



LAW RELATING TO MEDICAL NEGLIGENCE IN NEW ZEALAND

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Abstract: All developed countries maintain good health care system in their country for its citizen's welfare. In New Zealand medical negligence suffered by the patients or their dependents is considered as "personal injury caused by medical treatment". The claims can be made under statutory compensation scheme. It is mandatory to register to practice medicine in New Zealand to ensure competency and fitness of doctor to treat patients. In New Zealand there is public & private healthcare system. The Accident Compensation Act 1972 was originally enacted to cover compensation for personal injury by accident. The ministry of health in New Zealand is committed to patient service free from medical negligence, so the country believes that patients suffering injuries during treatment should get fair, speedy & adequate compensation. So no fault compensation system allows patients to be compensated without burden of running around to courts and bearing litigation costs. The Medical Council of New Zealand is an independent body from Government. To protect the patient rights the council functions independently from the doctors & the govt. To put patient health & safety first, promote & encourage good medical practice; promote fairness & equality and diversity; do job fairly & follow principles of consistency transparency & balance fairly. It sets national standards and assessment for medical education and training. This ardent task of providing justice to the victims of medical negligence in our Country is well laid down in the Constitution of India on the 3 important organs of the state: Legislature, Executive and Judiciary in the Constitution of India. In this need of the hour the principle of No Fault liability can be implemented in India to compensate the patients for failure in duty of care by the medical service providers.

Index Terms:- Medical Negligence, Vicarious Liability, New Zealand Health Care, Accident Compensation Corporation, No- Fault Liability Principle, Treatment Injury.

I.Introduction:-

All developed countries maintain good health care system in their country for its citizen's welfare. In New Zealand medical negligence suffered by the patients or their dependents is considered as "personal injury caused by medical treatment". The claims can be made under statutory compensation scheme. It is mandatory to register to practice medicine in New Zealand to ensure competency and fitness of doctor to treat patients. In New Zealand there is public & private healthcare system.

The term referred to as "medical negligence" is also referred as "medical malpractice". In New Zealand the patients who become victims of medical negligence can easily access justice delivery authorities for getting justice. In New Zealand there is "No fault liability system" for delivering justice to victims of medical negligence. As many healthcare policy Analysts & Scholars view that no fault liability is very advantageous to patient & brings greater efficiency in resolving medical negligence claims, reduces litigation costs & encourages safer medical care. The reason for bringing reforms from tort law to compulsory compensation scheme was to cover patients from unintended injuries during treatment process. All medical events whether or not preventable, expected outside & beyond are considered to compensate. The Court of Appeal in *Green v. Matheson*¹ held that in this case there was medical

¹ [1989] 3 NZLR 564 (CA) 572-573.

misadventure, which included insufficient or wrong treatment, failure to inform, misdiagnosis, misrepresentation (innocent/fraudulent) or administrative shortcoming.

A “treatment injury is an injury caused to someone seeking or receiving treatment from a registered health professional. It’s generally the physical injury caused at any time during the treatment process². The range of treatment injuries is very wide & is caused by a mishap any time during treatment process:- such as a missed or incorrect diagnosis, failure to provide treatment in timely manner, failing to obtain consent, adverse reaction to medicines, equipment failure. The ministry of health in New Zealand is committed to patient service free from medical negligence, so the country believes that patients suffering injuries during treatment should get fair, speedy & adequate compensation. So no fault compensation system allows patients to be compensated without burden of proof.

II. Brief history of medical negligence in New Zealand:-

In 1854 at Wellington the regulating of medical profession had started. In 1864 the mandated registration for medical practitioners under the 1864 Act in Otago arrived, which empowered the authorities to strike off any practitioner found guilty of misconduct or disreputable behaviour. The Patient’s right to know alternatives treatment of care is well settled principle of law and violation, attracts liability to pay compensation. New Zealand followed British law until the right of appeal to the privy council, in London was abolished in 2004 with establishment of the supreme court of New Zealand. NZ is close to Canadian legal model than that of UK, Which has closure ties with Europe. The ACC scheme introduced in 1972, resulted in doctrine of No Fault Liability, thereby removing common law action to recover damages for personal injury. The state is responsible for cost of treatment and earning – related compensation.

