THE CLINICAL TRIAL: HARMONISING WITH DEVELOPING MODERN LAW

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INTRODUCTION

- Undeniably, clinical research plays a vital role in the continued development of medical science.
- Without good research, existing techniques and procedures cannot easily be improved and new ones discovered.
- However, any research involving human subjects tend to trigger legal issues, unlike non-human subjects due to their inability to sue.

Clinical research aims to ascertain the efficacy and safety of medicines and interventions used in clinical practice…

….the *perceived advantage has to be weighed against potential detriments….*

CLINICAL RESEARCH - RANGE OF ACTIVITIES…

- 1. Clinical Drug Trials
- 2. Non-interventional studies (based on questionnaires and interviews
- 3. Epidemiological or population-based studies drawn from clinical data and records.
- **For an experiment to be classified as therapeutic – some form of benefit to the participant is required.**

Section 1.15 of the Malaysian Guideline for Good Clinical Practice....clinical trial is defined as "any investigation in human subjects intended to discover or verify the clinical pharmacological/ pharmaco dynamic effects of an investigational product(s) and/or to identify any adverse reactions to an investigational product (s) and/ to study absorption, distribution, metabolism, and excretion of an investigational product with the object of ascertaining its safety and /efficacy.

THE CLINICAL TRIAL.....WHAT IS IT??

CLINICAL TRIAL – THE PHASES

- Initial stages are carried on **animals** necessary to establish drug's efficacy and baseline safety profile…once preliminary investigations complete, human trials begin…
- **Testing the drug in healthy volunteers or even patients..to test the way which the drugs are absorbed and excreted by the body as well as side effects…no therapeutic value but considered essential.**
- Involves controlled testing on small group of patients with condition under study…receive trial medication to evaluate the effectiveness, side effects and risks.
- Involves controlled and uncontrolled trials in larger groups of subjects who take the drug under medical supervision and for extended periods of time..to gain deeper understanding of the medication effectiveness and safety.

Ethical standards play an influential role in the development of law as "a legal duty is usually founded on a moral duty but a moral duty is not necessarily a legal duty.....

THE ETHICAL ISSUES....

What makes any experiment *ethical*...

- Respects for persons, beneficence and justice
- Risks of harm minimised
- Benefits to the relevant persons
- Value of the output should enhance health and knowledge
- Trials must be reviewed, approved, amended or terminated
- Research should be scientifically rigorous to ensure quality and validity
- Selection of research subjects should be fair

Clinical research including clinical trials needs to be undertaken within a robust governance framework that encompasses accountability, openness, honesty, values and respect for those taking part.

BEFORE EMBARKING ON ANY TYPE OF RESEARCH….

1. **KNOW THE RELEVANT ETHICAL CODES, GUIDELINES AND PROTOCOLS**
2. **KNOW THE LAW….. THE DUTIES AND OBLIGATIONS**

INTERNATIONAL GUIDELINES

NUREMBERG CODE 1948

- Introduced as a result of atrocities inflicted on prisoners in concentration camps.
- Served a foundation for ethical clinical research
- Developed focusing on rights of research participants and responsibilities of investigators

- Adopted by World Medical Association in 1964
- Provides the ethical principles that govern medical research
- It is the duty of the physician in medical research to protect the life, health, privacy and dignity of the human subjects.

DECLARATION OF HELSINKI

Examples…

- **Paragraph 17 – Physicians should abstain from engaging in research projects involving human subjects unless they are confident that the risks involved have been adequately assessed and satisfactorily managed.**

- **Paragraph 18 – Medical Research involving human subjects should only be conducted if the importance of the objective outweighs the inherent risks and burdens to the subjects.**

- Guidance from CIOMS has been influential.
- It is an international, not-for-profit organisation established jointly by WHO and UNESCO.
- Developed specific guidelines for research on human subjects done by developing nations according to their socio-economic circumstances and laws and regulations within the communities.

THE COUNCIL FOR INTERNATIONAL ORGANISATIONS OF MEDICAL SCIENCES (CIOMS)

NATIONAL GUIDELINES

- *To ensure ethical and scientific quality for designing, conducting, recording and reporting clinical trials involving human subjects*
- *Requires are trials to be conducted in accordance with the Declaration of Helsinki*

MALAYSIAN GUIDELINES FOR GOOD CLINICAL PRACTICE (GCP)

GOOD CLINICAL PRACTICE

Section 1.28 – A standard for the design, conduct, performance , monitoring auditing, recording, analysis and reporting of clinical trials that provides assurance that the data and reported results are credible and accurate, and that the rights integrity, and confidentiality of trial subjects are protected.

