

KECUAIAAN PERUBATAN: LIABILITI KONTRAK DAN TORT

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MEDICAL NEGLIGENCE: LIABILITY UNDER TORT LAW AND CONTRACT LAW

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WHAT IS LAW?

The system of rules that a particular country or community recognizes as regulating the actions of its members.....

A system by which a society is regulated.....

Why the **NEED FOR LAW?**

- There are many reasons why we need law: **to regulate society; to protect people; to enforce rights and to solve conflicts.**
- Law prevents or deter people from behaving in a manner that negatively affects the quality of life of other people.
- Members of society are refrained from doing what they like according to their desires.
- **THE PROCESS OF JUSTICE.....**

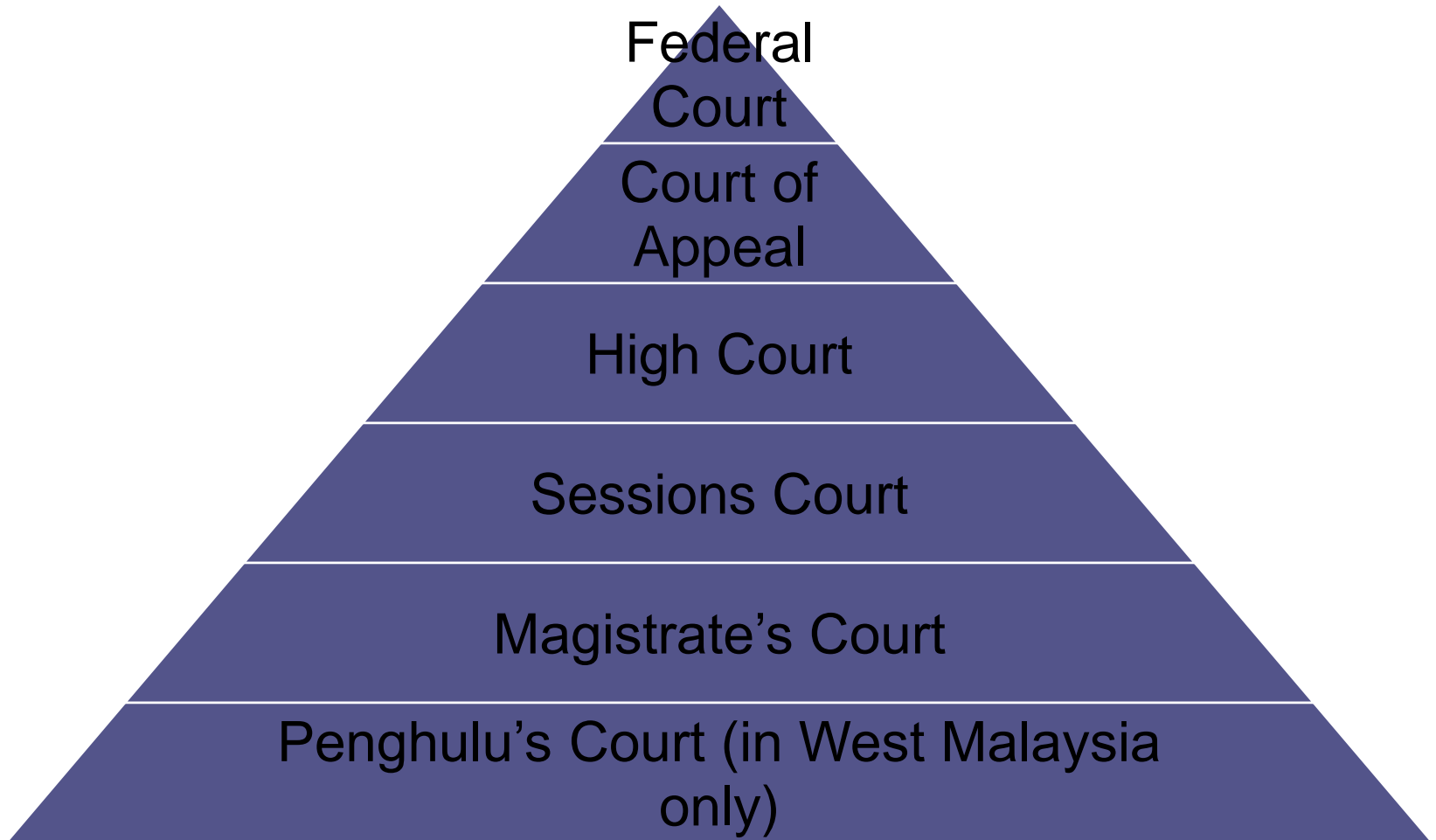
1. Bring the case to court...the start of court litigation

2. Make a complain to Malaysian Medical Council

3. Make a complain direct to the hospital or relevant NGOs

When a patient is not satisfied with the treatment given and perhaps have suffered injury...he can....

