MahWengKwai & Associates

ADVOCATES AND SOLICITORS

Speaker
JEREMY BALANG
Senior Associate

Speaker
ALICIA CHIN
Associate

Moderator
THARANI KUNASEKARAN
Pupil In Chambers

Wed 25 October 2023
3:00pm (GMT +8)

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MWKA ONLINE TALKS

Understanding Damages for Medical Negligence: Types, Trends and Tactics

DATO

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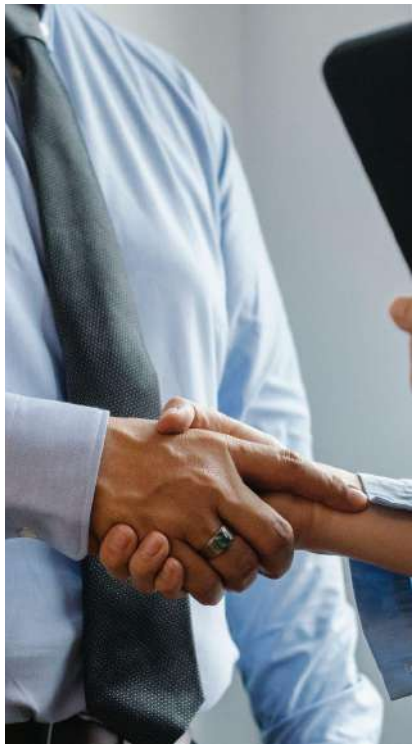

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MWKA Online Talks

- To share knowledge, raise awareness, encourage networking
- For clients, potential clients, in-house counsel
- Recent MWKA Online Talk:
  - 18.10.2023 : Contempt of Court: Forcing Compliance with Orders through Committal Proceedings
- Upcoming MWKA Online Talk:
  - 8.11.2023 : An Introduction to Strata Management By-Laws

MahWengKwai & Associates

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Jeremy Balang

Senior Associate

- Senior Associate practising in the areas of medical law, personal injury, debt recovery and general litigation.
- Admitted to the Malaysian Bar in 2018.
- Specialises in acting for patients and/or their family members in medical negligence claims against owners and managers of hospitals, healthcare practitioners including doctors and nurses, and their respective professional indemnity providers.

Alicia Chin

Associate

- Associate practising in the areas of medical law and personal injury with experience in general litigation.
- Admitted to the Malaysian Bar in 2022.
- Specialises in acting for patients and their family members in medical negligence claims against owners and managers of hospitals, healthcare practitioners including doctors and nurses, and their respective professional indemnity providers.

INTRODUCTION

What are Damages?

- Monetary compensation for the loss or injury suffered.
- Compensatory in nature - put the victim, in so far as it is reasonably possible, in the position that they would have been in, if the tort had not occurred.

Talk Points

- The different types of medical negligence cases.
- The different types of damages.
- Recent cases and trends in awards.
- The additional ways and/or steps that a patient can take, to improve their case.

Different Types of Medical Negligence Cases

Different Cases and/or Injuries = Different Types of Damages and/or Quantum of Damages

- Different types of cases and/or injuries will impact the items of damages awarded and the quantum of such damages.
- Depending on a few factors such as:
  - The type of injury or severity of such injury; and
  - Whether future care is needed.

Illustrations:

1. Undiagnosed fracture of the elbow, and it then heals wrongly, resulting in a malunion. The patient then has to undergo remedial surgery.
2. Severe perforation of the uterus, which ultimately resulted in the patient having to undergo a hysterectomy, or removal of her uterus.
3. A delayed delivery of an infant, resulting in the infant suffering permanent brain damage, leaving them permanently disabled.

Types of Damages in Medical Negligence Claims

Types of Damages

1. Special Damages
2. Pre-Trial Damages
3. General Damages
4. Future General Damages
5. Aggravated Damages

Special Damages

- Expenses incurred prior to the filing of the claim
- Quantifiable - with some precision
- Requires the patient to prove, to a certain extent, that such expenses were incurred - i.e. with bills and receipts.

Pre-Trial Damages

- Usually an extension of Special Damages
- Expenses incurred from the time of filing of the claim, up to the judgment
- Quantifiable - with some precision

General Damages

- Unquantifiable
- Awarded based on evidence and precedents
- Examples include:
  - pain and suffering and loss of amenities of life
  - value of care gratuitously provided to the patient

Future General Damages

- Unquantifiable
- Awarded based on evidence and precedents
- Court will usually consider expert evidence.

Aggravated Damages

- Compensatory damages where there has been intangible injury to the interest or personality of the Plaintiff, and this injury has been caused or exacerbated by exceptional conduct of the defendant - *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors [2018] 1 MLJ 784*

Aggravated Damages - Continuation

- Dependant on circumstances of the case and conduct of the tortfeasors following the negligence events
- Conduct that worsens the harm suffered by the patient or their family members

Aggravated Damages

- Aggravating features can also include the way the litigation and trial are conducted - *Ahmad Radhiq Arbee bin Ahmad Rejal Arbee (as a husband and dependant of Sharifah Shalihah bt Sayed Abdullah, deceased) & Ors v Kerajaan Malaysia & Ors [2020] 10 MLJ 459*

Aggravated Damages - Continuation

- Examples include: (i) insolent behaviour of the medical practitioner towards the patient and family members causing distress and anxiety; (ii) negative conduct displayed throughout the trial; (iii) failure to follow hospital guidelines; (iv) inaccurate information and dishonesty in documentation; (v) suppression of the patient's medical records

Conclusion

Trends and Tactics - Damages in Medical Negligence Claims

Naren a/l Vejayan (suing through his mother and litigation representative, Sarroojar a/p Subramaniam) v The Government of Malaysia & Ors [2022] MLJU 1993

- Naren - 26 years of age in 2016 when he suffered brain damage as a result of negligent treatment at a Government hospital.
- In 2022, the Court awarded approximately RM 5 million in damages and costs, excluding interest.

