

IMPLICATIONS OF APOLOGY AND ROLE OF APOLOGY LAWS

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CHANGING TRENDS IN HEALTHCARE PRACTICE

Rapid Growth of Technology

- **Advent of Internet and Social Networks**
- **Patients become more literate and knowledgeable**
- **Very questioning**

Commercialisation & Privatisation

- **When they pay for services – at times ‘Over Optimistic’ and ‘Perfectionist’**
- **Healthcare Services requires Excellence – Higher Accountability**

IMPLICATIONS

Higher Expectations

- Healthcare Services are expected to be Excellent
- Consumers are no longer tolerant to Substandard Services

Litigation Prone Society

- Demanding for Higher Accountability
- Demanding Justice through the Court Law
- **'The Name, Blame and Shame'** Culture

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**

FEDERAL COURT JUDGMENTS –

crucial in the
development on
the law of medical
negligence in
Malaysia

1

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593 (*Position of the Bolam principle for Duty to warn*)

2

Zulhasminar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438 (*Standard of care for duty to diagnose and treat*)

3

Dr Hari Krishnan & Anor v Meqat Noor Ishak bin Meqat Ibrahim & Anor and another appeal [2018] 3 MLJ 281 (*Aggravated Damages*)

4

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685 (*Non-Delegable Duty of Care*)

**CURRENT
TREND**

**INCREASING
NUMBER OF
MEDICAL
NEGLIGENCE
CASES**

High Amount of Damages / Monetary Compensation

Compensation for Medical Negligence Claims
...not just limited to Compensatory Damages
under the rule of *Restitutio in integrum* –

Special and General Damages

But also presently include...

AGGRAVATED DAMAGES

3 hospitals, 8 doctors face RM45mil suit over wrong cancer diagnosis

Predeep Nambiar - April 7, 2021 10:38 AM

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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.

Cases are constantly Publicised in Social Media

HOME / MALAYSIA

OPINION SPORTS TECH/GADGETS DRIVE VIDEOS

Report: Family of elderly Covid-19 patient who died on Kedah hospital floor lodge police report to ascertain cause of death

Tuesday, 31 Aug 2021 07:30 PM MYT
BY YISWAREE PALANSAMY



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IN MALAYSIA

Husband awarded over RM735k for wife's death by negligence at Hospital KL

NATION

Monday, 06 Aug 2018

2:53 PM MYT

By MAIZATUL NAZLINA



KUALA LUMPUR: The husband of the former assistant director of Hospital Kuala Lumpur (HKL) has been awarded RM735,596 in damages for the death by negligence of his wife four years ago - at HKL itself.

Datuk Stanley Isaacs, the former head of prosecution at the Attorney-General's Chambers, was awarded RM500,000 in aggravated damages and RM140,000 in general

Why Patients Sue?

They want:

- ☐ JUSTICE?
- ☐ COMPENSATION?
- ☐ TO NAME, SHAME AND BLAME?
- ☐ FAILURE TO GET NON-LEGAL
REMEDIES – EXPLANATION,
APOLOGY...?

Action for Victims of Medical Accident (AVMA)

- “...what they want is ‘satisfaction’...what that means is a full explanation of what went wrong and if appropriate, **an apology for what actually happened....** there are times when financial compensation is also necessary and that will form part of the ‘satisfaction’ that the patient wants.”

The Role of Apology Laws in Medical Malpractice

Nina E. Ross, MD, and William J. Newman, MD

Apologies are an integral part of human communication and can repair damaged relationships. Within the medical system, apologies remain controversial. Physicians often wish to apologize to patients harmed by medical errors, but they may not disclose errors to patients and their families because of the concern that disclosing errors could increase the likelihood of a malpractice claim. Yet physicians who apologize to patients may instead mitigate many of the communication problems known to prompt patients to pursue legal action. This idea has prompted many state governments to pass apology laws, legislation that aims to reduce rates of malpractice by encouraging physicians to apologize. These laws have not yet had their intended effect of reduced malpractice rates, likely because most apology laws protect expressions of regret but do not protect error disclosure. Apology laws therefore do not facilitate the type of communication that would improve physician transparency and overall patient satisfaction.

