ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Edited by

Adnan Yaakob
Ashgar Ali Ali Mohamed
Arun Kasi
Mohammad Naqib Ishan Jan
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CONTENTS

CHAPTER 2

ALTERNATIVE DISPUTE RESOLUTION: DEFINITION AND ITS DEVELOPMENT

CHAPTER 3

ALTERNATIVE DISPUTE RESOLUTION IN ISLAM

CHAPTER 4
CONFIDENTIALITY AND PUBLIC POLICY IN ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 5
NEGOTIATION: TYPES AND ETHICAL ISSUES

CHAPTER 6
WITHOUT PREJUDICE NEGOTIATIONS

CHAPTER 7
MEDIATION: DEFINITION, ORIGINS AND PROCESSESS

CHAPTER 8
MEDIATORS: ACCREDITATION AND TRAINING REQUIREMENTS

CHAPTER 9
MEDIATION: STANDARDS OF CONDUCT

CHAPTER 10
MEDIATION: COURT ANNEXED

CHAPTER 11
MEDIATION: COMMUNITY DISPUTES

CHAPTER 12
MEDIATION: RELIGIOUS AND CULTURAL DISPUTES

CHAPTER 13
MEDIATION: NATIVE DISPUTES

CHAPTER 14
MEDIATION: MEDICAL DISPUTES

CHAPTER 15
MEDIATION: REAL ESTATE AND LAND DISPUTES

CHAPTER 16
MEDIATION: SPORTS DISPUTES

CHAPTER 17
MEDIATION: PLEA BARGAINING IN CRIMINAL CASES

CHAPTER 18
MEDIATION INSTITUTIONS

CHAPTER 19
SINGAPORE MEDIATION CONVENTION: WHETHER RULE OF LAW INTACT?

CHAPTER 20
CONCILIATION v. MEDIATION: SIMILARITIES AND DIFFERENCES

CHAPTER 21
CONCILIATION: LABOUR DISPUTES

CHAPTER 22
CONCILIATION: MATRIMONIAL DISPUTES

CHAPTER 23
CONCILIATION: APPLICATION IN *SYARIAH* COURT

CHAPTER 24
ARBITRATION IN MALAYSIA: AN OVERVIEW

CHAPTER 25
INTERNATIONAL ARBITRATION

CHAPTER 26
ARBITRATION AGREEMENT

CHAPTER 27
ARBITRATOR: QUALIFICATION AND TRAINING

CHAPTER 28
ARBITRATORS: APPOINTMENT AND REMOVAL

CHAPTER 29
ARBITRATORS: IMPARTIALITY AND INDEPENDENCE

CHAPTER 30
STAY OF ARBITRAL PROCEEDINGS

CHAPTER 31
ANTI-SUIT INJUNCTION

CHAPTER 32
ARBITRAL AWARD AND ENFORCEMENT

CHAPTER 33
ARBITRAL AWARDS: GROUNDS FOR REVIEW

CHAPTER 34
INTERNATIONAL ARBITRAL INSTITUTIONS

CHAPTER 35
ALTERNATIVE DISPUTE RESOLUTION IN FINTECH

CHAPTER 36

ALTERNATIVE DISPUTE RESOLUTION IN ISLAMIC BANKING AND FINANCE

CHAPTER 37

ALTERNATIVE DISPUTE RESOLUTION IN CONSTRUCTION DISPUTES

CHAPTER 38
STATUTORY ADJUDICATION UNDER CIPAA 2012

CHAPTER 39
BIRD'S EYE VIEW OF CIPAA 2012

CHAPTER 40
EARLY NEUTRAL EVALUATION IN INDUSTRIAL COURT

CHAPTER 41
OMBUDSMAN

CHAPTER 42
EXPERT DETERMINATION: CONVENTIONAL AND ISLAMIC APPROACH

CHAPTER 43
ONLINE DISPUTE RESOLUTION AND ITS APPLICATION IN FINANCIAL DISPUTES

CHAPTER 44
UNIVERSITY ARBITRATION

CHAPTER
14

MEDIATION: MEDICAL DISPUTES*

Introduction

Victims in medical negligence disputes often pursue their claims out of anger and their desire for compensation over their physical and emotional harm. The current adjudication system, that is the tort system, allows them to be financially compensated for the harm suffered but does not offer them non-legal remedies in the form of explanation, information, and sincere apologies from the wrongdoer.[1] However, medical negligence cases are often brought to the court of law not merely to obtain monetary compensation but also to receive the appropriate explanation on the events that transpired and acceptance of responsibility by the person who caused the harm. Nevertheless, litigation has often been viewed as the last resort as its processes tend to be cumbersome and costly. Thus, engaging into methods of 'open disclosure' in providing proper explanation of the events, remedial steps for the prevention of future recurrence as well as making statements of regret with empathy, will eventually have the ability to defuse the growing anger and preserve the cordial relationship between the disputing parties.[2]

* This chapter is contributed by Puteri Nemie Jahn Kassim.

