

Parental Negligence and ‘Treatment’ Rights for Children in Malaysia

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1. Parental Negligence under Tort Law
2. Parental Negligence under Child Act 2001
3. Treatment Rights for Children under Child Act 2001

LEGAL ISSUES THAT WILL BE DISCUSSED...

1. Parental Negligence under Tort Law

NEGLIGENCE...*failure to take reasonable care to avoid causing injury or loss to another person*

- ▶ Elements required in proving Negligence under Tort Law:
- ▶ **1. DUTY OF CARE**
- ▶ 2. BREACH OF DUTY
- ▶ 3. CAUSATION

ELEMENT OF 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 such a duty in a given set of circumstances has given rise to what is known in the law of torts as a “DUTY SITUATION”.

Lord Atkin in *Donoghue v Stevenson* (1932) - “*persons who are **so closely and directly affected by my act** that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind **to the acts or omissions** which are called in question.*”

A person will owe a duty of care to those who are also within his contemplation who will **suffer foreseeable loss**.



❖ Parents can reasonably foresee that their act / omission (failure to act) will affect their children who are considered to be closely and directly affected by their actions/inactions

PARENTS OWE A DUTY OF CARE TO THEIR CHILDREN WHO ARE UNDER THEIR CARE IN WHICH THEY HAVE RESPONSIBILITY OVER

EXAMPLES OF PARENTAL NEGLIGENCE

- ▶ Failure to act as a reasonable prudent parent and failure to execute duties under the scope of their 'parental responsibilities'...

THE BREACH OF DUTY

- ▶ Positive Acts and Actionable Omissions - leading to failure to provide children the adequate supervision, health care, clothing, or housing, as well as other physical, emotional, social, educational, and safety needs.

The BREACH OF
DUTY thereby
CAUSING
DAMAGE/HARM TO
THE CHILD

Can Failure to Vaccinate amount to Parental Negligence?

- ▶ Courts have been cautious in imposing duty of care on omission/ failure to act as it can lead to floodgates.
- ▶ Failure to act can be an ACTIONABLE OMISSION when there is a duty to act and it is 'just and reasonable' to impose such a duty.
- ▶ The court will take into account the Implications to the society - the risks of danger created by failure to vaccinate the child to the public

Does deciding on 'Home Birth' can lead to Parental Negligence?

- ▶ There are separate legal issues in this question:
- ▶ **First Legal Issue** - The **Autonomy of a Woman** to decide matters pertaining to her own body is firmly entrenched in Medical Law provided that she is **legally competent** to decide whether to accept or refuse the treatment proposed.

Lord Donaldson in Re T (An Adult: Medical Treatment) [1992]

- ▶ “The patient’s right of choice right of choice is not limited to decisions which others might regard as sensible. It exists notwithstanding that the reasons for making the choice are **rational, irrational, unknown or even non-existent.**”

A legally competent person having the capacity to consent has also the capacity to refuse any medical treatment proposed.

Lord Brandon in F v West Berkshire HA (1989)...the issue of whether the patient has the capacity to refuse consent hinges on whether the patient has the capacity to understand the nature and purpose of care.

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(5) Malaysian Mental Health Act 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.

Fetus does not have not have any legal identity...

- ▶ **Second Legal Issue** - An unborn child or fetus is a biologically distinct organism from the mother, it is not a legal person, it has been accepted that in order to have a right of action, the fetus must be born and be a child. When an unborn child becomes a living person and suffers damages as a result of pre-natal injuries, the child is able to bring proceedings. On birth, the child acquires legal status and thus, legal rights - ***Chin Yoke Teng & Anor v William Ui Ye Mein (2005)***

However, it does not mean that one can do anything to the fetus including killing it....

- ▶ Section of the 315 Penal Code - Whoever before the birth of any child does any act with the intention and thereby preventing the child from being born alive, or causing it to die after its birth shall if such act be not caused in good faith for the purpose of saving the life of the mother be punished with imprisonment which may extend to ten years or with fine or with both.