J Am Acad Psychiatry Law 49(3) online, 2021. DOI:10.29158/JAAPL.200107-20

Key words: malpractice; negligence; apology; medical error; disclosure

An apology can have tremendous therapeutic potential for both parties. Apologies can reduce anger, promote healing, and repair damaged relationships.¹⁻³ To have positive effects, an apology must be given well. An effective apology generally contains four elements: the acknowledgment of harm, evidence of

two parties and how motivated they are to reconcile the relationship.

A bad apology is often worse than no apology at all.⁵ Apologies perceived to be inadequate can be met with anger, hurt, and criticism.^{4,5} Ineffective apologies are so common that the word nonapology has

The Importance of Apology

*"an apology has the potential to **help people who have suffered serious emotional harm** through the wrongdoing of others in ways that monetary damages alone cannot"*

Definition of Apology

- Literally, apology means **“saying you are sorry”** .
- In a more specific context, **apology refers to “an acknowledgment of responsibility for an offense coupled with an expression of remorse”**.
- In a healthcare setting, when the services provided result in negative outcomes such as death and personal injuries, it is rather common **for community’s expectation to include the desire for explanation of what had actually happened and consoling expressions from the healthcare providers.**

Role of Apology very significant in Open Disclosure Process

The process of “open discussion of incidents that result in harm to a patient while receiving health care”

(Australian Commission on Safety and Quality in Health Care, 2013)

Elements of Open Disclosure

factual explanation of what happened;

discussion of the potential consequences of the adverse event;

opportunity for the patient, their family and carers to relate their experience;

apology or expression of regret; and

an explanation of the steps being taken to manage the adverse event and prevent recurrence

Carol B. Liebman and Chris Stern Hyman Liebman. (2004). A Mediation Skills Model To Manage Disclosure Of Errors And Adverse Events To Patients. Health Affairs. 23(4) : 22-32

“...a sincere and timely apology can have a powerful impact on the patient as well as the affected family and this may serve as a critical step in defusing anger and rebuilding trust”

Beverly Engel. (2002). The Power of Apology - Healing
Steps to Transform all your Relationships. Canada:
John Wiley & Sons Inc

“Apology as an important factor in creating and
maintaining healthy relationships as the
power of apology can **disarm the anger** of
others, **prevent further misunderstandings,**
soothe wounds, rehabilitate an individual,
resolve conflicts, and restore professional
harmony”

Characteristics of Apology

- Four salient characteristics of an apology:
- (i) the **acknowledgement of the offense** which includes the identity of the offender(s), appropriate details of the offense and validation that the behaviour was unacceptable;
- (ii) the **explanation for committing the offense** as it may mitigate or aggravate the offense;
- **(iii) the expression of remorse, shame, forbearance and humility and**
- (iv) **reparation** which can range from an early scheduling of the next appointment to cancelling the bill to a financial settlement including the fact that the medical practitioner and healthcare facility are committed to correct faulty procedures and avoid similar offenses.

Aaron Lazare. (2006). Apology in Medical Practice An Emerging Clinical Skill. Journal of American Medical Association . 296(11) : 1401- 1404

