

# A Comparative Analysis of Medical Negligence Compensation in Sri Lanka for the Protection of Patients

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**Abstract** - Sri Lanka provides free health service to all the persons in the country through establishing and maintaining nearly five hundred government hospitals in every province and district. Sri Lanka scored 76th place in World Health Organization statistics with higher regional life expectancy and lower maternal and infant death rate. This study analyzed the level of duty of care maintained by the trained medical staffs in Sri Lanka, in order to secure the betterment of the patients. The situations had reported where mistakes and errors of medical professionals' duties lead to physical, mental injuries or even a death of their patient. But, in practical a handful of medical negligence litigations are hardly to find out. In this research journey, both primary and secondary medico-legal sources were attracted to follow the qualitative research method. Finally, the study analysed the success stories of consumer protection, insurances, and strict liability in other jurisdictions with comparative jurisdictions.

**Keywords**— *medical negligence, Sri Lanka, consumer protection*

## I. INTRODUCTION

From the day man being civilised always look to believe in keeping orders. Then gradually introduced the concept of law in order to protect the innocents due to an unreasonable act or omission of superior. Usually the remedy is in seek of pecuniary damages or punitive damages. Same ideology is with medical matters of today's engagement of development. Actually no one is perfect with everything. Even a person who is well knowledgeable with the special skill might do mistakes. This is same for medical professions also where their mistake can lead to minor injury or sometimes for severe injuries as death. However, there has to be a justice and a satisfactory remedy to the victims of medical negligence. Best interest of the patient (consumer) is the purpose even it is a patient oriented or medical professional oriented. On the other hand,

professional negligence is a one term and medical negligence is a special branch coming under members of professionals and services.

## II. METHODOLOGY

This research is looking for analytically evaluate the ups and downs of prevailing medical negligence compensation law to protect consumer with the great expectation of achieving the research question and objectives as stipulated. In practical, for several years the health professionals, administrative of hospital and innocent patients have been struggling with awarding compensation in breach of owed duty of the liability with a medical negligence. However, medical negligence lies completely with civil law and case facts. Criminal negligence is another view that rarely practice. Four elements as duty, breach of duty that duty made damage and causation between duty and damage need to prove in order to win negligence litigation by the plaintiff the person bring the action. So, the defendant does not need to prove his innocence. However the doctor's legal representatives within his protection society will energetically present their side. An exception to general burden of but it will be great if proof the onus can shift to doctors to prove that was not negligence. Today, there are more successful methods following in all throughout the jurisdiction. Countries like India are been following statues like consumer protection. New Zealand, Sweden and Finland are some countries that attracted by no-fault system that victim (consumer) is compensated irrespective of medical negligence of medical professions and administrative. Other than that professional liability insurance is famous among most Americans as an essential coverage to physicians and other medical professionals like dentists, nurses, pharmacists in order for liabilities arising out of negligence that results in patient's injuries and death.

## III. ANALYSIS AND DISCUSSION OF FINDINGS

## *A Analysis*

### *1) Negligence in general*

The modern law concept of negligence light up with concept of 'love your neighbour' from the wording of Lord Atkin's at 1932 case law of *Donoghue v Stevenson*. With the merits of the negligence the interpretation from *Palsgraff v Long Island Railroad Corporation*, *Hay or Bourhill v Young*, *Caparo v Dickman*, *Hill v Chief Constable of West Yorkshire* and *Osman v UK* grow up with new vocabulary including foreseeability, proximity, fairness, justice and reasonableness even in the absence of a contract. So, the traditional definition brings up with the idea of take reasonable care to avoid acts or omissions which can reasonably foresee the damage to your neighbour as well as your ultimate consumer. Theoretically, law used to satisfy duty, breach of duty, damage bring with breach and causation with four elements in order to establish negligence according to authority of *Lochgelly Iron and Coal Co v McMullan*.

### *2) Medical Negligence*

Medical negligence is a special branch from negligence. It leads to a complaint or litigation about inadequate standard of medical care given to a patient. Bolam test is the indicator that looks for four elements in the failure to perform an owed duty with a reasonable degree of skill and care in the diagnosis and treatment of a patient causing damage in some bodily, mental or financial disability. In most of the countries there are societies, non-profit organisations that advice, defence and insurance on their medical professional members. Civil and Criminal medical negligence are the two types generally followed by every jurisdiction all over the world. Medical negligence litigations are very serious and need a deep concentration with medical and legal technological and terminology practicality. In reality there are few alleged medical negligence cases are reported. Some cases have gone up to courts and most of them have been settled outside. So, it is hard to find a simple or clear cut of medical negligence litigation that award compensation. Often the lawyer have to collect a great deal of information and wisely analyse all circumstances. *Ankur Arora Murder Case* is a brilliant movie directed by Mr. Suhail Tatari which lime light the well-known medical profession's act of omission to perform an owed duty cause to a breach in medical negligence. It is a story of innocent boy who was unable survive after an appendectomy due to negligent pre operational care. However,

mother of this boy strong enough to expose the fatal flaws in medical profession throughout the film.

