the pattern where people from the developed countries are approaching smaller countries for cheaper medical treatments. Many people are looking out for places where they can avail any kind of medical services and at the same enjoy a good vacation for a really small price. This is a billion-dollar industry that generates such a large amount to our economy through foreign exchange revenue. People approach India for a simple Ayurvedic treatment to major medical procedures like knee replacement and heart valve replacement surgeries etc.

There are various reasons why people choose India as a destination for medical tourism and why it has grown as a billion-dollar industry in India. The reasons are really simple we have many internationally accredited medical facilities in India that provide cheap medical services than compared to the other countries especially the developed countries like the US and UK. We have a large number of doctors who are excellent, trained and have gained experience from around the world. Some people are also motivated to come due to procedures that are unavailable or non-licensed in the home country but available here like surrogacy.<sup>1</sup> Hospitals in India especially the corporate hospitals provide a world class treatment at a lower rate. Another important reason is the ease at which you can avail visas. With the introduction of the relatively new “M” visa in India makes getting visas for medical purposes much easier than ever.<sup>2</sup> The waiting time for procedures in India are usually really

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<sup>1</sup> Hai Marad & Xu Huaifu, Why people prefer seeking care from one country to other countries: a case study from Cambodia, MEDCRAVE, (Jan 29<sup>th</sup>, 2021), <https://medcraveonline.com/MOJPH/why-people-prefer-seeking-care-from-one-country-to-other-countries-a-case-study-from-cambodia.html>

<sup>2</sup> 6 Major Factors which make India An Ideal Medical Tourism Spot, Tour My India, (Jan 25<sup>TH</sup> 2021), <https://www.tourmyindia.com/medical-tourism/blog/6-major-factors-make-india-ideal-medical-tourism-spot/>

small period as compared to the Western nations where sometimes the waiting period can go up to weeks or months for vital, life-saving treatments.<sup>3</sup>

## **Legal Assistance available to Medical Tourists in cases of Medical Malpractice;**

There are many legal issues that can arise in this industry. When people leave their own countries and approach other countries for treatment very often there are issues that arise. There can be cases of medical malpractices by the hospital or the doctors that can lead to various complications and deaths. The question that arises is what is the legal recourse available to these patients in case of any medical malpractice.

In India the only laws that particularly deal with medical tourism is visa laws that provide for a separate category of visa known as medical visa granted for a period of one year or for the duration of the treatment whichever is less. This can also be extended in case the treatment will take a longer time for another one year by the Ministry of Health Affairs on the recommendation of Foreign Regional Registration Offices and State Governments.<sup>4</sup>

The other areas of laws that could probably be applied in case of any negligence or medical malpractices are:

1. **The Consumer Protection Act, 1986-** a “consumer” who hires or avails of any “services” for consideration is entitled to sue for any “deficiency in service” and claim compensation.<sup>5</sup> “Deficiency” is usually construed to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance of any service.<sup>6</sup> In our case the patients can now sue for damages as

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<sup>3</sup>*Ibid.*

<sup>4</sup>Ishita Mehrotra, Medical Tourism in India, MEDICAL NEGLIGENCE AWARENESS FOUNDATION INDIA, (Jan 27<sup>th</sup>, 2021) <http://mnafindia.org/medical-tourism-in-india/>

<sup>5</sup>Suhas Srinivasiah & Arjun Krishnamoorthy, Medical Malpractice Laws In India – A Summary, INDIA LAW NEWS, (Jan 27<sup>th</sup>, 2021), <https://indialawnews.org/2012/06/01/medical-malpractice-laws-in-india-a-summary/>

<sup>6</sup>*Ibid.*

consumer for any kind of deficiency of services on part of the hospitals. In *Indian Medical Association v. V.P. Shantha* Supreme Court through this case included medical profession and medical negligence, within the scope of the Consumer Protection Act<sup>7</sup>. The plaintiff affected by medical negligence now can sue for damages against a Doctor or a hospital for deficiency in services and claim compensation from them.

2. **Criminal Negligence** – as per Section 304A of the Indian Penal Code of 1860 states that whoever causes the death of a person by a rash or negligent act not amounting to culpable homicide shall be punished with imprisonment for a term of two years, or with a fine, or with both.<sup>8</sup> Though this provision exists in various case laws the courts have given various view on this particular point. Most of the judges feel that the no doctor can be held liable under criminal negligence although the hospital or the medical institution can definitely be held liable in case of any criminal negligence. The reason doctors are not held liable is due to the fact that it might scare the doctors and they will not be able to perform the medical procedure in fear of committing any wrong. They would probably just opt not to conduct the procedure. Section 80 of the Act also provides certain defences for the doctors who are held liable for any criminal negligence if the act was done with an intention not to cause any harm, in good faith for the benefit of the patient who has given their consent.<sup>9</sup> In some other cases we see how the court has provided a view that hospitals should not be held liable whereas a doctor needs to be held liable under criminal negligence as it was not the fault of the hospital management rather a negligent act performed by the doctor. Hence he needs to own up to his mistake and receive the required punishment. This is still a very argued concept and it is decided from case to case on the basis of facts, circumstances and evidence.