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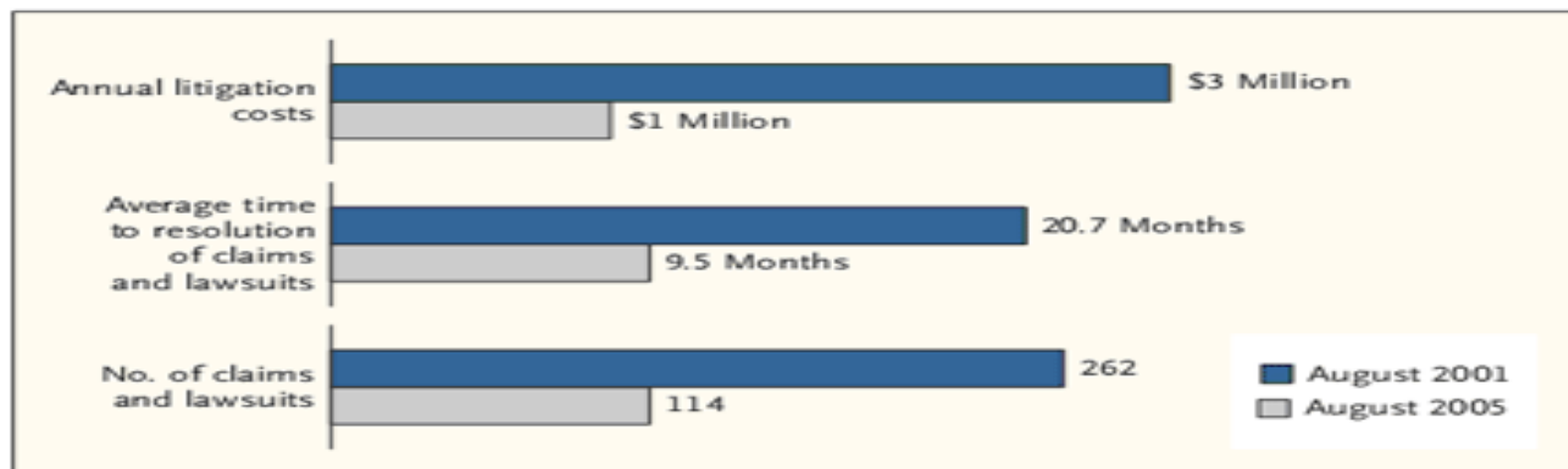
Malpractice suits drop when doctors admit mistakes, apologize

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Results of Medical Error Disclosure Program at the University of Michigan Health System.

THE DRAWBACKS OF MAKING APOLOGIES

Is Apology as Admission of Guilt?

Is Apologising an Act of Suicide?

Legal Ramifications of Apology

Norizan bt Abd Rahman v Dr Arthur Samuel [2013] - the court held that the apology made by the medical practitioner to the patient reflected the guilt which the defendant failed to deny, thereby, establishing negligence on the part of the defendant

Gurmit Kaur A/P Jaswant Singh v Tunq Shin Hospital & Anor [2013] - Rosilah Yop JC stated that; “[in] my view, when the second defendant had apologized to the plaintiff, proves that the second defendant had admitted to a mistake he had done”.

TYPES OF APOLOGY

1. Full Apology
2. Partial Apology

FULL APOLOGY

“Full apology” which includes statement or an expression of heartfelt regret and remorse for what has happened, sympathy for victim and acknowledgement of the wrongdoing committed .
The most important element in “full apology” is acknowledgement of fault and the acceptance of responsibility on the part of the wrongdoer .

PARTIAL APOLOGY

Partial apology is only concern with expression or **statements of sympathy, commiseration, condolences and compassion alone without any expression of admission or taking responsibility.**

This type of apology **has lesser legal consequences compared to full apology** because the statements are only mere expressions of sorrow without involving any statements signifying responsibility, admissions of liability or accountability for the wrong committed.

THE NEED FOR APOLOGY LEGISLATIONS

Several countries enacting 'apology laws' that mandate open disclosure of medical errors but at the same time, **shielding those who apologise from legal liability**

Development of Apology Laws in Selected Jurisdiction

United States of America - Australia - Canada

United States of America

Background

The initiative to legislate ‘apology’ can be traced back to the 1980s from the state legislature of Massachusetts in 1986 **to create ‘safe harbour’ provisions** to allow a person to apologise to the injured party in a tortious claim.

Massachusetts General Laws ch.
233 in sec. 23D



*“statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, death of person involved in an accident and made to such person or to the family of such person **shall be inadmissible**”*

'Partial Apology Law' introduced in Texas

- Introduced improved version of Massachusetts Law
- The **ambiguity** as to the position of fault **was made clear**.
- The legislature in Texas **adopted 'partial apology law'**
- This model was adopted in 35 other states in the US.

