

Medical Negligence Law; for a Better Approach in Sri Lanka

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Abstract— *Doctors are expected to use their special expertise knowledge and skills to save patient's lives without being negligent and if a patient suffers an injury due to negligence of doctor, there's a remedy available under civil law. In a medical negligence law suit, the plaintiff has to prove four elements, and whether the defendant doctor has attained the required standard of care is a complex factor which is difficult to determine in a lawsuit. In English law several tests have been developed to measure this requirement in a medical negligent lawsuit. In today's society the patients want best of care and the doctors wanted to treat their errors as human errors. While granting a satisfactory solution to the victimized patient, the courts also have a duty to allow doctors to behave without fear of litigation. So with the emerging concepts of patient autonomy and the patient safety, medical negligence has become a debatable issue today. This paper analyzes some case studies, articles and books of medical negligence law with the main objective of examining the required standard of care by doctor. Medical malpractice lawsuits have continued to rise in western countries over the past years. It directly affects clinical freedom and therefore doctors tend to take defensive actions when treating patients. In countries like Sri Lanka on the other hand, people are not much aware about medical negligence even terrible incidents take place, causing injustice to patients. Based on the analyzed issues and identified best practices (such as no fault compensation schemes, Alternative dispute resolution), this paper discusses about how Sri Lanka can best respond to the patient safety approaches by law reforms with the aim of reducing medical negligence to ensure patient safety and also to reduce risk of litigation.*

Keywords— *Medical Negligence, Litigation, Reforms*

I. INTRODUCTION

Medical profession is regarded as a noble profession. The doctors are expected to use their special expertise knowledge and skills to save patient's lives without being negligent. If a patient suffers an injury due to the negligence of the doctor, there's a remedy available under the civil law. A person who claims a negligent medical malpractice, have to prove four elements. Adequacy of the standard of care exercised by the doctor is the main problem associated with medical negligence claims. In a malpractice law suit the court has to

determine whether the defendant doctor has attained the required standard of care. In today's society the patients want best of care and the doctors wanted to treat their errors as human errors. Moreover it is essential to protect patient's rights, who approach doctors with lot of expectations. While granting a satisfactory resolution to the victimized patient, the courts also have a duty to allow doctors to behave without fear of litigation. So with the emerging concepts of patient autonomy and the patient safety, medical negligence has become a debatable issue today. Medical negligence is "the breach of duty of care towards a patient by an act of commission or omission, resulting in damage or harm or injury to a patient" (Fernando.R, 2013). Medical liability lawsuits are civil actions designed to determine whether a doctor was professionally negligent and whether the negligence caused the harm.

Due to the inherent weaknesses associated with the fault based civil liability system and the adversarial litigation procedure in Sri Lanka, it is doubtful whether ill persons are ever be able to claim compensation for their injuries. The main research problem of study revolves around some issues in medical negligence legal framework and lack of public awareness about remedies associated with medical negligence. Therefore, the study reviews the necessity of a paradigm shift in medical negligence cases with reference to duty of care. The paper also attempts to investigate the necessity of moving to alternative modes to redress victimised patients in Sri Lanka.

II. METHODOLOGY

This paper review some past literature, analysis of past case studies and books in the area of medical negligence law with the main objective of examining the required standard of care by a doctor, which is one of a main factor of a medical negligence claim. Several reforms to Sri Lankan law is proposed in the light of analyzed case studies, academic expressions and identified best practices around the world to protect the interests of both the patient and the doctor.

