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REMEDY FOR VICTIMS OF MEDICAL NEGLIGENCE AND THE ROLE OF COURTS IN MAURITIUS

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Abstract: *Mauritius is working towards an ambitious project of becoming a medical hub for the African region in the coming years. While huge emphasis is being made upon re-engineering the medical profession by setting the standards for qualifications, experience and training, it is imperative for medical practitioners to abide by the duty of care which is expected of them. In this light, this research paper aims to analyse the duty of medical care from a Mauritius law perspective and thereafter assess the various remedies available to victims of medical negligence arising from a breach of duty of care. To achieve this research objective, the black letter method is adopted by analysing the corresponding laws on medical negligence in Mauritius and the relevant case laws. Additionally, this study has adopted a comparative approach that is, the UK tribunals' approach to clinical negligence is examined and some recommendations have been suggested to enhance the existing framework on medical negligence in Mauritius.*

Keywords: Medical Negligence, Medical Council, Tort Law, Mauritius, UK
Research Area: Social Sciences
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1. INTRODUCTION

Despite the high importance of medical negligence emerging since decades, it is surprisingly unreal to find that there is no global and commonly agreed definition of the term "medical negligence". In this respect, in the absence of any precise description, countries across the globe have attempted to attribute specific meanings, features and characteristics to medical negligence based on the individual circumstances on each case and these are spelt out in the domestic legislation of each country. Nevertheless, one common approach adopted by all courts for cases of medical negligence is to assess the duty of medical care that a practitioner is supposed to offer and its relationship with the medical malpractice.

Undoubtedly, medical negligence cases have serious adverse implications which may extend far beyond the physical scars to emotional and psychological trauma that the victim may experience through stress, isolation and vulnerability (**Meryll, 2019**). In addition, the side effects not only affect the victims but their families and friends, the medical profession and government authority as well. Essentially, trust in the medical profession and the government body if the medical practitioner is in the public sector, is likely to be completely broken and not replaceable. However, it does not mean that if a client is not satisfied with the treatment given by the physician or if the treatment was interrupted due to some logical reasons, there is a case of medical malpractice. Similarly, experiencing a bad result is not really evidence of medical negligence. The benchmark to assess the extent of medical negligence relies on the duty of care that a doctor should abide by (**Alison, 2018**) and **Black et al. (2017)** state that the duty of care is breached if the service of a medical practitioner has

triggered an injury or has transformed an existing condition into a worst scenario. In other words, the malpractice or negligence involves a medical mistake such as a wrong diagnosis, medication dosage, health aftercare, treatment or management. Case laws have also provided for some specific circumstances in which a person may be accused of medical negligence and courts across the globe commonly agree that each case has to be decided based on its own facts and circumstances.

In the context of Mauritius, it is the vision of the Mauritius government to transform the country into a medical hub and in the budget of 2018/19, around MUR 12.2 Billion has been earmarked to improve the attractiveness of the country for medical treatment, medical tourism and wellness. Hence, it becomes vital to inculcate a high level of trust and confidence in the country's ability to provide health care services. However, in Mauritius, alleged cases of medical negligence have risen drastically since the year 2005. For instance, as of 2018, the number of cases being investigated on the subject matter amount to 37 as compared to only 5 in the year 2013 (**Medical Update, 2018**). While there is no specific act of parliament that deals with medical duty of care, cases of medical negligence are referred to the Medical Council (**Council**) which is set up under the Medical Council Act 1999 of Mauritius. Any complaint against medical practitioners are made to the Council in circumstances suspicious of professional misconduct, malpractice, fraud, dishonesty, negligence or breach of the code of practice. Thereafter, an investigatory committee is appointed by the Council to look into the alleged cases, following which the findings are taken to the council to take a decision. However, it is also possible for any aggrieved party to seek relief from Mauritius courts by lodging either a civil case or a criminal case against the medical practitioner. In the latter instance, the case is lodged against the Ministry of Health and the Government of Mauritius.

In the light of the above, this research paper aims at examining the various types of medical negligence cases that may be referred to the Registrar, the relief available to victims of negligence under the Medical Council Act, the circumstances in which a person may lodge a case before Mauritius courts and a critical analysis will be carried out on some judicial decisions surrounding the subject matter. Consequently, to achieve these research objectives, the methodologies adopted are in essence comprised of the black letter approach which will analyse the legal provisions relating to medical negligence in Mauritius. A brief comparative analysis will also be performed to find out the approach of courts in relation to medical negligence cases in Mauritius and the UK. This comparative study is vital to gauge the efficiency of remedies available under Mauritius laws for medical negligence and to thereafter, suggest possible recommendations to enhance the avenues of appeal by an aggrieved party.

At present, there are few literature on the researched topic and this study will be amongst the first academic writings on the effectiveness of the remedies available for medical negligence in Mauritius. The study is carried out with the aim of combining a large amount of empirical, theoretical and factual information that can be of use to various stakeholders and not only to academics.

