MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Speaker
JEREMY BALANG
Senior Associate

Speaker
FUNG KAR MEN
Associate

Moderator
JASMINE WONG
Senior Associate

Wed 3 May 2023
3:00pm (GMT +8)

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MWKA ONLINE TALKS
Medical Negligence Claims: What Patients and Their Families Need to Know

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About Us

- Welcome to MahWengKwai & Associates!
- Trusted by small medium enterprises (SMEs), family businesses and individuals.
- Established in 1985 by Dato' Mah Weng Kwai, now a consultant with the firm.
- Medium-sized law firm with 28 lawyers and 35 staff.

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Our Services

- Full-service law firm with 4 Departments:
  - Corporate
  - Dispute Resolution
  - Employment
  - Individuals & Families

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MWKA Online Talks

- To share knowledge, raise awareness, encourage networking
- For clients, potential clients, in-house counsel
- Recent MWKA Online Talk:
  - 19.4.2023: Eviction of Squatters: A Landowner's Right to Vacant Possession
- Upcoming MWKA Online Talk:
  - 31.5.2023: Industrial Court vs Labour Court: Understand the Process, the Law and Recent Amendments to Protect your Rights

Jeremy Balang

- Senior Associate practising in the areas of medical law, personal injury, debt recovery and general litigation.
- Involved in various medical and dental negligence claims, acting for patients, hospitals, healthcare practitioners and insurance companies.
- Bachelor of Laws (Honours) from Cardiff University in 2017.
- Admitted to the Malaysian Bar in 2018

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Kar Men Fung

- Associate in our Dispute Resolution and Individuals & Families Department.
- Bachelor of Laws (Honours) from Cardiff University, UK.
- Called to the English Bar in November 2018.
- Admitted to the Malaysian Bar in 2020.
- General litigation, debt recovery, probate and administration of estate, corporate and commercial litigation, Joint Management Body matters and family law matters.

Talk Points

- Obtaining discovery of medical records
- Seeking independent expert medical opinions
- Grievance mechanism; deceased patients; limitation periods; etc
- The types of damages claimable
- Interest rates and legal costs

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Introduction to Medical Negligence

Criteria for Establishing Liability

- that there existed a duty of care which was owed by the healthcare provider and/or practitioner to the patient at the material time;
- that such duty of care had been breached; and
- that such breach had caused or materially contributed to the harm or injury suffered.

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Obtaining discovery of medical records

Medical Records

- **Yes** - medical records play a very important role in medical negligence claims.
- **No** - medical records are distinct from a medical report. A medical report is on its own often not enough in order to prove either liability or causation in a medical negligence claim.
- **No** - a medical report is not the same as an expert report.

Tindok Besar Estate Sdn Bhd v Tinjar & Co [1979] 2 MLJ 229

"...I would with respect feel somewhat safer ***to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings.*** *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case.* ***Plausibility should never be mistaken for veracity****..."*

Norazleen Mohammed Mustaffa v Dr Omar Md Isa & Anor [2015] 4 CLJ 474

"[65] The learned judge also held that even though the consent forms (exhs. D23 and D25) did not state specifically the risks which were informed to the plaintiff's parents, it did not mean that the risks, including paralysis were not verbally informed.

[66] With respect, we are unable to agree with the approach taken by the learned trial judge. ***Such an approach downplays the importance and purpose of the consent form****, as well as the importance of the duty to warn patients of the inherent risks of the proposed treatment. Moreover,* ***such a liberal approach by the court is open to abuse*** *by medical practitioners…*

"

Norazleen Mohammed Mustaffa v Dr Omar Md Isa & Anor [2015] 4 CLJ 474

"[67] On the facts in the present case, we find that the plaintiff had successfully proven that the defendants had failed to inform her and her parents of the risk of paralysis. This is based on the fact that ***nowhere in either the consent forms*** *(exhs. D23 and D25),* ***or the clinical notes of the plaintiff*** *(exh. D21)* ***was the risks of paralysis, or for that matter, any risks mentioned at all****.*

*[68] We feel that i****n the absence of any documentary evidence*** *in support of the defendants' case that the risk of paralysis had been informed, the learned High Court Judge* ***should not have made any assumptions*** *and arrived at such a simplistic conclusion……"*

Obtaining Medical Records

- Some hospitals make voluntary disclosure. Some do not.
- An application for pre-action discovery pursuant to **Order 24 rule 7A of the Rules of Court 2012** may be filed to compel the hospital to disclose copies of medical records.
- The costs of such application may be included in a claim in medical negligence as an item of special damages.