The Hierarchy of Courts



Jurisdiction...*on the amount of claim*

- **Magistrates Court** has jurisdiction to try actions where amount of dispute **does not exceed RM100,000.00**
- **Sessions Court** – amount of dispute **does not exceed RM1,000,000.00**
- **High Court** – amount of dispute can be **more than RM1,000,000.00**

SOURCES OF LAW

1. Federal Constitution
2. Legislation
3. Judicial Decision
4. English Law
5. Islamic Law - *Shariah*
6. Customary Law

1. FEDERAL CONSTITUTION

“Constitution”-

The body of legal and non-legal rules concerning the government of a State.

A single written document having special legal status, which establishes the State, and sets out the structure and powers of the State.

Examples:

- **Article 5. (1)** No person shall be deprived of his life or personal liberty save in accordance with law.
- **Article 6. (1)** No person shall be held in slavery.
- **Article 8. (1)** All persons are equal before the law and entitled to the equal protection of the law.

2. LEGISLATIONS

Law enacted by the legislature (law-maker) and by bodies and persons authorized by the legislature.

Legislature-

Federal level: The Parliament

State Level: State Legislative Assembly (DUN)

Laws enacted by the Parliament: **Act**

Laws enacted by DUN: **Enactment**

Examples Acts and Enactments

- **Mental Health Act 2001, Nurses Act 1950, Private Healthcare Facilities and Services Act 1998, Child Act 2001**
- **Islamic Law Enactment 2002**

3. JUDICIAL DECISIONS

The legal principle underlying a decision binding future courts in other cases with similar facts

ie... stare decisis (SD)

The operation of SD

1- Vertical (a court is bound by the prior decisions of a higher court)

2- Horizontal (some courts are bound by their own prior decisions and prior decisions of a court of the same level, whether past or present, if any)

4. ENGLISH LAW

Article 160 of the Federal Constitution includes ‘common law in so far as it is in operation in the Federation or any part thereof’ in the definition of ‘law’.

English Common Law

- **English law** means ‘the common law of England and the rules of Equity’- Section 3 Civil Law act 1956
- **Common Law**
- The body of rules developed by the old common law courts- Courts of Exchequer, Court of Common Pleas, Court of King’s Bench

English judicial cases...

- When points of law are argued in local courts, English cases are frequently cited along with local cases if any.
- Since England has a much larger body of reported case law than Malaysia, it often happens that a point of law will be covered by an English precedent but not a local one.
- The legal profession, both members of Bench and Bar is still dominated by those trained in England.
- Applicability of Commonwealth Judicial Decisions.

5. ISLAMIC LAW - SHARIAH

- Islamic Law- the legal rules that are part of the Shariah and enacted as legislation in accordance with the procedure prescribed in the Federal and state legislation
- **Applicable only for Family Law and Inheritance Law**

6. CUSTOMARY LAW

The regular pattern of social behaviour, accepted by a given society as binding upon itself.

Article 160 of the Federal Constitution defines 'law' to include 'customs and common usages having the force of law'.

Examples of customary law still in existence;
Adat pepatih in Negeri Sembilan

DIVISIONS OF LAW

1. **Public Law** – governs relationship between State and society e.g. Criminal Law, Constitutional Law
2. **Private law** - that part of a civil law legal system governing relationships between individuals – e.g Contract Law, Tort Law
3. **International Law**

BRANCHES OF LAW

Land Law.....Family Law.....Contract Law

Criminal Law.....Constitutional Law

Tort Law

Tort and other Legal Subjects

| Tort Law | Contract Law | Criminal Law |
|---|---|--|
| Duties are imposed by law | Duties are imposed by parties | Duties are imposed by State |
| Parties are often unconnected | Parties are often connected | Parties may be connected or unconnected |
| Privity of contract is irrelevant | Privity of contract is necessary unless the person falls under the exceptions | Privity of contract not necessary |
| Concerned with protecting interests and compensating wrongs | Concerned with supporting and enforcing promises | Concerned with punishing wrongdoers |
| Aims to restore the plaintiff to pre-accident position | Aims to treat the plaintiff as if the contract has been performed | Aims to promote justice for the plaintiff and protect the society as a whole |
| Limitation period begins to run from the date the damage occurred | Limitation period begins to run when the breach occur | No limitation period – as soon as evidence come to light |

Medical negligence claims

- can arise under law of contract as well as under the law of torts.
- claims brought under the latter are far more numerous.
- the actual content of the law is often similar in both areas.