III. DISCUSSION

In a medical negligence claim, the plaintiff has to prove that the doctor owed a duty of care, doctor violated the required standard of care, person suffered a compensable injury and the injury was proximately

caused by the act. In most cases, breach of standard of care is determined according to the standard of the 'reasonable man' and where there's a breach in the professional duty, that is determined according to the standard of comparable professional practice (Bryden.D, & Storey. I, 2011). The court has to determine whether the defendant doctor has attained the required standard of care, taking into consideration of all the relevant important factors in order to balance both parties' interests, the doctors and the patients. Traditionally it is considered that the doctor has not breach the standard of care, if the practice is supported by a responsible body of similar professionals. This test for medical negligence was established in a case, *Bolam v Friern Hospital Management Committee* (1957 1 WLR 582). This standard was again accepted in cases such as, *Sidaway v. Board of Governors of Bethlehem Royal Hospital and the Maudsley Hospital* (1985 AC 871), *Maynard v. West Midland Regional Health Authority* (1984 1WLR 634) and in *Whitehouse v. Jordan* (1981 1WLR 246). According to the Bolam test, the doctor is not negligent, if he has acted in accordance with a responsible body of medical opinion. This approach has been severely criticized as it fails to address patient's interests rather than giving more interests to the role of the doctor.

The idea derived from the judgment in *Bolitho v. City and Hackney Health Authority* (1997 4 All ER 771) allowed courts to behave more actively with regard to the question of standard of care, evaluating rights of all the concerned parties. With the Bolitho judgment a two stage test was recognized in English law. This two stage risk analysis test was used later in *Marriott v. West Midlands Health Authority* (1999 Lloyds Rep Med 23) and in *Penny, Palmer and Canon v. East Kent Health Authority*(2000 Lloyds Rep Med 41).

Today the world highly speaks about human rights. Patient's rights are an important part of that and have become a strong debate in today's world. Rather than highly relying on medical evidence, the decision of Bolitho case allowed the courts to reach a conclusion on the reasonableness and the duty of care of clinical conduct by considering all the competing interests and values. It is the duty of the experts in the medical field who possess necessary knowledge, skills and experience, to assist the court impartially to determine standard of care by providing a valid and a reliable scientific medical testimony. The House of Lords decision in Bolitho case invited the courts to have a closer scrutiny of the expert evidence and the reasonableness of the doctor's conduct rather than accepting the standard of care determined by a group of professionals. This opened the way to critically analyse whether the opinion given is reasonable and

logical. Accordingly, under English Law, the standard of care must be in accordance with the practice accepted by a respectable body of professionals and is expected to be up to date and current practice also must be reasonable and logical and the conclusion reached, must be defensible by reason.

Negligent liability of a doctor also can occur if the doctor failed to disclose necessary information to the patients. Informed consent is the process by which the treating health care provider discloses appropriate information to a competent patient, so that the patient may make a voluntary choice to accept or refuse treatment (Appelbaum P.S, 2007). The consent of the patient should be given with full knowledge of the risks involved, probable consequences and the alternatives. The doctor or the healthcare provider must disclose sufficient information to the patient or to the guardian to give the consent. In modern medical practice, doctrine of consent is paramount important and the doctor has to disclose the material risks inherent in the treatment and also the patient has to give the consent with full understanding (Mayberry M.K,& Mayberry J.F, 2002). In some situations, the failure to obtain the consent may lead to a medical malpractice law suit. The health care provider has a duty to provide all the potential benefits, risks, alternatives in the medical procedure which he/she is going to undergo and has to obtain the consent of the patient. In a country like Sri Lanka, because of the knowledge gap between the doctor and the patient, there is no adequate discussion between the doctor and the person who gives consent to the treatment before signing the consent form. In, *Chester v Afshar* (2004 UKHL 41), a question arose regarding the failure to disclose information. The court considered whether the consultant's omission provided a sufficient basis for establish a causal link between the harm and the breach.

Sri Lanka has a society which accepts the hierarchical orders and the medical profession is regarded as a noble profession which is in the top level of the hierarchy. Sri Lankan Constitution (1978) contains a Fundamental Rights Chapter. But right to life and patient's rights have not been recognized as fundamental rights under the present constitution. Even though there are number of patients in Sri Lanka who suffers from medical negligence behaviours, most of them do not go before the courts due to lack of proper knowledge and understanding. Even there are many incidents that take place due to medical negligence in Sri Lanka, most of the people are unaware about medical negligence and ill treatments.

