A landmark case of medical negligence in Sri Lanka

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. Sri Lanka has not seen an epidemic of medical negligence cases as in some developed countries. The case against a former Professor of Paediatrics by an attorney-at-law, attracted much publicity and public attention as it related to the death of a child who had brain stem glioma. This was a landmark case because the Supreme Court (SC) allowed the professor's appeal against the verdicts of the district court and the court of appeal, observing that the plaintiff has failed to prove, on a balance of probabilities, that the negligence of the professor caused, or materially contributed to the death of the child, and neither the original court nor the court of appeal gave adequate consideration to the question of causation. The judges of the SC observed that a proper evaluation of the evidence was not made by the lower courts as to what symptoms of the malady appeared and when they did manifest, and that mere misdiagnosis or non-diagnosis of a disease by itself does not amount to negligence.

Cases of medical negligence against the medical profession in Sri Lanka are rare. In the last century the number of reported cases is less than ten. The case against Prof. Priyani Soysa, former Professor of Paediatrics, University of Colombo, by an attorney-at-law was a landmark case because the Supreme Court (SC) judgement affirmed medical practitioners' faith in the judiciary, which took a nose-dive as a consequence of the judgements of the district court and the court of appeal.

As stated in the SC judgement, this case has attracted much publicity and public attention as it relates to the unfortunate death of a child and everyone who hears or reads about it cannot but be moved by the tragedy. They continued, "However, sympathy is not the valid basis for determination of the important issues in this case and as judges it is our responsibility to do justice..... according to the law."

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. For an action of medical negligence to succeed four components are necessary.

Firstly, there should be a duty of care or the doctor-patient contract should be established. Secondly, there should be a breach of duty by act of commission or omission by the doctor. Thirdly, damage or harm must be caused as a result. Fourthly, and most important, the damage or harm caused should be causally related to the act of commission or omission.

For a successful action of medical negligence, the plaintiff must prove that a duty was breached which was the proximate cause of the harm, damage or injury to the patient, and the existence of the causal connection

between the defendant's breach of duty and the damages he suffered (1).

Briefly, these are the facts of the case against Prof. Soysa. The plaintiff and his wife and two children were holidaying in Nuwara Eliya in April 1992. One of the children was the then 4-year old Suhani. She was considered quite a normal and healthy child attending school. After a few days' stay at Nuwara Eliya it was observed that Suhani was dragging a leg when she walked, she was brought to Colombo by her parents, and on 18 April she was taken to Prof. Priyani Soysa. She examined the child at a private nursing home and made a provisional diagnosis rheumatic chorea (RC). Suhani was referred for admission to another private hospital and Prof. Soysa requested three tests (anti-streptolysin "O" titre, ESR and a chest xray). She prescribed penicillin, diazepam and multi-vitamin tablets for Suhani.

On 23 April, as arranged by Prof. Soysa, Dr J B Peiris, a consultant neurologist, examined Suhani. On the 1 and 2 of May, as Prof Soysa was out of Colombo, she arranged Dr D R Karunaratne, Director, Lady Ridgeway Hospital, and a paediatrician, to attend on Suhani in her absence. On 20 May, Suhani's father wrote to the sister-in-charge of the hospital, conveying his decision to transfer the care of the child from Prof Soysa to Prof S P Lamabadusuriya, a paediatrician and the Professor of Paediatrics, University of Colombo, since "...Suhani has not made much progress since her admission".

After examining the child, Prof Lamabadusuriya wrote in the bed head ticket (BHT), "Clinical features suggestive of rheumatic chorea. All tendon jerks very brisk with ankle clonus". He prescribed sodium valproate. The next day the parents thought that the "involuntary movements were less and Suhani's speech was better." On 23 May the child became more drowsy and less alert. The involuntary movements were same. On 24, Prof. Lamabadusuriya referred Suhani to Dr Newton Jayaratne, a consultant radiologist stating, "I cannot visualise the optic discs to see whether there is papilloedema. Could you please do a CT scan of the brain to exclude the possibility of a space occupying lesion?" Dr Jayaratne performed the CT scan two days later, and Suhani's illness was diagnosed as a brain stem glioma (BSG). If the optic discs were visualised by Prof. Lamabadusuriya, a CT scan may not have been ordered because the discs were normal. In BSGs papilloedema occurs late in the illness. According to the judgement, Suhani never had papilloedema.