Basis of Liability

- Contractual Liability – Express and Implied Warranties
- Tortious Liability – Trespass to person (Battery), Negligence

1. Contractual Liability

- Why? - to obtain a stricter liability if the doctor had given a warranty as to the outcome of the treatment – **usually non-therapeutic.**
- In *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] Lord Denning said: “The law does not usually imply a warranty that [a professional] will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does a solicitor warrant that he will win the case.”

Reasonable Care

- In absence of explicit and unequivocal terms in the contract, the courts reluctant in finding that a doctor has warranted or guaranteed the success of a treatment.
- In ***Thake v Maurice*[1986]** Neill LJ -“Medicine, though a highly skilled profession, is not, and is not generally regarded as being, an exact science. The reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that specialty: he **would not in my view have expected the defendant to give a guarantee of 100 per cent success.**”

Express and Implied warranties

- Theoretically, possible for doctor to give a contractual warranty that he will achieve certain result but court slow to infer such warranty in absence of an express term – medicine inexact term usually unlikely for doctor to give such a warranty.

Thake v Maurice (1986)

- Ps - four children with the fifth one on its way - arranged with the def to carry out a vasectomy operation on Mr T. Dr M told them vasectomy operation - irreversible, subject to a possible operation to restore fertility but did not warn them that there was a chance of the vasectomy failing to sterilise Mr T. Operation performed - late recanalisation occurred - Mrs T surprised that she was five months' pregnant - too late for abortion - gave birth to a baby girl. Ps sued D under breach of contract and negligence.

Thake ...the decision...

- CA held: the operation, which had been competently performed, was not based upon a guarantee to make the plaintiff infertile but was an agreement to perform a vasectomy using reasonable skill and care.

La Fleur v Cornelis (1979)

- Canadian case -a plastic surgeon contracted to reduce the size of the plaintiff's nose, and drew a sketch to show the changes that would be made. After the operation the plaintiff had some scarring and deformity. Barry J. held D strictly liable for breach of contract, stating that whilst there is usually no implied warranty of success, there is no law preventing a doctor from contracting to do what he paid to do. D had said to P that there would be “no problem...you will be very happy.” This was held to constitute express warranty of success.

2. Tortious Liability

- Negligence - common ground medical negligence claims.
- Under the law of torts, such claims might also be based on trespass to person, namely battery – problems of proving patient did not consent as patient usually had consented to the treatment given. It is only at the later stage of the treatment when a mishap occurs which may be due to negligence of the person administering the treatment.

Tort Law

- Tort comes from Latin word “tortus”, which means twisted, generally known as “wrong”
- In legal terms it means “a legal wrong which the law provides legal remedy.”
- Tort Law protects a variety of interests.

Protected interests and Causes of Actions under Tort Law

- Protection of physical Integrity – **Negligence, Trespass**
- Protection of property – **Negligence, Trespass, Nuisance**
- Protection of reputation - **Defamation**

Aims of Tort Law

- Compensation
- Appeasement and Justice
- Deterrence and Punishment
- Allocation of losses – Role of Insurance

What is medical law?



- law relating to medical practice, ie the relationship between health care professionals particularly doctors, and their patients
- made up of various areas of law particularly law of tort, criminal law, contract law and family law.

- **Intervention of Law into Medical Practice creates a host of legal and ethical dilemmas**
– e.g. ***Beneficence versus Autonomy***
- **Not possible for all moral duties to be legal duties...**

- **Its complex as it draws on a wide range of legal subjects including Tort Law, Contract Law, Family Law, Criminal Law...**
- **Is judicial intervention appropriate when judges are experts in law not in medicine?**

MEDICAL LAW – *A Challenging Legal Area*

The medical profession in the early ages



- Highest pedestal
- Medicine was a matter of mystery
- Medicine was then interwoven with bonds of religion, superstition and magic.
- Ability to heal was not judged by competence but by their ability to communicate with demons and gods
- **They functioned as priest, witch, and at the same time a lawgiver and judge**

Historical Aspects of Medical Negligence

- Code of Hammurabi, which was introduced in the late 18th century BC by Hammurabi, the king of ancient Babylon
- Severe punishments – e.g. punishments for failure of treatment are written as “[i]f a doctor has treated a man for severe wound with a metal knife and has caused that man to die, his hands shall be cut off.”