1 AJ Kellett 'Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients' Journal of Dispute Resolution 1987 pp. 111-31.

2 SD Hodge, N Saitta 'Physician Apologies' Practical Lawyer 57 No 6 Prac Law 35 2011 pp. 35-44.

The Importance Of Communication After The Occurrence Of Adverse Events

Litigation often starts because the patient cannot get the information he is seeking, explanation or apology from the appropriate persons. Not all patients want to obtain financial compensation; some merely want to ensure that there is no repetition of the mishap that had occurred and to receive an apology for what had happened. Lord Woolf MR in an interim report on his Access to Justice Inquiry in June 1995, identified the needs of patients as wanting 'impartial information and advice, including an independent medical assessment, fair compensation for losses suffered, a limited financial commitment, a speedy resolution of the dispute, a fair and independent adjudication; and (sometimes) a day in court.'[3] Doctors, on the other hand, want 'a discreet, private adjudication, which some would prefer to be by a medical rather than legal tribunal, an expert of their own or their solicitor's choice and an economical system.'[4] Legal proceedings should be treated as a last resort and to be used only when other means of resolving disputes have been exhausted. It is vital to find out what the aggrieved patient wishes to achieve. If substantial financial compensation is his main motive, then perhaps litigation is the best way to deal with it. But if the patient is concerned with receiving an explanation, apology and assurance, that in future such can be avoided, then litigation is not the best way to deal with the situation. Thus, effective communication is important when things go wrong.

3 Lord Woolf MR 'Access to Justice: The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' HMSO (1996) para. 18.

4 *Ibid* para. 19.

Mediation As The Most Feasible Method Of Alternative Dispute Resolution

Alternative Dispute Resolution ('ADR') methods have the advantage of preserving doctor-patient relationships and offer an alternative for those who lack the stamina to see through the litigation process. Compared to other methods of ADR, mediation seems to offer an inexpensive process of integrative bargaining. It does not emphasise on who should win or lose, who is right or wrong. Rather, it focuses on goals of reconciliation and personal transformation. In mediation, parties participate directly in what is thought to be an informal and voluntary dispute resolution process that may offer a novel and promising approach in resolving claims. Mediation has been seen as the most feasible form of dispute resolution for medical disputes as it provides speedy, economical and trauma-free alternative to litigation.

For successful mediation, the role of the mediator must be clearly defined. The mediator is not to make a decision, as that is the function of the judge or the arbitrator. The role of the mediator is simply to establish an atmosphere in which the parties work to settle a situation themselves. The good mediator constantly points out to the parties the practicalities of negotiations and the advantages and disadvantages of various approaches. Necessarily, mediators should have fair knowledge of the subject matter. This can be achieved by having independent scientific, medical and pharmaceutical experts advising mediators on aspects of medical issues. With sufficient knowledge, mediators should be able to propose settlement terms, with compensation being assessed for losses or previous temporary impairment and loss of income suffered and the effects of continuing impairment. By probing strengths and weaknesses of each side, the mediator can facilitate settlement or help to narrow the issues in dispute. The strength of evidence on one side can be brought to the attention of the other side at an early stage and this may prompt early settlement. Substantial costs and expenses can be saved.

The appointment of the mediator should be at the discretion of both parties. Impartiality should be the main assessing criteria in choosing the mediators. Mediation should be conducted without prejudice and the mediator should have the power to choose the procedure, which he thinks is fit and considered to be the most efficient, speedy and cost effective. The mediator cannot be called upon to act as an advocate adviser or witness to a litigation proceeding or be in a position that requires him to disclose information about any matter arising from the mediation. This is to ensure the confidentiality of the proceedings. The parties should bear their own costs of mediation and pay half of the mediator's fee regardless of the outcome.

Mediation also provides an early opportunity for patients' needs to be reviewed and addressed in a positive light. Unlike arbitration or court litigation, no resolution can be reached save by the consent of the parties and the mediator's decision is not binding. All discussions are without prejudice and parties can walk away at any stage. In other words, the parties should be free to continue or opt out. Settlement achieved should be on terms acceptable to all parties after each side assesses and balances the risks involved. If after a session of information-sharing and good faith negotiations, the parties cannot agree, settlement will not and should not result. Levels of compensation offered must be realistic. It must be a structured settlement and the complainant is to be told what the adequate award is for their type of injury and structured specifically for them.

