

Medical Negligence and Doctor's Liability; A Critical Review in Present Legal Regime in Sri Lanka

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Abstract— Medical negligence is the breach of a duty of care towards a patient which results in harm to a patient. Medical negligence is a global occurrence but some countries with developed health care systems where redress scheme for negligence. Medical negligence now a days have become one of the serious issues in Sri Lanka. Unfortunately, there are no proper criteria or law to identify or investigate errors in health care either in the public or private sector. In a case of negligence it is necessary to determine when and how a breach of duty has occurred and whether there was a failure to exercise a reasonable degree of care and skill. However, weakness of the present legal regime is delay in calling an inquiry allows time to manufacture evidence, with prolonged civil litigation. This research is based on qualitative and quantitative data and embraces both desk research with occasionally field investigations and collection of secondary data in the form of law reports, books, journals, dissertations and as well as judgements of alleged landmark negligence cases Sri Lanka. The objectives of this paper is critically analyze the concept of negligence and how is the breach of doctor's liability in each cases. Also it examines the principles followed by the courts in assessing the quantum of damages and practical difficulties within existence Sri Lankan legal regime. In my study, I found in Sri Lankan health care set up, to reduce the events of malpractices contributing factors must be minimized. Shortage of professionals with expertise in the public as well as private sector are contributing factors for negligence and less skilled substitutes to undertake such tasks. In assessing damages in such a case, the court must weigh policy factors with a sense of flexibility depending on the circumstances.

Keywords— Legal regime, Medical malpractice, Liability

I. INTRODUCTION

Negligence may be defined as doing something which a prudent and reasonable man would not do or omission to do something which a prudent and reasonable man would do, in a given situation. Although medical accidents and misadventures are an expected social phenomenon, medical negligence is not. Medical

negligence is the breach of a duty of care towards a patient which results in, harm to a patient. This could be by an act of commission or omission by the medical staff. This duty is owed by all those professionals who hold themselves out as skilled in medical, nursing and paramedical fields. It arises independently of any contractual relationship.

Medical negligence or medical malpractice is often considered as one and the same. It actually means medical care that is hampered due to negligence by the health care provider. It may include doctors and all other related staff who are responsible for providing healthcare.

Those patients or their family members have all the right to initiate legal actions against such practices, and the people involved can be sued in court. It is, however, very difficult to prove that the injury occurred as a result of medical negligence.

In most of the jurisdictions, people are qualified to get a certain standard and level of medical care. When such standards are brought down due to any reasons, the entire staff responsible for providing medical care is subjected to the lawsuit. The reasons of low standards are when the staff do not adhere to the guidelines and are either too busy or tend to get distracted. Sometimes, erroneous actions or faulty machines can also result in unwanted negligence.

Insufficient skill, care, pace or attention can lead to negligence. Professionals providing psychological care to patients are equally responsible for providing due care to their patients. In case of any negligence on their part, they may be charged for medical malpractice. Patients are authorized to receive good medical facilities during their course of treatment. Hence, any negligence in that can also be charged.

The medical professionals who have been charged under medical negligence are often compared to other medical professionals of their group for professionalism and competency before trying them in the court.

A. Elements of a Medical Negligence

Medical negligence is established when 04 main criteria are satisfied. They are:

- The doctor owes a duty of care to the patient
- There is a breach of this duty by an act of commission or omission,
- A causal relationship exists between the breach of the duty and the damage caused to the patient
- Damage or harm is caused to the patient

The burden of proving these elements is on the plaintiff in a malpractice law suit. More important is that the plaintiff must show some actual compensated injury that is a result of the alleged negligent care. Caution may also be vigorously litigated issue because the physician may allege that the injuries were caused by physical factors and related to the alleged negligent treatment. There is a limited time during which a medical lawsuit can be filed which varies per jurisdiction & type of malpractice.

B. Liability of Medical Professionals

Roman-Dutch law recognizes that individual public officers could be held liable for their negligent acts and/or omissions. Further, it recognizes that a negligent breach of a duty, whether imposed by statute or by common law, could give rise to delictual liability. In English law too, the traditional approach has been that public authorities or officers are in the same position with regard to negligent acts and/or omissions, as private persons. Hence, it would be possible in Sri Lanka to bring action against individual Medical officers under law of delict, in respect of negligent omissions which constitute breach of duties imposed by law.