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Seeking independent expert opinion

Independent Expert Opinion

- **Yes** - engaging and obtaining independent expert opinion is often crucial in order to succeed in a medical negligence claim. Sometimes you may need more than one expert in a case.
- **No** - it is not the case that you need expert evidence in every medical negligence claim in order to succeed.
- **No** - a patient's treating doctor cannot give expert evidence in that patient's case.

Independent Expert Opinion

- **Yes** - there are doctors who are willing to give expert evidence against their fellow doctors though they are not necessarily always critical in their opinions.
- **Yes -** an expert is likely to charge a fee for preparing his or her expert report and also for attending Court. The fee is determined by the expert.
- **No** - an expert must be paid his or her fee regardless of whether his or her opinion is supportive of the intended claim in medical negligence. This may include cancelled Court attendances. It is the expert's prerogative as to whether to reduce his or her fee(s) or to waive it.
- **Yes** - the expert's fees may be claimed later in the suit.

Independent Expert Opinion

- The Courts in Malaysia apply the Bolam test which essentially states that a doctor is not negligent if he or she had acted *"in accordance with a practice accepted are proper by a responsible body of medical men skilled in that particular art"*.
- The Bolam test does not apply to findings of fact; the provision of advice and information; administrative or clerical errors; etc
- The Bolitho qualification - the expert evidence must be reasonable, responsible and respectable and stands up to a logical analysis.

Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor [2018] 11 MLJ 238

- Following a biopsy, the defendant had described the cells to be round and polygonal in shape when the cells were in fact thin, elongated and spindle shaped.
- As a result of the negligent description of the shape of the cells, there was a delay in diagnosing the plaintiff's cancer, causing her to suffer harm.

Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor [2018] 11 MLJ 238

*"Further another **obvious mistake** made by the first defendant **which did not require any special skills** to determine is the shape of the cells tested under the microscope. The first defendant described the cells as round or polygonal when in actual fact it is spindle shape and **no special skill is required to determine the shape** . The shape of the cells **can be determined by a lay man** by just looking at it. The mistake in identifying the correct shape of the cells has a profound effect on the final results as testified by Dr Pathmanathan. This obvious mistake by the first defendant once again proves the breach of duty towards the plaintiff…"*

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Other Issues Concerning Liability

Basic Limitation Periods

- An adult patient suing a private hospital or a healthcare practitioner practising there - **6 years** from the date of the tortious act (section 6 of the Limitation Act 1953).
- An adult patient suing a Government or university hospital or a healthcare practitioner practising there - **36 months** from the date of the tortious act (section 2 of the Public Authorities Protection Act 1948).

Limitation Periods (Infants With One or More Disabilities)

- A patient who is a minor (less than 18 years) - the limitation on his or her cause of action would only begin upon the infant reaching the age of 18 years (i.e. the date which he ceases to be under a disability) (see section 6(1)(a) of the Limitation Act 1953 which is to be read together with section 24)
- A patient who is a minor and who has suffered permanent injuries - the limitation period would never run as the patient never ceases to be under his or her disability.

Imdadurrahman bin Hithayatullah v Pearl Maternity Hospital Sdn Bhd & Anor [2021] MLJU 401

- The infant was born in 2007. The suit was filed in 2019.
- The defendants sought to strike out the claim on the ground that the claim is barred by limitation.
- The High Court dismissed the application. The defendants later withdrew their appeal to the Court of Appeal.

Imdadurrahman bin Hithayatullah v Pearl Maternity Hospital Sdn Bhd & Anor [2021] MLJU 401

"…since the minor in the instant case ***has yet to reach his age of majority, time for the purposes of the period of limitation is yet to commence*** *.* ***Time will only commence on the minor's eighteenth birthday.*** *Only then he would be possessed with the legal capacity to commence an action on his own right. Nevertheless, the plaintiff while still a minor is permitted at any time to bring legal proceedings on the right of action accrued to him through his next friend or litigation representative…."*

Limitation Periods (Deceased Patients)

- A dependency claim against a hospital, whether private or public, and/or the healthcare practitioners practising there - **3 years from the date of death** (section 7(5) of the Civil Law Act 1956).
- An estate claim against a private hospital or a healthcare practitioner practising there - **6 years from the date of the tortious act** (section 6 of the Limitation Act 1953).
- An estate claim against a Government or university hospital and the healthcare practitioners practising there - **36 months from the date of the tortious act** (section 2 of the Public Authorities Protection Act 1948).