Origins of Medical Ethics

- Greek culture - Plato held that only other physicians should judge actions of physicians.
- Aristotle, his pupil, emphasised that the only penalty applicable to any wrongdoing by a physician was limited solely to injury to his reputation and to nothing else.
- Hippocrates, the ancient Greek who is often called the Father of Medicine, created an oath regarding medical ethics, which is now widely accepted by modern physicians.

Hippocratic Oath

- I swear by Apollo Physician and Asclepius and Hygieia and Panaceaia and all the gods and goddesses, making them my witnesses, that I will fulfil according to my ability and judgment this oath and this covenant:
- I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.
- I will neither give a deadly drug to anybody if asked for it, nor will I make any suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness, I will guard my life and my art.
- What I may see or hear in the course of the treatment or even outside the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.

Modernised version

- The archaic language of the Oath was replaced with a modernised version by the World Medical Association and named the Declaration of Geneva in 1948. The modernised version was further amended in Sydney in 1968, which provides a basis for the International Code of Medical Ethics.
- The Oath of a Muslim Doctor

The Oath of a Muslim Doctor

In the name of God, Most Gracious, Most Merciful
I swear by God...the Great

To regard God in carrying out my profession; To protect human life in all stages and under all circumstances, doing my utmost to rescue it from death, malady, pain and anxiety; To keep people's dignity, cover their privacies and lock up their secret; To be, all the way, an instrument of God's mercy, extending my medical care to near and far, virtuous and sinner and friend and enemy; To strive in the pursuit of knowledge and harnessing it for the benefit but not the harm of mankind; To revere my teacher, teach my junior, and be brother to members of the Medical Profession joined in piety and charity; To live my Faith in private and public, avoiding whatever blemishes me in the eyes of God, His Apostle, and my fellow Faithful;

And may God witness this Oath.



E.g. NURSING BOARD MALAYSIA CODE OF PROFESSIONAL CONDUCT FOR NURSES –APRIL 1998 edition

- ⊙ Offers guidelines for professional behaviour and practice
- ⊙ Complements the Nurses Act 1950 and Regulations 1985 (Part V and Part VI)
- ⊙ Definition of registered nurse
- ⊙ Accepted practice to be followed:
 - a. Respect for patient – confidentiality and informed consent
 - b. Accountability
 - c. Advocacy
 - d. Teamwork

Medical Ethics

- Definition - “Ethics” derived from the Greek word “ethikos” meaning character, manners or morals.
- Oxford English Dictionary – ethics include “the science of morals”, “the rules of conduct” recognized in certain limited departments of human life.

The Importance of understanding Ethics as it is...

- A system of moral principles or standards governing conduct.
- A system of principles by which human actions and proposals may be judged good or bad, right or wrong;
- A set of rules or a standard governing the conduct of a particular class of human action or profession;
- Any set of moral principles or values recognized by a particular religion, belief or philosophy;
- The principles of right conduct of an individual.

Ethical Principles in Action

- **BENEFICENCE** – To positive duty to do good for the patient
- **NON-MALIFICENCE** – To refrain from inflicting harm
- **AUTONOMY** – To respect self-determination
- **VERACITY** – Upholding honesty and truth-telling
- **JUSTICE** – Fair allocation of benefits and burden – what is deserved

THE IMPORTANCE OF MEDICAL ETHICS in MEDICAL LAW

Lord Coleridge in R v Instan [1893] 1 QB 453 – “It would not be correct to say that every moral obligation involves a legal duty but every legal duty is founded on a moral obligation.”

- Increasing awareness amongst members of the society on medico-legal issues.
- Growth of consumerist attitude – rising expectations - claims triggered if the provision of medical services below expectation.
- *Changing trend causing judicial and legislative interventions.*

The Changing Trends

THE PRESENT...

■ It is established that the [right] to self-determination requires that respect must be given to the wishes of the patient”.

Lord Goff in *Airedale National Health Service Trust v Bland* [1993] 1 All ER 821



Nevertheless... Society's expectations changed in response to professionalism and societal needs...

- ❖ The Desire to **Retaliate**
- ❖ Demands for **Accountability**
- ❖ **Patient Autonomy** and **Right of Self-Determination**
- ❖ **Technology** and Advancement of **Knowledge**

Friday, 11 September 2015

Doctor ordered to pay RM312,500 to TNB training exec

BY M. MAGESWARI



KUALA LUMPUR: A TNB training executive won RM312,500 in damages in a medical negligence case against a consultant anaesthesiologist.

However, V. Prabakhari, 46, lost her claim against a private hospital for alleged breach of contract and negligence.