### *3) Civil medical negligence*

Sometimes civil medical negligence is known as malpractice. In general terms all patients have their right to expect satisfactory, standard medical care, treatment, management from the admission and after care. Everyone complete their duty with some self-confidence and guarantee success with the academic and clinical practices they gain from training and experiences. But, sometimes biological factors play a role producing an unpredictable outcomes. However, the patient is entitle to receive financial compensation if the patient is able to prove the harm or loss which resulted due to the commitment or inability to performance the reasonable standard of medical care by the medical professional. The rational of awarding damages by a civil court is to resuscitate the financial loss suffered as a result of breach of medical professionals. Even in Sri Lanka at civil courts (district courts) award compensation for physical and rarely mental damages cause by breach of owed care by medical practitioner. The critical question that courts ask that should be affirmative to be guilty of the medical professionals is whether the respondent doctor would have done or omitted to do as an average doctor of the same seniority and experience in identical circumstances in relation to the condition of the patient and the place in which the examination and the treatment was conducted. Sometimes there are crystal clear situations "the factor speak for themselves" (*res ipsa loquitur*) and that situation shifts responsibility of burden to prove to medical practitioner. In some situations the civil courts has to adopt the procedure to find out from peers about opinion regarding medical issues. The fact of the case are placed for clarification before the experts whether that act is accordance with the reputable and acceptable medical practice. In many countries there are medical protection societies which will offer insurance cover against alleged breach of owed duty of medicine by the professionals. So, in this tort system under civil cases even a serious harmed patient does not able to get any certain compensation if the matter failed. General sense that the legal process is very slow and take several years including expenses. Therefore only a few people will bear the time and money consumption at the medical negligence litigation. To overcome the unfairness in the civil litigation most of countries like New Zealand, Finland, Sweden and Norway introduced no-fault

system to their patients of victims who seek compensations for breach of a medical negligence. This system is test not the medical practitioner's negligence but the patient centered safety. Usually, this system is funded from the employers, employees and state to pay the patients who select the no-fault system. Actually no fault system is like a strict liability that does not need the proof of damage caused. The only thing the patient has to prove that medical profession was in breach of the owed duty to care that is to receive compensation for the damages. As there are two side in one coin the only disadvantage of the no fault system is, this system able to pay a small quantum only. No fault system is a method that is for 'all or nothing'. Accordingly, the burden of proof has to achieve at least fifty one percentage in order to win the claim . On the other hand if the result is forty nine percentage then the patient has nothing. Patient losses everything available in the case matter. So, this bring frustration to the severely damaged patient, if the patient does not file a tort suit at civil courts against the medical practitioner who breach the owed duty of care within his authorised profession. Litigations are extremely expensive and take more time. Usually rich people and poor's who gain legal aid can fight for this. Another sad situation is its extremely difficult to get medical opinion in favour of patient who suffers the breach of medical negligence. All most all of specialists would not like to give their opinion against their colleagues in professions as expert opinions or secondary opinion delivery.

#### *4) Sri Lankan judges' view on quality of standard*

Quality of standard of medical practice is always look through the evidence of competent medical practitioners in the regarding field. So, the most relevant and only reported case in Sri Lanka is none other than the Arsecularatne vs Soya. During 1994 at the District Court of Colombo called for a neurologist, neurosurgeon and two Professors of Pediatrics in order to secondary medical evidence. According to the case facts defendant, Professor Priyani Soysa consultant who took the consultation and undertake the admission of baby Suhani Arsecularatne to the Nawaloka privte hospital. Treatment went about a month but no signs of recovery or healing other than deterioration of her condition. Eventually, little baby died. According to the trial judge, the Paediatric Professor Priyani Soysa misdiagnosis which could have been prevented if respondent, Paediatric had shown more care and attention to her patient. The respondent was found guilty of medical negligence