Deceased Patients

- If a dependant wishes to sue as the administrator of a deceased patient's estate, he or she will need to apply fo apply for grant of letters of administration.
- If the deceased had left behind a will, the dependant would need to apply for grant of probate.
- There are items of damages which may be claimed in an estate claim which cannot be claimed in a dependency claim, e.g. general damages for pain and suffering and loss of amenities of life of the deceased, aggravated damages, etc.
- It is possible to sue as both a dependant of the deceased and the administrator of the estate.

Grievance Mechanism

- The private healthcare regulations provide that if a patient were to inform the officers of a hospital of his or her grievance regarding the treatment and management of his or her case, the hospital is required to provide a reply to such grievance no less than 14 working days from receipt of the grievance.
- Such reply is to include the results of the investigation undertaken by the hospital in respect of the patient's grievance.
- Different regulations apply to a private hospital and to a private medical clinic or dental clinic.

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The types of damages claimable

Damages

- Once a claimant is successful in providing liability against the tortfeasors, the issue of quantum will arise.
- Quantum = the monies to be awarded to the victim of the tort.
- This is also known as damages.

Overriding principle

- The overriding principle of damages is that it be compensatory in nature, which is, to put the victim, in so far as it is reasonably possible to do so by the award of monetary compensation, in the position that he or she would have been if the tort had not occurred.

Types of damages

- Special damages
- Pre-trial damages (extension of special damages)
- General damages
- Aggravated damages
- Future damages
- Party-and-party costs
- Interest

Special Damages

- May be quantified with some precision.
- *"Actual pecuniary damage or loss suffered between the date of the negligent act and the date when the Court delivers judgment"* - Vazeer Alam JC (as his Lordship then was) in ***Nurul Husna binti Muhammad Hafiz & Anor v the Government of Malaysia & Ors*** **[2015] 1 CLJ 825**

Special Damages

- Examples:

1. Hospital/medical expenses
2. The cost of purchasing medications, supplements, special foods
3. The cost of therapies or traditional treatment
4. Traveling expenses
5. The cost of purchasing equipment or appliances
6. The cost of engaging a carer or maid

Concept of special damages

- Special damages recoverable?
  - Yes, so long as they are justifiable in the circumstances and for a reasonable sum.
  - ***Rohgetana Mayathevan* v *Dr Navin Kumar & Ors and Other Appeals* [2017] 4 MLJ 102**, Court of Appeal held:

"In respect of Therapies (Spastic Centre) and Complimentary medicine (Ayurvedic), ***the defendants persisted before us that only such expenses incurred as could be supported by receipts (documentary proof) ought to be allowed.*** *We however did not find that the learned judge had misdirected himself on the law when he held that special damages,* ***so long as they were pleaded and particularised, could be proved by oral or documentary evidence*** *(ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1). Such claims were to be allowed* ***so long they were within a reasonable sum and justifiable in the circumstances****…..*(emphasis supplied)"."

Concept of special damages

- Documentary proof of every expense?
  - No, the Court may accept either oral or documentary evidence.
  - It is unrealistic for a victim of the tort to be able to collect, keep and produce every bill and receipt.
  - As long as there is oral testimony to support the expense and the expense can be reasonably expected to be incurred due to the circumstances of the case, the courts have allowed the claim for special damages. (***Nur Syarafina bt Sa'ari v Kerajaan Malaysia & Ors*** **[2019] 12 MLJ 741**)

Concept of special damages

- Evidence not challenged by the defendant
  - If there is no challenge, the Court should accept the evidence and ought to take it as true.
  - In ***Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund and another appeal*** **[2022] 4 MLJ 529**, the Court of Appeal took into account the unchallenged evidence by the claimant's wife at the trial.