Texas Civ Prac and Rem Code Ann, sec. 18.061



*“a **communication**, including an excited utterance...which also includes a statement or statements concerning negligence or culpable conduct pertaining to an accident or event, is admissible to prove liability”*

'Full Apology Law' introduced in Oregon & Colorado

- Introduced '**Full Apology Law**' limited only to medical negligence cases.
- It was **criticized** as it only granted blanket immunity to medical practitioners and not to other civil suits.
- The law was later **extended for all civil suits** as in Connecticut



Colorado Rev Stat 13-25-135

“any and all statements, affirmations, gestures, or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion, or a general sense of benevolence which are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim, or a representative of the alleged victim.... shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest.”

Connecticut General Statute Ch 899 tit 52 (2001)

“in any civil action brought by an alleged victim of an unanticipated outcome of medical care, or in any arbitration proceeding related to such civil action, any and **all statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion or a general sense of benevolence** that are made by a health care provider or an employee of a health care provider to the alleged victim, a relative of the alleged victim or a representative of the alleged victim and that relate to the discomfort, pain, suffering, injury or death of the alleged victim as a result of the unanticipated outcome of medical care **shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest the law provides that in any civil action which results in personal injury or wrongful death**, “the use of an expression of apology, whether oral or written, by such party shall not be admissible in evidence to establish culpability or state of mind”.

Hawaii Rev Stat 626-1 (2007)

“evidence of written or oral apologies issued by or on behalf of an individual, corporation, or government entity, whether made before or during legal or administrative proceedings relating to the subject matter of the apology, is not admissible to prove liability....evidence of benevolent gestures made in connection with such apologies is likewise not admissible”.

Background

Australia

- Law reform in Australia was initiated by the government due to the belief that **litigation rates concerning medical practice** has been **significantly increasing** and coupled with **a crisis in medical insurance.**
- In resolving these issues, a Legal Process Reform Group with the support from Australian Health Ministers' Advisory Council **recommended for a legislation** that provides an **apology “made as part of an open disclosure process to be inadmissible in an action for medical negligence”**
- **The application of apology law in Australia is rather unique because the types of apology vary in different states throughout Australia**

Full Apology Law

- New South Wales
- Australian Capital Territory
- Queensland

Partial Apology Law

- Victoria
- Northern Territory
- South Australia
- Tasmania
- Western Australia

Part 10 of the Civil Liability Act 2002 (NSW)

“Apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter”

- The workings of 'full apology law' requires three main elements concerning the position and consequence of such apology;

Declaratory Element

- **the law declares that apology is not an admission** of fault or liability
- Section 69(1)(a) Of Civil Liability Act 2002 (NSW)

Relevance Element

- **in determining a fault or liability on the part of the defendant, the law exclude apology from being taken into account as a relevant fact** in determining fault/liability - Section 69(1)(b) of Civil Liability Act 2002 (NSW)

Procedura l Element

- **from the law of evidence perspective, the apology is made inadmissible as evidence** and therefore, cannot be used in court against the person who gave it - Section 69(2) Of Civil Liability Act 2002 (NSW)

Background

Canada

- The Bill for **apology law in British Colombia was drafted** by **referring to** the **New South Wales Civil Liability Act (2002)** as the basic foundation.
- The legislation also provides statutory protection to **prevents the insurance contract from becoming void** if such apology was made.
- The protection given by the Canadian apology law is **available to all civil claims except** in the province of **Prince of Edward Island** whereby the protection for apology is exclusive for healthcare related cases only.
- Currently, most states in Canada adopted the **Uniform Apology Act 2006**.

Section 1, Chapter 19 of the Apology Act 2006

“apology means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate. “

Uniform Apology Act (2006) Section 2

Effect of Apology on Liability

2(1) An apology made by or on behalf of a person in connection with any matter;

- (a) **does not constitute an express or implied admission of fault or liability** by the person in connection with that matter,
- (b) does not constitute [a confirmation of a cause of action or acknowledgment of a claim] in relation to that matter for the purposes of [appropriate section of the applicable limitation statute],
- (c) **does not**, despite any wording to the contrary in any **contract of insurance** and despite any other enactment or law, **void, impair or otherwise affect any insurance coverage that is available**, or that would, but for the apology, be available, to the person in connection with that matter, and;
- (d) **may not be taken into account in any determination of fault or liability** in connection with that matter.