2. RELIEF TO VICTIMS OF MEDICAL NEGLIGENCE UNDER THE MEDICAL COUNCIL ACT

Established under Section 3 of the Medical Council Act of Mauritius, the Council is a body corporate that consists of 14 registered medical practitioners, 5 persons appointed by the Minister of Health who are not medical practitioners and representatives from the Ministry of Health, the Prime Minister's Office and the Attorney General's Office each. They all hold office for a period of 3 years after their appointment and are eligible for re-election. A Registrar is also appointed by the Council who needs to be a registered medical practitioner and also acts as secretary to the Council. This person is responsible for the proper administration of the Council and executing all the Council's decisions.

Additionally, the functions of the Council are set out under Section 12 of the Medical Council Act which include the duty of the Council to exercise and maintain discipline in the practice of medicine, advise the Minister of Health on many matter concerning the medical sector, establish a Code of Practice for medical practitioners, promote education and training of medical practitioners, keep a record of all proceedings and decisions of the Council and publish an annual list of medical practitioners. Furthermore, one vital role of the Council is its investigatory powers to look into any complaint of professional misconduct or negligence. Basically, "professional misconduct or negligence" in relation to any person registered with the Council, is defined in the Medical Council Act as a:

(a) breach of the Code of Practice,

(b) failure to exercise due professional skill or case which results in the injury or loss of a person's life,

(c) failure to exercise the proper and timely care expected from him,

(d) the prescription of a dangerous drug which is not required for medical treatment or in excess of the requirement amount, and

(e) an act of dishonesty or fraud or any improper, disgraceful, dishonorable act which brings the medical profession into dispute.

In the conduct of its investigatory power, upon a complaint received against a registered person who is defined as a person registered as a general or specialist medical practitioner or a pre-registration trainee with the Council, the Council will firstly appoint an investigating committee comprised of not less than 3 members. This committee will notify the relevant registered person of the nature of complaint against him. Then, the investigating committee may visit or inspect the premises where the alleged professional misconduct or negligence has occurred and may require the production or communication of any particular document or information. Afterwards, the registered person is afforded an opportunity to be heard by the investigating committee and he may even be assisted by a legal representative of his choice. Other witnesses may be summoned during this meeting. If a particular person refuses to provide any required information, the Registrar of the Council may apply to a Judge in Chambers for an order directing that person to disclose the evidence needed. In essence, this order is made only if the Judge in Chambers is satisfied that the information is bona fide required for the purposes of the investigation. Thereafter, the investigating

committee needs to submit its report to the Council within 3 months from the date of the investigation.

Consequently, upon receipt of the report of the investigating committee, if the Council is of the view that the registered person's act or omission is not of a "serious nature", then the latter is administered a warning or a severe warning. Nevertheless, the punishment rests entirely on the discretion of the Council since the term "serious nature" is not defined in the laws. Yet, there are specific circumstances under which the Council may start disciplinary proceedings against the medical practitioner. Basically, if the investigating committee succeeds in establishing a prima facie evidence of professional misconduct or negligence (defined above), the Council will start disciplinary proceedings against the accused person before the Disciplinary Tribunal (**Tribunal**). The Tribunal is comprised of a president who either holds judicial office for over 10 years or has been a law office for over 10 years, and 2 other persons who are registered medical practitioners.

Once disciplinary proceedings are instituted before the Tribunal, the Council shall notify the Minister of Health of the matter and if it considers that the act or omission of the accused person is of serious nature which could endanger public interest, then that person is suspended temporarily as a registered person for a span of time that is decided by the Council itself. Thereafter, the Tribunal will hear and determine the issue in dispute within 90 days of the start of the hearing of the proceedings. The hearing is conducted as a civil matter and the proceedings are kept private. Then the Tribunal has the duty to report to the Council within 3 days following its determination on the proceedings, the determination or findings of these proceedings and any record, document or article produced. However, the Tribunal is not empowered to make any recommendation on the form of disciplinary measure, a decision which is to be made solely by the Council. This decision depends on the circumstances of each case.

Accordingly, there is no fast track rule concerning punishment that may be issued by the Council. For instance, on one hand, if the charge is proved and the physician is a public officer working under the aegis of the government, then the Council reports the matter to the Mauritius Public Service Commission (**PSC**). The PSC may then dismiss the medical practitioner from office or cause him to retire compulsory from public service. On the other hand, if the person is a private doctor, then the Council may administer him a warning or suspend him as a registered person for a period not exceeding 2 years or may even deregister him as a registered person. Furthermore, if the physician is convicted of administering a dangerous drug which is in excess of the required amount or which was not necessary for the patient, the Council may in addition to any disciplinary actions, recommend the Minister of Health to withdraw authority of the registered person to supply, procure and be in possession of any dangerous drug. This power is in line with the Mauritius Dangerous Drugs Act 2000 in order to control dangerous drugs and to prevent, detect or repress drug trafficking in the country.