C. Defence of a doctor against charges of Negligence

A doctor will be considered negligent in the following circumstances

- Duty of care
- Breach of standard of care or failure to exercise such duty of care (dereliction)
- Injury or damage and reasonable foreseeability of damage

D. Doctor's Duty of care

When a medical practitioner attends to his patient, he owes him the following duties of care:

- (1) A duty of care in deciding whether to undertake the case;
- (2) A duty of care in deciding what treatment to give; and
- (3) A duty of care in the administration of the treatment.

A breach of any of the above mentioned duties gives a right of action for negligence to the patient.

II. LAWS RELATING TO MEDICAL NEGLIGENCE IN SRI LANKA

A. Civil Law

In Sri Lanka, civil wrongs should be adjudicated under the Roman-Dutch law, which is the general law of the country. Roman-Dutch law is one of the received legal systems in Sri Lanka. It provides relief for civil wrongs under law of delict. A delict is the breach of a general duty imposed by law, which will ground an action for damages at the suit of any person to whom the duty was owed, and who has suffered harm in consequence of such breach. The law of delict comprises those legal rules which indicate when, and to what extent, a person will be held liable for having committed a delict.

1) Liability under Law of Delict

Law of delict is derived from two basic actions, the Aquilian Action and the Actio Injuriarum. The Supreme Court decision in **Prof. Priyani Soysa v. Rieni Arsecularatne** has established that, Sri Lankan Courts must develop the law of delict within the framework of the core norms of the Aquilian Action and the Actio Injuriarum, until legislative changes are introduced. Therefore, the liability of the medical professionals under law of delict should be determined within this basic frame work. The Aquilian Action has three core elements:

- (i) proof of wrongful acts or omissions;
- (ii) Negligence (culpa) or intentional wrongdoing (dolus)
- (iii) Resulting patrimonial loss.

The Actio Injuriarum requires proof of an infringement of interest connected with person, dignity or reputation, committed intentionally or with animus injuriandi. It becomes clear that any delictual action based on negligence could only be brought under Aquilian Action. Hence, liability of the police for negligent omissions should be determined under the Aquilian Action

B. Certain Public Law Remedies

There is a main public law remedies available to persons aggrieved by negligent omissions of the Medical professionals and, the remedy provided in Article 126 of the Constitution, in respect of fundamental rights infringement Fundamental rights jurisdiction of the Supreme Court has become a popular method of holding Medical professionals accountable for their conduct. Certain fundamental rights guaranteed by the Constitution are directed at prevention of physical injury on human beings. For instance, Article 11 of the Constitution of Sri Lanka declares that, "No person shall be subject to torture or to cruel, inhuman and degrading treatment or punishment".

C. Action against the Medical Negligence

In Sri Lanka, a victim seeking redress of a medical negligence can make a complaint to the health authorities, forward an affidavit to the Sri Lanka Medical Council (SLMC), complain to the Human Rights Commission, lodge a complaint to the police station or file a civil court case in the District Court. In high profile cases all the above events can take place concurrently, but in most instances a departmental enquiry and police investigations followed by a court case will be the outcome. The SLMC Registrar says many victims are not aware of the role that SLMC plays and laments that complaints are not brought to them. He explained the protocol to be followed by the victim of the family or his estate and the lengthy procedure involved thereafter. The Ministry of Health inquirers initiate action against the accused probably by appointing a committee or a medical administrator, all disciplinary in nature and if the element of negligence is proved in the case of a state employee, the Public Service Commission (PSC) has the power to take disciplinary action against the accused but the victim will not be compensated by way of pecuniary measures. If the Police files a court case it may take a long time, perhaps 10 years. Unless a gross negligence is proved, criminal liability does not exist. If serious nature of injury or death occurs, the case may be heard in the lower or superior courts and in the event of appeal, it may end up in the court of appeal or even supreme court. Commissioner of Human Rights, Sri Lanka emphasizes the need of firm legislation to prevent doctors walk away easy after treating haphazardly and insists that every victim to send petitions to SLMC to take action. Apart from that he insists the need of more stringent legislation to stem the carelessness of doctors. As a whole all the above avenues are time consuming, some are costly and some lack transparency. Moreover, the victim or the aggrieved party and the Health Care Provider (HCP) both undergo a gruelling period leaving only frustration, financial loss, mental agony, and retribution. Those procedures will add more misery to the victim and the relatives already subject to purported medical negligence even to the extent of losing a loved one, loss of a limb, or damage of irreparable nature. The only option for the victim in the present context is to file a compensation case usually labelled as case (Wrongful act or infringement of rights leading to legal liability), a journey down a long pathway, an adversarial and hangs on balance of probabilities. Even if the victim is compensated, it is usually years after the adverse event and the award is reduced by a large percentage that covers legal fees and expenses associated with the trial. According to a consultant JMO the present compensation system is financially oriented and far away from the scientific fundamentals of the medical practice as well as