The Accident Compensation Act 1972 was originally enacted to cover compensation for personal injury by accident. Amended to add “medical, surgical, dental or first aid misadventure” as an illustrative category, covers all personal injury claims “wherever, Whenever, & however occurring”. This authority protects & promotes public health & safety, is funded from the fees that doctors pay for registration & fees paid to practice medicine.³ In 1992 the Act amended the term medical misadventure as any personal injury caused by medical error or medical mishap. Since 1996⁴ New Zealand applied Code of Patients’ Rights enforceable by complaints to an independent ombudsman. Patients are entitled to receive health care of appropriate standard, to give informed consent, & to complain to a Health Commissioner of ACC about perceived malpractice. The commissioner investigates & reports on complaints, recommends practice changes by providers, acts as a gatekeeper to discipline by professional boards, also takes care as a public advocate for patient safety.

In 2001 the ACC Act amended s.3 with the purpose of “enhancing public good, reinforce social contract represented by first ACC compensation scheme by providing fair , sustainable scheme for managing personal injury to minimise injuries. The meaning term of the term “personal injury” is provided in s.26 (1) as :- a. death of person; b. physical injury suffered by a person like strain or sprain; c. mental injury suffered by a person because off physical injuries suffered by a person ; d. Mental injury suffered by a person in circumstances described in s.21; da. Work related mental injury u/s.21B; e. damage (other than wear and tear) to dentures or prostheses that replace a part of human body.

From time to time to meet the needs of patients right to be protected from medical negligence the term of coverage was enhanced by the Ministry of Health of New Zealand and s.32. (1) “Treatment Injury” means Personal Injury that is:- a. Suffered by a person- i. Seeking treatment from one or more registered health practitioner; ii. Receiving treatment from or at the direction of one or more registered health practitioner; b. cause by treatment. (2) but does not include personal injury caused by person’s underlying health conditions or delaying consent to undergo treatment. S.32(1)(a) provides the meaning of “Registered Health Professional” means a Chiropractor, Clinical Dental technician, dental technician, dentist, medical laboratory technologist, medical radiation technologist, midwife, nurse, occupational therapist, optometrist, pharmacist, physiotherapist, podiatrist or registered medical practitioner.

The purpose of this Act is laid down in s.6 as to promote and protect the rights of health consumers and disability services consumers, and to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringement of those rights the Health & Disability Commissioner Act 1994 (HDC Act) was implemented. The HDC Act establishes the Office of the Commissioner to discharge the functions of promoting the consumer rights and give effect to investigation of complaints in S.7 by

² Treatment injury healthify.nz [https:// healthofuy.nz>health-a-z](https://healthofuy.nz>health-a-z)

³ Stephen Todd, “Treatment Injury in New Zealand” 86chi_ kent L.Review.1169 (2011).

⁴ Ron Patterson, “The Patients complaints system in New Zealand ” 2002 May-Jen Punmed. Visit on 23/01/2024.

considering the govt policies statement on health and any health strategy introduced in public interest. If the Commissioner finds the code is breached, then recommends its findings to concerned authority or professional body as the case may be or further take action by initiating proceedings to enquire into disciplinary proceedings by referring to Health Practitioners Competence Assurance Act 2003.

The Complaints against doctors are made to health and disabilities service. The rights of the patients are protected under code of health and disabilities services consumer rights. Complaints can be made directly to the Health and Disability Commissioner. Written complaints are not mandatory. Patients have the option to send the messages or emails for complaints against doctors or hospitals. After the complaint is received against any health professional within five days it should be acknowledged. Later the doctor has ten working days after acknowledging the complaint to decide whether to accept it or reject it. If they need more time to decide extra time is more than twenty working days and the reasons why they need extra time. If it is justified or not it must be explained with reasons. They must also tell what action they propose to take.