In contrast, if the accused registered person has already been convicted of an offence and is serving a sentence of imprisonment, then the Council may either suspend him as a registered person for such time as may be determined or give him an opportunity to show

cause as to why he shall not be deregistered. For information dissemination to the public, the Registrar has the duty to publish any suspension or deregistration in the Government Gazette and in 2 daily newspapers. It is to be noted that the punishments that the Council are entitled to inflict, do not extend to payment of compensation, fines or imprisonment of the physician. Only a temporary or a permanent suspension of the medical practitioner is warranted if the charge is proved. Hence, victims who have suffered tremendously from the medical malpractice may not always receive the intended relief. In this instance, some other avenues of relief may be sought before Mauritius courts, which the following section will analyse.

3. RELIEF TO VICTIMS OF MEDICAL NEGLIGENCE IN COURTS

The term "duty of care" at first instance seems to suggest the irresponsible behaviour of a person without necessarily portraying the intention to harm others (**Kite, 2018**). Nevertheless, this concept extends beyond a simple act of carelessness and this has been established by legal principles and case laws.

One pertinent development in judicial decisions concerning cases of duty of care is the reasoning of Lord Atkin in the UK case of *Donoghue v. Stevenson (1932) AC 562*. In the case, Mrs Donoghue bought a ginger beer from a Café and she found the presence of a snail in it which caused her severe shock and gastro-enteritis. She brought the case against the manufacturer of the ginger beer for breach of duty of care and the House of Lords had to analyse whether the plaintiff had a valid case of action and the amount of compensation for damage suffered was not determined. Consequently, three elements were considered by the Lords namely, the presence of negligence in tort, the contractual relationship and duty of manufacturer to customers. Notably, Lord Atkin put forward the "neighbour principle" highlighting that reasonable care has to be taken to avoid acts or omissions which one can reasonably foresee that would be likely to injure his or her neighbour. A further elaboration of "neighbour" was given to include persons who are closely and directly affected by the relevant acts or omissions in question. In other words, what emerges from this judgment is the duty of care between 2 or more parties that is characterised as proximity or neighbourhood and that the situation should be one in which court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other (**Bridge, 2005**). Consequently, the existence of a duty of care encompasses the requirements of foreseeability, proximity and fairness and this brings the principle underlying the Caparo test which is largely relied upon by the UK courts.

Basically, the Caparo test has been established based on a series of case laws and comprises of a three-step analysis. Firstly, the foreseeability principle is assessed to figure out whether it was feasible to predict if the defendant's act or omission would cause damage to the plaintiff. This begs the question as to when is a defendant liable to the claimant. This issue was debated in the famous US case of *Palsgraf v. Long Island Railroad Co (1928) 248 NY 339*, whereby the claimant was standing at a railway station and was injured because some railway staff had accidentally caused a box of fireworks to fall and the fireworks exploded. However, the US court held that in order to bring a case of negligence, the plaintiff must demonstrate a violation of her personal rights. In the given circumstances, the railway staff could not be aware of the content of the package or that dropping it would cause the

fireworks to explode. Consequently, it was held that the defendant was not liable to any loss suffered by the claimant. Secondly, the Caparo test requires a relationship of proximity between the defendant and the plaintiff. Here, the physical distance is not being referred to but rather there must be a close link between the defendants and the claimants. In this respect, some guidance has been provided in the case of *Alcock v. Chief Constable of South Yorkshire (1992) 1 AC 310*. In the case, fire broke in a football stadium which cause the death of several persons. While the event was filmed online, millions of viewers witnessed the live massacre and suffered psychiatric harm. As a result, various claimants brought an action against the police on the ground of negligence for allowing the stadium to be overcrowded by people on that day. The House of Lords made a distinction between primary victims who were the ones that were physically present at the stadium and the secondary victims who were the online viewers. It was held that the defendant owed a duty of care to the primary victims due to their physical presence at the stadium. Then, the House of Lords highlighted that the secondary victims would only succeed if:

(i) they establish a close relationship to the primary victim,

(ii) they were close to the event, and

(iii) the psychiatric harm must be caused by a sufficiently shocking event.

Consequently, since the secondary victims could not meet these conditions, the case did not succeed.

Lastly, the Caparo test allows for some judicial discretion in permitting courts to find out whether it is fair, just and reasonable for a defendant to owe a duty of care to the claimant. This discretion relies entirely on judges' personal opinions and is practiced on a case by case basis. For instance, in *Marc Rich & Co v. Bishop Rock Marine Co Ltd (1996) AC 211*, the issue was whether a third party contractor owed a duty of care to the claimant. In the case, a ship developed a crack in its hull and the ship owners requested a society to inspect the damage. The society advised that the ship be put into dry dock for repairs to be carried out. However, the shop owner opted for temporary repairs to be carried out and the result was that the ship sank and lost cargo which belonged to the claimant and which was valued at large amount. The claimant succeeded in recovering damage from the ship owner for breach of duty of care and sued the repairs society for the same cause of action. The House of Lords applied their discretion in the given circumstance and held that it was unfair, unjust and unreasonable to hold the repairs society liable against the cargo owner because this society acts for collective welfare and cannot rely on any limitation provision. Hence, no duty of care was deemed to exist between the claimant and the defendant.

