AWARENESS OF MEDICO-LEGAL IN HOSPITAL

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The Changing Trends

- **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 caused judicial and legislative interventions.**

The increasing number of medical errors and payment for compensation for negligence

Patients demanding for more and more accountability and the growth of PATIENT AUTONOMY

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.

Paralysed ex-national athlete cries despite winning medical negligence suit

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

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.

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 obtained an informed consent from her before administering the anaesthetic.

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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Azmil Mustapha able to breathe without

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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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**

THE PRESENT TREND…

- **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

THE MEDICO LEGAL ISSUES

Why is medicine so susceptible?

- Dealing with life and health
- System constraints
  - Staffing problems
  - Fatigue
  - Communication and continuity of care

Not All Errors are Negligent

- **Medical negligence…**
  - **Failure to meet the standard of practice of an average qualified physician practicing in the specialty in question**

  - ***Occurs not merely when there is an error, but when the degree of error exceeds the accepted norm***

1. ISSUES ON MEDICAL NEGLIGENCE

- Doctor owes a duty of care to **patients** and **third parties**. Non-patients if they satisfy the proximity requirement.
- Standard of Care for Duty to Treat and Duty to Diagnose – **Medical Opinion and Discretion of the Judge to choose**
- Standard of Care for Duty t Disclose Risks – **Medical Opinion and Circumstances surrounding the Patient**

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.

1. The Duty of Care

- Definition: **an obligation or a burden imposed by law, which requires a person to conform to a certain standard of conduct**
- The existence of a duty of care towards patient is quite clear - within contemplation of the nurse as **someone that is likely to be injured** if the nurse fails to take care.
- However, a nurse will owe a duty of care to those who are also within his contemplation who will suffer foreseeable loss.

Patient as nurse's legal neighbour

- If the nurse realises that the patient **might be affected by his act,** then it automatically establishes the neighbour principle – duty of care arises from the nurse-patient relationship.

Giving assistance to strangers

- Without the existence of a relationship i.e. a nurse-patient status, there is no duty to act. There is no legal obligation on a nurse to play a **"Good Samaritan"** and render assistance to a stranger.

Their ability to help...

- Medical profession' ability to help and moral obligation to do so make them vulnerable to expectations of the society.

- Hippocratic Oath, the medical professional swears to "act so as to preserve the finest traditions of my calling and experience the joy of healing those who seek my help".

- However, should they render medical assistance to anyone in distress…..in other words, should they act as good samaritans?

GOOD *SAMARITANS…who are they?*

- Good Samaritan usually refers to the ***Parable of the Good Samaritan***, a story in the Christian gospel of Luke that **encourages people to help others that are in danger. (Luke 10:30-37).**

- **- "A compassionate person who unselfishly helps others, especially strangers."**
- **- "A person who voluntarily gives help to those in distress or need"**


MARVEL
DOCTOR
STRANGE

It is a *moral duty* to help those who are in need…

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."**

Strict confines of the common law

- **Common law – strong reluctance of subjecting persons to such liability to those who fail to help others…if the distress is not caused by him.**
- **Reluctance founded on the jurisprudential distinction between acts and omissions.**
- **Common humanity does not impose positive obligation to assist.**
- ***Misfeasance* is actionable whereas generally *non-feasance* is not.**

Windeyer J. in English case - *Hargrave v Goldman (1967)*

"He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was, or ought to have been, in contemplation when something is done. The dictates of charity and compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him."

Therefore…there is No legal obligation on a nurse to play a Good Samaritan and render assistance to a stranger…under the English Common Law

Duty to emergency patients

- The common law does not impose a positive duty on a nurse to attend upon a person who is sick, or even in an emergency, if that person is one with whom the nurse is not and has never been in a professional relationship of nurse and patient
- **Nurse may owe duty if work in casualty/emergency department**

The Departure from the strict confines of the Australian common law

Lowns v Woods (1996)

Issue: Whether emergency request sufficient to create duty of care?

- Neither Patrick nor any members of his family were Dr L 's patients
- **No prior contact** between them
- **No circumstantial proximity** based on doctor-patient relationship
- Court held that **duty of care existed**

Reason 1 : Proximity

- relied on ***The Council of the Shire of Sutherland v Heyman*** (1985), where it decided that duty was founded to be based on **physical proximity, circumstantial proximity and causal proximity.**
- Three kinds of proximity exist in this case

Continuation….