Concept of special damages

- Specifically pleaded and particularised in the Statement of Claim?
  - General rule, yes.
  - However, the Court is not bound to limit each of the particulars of special damages to the amount pleaded in the Statement of Claim
  - If evidence shows that the actual damages are more than the amount pleaded, the Court may award the actual amount (***Mat Jusoh bin Daud*** **v** ***Syarikat Jaya Seberang Takir Sdn Bhd*** **[1982] 2 MLJ 71**)

General Damages

- Cannot be quantified with precision.
- Court award general damages based on precedents, comparable cases or estimation.
- Examples of general damages:-
  - Pain and suffering and loss of amenities of life
  - Future damages
  - Value of gratuitous care provided to the victim of the tort by his or her family members
  - Loss of earning capacity

Pain and suffering and loss of amenities of life

- Two components:
  - Pain and suffering, e.g,: physical pain, emotional distress
  - Loss of amenities of life, e.g,: loss of one's enjoyment of life
- While the two are distinct, they are usually awarded in a single lump sum of damages

Concept of general damages

- There is a Compendium of Personal Injury Awards prepared by the Bar Council and the Court may consider when determining an award of general damages for pain and suffering and loss of amenities of life.
- However, the Court is at liberty to depart from the compendium if the facts warrant such departure. (***Abdul Waffiy bin Wahubbi & Anor*** **v** ***A K Nazaruddin bin Ahmad*** **[2017] MLJU 761**)

Concept of general damages

- Quite often, patients involving brain injuries of damage tend to receive the largest awards. Examples:
  - Infants who suffered brain injuries - cerebral palsy; or
  - Adults who suffered brain injuries - negligent anesthetic treatment resulting in vegetative state
- The Courts have awarded a range between RM400,000 and RM600,000 as general damages for pain and suffering and loss of amenities of life in cases like these.

Concept of general damages

- A patient who suffered only for a relatively short period of time before dying as a result of his or her injuries does not mean that the patient should receive only nominal general damages for pain and suffering and loss of amenities of life.
- ***Dato' Stanley Isaacs* v *The Government of Malaysia & Ors* [2019] 8 MLJ 331**:

> *"[71] The plaintiff submitted that there are no comparable precedents for damages for pain and suffering and loss of amenities of life as what had come to pass in this case. I am in agreement with the plaintiff.* ***To award a nominal sum of RM50,000 for general damages as proposed by the defendants would be an affront to the plaintiff in light of the agonising last few days of her life and to the deceased's immediate family members, relatives and close friends who had loved and cherished her. Hence, in my view, an award of RM100,000 as submitted by the plaintiff is apt and befitting****…..*(emphasis supplied)"

Aggravated Damages

- Aggravated damages are "classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest or personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant" - ***Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors*** **[2018] 1 MLJ 784**

Aggravated Damages

- ***Dr Hari Krishnan & Anor* v *Megat Noor Ishak bin Megat Ibrahim & Anor and other appeal*** **[2018] 3 MLJ 281** - The Federal Court upheld an award of RM 1 million as aggravated damages. While the Federal Court did not specifically identify the facts warranting such award, the following facts may served as the basis for upholding the award of aggravated damages:
  - the failure by the 1st defendant to explain to the plaintiff that his right eye was blind;
  - the removal of the plaintiff's right lens without the plaintiff's consent; and
  - the giving of false hope by the 1st defendant to the plaintiff

Aggravated Damages

- Various cases after ***Dr Hari Krishnan*** in awarding aggravated damages:
  - Delay or refusal to admit liability
  - Defendants pleaded and presented a false case, alter medical records to escape liability
  - Unfair or insulting cross-examination of the patient
  - Failure to make voluntary disclosure of medical records

Aggravated Damages

- The law regarding aggravated damages and its quantification is still a developing area of law. It is highly dependent on the **factual circumstances** of the case and most importantly, the conduct of the defendant tortfeasors following the negligent events and how such conduct had worsened the harm suffered by the patient or their family members.

Future Damages

- Future damages is a complex exercise and in many instances, it requires expert evidence.
- 3 important features to assessment of future damages:
  - The life expectancy of the patient
  - The multiplier
  - The multiplicand
- The Courts are usually guided by expert evidence in respect of the life expectancies of patients as well as their future needs and the costs of the same.