In 2005, a 48 year old mother had her healthy leg accidentally amputated, whilst another died after

transfusion of a wrong blood type at the Negombo Base Hospital. (Ceylon Today, 14th August 2013). A 24 year old girl's left arm was amputated and a 5 year old girl died in a Colombo private hospital when she was taken for a MRI Scan are some reported cases comes under medical negligence. Another incident was about a 45 year old man who lodges a complaint with the police and alleged that his wife died due to medical negligence of the gynaecologist and obstetrician who performed the surgery (Daily News, 1st March 2013). Even many incidents happened in Sri Lanka, they rarely come before courts.

The law of medical negligence and the duty of care owes by a doctor to the patient was reviewed by the Sri Lankan judiciary in the case of *Priyani Soyza v. Arsekularathna* (2001)(2)Sri.LR 293). The Supreme Court, in a unanimous judgment, delivered by Dheeraratne J. held that the plaintiff's claim had failed and that the defendant's guilty of negligence on treating the deceased child did not cause her death and was no liable for damages. However, by delivering the judgment, the Supreme Court held that, despite the fact that negligence was established, the failure to establish a causal nexus between the negligence and the death of the patient, led to fail the plaintiff's claim.

Causation is also a debatable issue in medical malpractice litigation. In determining causation, the court often uses the "but for" test and when there are several causes, the court see whether the defendant's conduct materially and significantly contributed to the injury of the plaintiff. Firstly it has to be proved that the defendant's breach has caused the claimant's damage and secondly the damage must be such that the law regards it proper to hold the defendant responsible for it (Goldberg.R, 2012). Most of the medical injury cases fail, when the defendant can establish that the injury can occur regardless of the breach of duty and when there are combined causing factors for the injury suffered, it is hard to identify the exact factor which finally led to the harm. In *Barnett v. Chelsea and Kensington Hospital Management Committee* (1969 1 QB 428), it was considered, whether the defendant's negligence is the cause of the death or would it have inevitably happened anyway. According to the *Priyani Soyza* judgement, it is doubtful whether an ill person ever be liable in a claim of negligence. Moreover the public will lose respect for the law and the society will dismiss the judiciary as a stronghold which protects their rights.

PRACTICAL AND A FAIR REDRESSAL FOR MEDICAL NEGLIGENCE

This complication can be reduced to some extent by introducing out of court compensation systems. Many experts throughout the world recommend advanced alternative methods to compensate injured parties by medical negligence behaviours. Rather than focusing on the negligence, some countries have introduced no fault compensation systems. It removes the requirement of proving fault or negligence and compensate based on the loss. With regard to medical malpractice, patient is compensated for a proven injury incurred unnecessarily through treatment. Such a no fault compensation system has been implemented in New Zealand (Hitzhusen.M, 2005). Sweden, Denmark, Norway, Finland, France also have eliminated fault criteria, for some kinds of medical injury (Douglas.T, 2009). This is very common in New Zealand and if a claim for compensation is successful, that compensation is paid from an account maintained through general taxation. This can be argued as a fundamental improvement over negligence and can be considered as a more rational system which can compensate patients. The other advantage is, claims can be proceeded faster than litigation and also physicians can more focus on better health care of patients rather than practicing defensive medicine. In Germany medical malpractice claims are referred to mediation boards. In France medical negligence cases are handled under an administrative law scheme. The Canadian medical malpractice claims declined steadily since 1997 due to improved patient safety initiatives and physician participation in continuing professional development programs and informal judicial forums are also being used to address patient concerns in Canada (Sonny Bal .B,2009). Alternative Dispute Resolution (ADR) is a better platform which can be used as a technique to resolve conflicts without going to court rooms. Alternative Dispute Resolution has the potential to help reform the current tort system, reducing costs and increasing both parties satisfaction (Sohn. D.H, Sonny Bal. B, 2012). Mediation is one form of Alternative Dispute Resolution. It is a negotiation that is facilitated by a neutral third party mediator. Arbitration is a more formal and a binding method, which have a skilled and knowledgeable arbitrator as the decider of facts. Pre-trial screenings can also be used as a tool to reduce fraudulent claims. Pre-trial screenings are informal screenings before litigation by a neutral party to assess the relative strengths of each party's case and determine whether the trial merits going to trial. In United States pre-trial screening panels have been existence since 1957. These medical-legal screening panels are created by statutes, by court rules and also by voluntary cooperation of local bar and medical associations (Johnson.L.L,1976-1977). ADR has become