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<sup>7</sup>Priyanka Batra & Nishtha Das, Deficiency of Services under Consumer Protection Act, 2019, LEXOLOGY, (Jan 29<sup>th</sup>, 2020), <https://www.lexology.com/library/detail.aspx?g=e4640dbe-76ac-43b1-bcd0-e1cee3a3b80b>

<sup>8</sup>PEN. CODE. § 304 A.

<sup>9</sup>PEN. CODE. § 80.

3. **Vicarious Liability** - Alternatively a medical tourism plaintiff can hold a hospital liable for the negligence of the foreign provider.<sup>10</sup> Vicarious liability is the concept where the employer is held liable for the negligent act of the employees. The hospitals can now be held liable for the acts of the doctors, nurses or any other employee of the hospital or medical institution in case of any negligence on their part.

Under Indian law, upon award of final compensation, if the defendant has not voluntarily rendered compensation, the aggrieved party is entitled to commence proceedings to execute the award.<sup>11</sup> In such proceedings, the court is empowered to seize and sell any property belonging to the defendant to ensure that the aggrieved person is paid due compensation. In cases involving foreigners, since the proceedings are in India, a concern relates to actual remittance and receipt of the awarded compensation amount by the foreigners abroad. In case of non-payment of the compensation the person can also be arrested. This is a very helpful legal protection available for the foreigners or even Indian patients who probably visit abroad for treatment. This ensures that the awarded compensation will be paid to the aggrieved person even if the court has to go to the extreme and sell their properties. This provides help to those who suffer when they come to India for treatment and often do not get the compensation that has been awarded. Most of the time these foreigners need to return to their countries immediately and mostly they do not wait to collect the compensation awarded. This just ensures that the victims get what they deserve.

In spite of these laws we see how there are various legal impediments that arise in this industry. What is the jurisdiction when it comes to any medico legal issues? Whether Indian laws or the laws of their country will apply? The answer is simple once a person leaves their home country to avail treatment abroad then the laws of that country will only apply in case something goes wrong. So if someone comes to India then the Indian laws will apply in case of any malpractice. The issue of jurisdiction- one of the results of receiving medical services in a foreign land is the issue of jurisdiction that will arise in case of any dispute.<sup>12</sup> By

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<sup>10</sup>Mirrer-Singer, P. (2007). Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism. *Law and Contemporary Problems*, 70(2), 211-232. Retrieved January 29, 2021, from <http://www.jstor.org/stable/27592188>

<sup>11</sup>Suhas Srinivasiah & Arjun Krishnamoorthy, *supra* note 5, at 4.

<sup>12</sup>Ishita Mehrotra, *supra* note 4, at 4.

*promoting services across international borders to attract overseas patients subject to the jurisdiction and laws of that country.*<sup>13</sup> Since Indian laws will apply they need to be more stringent and must be more clear on various aspects so that the foreigners are not demotivated to come here to seek treatment as they will be unsure about the legal help they will get in case something goes wrong. In some cases of people do file a case against an Indian hospital or medical institution in their home land then the question that arises is whether that particular court in a foreign land has a personal jurisdiction over this case.<sup>14</sup> The plaintiff here needs to prove to the court that they do have personal jurisdiction over this case and that they can take action against an Indian service provider who has caused damage to this foreign citizen.<sup>15</sup> Most of the time courts do not entertain cases or state jurisdiction over a foreign hospital or doctor who are not located within their geographical jurisdiction.

The Indian legal framework is very limited when it comes to medical tourism. This is indicated by the fact that there is nobody, which has been designated for the purpose of addressing grievances and complaints arising from either negligence or deficiency in service in case of medical tourism.<sup>16</sup> There is no specific agency or required form for registration of their grievances or complaints. This is a major lacuna that arise when it comes to medical tourism in India. This uncertainty shows the lack of interest on part of the authorities to regulate, control the medical tourism industry and this can affect the number of patients who come to India.

Compensation is also another issue as these patients are living abroad most of them do not wait to file a case and seek compensation due to the slow judicial proceedings, even though there are efficient mechanisms in place to check if the compensation awarded is being provided or not. There needs to be a way to ensure that there is speedier disposal of cases so that they can return back to their countries immediately. This will give them some kind of an

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<sup>13</sup> *Ibid.*

<sup>14</sup> Mirrer-Singer, P., *supra* note 10, at 6.

<sup>15</sup> *Id.* at 212

<sup>16</sup> Ishita Mehrotra, *supra* note 4, at 4.

incentive or motivation to approach the court and seek compensation for the damage or injustice caused to them in a foreign land.