Special Damages

- Trends:-
  a. The acceptance of oral evidence
  b. The test of reasonableness / the absence of challenge
- Tactics:-
  a. Keeping documentary evidence
  b. Tracking and documenting expenses for which there is no documentary evidence
  c. Preparing of retrospective documents

Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund (suing through his wife and litigation representative Wan Zafura bt Wan Kassim) and another appeal [2022] 4 MLJ 529

- Fareed was 44 years of age in 2015 when he suffered brain damage as a result of negligent treatment at a private hospital.
- HC - approximately RM 7 million in damages, including RM 30,000 a month for loss of income
- COA - generally maintained the High Court's awards.

Special Damages

- Trends:-
  a. The acceptance of oral evidence
  b. The test of reasonableness / the absence of challenge
- Tactics:-
  a. Keeping documentary evidence
  b. Tracking and documenting expenses for which there is no documentary evidence
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Irwanbudiana bin Amsah (suing as the administrator of the estate of Child M, deceased) v The Government of Malaysia [2023] 10 MLJ 633

- The infant passed away 5 years and 7 months after receiving negligent treatment at a Government hospital.
- The claim was filed in 2019 at a time when the infant was alive. He unfortunately passed away in 2021.
- In 2023, the Court awarded approximately RM 770K in damages and costs, excluding interest.

General Damages (PSLA)

- Trends:-
  a. Varying awards in different medical negligence claims
- Tactics:-
  a. Knowledge of relevant precedents
  b. The importance of medical records and reports, especially by treating hospitals and doctors
  c. Evidence regarding loss of amenities of life

Examples of Awards

- Naren a/l Vejayan - RM 500,000
- Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors [2019] 8 MLJ 331 - RM 100,000
- Siti Zalwani bt Mohd Zaid v Medi-Circle Sdn Bhd & Anor (unreported) - RM 150,000 + RM 10,000

Aggravated Damages

- Trends:-
  a. Increasing number of awards made in medical negligence claims
  b. Consideration of conduct during the course of litigation
- Tactics:-
  a. Early mitigation
  b. Knowledge of precedents

Siti Zalwani bt Mohd Zaid v Medi-Circle Sdn Bhd & Anor **(unreported)**

"[57] However, instead of attempting to make amends with Siti Zalwani, they neither apologised nor offered adequate compensation. They even filed their respective Defences denying liability and putting Siti Zalwani to "strict proof"."

***Siti Zalwani bt Mohd Zaid v Medi-Circle Sdn Bhd & Anor* (unreported) (cont.)**

> *"[58] …The cross examination of Siti Zalwani was also marred with distasteful and unfair questions…"*
>
> *"[59] It can be seen that instead of determining Siti Zalwani's loss and that liability was already determined, the Defendants' focus was simply to see that as little compensation as possible is awarded to her by subjecting her to unfair and unwarranted questions."*

Future Damages

- Trends:-
  a. Increasing number of increased awards for future damages
- Tactics:-
  a. The role of expert evidence
  b. The concept of life expectancy and the calculation model for future damages
  c. The use of photographs and videos

Medi-Circle Sdn. Bhd. v. Nur Zulaikha Dzulzaili & Another Appeal(s) **[2022] 1 LNS 1546**

- The Defendants in the High Court did not call any expert witness on quantum
- The High Court entirely relied on the Plaintiff's expert evidence in awarding future damages
- HC - approximately RM 8 million which was reduced to RM 6 million by the COA.

Future Damages

- Trends:-
  a. Increasing number of increased awards for future damages
- Tactics:-
  a. The role of expert evidence
  b. The concept of life expectancy and the calculation model for future damages
  c. The use of photographs and videos

***Nur Arissa Nor Affrizal & Anor v Dr Abirami Kunaseelan & Ors* [2023] 5 CLJ 793**

- HC - RM 8.3 million in damages, the highest reported award of damages in a medical negligence claim to date.
- Over 76 items of damages, life expectancy of 44 years. The patient was 4 years of age at the time of judgment.
- The Government has filed an appeal to the Court of Appeal against the HC's decision.

Nur Arissa Nor Affrizal & Anor v Dr Abirami Kunaseelan & Ors [2023] 5 CLJ 793 (cont.)

> *"[72] It is indeed an expensive lesson for the defendant to learn but the amount cannot repair the damage done unto the first plaintiff. She will never have a taste of any decent normal living. The pain and suffering also extends to the second plaintiff and the rest of her family.*

Nur Arissa Nor Affrizal & Anor v Dr Abirami Kunaseelan & Ors [2023] 5 CLJ 793 (cont.)

"[73] The amount of damages awarded may at first instance looks like a fortune but when employed according to this court's order would only ensure some convenience to her survival…."

Questions?

Nurul Husna binti Muhammad Hafiz & Anor v The Government of Malaysia & Ors [2015] 1 CLJ 825

> *"The patient has an **innominate and qualified right of access to his medical records** and there is a **corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers** (emphasis supplied)".*

Upcoming Talks

Date	Topic	Speakers
8 November 2023 (Wednesday)	An Introduction to Strata Management By-Laws	John Chan & Jasmine Wee

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Thank you!

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