The decision of the House of Lords in Bolitho V. City and Hackney H.A. modified the approach to the concept of “accepted practice” in the Bolam case in the following words of Lord Brown-Wilkinson:

The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving as they often do the weighing of risks against benefits. The judge before accepting a body of opinion as being responsible, reasonable or respectable will need to be satisfied that in forming their views the experts had directed their minds to the question of comparative risk and benefits and have reached a defensible conclusion on the matter.

S. 37(1) of the ACC Act (2001 Amendment) had barred the claimants to sue for damages and the aggrieved patients of medical malpractice need not go to courts to prove the medical negligence suffered due to failure in rendering duty of care to patients, “No person may bring proceedings independently of this Act”. The country of New Zealand implemented the no fault liability scheme⁵ is adopted for its citizens benefit.

In 2005 the concept of “Treatment Injury” was implemented in New Zealand. So that the claimants are not burdened to prove what fault committed by registered health professional to be entitled to compensation. This helped the patients to get compensation without the burden of proving their case. It also facilitated to build good relationship among patients and doctors and even ACC could take active steps in protecting public safety. But being under cover helped them to get compensation easily. It encourages the health sector to be partners with ACC instead of contending as rivals.

Six categories of Treatment injury claims under ACC Act: - i. Treatment injury suffered by the person. ii. Infection passed on by a victim of treatment injury to his/her spouse/child/3rd party whether directly or through his/her spouse. iii. Personal injury caused by treatment for which the person has cover. iv. Personal injury caused by gradual process, disease, infection as consequences of treatment. v. Cardio-vascular treatment injury. vi. Cerebro - Vascular treatment injury.

III. Medical Council of New Zealand⁶: -

It is an independent body from Government. To protect the patient rights the council functions independently from the doctors & the govt. To put patient health & safety first, promote & encourage good medical practice; promote fairness & equality and diversity; do job fairly & follow principles of consistency transparency & balance fairly. It sets national standards and assessment for medical education and training. It is responsible for the registration of the doctors and has the power to suspend and remove the right to practise medicine. Its responsibilities are defined by the

Objectives of council⁷:- i. Uphold the wellbeing and safety of the public by establishing mechanisms to ensure that health care practitioners are proficient and competent to practice their respective professions. ii. Maintain uniform accountability frame work for all health care professions, by defining the scope of practice for each health care practitioner based on their competency. iii. Implement systems to prevent health care professionals from practicing beyond their authorised scope. iv. Granting authority to restrict certain activities to specific categories of health care practitioners to mitigate the risk of severe or lasting harm to the public .v. Provide safeguards for health care practitioners engaged in protected quality assurance activities.

⁵ No-fault liability system allows patients to be compensated without proof of providers fault or negligence.

<https://www.degruffwer.com>htrml>. Visit on : 20/2/2023.

⁶ <https://www.mcnz.org.nz> Visit on: 12/6/2024.

⁷ en.m.wikipedia.org visit on 15/3/2023

IV. New Zealand Health Practitioners Competence Assurance Act 2003:- Its main functions are stated as follows:-

- i. Register Doctors.
- ii. Keeps register of all doctors.
- iii. Sets standards for doctors to practice medicine.
- iv. Checks doctors skills to practice within the scope of registration.
- v. Promote continuous learning for doctors so that their skills are kept up to date.
- vi. Reviews doctors performance as per professional conduct & healthcare practices.
- vii. Issues doctors "Practice Certificate" to maintain their skills at the right level to practice medicine well.
- viii. Ensures medical students & new doctors get the right training.
- ix. Ensures doctors continue their medical education once they start working.
- x. Manages doctor's practise if they are unwell & may be putting patients health at risk.
- xi. Suspends doctor's practise if necessary.