Nevertheless, there exist some exceptions to the Caparo test whereby even if the 3 conditions are not met, a duty of care may still be present. Case laws have provided for three main groups of scenarios where an individual has a duty to act. These are situations where the defendant has control, has assumed responsibility and has created or adopted a risk. A control situation arises when a defendant is able to influence another individual to a great extent and directly. Hence, there accrues a duty to exercise that influence responsibly. For example, if a prisoner who is on suicide watch has killed himself, then the police responsible at that time

will be held responsible (*Reeves v. Commissioner of Police for the Metropolis (2000) 1 AC 360*). The second exception to the Caparo test refers to the assumption of responsibility which arises when one person implicitly acquires a duty of care by merit of a contract or employment. For instance, in a situation of joint employment, one person has a duty of care towards the other to prevent foreseeable harm from occurring (*Costello v. Chief Constable of Northumbria Police (1998) EWCA Civ 1898*). The last exception pertains to the creation or adoption of risk by a person who creates a dangerous situation including accidentally.

In the context of Mauritius, courts in the country follow the principles of the Caparo test in establishing negligence and to prove the existence of the duty of care. Yet, cases involving medical negligence are not straightforward since there are distinct manners in which clinical negligence may occur including but not limited to misdiagnosis, inaccurate treatment or surgical errors (**Anning, 2016**). Primarily, it is imperative to highlight that negligence cases are governed by Article 1382 and 1384 of the Mauritius Civil Code. In essence, Article 1382 requires any person who has caused a damage to a third party has the obligation to rectify the prejudice caused. Article 1384, on the other hand, sets out a list of control situations in which the defendant owes a duty of care to a third party for damage caused by persons for whom they need to exercise control. For instance, this same Article 1384 mentions that parents of a minor child are responsible for the acts and actions caused by the child, employers are accountable for damages caused by their employees in the exercise of their functions, teachers are answerable for the acts caused by their students under their surveillance and owners of a property are responsible for the damage caused by it. In addition to civil cases, medical negligence may also fall under criminal suits if the aggrieved party invokes Section 239(1) of the Mauritius Criminal Code. The article imposes a punishment on any person who by unskillfulness, imprudence, want of caution, negligence or non-observance of regulations, involuntarily commits homicide or is the unwilling cause of homicide, of a fine not exceeding MUR 50,000 and imprisonment as well.

In the light of the above, there has been several case laws decided by Mauritius courts concerning the responsibility and duty of care of medical practitioners in cases of negligence or malpractice. It is thus imperative to critically analyse these cases to establish the circumstances under which courts may provide relief to victims of medical negligence.

4. CASE LAWS ON MEDICAL NEGLIGENCE AND THE APPROACH OF MAURITIUS COURTS

The most recent case pertaining to medical negligence concerns the plaint of *Ragoobeer v. Permanent Secretary, Ministry of Health (2020) INT 47*. The case was lodged on the grounds of failure by the medical practitioners to exercise their duty of care and attention and that they have acted negligently which caused the death of the plaintiff's child. Consequently, court had to determine whether the plaintiff has established the alleged imprudence or negligence and the causal link between that imprudence or negligence and the consequence complained of. The intermediate court applied the Bolam test which has been laid down in the UK case of *Bolam v. Friern Hospital Management Committee (1957) 1 WLR 852* and which provides as follows:

"*The test is the standard of the ordinary skilled man exercising and professing a special skill. A man need not possess the highest expert skill but it is established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art, he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.*"

As such, in order to prove negligence, this case highlights that it is imperative to establish that the course that the doctor adopted is one which no doctor of ordinary skill would have taken if he had been acting with ordinary care. Additionally, court had in the case considered some other factors in determining the negligence of the medical practitioner. In particular, the judge had assessed the circumstances in which the doctor had acted, that is, whether there was an urgent intervention and if the latter had the appropriate expertise to deal with the issue at hand that is expected to have been acquired based on the experience and qualification of the doctor. In brief, the Ragoobeer case considered 4 questions in establishing negligence and breach of duty of care:

- has the doctor acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art,
- whether the course the doctor adopted is one which no doctor of ordinary skill would have taken if he had been acting with ordinary care,
- at which rung of the career ladder the doctor had reached at the time of the alleged incident, and
- the circumstances with which he was faced at the material time.

Thereafter, following an examination of the facts based on the above 4 assessment criteria, court held in the Ragoobeer case that the plaintiffs failed to prove any negligence or imprudence against the medical practitioner on the balance of probabilities. The case was therefore dismissed accordingly.