High Court Judicial Commissioner Mohd Zaki Abdul Wahab ruled that Prabakhari had proved that Dr Nazri Bhupalan breached the duty of care when he gave her anaesthesia.

He said Dr Nazri had failed to obtain an informed consent from Prabakhari and had committed negligence due to breach of duty of care.

He awarded RM300,000 in general damages for pain and suffering, loss of amenities and mental distress.

He allowed RM12,500 in special damages, which included Prabakhari's expenses for travel and food.

The court held that Pantai Medical Centre Sdn Bhd was not vicariously liable for the doctor's negligence.

Mohd Zaki also said that the private hospital also did not commit breach of contract and that there was no negligence on its part.

He ordered Dr Nazri to pay RM100,000 in costs to Prabakhari.

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NEWS | MALAYSIA

Medical negligence: Doctor ordered to pay woman more than RM300,000

September 11, 2015 07:25 MYT



The court ordered Dr Nazri to pay Prabakhari RM300,000 in general damages, for loss of amenities of life, mental distress, pain and suffering.

obtained an informed consent from her before administering the anaesthetic.

KUALA LUMPUR: The High Court Thursday ordered a doctor at a private hospital to pay damages of RM312,500 to a Tenaga Nasional Berhad employee due to medical negligence.

Judicial Commissioner Datuk Mohd Zaki Abdul Wahab handed down the decision after allowing the suit filed by V. Prabakhari, 46, against consultant anaesthesiologist, Dr.Nazri Bhupalan.

In his judgment, Mohd Zaki said Prabakhri had succeeded in proving that Dr Nazri had breached the duty of care for failing to give information or

As a result of that, Prabakhri suffered injuries and pain, he added.

The court ordered Dr Nazri to pay Prabakhari RM300,000 in general damages, for loss of amenities of life, mental distress, pain and suffering.

The doctor was also ordered to pay RM12,500 in special damages and costs of RM100,000 to Prabakhari.

The court, however, dismissed Prabakhri's claim against the hospital, Pantai Medical Centre Sdn Bhd, which was named the second defendant in the suit.



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Taking a painkiller to reduce your pain could also reduce your empathy for others



Azmil Mustapha able to breathe without

Paralysed ex-national athlete cries despite winning medical negligence suit



Photo: The Star/ANN

Not a happy ending: Norazleen breaking down in tears outside the courtroom despite being awarded almost RM640,000 (S\$235,777).

THE STAR/ANN | May 30, 2015



GEORGE TOWN - Norazleen Mohammed Mustaffa is richer by almost RM640,000 (S\$235,777) but she is not jumping with joy. She simply can't.

The former national junior athlete is partially paralysed from the waist down

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RM10mil negligence suit against two Terengganu hospitals to be decided next month

Vi-Jean Khoo, 07 Apr 2017



Muhamad Sardi and his wife, holding photographs of Ulya Insyirah. Photo credit: Sinar Harian Online

A married couple, who filed a RM10 million [negligence suit](#) against two public health facilities in Terengganu over the death of their four-year-old daughter in 2013, will know of the High Court's decision next month.

WOMAN LOSES BREAST AT M'SIAN HOSPITAL, TO SUE DOCTOR, GOVT FOR RM20MIL

Social | April 20, 2017 by | 0 Comments

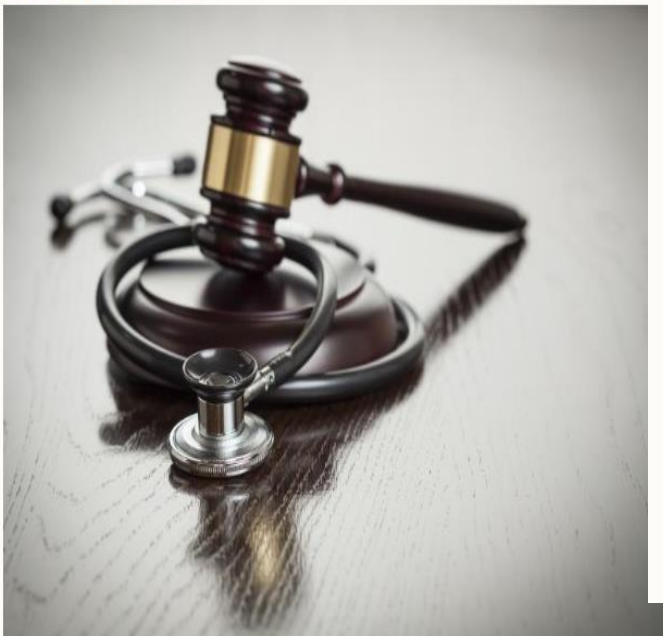


A woman has filed a medical negligence suit against a Serdang Hospital doctor claiming that a botched procedure had caused the loss of her left breast.