Mediation is a less formal method of ADR as compared to arbitration. In arbitration, the arbitrator takes the place of the judge in coming to a decision whereas in mediation, it is the disputing parties themselves that determine the outcome. In mediation, a mediator is appointed by the disputing parties themselves to assist them to reach an agreement by structuring discussions internally without involving external rules. This means that this process is not bound by the rules of either procedural or substantive law or by rules of evidence. It is the parties

that make their own rules and only receive help from the mediator where appropriate. The exact format of the mediation session will depend upon the mediator, the parties and the type of dispute involved. The mediator's role may vary significantly, depending on the nature of the dispute. The mediator is usually involved in probing into the parties' subjective understanding of the dispute and their immediate and long-term needs. It is also the mediator's role to assist the parties in developing solutions to the conflict by applying neutral standards to these needs. The mediator generally does not render a decision or give any advisory opinion on the dispute unless requested to do so by the parties. This usually occurs after the parties fail to reach an amicable solution voluntarily. The decision made at the end of the mediation process is not binding on either party.

Mediation provides creative solutions to problems by identifying and exploiting the parties' possibly differing interests. It is in the simplest form where parties volunteer to reach a settlement without having their participation coerced by any party. It is a rational way of solving the problem by clearing up misunderstandings and clarifying issues and helping negotiations by bringing in factors such as realism and objectivity into the discussion. Quite often, the parties can reach a mutually satisfactory solution that meets their particular needs and interests. This is very much needed in medical negligence cases as the medically injured patient is usually in need of clarification of what actually happened without going through the lengthy litigation process. Often, aggrieved patients want something additional to monetary payment. They want to be heard and to have an opportunity to express their anxieties over what has happened. At times, they want an apology and an assurance that what happened to them will not be repeated. Mediation provides the proper forum for patients to express their opinion and for doctors to explain why something was done the way it was. This conceivably offers an inexpensive method for resolving disputes without going through litigation.

Promoting The Use Of Apologies During Mediation

Apology has long gained prominence as an effective tool in ADR particularly, in mediation. In ADR such as mediation, it offers higher expectations and potential to heal the relationship between the parties before the dispute is brought to court,[5] as the disputing parties can negotiate with a neutral third party on how to achieve a mutually acceptable resolution of the points in conflict. Although an apology can only come from the parties themselves, mediators are recommended to propose for an apology even when it was not initiated by either party whenever appropriate, as it can be an effective tool in promoting the resolution of the dispute.[6] An apology at this juncture will reduce anger as well as the hostility between the parties and since the mediation process is not restricted to the rules of evidence nor procedure, this would be a great avenue for the wrongdoer to offer a sincere apology to the victim as the apology offered cannot be used as an admission of guilt in the court of law should the mediation fail to resolve the dispute.[7] During the mediation process, the parties involved will have the opportunity to make any retraction or correction in statements made, offering statements of regret as well as apology and this will likely affect the outcome of the dispute resolution process itself.

5 Susan Alter, Law Commission of Canada *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations* (1999).

6 DL Levi 'The Role of Apology in Mediation' New York University Law Review Vol. 72 1997 pp. 1165-1210.

7 AJ Kellett 'Healing Angry Wounds: The Roles of Apology and Mediation in Disputes between Physicians and Patients' Journal of Dispute Resolution 1987 pp. 111-31.

There are several aspects of the mediation process that promote the making of an apology as the mediation process itself provides an opportunity for direct participation by the parties in the negotiation process and at the same time, allows it to be confidential as well as meaningful dialogue between the parties without taking into account the legal complications of the apology. Besides that, it will also allow the parties to be clear about the facts, issues and the expectations of both parties. As a neutral third party, the mediator needs to play the very important role to remind the parties that litigation is not the only way to settle their dispute. Mediation will thus, empower the parties to resolve the dispute in accordance to their choice and may provide more psychological benefits to the parties.[8] Since an apology may serve various benefits to the parties during the mediation process as it provides a conducive platform for the parties to apologise, this has garnered attention and interest of legal scholars and legislators for apology to be used beyond mediation in the resolution of dispute process.[9]

Although an apology offers immense benefits in the dispute resolution process, the main impediment in the application of medical apology as an effective tool in the resolution of disputes is that it can be self-incriminating and viewed as an admission of guilt on the part of the medical practitioner. Due to this reason, medical practitioners constantly fear that the apology offered by them to their patients will be used against them in the court of law. The legal ramifications of medical apologies can be illustrated in the following cases. In *Gurmit Kaur Jaswant Singh v. Tung Shin Hospital & Anor*,[10] a woman sought

8 RO Carroll 'When "Sorry" is the Hardest Word to Say, How Might Apology Legislation Assist?' Hong Kong Law Journal 44(2) 2014 pp. 491-517.