More provisions…

- Section 2.6 – Every clinical trial conducted must be scientifically acceptable and the **protocol is clearly described.**
- Section 2.7 – The medical care and decisions made for or on behalf of subject should always be under the responsible care of a qualified physician when appropriate.
- Section 2.9 – Prior to clinical trial participation, a valid and **freely given informed consent** should be obtained from every subject
- Section 2.10 – All information of the clinical trial should be **recorded, handled and stored** in a way that allows its accurate reporting, interpretation and verification
- Section 2.11 – The **confidentiality of records** must always be guaranteed and protected, respecting the **privacy** and confidentiality rules in line with the applicable regulatory requirements.

Institutional Review Board (IRB)/ Independent Ethics Committee(IEC)

- **Stated under section 3.1.1 – this body is to protect the rights, safety and well-being of all trial subjects by giving special attention to trials that may include vulnerable subjects.**
- **Must review trial within a reasonable time and provide opinion/ approval**
- **To check on the degree of risks to human subjects**
- **Should determine the proposed protocol and procedures in emergency situations.**

Informed Consent under the Guidelines…

- Before a person participates in a trial, the written informed consent form should be signed by research subject or legal representative (Section 4.8.7)
- Information to be provided include (i) the Purpose of the trial (ii) The trial involves research (iii) The trial procedures (iv) The Responsibilities (iv) Aspects of the trial that are experimental (v) The Reasonably forseeable risks (vi) Potential benefits vs risks (vii) The trial is voluntary (viii) Results will be confidential……etc..

- …released by the National Committee for Clinical Research authorising the Medical Review and Ethics Committee of the Ministry of Health to observe clinical research on human subjects in Malaysia.
- Subjects should be exposed to minimal risks….

GUIDELINES FOR ETHICAL REVIEW OF RESEARCH INVOLVING HUMAN SUBJECTS

THE IMPORTANCE OF LAW

WHAT IS LAW?

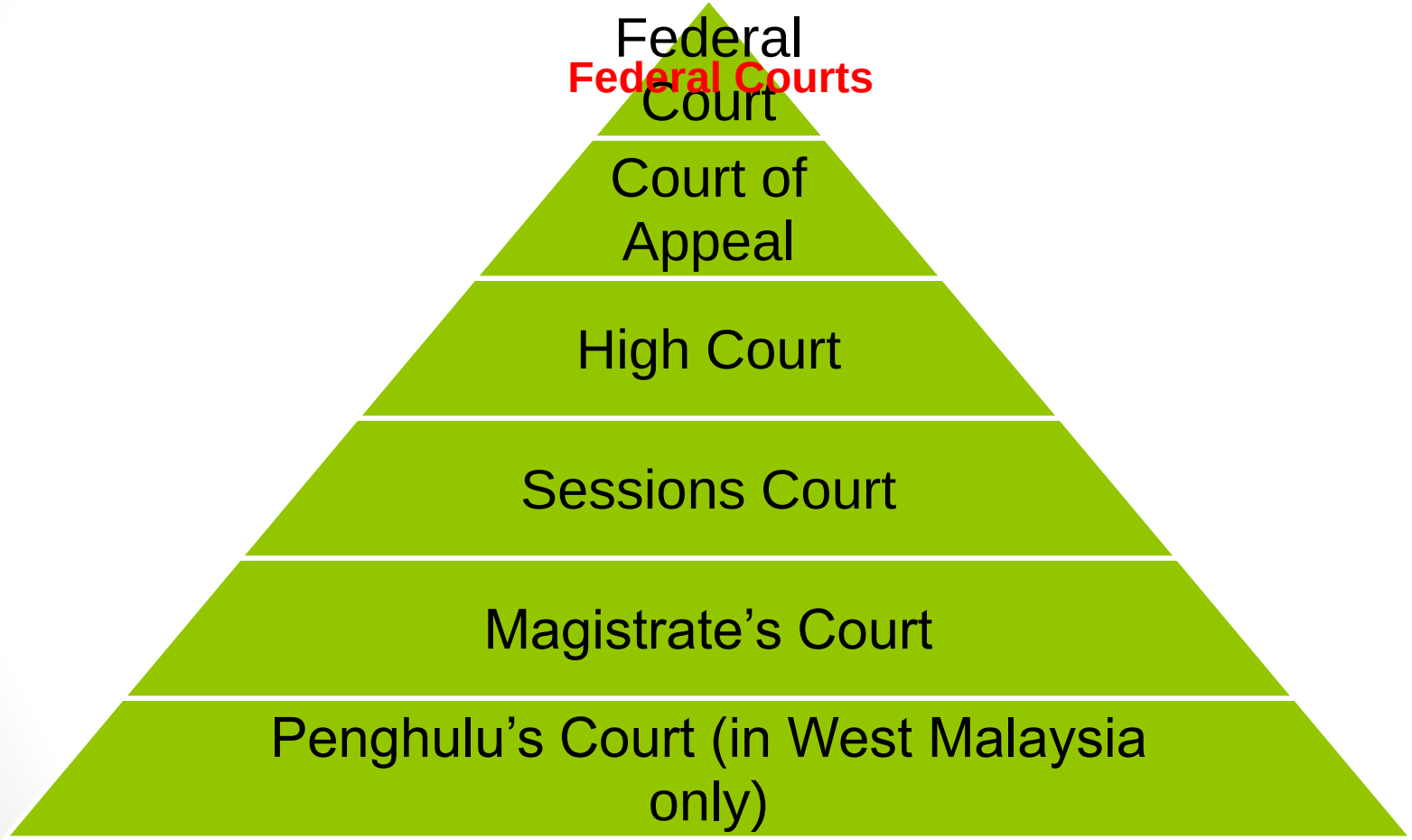
The system of rules that a particular country or community recognizes as regulating the actions of its members…..