In the same context, a similar approach was adopted in the case of *Ungnoo v. State of Mauritius (2005) SCJ 89*, whereby the plaintiff entered an action against the respondent for negligence. In fact, the specialist doctor was absent at the material time from the labour ward which has resulted in the birth of a still-born child. The issue was whether a generalist doctor should have stepped in to provide medical care to the defendant due to the absence of the specialist doctor and whether the appropriate and relevant treatment was given by the generalist doctor. In other words, the judge had to establish whether the treatment given by the generalist was something that any doctor of ordinary skill like him would have done, if acting with ordinary care in all the circumstances. The court cited the French Jurisclasseur Civil-Santé- Art. 1382, 1386, note 50 to rule that the generalist doctor was not negligent in his duty since he did exercise his duty of skill and care that an ordinary doctor is expected to do. Accordingly, due to failure by the plaintiffs to establish the case on a balance of probabilities, the case was dismissed.

Along similar lines, the issue of the exercise of a reasonable degree of care and skill was raised in the case of *Gopee v. State of Mauritius (2007) SCJ 303*, whereby the plaintiff got injured and went to the hospital but he averred that the appropriate care was not given as

a result of which his testicles were removed which cause him to be infertile. The dispute surrounded the facts that the patient was first examined by a general practitioner and then a specialist and was discharged from hospital but thereafter, the specialist passed away while the generalist doctor left the country. The plaintiff was then taken charge by a specialist who gave his expert opinion on the examination performed and the treatment dispensed by the previous generalist and specialist. Consequently, the duty to exercise reasonable skill and care of the first doctors was raised by the plaintiff and court relied on an extract from Jackson and Powell on Professional Negligence 5th Edition at page 776 paragraph 12-067 as follows:

"*Every person who enters into a learned professional undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill, and you will say whether in this case, the injury was occasioned by the want of such skill in the defendant.*"

In addition, the court had in the case applied the Bolam test as laid out in *Bolam v. Friern Hospital Management Committee (1957) 1 WLR 852* explained above and the conclusion was that there was no evidence based on the signs and symptoms presented by the plaintiff that a doctor with ordinary skill and competence could have reasonable diagnosed torsion. Hence, the plaintiff failed to show a breach of the ordinary skill of an ordinary competent man exercising that particular art. On the contrary, court held that the preponderance of evidence showed that the medical practitioners who attended the patient in the first place, acted in accordance with a practice accepted as proper by a responsible body of medical men and the action was thus dismissed.

While the majority of case laws have failed to establish negligence on a balance of probabilities, the case of *Kaudeer & Others v. P.S. Ministry of Health (2008) SCJ 113* has concluded otherwise. In this case, the plaintiffs were the father, mother and brother of the deceased victim and they averred that the death of their daughter was due to gross negligence of medical staff for (i) failure to provide the appropriate medical treatment at the appropriate time, and (ii) having left her unattended in her ward as a result of which she fell off the bed. The facts showed that the deceased scan's test demonstrated a matter of urgent attention but the doctor chose to wait for her blood pressure to stabilise in order to attend to her. In this regard, court acknowledged that there may more than one treatment method but there is a negligence on the doctor if he opted for a method that although technically acceptable, was not appropriate given the condition of the patient. To support this conclusion, court cited the French Jurisclasseur Civil – Vol. Santé Art 1382 – 1386, fasc 440-40 at Note 44 which provides that a technical medical error occurs when the doctor prescribes a treatment which is in conformity with the rules of medicine but which is not appropriate given the patient's state of health having regard to risks and benefits of that treatment. Consequently, court found out that the medical practitioner in the case had pursued his treatment in a careless manner and which is inconsistent with his apparent full awareness of his patient's serious condition. Negligence was also shown on the part of the nursing staff due a lack of supervision of a

patient who had been advised complete bed rest but she was seen going to the bathroom. In its judgment, court ordered the defendants to pay the plaintiffs a sum of money amounting to MUR 575,000 that is considered fair and reasonable for moral damage, prejudice, trouble and annoyance they have suffered.

Regarding proceedings of a case of medical negligence, it is imperative to ascertain the basis of the cause of action, that is, whether the issue is a matter of contract or tort. For instance, in *Chiang and anor v. Medical and Surgical Centre (2011) INT 55*, the appellant entered a case of medical negligence on the ground of tort against a private clinic. It was held that the relationship between the defendant and the plaintiffs are not the same as with a public hospital. In other words, in the case of a public hospital, the cause of action must be grounded on tort under Article 1382 of the Civil Code whereas in the case of a private clinic, the cause of action must be grounded on breach of contract. This contract is one of treatment agreement in which they types and modalities of treatment which are to be undertaken by the defendant and forming part of the consensus between the defendant and the plaintiffs, are prescribed. In the present case, the plaintiff ought to have proceeded for breach of contract but they chose to make an amalgamation of causes of action by alleging fault, imprudence and negligence of the defendant under the realm of tort action. However, this is contrary to the rule of non-cumulation of actions which prevents a party from claiming a remedy both in contract and in tort. Thus, the case was dismissed accordingly.