9 EA O'Hara, D Yarn 'On Apology and Consilience' Washington Law Review Vol. 77 2002 pp. 1121-92,

10 [2013] 1 CLJ 699, HC.

treatment from the defendant medical practitioner to remove a fibroid in her uterus. However, it was found later that a hysterectomy procedure was conducted on her. The medical practitioner was found liable and the apology given by him was considered as proof for the negligence committed. Rosilah Yop JC in delivering her judgment stated:

> My view, when the Second Defendant had apologised to the Plaintiff, proves that the Second Defendant had admitted to a mistake he had done.

This can be seen as a clear illustration on how an apology can be viewed as an admission of guilt. Further consequences of an apology in medical negligence claims can also be illustrated in the case of *Norizan Abd Rahman v. Dr Arthur Samuel.*[11] In this case, four months after the birth of her fifth child, the plaintiff, discovered she was pregnant again and requested the defendant, an obstetrician and gynaecologist, to terminate the pregnancy and at the same time insert an intrauterine contraceptive device (IUCD). However, while the procedures were being performed simultaneously, the plaintiff's right uterine wall and right artery of the uterus were perforated necessitating an emergency life-saving operation by the defendant to remove her womb and right ovary. The plaintiff claimed that they were informed that this was just a simple procedure and were not informed about any risks. The court in allowing the claim which amounted to RM220,000 in general damages and RM3,000 in special damages had also considered the contention by the plaintiff that an apology was made by the defendant and the defendant was not present to answer or deny such claim. The court held that such an apology made was considered as establishing negligence on the part of the defendants. Thus, it can be seen from this case that, an apology by the medical practitioner may be used by the court in the determination of his liability. It is clear from the judgment of these cases

11 [2013] 4 CLJ 275, HC.

that whenever a medical practitioner apologises, it may be considered as legal suicide as it could backfire against them as such apology can be construed as an admission of guilt and considered in determining the liability of the medical practitioner.[12]

Although medical apologies offer much benefit in defusing the desire for patients to litigate, it also has the effect of being a 'double-edged' sword and be seen as self-incriminating on the party who apologises. In other words, medical apology can be seen as an admission of guilt and be tendered as evidence in court proceedings against the medical practitioner. This problem has led to several countries enacting 'apology laws' that mandate open disclosure of medical errors but at the same time, shielding those who apologise from legal liability.[13] The workings of apology law differs from one jurisdiction to another and according to what type of apology, whether full or partial they would like to protect. It is thus, important to examine the relevant jurisdictions that have implemented apology law for resolving medical disputes.

In the USA, there are 36 states which have introduced apology laws in the form of full or partial apology. Although there is no direct link between apologies and the reduction of the cost of medical negligence disputes, it was however, found that after the introduction of the apology legislations, positive implications occurred which include the reduction cost of a medical dispute process, improvement in patient safety, and restoration of trust between the medical practitioner and the patient.[14] In Australia, this concept gained attention after the increase in

12 RE Ebert 'Attorneys, Tell Your Clients to Say They're Sorry: Apologies in the Health Care Industry' Indiana Health Law Review Vol. 5(2) 2008.

13 B Ho, E Liu 'Does Sorry Work? The Impact of Apology Laws on Medical Malpractice' Journal of Risk and Uncertainty Vol. 43(2) October 2011 pp. 141-167.

14 CB Liebman, CS Hyman 'A Mediation Skills Model To Manage Disclosure of Errors and Adverse Events to Patients' Health Affairs 23(4) pp. 22-32.

the number of medical malpractice cases[15] as well as medical insurance crisis.[16] In addressing these concerns, the legislators in Australia recommended for a legislation that provides for medical apologies to be a mandatory part of the open disclosure process and inadmissible for medical negligence cases.[17] Like the USA, the application of apology laws vary in different states throughout Australia.[18] States such as New South Wales, Australian Capital Territory and Queensland enacted the 'full apology law' whereas the rest of the states such as Victoria, Northern Territory, South Australia, Tasmania and Western Australia enacted the 'partial apology law'.[19] The workings of 'full apology law' in Australia require three main elements that concern the position and consequence of such apology, i.e. the declaratory element, relevance element and procedural element.[20] For instance, in the New South Wales Civil Liability Act 2002 s. 69(1)(a), declares that apology is not an admission of fault or liability. This refers to the first element which is the 'declaratory element'. Secondly, in determining a fault or liability on the part of the defendant, s. 69(1)(b) excludes apology from being taken into account as a relevant fact in determining fault. This provision is concerned with the 'relevance element'. Thirdly, with regards to the 'procedural element', from the law of evidence perspective, apology