from our long standing culture religious and humanitarian values. (GMJ Sept.2009) According to him tort-based medical litigation make the health care professional and the patient both become victims but benefits the legal profession.

III. DAMAGES

In the civil law if someone does any harm he has to pay for it irrespective of he did it wilfully or negligently or by inevitable accident. In such cases he has actually done harm and therefore is bound to undo by paying compensation. The principle in the civil case is the transfer of loss from the plaintiff to the defendant by enforcing compensation.

A. Types and landmarks of Medical Negligence

Arseculeratne v. Priyani Soysa is a landmark and controversial case of alleged medical malpractice in Sri Lanka. The plaintiff's case was that the defendant was negligent in not diagnosing Brain Stem Glioma and in the misdiagnosis of Rheumatic Chorea. Had a timely diagnosis been made, it was argued by the plaintiff, survival or prolongation of life would have been possible. Since Brain Stem Glioma was a terminal condition with no prospect of effective treatment, it was also argued for the defendant that even if her negligence was established, causation had not been proved and as such the plaintiff's action should fail. It was on this ground that the Supreme Court allowed her appeal. Prof. Soysa's appeal to the Court of Appeal was dismissed, however the quantum of damages was reduced as under the Common Law of Sri Lanka which is Roman Dutch law, and damages could only be awarded for patrimonial loss. The Supreme Court allowed Prof. Soysa's appeal setting aside judgments of both lower courts. In a landmark judgment heavily critical of the decisions of the lower courts, the Supreme Court held that causation was not established on a balance of probabilities by the plaintiff. The defendant was also allowed costs of action, which she declined to accept. The case lasted almost a decade traversing the full extent of litigation in the country - from the District Court of Colombo to the Court of Appeal to finally the Supreme Court. The District Court upheld the Plaintiff's case and awarded him Rs. 5,000,000 (around US\$ 125,000 at the time) and costs.

Medical negligence can occur in an infinite number of ways, but many instances of medical negligence can be grouped into one of the following categories:

1) Misdiagnosis

One of the most difficult aspects of a doctor's job is taking a set of symptoms and diagnosing the illness or injury causing them. Often times, several different

illnesses may result in similar symptoms, but will require very different treatment. For this reason, it is important that, if a doctor has doubt regarding a diagnosis, further testing should be done. Often times, an illness or injury becomes more and more difficult to treat as time goes on. It is often critical that a doctor diagnose an illness or injury in an appropriate amount of time, so that treatment can be administered, and the patient made well.

Jude Stanly (15) in Negombo died in 2011 at the Lady Ridgeway Children's hospital after being prescribed filaria tablets without identifying the real illness Failure to Timely Diagnose.

Chandrika Wickramasinghe (30) in 2012 died at a private hospital in Matara just two days after the delivery of her baby. Cause of death: The administration of a wrong injection.

A 45-year-old mother reportedly died after receiving a transfusion of the wrong blood type at the Negombo Base hospital.

2)Surgical Error

Surgical errors are a common form of medical negligence, and usually involve a doctor accidentally cutting or cauterizing an internal organ or tube, which can be defined as a negligent act if careful performance could have prevented it. Common injuries resulting from surgical errors have to do with foreign fluids, such as urine, bile or feces, entering the abdominal cavity through a cut unintentionally made during a surgical procedure. This often leads to severe infections and sepsis, or septic shock which can lead to a patients' death.