Can apology legislations reduce medical negligence claims?

Although there is yet to be any empirical evidence showing the efficacy of apologies in reducing subsequent legal suits in Malaysia, but there have been studies conducted in several jurisdictions to show that **the effectiveness of 'apologies and disclosure of errors' in reducing the number and severity of medical practitioners' liability claims, defusing the spur of litigation and ultimately, preserving the sanctity of the relationship between the medical practitioner and the patient.**

Effectiveness of Apology Programs

- In **Australia**, a study on medical complaints cases showed that where **97% of complaints had resulted in an explanation and/or apology, not one of the cases had proceeded to litigation.**
- ‘Apology programs’ conducted at individual hospitals in Pennsylvania and Tennessee had also found that **effective apologies and disclosure of mistakes can dramatically reduce malpractice payments.**
- In addition, a study conducted at the University of Michigan Health Service reported that their **per case payments decreased by 47% and the settlement time dropped from 20 months to 6 months** since the introduction of their 2001 apology and disclosure program.

In tandem with patient safety goal...

One of the main Patient Safety Goals, promoted by the Malaysian Ministry of Health is “to stimulate healthcare organisations to improve key patient safety areas as well as patient safety in general.” The first Patient Safety Goal

Amongst the key patient safety areas that need to be improved is ensuring that “**patient complaints and other grievances are dealt with in an effective manner.**” This is considered to be in tandem with the move towards open disclosure’ practices that are considered to be more ethical

To minimise Risks of being sued....Healthcare Providers 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.

Good complaint machineries...

- Medical negligence claims can be defuse at an early stage if the patients received the appropriate information.
- To some patients, monetary compensation alone may not be the answer to their grievances.
- Most of the time, they want to know what actually happened, why it happened and be assured that it will not happen again in the future.

Why do patients complain?

Discrepancy between the expectation of the patient and the service received or outcome of treatment usually forms the basis of a complaint.

Patient expectations are formed by their past experiences, word of mouth and advertising.

When a patient arrives at the hospital, they already have some perceptions about the type, quantity and quality of care they should receive. If the care and treatment do not meet their expectations, a complaint may be forthcoming.

Complaints and litigation

- Complaints that are not dealt with properly often triggers a legal action.
- In many cases, complaints made by patients genuinely indicate that something is amiss and should be resolved as soon as possible.
- *Kow Nan Seng v Nagamah* [1982]
- *Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor* [2006]
- *Hong Chuan Lay v Dr Eddie Soo Fook Mun* [2006]

**Tan
Eng
Siew &
Anor v
Dr Jagjit
Singh
Sidhu &
Anor
(2006)**

Defendant doctor should have been able to diagnose the pain complained of by the patient after the second surgery was caused by the bone cement and proceed to removing it as soon as possible.

Instead, when the patient complained of pain in the femur and numbness, the defendant doctor made notes and prescribed relevant antibiotics.

Continue...

- Despite more complains by the patient of a deep thigh pain and that her wound was not healing, the defendant doctor continued to prescribe antibiotics. The delayed reaction by the defendant doctor in diagnosing that the bone cement was the caused of the infection amounted to negligence.

**Stanley
Isaacs v The
Government
of Malaysia
[2018] MLJU
1672**

- Amount of Aggravated Damages awarded – RM500,000.00
- Reasons for the award –
 - Failure on the part of the defendants to follow up on the blood investigations and this led to a downhill spiral in the deceased's condition.
 - Failing to ensure that an accurate and speedy diagnosis of the deceased's ailment.
 - The negligent act of administering tramadol to the deceased despite her history of intolerance to the drug caused the deceased to be disoriented and nauseous and to suffer prolonged retching on the night of her admission and the early hours of the next day.
 - Words and conduct during the doctor's meeting with the deceased's family members following her death were disturbing, appalling and an insult to his profession and to the plaintiff and his family. It was painfully cruel for the plaintiff and his family members who attended the meeting to hear such utterances from a professional medical doctor.

