

Medical Negligence in Malaysia and Bangladesh: A comparative study.

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Abstract: *The issue of Medical negligence is extremely important factor for patient. Instances of negligence in the medical profession are not a new phenomenon. Medical Negligence is being committed in all over the world every day. The main purpose of this Study is to focus how Medical Negligence is being committed in Bangladesh and Malaysia. The article also attempts to highlight and discuss the reforming the existing system. It is qualitative research. Primary and secondary resources are used in this paper. The information has been taken from many readings, articles, books, case law and status. The result is that Bangladesh and Malaysia is following Medical Negligence from long time ago. We have many problems to solve this situation. The issue is more vibrant in a society like Malaysia and Bangladesh where the problem of medical Negligence is still considered to be the result misfortune, and people superstitiously believe that the affect of Medical Negligence is considered sometimes to be the result of sin on the part of the parents of the patient. It is expected that the present study assist to facilitate improvement of the legal regime of the Medical Negligence and the enforcement of laws for the better future of the Medical Negligence of Bangladesh and Malaysia.*

Keywords: *Bangladesh, Comparative Study, Medical Negligence, Medical Malpractice, Malaysia.*

I. Introduction

In the present situation, Medical Negligence is very well-known word. It is happening all over the world every day. Patients are suffering very much for this. For example, when someone dies by medical negligence and he is the only one earning member of his family, how will we fulfil the loss of that family? So, it is very important that we should aware about medical negligence. Here I have compared the position of medical negligence between Bangladesh and Malaysia. Why I have chosen them to compare. The reason is, Malaysia is a common law country like Bangladesh. Malaysia is not only common law country but also Muslim Country like Bangladesh. Most of the people of them are Muslim. In addition, Malaysia was a colony of British like Bangladesh. They also adopted their law from British. So that, Bangladesh and Malaysia has many similarities.

II. Conceptual analysis

The Word “negligence”, when used in the law of torts means more than mere carelessness. Many years ago, Baron Alderson said that, Negligence is the omission to do something which a sound and careful man cannot do.¹ L.B Curzon, in *Dictionary of Law* defined the term ‘Negligence’ as a breach of legal duty to take care, resulting in damage to the climate which was not desired by the defendant. In the case of *Blyth vs. Birmingham Waterworks Co.* (1856)11 EX.78, the concept ‘negligence’ was define as the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Medical Negligence means medical malpractice. *Blyth v Birmingham Waterworks Co.* In this case defined negligence in the following terms:

“Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.”²

Medical malpractice is professional negligence by act or omission by a health care provider in which the treatment provided falls below the accepted standard of practice in the medical community. For this patient are suffering by injury or death. Standards and regulations for medical malpractice are different from one country to another country. Some countries have adopted some special law for medical negligence and some countries are following the provision of Penal Code. A plaintiff must establish all four elements of the tort of negligence for a successful medical malpractice claim.³ (1) A duty of care was owned by the physician; (2) The

¹ *Blyth v Birmingham Waterworks Co*, 11 Ex 781 (1856).

² S Radhakrishnan, *Medical Negligence*, 4 MLJ 1, 8 (2002).

³ “The Four Elements of Medical Malpractice” Yale new Haven Medical Center: Issues in risk Management.1997

physician violated the applicable standard of care; (3) the person suffered compensable injury; (4) the injury was caused in fact and proximately caused by the substandard conduct.

We should discuss 'duty of care' and 'standard of care'. The concept of negligence presupposes a duty of care. It is obvious that without having a duty to take care a person shall not be held liable. So, there must have been a 'duty' and that duty must be done 'carefully'. In the case of *Le Lievre vs. Gould* [1893] 1 Q.B.

491,497,504, A.L. Smith, LJ held that a duty to take care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. Again the mere fact that a man is injured by another's act gives in itself no cause of action unless there is *mens rea* (It is a Latin term. Meaning is "guilty mind"; guilty knowledge or intention to commit a prohibited act). If the act involves lack of care, no cases of actionable negligence will arise unless the duty to be careful exists.⁴

In order to succeed in a claim of negligence, the victim must further prove, on a balance of probabilities that the conduct of the doctor falls below the required standard of care. The meaning of standard of care is reasonable care. If a person achieves the reasonable care properly by the doctor, he will not be able to get remedies under common law.⁵