The suit was by Pertemahwadi Isac through her lawyer Arunan Selvaraj at the Kuala Lumpur High Court today, against the cardiothoracic specialist Dr Abdul Muiz Jasid and the Malaysian government.

Malaysian housewife sues government specialist for RM20mil over negligence

Vi-Jean Khoo, 24 Apr 2017



Hospital for further treatment.

Under Muiz's advice, Pertemahwadi underwent a Vacuum Assisted Closure (VAC) treatment. However, as the infection from the wound had spread, she was referred to the Breast Specialist Department and advised to have the infected part of her breast removed. Due to the extent of the infection, she had to undergo two surgeries to remove her entire left breast.



Incident caused patient emotional suffering

Following the incident, Pertemahwadi claimed that she has lost confidence in the treatment, attention and patient care provided by Serdang Hospital. She added that she has been suffering emotionally and facing mental distress, causing her to be unable to carry out her household duties since February last year.

She is currently seeking RM20 million in general and aggravated damages, along with RM223,486 in special and other reliefs deemed fit by the court.

According to lead counsel Datuk Dr Arunan Selvaraj, Pertemahwadi was asked to sign a letter, promising that she will not take legal action against the hospital. However, she refused to sign the letter and decided to proceed with the civil claim as the hospital failed to provide an explanation for the incident.

"We have no choice but to come to court to seek justice," he said.

"We don't want this to happen to other women." **MIMS**

Nature of Damages

- 1. Damages recoverable **only once**
- 2. *Restitutio in integrum*

Restitutio in integrum

- Damages is to be assessed on a compensatory basis —
to restore the pff to his pre-accident position
- **Livingstone v Raywards Coal Co [1880] 5 App Cas 25 at 39** — *restitutio in integrum* is that sum of money which will put the party who has been injured, or who has suffered, **in the same position as he would have been in if he had not sustained the wrong** for which he is now getting his compensation or reparation.

Categories of Damages (Monetary Compensation) that can be claimed

Examples:

- Loss of Earnings from date of accident to the date of trial
- Loss of Future Earning
- Loss of Earning Capacity
- Loss of Amenities/Enjoyment of Life
- Pain and Suffering
- Nursing Care, Medical Expenses and Transport

Type of Damages

- 1. Nominal Damages
- 2. Contemptuous Damages
- 3. **Exemplary Damages**
- 4. **Aggravated Damages**
- 5. **Special and General Damages**

Exemplary Damages

- In this kind of damages, the court has the intention to punish the wrongdoer by an additional award on top of the award of compensatory damages and perhaps to deter others who might be tempted to act in the same way as the def.
- **Rookes v Barnard [1964] AC 11-** Lord Devlin stated that damages of this type would only be awarded in specific cases and then only very exceptionally. Three classes of cases where exemplary damages have been awarded were considered:
- (i) **Where servants of the Govt behave in an oppressive, arbitrary or unconstitutionally way** - cases concerning police misconduct and racial discrimination fall into this category

Foong Chee Chong v Inspector Mohd Nasir Shamsuddin & Anor [1998] 4 CLJ 309

- **Facts:** The pff lost gold articles and jewelleries due to burglary at his goldsmiths shop. The items were later recovered and the police retain the items as evidence. When the items went missing, the pff claimed for conversion, negligence including exemplary damages.
- **Held:** The court held that such a case warrant exemplary damages but this has to be specifically pleaded which the pff did not do. It was discovered that the wife of the first defendant misappropriated the items, therefore, the charges against the 1st defendant was withdrawn.

Aggravated Damages

- Awarded if the court wishes to express disapproval of the def's behavior, as a result of which the pff suffered more than normally be expected in the situation - **also awarded when the def has injured the feelings or pride of the pff** –
- It differ from exemplary damages in that the former represent merely additional compensation whereas exemplary damages contain a punitive and deterrent element.

Dr Hari Krishnan & Anor v Megat Noor Ishak & Tun Hussein Onn Hosp [2017]

- Federal Court Judgment
- “Aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person’s reputation. **There is no reason to exclude this kind of damages from medical negligence cases,** which involve real injury to a person’s body.”