In fact, all of the above mentioned case laws fall under the pursuit of civil proceedings. Nevertheless, it is still possible for an aggrieved party to invoke criminal proceedings against a doctor under Section 239(1) of the Mauritius Criminal Code. One notable case in this respect is the matter of *Boodoo v. The State (2016) SCJ 525*. This case concerns an appeal from a judgment rendered by the Intermediate Court convicting the appellant to 9 months' imprisonment for having by medical negligence involuntarily caused the death of a patient in breach of Section 239(1) of the Mauritius Criminal Code. Thus, the Supreme Court had to consider the facts and circumstances of the case to conclude whether the doctor's sentence was appropriate. The deceased patient had delivered a baby by cesarian and due to complications of her health status, the appellant was asked by the gynaecologist to perform a hysterectomy. The medical report further to the autopsy showed that this has caused the patient to bleed heavily leading to her death. The appellant averred that it is the fault of the gynaecologist to have instructed him to perform the hysterectomy which led to the involuntary death of the patient and he was then seeking for a reduction in his term of imprisonment of 9 months. The Supreme Court referred to French law and doctrine since Section 239(1) of the Mauritius Criminal Code is inspired from French law more precisely, Article 319 to 320 of Garcon, Code Pénal Annoté, Tome II, Livre III. This article mentions that French doctrine and case law advocate a need for a gross negligence for a doctor to be found criminally liable. Court had thus concluded that the appellant was expected to exercise a certain level of proficiency and professionalism in his work and that the operation was supposed to be a normal one without any complication. However, the multiple injuries found in the ovarian region are evidence of gross error committed during the Ceasarean operation committed by the appellant. Court was thus of the view that the appellant had deviated from

the accepted medical standard of care that was expected of him under the circumstances and that he was guilty of gross medical negligence. Taking into consideration that the appellant did not have any criminal record and that the delay of 10 years had elapsed since the commission of the offence, the Supreme Court amended the sentence pronounced by the Intermediate Court from a term of 9 month's imprisonment to 6 month's imprisonment as the custodial sentence.

5. MEDICAL NEGLIGENCE IN THE UK: THE APPROACH OF UK COURTS

Likewise the case of Mauritius whereby aggrieved parties may resort to the Medical Council for relief in situations of medical negligence, the UK has its National Health Service (**NHS**) to handle complaints received against medical practitioners. It is to be noted that the majority of claims that the NHS receive are resolved without formal court proceedings and this is evidenced by the NHS statistics in 2017/18 which shows that just under one-third of claims ended up in litigation with fewer than 1% going to a full trial (**NHS, 2020**). Concerning court's proceedings, similar to Mauritius, negligence from medical acts may result in a civil action by the plaintiff or a criminal prosecution. While for a civil suit, medical negligence is proved on a balance of probabilities, in a criminal prosecution, evidence has to be shown beyond reasonable doubt. Usually, civil actions result in compensation or damages awarded to the aggrieved party while criminal actions entail custodial imprisonment and even fines under certain circumstances.

Essentially, the UK tribunals consider Caparo test being the three-stage test in matters of medical negligence, mainly the existence of a duty of care, a breach of the duty of care and the harm suffered by the patient as a consequence of that breach. The principle of the duty of care was established by *Donoghue v. Stevenson* in 1932 cited earlier in this paper, whereby Lord Atkin mentioned that there was a general duty to take reasonable care to avoid foreseeable injury to a "neighbour". A "neighbour" is thus defined as a person who may be reasonably contemplated as closely and directly affected by an act. As such, a medical duty of care is established between a patient once he is admitted to a hospital, and the treating doctor at the hospital who comes into contact with the patient. Thereafter, a breach of duty has to be proved, which is established when a doctor's practice has failed to meet an appropriate standard. In this regard, the UK courts follow the Bolam test (explained earlier) but the UK courts have come to realise that this test is not definitive as there is a doubt on the idea that an acceptable standard of care is judged by doctors commenting on practice standards and that it may be part of the role of the court to determine otherwise. In other words, the court must be vigilant to see whether the reasons given for putting a patient at risk are valid or whether they stem from a residual adherence to out of date ideas.

Indeed the first departure from the Bolam test by UK courts has arisen from the case of *Bolitho v. City and Hackney HA (1996) 4 All ER 771*. In the case, a child was admitted for breathing problems and the doctor did not intubate the baby as a result of which, the child was dead. A group of 8 medical experts testified in the case and 5 of them said that they would have intubated the child while the other 3 said they would not have. Thus, the House of Lords had to determine whether the hypothetical decision not to intubate the child was a breach of duty of the doctor in the case. The Bolam test suggests that a doctor would have

acted negligently if his actions conformed to a practice supported by a body of professional opinion. However, the House of Lords in the Bolitho case held that a defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter. They went on to further conclude that the professional opinion to be relied upon cannot be unreasonable or illogical. Thus, it was highlighted in the Bolitho case that it is necessary for the judge to consider the facts and evidence of the case and to decide if that clinical practice puts the patient unnecessarily at risk.