Future Damages

- Example:
  - A 5 year old infant with brain injuries requires physiotherapy once a week for the rest of his/her life.
  - The expert(s) give evidence that a single physiotherapy session at a private hospital is approximately RM100 (multiplicand)
  - The expert(s) also suggest that the infant may live till the age of 40 years, which is considerably lesser than the average individual
  - The multiplier is derived by deducting the expected life expectancy (40 years) from the infant's age (5 years) = 35

Future Damages

- Example:
    - Calculation for future damages for the cost of physiotherapy:

      RM100 x 52 weeks (a year) x 35 years = RM182,000

Future Damages

- Example:
  - A 20 year old Malay male loses his leg as a result of negligent treatment. He requires a prosthesis, which costs about RM50,000 (the multiplicand), and has a lifespan of about 10 years.
  - The average life expectancy is considered, approximately 70.4 years
  - Deduct the patient's age (20 years) with usual life expectancy (70.4 years), you'll get a multiplier of 50.4 years.
  - The prosthesis would therefore need to be replaced at least 5 times

Future Damages

- Example:
  - Calculation for future damages for the prosthesis:

    RM50,000 + (RM50,000 x 5 replacements = RM250,000) = RM300,000

Future Damages

- The standard of proof for future damages is on a balance of probabilities, but with a lower degree of certainty which can be described as a “possibility”, “chance”, “risk”, “danger” or “likelihood”.
- In other words, the plaintiff only need to prove that there is a substantial “possibility”, “chance”, “risk”, “danger” or“likelihood” that such future damage may occur.

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Interest rates and party-and-party costs

Party-and-Party Costs

- Order 59 of the Rules of Court 2012:
  - Party-and-Party costs includes “fees, charges, disbursements, expenses and remuneration”.
  - Rule 6(1) provides various factors which the Courts are to consider when assessing and awarding costs:
    - Complexity of the item
    - Skill, specialised knowledge and responsibility required
    - Number and importance of the documents
    - Importance of the cause or matter to the client

Party-and-Party Costs

- Court may order that each litigant is to bear their own costs or that the costs are to be “in the cause”, which means costs of the interlocutory proceedings shall be awarded to the party who succeeds at the conclusion of the main suit.
- Court may also make a Sanderson or Bullock order
  - Sanderson order requires an unsuccessful defendant to pay the costs of the successful defendant instead of the plaintiff paying the costs
  - Bullock order requires the plaintiff paying the costs of the successful defendant and then claiming the same from the unsuccessful defendant.

Interest

- The law applies various interest rates to be applied to various types of damages and the accrued interest is taken into account when payment of the damages is made.
- The rationale behind awarding interest is to compensate the plaintiff for being deprived of the use of the money which they are entitled to.

Interest

- Two types of interest:
  - Pre-judgment interest
  - Post-judgment interest

Pre-judgment interest

- Section 11 of the Civil Law Act 1956
  - Allows interest to be awarded on damages for the period between the date when the cause of action accrued and the date of the judgment, i.e. the pre-judgment period
- The rate of interest is at the discretion of the Court

Pre-judgment interest

- Usual rate for pre-judgment interest:
  - 4% per annum on special damages from the date of the incident to the date of judgment; and
  - 8% per annum on general damages from the date of service of the writ to the date of judgment.

Post-judgment interest

- Order 42 rule 12 of the Rules of Court 2012 & Practice Direction No. 1 of 2012 issued by the Chief Justice:
  - Post-judgment interest is calculated at the rate of 5% per annum from the date of judgment to the date of payment.
- Order 59 rule 24 of the Rules of Court:
  - Interest on costs awarded should also run at the rate of 5% per annum from the date of judgment to the date of payment.

Questions?

Upcoming Online Talk

Date (Day)	Topic Title	Speaker(s)
31st May 2023 (Wed)	Industrial Court vs Labour Court: Understand the Process, the Law and Recent Amendments to Protect your Rights	Naveen Joshua & Kirthika Padmanapan

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Upcoming Academy Talk

Date (Day)	Location	Topic Title	Speaker(s)
16 May 2023 (Tuesday)	WORQ TTDI Glo Damansara Mall	(MC) Mergers & Acquisitions: Benefits, Getting it Right and the Need for Due Diligence	Cassandra Nicole Thomazios & Tommy Wong

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Thank you!

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