What You do & What you Don't …
on
Medical Negligence…..
TRENDS & CHALLENGES TO THE MEDICAL PROFESSION

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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……

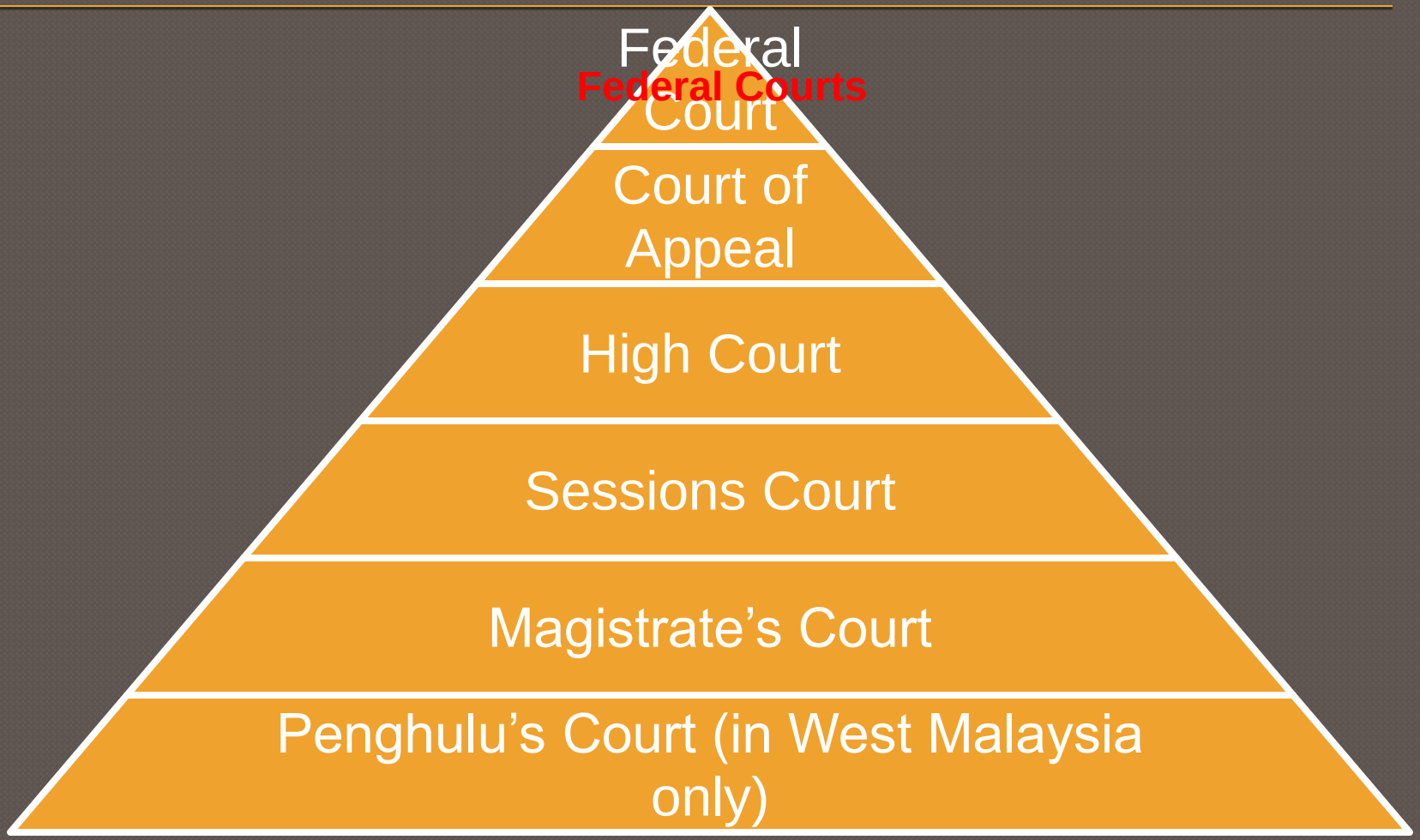
1. Bring the case to court…the start of court litigation

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

Categories of Damages 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
- Pain and Suffering
- Nursing Care
- Medical Expenses and Transport

The Pains of Court Litigation

- Medical Negligence Litigation has never been a haven for neither patient nor doctor.

- Although one is innocent until proven guilty, a medical negligence claim assaults doctor's credibility, insinuate faulty judgment even though at the end of the trial the doctor is found not guilty.

- For the patient, there are so many obstacles in bringing a successful claim in negligence.