- **Physical proximity** – P was 300 metres away from Dr L's clinic
- **Causal Proximity**- Dr L was apprised of P's condition and recognised it as medical emergency – he was competent to do something
- **Circumstantial proximity** – Dr L was in the place of practice when request was made

Reason 2 : Breach of statutory duty

- s27(1)(h) of the Medical Practitioners Act 1938 (NSW) - professional misconduct" in relation to a registered medical practitioner, includes the following:
- ... (h) **refusing or failing, without reasonable cause, to attend, within reasonable time after being requested to do so**, on a person for the purpose of rendering professional services in the capacity of a registered medical practitioner in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner."

Reason 2 : Breach of statutory duty

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Continuation….

- There exist the required "proximity" to impose a doc in the above provision because there an expectation in society that the medical profession would comply with its terms and attend persons in need of urgent attention. **The law should generally accord with community's expectations especially in assessing "reasonableness of conduct."** It should further take into account social developments and public perception of the content of a particular duty when imposing a duty of care.

Duty to Third Parties

- **Medical negligence may have serious consequences not only to patients but others as well.**
- **In certain circumstances, a duty may be owed tothose coming within the "neighbour principle" formulated by Lord Atkin in *Donoghue v Stevenson.***

Various situations –duty of care to third parties

- **Third party suffering from an identifiable psychiatric injury through witnessing a trauma or its immediate aftermath.**
- **Third party coming into contact with patients taking prescribed drugs with certain side effects.**
- **Third party is the unborn child.**
- **Third party in danger from harm or infectious disease by coming into contact with the patient.**

2. Breach of Duty / The Standard of Care

- The standard of care, which the law demands of a person in a normal case, has been established to be the standard of "**reasonable care" - standard satisfied by the hypothetical reasonable man.**

The Test: The Bolam Principle

- The test to determine what is the standard of care demanded for the medical profession 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. "

However, in…

- The Federal court case of ***Foo Fio Na v Dr Soo Fook Mun & Anor*** **(2007)…applying Bolitho v City & Hackney Health Authority [1997] 4 All ER 771**

"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."

Present Essential Elements

1. The nurse 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

3. The court will decide which medical opinion reaches up to a logical analysis…

Turkyah Abdul Rahman v Dr Seri Suniza & Prince Court

- **Facts: Pff – Saudi Arabia national – requested for induction of labour – induction was done using Cytotec tablets – membranes burst spontaneously – poor dilation – delivery by vacuum and forcepts – baby died**
- **Pff heavy menstrual bleeding given blood transfusion - laparotomy surgery and hysterectomy done - she suffered hyper stimulation of the uterus - uterine rupture / uterine wall tear - post-partum haemorrhage - rectovaginal fistula which required colostomy.**

The Decision - *Turkyah*

- **Held: The defendant was negligent in carrying out induction with Cytotecs tablets – did not take into account her previous history of pregnancies had put her on high risk to suffer from a uterine rupture from the induction - The baby died from uterine rupture caused by the use of cytotec tablets in the dose of 100mcg used for induction of labour - the intensity of contractions caused by cytotec caused a partial rupture of the uterus and this was aggravated by the failed vacuum delivery that caused the vaginal tear.**

Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017]

- **The test propounded by the Australian case in Rogers v Whitaker and followed by this Court in Foo Fio Na in regard to standard of care in medical negligence is restricted only to the duty to advise of risks associated with any proposed treatment and does not extend to diagnosis or treatment. With regard to the standard of care for diagnosis or treatment, the Bolam test still applies, subject to qualifications as decided by the House of Lords in Bolitho.**

Facts of *Zulhasminar* (2017)

- Zulhasminar, pregnant, chose Dr Kuppu to be her O&G. When she was 36 weeks, came to the hospital complaining of abdominal pain, admitted to hosp (pulse 108, blood pressure 122/68). Given Pethidine and Phernegan (pulse n bp came down).
- Later that morning, Zulhasminar suddenly collapsed – severe bleeding – Code Blue alarm sounded – resuscitated – rushed to the operation theatre – her baby was delivered alive – hysterectomy done due to ruptured blood vessel at placenta.
- Baby suffered severe birth asphyxia causing cerebral injury.

THE CLAIM

- 1. Zulhasminar claimed that the was in labour shortly after admission, if Caesarian Section (CS) had been performed without delay, her baby would not have suffered her present disability.
- Dr Kuppu and nursing staff were negligent in failing to diagnose that she was in labour, instead drugs were given to lessen her pains.
- 3. Dr Kuppu should have foreseen that Zulhasminar might suffer a uterine rupture if CS was delayed as she knew she had a condition called cephalo-pelvic disproportion after delivering her first baby.
- 4. If Zulhasminar was adequately resuscitated, her baby would not have suffered cerebral injury.