15 GAB Barr 'Disingenuous or Novel? An Examination of Apology Legislation in Canada' 2009.

16 P Vines 'Apologising to Avoid Liability: Cynical Civility or Practical Morality?' 27(3) Sydney Law Review 2005 p 483.

17 *Ibid.*

18 GAB Barr 'Disingenuous or Novel? An Examination of Apology Legislation in Canada' 2009.

19 C Wheeler 'Open Disclosure and Apology — Time for a Unified Approach across Australia' AIAL Forum No 75 July 2013.

20 *Ibid.*

made is inadmissible as evidence of fault and therefore, cannot be used in court against the person who gave it (s. 69(2)). Further development took place in Canada whereby the state of British Columbia referred to the New South Wales Civil Liability Act 2002 as the basic foundation.[21] However, the British Colombia Apology Act incorporated not only the essential elements based on the Australian legislation but also included specific provisions for insurance contracts. This is an extension of the protection where the law does not only render such apology inadmissible in court, but also prevents the insurance contract from becoming void if the apology was made.[22]

Conclusion

Apology has been proven as an effective means in resolving conflicts and at the same time prevents litigation. However, there are many barriers which hinder apologies from being given by medical practitioners. This is due to the fact that apology has long been associated as evidence of guilt which have the possibility of increasing legal liability. However, apology now has gained attention particularly, in medical disputes as it can be highly beneficial to the parties as well as to the dispute resolution process itself. This can be seen by the implementation of various jurisdictions in enacting apology laws to ensure the clarity of the consequences of apologies is made within a clear legal framework. Although an apology cannot be a substitute for monetary compensation, it is nevertheless, a powerful tool that can lead to the closure of an

21 GAB Barr 'Disingenuous or Novel? An Examination of Apology Legislation in Canada' 2009.

22 C Carman 'Apology Act Promotes Dispute Resolution' 2006.

ongoing dispute and facilitate the dispute resolution process for the benefit of the relevant parties. In handling medical disputes in Malaysia, the benefits of apologising are beyond doubt but in encouraging medical practitioners to apologise, a clear legal framework needs to be established to protect the apologies made in certain circumstances for unintentional wrongdoings. The enactment of apology laws for the protection of apologies in the legal system will offer various benefits to the parties in dispute. For instance, it will encourage faster and more cost-effective resolution of medical disputes as it can be an effective means of preventing litigation. This is due to the fact that medical practitioners are given the legal platform to make apologies which may have the possibility of disarming the patient's anger. In Australia, it has been found that there is significant reduction in number of new claims for compensation, increased number of closed claims and a reduction as to the proportions of large damage awards after the notable Australian tort law reform which had allowed the doctors to apologise without the fear that it would be considered an admission of guilt. Therefore, there is a need to develop a comprehensive legal framework for the protection of apologies in the Malaysian healthcare setting to promote the usage of apology in the dispute resolution process in gaining its potential benefits. Lessons can be learned from the American, Canadian and Australian experiences in drafting and implementing apology laws as well as making amendments to the law of evidence in ensuring that apologies made are not treated as admissions of guilt. It is hoped that the establishment of a 'structured apology law' in Malaysia will reduce the number of medical negligence disputes, defuse the spur of litigation and ultimately, preserve the sanctity of the relationship between the medical practitioner and the patient.

ALTERNATIVE DISPUTE RESOLUTION

Law & Practice

Alternative Dispute Resolution: Law and Practice is divided into 44 chapters which cover alternative dispute resolution (ADR) mechanisms in all their varieties, including negotiation, mediation, conciliation, ombudsman, arbitration, and court adjudication. These ADR mechanisms can be used alongside existing court systems and have gained widespread acceptance because of its speedy resolution of disputes and outcomes that preserve and sometimes even improve relationships.

The primary objective of this book is to enhance reader's understanding of the various regulatory framework governing ADR on diverse issues at both national and international levels. This includes the application of ADR to fintech, Islamic banking and finance, labour, and construction disputes among others. Online dispute resolution, Singapore Mediation Convention, and university arbitration are also featured in this book.

All those concerned, both the legal and non-legal community such as legal practitioners, arbitrators, mediators, academicians, and students, will find this book as a valuable aid for a good understanding of matters pertaining to ADR without having to refer to several other sources.

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