Name, Shame and Blame

- The threat of litigation compels the doctor to view his patient as a **future adversary** in a courtroom proceeding.

- "For 7 years it went on, months of sitting in court **listening to what a terrible person you are**, no one recovers from that. It is on your mind every day, every minute. It changed the whole way I practiced. **The empathy I had, that I was known for, just wasn't there anymore.** ***Every patient was a potential law suit.***" - *Canadian retired doctor*

Silversides, A. "Fault/no fault: bearing the brunt of medical mishaps, CMAJ News, August 12, 2008, 179(4).

Further….

- Medical negligence – longest to try compared to other personal injury claims.
- Rise in medical insurance premium rates.

Category	2004	2005	2006	2007	2008	2009
Obstetrics & Gynaecology	15,300	23,100	28,250	32,445	38,425	43,610
Neurosurgery, Spinal Surgery, Plastic Surgery	10,000	15,200	17,500	20,465	24,240	27,150
Orthopaedics	10,000	14,200	15,725	17,000	19,200	21,120
Paediatric Surgery	5,885	7,780	8,730	9,780	10,350	11,180

Increasing Subscription Rates/ Medical Malpractice Insurance Premiums for Medical Defence Malaysia (2004-2009)

MDM Bhd *is to provide all doctors in Malaysia with a security mechanism for their malpractice liability protection at competitive subscription rates and defence against unmeritorious cases and defence of members' reputations.*

Problems with Court Litigation

- Adversarial nature of the legal process
- Difficulties inherent in the substantive as well as procedural law
- Name, shame and blame
- Destroy doctor-patient relationship
- Costly, lengthy and complex
- Uncertainty and strong element of lottery
- Unjust
- Not able to provide non-legal remedies

The growth of medical negligence claims

- Although not experiencing a "malpractice crisis", there is certainly an increase in the number of claims…….
- Certainly, a rise in the number of claims brought to court…….
- Patients are much more aware of their rights…….

No.	DISCIPLINE	2005	2006	2007	2008	2009	Total
1.	O & G	4	8	7	5	18	42
2.	Surgery	1	3	2	4	7	17
3.	Orthopaedic	1	0	1	4	2	8
4.	Paediatric	3	3	2	2	7	17
5.	Anaesthesia	0	0	0	1	0	1
6.	Medical	0	1	3	6	14	24
7.	Psychiatry	0	1	0	0	0	1
8.	Ophthalmology	0	0	0	0	1	1
9.	Oncology	0	0	0	0	2	2
Total		**9**	**16**	**15**	**22**	**51**	**113**

Number of Potential Medico-Legal Cases & Medical Legal Cases Settled 2005-2009

Source: Complaints, Enforcement & Medicla-Legal Section, Malaysia's MOH

No.	DISCIPLINE	2005	2006	2007	2008	2009	Total
1.	O & G	257,994	315,224	328,775	114,000	844,135	1,860,128
2.	Surgery	25,779	121,809	28,265	132,362	87,319	395,534
3.	Orthopaedic	15,000	-	10,000	70,034	29,736	124,770
4.	Paediatric	30,000	32,907	293,819	189,867	109,300	655,893
5.	Anaesthesia	-	-	-	12,000	-	12,000
6.	Medical	-	613,057	423,353	659,096	1,551,224	3,246,730
7.	Psychiatry	-	141,993	-	-	-	141,993
8.	Ophthalmology	-	-	-	-	75,000	75,000
9.	Oncology	-	-	-	-	152,200	152,200
Total		**328,773**	**1,224,990**	**1,084,212**	**1,177,359**	**2,848,914**	**6,664,248**

Compensation Paid Upon Court Orders & Ex Gratia, 2005-2009

Source: Complaints, Enforcement & Medical-Legal Section, Malaysia's MOH

AMOUNT OF COMPENSATION PAID BY COURT ORDER AND OUT OF COURT (EX GRATIA PAYMENT), 2006 - 2010

No.	Year	Payment for Court Cases (RM)	Payment for Ex Gratia Cases (RM)	Total (RM)
1.	2006	1,224,990.00	25,000.00	1,249,990.00
2.	2007	1,084,212.00	0.00	1,084,212.00
3.	2008	772,263.00	405,096.00	1,177,359.00
4.	2009	2,000,969.00	847,945.00	2,848,914.00
5.	2010	5,652,242.91	906,365.21	6,558,608.12
Total		**10,734,676.91**	**2,184,406.21**	**12,919,083.12**

Source: Medico Legal Section, MoH

SUING FOR MEDICAL NEGLIGENCE: ISSUES AND CHALLENGES

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What is medical negligence?