THE DECISION – Doctors, staff and hospital were found not liable…

- 1. Failure to prove that she was in labour and merited an earlier CS to be performed on her as it can be shown that she was **closely monitored** and there were **no signs of being in labour..**
- Failure to show that uterine rupture was forseeable and preventable as given her obstetric history, **an elective CS would have been done if she was at 38 weeks gestation**.
- 2. She suffered an **abnormal presentation** namely, **placenta percreta** which was not detectable during the normal check up…this condition led to the vessels on the outer surface of the uterus to rupture.
- 3. From the time of her collapse, **the delivery of the baby was within 30 minutes which was internationally accepted standard.**

CASE STUDY – BREACH OF DUTY TO DIAGNOSE

Chien Tham Kong v Excellent Strategy Sdn Bhd & Ors

[2009] 7 MLJ 261

Facts of the Case…

- Plaintiff – 41 year old diabetic patient – 3 week history of lower back pain.
- Admitted to hospital (Ist def), seen by consultant orthopaedic surgeon (2nd def) and also 3rd def (consultant physician for management of diabetes).
- Discharged after 3 days…returned to see 2nd def for pain at the neck – did conservative treatment included physiotherapy

Continue ----Facts…

- Admitted to hosp 4 days later – experienced weakness of the right limbs, sweating at night and fever
- Examined by 3rd def…neurological condition worsened…became paraplegic
- First MRI scan revealed pff did not suffer stroke…subsequent MRI revealed cervical epidural abscess – a rare type of infection in the epidural spine

THE CLAIM

- Against the second defendant - **Failure to take any proper precaution to prevent injury to the pff's spinal cord.**

- Against the third defendant – **Negligence in making initial diagnosis of stroke without considering alternative diagnosis**

THE DECISION

Cervical epidural abscess is a very rare type of infection in the cervical epidural spine which defies early diagnosis and treatment. In the instant case, it would have been very difficult to even consider the possibility of cervical epidural abscess when the plaintiff presented signs and symptoms consistent with a stroke. It was unreasonable for a doctor to first suspect a rare condition when the symptoms and signs presented by a patient pointed to a different but much more common condition

2nd and 3rd Defs did not breach the standard of care and 1st Def not vicariously liable.

Duty to Treat

- A medical mistake is something that the courts will accept as part of the ordinary human fallibility whereas medical negligence encompasses conducts that transgresses beyond what is expected of a reasonably skilful and competent doctor or nurse.
- is no doubt in finding negligence in cases of gross medical mistakes. For instance, removal of the wrong limb, the use of the wrong drug or administering the wrong gas during the course of an anaesthetic or leaving operating equipments inside the patient's body. **In such cases, the doctrine *res ipsa loquitor* (the thing speaks for itself) can be invoked in determining negligence.**

RES IPSA LOQUITOR

- This doctrine permits the court in certain cases to draw an inference of negligence at an early stage in the trial on the basis of circumstantial evidence of a highly suggestive nature.
- This doctrine relieves the plaintiff, who usually has insufficient knowledge of how the accident occurred, from bringing evidence to show the precise way in which the negligence occurred.

Definition

- literally means **"the thing speak for itself"**. In legal terms, **it means that the fact of the accident by itself is sufficient (in the absence of an explanation by the defendant) to justify the conclusion that most probably the defendant was negligent and that his negligence caused the plaintiff's injury.**
- The doctrine first appears to have surface in ***Byrne v Boadle*** **(1863)**
- The classic exposition of the doctrine appeared two years later when the doctrine was laid down succinctly by Erle CJ in *Scott v London and St Katherine Docks* (1865)

The doctrine

- Erle CJ in *Scott v London and St Katherine Docks* stated:

"…where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Objective

- The principal objective of this maxim is **to prevent injustice to the plaintiff**, which would be the case if the plaintiff were required to prove the precise cause of the accident and the defendant's responsibility for it. In medical cases particularly, where the treatment and operation is complex and the patient may be unconscious at the time, this doctrine can be of particular significance

Requirements to be satisfied

1. **The Defendant must be in control of the thing which caused the injury to the plaintiff**

Gee v Metropolitan Railway (1873) LR 8 QB 161 – Station in control as train just left the station