**Mariesosela
a/p Anthony
(suing
through her
husband...)
v Kerajaan
Malaysia &
Ors [2021]**

- The plaintiff fell from the bed after being transferred from the ICU to ordinary ward and thereafter the plaintiff was diagnosed to suffer from severe cortical dysfunction and hypoxic ischemic encephalopathy
- Defendants are in **BREACH OF DUTY** due to the following –
 - - Although the directive for the transfer of the plaintiff was proper but the time for transfer from ICU to normal ward was not proper
 - Providing the plaintiff with a bed without a handrailing was a breach of duty of care
 - A senior medical personnel should have examined the plaintiff after her fall to see whether she is in need of further medical attention.

**Mariesosela
a/p Anthony
(suing
through her
husband...)
v Kerajaan
Malaysia &
Ors [2021]**

- Amount awarded for Aggravated Damages – RM200,000
- In this case there were severe instances of dereliction of duty on the part of the defendants which caused an irreparable damage to the plaintiff

Strengthening patients' voices




- Consumer complaints are a unique source of information for health care services on why adverse events occur and how to prevent them.
- As well as reducing future harm to patients, better management of complaints should restore trust and reduce the risk of litigation, through open communication and a commitment to learn from the problem and prevent its recurrence.

Important Quality Assurance Tool...

- Complaints are potentially useful quality assurance tools and can identify remediable system flaws as they provide opportunities for self-examination and improvement.
- Healthcare providers should understand why patients complain and be able to respond appropriately. It is also important that healthcare providers inform patients that they have several avenues for voicing concerns and try to resolve the problem quickly and effectively, without a need to resort to litigation.

Turning patients' voices into opportunities

-  “There is a recognition that complaints have a major role to play in the improvement of health care; they are the jewels to be treasured as they show nothing else except the shortfalls of the system.” - *Arnold Simanowitz*.
- Understanding of complaints and providing effective complaints mechanisms that incorporate features such as **responsiveness, accessibility, impartiality, simplicity, speed and accountability** will work as an alternative to, or way of, avoiding civil litigation.

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)

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.

Eg - Hospitals under the doctrine has the following duties:

- 1. 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)

CURRENT TREND – VICARIOUS LIABILITY & NON-DELEGABLE DUTY OF CARE

- The Federal Court in the case of **Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685** has held that non-delegable duty of care is applicable in Malaysia.
- Therefore, owners and managers of healthcare institutions as providers of healthcare services will have a direct duty in law to ensure the safety of their patients. Such a duty is non-delegable because the owners and managers of healthcare institutions cannot escape their legal liability by delegating, not the existence, but the performance, of such duty to others, including independent contractors. The owner and managers also have a direct duty to ensure that the appropriate systems are in place for the safety of their patients. Thus, as healthcare services are integral to direct patient care and are important aspects of health and safety, healthcare providers must be responsible for these services as well as ensuring that these services are provided in a safe and effective manner. Consequently, healthcare providers must develop comprehensive policies and be proactive to oversee implementation of patient safety initiatives so that all reasonably practicable steps are taken to reduce risks within the healthcare institutions.