Another form of surgical error is called a wrong site surgery, and is exactly what it sounds like. There have been cases reported of patients needing an arm, leg, hand, finger or other appendage amputated, and a mistake prior to surgery results in the wrong appendage being amputated. Imagine a patient who would have otherwise lived a normal life with one prosthetic leg, is now permanently bound to a wheelchair.

A 48-year-old mother, **Sithy Nazeera** alleged that her healthy leg was accidentally amputated at the Negombo Base Hospital.

Upali Gunatilake (47 years old husband) and a **Sanduni Rashmika Gunatilake**(15-year-old daughter)of a **Dayani Hemamala** (38-year-old wife) who died due to alleged medical negligence at the Durdans Hospital in Colombo filed a lawsuit against the hospital and the gynaecologist and obstetrician who performed a surgery into an

ovarian cyst of the deceased woman, claiming Rs.14.6 million as loss and damages.

Professor in the Peradeniya University **Rajiva Jayasinghe** died in 2013 an operation named SLEEVE GRESTECTOMY under a Laparoscopy method at the Kaalubowila Teaching Hospital.

3) Failure to Follow Up with Treatment

This is a broad form of medical negligence that involves a doctor prescribing treatment, then failing to monitor the progress and adjust or cease treatment accordingly.

The plaintiff Achala Priyadarshani had been admitted to the Matara Hospital with fracture injuries in her left hand after falling down a flight of stairs at her home in Urubokka. The plaintiff stated she received treatment at the Matara Hospital and was subsequently transferred to the Colombo National Hospital for further treatment. The plaintiff stated that upon being admitted to the Colombo National Hospital, the doctors had diagnosed to amputate her left hand. The plaintiff further stated that her left hand was amputated due to negligence on the part of the staff attached to the Matara General Hospital and the Colombo National Hospital. She further stated that the doctors diagnosing to amputate her hand could have averted it, if the defendants and the hospital staff had acted in a responsible, effective and vigilant manner and claimed a sum of Rs.100 million as damages from the defendants and the state.

Nimeshka Kavindi Abeysekara whose finger was amputated immediately after her birth at the De Soyza Hospital in 2005 sued the nurse and the Attorney General stating that it was the negligence of a Government servant and claimed Rs 10 million as compensation.

Dedunu Kanchana de Silva (23) died in 2008 at the Ragama hospital, due to lack of proper medical care.

4)Failure to Treat in a Timely Manner

Once a doctor makes a diagnosis regarding a patients' illness or injury, treatment should be administered is such a time frame that gives the patient the best possible chance at recovery. If a doctor fails to act quickly enough to treat the patient, then possible negligence has occurred. Often times, this form of medical negligence takes place in an emergency room or urgent care situation, where timeliness of treatment can mean the difference between life and death.

Birth injury cases also often result from a failure to treat in a timely manner. In cases of fetal distress, hospital staffs have precious few moments to act, and perform a c-section to remove a baby, before permanent damage or injury occurs to the fetal brain. There have been

numerous cases of a failure to perform a c-section in time, resulting in permanent brain injury, or cerebral palsy in a new born baby.

Baby died after delivery at the Nagoda hospital. Mother - Rukmani Dias (28) was in severe labour pains but the doctor did not transfer her immediately to the Castle Street maternity hospital.

Sarath Paladeniya (39) in 2001 a Sergeant of the Special Task Force, admitted to the NHC for high blood pressure, died due to negligence in giving him timely treatment.

Ashoka Dayananda's daughter aged one year and two months baby Sewmini whose finger and left hand was amputated due to human error and not willful negligence at the Kandy General Hospital in 2006.

Five pregnant women died at the Nagoda hospital after caesarean operation in 2011.

5) *Anesthesia Error*

In any surgical procedure, anesthesia poses a high risk in and of itself, which is why anesthesiologists practice such a narrowly focused medicine. Anesthesia errors can lead to severe brain injury, organ failures, and even death. In many cases, medication administered to a patient in the days and weeks prior to a surgical procedure can affect the drugs used for anesthesia. It is critical that an anesthesiologist examine the patient's medical records prior to deciding on the type, mixture or "cocktail" to use to anesthetize the patient for surgery. Any failure to do so can result in serious injury to the patient.