Easson v LNE Rrailway [1944] 2 KB 421 – station not in control – train 7 miles from station

Requirements…cont…

- 2. **The accident must be of such nature that it would not have occurred in the ordinary course of events**
- *Byrne v Boadle* (1863) 2 H & C 722 – barrel of flour would not have fallen in absence of negligence
- *Mahon v Osborne* [1939] 2 KB 14 – swab would not have been left in abdomen in absence of negligence

Requirements…cont…

- **3. There must be no explanation for the accident**

- *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 – "…[t]he doctrine [of *res ipsa loquitor*] is dependant on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not"

3. Causation in Fact and Law

- Once the plaintiff has overcome the difficulties posed by the *Bolam principle*, he has yet to face another difficulty, that is, the problem of proving causation.

- According to *Giesen*, "**...establishing a causal connection between medical negligence and the damage alleged is often the most difficult task for a plaintiff in medical malpractice litigation...**"

Definition

- There must be a **causal link between the defendant's breach of duty and the damage sustained by the plaintiff.**
- Therefore, in order for the plaintiff to overcome the issue of causation, he must show that the damage he suffered was caused by the defendant's negligence.

Causation in fact

- ***The "but for" test –*** whether the damage would not have occurred "but for" the defendant's negligence? If yes, the defendant will be liable
- ***Cork v Kirby Maclean Ltd*** [1952] 2 All ER 402 – if the damage would not have happened but for a particular fault, then that fault is the cause of the damage, if it would have happened just the same, fault or no fault, is not the cause of the damage.
- ***Barnett v Chelsea and Kensington Hospital Management Committee*** [1969] 1 QB 428

CASE STUDY – FAILURE TO TREAT

Azizah Abd Manan & Ors v Dr Norlelawati Ab Latip & Ors (2013) – High Court JB

Chronology of Events:

- 13 Feb 2009 – Admitted to hosp after bleeding for 6 days…urine test confirm that she is pregnant…scan showed uterus was empty…..suspected ectopic pregnancy
- 17 February 2009 – diagnosis of right tubal ectopic pregnancy was made but despite this continued with conservative management and wait for the ectopic pregnancy to rupture
- 18 February 2009 – Bleeding and abdominal pain

Facts…continue..

- 20 February 2009 – Another scan showed empty uterus with right adnexal mass with irregular gestation ----failing ectopic pregnancy of unknown location…patient request for discharged and was allowed.
- 24 February 2009 – Patient at Emergency Department – abdominal pain, nausea, shortness of breath and palpitation
- 25 February 2009 was scheduled for emergency laparotomy as a leaking ectopic pregnancy case

Facts…continue

- Anaesthetist assessed her as having throat irritation and non-productive cough…she was explained the danger of anaesthesia due to her upper respiratory throat infection…she consented to the surgery….during anaesthesia difficulty in intubation encountered…developed bronchospasm and then pneumonia.
- Managed in ICU – suffered left lung collapse – condition worsened
- 4th March 2009 – transferred to private hospital diagnosed as having post-operative nosocomial pneumonia with septicaemia…later she developed complications of pulmonary fibrosis, pheumothorax and pleural effusion

The problem – causative link?

- The deceased died not due to leaking or ruptured ectopic pregnancy but complications from bronchospasm developed during anaesthesia.

Decision by the court

- The court held that there was negligence by omission.
- doctors at has did not manage the deceased case properly…**she suffered the consequences of a lost chance**…doctors failed to conduct the surgery before 20 February. If this was done, the anaesthetic complications would not have arisen.
- Further, the throat irritation and non-productive cough for two days should have been observed prior to the surgery.

Decision…continue….

- The fact that bronchospasm was a risk of operation which has been explained to the deceased and she consented to the operation could not absolve the defendants from liability.
- The deceased received **RM484,990.55** in damages inclusive of **RM150,000** for pain and suffering and **RM142,515.55** for the private hospital expenses.

Causation in Law

- **The foreseeable consequences test: *The Wagon Mound* (No 1) [1961]**
- Test: the defendant is liable for all the damage of a certain type which is reasonably foreseeable.
- ***The Wagon Mound (No 1)* [1961] AC 388** – In order to recover for damages, the **plaintiff must prove that the kind or type of damage which he incurred must be foreseeable**. The kind of damage must be reasonably foreseeable although neither the extent of the damage nor the precise manner of its occurrence need be reasonably foreseeable.