for failure to diagnose a brain stem glioma (brain tumour). Medical practitioner diagnosed as rheumatic chorea. At the Appeal Court judges found the medical practitioner negligent on the grounds of failure to take proper history of the patient. Also failed to record the history took and prescribed simple investigation called CT scan to the baby patient. According to the trial it was pointed out that diagnose of rheumatic chorea had made without recording and considering inconsistence symptoms with such diagnosis. The surprise is that it is possible that doctors do not record the clinical observation but in reality it pointed out that lapses get highlighted. In the court there need every reasonable evidence that medical practitioner had done everything to come to the reasonable decision according to the circumstance. The court can come to a conclusion at the time if the bed head ticket of the baby Suhani had a reasonable notes. Generally the medical practitioner records important positive and negative features of the patient and not all things in the bed head ticket. However, Court of Appeal declared that "a doctor who considers too important not to condescend to write history on a bed head ticket or make referral notes herself cannot be expected to have treated the child or parents with care and respect, nor given herself sufficient time to investigate and reconsider her initial diagnosis of rheumatic chorea". The trial judge's view was that "Negligence, if admitted in law, is a feature of the present and past. A doctor is expect to treat the child to the best of the practitioner's ability, irrespective of what is take place in the future. An extended peep into the future with the knowledge of medical science as it exist in the present, cannot be used as a weapon to sward off the evil effects of our present or past action." If this happened today, court might seek expert assistant under Recovery of damages for death of a person Act, No.2 of 2019 to determine parents on the death, loss of the love affection, care and companionship.

#### *5) Duty of medical practitioner and rights of patients*

Generally, The Americans are used to practice patient oriented standard. According to Canterbury v Spance the patient has the right of inform and medical professionals are under a duty to disclose all the information. But, the final selection is with the patient. The British are attracted by medical professional oriented method. According to the Sideway doctor has the selection of what to disclose and not, to the patient. As a medical practitioner should always be aware of recent developments as a

common knowledge including the knowledge of accepted methods in history taking, clinical examinations, investigations, diagnosis, treatments, prophylaxis, therapies and care after treatments. There are some situations that junior working for long hours and tiredness or untrained can lead to loose skill and making judgements. So, there can be situations these fatigue or lack of knowledge neglect the necessary step or doing incorrect procedure and lead to a breach of their owed duty as medical practitioner and liable to medical negligence compensation awards. In practical there were some incidents that untrained blood bank medical officer's incompatible blood group cause the death of a patient. Also, doctors, nurses, pharmacists and other relevant medical professionals should consider the warnings, circulars, quality failures, side effects send through health services and regulatory committees regarding drugs. No excuses for being in a rural area or village. Reading a recognised journal like Ceylon Medical journal, British Medical journal and Lancet is very helpful to gain the new knowledge. As a practice medical professionals enter all information in bed head ticket from the arrival for diagnosis, clinical findings, and investigations until consequences follow ups even after discharge. But most of the busy senior doctors in Sri Lanka used to write minimum or ask their juniors to write in detail in the bed head ticket.

The duty to inform complete information to the patients about the risk of a proposed treatment while giving details benefits of the treatments. The patient is entitle to know what is done even when the patient is not in a position to assess like anaesthetized. Even though the medical professions are not need to admit negligence but patients have a right to know everything to the fullest disclosure of what was committed and omitted even at things went wrong. When competent medical professionals brave enough to follow a procedure for the first time which is not yet approved through clinical trials or science has not yet currently use to save lives does not considered as accepted practice of medicine. So, in these circumstances patient has a right to well inform of the procedure of experiment. On the other hand when new technology goes better than the old methods, the old fashion has to tail off and act as minority practice. So, the patient has the right to ask for new accepted technology in their procedure of medical care. Another interesting fact is that other countries, including Sri Lanka proving a medical negligence against a medical professionals is a

strange subject matter. As average people cannot compel doctors or other medical professionals to ask for medical records of his or relatives. Even the law has not yet consider this area much. But the patient has a right to ask a copy of his or her medical record even for a nominal price if it is a property of medical professionals and hospital. According to section 33 to 35 of the Supreme Court Act 1981 of England provide authority for High Court to order, to have possession and disclose all documents before filing a case.

According to common law authority in *McCormack v Redpath Brown and Company* and another complain made on medical negligence liability of doctor and the hospital. But, the final declaration was that hospital was ordered to pay damages considering as that young and careful doctor had done his best to the circumstance even though he was having lack of sleep and tired working for thirty hours. This a good example that suit for Sri Lankan consideration with under staff status and lack of facilities in unprivileged government and private hospitals. But sadly, Sri Lankans used to follow English or other jurisdictional cases blindly been expecting to perform beyond available resources without thinking the real condition and standard of care in those countries.