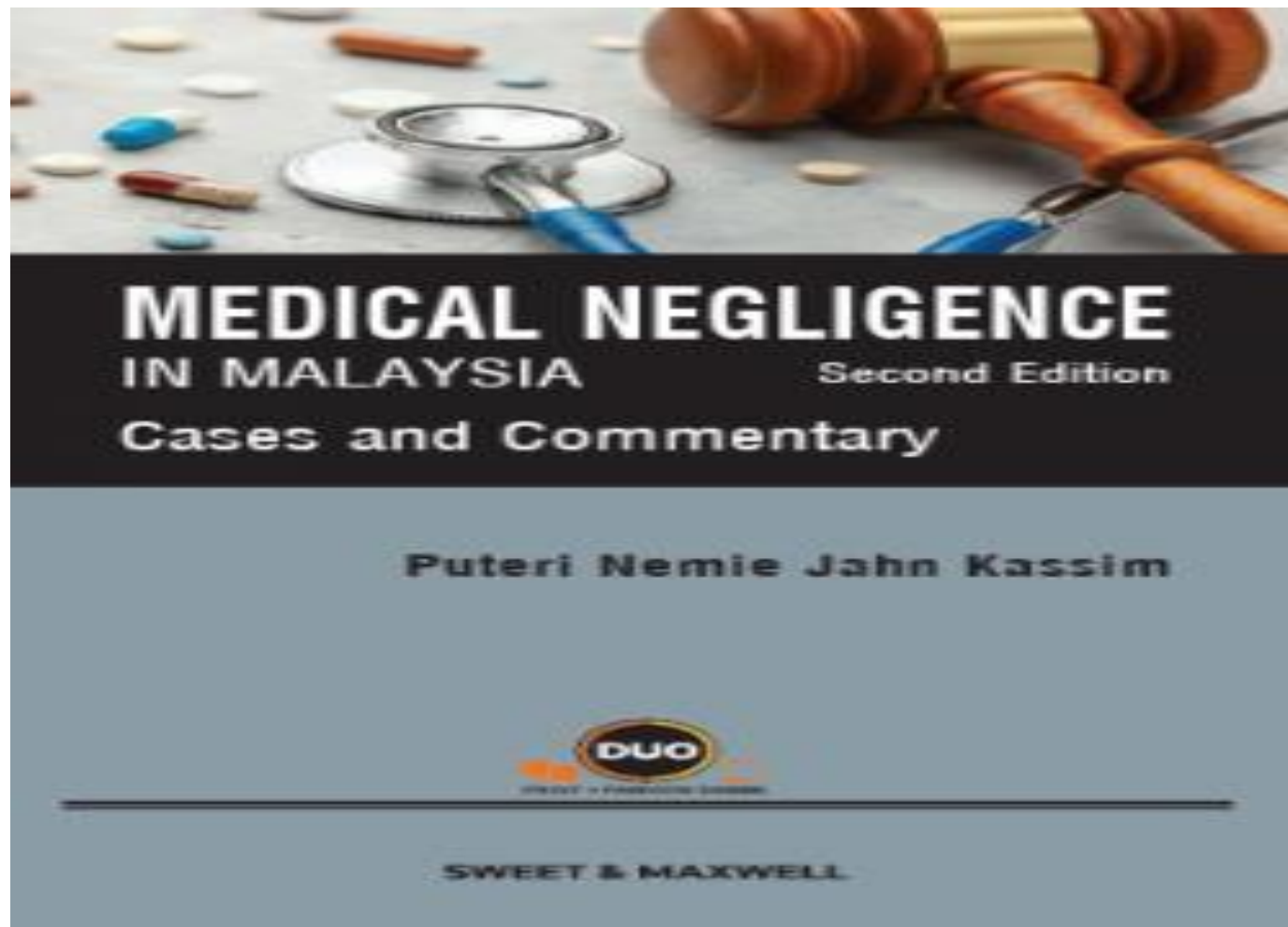
ENACTING APOLOGY LEGISLATION IN MALAYSIA

Problems & Prospects

Conclusion

- ❑ Although apology cannot be a substitute for monetary compensation, it is nevertheless, a powerful tool that can lead to the closure of an ongoing dispute and facilitate the dispute resolution process for the benefit of relevant parties.
- ❑ But in encouraging medical practitioners to apologize, a clear legal framework need to be established to protect the apologies made in certain circumstances for unintentional wrongdoings.
- ❑ The enactment of apology legislation for the protection of apologies in the legal system will offer various benefits to the parties in dispute and encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of reducing as well as preventing litigation.

Thank you...



Dr Puteri Nemie Jahn Kassim IIUM