Standard of Care of a 'Doula'

- ▶ **Third Legal Issue** - The standard of care of a Doula is a separate issue from the right of the woman to decide on the type of birth she wants.
- ▶ The Doula can be held to be in **BREACH of DUTY** and ultimately to be negligent if she acts over and above her scope of her responsibilities.
- ▶ 'Doula' are not trained and registered as midwives under subsection 14(1) of The Midwives Act 1966 - their duty is **limited providing support in terms of emotional and physical assistance to the mother**, father and also the baby throughout labour, during and after birth - **they are not medically competent to offer any advice on the risks inherent in the proposed medical treatment** to be undertaken.

2. Parental Negligence under Child Act 2001

Child Act 2001

Children are considered as incompetent persons - require parental consent

However - Section 17 - A child is in need of care and protection if...

(d) the parent or guardian has neglected or is unwilling to provide him adequate care, food, clothing and shelter;

Thus, section 18 will come into play, in which Protector / police officer can take temporary custody of the child.

Ill-treatment, neglect, abandonment or exposure of children

- ▶ Section 31(1) - Any person who, being a person having the care of a child— (a) abuses, **neglects**, abandons or exposes the child or **acts negligently in a manner likely to cause him physical or emotional injury or causes or permits him to be so abused, neglected**, abandoned or exposed; or (b) sexually abuses the child or causes or permits him to be so abused, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both.

*Continuation....*Section 31 Child Act 2001

- ▶ (4) A parent or guardian or other person legally liable to maintain a child shall be deemed to **have neglected him in a manner likely to cause him physical or emotional injury if**, being able to so provide from his own resources, he fails to provide adequate food, clothing, medical or dental treatment, lodging or care for the child. (5) A person may be convicted of an offence against this section **notwithstanding that—**
 - ▶ (a) **suffering or injury to the health of the child in question or the likelihood of suffering or injury to the health of the child in question was avoided by the action of another person**; or (b) the child in question has died.

3. 'Treatment' Rights for Children 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.**

Once the child taken into temporary custody, Protector to bring child to see a doctor - who must be a registered medical practitioner in the Government service and includes teaching hospital

Section 20(1) Child Act
2001

“Protector or Police officer”
may alternatively write to the
person whom he thinks has
the care of a child at that
time, directing that person
immediately take the child to
a doctor.

Section 20(3) Child Act
2001

Section 21 a-c

- ▶ The medical officer who is presented with the child in need of treatment **may conduct an examination on the child** and if authorized by the Protector or police officer, the medical officer can also **administer procedures and tests to diagnose the child's condition**. The medical officer can also provide the necessary treatment if he considers necessary as a result of the diagnosis

However, if the medical officer is of the opinion that the child needs hospitalization, he must get the **required authorisation from the Protector or police officer.**

Once the child is hospitalized, the Director General has control over and responsibility for the maintenance of the child.

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.**

Has to be noted that Parental
Autonomy has Limits...as the
court in determining matters
regarding children ...

BEST INTERESTS OF THE CHILD PREVAIL

**CHILD'S WELFARE FIRST AND PARAMOUNT
CONSIDERATION**

The Limits of Parental Consent

- ▶ ***Re C (HIV Test)* [1999] 2 FLR 104 - parental wishes not determinative**
- ▶ This case arose when the baby's physician realised that the mother, who tested for HIV positive, was breastfeeding her child. Parents refused to have the child tested for HIV. Court ordered for the baby to be tested for HIV - CA considered **the reasonableness of the parents refusal** - held that the question **whether the child should or should not be tested was a matter relating to the welfare of the child and not the rights of the parents**, it was clearly not in the best interests of the child for them to remain ignorant on the health status of the baby.

Re T [1997] 1 All ER 906 – parental wishes determinative

- ▶ Baby T was born suffering from biliary atresia, a life-threatening liver defect and an operation when he was three and a half weeks old was unsuccessful. Without transplantation he would not be beyond the age of two and a half. The operation had a 80% chance of success. Parents who were both doctors refused to give consent. Doctors applied to court. CA held that it was not in the best interests of the child for the child to come back to England for the operation and be subjected to an invasive surgery—the child's care is best left with their parents – the decision of a loving, caring mother should be respected.

THANK YOU

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