2. ISSUES in PATIENT'S PRIVACY

The Right of Patient's Privacy particularly female patients have been recognised in law

Respecting patient's privacy

- ***Lee Ewe Poh v Dr Lim Teik Man & Anor*** [2011] MLJ 835
- Facts: Pff suffered haemorrhoids/piles – 1st def – a colorectal surgeon successfully perform a procedure to treat pff – pff found that 1st def had taken photos of her private parts without her knowledge and consent.

The Claim

- Pff claim that 1st def should not have taken photos of her anus without her knowledge and consent
- 2nd def- hospital vicariously liable

1st def – violation of privacy not a recognised tort/cause of action

Photos taken in the course of surgical procedure intended for pff's medical record and there was no publication

Pff's identity was protected and not known

The Judgment

- **Invasion of privacy** of a female modesty, decency and dignity **is a cause of action** and actionable and also there is breach of confidence
- Photos was taken while she was under anesthesia **without her express consent**
- Altho no unauthorised use of the photos but pff was informed by the nurse of the photos, photos no longer confidential, **there was publication**
- **Consent by female patient an absolute requirement** especially as this involve intimate parts and the taking of these photos were only discretionary not compulsory.

Therefore....

- Consent must be obtained from the patient , particularly in this case from female patients before he can take photographs of her or their intimate parts of the female anatomy.
- **Modesty and decency of the female patients must be respected** and not violated.
- Failure to do so constitute an invasion of the plaintiff's privacy or a breach of trust and confidence.

3. ISSUES ON CONSENT

Before any treatment is undertaken, legally valid consent must be taken from an adult patient (18 years and above) of sound mind.

If not, battery (a form of trespass to person) will be committed i.e. non-consensual touching.

Legally valid consent

- Requirements:

a. Mental competence – reach the age of majority, not mentally incapacitated – able to have sufficient understanding.

b. Own free will – no duress, undue influence.

c. Sufficient information of the proposed treatment – consent must be real, must be informed in nature not just "in a form" only.

Cases where consent is not necessary

- **Persons who are unable to give valid consent:**

Incompetent patients – those who are temporarily unconscious, permanently unconscious through disease, trauma, injury, mentally handicap and children (require parental consent).

****Defence of Necessity** – Violate one right to protect another right in urgent situations of imminent peril

Lord Bridge in F v West Berkshire Health Authority or Re F (Mental Patient: Sterilisation) [1990] : "treatment which is necessary to preserve life, health and well-being of the patient my lawfully be given without consent."

**Defence of “therapeutic privilege”

- This allows the withholding of information from his patient concerning risks of proposed treatment if it can be established by means of medical evidence that disclosure of this information would pose a serious threat of psychological harm to the patient and **detrimental to patient’s health.**

STATUTORY EXCEPTIONS

IF provisions of the statute require the person to submit to any intervention under the law….*he has to comply*

Examples…

Road Transport Act 1987 – Section45C.
Provision of specimen for analysis

- (1) In the course of an investigation whether a person has committed an offence under section 44 or 45 involving intoxicating liquor or under section 45A a police officer may, subject to the provisions of this section and to section 45D, require him-
- (a) **to provide two specimens of breath for analysis by means of a prescribed breathanalyser; or**
- **(b) to provide a specimen of blood or urine for a laboratory test**

Section 45D. Protection of hospital patient.

(1) A person who is at a hospital as a patient shall not be required to provide a specimen for a breath test or to provide a specimen of blood or urine for a laboratory test **unless the registered medical practitioner in immediate charge of his case authorizes it and the specimen is to be provided at the hospital.**

(2) The registered medical practitioner referred to in subsection (1) shall not authorize a specimen to be taken where it would be prejudicial to the proper care and treatment of the patient.

Atomic Energy Licensing Act

- Section 58 –Compulsory examination and treatment of persons who were or might have been exposed to ionizing radiation resulting from a nuclear incident.
- A criminal offence if **a person "refuses, fails or neglects to submit for examination, treatment, detection or observation."**

The Prevention and Control of Infectious Diseases Act 1998

- Section 7(1)(b) – an authorised officer may "medically examine any person" on board a vehicle entering Malaysia.
- Section 7(1)(c) **-may take samples from such person for determining "the state of health of such person".**
- Section 7(3) –An authorised officer may order the infected person or a contact be removed to a quarantine station and detained therein for isolation or observation.