Apart from civil actions, medical practitioners in the UK may also be subject to criminal negligence cases. While prosecutions for criminal negligence are rare, doctors are often investigated by the police for a potential linkage to a charge of manslaughter after an event causing the death of the patient. Yet, courts do encounter difficulties in establishing what determines the death of a person, for example, extreme subjective recklessness such as indifference to an obvious risk to the patent or objective evidence of incompetence or ignorance may be matters of concern for criminal negligence. In this context, court had drawn a line of demarcation between involuntary manslaughter and breach of duty of care in the case of *R v. Adomako (1995) 1 A.C. 171*. The case concern an appeal from the defendant on his conviction for involuntary manslaughter. The appellant was an anaesthetist in charge of a patient during an eye operation and during the operation, an oxygen pipe became disconnected which caused the death of the patient. The defendant failed to notice this disconnection and the jury convicted him of gross negligence manslaughter. On appeal, the court considered the test for gross negligence manslaughter of Lord Mackay LC which reads as follows:

"…the ordinary the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

Consequently, the appeal was dismissed by the Court of Appeal.

Additionally, for a criminal case to succeed, the breach of duty of the medical practitioner must cause death. It does have to be the only cause but it must have more than minimally, negligibly or trivially caused the death and the burden rests with the prosecution to establish causation. In essence, the test for causation in criminal cases was put by *Lord Woolf in R v. HM Coroner for Inner* London, ex parte Douglas-Williams (1998) 1 All ER 344 as follows:

"In relation to both types of manslaughter (i.e. unlawful act and gross negligence) it is an essential ingredient that the unlawful or negligent act must have caused the death at least in the manner described. If there is a situation where, on examination of the evidence, it cannot be said that the death in question was caused by an act which was unlawful or negligent as I have described, then a critical link in the chain of causation is not established. That being so, a verdict of unlawful killing would not be appropriate and should not be left to the jury."

Furthermore, it is imperative to show that the breach of duty must be gross, that is criminal and this was elaborated in *Adomako (1994) 3 All ER 79* where the court stated that prosecution must prove the following 2 elements:

1. the circumstances were such that a reasonably prudent person in the defendant's position would have foreseen a serious and obvious risk of death arising from the defendant's act or omission, and
2. the breach of duty was, in all the circumstances, so reprehensible and fell so far below the standards to be expected of a person in the defendant's position with his qualifications, experience and responsibilities that it amounted to a crime.

In fact, various terms have been used to describe the type of conduct that may amount to gross negligence. For instance, the case of *Misra (2004) EWCA Crim 2375* provides some guidance on the degree of negligence required for it to be regarded as gross. It was held in the case that "*mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment are nowhere near enough for a crime as serious as manslaughter to be committed*". This implies that the defendants' conduct must fall so far below the expected standard of a reasonably competent and prudent man that the act or omission was something truly and exceptionally bad. Likewise in *R v. Sellu (2016) EWCA Crim 1716*, the court highlighted the importance of explaining to the jury the seriousness of the departure from ordinary standards required by the concept of gross negligence. It is possible for the jury to rely on expert's opinion but the jury must be sufficiently assisted to understand how to approach their task of identifying the line that separates even serious or very serious mistakes or lapses, from conduct which was truly exceptionally bad and was such a departure from that standard of a reasonably competent doctor that it consequently amounted to being criminal.

In brief, the UK tribunals evaluate the evidential test for grossness by considering the conduct of the medical practitioner and that of the background of all the relevant circumstances in which the act or omission occurred. Expert evidences are also considered but judges do have to appreciate the circumstances in view of the expected skill and expertise of the medical practitioner.

It is also noteworthy to point out that the general time limit for medical negligence claims in the UK is 3 years from the date of the alleged negligence that has occurred or within 3 years of the victim becoming aware of possible negligence. This is of relevance to minors where the 3 years starts when the minor reaches the age of maturity that is 18 years of age.

6. COMPARATIVE STUDY AND ANALYSIS

As compared to the UK, Mauritian case laws have not yet elaborated on factors convicting a medical practitioner of criminal medical negligence. The practice is to assess the conduct of the doctor and if a gross negligence has been proved, then the latter is sentenced under Section 239(1) of the Criminal Code. It is to be noted that no definition is provided by case laws for gross negligence and there is no indication that members of the jury are advised not to rely entirely on experts' opinion but to also consider the facts and circumstances of each negligence claims. Another difference lies in the limitation period to lodge an action of medical negligence. While in Mauritius, the prescribed timeline to enter a civil case is 30 years from the date of the alleged wrong and 10 years for a criminal case, in the UK, the limitation period to lodge a case of medical negligence is 3 years from the alleged negligence or within 3 years from the date the victim becomes aware of the possible alleged negligence.