#### 6) *Criminal medical liability*

Beyond reasonable doubt is the burden of prove that expect in criminal offences. In criminal medical negligence litigation required the type of degree should amount to criminal offence. In civil medical negligence the patient who suffers can made a complaint against the medical professional with the intention of pecuniary compensation is the most famous type in most jurisdictions. But in criminal medical negligence charges bring punishments as punitive compensation award to the alleged medical negligence of medical profession. The mens rea that amount to deliberate wicked, reckless, rash and had scant disregard for the life and the safety of their patient. Generally criminal medical negligence is here before the magistrate court or the high court in litigation. Sometime this kind of criminal wrong can be consider much more serious than a negligence at judgments. As there is no malice or pre mediation to destroy the life of the patient and direct action situation is different from murder. But the sever carelessness or lack of fore thought can consider as culpable homicide not amounting to murder according to Sri Lankan Penal Code and manslaughter in the United Kingdom. According to



section 328 of Sri Lankan Penal Code a medical professional can be held liable for criminal negligent act of rashness causing patient hurt. The punishment is maximum six month imprisonment and a fine. Section 389 is for grievous hurt caused by the negligent act with the award of two year imprisonment and a fine. Finally, if death caused by the negligent act can give five year sentenced of imprisonment and a fine. Actually in practice there have been very limited number of criminal medical negligence charges for the breach of owed duty by the medical practitioners in all over the world jurisdiction including Sri Lanka. Most probably the reason is state who has the power reluctant to prosecute the noble people in medical profession. But, someday the state will prosecute the medical professionals for their breach of owed duty for the commitment of negligence like damage caused due to the influence of drugs or alcohol or cause a negligence during a trade union action fails to attend on emergency service. Even though civil responsibility has immunity for trade unions but criminal commitment looks in different spectacle considering best interest of the patient at the circumstance with informed consent and lack of adequate resources in developing countries.

#### *B Discussion of the results of the analysis*

##### *1) Medical professional insurance*

Typical insurance policy responds for bodily harm, property damage or other forms of insurance cover employers, product liability and any other general circumstances only. But medical professionals can give rise to legal claims under the name of medical negligence. But without any specific clause in those general policies in insurances reluctant to perform. Under professional liability insurance the special policies like error, omission or negligence act committed in the insured's medical professional duty based on circumstances are obliged to cover claims made during the policy period. Majority of American doctors, dentists, psychologists, pharmacists, optometrists, nurses and physical therapists require to consider this type of medical insurance for their professional career. Depend upon the location and nature of medical practice insurance differs. Sometimes federal (USA) government made the insurance against medical negligence liability to protect the medical employees. Generally medical professional insurance coverage seeks to protect medical professional and the business surrounding too. All the expenses in medical negligence litigation

including attorneys' fees, court costs, arbitration costs, settlement costs, compensation, and medical damages usually consider under indemnity covering. Medical professional insurances does not cover criminal acts, sexual misdeeds and misbehaviours. Enhance patient safety and non-judicial compensation by replacing tort liability is always intended as USA, being patient oriented country.

##### *2) No fault system*

No fault system is a new successful era introduced at the failure of civil and criminal medical negligence like practice in Sweden, Finland, Norway and New Zealand. It is not seeking for the doctor's negligence at breach of owed duty but always wish to pay attention for the patients need. Even though no-fault is a supplement with advantages there are few regrets in this system too. The main disadvantage is difficulty in identifying qualified subjective area for compensation. No fault system is unfair for the patients who suffer a serious medical negligence as the compensation award is minimal and hardly pay a large number of monetary amount. As funding comes from government, local council and physician. The basic steps to no fault system is so flexible. The victim patient makes an application in order to get compensation for medical negligence (malpractice). Then at the time notification made by the expert panel to the physician, has to give a written report about damages and procedures. Next, during the primary investigation has to determine the eligibility of the application and medical report. If the patient supposed not to appear before court the panel have to interview the physician. Panel also can call for witness when necessary. No fault system does not intend to replace court system. Within six months medical negligence compensation for breach of owed duty will be awarded.