She was then referred to Dr Lal Gunasekera, a neurosurgeon, who stated that there was very little he can do here and asked Prof. Lamabadusuriya to contact Dr Srilal Dias, a neurosurgeon in the UK. Suhani was taken to the UK on 1 June and shown to Dr Srilal Dias. But no operation, not even a biopsy, was performed to diagnose the pathology of the tumour as it was at an inaccessible site.

She was brought to Sri Lanka and admitted to the neurology unit of the General Hospital, Colombo under the care of Dr J B Pieris on the 16 June. On 18 June, Dr R S Jayatilke, oncologist and Director, Department of Clinical Oncology, Cancer Hospital, Maharagama, found that the BSG covered the entire brain stem extending from the mid-brain to the medulla. Suhani died the following day, about two months after the clinical features first observed by the parents.

Suhani's father then filed a case of negligence against Prof. Soysa. The trial judge, Mr. Mahanama Tillekeratne on 17 January 1994, delivered the judgement. Prof. Soysa was found negligent and was asked to pay Rs 5 000 000 (about US\$ 10,000) as damages. The Court of Appeal (CA) upheld the conclusion of the trial judge, though not necessarily for the same reasons, but concluded that the defendant was only entitled to claim under the law Rs. 250 000/- as medical expenses incurred by him, plus costs of action. Prof. Soysa appealed against this verdict as well, and seven and a half years after Suhani's death, Justices Dheeraratne, Ismail and Bandaranayake allowed her appeal.

The SC judges stated that "In view of this unsatisfactory evidence on causation, learned President's Counsel for the appellant submitted that the defendant's liability for negligence should not be based on a mere possibility, as distinct from probability, and that allegation has to be established upon a preponderance of probability and not on a mere speculative theory. He is correct in that submission".

The SC judges held that the plaintiff had failed to prove on a balance of probabilities that the negligence of the defendant caused, or materially contributed to the death of Suhani and thereby caused patrimonial loss to plaintiff. The appeal was allowed, setting aside the judgements of both courts below and dismissing the plaintiff's action. The judges stated that Prof Soysa would be entitled to tax costs of the action in all courts.

In the judgement, the SC quoted from a reputed paediatric book about brain stem glioma. "Onset between 5 and 7 years of age excision is impossible, radiotherapy is palliative. It is small in size but the critical location of the tumour makes it highly lethal. Any form of interventional therapy either surgery or radiotherapy, conventional or stereotactic radiotherapy, has limited scope in any definitive treatment of the lesion as the possible benefits would be marginal and unlikely to provide any improvement of the quality of life."

As mentioned earlier, on 20 May, Suhani's father wanted to transfer the care of the child from Prof Soysa to Prof Lamabadusuriya, since "Suhani has not made much progress since her admission on 18 April". Prof Soysa's counsel quite rightly submitted that the child's condition has not deteriorated as made out, requiring Prof Priyani Soysa to order a CT scan.

It was mentioned earlier that "causation" is a key issue in a case of medical negligence. This is what the SC stated about causation: "Neither the original court nor the CA gave adequate consideration to the question of causa-

tion, that the negligence caused the death. The CA was clearly in error when it concluded that the defendant was negligent in non-diagnosing the BSG around 18 April. Neither court would have fallen into this error if ... as observed earlier, a proper evaluation of the evidence was made as to what symptoms of the malady manifested and when they did manifest". This suggests that the SC judges were of opinion that in the other two courts no proper evaluation of the evidence was made!

If at all, there was an error of judgement by Prof Soysa in diagnosing RC. But what did the trial judge say? "In my view misdiagnosis can be non-diagnosis. Misdiagnosis is wrong diagnosis, wrong diagnosis is no diagnosis."

In the case of *Whitehouse v Jordan*, the reputed and well known British judge, the then Master of Rolls, Lord Denning stated, "We must say and say firmly that in the professional man an error of judgement is not negligent". In the same case in the House of Lords, Lord Fraser said, "I think what the learned Master of Rolls must have meant to say was that error of judgement is not necessarily negligent. The true position is that an error of judgement may or may not be negligent. It depends on the nature of the error". The opinion expressed in the SC judgement was not very different: "Mere misdiagnosis or non-diagnosis of a disease by itself does not amount to negligence". They further stated that "Attention of both the original court and the CA appears to have been diverted to many peripheral matters which have no nexus or relationship to the alleged culpable act of negligence".