LEGAL IMPLICATIONS

- **Section 22 - Any person who-**

- **(a) obstructs or impedes, or assists in obstructing or impeding, any authorized officer in the execution of his duty;**

- **(b) disobeys any lawful order issued by any authorized officer;**

- **(c) refuses to furnish any information required for the purposes of this Act or any regulations made under this Act; or**

- **(d) upon being required to furnish any information under this Act or any regulations made under this Act, gives false information,**

commits an offence.

Children…

- … regarded to be within the category of those **legally incompetent** to give consent and decide on what medical treatment they should have until they reach the age of majority. For children under the age of majority, it is their parents or guardians that will decide for them, and give proxy consent.

Medical Examination and Treatment of child

Within the definition of "Child in need of Care and Protection" under Child Act 2001

Child in need of Care and Protection – Child Act 2001

- **Section 17** – meaning of child in need of care and protection includes **(f) the child needs to be examined, investigated or treated.**

(i) **for the purpose of restoring or preserving his health;**

(ii) **his parent or guardian neglects or refuses** to have him so examined, investigated or treated.

A CHILD WHO IS IN NEED OF MEDICAL TREATMENT WILL FALL WITHIN THE AMBIT OF THIS PROVISION AND **PARENTAL CONSENT IS NOT NEEDED** IF THE CHILD IS IN NEED OF TREATMENT **TO RESTORE AND PRESERVE HIS OR HER HEALTH.**

Temporary Custody

- Section 18 - if a child is believed to be on reasonable grounds, in need of care and protection (including medical examination and treatment), **a child can be taken into temporary custody by a Protector or a Police officer.**

When is Consent of 'Parent and Guardian' Not Necessary

- Where there is **an immediate risk to the health of the child certified by doctor in writing** – the consent of the parent or guardian or person with authority to consent is not necessary.
- The protector may authorize the **medical, surgical or psychiatric treatment** that is considered necessary. – Section 24(3)

Situation of Emergency

- A situation of emergency does not confer an absolute power to consent to the Protector. The protector's power to consent is subject to the following circumstances:
- (i) that the parent and guardian or person with authority to consent has **unreasonably refused to give consent or abstained from giving consent** – s24(3)(a)
- (ii) the parent or guardian or person with authority to consent **is not available or cannot be found within reasonable time** – s24(3)(b)
- (iii) the protector believes on reasonable grounds that the parent or guardian or person with authority to consent has **ill-treated, neglected, abandoned or exposed or sexually abused the child** – s 24(3)(c)

No Liability Incurred

- Section 26 further provides that even if the medical examination or treatment of the child is made **without the consent of the parent or guardian or person with authority to consent** but instead with the consent of the protector or police officer, **all who are involved including the Protector, the Police officer, the Doctor and all persons who assist the doctor will not incur liability.**

In the event of any conflict….

"Best interests of the patient' should prevail…

FOR ADULTS, THEY CAN MAKE THEIR OWN DECISIONS IF THEY ARE COMPETENT – HOW TO ASSESS THEIR MENTAL CAPACITY…

Assessment of the Mental Capacity

- This was laid out in **Re MB (1997) -**
- First, the patient must be **able to comprehend** and **retain** the information, which is material to the decision, especially as to the **likely consequences of having or not** having the treatment in question.
- Secondly, the patient must be **able to use the information and weigh it in the balance** as part of the process of arriving at the decision. The **level of understanding that is required must commensurate with the gravity of the decision** to be taken, more serious decisions requires greater capacity.

Section 77 of the Malaysian Mental Health Act 2001

- Subsec(1) – Where a mentally disordered person is required to undergo surgery, electroconvulsive therapy or clinical trials, consent for any of them may be given –

- (a) **by the patient himself if he is capable of giving consent** as assessed by a psychiatrist;

- (b) by **his guardian** in the case of a minor or a relative in the case of an adult, if the patient is incapable of giving consent;

- (c) by **two psychiatrists,** one of whom shall be the attending psychiatrist, if there is no guardian or relative of the patient available or traceable and the patient himself is incapable of giving consent

How to assess under MHA 2001?