increasingly prominent in the medical malpractice reform discussion. Mediation, Arbitration and pre-trial screening have been successfully implemented in the medical arena throughout the world (Sohn.D.H , Sonny Bal.B,2012).

Article 25 of the Universal Declaration of Human Rights (1948) recognized right to health as a human right. International Covenant on Civil and political Rights (1966), states that every human being has the inherent right to life and this right shall be protected by law (Article 6). International Covenant on Economic Social and Cultural Rights (1966) recognized right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12). According to South African Constitution (1996), everyone has the right to life (Article 11) and also everyone has the right to freedom and security (Article 12). Everyone has the right to access to health care services within available resources (Article 27(1)). However Sri Lankan Constitution (1978) does not recognize right to life as a fundamental right. Right to health care services has not directly protected as a fundamental right under the Sri Lankan Constitution.

Sri Lankan adversarial legal system is both costly and time consuming. So Sri Lankans rarely go to courts for injuries caused by medical negligence. Also it is difficult to establish the negligence, because doctors are reluctant to provide evidence against their own professional colleagues. The burden of proving the four main elements in a medical negligence case lies with the plaintiff. Out of these elements, most difficult elements to prove are that the defendant doctor violated the standard of care and the breach of standard of care has led to the harm. This is a difficult task from the injured patient's point of view and also the fear of litigation may lead doctors to practice defensive medicine which finally affects the effectiveness of the medical practice. Doctors will conduct tests and procedures not for the purpose of furthering the diagnosis of the patient, but to avoid litigation and to show that the required standard of care has been met. Even these unnecessary tests are a defence for doctors there may be situations that these unnecessary tests can create a potential risk to the patient. From the patients point of view defensive medicine increase expenses in patient care and can delay the required treatment. Additional tests which lead the patient to unnecessary risks can lead to another malpractice litigation, which ultimately damage the doctor-patient relationship. If the patients tend to bring more and more lawsuits against doctors, it will affect the doctor patient relationship adversely. Practically doctors hesitate to accept another doctor's patient because it can lead to another malpractice claim. Because of the

litigation fear, doctors cannot improve the standard of care which they provide for patients because they lack their clinical freedom.

IV.FINDINGS AND RECOMMENDATIONS

Sri Lankans are not aware of their rights. Even the damage has occurred due to the negligence of the doctor, sometimes they are reluctant to go before the law, due to lack of understanding and the fear of litigation. So steps should be taken to educate the general public through media and other several campaigns regarding ill treatments. In a medical negligence claim, the responsibility of the court is to strike a balance between both the parties. It is important to compensate the injured patients if the injury has caused as a result of the doctors negligent.

Steps should be taken to strengthen the doctor patient relationship. In order to build up a better doctor patient relationship, it is essential to have a good discussion regarding the benefits, risks and different alternatives available for a patient. Even after an injury occurred to a patient through the negligence by the doctor, they are reluctant to discuss their mistakes. Doctors should be given the assurance that the admission of errors will not lead as evidence against them in courts (Liang.B.A, 2004). And also it is the responsibility of the country to provide a confidential platform for such a discussion.