- forms part of the area of professional negligence.
- concerned with the **tort of negligence** applied in the specific context of the provision of healthcare.
- major focus of this area is the liability of doctors but the **legal principles applicable to other health professionals** such as dentists and nurses or pharmacists are essentially the same.

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 consideration 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.

The Test: The Bolam Principle

- The test to determine what is the standard of care demanded of a doctor was established by McNair J. in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 - subsequently became known as the *Bolam principle*

The Bolam principle

- "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time.... I myself would prefer to put it this way, that 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. .... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that would take a contrary view."

Essential Elements

- 1. The doctor must have acted in accordance with "accepted medical practice"
- 2. The accepted practice must be regarded as proper by " a responsible body of medical men" skilled in that art

However, in…

- The Federal court case of ***Foo Fio Na v Dr Soo Fook Mun & Anor* (2007)…**

"The court is at liberty to reject medical expert evidence which does not stand up to logical analysis. The court must scrutinise and evaluate the relevant evidence in order to adjudicate the appropriate standard of care."

Doctor's duty is actually one single indivisible duty but for the purposed of standard of care….the duty is divided into 3:

1. DUTY TO DIAGNOSE
2. DUTY TO TREAT
3. DUTY TO WARN/DISCLOSE RISKS

Duty to warn

- Duty to warn/ disclose risks is in itself different than duty to treat and diagnose.
- There is a need to warn the patient before any medical treatment.
- However, in order to discharge his duty to disclose inherent risks in the treatment, there are many factors that have to be weighed.

Failure to inform "material risks"

- Majority of cases on medical negligence touches on the issue of "failure to inform of material risks in medical treatment.
- Egs. Failure to inform risk of paralysis

1. *Foo Fio Na v Hospital Assunta & Anor* [1999]
2. *Hong Chuan Lay v Dr Eddie Soo* [1998]
3. *Tan Ah Kau v Govt of Malaysia* [1997]

The Doctrine of Informed Consent

- The doctrine has developed into a significant principle through law and ethics in protecting a patient's right of self-determination.
- It requires doctors "to provide their patients with sufficient information so that the patients could assent to or withhold consent from a proffered medical treatment."
- To give the patient a meaningful choice rather than a meaningless one.

The Decision – *Rogers v Whitaker*

- Federal Court adopted the decision of *Rogers* –

- **"to warn a patient of a *material risk* inherent in the proposed treatment; a risk is material if, in the circumstances of a particular case, *a reasonable person* in the patient's position, if warned of the risk, would be *likely to attach significance* to it or if the medical practitioner is or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it This is subject to therapeutic privilege."**

What risks are material?

Reasonable Patient

What a reasonable patient would want to know

Particular Patient

What the particular patient you are treating would want to know

The Standard of Care demanded by *Rogers v Whitaker*

- The standard to be observed by medical practitioners will no longer be determined solely or even primarily by medical practice as there will no longer be a conclusive force to medical opinion.
- It is for the courts to judge what standard should be expected from the medical profession taking into account not only medical opinion but other relevant factors surrounding the circumstances of the patient.

Factors to be considered…

- 1. The likelihood and gravity of risks
- 2. The desire of the patient for information
- 3. The physical and mental health of the patient
- The need for treatment and alternatives available
- Medical practice at the time
- Nature of the procedure – whether routine or complex

CASE STUDY – FAILURE TO INFORM – The Importance of Patient Comprehension

Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] – High Court KL

Facts of the case

- Plaintiff – 38 year old mother of 4…sought treatment from 1st def hospital..2nd def consultant , O & G to remove uterine fibroid – agreed to the surgery to remove the fibroid.
- During the follow-up treatment discovered that a hysterectomy was conducted on her and she was unable to have anymore children. Pff was shocked and the 2nd def apologised.

The Claim

- The 2nd def failed to procure a legally valid consent for the hysterectomy – the pff did not understand the nature of the operation done and did not actually consented to the hysterectomy even though she signed the consent form.
- The 2nd def also submitted that the hysterectomy was medically indicated to treat her heavy and painful menstrual period.

The Decision

- The fact that the pff was shocked when she was told that she can no longer have any children as hysterectomy was done on her showed that she had not fully comprehended the nature of the surgery.
- The plaintiff did not request for hysterectomy and there are other available options.
- Hysterectomy should had been offered as an option only if the pff had completed her family.
- Her husband was not asked to sign the consent form even though he was waiting outside.