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……

The Hierarchy of Courts



Jurisdiction..*on the amount of claim*

- **Magistrates Court** has jurisdiction to try actions where amount of dispute does not exceed RM25,000.00
- **Sessions Court** – amount of dispute does not exceed RM250,000.00
- **High Court** – amount of dispute can be more than RM250,000.00

LEGAL ISSUES

- The Standard of Care in Medical Negligence
- The Need to get Legally Valid Consent
- Right of Privacy and Duty of Confidentiality
- Tampering with Data

THE STANDARD OF CARE IN MEDICAL NEGLIGENCE

Principal Elements in 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.**

The Required Standard of Care

- How to assess breach of duty?
- **Depends on whether a reasonable medical professional in that particular area of expertise would have acted the same way.**
- **The Bolam principle (1957)** - you are not negligent if acted in accordance with a practice accepted as proper by a body of medical men who possess similar skills. It is immaterial that there exists another body of opinion that would not have acted differently.
- The case of Bolitho v Hackney HA (1997) – the court will choose which opinion reaches to a logical analysis.

You must take the victim as he finds him…..

Kennedy J: "if a man is negligently run over or injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or unusually weak heart." (Dulieu v White & Sons [1901] }

THE EGG-SHELL SKULL RULE

In cases of gross negligence….

- **The availability of the doctrine of *res ipsa loquitor* makes it easier to establish negligence.**
- ***Res ipsa loquitor* (the thing speak for itself) – the fact of the accident by itself sufficient to establish negligence.**
- **Requirements:**
- **1. The Defendant must be in control of the thing which caused the injury to the plaintiff.**
- **2. The accident must be of such nature that it would not have occurred in the ordinary course of events.**
- **3. There must be no explanation for the accident.**

The Importance of Avoiding Medico-Legal Claims

- **Why?**
- **Patient assaults your credibility, insinuating faulty judgment and treatment.**
- **Detrimental effect on your reputation and practice even if the matter does not go to trial , even if at the end the found not guilty.**
- **Medical negligence longest to try compared to other personal injury claims.**

NO-FAULT COMPENSATION SCHEMES (NFCS)

- In several countries such as New Zealand, Sweden, Denmark, France, Belgium, NFCS are used to compensate victims of medical injuries resulting from clinical research.
- When an injury occur, the victim need not prove the essential elements of medical negligence as a “compensation fund” disburses some amount of money to compensate these victims, regardless of proving fault.

THE NEED TO OBTAIN LEGALLY VALID CONSENT

1. **Consent must be real or informed in nature and not "in a form" only – patient must be given "sufficient information" on the proposed treatment.**
2. **Consent given thru own free will – no coercion, duress, undue influence.**
3. **Patient must be legally competent – reach the age of majority, of sound mind, has sufficient understanding of the treatment proposed**

REQUIREMENTS OF A LEGALLY VALID CONSENT

The Standard of Care for Duty to warn/disclose risks

- **Malaysia – adopts position in Australia**
- **The reasonable prudent patient test - would reasonable prudent patient with the patient's characteristics find the risk "material"**

Factors to be considered

1. The likelihood and gravity of risks
2. The desire of patient for information
3. The physical and mental health of the patient
4. The need for treatment and available alternatives
5. Medical opinion at that time
6. The nature of treatment – routine or complex