Special and General Damages

- **Special damages (Quantifiable Pecuniary Loss)** - are awarded for injury or loss arising from the def's tortious action but which the law does not presume to have arisen from it e.g. as a foreseeable consequence of the accident the pff was unable to continue with his trade and fulfill, a valuable contract with the customer.
- **General damages (Pecuniary and Non Pecuniary, Quantifiable and non-Quantifiable)** - awarded because a tort has been committed whereupon the law presumes that the pff has suffered loss which could either be pecuniary in nature (such as loss of future earnings and loss of earning capacity) or non-pecuniary in nature (such as damages for pain and suffering) incurred before and after the trial. General damages must be averred to in pleadings but need not be specifically pleaded by the pff.

Sam Wan Hoong v Dr. Kader Ibramshah [1981] 1 MLJ 295

- In, Mohamed Azmi J stated:
- “In an action for personal injuries, there are two classes for damages which have to be considered -- Special damage which has to be specially pleaded and general damage which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the plaintiff. **Special damage consists of out-of-pocket expenses, such as hospital bills and actual loss of earning during period of total incapacity, and is generally capable of substantially exact calculation.**

Sam Wan Hoong...continue

- General damage comprises damage for pain and suffering, loss of amenities and the like which the law implies, and in certain cases where the injuries suffered are such as to lead to continuing or permanent disability, it includes future loss of earnings and loss of earning capacity. Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on the nature of injuries sustained and the period of hospitalization, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances.

Introduction to Negligence

- most important area in modern tort law.
- covers nearly half of any textbook.
- tort of negligence protects various interests such as interests in physical integrity, interest in property and economic interests.

Definition of “negligence”

- defined by *Winfield* as “the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.”
- In *Loghelly Iron & Coal v M'Mullan* [1934] - Lord Wright stated “Negligence **means more than heedless or careless conduct**...it properly connotes the complex **concept of duty, breach and damage** thereby suffered by the person to whom the duty was owing.”

Continuation...

Prof. Fleming: Negligence is the conduct falling below the standard demanded for the protection of others against unreasonable risk of harm.

Blyth v Birmingham Waterworks Co (1856) 11 Ex 781: Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.

Principal Elements of Negligence

- (a) **duty of care** or an existing legal duty on the part of the defendant to the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty;
- (b) **breach of duty** or failure to conform to the standard of care which the defendant owes the plaintiff;
- (c) **causation or consequential damage** to the plaintiff , that is, the plaintiff suffers damage as a result of the defendant's breach of duty.

Difference between Negligence and Criminal Offences

- Under the law of negligence - intention, motive are all irrelevant.
- However, under criminal law – the state of mind of a person is very important.
- To be guilty of a criminal offence (i) there must be commission or omission of the offence (actus reus);
- (ii) the person must have the intention ie state of mind (mens rea) towards the commission or omission of the offence.
- His guilt must be proven beyond reasonable doubt.
- Criminal offences are usually put in statutes in order to promote public safety. The penalties are prescribed in the statute.

Criminal Offences - the Law in Malaysian Penal Code (Revised 1997)(Act 574)

- The Penal Code modeled after the Indian Penal Code provide certain provisions relevant for abortion, euthanasia and rape.

ISSUES UNDER THE PENAL CODE

1. **Rape, Incest, Sodomy**
2. **Abortion**
3. **Euthanasia**
4. **Criminal Negligence**
5. **Assault**
6. **Causing Hurt**

E.g. Causing Death by Negligence

- Section 304A
- Whoever causes the death of any person, **by doing any rash or negligent act not amounting to culpable homicide**, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

THE ROLE OF HEALTHCARE ORGANISATIONS IN PROMOTING PATIENT SAFETY

Promotion of the safety of care requires a management commitment and leadership, collaboration and cooperation of all the professionals within the organisation

(Patient Safety and Risk Management Guidelines)

The Doctrine of Corporate Negligence

- This doctrine creates a duty of the hospital itself directly to the patient. **Hospitals cannot abdicate the responsibility to third party.** Hospitals are responsible to monitor the personnel involved in the processes within the organisation, assess the overall operation of the facility and make conscious effort to identify potential risks (Dearmon, 2013)

Hospitals and Clinics are under the doctrine has the following duties:

- The Duty to use reasonable care in maintaining safe and adequate facilities and equipment.
- 2. The Duty to formulate adequate policies to ensure quality care for patients.
- 3. The Duty to oversee all persons who practice within its walls.
- **4. The Duty to select and retain competent physicians and staff.** (Dearmon, 2013)

Employers as potential Defendants

- **Healthcare providers as employer, have always been seen as potential defendant worthy of suing financially.**
- **The fact that they have economically benefitted from the acts of their employees, they should undertake the burden when things go wrong.**