Continuation…the decision

- It was not enough for the 2nd def to proceed with the operation just because the pff had signed the consent form.
- Failure to call nurse who witness the signing of the form – sec 114(g) of the Evidence Act 1950 –judgment may be decided against the 2nd def.
- Ist def not vicariously liable as 2nd def is a freelance and independent consultant
- Pff awarded RM120,000.00 for loss of uterus, inability to conceive, injury and pain and suffering.

Norizan v Dr Arthur Samuel (2013)

- Pff and her husband requested for termination of ~~pregnancy and insertion of contraceptive device in~~ a single procedure
- Defendant agreed to carry out the procedure but did not inform of the risks inherent in performing both procedures at once.
- During the procedure, def perforated her uterus…required emergency hysterectomy
- Pff and her husband claimed would not have proceeded if had known about the risks

The choice was theirs…and they needed information..

- There was an increased risk of perforation of the uterus due to pff's previous pregnancies and termination of pregnancy.
- If they had known…they would have opted for a safer method rather than going for D&C and IUD in a single procedure.
- By failing to inform the risks, they were denied of considering other alternatives available.

But Informed Consent is not just a principle

IT IS A PROCESS….which starts from the time which the doctor and patient discusses the proposed actions, risks, benefits and alternatives….***a process which require disclosure of pertinent information, comprehension and voluntary agreement***…

Going beyond individual autonomy

The Importance of Spousal Consent….***not just limited to issues affecting reproductive rights of both parties….***

Abdul Razak bin Datuk Abu Samah v Raja Badrul Hisham Raja Zezeman Shah [2013]

- Facts: Deceased 71 year old – abdominal pain..vomitting…had intestinal obstruction
- Was admitted to Temerloh Hospital but later transferred to HKL under the care of 1st Def.
- Deceased's husband knew the 1st Def personally
- 1st Def away attending conference – he requested his surgical trainee to insert

Facts….continue…

- Patient refused as the insertion caused her discomfort which was recorded.
- 1st Def called deceased's husband that deceased needed immediate surgery…consented but no risks was mentioned about the importance of inserting the Ryle's tube before the induction of anaesthesia.
- After induction, deceased regurgitated a large amount of stomach fluid which entered her lungs, causing respiratory failure and death the next day.

The Decision…

- Ist Def and 3rd & 5th Defs (Anaes)…were held liable for failing to advise the deceased adequately and sufficiently of the inherent and material risks of proceeding the surgery and anaesthesia (risk and death from aspiration) without the insertion of the tube and emptying the stomach content.
- Also liable for failing to advise the deceased's husband, the pff

The Importance of Spousal Consent

- Although the consent form did not require the consent of the pff but the pff needed to be inform on the risks when the deceased refused the insertion of Ryle's tube.
  - The pff's involvement in the deceased's decision making was obvious from the evidence… the 1st Def also called the pff personally to inform that the deceased require immediate surgery.
- Involving the plaintiff in the decision prior to the surgery would have made a difference to the outcome.

The Court held that…

Spousal consent was held to be necessary when…

1. **The issue concerns the reproductive rights of both parties.**
2. **The spouse was dependent on the other to make the decision as in this case the deceased was dependent on the husband to make the necessary decisions for her.**

Consent Guidelines adopted by the Malaysian Medical Council in 2013

- Example….Provision 14…The medical practitioner should assist the patient to understand the material provided and, if required, explain to the patient any information that he or she finds unclear or does not understand. The medical practitioner must afford the patient the opportunity to read the material and raise any specific issues of concern either at the time the information is given to the patient or subsequently.
- The medical practitioner must ensure that any pre-prepared material given to the patient is current, accurate and relevant to the patient.
- If such pre-prepared information material does not disclose all "material risks" either in general terms or otherwise, the medical practitioner must provide supplementary information on such "material risks" as are not disclosed, verbally. The likelier the risk, the more specific the details should be.

With these legal developments ….

Arduous obligations are put on medical practitioners to live up to the demands of the law in their everyday practice

Thank you…

- If you need more details on medical and nursing law, please purchase my books on

1. **"Issues in medical law and ethics"**
2. **"Medical Negligence Law in Msia"**
3. **" Statutes on Medical Law"**
4. **"Law and Ethics relating to Medical Profession"**
5. **Nursing Law and Ethics**

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