Many hospitals charge extra money from these patients than compared to Indians who avail the same treatment. Most of the time many private hospitals charge a higher cost for the treatments availed by these foreigners. They charge unnecessarily for treatments, rooms, medicines which is provided at a cheaper cost for Indian but at an exorbitant price for outsiders. This is due to the lack of regulation from the side of the government. There definitely needs to be some method to regulate this, some kind of a regulatory body or some kind of laws at least needs to be in place to handle this matter. This practice is definitely immoral and gives a wrong impression of our country. These people provide a huge amount to our economy and thus it is important to create a good impression. At this stage where we are still growing in this industry it is important we create a good image and also do the needful to bring in some kind of ethical practices in the industry.

**Effect of Covid-19 on Medical Tourism in India:**

In Asia, India is a fast growing centre when it comes to medical tourism. According to the ministry of tourism, around 7 lakh foreigners applied for medical visas in 2019.<sup>17</sup> The year 2020 though did really take a toll on this industry as well. In 2015, the number of Foreign Tourist arrivals for medical purpose in India were 2,33,918, in 2016, the figures went up to 4,27,014 and in 2017, the numbers were 4,95,056, as per information provided by the Ministry of Home Affairs.<sup>18</sup> The lockdown and cancellation of flights have resulted in hardly any medical tourists visiting India for treatment since March. The travelling percentage has come down to 20-25%.<sup>19</sup> Earlier a hospital would at least have ten patients a month but now only one patient comes per month and patients from UK are not allowed to come. The numbers are gradually increasing as India has gradually started air service through air bubbles but it is with only a few countries. People from these countries are reaching India for some treatments and surgeries. India is slowly getting back on track but it will definitely take months for everything to stabilise and come back to normal. At this stage importance needs to be given to promote this industry so as to attract more and more customers. Government needs to come in support of hospitals in need who are suffering a loss due to the lack of foreign patients. They also need to ensure the Covid -19 protocols are also followed by the foreign nationals, hospitals, the hotel where they stay and also by medical tourism agencies. Certain reductions can be made in the prices of these medical services provided so as to encourage more and more tourists. Practices like Ayurveda, other complex treatments, surgeries in which India has an edge over the other countries and more experience when it comes to these services need to be promoted more in this kind of a scenario. There is also a need to regulate this industry and make sure that all the lacuna are removed so as to ensure that people can confidently approach this country without any inhibition. During this pandemic all efforts need to be made by the hospitals, the government and medical tourism agencies. They all need to work together in unity in order to bring back this industry to track, make sure it is running smoothly and efficiently.

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<sup>17</sup> Rupsa Chakraborty, Mumbai's medical tourism drops by 80% amid Covid -19, HINDUSTAN TIMES, (Jan 27<sup>th</sup>, 2021), <https://www.hindustantimes.com/cities/mumbai-news>

<sup>18</sup> Medical tourism in India sees recovery amid Covid-19 pandemic, FINANCIAL EXPRESS, (Jan 28<sup>th</sup>, 2021), <https://www.financialexpress.com/lifestyle/travel-tourism/medical-tourism-in-india-sees-recovery-amid-covid-19-pandemic/2101384/>

<sup>19</sup> *Ibid.*

## Conclusion:

The researcher would like to conclude that India needs to create an enabling environment to its customers who generate such a huge amount to our economy while they visit the country from time to time to seek medical assistance. Without ensuring a sound legal framework, patients and investors may be discouraged to patronize the industry.

Therefore, the government needs to come out with a separate law to regulate this industry especially the private hospitals and also to provide necessary recourse or redressal mechanism to the foreigners in case of any malpractice or negligence. We have a stronger grip on the market compared to other Asian competitors like Thailand, Sri Lanka, Singapore and Bangladesh when it comes to rules, regulations, cheaper mode of treatment and excellent medical professionals. To maintain this, they need to assure that they only provide the best services and have a good legal framework to protect them. The government support towards medical tourism is evident first and foremost by the introduction of a special visa known as medical visa especially introduced for foreigners seeking medical assistance in this country. The Government of India has done a lot when it comes to medical tourism but it is not sufficient to ensure the smooth functioning of the industry. The main effort needs to be to make sure that everything is smooth and easy for all those who approach India for treatments and surgeries. Traditional treatments like Ayurveda can also be promoted among these tourists.

The pandemic has forced us to restructure and rethink about the whole industry. There has been a small halt in the industry due to the pandemic as people cannot travel and come to India to avail these medical services. The main focus now should be to regulate this industry, make more stringent laws, provide cheaper but good quality services and ensure that the industry works efficiently and smoothly. There needs to be a boost in this industry so that it can have a positive impact on our economy as this industry contributes a large sum to our economy. The governments needs to promote and also support these hospitals in case any help is needed. They also need to make sure that proper covid-19 guidelines are followed by the hospitals, patients, hotels or places of accommodation and medical tourism agency.



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