

Litigation against medical practitioners: facts and myths

Rohan Ruwanpura

Consultant Judicial Medical Officer, Teaching Hospital, Karapitiya, Galle.

e-mail address of the corresponding author; Dr. Rohan Ruwanpura: rohanr@sltnet.lk

A present medical litigation system in Sri Lanka

The number of medical negligence cases against medical practitioners is on the rise during the recent past, probably due to increasing awareness and motivation among the general public. Patients who suffer an adverse health care outcome, so called medical injury, generally assume that, it is essentially due to mistakes of their treating physician, though medical injury may well be out of the hands of the treating physicians and health care team. The victim seeking redress of a medical injury could make a complain to the health authorities, forward an affidavit to the Sri Lanka Medical Council or Human Rights Commission, lodge a complain at the police station or file a civil case at the District Court. The majority of victims while being unaware of the legal basis of medical negligence often consult a plaintiff attorney and begin a long journey down the tort pathway to seek compensation. This process is adversarial and has many inconsistencies¹. The final outcome of the civil negligence case hangs on balance of probabilities. One should understand the fact that evaluating debatable opinions of ever advancing medical science is an extremely difficult exercise. Even, if the patient is compensated, it is usually years after the adverse event, and the award is reduced by a large percentage that covers the attorney's fees and expenditure associated with the trial. It benefits the legal profession and impoverishes the health service with little benefit to the alleged victims of negligence².

It has been consistently noted in the recent past, that many victims complain to the police, who investigate the medical negligence case under the provisions of the Criminal Procedure Code and the Police Act. Though police has neither expertise nor technical support essential for investigating matters pertaining to medical science, they obtain all documentary evidence from the hospital authorities which subsequently facilitate the victim who is

determined to file a civil action in the future. Subsequently they arrest the doctor as a suspect in a criminal case and finally advise the patient to go for a civil action. In this process, there is no one accountable for the harassment of medical professional who has not committed any crime, often not committed even a civil error under provisions of the existing law. The Indian Supreme Court, considering undue arrest of doctors under the provisions of criminal law, has ruled that doctors may be criminally prosecuted only for gross negligence or a high degree of negligence and that a simple lack of care, an error of judgment, or an accident is not proof of negligence³.

Many physicians believe that present malpractice compensation system is financially orientated and far away from the scientific fundamentals of the medical practice as well as from our long standing cultural, religious and humanitarian values. In our opinion, the doctor and the patient, both are victims of the present system of tort-based medical litigation.

The following critical remarks raised by Senator Michael B. Enzi regarding current medical litigation law in USA expose the reality behind the preset system⁴.

The medical litigation system stands in the way of creating a culture of safety and quality in healthcare. The shortcomings of the medical litigation system are manifest:

- *Compensation to patients injured by medical errors is neither prompt nor fair. The randomness and delay associated with medical litigation does not contribute to timely, reasonable compensation for most injured patients. Some injured patients get huge jury awards, while many others get nothing at all.*
- *Verdicts with huge awards that do not match the*

severity of injuries or the conduct of the defendants destabilize the insurance markets and send premiums skyrocketing, which forces many physicians to curtail, move or drop their practices. This leaves patients without access to necessary medical care.

- *Litigation does nothing to improve quality or safety. The constant threat of litigation drives the inefficient and costly practice of “defensive medicine” and also discourages the exchange of critical information that could be used to improve the quality and safety of patient care.*

These comments lead the Institute of Medicine (IOM) in USA to reinforce the need to promote patient safety in their often cited 1999 report on medical errors. Following on that report, another IOM committee suggested enhancing patient safety through “replacing tort liability with a system of patient-centred and safety-focused non-judicial compensation⁵.”

In addition to tort-based actions, there are other compensation mechanisms as well which are discussed below:

1. The consumer protection legislation

The medical injury compensation systems in India and some Middle Eastern countries are based on non-judicial compensation by employing redress mechanisms under the consumer protection acts⁶. This system has several advantages over the tort based liability compensation due to efficiency and lesser consumption of time. However, the patient who does not pay for the services [free treatment] at the Public Hospitals cannot be generally bundled as a “consumer” in commercial sense, and therefore, shall not be eligible for any monetary rewards. Furthermore, damages due to unavoidable medical mishaps are not covered by the consumer protection acts.

2. A No-Fault system

A no-fault system of compensation for medical injury allowing physicians to come forward when an error occurs and join forces with their patient(s) and thereby facilitating hospital system to improve the

entire network of health care. A no-fault system encourages health care professionals to identify the system malfunction and take a proactive approach to fixing it. At the same time, where a patient has suffered harm, the no-fault system assures appropriate compensation. The no-fault compensation system is well operating, over last 25 years in Sweden and New Zealand⁷, the top-ranked nations in the world by humanitarian development aspects.

The no-fault system functions as follows: A patient who suffered damage due to medical malpractice or due to unavoidable mishap which is not negligence will make an application for compensation. The physician concerned, in response to notification by the expert panel, has to submit a written report giving all the details about the damages and procedures. The application and accompanying medical report are reviewed by a primary investigation officer, who makes an initial eligibility determination. Then the claims are forwarded to an independent expert panel, which decides whether the injury is compensable and, if it is, uses a fixed benefits schedule to establish a cash award that includes payment for economic and non-economic (pain and suffering) losses⁸. Patients who are dissatisfied with the outcome reserve a right to appeal to a claims panel.

The system does not prevent the patients from approaching courts, if they wish to do so, and administrative procedures by health authorities to rectify future errors in the hospital system. It has been suggested that the panel should interview the physician and call witnesses whenever necessary. Claims are generally settled within six months, much faster than the traditional court proceedings.

It is high-time for us to initiate a similar medical compensation system which suit Sri Lanka. A higher rate of funding from local councils and physicians may be the disadvantage of no-fault system, but could easily be met by restructuring the present 'Agrahara' health development fund in Sri Lanka.

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