III. Medical Negligence in Malaysia

A. Malaysian Law:

The Federal Constitution of Malaysia considers the health issues very seriously. The Federal Constitution extensively covers this issue. Part-II (Art.5-13) of Federal Constitution of Malaysia discusses about fundamental liberties. Article 5(1) of this part lays down that "No person shall be deprived of his life or personal liberty save in accordance with law. Part II concerns with judicially enforceable rights subject to such restrictions as mentioned in those provisions. If any of these rights are infringed the victim or the aggrieved person can go to the High Court Division.⁶ So that, According to Malaysian Federal Constitution, if any person deprived from proper treatment, he or she will be able to go court for protect his health. Medical Negligence is being committed in Malaysia from the beginning like other countries. There is no special Act for medical negligence in Malaysia. Currently, the tort system is using to regulate medical negligence in Malaysia. This system provides compensation only. The tort system is being adversarial in nature. The job of the court is to do fair dealing based on the available evidence and the law. In reality, in sometimes happen that litigation fails to achieve real justice for this adversarial system. There are many Acts which discuss about health protection against medical negligence. Section 304A of the Malaysian penal code explains that, If any person die by doing any rash or negligent act, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both. According to this section, if any patient is being died by any negligent of the doctor, he or she will be convicted under this section. Moreover, a doctor can be convicted under section 301,302 and 304 of the Penal code. If a doctor commits any miscarriage without the consent of the woman, he or she will also liable under this Act.⁷

If a medical officer or a registered medical practitioner believes on reasonable grounds that a child he is examining or treating is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed, or is sexually abused, he shall immediately inform a protector (protector means the Director General, the Deputy Director General, a divisional Director of Social Welfare, the state Director of Social Welfare of each of the state, any Social Welfare Officer appointed under section 8)⁸. If the officer or medical officer or registered medical practitioner fails to inform, he or she shall be convicted under this section.⁹

Section 19(2) of the Medical Act 1971 empowers the council to exercise disciplinary jurisdiction over medical practitioners who is convicted of a punishable offence with imprisonment, found guilty of "infamous conduct in any professional respect."¹⁰ Any members of the public can Complaint against medical negligence to the president of the MMC with the name of the practitioners, the place of practice, nature and details of complaint and documents and evidence in support of the complaint.¹¹ Malaysia Medical Council Will makes three Preliminary Investigation Committees (PICs). MMC holds a tribunal to inquire into the complains about medical professionals. One of the Preliminary Investigation Committees is specifically assigned to look into

⁴ Md.Ershadul Karim, Examining Liabilities Arising from Doctor's Negligence, 16 Dhaka University Law Journal 166 (2005).

⁵ Putery Nemie Jahan kassim, Medical Negligence Law in Malaysia, 29 (Rev.2008).

⁶ Federal Constitution of Malaysia, art.5, para.2.

⁷ The Penal Code, §313 (Act no. 574)

⁸ Child Act, §2 (2001).

⁹ Id. at § 27.

¹⁰ The Phrase "infamous conduct in any professional respect" was fined in 1894 by Lord Justice Lopez in *Allinson v The General Council of Medical Education and Registration*, 1 QB, 750 (1894).

¹¹ The procedure disciplinary enquiries are outline in Regulations 26 to 33 of the Medical Regulations 1974 and guided by the code of professional conduct.

matters pertaining to advertisement and other two look into matters of ethics and conduct.¹² PICs can instantly dismiss an allegation if it is found to be indefensible.¹³ On the other hand, PICs may recommend an inquiry by the MMC, if they find reasonable ground to support the allegation.¹⁴ MMC may take disciplinary action, if a doctor is found guilty of “infamous conduct in a Professional respect” during the inquiry.¹⁵ If any party is displeased by the decision of the MMC, he or she may appeal to the High Court.¹⁶

B. Health Related Cases before the Malaysian Courts:

There are many cases were filed in Malaysian Court regarding health. Most of the time, health related cases were filed for medical negligence committed by the doctor. In *Chelliah a/l Manickam & Anor v. Kerajaan Malaysia*¹⁷, the High Court held that the defendant (Doctor) was vicariously liable for the acts of the doctors at Penang General Hospital. The Doctor Involved had wrongly diagnosed an acute perforated appendicitis. The treatment for pancreatitis are different, namely in the case of acute appendicitis, the treatment in surgical intervention whereas for acute pancreatitis is conservative treatment.¹⁸ In *Chin Keow v Government of Malaysia*,¹⁹ a doctor was held negligent for not inquiring the medical history of the patient. In *Chin Yoon Hiap (Dr.) v Ng Eu Khoon & 2 ors*,²⁰ the plaintiff (Patient or his/her guardian) sued Dr Smith and Dr Chin for negligence and claim damages for pain and suffering and for causing the plaintiff's blindness. The trial judge held that Dr Chin was negligent and he appealed against this decision. On this issue of whether Dr Chin was negligent, the Court of Appeal held that he was not.²¹ This case was held about anaesthetist. The plaintiff claimed that the negligence was held during the pre-operative sigmoidoscopic examination. Here the question was whether it was proper for the anaesthetist to perform sigmoidoscopic examination under general anaesthesia. In this case Court took expert opinion. Then the Court observed that the anaesthetist had previously successfully performed hundreds of sigmoidoscopic examination under general anaesthesia. Thus, applying the Bolam principle²² (according to this principle, a doctor is not negligent if he has acted with a practice accepted as proper by a reasonable body of medical men skilled in that particular art.)²³ to this issue, the court held that the anaesthetist was not negligent as he had followed the general and approved practice in the situation he was facing. The technique he adopted was approved by a reasonable body of medical men since 1956. Therefore, it did not matter if there is another body of opinion that would have taken a contrary view.²⁴ On the other hand, in *Kamalam a/p Ruman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor*,²⁵ the court refused to apply the Bolam Principle. In this case, the court created that the doctor had failed to provide the standard of care and so that, the victim died. A ruling was declared by the Federal Court in *Foo FioNa v Dr Soo fook Mun & Anor*²⁶ that, the practitioner is duly bound by law to inform his patient about the risk of treatment who is capable of understanding and appreciating such information of the risk.²⁷

