INTRICACIES OF FAULT BASED LIABILITY IN MEDICAL NEGLIGENCE LITIGATION IN THE 21ST CENTURY CONCERNING SRI LANKA

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I. INTRODUCTION

The adversarial system has remained to be a controversial yet, a preferred system for the administration of justice since centuries. Nevertheless, there is a growing perception concerning its continued viability to advocate medical negligence litigation due to its arbitrary nature and the cost of suit outweighing justice to parties. Whilst through the adversarial system victims could obtain compensation, it is often unpredictable as success may not entirely depend on the merits of the claims. Stagnation and uncertainty of justice in adversarial system have resulted in further victimization of victims especially, in medical negligence litigation. Thus, for years, strong proponents of wiping out the conventional adversarial system of justice, which corresponds with the fault-based liability, has been a concern of many countries. To remedy this vexation, among various alternatives, no fault compensation system which would permit compensation to be provided without having to prove the fault had triggered much discussion as an efficient mechanism to compensate for medical injuries.

II. **Complexities of the Adversarial System**

Medical disputes in Sri Lanka are resolved through the "Fault based" system. Consequentially, establishing the fault is fundamental to a successful claim of negligence. Nevertheless, inherent complexities of the adversarial system leave many victims of medical negligence litigation uncompensated for their injuries. The fault-based system is formed on "all or nothing" approach leaving no room for compromises if the victim fails to successfully establish the fault element. In fact, majority of victims endure immense tribulation in procuring an unequivocal medical report from a medical

professional against a fellow practitioner. J. Fleming observed that:

> *"the most controversial aspect of the negligence system is that it discriminates between different accident victims not according to their deserts but according to the culpability of the defendant: a claimant's success is dependent on his ability to pin responsibility for his injury on an identifiable agent whose fault he can prove. Put differently, negligence deems as deserving only those who can trace their harm to someone's wrongdoing."*[1]

Adding fuel to the fire, "Causation" as one of the decisive elements of an Aquilian action further aggravates the unpredictability of success in medical negligence litigation, as the pathogenesis of diseases and thereby injuries may initiate naturally as opposed to a negligent conduct by the medical practitioner. This view was endorsed by Lord Bridge, in **Hotson v East Berkshire Health Authority**[2], where he upheld that:

> *"in some cases, perhaps particularly medical negligence cases, causation may be shrouded in mystery that the court can only measure statistical chances".*[3]

In the aftermath of such intricacies, judges tend to heavily rely upon intuitive judgements in lieu of logical reasoning. This inevitably culminates to the detriment of the parties in litigation. Furthermore, prevalent awarding of lump sum amount in tort litigation is often unwarranted as it is vital that an estimation of the costs that the Plaintiff expects to incur in the future due to the defendant's conduct be crucial in awarding of compensation. This entails legal ramifications for parties for two main reasons. One is the inaccuracy of estimation due to unpredictability of future upshots, and the other results from the first, in over-compensating victims in certain occasions and under-compensating in others. Hence, ultimately the award inhibits in serving the very purpose of paying compensation.

Regrettably, the hostile approach towards doctors in litigation, which is a vehement attack on their credibility and integrity, would invariably tarnish the healthy balance of doctor-patient relationship. Moreover, the attack being against the credibility of medical doctors inevitably results in belligerent retractions of admitting mistakes. This confrontation leads doctors with the option of diverging from general practices *nolens volens* and avail from "defensive

[1] J. Fleming, "Is there a future for tort?" Louisiana Law Review, vol. 44, pp. 1193 - 1212, 1984, p. 1198
[2] (1987) 2 All ER at p. 913
[3] ibid 2 at p. 913

medicine" for the sake of avoiding medical negligence litigation. As Lawton J in **Whitehouse v Jordan**[4] defines, "defensive medicine" is:

> *"adopting procedures which are not for the benefit of the patients but safeguards against the possibility of the patient making a claim of negligence".*

On a positive note, this practice could be beneficial for patients as it provides supplemental care by way of additional testing and/or treatment. Nonetheless, this practice would inexorably serve more harm than benefits since increasing cost of health care would eventually impede the quality of the healthcare system as a whole. Irrefutably, the likelihood of mishaps and thereby sufferings are higher as more medications are prescribed. Thus, this unhealthy trend resulting in distorted medical practice is quite evidently inevitable. Practical difficulties inherent to the adversarial system have revitalized for potential alternative methods of compensation such as no-fault compensation.