Concerning civil cases of medical negligence, it is witnessed through several case laws that Mauritian courts adopt the principles of the Bolam test to ascertain the degree of reasonable standard expected of a medical practitioner. The UK courts also follow the Bolam principles but they have come to realise that this test is not definitive. In this regard, the UK courts are now warning its jury members to see whether the reasons for putting a patient at risk are valid or whether they stem from a residual adherence to out of date ideas. Basically, jury members are advised not to rely entirely on expert's opinion to determine a breach of duty but also to consider each case based on its own facts and circumstances.

Moreover, another notable difference lies in the corrective measures imposed in the UK and Mauritius on medical practitioners who are convicted of medical negligence. For civil cases, in Mauritius, the medical practitioner is given damages, the amount of which rests entirely on the court to determine. Also, the maximum term of imprisonment for criminal gross negligence is 5 years with a fine of a maximum of MUR 50,000 while for that of the UK, the imprisonment may extend for a lifetime with the possibility of reassessment of the person's ability to exercise medicine. These measures are set out in Section 239(1) of the Criminal Code which has not been amended since the 19th century. Consequently, Mauritius laws must be amended to provide for some more strict punitive actions for persons convicted of medical negligence.

7. RECOMMENDATIONS

In the light of the above, this paper recommends in the absence of well-established case laws that provide guidelines on factors convicting a medical practitioner of criminal negligence in Mauritius, the Criminal Code needs to be amended in order to include either a definition of gross negligence or indicate features of gross negligence. These amendments may be borrowed from UK case laws explained earlier in this paper whereby the judge have meticulously explained the reasoning behind the conviction of medical professionals for involuntary homicide. This will thus form part of the underlying basis for considering criminal medical negligence cases and will lead to more clarity and transparency in the corresponding judgments.

It is also suggested that Mauritian judges follow the Bolitho test rather than simply relying on the Bolam test. This implies that it is vital to admonish jury members of exercising the independence of mind and judgment in deciding on the accused convicted and not to entirely depend solely on experts' opinions. Yet, these experts' opinions are vital since they do give an indication on what type of reasonable conduct is being expected from a medical practitioner in the light of the latter's qualifications and skills, but are not definitive. In other words, each case is determined on its facts and circumstances independently.

Last but not the least, the insertion of the criminal offence for medical negligence in the Mauritius Criminal Code dates from the 19th century which provides for punitive measures of a maximum of 5 years and fines not exceeding MUR 50,000, which are relatively low. It is thus high time for the sentencing clause to be amended, for example, in the UK, the maximum imprisonment term in lifelong and it is also possible for the medical practitioner to be banned from exercising medicine if he is convicted of criminal medical negligence.

8. CONCLUSION

This research paper has emphasized on the importance of medical negligence, its impact on the victims and the accused party and most importantly, on the society in general. In this respect, it is imperative to elaborate on the available avenues of relief that a victim of medical negligence can have against the medical practitioner. It has been seen that an aggrieved party may register a complaint against a medical person with the Medical Council of Mauritius which shall then perform an investigation on the facts and circumstances of the complaint. While the Council may only issue a warning or severe warning, it may refer instances of serious acts or omission to the Disciplinary Tribunal. This tribunal then submits its recommendations to the Council who shall take the relevant corrective or disciplinary action. Additionally, a victim of medical negligence may also seek the assistance of courts either in the civil division in which case the law of negligence under Article 1382 and 1384 of the Mauritius Civil Code apply, or in the criminal division under Section 239(1) of the Mauritius Criminal Code. Nevertheless, in both circumstances, it is for the aggrieved party to prove the case of negligence by invoking a breach or gross breach of the medical practitioner's duty of case. In this light, several Mauritian case laws have been perused and it is found that Mauritius courts still follow the Bolam principles in deciding judgment. As for criminal medical negligence, the laws and case laws are missing on the guidelines for convicting a medical practitioner of gross negligence. As such, the approach of UK courts have been analysed and some suggestions have been put forward for Mauritius to adopt, which are inspired from the UK judgments in order to provide a more equitable remedy for victims of medical negligence. Essentially, it is recommended that the Criminal Code be amended to provide more clarity on the indicators of criminal gross negligence, the limitation period to enter a case of medical negligence be prescribed in Mauritius laws and that courts need to brief jury members of the dangers of relying solely on expert's opinion. Additionally, it is seen that the punitive measures for medical negligence are too lenient in Mauritius since these are based on a law which has not been amended since the 19th century. It is thus high

time for Mauritius legislators to start pondering on the amendments of the corresponding medical negligence laws in order to provide greater relief to victims of medical negligence.

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