The Doctrine of Vicarious Liability

- imposes liability on employers for the torts committed by his **employees who are acting in the course of employment.**
- all healthcare providers will be vicariously liable for the acts and conducts of their employees

Respondeat Superior'

- The doctrine of vicarious liability is a form of strict, secondary liability that arises under the common law doctrine of agency, namely, respondeat superior – the responsibility of the superior for the acts of their subordinate.
- Lord Justice Holt in **Middleton v Fowler** [1969] 1 Salk 282, 'no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given by his master, and then the **act of the servant is the act of the master.**'
- Lord Mansfield stated in **Ackworth v Kempe** [1778] Dougl 42.that '**for all civil purposes the act of the sheriff's bailiff is the act of the sheriff.**'

Justifications for the doctrine

- (1) Employer has bigger and deeper pocket
- (2) Encourages accident prevention by pressuring the employer to ensure that their employees act with regard to the safety of others
- (3) One who takes the benefit must take burden as well
- (4) Loss distribution mechanism

“...the principle of vicarious liability rests on the fundamental premise that the employer is best placed, relative to everybody else, to manage the risks of his business enterprise and prevent wrongdoing from occurring ...”

Chan Sek Keong, CJ, 2011, judgment on vicarious liability in the Singapore Court of Appeal in Skandinaviska Enskilda Banken v Asia Pacific Breweries [2011] SGCA 22.

Conditions (1) Provided they are “employees”

Other requirements include

- (2) They have committed a legal wrong
that is actionable in tort law
- (3) They have acted in the course of
employment

The Determination of Employees

- The employer is only liable for the acts of their employees and not of the independent contractors
- How to distinguish between employees and independent contractors – ***Difficulties***
- The courts have employed various tests - Control Test, Business integration test, Economic Reality test, Multifactorial test

healthcare providers namely physicians, nurses, radiographers, and medical attendants are all INDEPENDENT CONTRACTORS and NOT the clinic's employees. They alone are responsible for their actions. Because of this, [REDACTED] is NOT liable in any way, form or manner for any medico-legal suits or costs arising from their alleged negligence as the doctrine of "Respondeat Superior" is not applicable, nor is that of vicarious liability on the employer's part. Any patient getting treatment at any [REDACTED] branch is legally bound by the above contract.

Can this be allowed?

The answer is “No”.....as the employer may have delegated the performance of the duty to another but the responsibility on the performance of the duty remains with the employer.

Chai Beng Hock v Sabah Medical Centre Sdn Bhd & Ors[2011] 1 LNS 33

Abdul Rahman Sebli J. stated that: "...a medical institution like Sabah Medical Centre Sdn Bhd (SMC) has a duty to ensure that doctors who practice at the hospital whether employed by them or otherwise have the necessary skill and competency to treat patients. It is no defence for SMC to say that it is not responsible for the wrongdoings of its 'independent contractors' if otherwise these doctors were allowed by SMC to run their practice at the hospital."

In the Federal Court...Sunway Medical Centre v Soo Cheng Lin (2016)

- Hospital's duty included the treatment of patients with reasonable care, and such duty is not discharged by delegation... it was opined that the obligation undertaken by a hospital towards the patient is **not merely to provide a skilful nurse, BUT TO NURSE HIM**: “A nurse, I should have thought, is employed by a hospital to nurse the patients... and **a patient would expect that the hospital employed a nurse to nurse him.**”

Patient Safety requires...

- Promotion of the safety of care requires a **management commitment and leadership, collaboration and cooperation of all the professionals within the organisation** (Patient Safety and Risk Management Guidelines, 2008).

To minimise Risks of being sued....

Healthcare Organisations need to...

- Understand the law relating to their practice and provide platforms to inculcate the **understanding of law and ethics relating to their practice** to all personnels.
- Provide **good and conducive complaints machineries** as this can defuse the spur to litigate.
- Be **transparent and accountable**.
- **Conduct Good reporting** and quick to prevent recurrence of the same errors.

The need to have effective patient complaint mechanisms

- Patients need an avenue where their complaints can be channeled expediently and taken seriously.
- Demands for mechanisms that will be able to deal with complaints expeditiously, sympathetically and comprehensively.
- Increasing public concern on the effectiveness and credibility of the existing patient complaint mechanisms in Malaysia.

Thank you...

- If you need more details on medical and nursing law, please purchase my books on
 1. “Medical Negligence Law in Msia”
 2. Cases and Commentary on Medical Negligence
 4. “Law and Ethics relating to Medical Profession”
 5. Nursing Law and Ethics
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