



DAMAGES: MEDICAL NEGLIGENCE

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DAMAGES

1. GENERAL DAMAGES
2. SPECIAL DAMAGES

GENERAL DAMAGES

- Pain & Suffering & Loss of Amenities
 - Based on initial injury and residual disabilities
 - Depends on initial medical report and expert report

ASSESSMENT OF QUANTUM FOR GENERAL DAMAGES

- Depending on injury
- First rough estimate: Compendium on Personal Injury Awards 2018
 - a range of quantum suggested depending on severity of injury
 - Factors to be taken into account such as age of patient, male or female, whether single or married
 - Existing case-law
 - Trend is due to inflation and drop in value of money, quantum is now higher
 - Recent brain damage together with quadriplegia RM 500,000.00 awarded

HOW TO MINIMISE AMOUNT OF GENERAL DAMAGES AWARDED

- ▶ Send for specialist re-examination
- ▶ Remember to request for estimated lifespan
- ▶ To get specialist relating to injury together with rehabilitation expert

NEW HEAD OF GENERAL DAMAGES

- ▶ Aggravated damages
 - ▶ Need not be pleaded
 - ▶ Depends on conduct of doctor and hospital
 - ▶ Starting point is **Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal** [2018] 3 MLJ 281 where RM 1,000,000.00 was awarded for aggravated damages
 - ▶ **Stanley Isaacs Dato' (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors** [2018] MLJU 1672 where a sum of RM 800,000.00 was awarded as aggravated damages

FUTURE CLAIMS

- ▶ Various heads can be claimed
 - ▶ Future costs of care (domestic maid, nurse, spouse)
 - ▶ Future accommodation
 - ▶ Costs of renovation of premises
 - ▶ Nursing home charges

TYPES OF FUTURE LOSSES CLAIMABLE

- ▶ Costs of future treatment
 - ▶ Future surgeries
 - ▶ Future follow up visits
- ▶ Costs of rehabilitation therapy
 - ▶ Physiotherapy
 - ▶ Occupational therapy
- ▶ Costs of future medication

FURTHER HEADS OF DAMAGE CLAIMABLE

▶ Costs of assisted devices

- ▶ Wheelchair,
- ▶ Electronic hoist
- ▶ Reclining commode
- ▶ Special beds

▶ Costs of consumables

- ▶ Diapers
- ▶ Nasogastric tubes
- ▶ Catheters
- ▶ Nutritional support

FURTHER HEADS OF DAMAGE CLAIMABLE

- ▶ Loss of earnings

- ▶ Future loss of earnings

- ▶ Earning capacity (lump sum to compensate for lack of opportunity in employment market)

ASSESSMENT OF FUTURE CLAIMS

▶ Multiplier multiplicand approach

- ▶ Multiplier is expected lifespan- age of plaintiff into pre-trial and future components
- ▶ Multiplicand is the actual value proved by evidence
- ▶ Deduction of 1/3 due to accelerated payment (Some judges reduce the multiplier by 1/3, others reduce the future total by 1/3 to reflect accelerated payment
- ▶ Important for specialist to assess lifespan to reduce multiplier

SPECIAL DAMAGES

- ▶ Must be strictly proved
 - ▶ Out of pocket expenses and disbursements
 - ▶ Pre-trial
 - ▶ In certain circumstances awarded on oral evidence even if no documents produced
- ▶ Heads which can be claimed
 - ▶ Cost of care
 - ▶ Costs of consumables (eg. Diapers)
 - ▶ Hospital and medical bills
 - ▶ Costs of medication
 - ▶ Costs of special food
 - ▶ Cost of travelling

JOINT AND SEVERAL LIABILITY

- ▶ Hospital and doctors jointly sued
 - ▶ Vicarious liability for negligence of employees
 - ▶ Direct liability
 - ▶ Non-delegable duty
 - ▶ No safe system

JOINT AND SEVERAL LIABILITY

- ▶ Doctors, nurses, etc
 - ▶ For public hospitals each tortfeasor must be sued (S.6 Government Proceedings Act 1956)
 - ▶ Vicarious liability (test laid out in **Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal** [2018] 1 MLJ 685)
 - ▶ Usually applies for employer, employee situation

Test laid out in Dr Kok Choong Seng

“Based on recent decisions of the courts it is now apparent that the boundaries of vicarious liability had been expanded to **include tortfeasors who are not employees of the defendant but stand in a relationship which is sufficiently akin to employment but not to include those who were clearly independent contractors**. In determining whether there was a relationship of employment or akin to employment between the hospital and the doctor, **it was necessary to consider the practising agreement signed between the hospital and the doctor, which provided**, among others, that the doctor was an independent contractor and not a servant of the hospital.”

NON-DELEGABLE DUTY

- ▶ For consultants and others not employed under contract of service
- ▶ Independent contractors
- ▶ Hospitals still liable under the doctrine of non-delegable duty
- ▶ Test laid out in Federal Court cases of :
 1. **Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal** [2018] 1 MLJ 685
 2. **Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal** [2018] 3 MLJ 281

TEST FOR NON-DELEGABLE DUTY IN Dr Kok Choong Seng

- ▶ “The nature of a non-delegable duty was, in essence, **a positive duty to ensure that reasonable care was taken**. However, non-delegable duties represented a ‘markedly more onerous obligation’ than just a positive duty with the defendant taken to have assumed responsibility for the exercise of due care by anyone to whom performance was delegated.”

RANGE OF AWARD OF DAMAGES

- ▶ Raising due to detailed expert reports setting out disabilities
- ▶ Larger quantum for cerebral palsy and brain damage cases which range from RM 2,000,000.00 to RM 6,000,000.00
- ▶ Large awards for quadriplegia and paraplegia
- ▶ Infant claims and young adults awards higher due to large multiplier for future
- ▶ Special damages component raises the amount payable to patient
- ▶ Probably prudent to engage adjuster to investigate if patients claims are justified



THANK YOU!!

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