The notifications are made so that the public investigate the notification about a Doctor or is asked to take disciplinary action against a doctor or their behaviour or competence. If notification is about doctor behaviour the Commissioner investigates the matter & submits its report to council. Further the Council decides on putting restrictions on doctor's practice to protect the health & safety of the public. The council protects the public & promotes good medical practice.

V. HPDT (Health Practitioners Disciplinary Tribunal):- It hears & determines disciplinary proceeding brought against health practitioners. The Health & Disability Commissioner deals with notifications about a doctor from patients, their families or staff members in medical practice. All the complaints filed by public are referred to Health & Disability Commissioner. If notification is about a doctor on poor job, the commissioner investigates the notification. If the notification is on doctor's competence, the Council reviews doctor's practice. Outcome is doctor's competence programme show they have right skills to practice in their chosen area. It acts as an independent watchdog, for providing health & disability services to consumers with a voice, resolving notifications, holding providers to account for improving their practices at an individual & system-wide level.

Since 1990 onwards, Claims for wrongful pregnancy⁸ relating to failed sterilisation increased in New Zealand. Many cases were filed in the court because the parents are facing difficult situations for bearing the expenses of raising the child. The question before the New Zealand Supreme court was "Whether a woman who becomes pregnant following a failed sterilization has suffered personal injury caused by medical misadventure, for which she will have cover u/ the Injury Prevention, rehabilitation & compensation Act 2001?" The claimant sued the doctor for operation conducted in Jan 2004 and gave birth to child in March 2005 & gave birth to a child by caesarean section. The operation intended to render her sterile, but operation failed, a clip was not correctly attached to one of her fallopian tubes. For failed sterilisation operation she claimed damages 50,000 dollars against the Surgeon & from District Health Board who employed him. As she was suffering pain and mental agony for becoming pregnant and had the burden of raising the child. Hence she sought compensation. The court held that this amounts to medical negligence. The New Zealand Supreme court observed that "It is self-evident that a woman undergoes sterilization operation because she wishes to avoid becoming pregnant. If the sterilization operation is negligently performed, is ineffective, the resulting pregnancy is caused by medical misadventure". Hence the respondent pregnancy attracted cover u/s.26(1)(b) as the personal injury was caused by medical misadventure. Medical misadventure is defined in s.32(1) of Injury Prevention, Rehabilitation & Compensation Act 2001. Medical misadventure arises out of medical error or medical mishap. Hence the failed sterilization resulted from medical error. The failed sterilization resulted from medical error, failure of registered health professional to observe a standard of care & skill reasonably to be expected in the circumstances. Surgeon was held to have negligently performed the operation, amounts to medical misadventure covered u/ Accident Compensation Scheme. The operational negligence caused difficulties to the claimant. Recent developments focus on imposing criminal liability for disastrous death of patients due to failure in responding appropriately to the particular circumstances of the patients care.⁹

⁸Bryan v. Phillips New Zealand Ltd [1995] 1 NZLR 632,640(Barker J).

⁹ Allan Forbes Merry "When are errors a crime? Lessons from New Zealand" <https://doi.org/10.1093>.

In Christopher Ryan v. Health Disability Commissioner¹⁰ The New Zealand Supreme Court held that as per S.72 of the Health and Disability Commissioner Act (HDC Act) a health care provider is liable for acts and omissions of an employee, agent or member of the health care provider. In this appeal the liability on a medical centre where two doctors conduct general practices from the medical centre and one of those doctors is found by the HDC guilty of breaching the code of HDC Services Consumers' Rights 1996, the sc found that the Moore Street Medical Centre was liable. Even the NZ medical association was given leave to intervene to decide on finding of breach committed by Dr. Sparks.

Brief Facts of the case:- The complaint against Dr. Sparks was made in 2016. The complainant was actually a patient of Dr. Ryan, but he was on leave so was seen by Dr. Sparks, then medicines were prescribed for which she had documented allergic to patient, again when the patient approached the pharmacist, even then the Pharmacist enquired about documented allergy then also Dr. Sparks negligently advised the pharmacist to continue with prescription. As a result complainant/patient suffered allergic reactions and was admitted to hospital. Held as "prescription error".