V. V. Chandra Malkanthi (37) died after delivering her baby at the Homagama hospital in 2007.

6) *Medication or Prescription Error*

Medication and prescription negligence can generally occur in one of two ways:

1. A doctor prescribes a patient a drug or medication that causes injury due to a dosage error, misdiagnosis of symptoms or failure to check for allergic reaction, or;
2. A prescription is filled incorrectly by a pharmacist, which can lead to injury to the patient. One case places liability for medical negligence on the prescribing doctor, and the other on the pharmacist.

Sumudhu Jayanath (14) from Hanwelle admitted for appendicitis died in 2003 at the Avissawella base hospital for bowl infection caused by wrong medication.

Obviously, this is not a comprehensive list of types of medical negligence, but does encompass most of the

types that usually result in injury and a case of medical malpractice.

IV. TRIAL

Medical negligence cases can drag on as long as ten years to come to court, at great expense, and are notoriously difficult to win. The courts seem keen to protect the integrity of the health profession while being very considerate to medical practice regarding medical negligence. In civil suits the victim or the legally designated party on behalf, has to prove all the elements by preponderance of evidences but if both parties agree, the case may be settled pre-trial, on negotiated term. Failing to do so, the case will proceed to trial. Expert witnesses invariably emerge from both parties, usually a qualified medical personnel with expertise and experience in the particular issue accepted to the court.

A. Burden of proof and chances of error

The burden of proof of negligence, carelessness, or insufficiency generally lies with the complainant. The law requires a higher standard of evidence than otherwise, to support an allegation of negligence against a doctor. In cases of medical negligence the patient must establish her/ his claim against the doctor.

B. The Patient Contribute to Medical Negligence

In most cases of medical treatment, a doctor or medical professional will order their patient to participate in the treatment by taking certain medications, eating, or not eating certain foods, avoiding strenuous work or exercise, or taking care of treated areas during recovery from an injury. What happens if a patient doesn't do as ordered? Is he or she also liable for any injury suffered as a result?

V. CONCLUSIONS

Thus, after critically analyzing the present paper I came up to following conclusion.

There are two possibilities in cases of negligence – either it is negligence of the doctor or it is negligence of the staff. There may be a possibility of negligence, both of the doctor and the staff. In most of the cases, it will be a case of joint and several liabilities, and both the doctor and the hospital will be liable. On the scrutiny of leading medical negligence cases of in Sri Lanka, certain principles should be taken into consideration while pronouncing the judgment in medical negligence cases.

1. Negligence should be guided upon the principle of reasonableness of common man prudence and negligence must be established in order to give the compensation in certain cases.

2. Medical profession requires certain degree of skill and knowledge, so the standard of care in cases of

medical professional is generally high and should also be taken into account while giving the judgment.

3. A medical professional can be only held liable, when the standard of care is reasonably is less than the reasonable care that should be taken from a competent practitioner in that field.

4. When a choice has to be made between certain circumstance when there is higher risk involved and greater success is involved and lesser risk with higher chances of failure, the facts and circumstances of the individual case should be taken into the consideration.

5. No negligence will apply on medical professional, when he performs his duty with the utmost care that should be taken, and he had taken all the precaution.

6. Medical professional should not be harassed unreasonably and unwanted apprehension and fear should not be created on the medical fraternity that they can give their best in certain cases where it is required; they should be given some liberty in certain peculiar situation where they need to make their judgment without any apprehension freely. So that it can be beneficial for the society.

7. In assessing damages in such a case, the court must weigh policy factors with a sense of flexibility depending on the circumstances such as the work load, facilities available, time constraints, competence of the patient to understand the risk factors etc .It can be argued therefore that in finding the legal causation (remoteness of damage) between the negligently caused act and the

damage, policy considerations that govern the rights of self-determination coupled with patient autonomy must be considered in Sri Lanka.

VI. RECOMMENDATIONS

- Medical Ethics teaching and training on soft Skills, especially of communication skills will go a long way in not only improving the quality of health care and satisfaction of patients but also in preventing medical negligence cases.
- Need for Classification of Medical Negligence Cases
- Need for further Research
- Establish a Redress Scheme for Medical Negligence

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