What were the main issues considered by all three courts? (a) Was the child suffering from a rapidly progressive extremely malignant incurable tumour in an inaccessible site? All three courts said "yes". (b) Was the death necessarily a part of the disease which was never preventable and with an inevitable fatal outcome? Again, all three courts said "yes". However, the trial judge and the CA added, "with proper diagnosis and treatment it could have been prevented or postponed". (c) If either (a) or (b) is answered in Prof Soysa's favour (that is "yes"), can the plaintiff maintain this action against the defendant? The answer should have been emphatic "no". But the trial judge and the CA answered "yes"! This is what the SC judgement says. "Both courts below answered the first two questions in the affirmative in favour of the defendant and proceeded to answer the consequential issues (c), also in the affirmative but in favour of the plaintiff (Suhani's father).

All three courts made reference to the BHT. In state hospitals, even in British hospitals, notes on the bed head ticket are, nearly always written by the house officer, registrar or senior registrar, and only rarely by the consultant. Rightly or wrongly, Prof Soysa followed this practice in private hospitals. The SC stated that medical opinion was unanimous that a proper record of the illness should have been recorded in the BHT and it was clear that the defendant was remiss in that matter. One lesson of the judgement for the medical profession was to remind it of the importance of maintaining proper records on the BHT whether written by specialists or junior doctors.

I was present when the trial judge delivered the judgement on the 17 January 1994. I could not believe my ears. I thought all the textbooks, journals, judgements I had read on medical negligence were wrong. As a leading academic lawyer said it was a "popular judgement", though certainly not a correct judgement, as shown by SC. As for the reaction of the medical profession, the entire profession was shocked and bewildered. The judgement of the CA had no effect on the medical profession which was in shock. The medical profession regained its confidence in the judiciary only after the SC judgement.

The Faculty of Medicine Teachers' Association, Colombo, the Sri Lanka Medical Association, and the Faculty of Medicine Teachers' Associations of other universities expressed their complete confidence in Prof Priyani Soysa, when the newspapers and "letters to the editors" columns insulted her.

What did the following weekend's editorial of the *Sunday Observer* say? Warning the doctors with the headline, "Doctors beware", it said that the Colombo District Judge Mahanama Tillekeratne's landmark judgement on the ethics of the medical profession will be hailed by every section of the community, including some enlightened sections of the medical fraternity. "Mr. Tillekeratne's incisive and perceptive judgement goes right to the heart of the diseased values that have clogged the arteries of the doctors particularly the specialists and numbed all their values and sensitivities except the muscles below the wrist that function only to collect fees... Mr. Tillekeratne's judgement will come as a great relief to the vast majority of patients who have suffered in silence without any recourse

to any kind of justice. Doctors have been thriving in the medical market where demand is greater than supply ... Knowing that they are in a privileged position they have been riding roughshod over the under privileged. Even if this judgement fails to rouse the conscience of doctors it should at least make them aware that society is now ready to condemn their arrogance, unethical behaviour and inhuman attitude towards the poor patients".

The *Sunday Times* editorial that weekend was much more balanced. "There are hundreds of good doctors, many of them unknown and unsung who are sacrificing their time and utilising their special skill to heal the sick and ease their pain. Nobody gives them a medal for service. It will only be debited to their *karma* for the next life... Insurance agents are already smelling blood from the outcome of this case which may well increase the cost of health care in this country".

What is sad about this 9-year episode was that a dedicated professional, who spent her entire professional career saving lives of poor children in many parts of the country, suffered for not doing the impossible, ie. saving the life of Suhani.

References

1. Nelson-Jones R, Burton F. Medical Negligence Case Law. London: Fourmat Publishing, 1990; 41-55.
2. Whitehouse v Jordan and Another [1980] 1. All England Law Reports, 650.
3. Whitehouse v Jordan and Another [1981] 1. All England Law Reports, 267. 1 Weekly Law Reports, 246.

Ravindra Fernando, Professor of Forensic Medicine and Toxicology, University of Colombo. (E-mail: ravindrafernando@hotmail.com telephone + 94 1 694016).