The NZSC held that Dr. Sparks breached three rights u/code:-i. Right 4(1) – failing to provide services with reasonable care and skill; ii. Right 6 (1) (b) – failing to give patient information it was reasonable for her to expect to receive, including explanations of option available; iii. Right 7(1) – breach of patient's right to make an informed choice and to give informed consent. It held that the medical centre had altered its practices and procedures after the prescription errors resulting in violation of patients safety rights. Dr. Sparks was personally held liable and Dr. Ryan and Medical centre were exempted from liability. Because Dr. Sparks was undertaking an act that was clearly within the functions he was required to perform i.e., prescribed drug to patient.

In HM v. ACC¹¹. In this case appeal was made u/ s. 149 of The Accident Compensation Act 2001. Claim for personal injury u/s.26 of the Act. A claim for personal injury for suicide attempt was rejected by lower court but New Zealand Supreme court held that "the suicidal attempts were due to medical misadventure i.e., clonazepam, especially when the patient was detected with the known allergic reactions". Even the Expert Opinion suggested that "the drug caused depression of neuronal functions" hence the claim cover for suicide attempt in sept 2000 caused by disinheriting effects clonazepam in a vulnerable individual. Appellant was entitled to claim cost. The sc directed the corporation consider the claim.

Facts: The appellant had knee operation in 1980 for Chondromalacia of the patella. Post-operatively she had a drug reaction to duloxena (dextro propoxyphene) commonly prescribed medicine with pain relief. She was allergic to this drug and this was noted on her hosp she was given capdex which is another generic name for dextro propoxyphene. She complained loss of consciousness. So she applied in ACC for medical misadventure.

The New Zealand Supreme court held that because of treatment for chronic pain in form of clonazepam resulted in suicidal tendency leading to suicide attempt of claimant/patient and hence it amounts to "treatment injury" it caused physical consequences by way of neuronal depression, cardiac problem, hypotension, seizures & a significant period of unconsciousness to patient. Hence these physical consequences & other minor physical injuries suffered during suicide attempt can collectively be considered as "treatment injury". The treatment injury suffered by the patient was caused by the effects of medication prescribed by the medical practitioner. The corporation decision as to claim in the context of treatment injury was set aside as not fair and reasonable decision and claimant right was upheld.

In Allenby v. H¹²In this case the patient suffered medical misadventure involving misdiagnosis of a disease. The progression of disease caused enlargement of cancerous tumour & spreading to cancer to another part of the body amounted to "physical injury to patient/claimant covered u/s.20(2)(c) of the ACC Act 2001 which covered "sufferer transmitted infection", The court held that patient suffered as a consequence of negligent treatment or negligent failure to administer treatment.

V. Conclusion:-

As the Doctor treating the patient is also a human being and the patient treated by the doctor is also a human being both being human then definitely there must be proper co-ordination among these humans playing different roles by acting justly. For example: the doctor can perform his role justly by rendering proper duty of care towards his patient and the patient can perform his role justly by following doctors advise sincerely and pay medical fees,

¹⁰ [2023] NZSC 42.

¹¹ [2024] NZACC 004 ACR.

¹² [2012] NZSC 33; [2012] 3 NZLR 425.

failure of either roles can be detrimental to patient's health and the question of medical negligence arises in the failure of doctor's role, hence law must regulate such failures in duty of care to patients the interest of peaceful co-existence in ordered society. This ardent task of providing justice to the victims of medical negligence falls on equal commitment placed on the 3 important organs of the state: Legislature, Executive and Judiciary in the Constitution of India. By and large in every nation the Hon'ble Supreme Court have always been respected as highest epitome of justice and people have always trusted the judiciary for getting justice be it for any sufferance which nevertheless includes medical negligence issues increasing needs the judicial help for patients victims of medical negligence.

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