Incompetent Persons

- Persons who are **unable** to give valid consent:
- a. Incompetent patients – those who are temporarily unconscious, permanently unconscious through disease, trauma, injury, mental handicap.
- b. Children under the age of majority need consent of their parents before medical treatment can proceed.
- **Several provisions under the Mental Health Act 2001 and Child Act 2001…may be relevant**

THE RIGHT OF PRIVACY AND THE DUTY OF CONFIDENTIALITY

The Duty of Confidentiality

- **is a legal and ethical duty…**
- **Code of Professional Conduct – Malaysian Medical Council**
- **1.2.4. It is the duty of the practitioner consulted to avoid any word or action which might disturb the confidence of the patient in the attending practitioner. Similarly, the attending practitioner should carefully avoid any remark or suggestion which would seem to disparage the skill or judgment of the practitioner consulted.**
- **2.22 Abuse of Confidence – A practitioner may not improperly disclose information which he obtains in confidence from or about a patient**

Justifications for breaching confidentiality

- The duty is not absolute the law recognised several justifications for breaching confidentiality:
- Disclosure with patient's consent elements of legally valid consent to be satisfied express or implied consent
- Disclosure allowed by statute e.g. Prevention and Control Diseases Act 1988, Poisons Act 1952, Criminal Procedure Code (Chapter 6)
- Disclosure in the public interest

- *Guidelines:*
- **It is probable that a real and serious risk of danger to the public must be shown before the public interest exception is made out. The public interest exception can only justify disclosure so long as the threat persists.**
- **Disclosure must be to a person with a legitimate interest in receiving the information.**
- **Even where the public interest requires disclosure, it is necessary to confine it to the extent strictly …**

  (W v Egdell (1990)).

THE PROTECTIVE PRIVILEGE ENDS WHEN PUBLIC PERIL BEGINS

THE PERSONAL DATA PROTECTION ACT 2010

- **The Act regulate the processing of personal data of individuals involved in commercial transactions by data users so as to provide protection to the individual's personal data…thereby safeguarding the interests of such individual.**
- **A data subject has various rights to his personal data kept by data users such as right of access to personal data; right to correct personal data; right to withdraw consent….*etc***

TAMPERING WITH DATA

WHEN THINGS GO WRONG…

Written evidence carries more weight than oral evidence

- Good Record = Good Defence
- Bad Record = Bad Defence
- No Record = NO DEFENCE

PROVIDES DOCUMENTARY EVIDENCE

IMPLICATIONS OF TAMPERING

- Tampering with records complicates successful defence of malpractice cases and raises questions about the quality of care that was rendered.

- Once accuracy of record is challenged, the integrity of the entire record becomes a suspect.

- E.g Most damaging to the case is rewriting of records – may amount to evidence of tampering

CORRECTING RECORDS

- Put a single line through the erroneous entry or incorrect entry. Initial and date it.
- Mention the error in subsequent entries
- Do not use correction fluid
- Do not erase or obliterate anything
- Do not attempt to deceive thru alteration
- Do not omit significant facts
- Do not place inaccurate information
- Dating record as though it were written at an earlier time
- Rewriting or altering records, putting someone else's….

BEWARE OF ABBREVIATIONS – *A SHORT CUT TO DISASTER*

- **They can be a total mystery.**
- **They can be easily confused.**
- **They can start up as time savers, but end up as time wasters.**
- **They can be unclear.**
- **They may be too creative.**
- **They can cause legal nightmares – *in the court room, you may forget or not understand your own abbreviations……***

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What constitutes good research practice…IMR guidelines

- i) Voluntary consent of research subject – the person should have the legal capacity to consent – all elements to a valid consent satisfied esp. informed consent.
- (ii) should yield fruitful results for the good of the society,
- unprocurable by other methods, not random and unnecessary
- (iii) should start with animal experimentation first
- (iv) should be conducted as to avoid all unnecessary physical and mental suffering
- (v) should not be conducted is death or injury is expected
- (vi) degree of risk should be minimal
- (vii) proper preparation and adequate facilities
- (viii) conducted by qualified persons
- (x) the human subject should have the option to opt out at anytime
- during the experimentation
- (ix) person in charge must be able to know when to terminate the experiment.

Books on Medical Law

- **If you need more details on medical law, you can purchase my books on**
- **1. Medical Negligence Law in Malaysia**
- **2. Cases and Commentaries on Medical Negligence in Malaysia**
- **3. Nursing Law and Ethics**
- **4. Law and Ethics relating to Medical Profession**
- **5. Issues in Medical Law and Ethics**

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