However, proponents of the corrective justice theory have overemphasized the importance of the concept of wrongdoing and thus, negligence liability. Nevertheless, a conception of justice which places less consideration on corrective justice and more consideration towards distributive justice could assist to make coherence of strict liability and to place negligence in its proper place.[5] Hereby, the author takes an initiative to sketch a system of justice, that in general, is to be concerned with sharing of burdens and benefits of social life fairly.

III. Corrective Justice v. Distributive Justice

Different scholars have argued on the premise that there is a social responsibility to compensate all victims regardless of establishing the fault but, also to hold liable those who have committed a wrong by preserving theoretical concept of corrective justice. However, the plausible issue is whether corrective justice in its theoretical terms is adequately able to serve its inherent purpose of correcting the wrongdoer's

[4] [1981] 1 W.L.R. 246 at 659

[5] Gregory . Keating, "Distributive and Corrective Justice in the Tort Law of Accidents", Southern California Law Review, Vol. 74:193, at p. 195

wrongful action, since the fault -based liability is confined to rigid tests, such as duty of care, proximity and foreseeability. Hence, the author takes due consideration to determine whether and to what extent our current practices pertaining to medical negligence corresponding with the corrective justice approach be comprehended as expressing an idea of justice.

Aristotalian principal of corrective justice is concerned with personal responsibility and relationship between individuals.[6] Unlike the adversarial system of justice, no fault compensation system is propelled by the principle of distributive justice which emphasizes the role of society and community responsibility. E.J. Weinrib [7] delineating the distinction between the two principles states that, "*distributive and corrective justices are the structures of ordering implicit in two different conceptions of interaction. In corrective justice, the interaction of the parties is immediate; in distributive justice it is mediated through a distributive arrangement,…which…activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion*". [8] Although E.J. Weinrib's exposition of corrective justice connects the entitlement of one party to the liability of another, and expounding on correlativity of harm done and harm suffered [9], Modak-Truran's [10] exposition of corrective justice refers to the mean between the two excesses of unjust gain and loss which provides a standard for judges to evaluate unjust gains and losses through judicial practical wisdom.[11] However, despite such egalitarian opinions on corrective justice, there is an iota of doubt as to what extent it serves justice to parties; especially victims of medical negligence litigation, due to the intricacies that prevail over the adversarial system. Hence, no fault compensation, which bears the imprint of distributive justice proposes that, the community or a part of the community should be accountable for harms or injuries accompanied by a conduct if, it is against the interest of the society. Lawton L.J in **Whitehouse vs Jordan**[12] reiterated that,

[6] H.E. Menyawi, "Public tort liability: An alternative to tort liability and no-fault compensation," Murdoch University Electronic Journal of Law, vol. 9, no. 4, pp. 1-21, Dec. 2002.
[7] E.J. Weinrib, "Corrective Justice," Iowa Law Review, vol. 77, pp. 403-425, 1992.
[8] ibid
[9] Weinreb, "The Insurance Justification and Private Law" (1985) 14 J. Leg. Stud. 681 at 683
[10] M.C. Modak-Truran, "Corrective Justice and the Revival of Judicial Virtue" Yale Journal of Law & the Humanities", Vol.12, issue.02, article 02, January 2002
[11] ibid at p. 252
[12] ibid 4

> *"as long as liability… case rests on proof of fault, judges will have to go on making decisions, which they would prefer not to make. The victims of medical mishaps of this kind should … be cared for by the community, not by the hazards of litigation.*"[13]

Therefore, implementing a no fault compensation scheme would undoubtedly assert a sense of accountability to the public including medical professionals, to be collectively responsible for misfortunes suffered by the community.