- Whether or not, the patient is capable or incapable to give consent, **section 77(5)** requires the examining psychiatrist to consider whether, the patient **understands the condition for which the treatment is proposed, the nature and the purpose of the treatment, the risks involved in undergoing and not undergoing the treatment and whether or not his ability to consent is affected by his condition.**

The Reasonable Prudent Patient Test

FOR ADULTS OF SOUND MIND - need to disclose to the patient all 'material risks' inherent in a proposed treatment. What is "material" would be determined by the "prudent patient" test which was introduced in the United States case of Canterbury v Spence (1972) 464 F. 2d 772 and later adopted in the Australian case of **Rogers v Whitaker** (1992) 175 CLR 479 – Federal court of Zulhasminar (2017)

Medical opinion no longer conclusive…other factors surrounding circumstances of the patient

- The likelihood and gravity of risks
- The desire of the patient for information
- 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

Risks that were considered to be 'material' in selected Malaysian cases

- **Foo Fio Na v Hospital Assunta & Anor [2007] 1 MLJ 593** - The **risk of paralysis** in a spinal cord operation was considered to be a material risk of which the patient should have been warned.

- **Lechemanavasagar a/l S Karuppiah v Dr Thomas Yau Pak Chenk & Anor [2008] 1 MLJ 115** – The **risk of esophageal perforation** on the upper part of the esophagus is a material risk that needed to be warned before undertaking the surgery to remove the fishbone.

- **Dr Ismail Abdullah v Poh Hui Lin (Administrator for the Estate of Tan Amoi @ Ong Ah Mauy, Deceased) [2009] 2 MLJ 599** - The deceased patient needs to be informed of the **risks of acute pancreatitis and acute respiratory distress syndrome** ('ARDS') in a procedure to remove the stones by the endoscopy method (ERCP) failing which he will undertake an operation called cholecystectomy. However, the defence of therapeutic privilege in not warning the patient of any material risks in the operation can be applied in a life-saving operation.

Material Risks…Continue

- **Hasan bin Datolah v Kerajaan Malaysia [2010] 2 MLJ 646 – Risk of paralysis** was a material risk in both surgical procedures, namely, a fenestration and a laminectomy.

- **Norizan Bte Abd Rahman v Dr Arthur Samuel (2013) MLJU 81 –** The **risk of uterine rupture** if the procedure to terminate pregnancy was done simultaneously with the insertion of an intrauterine contraceptive device ('IUCD') in a single procedure was material and must be informed to the patient.

- **Abdul Razak Dato Abu Samah v Raja Badrul Raja Zeezaman [2013] 10 MLJ 34 – The risk of aspiration** that could materialise if the surgery was undertaken without emptying the stomach content through the insertion of Ryle's tube needed to be informed to the husband of the deceased patient who would have persuaded his wife to subject herself to the Ryle's tube procedure.

The Importance of Patient Comprehension

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

Facts of the *Gurmit*

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

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.

ANTICIPATORY REFUSALS

A person who is competent to make decisions can also make anticipatory decisions in the form of advance medical directives regarding medical treatment in the event that they become incapacitated in future

ADVANCE DIRECTIVES…

Emanates from the **right of self-determination by a patient** whether to undergo a particular treatment or not…PATIENT AUTONOMY

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Group calls for gu … issuance of direc… write a living wish to be

FACEBOOK TWITTER GOOGLE+ LINKEDIN

KUALA LUMPUR: Malaysian Consulta… Hinduism, Sikhism and Taoism called … Medical Directive (AMD).

Its president Jagir Singh said the nex… for better management of their cases…

"The decision of next-of-kin must als… complications later," said Jagir.

He said the AMD would be useful f… organs.

Malaysians Against Death Penalty & Tortur…

…g an advance medical directive (AMD) a patient … appoint a power of attorney (POA) or a health-

…edical treatment to be administered if the patient … curable and irreversible illness or condition and … be suspended or discontinued.

…ch as pain relief, intravenous hydration, artificial …nary resuscitation, ventilators and even a "do not

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'Living will' for the terminally ill

BY M. MAGESWARI

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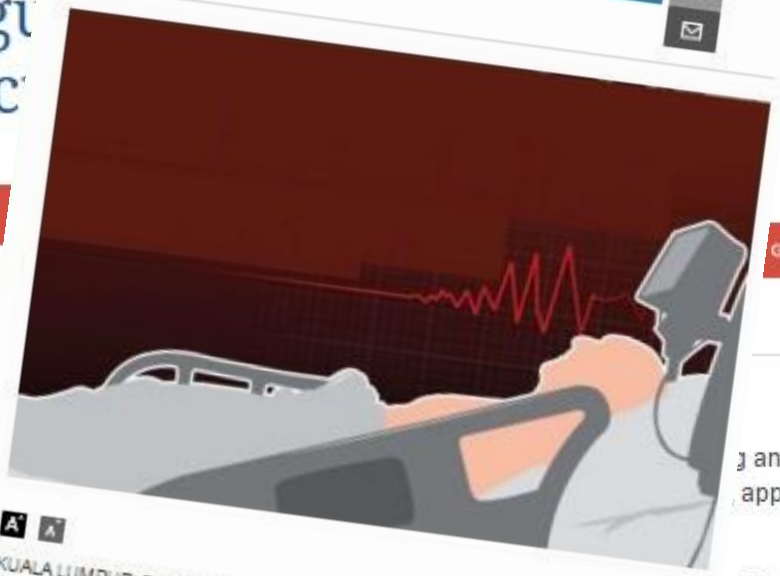