If the courts decide large financial awards as damages in a medical malpractice claim, it will de-motivate doctors to pay required standard of care towards patients in the future. Introduction of damage caps may reduce unnecessary law suits. Statute of limitations is another effective way which can reduce doctor's fear of litigation and by a statute of limitation, can limit the time period for the plaintiff which can bring a claim. This will reduce the fraudulent malpractice claims which come to courts and also will motivate doctors to accept medical errors and to build up a good doctor patient relationship. Moreover pre-trial screening methods have to be adopted prior to the hearing of the malpractice claim. The case can be screened by an impartial panel which constitutes from the experts in the medico legal field. Even in this stage the impartial panel can lead the parties to settle the case without going to litigation. The main purpose of creating a screening panel is to reduce malpractice litigation while redressing patients and also balancing doctor's interests. These informal procedures help litigants to exchange their ideas politely, and come to a settlement without adhering to strict legal procedures in the court room.

Furthermore Alternative Dispute Resolution (ADR) should be introduced as an effective, less costly and less procedural way to settle medical malpractice claims in Sri Lanka. Through ADR, doctors can resolve their disputes with patients without going to the court. Mediation can be recommended to settle disputes among doctors and patients. With the less procedural environment, doctors, patients and also the other necessary hospital staff can take a joint effort to prevent future errors while reducing the trauma attached to the injurious patient and the family members. It is the responsibility of the legislature to pass legislations recommending ADR mechanisms, especially mediation to resolve disputes of doctors and patients. The special characteristics of mediation, helps patients to relieve non-monetary stresses. Adversarial fault based litigation procedures are very traumatic, complex and lengthy. Victimized patients are not always satisfied by financial awards. What they usually want is a platform to open exchange of information and the acknowledgement of the error and remorse by the physician. Neutral mediator in the Informal environment can lead parties to facilitate negotiations to narrow the issues in dispute, while satisfying the emotional concerns of parties and also the interests of the physician. Court annexed mediation is the best suitable method to settle medical negligence cases in Sri Lanka.

Right to life, patient's safety and patient's autonomy have to be recognized as fundamental rights under the Constitution in Sri Lanka. In order to strike a balance between the conflicting parties, it is the responsibility of the legislature, judiciary, and also the media to respond positively to the problems which are associated with medical malpractice claims.

V.CONCLUSION

Medical negligence law suit is a very complex situation which involves extensive review of records, expert interviews, which takes long hours. The precise meaning of the term standard of care is unclear in a medical malpractice claim and also it is hard to prove the causal link between the breach and the injury. Even a huge number of malpractice cases come before the court in countries like USA, UK and Australia, Sri Lankan society is less aware of medical negligence and ill treatments. High number of malpractice claims can be harm to the medical profession and it will lead to reduce the trust between doctors and patients. On the other hand, it is essential to protect an innocent patient who is coming to a doctor with lots of expectations about their health and life. In a country which respect rule of law, the court should be given the opportunity to take the ultimate decision with regard to standard of care required by the doctor. ADR with no fault compensation mechanisms have to be

introduced in to the Sri Lankan legal system with the aim of ensuring doctor's clinical freedom and reducing defensive actions practiced by doctors.

A hybrid of no fault compensation system with Alternative Dispute Resolution will be immense helpful for patients both who are rich or poor and educated or uneducated. Due to granting compensation without waiting until proving fault or negligence, this system enhance the scope of patients who can obtain compensation. Also this system do not have procedural barriers, time consuming, and less expensive, because no need to pay for lawyers and the claims can proceed faster than a lawsuit in the court. Doctors are not being sued and rather than concentrating on defensive medicine, doctors can concentrate more on patient's lives. The data and the ideas which derived from discussions and negotiations can be used to make future improvements for both doctors and patients.

The most appropriate way to reduce malpractice claim is to prevent before the error occurs. This can be done by developing a good relationship with the patient by doctors. In Sri Lanka there's a huge knowledge gap between doctors and patients. Patients should be given a chance to ask questions regarding the medical treatment and an opportunity to involve in the decision making process about their lives. This communication is a platform to identify patient injuries before they become a law suit.

In summary, with the developments and the complexities in the world, it is utmost needed a system which equally protect both parties rights in an injurious situation due to medical negligence. The practices which are used by other countries around the world can take as an example by Sri Lankan authorities to develop a more effective approach in the area of medical negligence in the future.

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