IV. Viability of No-Fault Compensation as an Alternative to the Advesarial System

It is vital to note that, the fault becomes irrelevant in no fault compensation scheme, since a social insurance mechanism dispenses compensation for injuries arising out of accidents, including medical negligence situations. Englard [14] expounds that:

> *"extent of the damage is easier to calculate…[and] therefore, [would] be better handled by collective insurance".*[15]

Furthermore, M. Woodrow, [16] Scottish Secretary to the British Medical Association stated:

> *"……..no-fault compensation offers a less adversarial system of resolving the process for compensating patients for clinical errors. A system of no-fault compensation with maximum financial limits would benefit both doctors and patients, speeding up the process and reducing the legal expenses incurred by the current system. More importantly, however, it would address the blame culture……..which discourages doctors from reporting accidents and would end the practice of defensive medicine"*[17]

D.E. Seubert [18] provides a pragmatic explanation to no fault system and explains that:

> "*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 must assure appropriate compensation. Such an approach accomplishes two goals: first the patient is compensated for the injury, and,*

[13] ibid at p. 658
[14] Englard, "Alternative Compensation Systems", The Philosophy of Tort Law, Brookfield, Vermont: Darmouth Publishing Company, 1993
[15] ibid at p. 110
[16] BMA Scotland, "No fault compensation will end the blame culture within the NHS, says BMA Scotland," BMA Website, 2011. Retrieved from: http://web.bma.org.uk/pressrel.nsf/wlu/GGRT8E7LU8?OpenDocument.
[17] ibid
[18] D.E. Seubert, L.T. Cohen, and J.M. LaFlam, "Is 'no-fault' the cure for the medical liability crisis?" American Medical Association Journal of Ethics, Vol. 9, No. 4, pp. 315-321, April 2007.

> *secondly, society's health care is upgraded and enhanced by fixing an error in the system. Such an error may in fact be a physician with a deficit. The no-fault process can identify this deficit and allow for physician retraining and rehabilitation"*[19]

Hence, espousing a no fault system of compensation would deter the inherent intricacies and legal ramifications of the adversarial system such as stagnation and uncertainty of justice. Besides, establishing fault and causation which encumbers redressing the victims of medical negligence would no longer be relevant. Instead, a system that elevates the standards of health care would be an inexorable corollary in the no fault system.

Despite the egalitarian approach towards victims and medical doctors expounded under the no fault system, its viability in Sri Lanka as a developing nation remains an unresolved dimension. The foremost obstacle in manoeuvring a no fault compensation system is convolutions in funding and the unpredictability of the number of cases that would arise yearly. New Zealand has successfully manoeuvred an Accident Compensation Scheme which is funded through taxes of employers, self-employed people, motor vehicles, drivers of motor vehicles and general revenue. However, the viability of such a system would be highly contentious if, taxes are increased in a country that is already overburdened with such. Furthermore, critics of the no fault system have opined on the cumbersomeness of the no fault system as it tends to compensate a wide array of victims. Thus, the no fault system is costly compared to maintaining an orthodox adversarial system.

V. Conclusion

Manoeuvring a no fault system in Sri Lanka requires a great deal of consideration in terms of its social standing, population, financial standing and political ideology. Despite the convolutions of the no fault compensation system, the author wishes to note that such a system is not explicitly impossible in Sri Lanka. Constructing a viable system of no fault compensation which suits the local traditions of Sri Lanka is an onerous task as it essentially depends on burdens and priorities inherent to a society. In addition, legal luminaries have

[19] ibid at p. 316

further enlightened on the right of parties to sue, as the adversarial system has been a preferred measure of deterrence against general irresponsibility and a positive encouragement to a sense of individual responsibility towards one's fellows. [20] Nevertheless, given the inherent obstacles posed by the adversarial system, it is dubious as to whether it can achieve its purported objectives i.e: affording a fair compensation to victims in assuring justice and thereby their right to sue. Hence, the extent to which our tort practice pertaining to medical negligence be comprehended, as expressing an idea of justice and the viability of implementing a no fault compensation scheme in Sri Lanka, are shrouded in controversy.

[20] The Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Report), at p. 363