KUALA LUMPUR: The recent case of a terminally ill American woman who ended her life to prevent further suffering sparked global debate on the subject, including Malaysia.

Britanny Maynard, 29, who had end stage brain cancer, died on Nov 1 by taking a fatal dose of barbiturates prescribed to her legally by a doctor, under the state of Oregon's Death with Dignity Act.

Although euthanasia or assisted suicide is illegal in most countries of the world, there are also legal avenues for the terminally ill in Malaysia to issue an advance medical directive (AMD) to determine the treatment they want or do not want.

The AMD, or "living will", gives such patients a greater say in how they want to die before they lose their decision-making capacities and provide doctors guidelines to implement their wishes.

Legality of Advance Directives in Malaysia

- Use of **advance directives** in medical care a novel concept in Malaysia.
- Among dilemmas faced :

a) Cultural and religious influences

Many patients feel that health decisions especially at the end of life should be left to fate. Reluctance to appear as if interfering with the dying process, which is a matter of divine will.

b) Patient's lack of exposure and understanding of **advance directives**

Perception that it is premature to decide on such matters and would rather informally make their wishes known to close family members at a later stage if necessary.

c) Attitude of family members

Family members may find it distressing and refuse to assume responsibility in deciding whether or not to withdraw treatment that may hasten the death of their loved one.

Legality of Advance Directives in Malaysia

- By following the common law, an **Advance Directive** is therefore the prerogative of the individual if he is mentally competent when executing it…

Code of Medical Ethics of the Malaysian Medical Association

Clause 5, Section II:

"Where death is deemed to be imminent and where curative or life-prolonging treatment appears to be futile, ensure that death occurs with dignity and comfort. Such futile therapy could be withheld, withdrawn or one may allow irreversible pathology to continue without active resuscitation. One should always take into consideration any **advance directives** and the wishes of the family in this regard…"

LEGALITY OF ADVANCE DIRECTIVES IN MALAYSIA (CONT'D)

"Consent for Treatment of Patients by Registered Medical Practitioners" by the Malaysian Medical Council

Clause 17 (Advance Care Directives or Living Wills):

a) A doctor must comply with an unequivocal refusal to treatment in a patient's **written directive** in the circumstances specified therein;

b) A doctor must not comply with an **advance directive** that contains instructions that are unlawful such as euthanasia or the termination of pregnancy;

c) A doctor should determine the validity of an **advance directive** by considering the following factors:

   (i) whether it is sufficiently clear and specific to apply to the clinical circumstances which have arisen;

   (ii) whether it can be said to have been made in contemplation of the current circumstances; and

   (iii) whether there is any reason to doubt the patient's competence at the time that the **directive** was made, or whether there was any undue pressure on the patient to make the d**irective**;

d) If the doctor is in doubt about the validity of an **advance directive**, he should consult the patient's spouse or next of kin, and the doctor should also consider the need to seek legal advice;

e) In emergency cases, the doctor can treat the patient in accordance with his professional judgment of the patient's best interests until legal advice can be obtained on the validity or scope of the patient's **advance directives**.

Issues and Limitations in the use of Advance Directives

- Difficulty in **stipulation of contents**. A balance has to be drawn to ensure that the **advance healthcare directive** is not too narrowly or generally drafted, but specific enough to be able to convey the patient's true wishes and result in a clear understanding on the part of the attending doctor.

- **Problem with locating** the **advance directive** made by the patient when the need arises.

- **An advance healthcare directive cannot be in contravention with existing law.** For example, in the Malaysian context, an **advance directive** instructing the doctor to commit an act of euthanasia would be unlawful as it would be equivalent to culpable homicide not amounting to murder under section 299 of the Penal Code.

Thank you…

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

1. Nursing Law and Ethics"

2. Medical Negligence Law in Malaysia

3.Cases and Commentary on Medical Negligence

4.Law and Ethics relating to Medical Profession

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