##### *3) Consumer Protection Act*

Magna Carta is the first charter which took the attention of consumer. 1986, Act of Consumer Protection in India replaced by new Bill of 2019 with the intention of protecting consumer within the wide spread of business network. The consumer disputes Redressal forums are the statutory established courts specially to hear the consumer litigations. Section 7 of 2019 (S.2d of old Act) identify a person who avails a service for a consideration known as a consumer. Whereas the deficiency of service which lead to an injury to consumer by any act of negligence or omission or commission defines under section 11

of new Act (S.2g of old Act). Multiplier is a successful compensation calculating method. During 90s Mrs. Auradha Saha visited her hometown Kolkata, India. On their journey she died due to an overdose of a wrong drug prescription by a negligent doctor for treating her skin allergy. Her husband doctor Kunal Saha initiated the legal battle against the negligent act of medical professional that led to the death caused by breach of an owed duty. Mr. Kunal Saha have relentlessly fight for fifteen years in order to establish the justice for innocent patients like her wife. On August, 7th, 2009 the Honest Supreme Court of India held four Kolkata based doctors and AMRI Hospital of Kolkata guilty for death in a historic judgement. The highest consumer court of Indian National Consumer Disputes Redressal Commission (NCDRC) made the award for late Anuradha. This was the highest compensation awarded in India up until date. Awarded compensation of 1.7 crore of Indian Rupees on October 21st, 2011. Indian society are more proactive and lot of organisations and societies have raised like 'People for Better Treatment' in order to bring a safety towards the victims of medical negligence. However, the provisions of Indian consumer protection Act usually working with the government health institutions excluding where all services are deliver free of charge. Act of consumer is also reluctant to apply with free of charge services. There are lot of people even in Sri Lanka keep severly suffering every day due to some kind of breach of medical negligent owed by a medical professional. Sarla Verma and Nizam institution cases are some successful compensation awarded cases. Susamma, Trilok Chandra and Charlies are best examples where the development of law looked forward to consider consumer protection with colloborating no fault compensation method.

Sri Lankan legislature introduced 2003 a new Act, the Consumer Affairs Authority No.9 with the hope of alleviating the weaknesses and limitations with the prevailing legislates by replacing the Consumer protection Act 1979. As stated in the preamble aims by way to provide for the better protection of consumers through the regulation of trade and services against unfair practices. Same wordings are reiterated in Consumer Protection Act of India and Sri Lankan Consumer Affairs Authority No.9 of 2003. As example section 75 of Sri Lankan Consumer Affairs Authority Act 2003 define consumer and services as same as Indian Consumer Protection Act section 7 and 11. Specially, the definition of consumer and services are well matched. So, it is a

green light to get use of consumer protection at medical negligence litigations as from Indian statutes and common law.

#### IV. CONCLUSION AND RECOMMENDATIONS

Among the above discussed compensation methods for medical negligence, Sri Lanka can adopt selected comparative methods to enhance patient safety a replacement for civil (tort) liability. Medical professional insurance method can be a good indemnity to protect consumer (patient). Government funded (full or half) for government hospital medical staffs or individual funded (medical professional) insurance against medical negligence only arising for the provision. Government can make this as a mandatory policy as in some states in USA. No fault compensation system and consumer protection Acts are usually appreciated by non-judicial compensation. While no-fault system does not need any evidence of damage cause by the medical negligence while consumer protection act has to go through with statutory provisions to define consumer, services and deficiencies to win the case. In no fault system medical professionals come forward with their patients to improve the whole network in medical system. As no fault system is a flexible compensation award for settlement claims within six months. In consumer protection Act being a consumer has more rights than a layman. Even though no-fault system has been well operating over twenty five years in top ranked humanitarian develop countries, the final award is a small quantum of compensation and it is a 'all or nothing' method that sometimes frustrate the patient (consumer). The patient who consider as a consumer has more rights with medical negligence compensation than before. However, professional medical insurance, no fault system and Consumer Protection Act will be better helpers to fill the gap when comparing other jurisdictional methods for medical negligence compensation. The people of Sri Lanka have to be more vigilant and enthusiastic on judicial activism on medical negligence compensation. There are lot of 'Suhani Arsecularatnes', Auradha Sahas been dying every day asking to enhance consumer (patient) safety with assured compensation for medical negligence breach. However, the best story about medical professionals and medical negligence litigation compensation revealed in Hatcher v Black as professional reputation is as dear to professionals as his body. But an action for negligence can wound his reputation.

Recommend to analyse merits of prevailing medical compensation law and evaluate the protection available to patient as a consumer through medical professional indemnity insured without any evidence of damages.

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