C. Case Limitation in Malaysia:

Litigation procedure is so long from lower court to Federal Court of Malaysia (Federal Court is highest Court of Malaysia). For example, in the case of *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals*²⁸, the court took about 16 years to come to an end. It was initiated on December 1981 whereas the judgement was delivered on November 1997. If we calculate the time when the cause of action arose, the duration would be 21 years because the cause of action arose on January 1976. In addition, in *Foo Fio Na v Hospital Assunta & Anor*²⁹, the court took 24 years. The cause of action arose on July 1982 and the judgement was delivered by the

¹² Nik Rosnah Wan Abdullah, *Regulating the Private Health Sector in Malaysia*, 129 (2005).

¹³ Regulation 28 of the Medical Regulations 1974.

¹⁴ Regulation 29 of the Medical Regulations 1974.

¹⁵ According to the powers given by section 30 of the Medical Act 1971.

¹⁶ The Medical Act, § 31(1) (1971); Puteri Nemie bt. Jahn Kassim. *Medical Negligence Litigation in Malaysia : Current Trend and Proposals for Reform*. Available from: http://mdm.org.my/downloads/dr_puteri_nemie.pdf, accessed on January 2nd, 2013.

¹⁷ *Chelliah a/l Manickam & Anor v. Kerajaan Malaysia*, 2 AMR 1856 (1997).

¹⁸ Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia*, 82 (Rev.2008); Puteri Nemie Jahn Kassim, *Law and Ethics Relating to Medical profession*, 106 (1st ed.2007).

¹⁹ *Chin Keow v Government of Malaysia*, 2 MLJ 45 (1967).

²⁰ *Chin Yoon Hiap (Dr.) v Ng Eu Khoon & 2 ors*, 1 All ER 871. 873 [1997]

²¹ *Elizabeth Choo v Government of Malaysia*, 2 MLJ 171 (1970).

²² *Bolam Case*, 1 MLJ 484 (2002) ; 5 MLJ 167 (2002).

²³ Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* 30 (Rev.2008).

²⁴ *Ibid.* at pp.46-47.

²⁵ *Kamalam a/p Ruman & Ors v Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore & Anor*, 4 MLJ 674 (1996).

²⁶ *Foo FioNa v Dr Soo fook Mun & Anor*, 1 MLJ 593 (2007).

²⁷ *Ibid.* at para. 36.

²⁸ *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other*, 1 MLJ 57 (1998).

²⁹ *Foo Fio Na v Hospital Assunta & Anor*, 6 MLJ 738 (1999).

honourable High Court in October 1999³⁰ and the decision of the Court of Appeal was delivered in April 2001.³¹ Against the decision of the Court of Appeal, an application for leave to appeal to Federal Court was made in November 2001.³² The Federal Court finally delivered its judgement on the 29th December 2006. It can be seen that the entire litigation process for medical negligence case requires an average of about of a minimum period of 15 years, from the date of injury to the conclusion of the case.³³

IV. Medical Negligence in Bangladesh

A. Bangladeshi Law:

The Constitution of the People's Republic of Bangladesh considers the health issue very seriously like Malaysia. Constitution comprehensively covers this issue. According to Bangladesh Constitution health is a fundamental right and if any person deprived from his fundamental rights, he or she will be able to go High Court Division of the Supreme Court.³⁴ Medical Negligence is being occurred from long time in Bangladesh like other countries. There is no special law for medical negligence. Tort system is not following for medical negligence in Bangladesh. Penal Code is being used for medical negligence litigation. The criminal cases against the doctors were registered under section 304 of penal code, 1860 (Culpable homicide amount to murder) and 304A of the Penal code 1860(rash and negligence act) against the doctor.³⁵ When people are affected by medical negligence, they file case under Penal Code. For Example, if any person dies due to medical negligence, his guardian files case for murder under Penal Code. For example, Asma was a patient. She affected by medical negligence. Her mother filed a suit against doctors under Section 307 (Attempt to murder), 326 (Voluntarily causing Grievous hurt by dangerous weapons) of penal code.³⁶

Where a patient died due to the negligent medical treatment of the doctor, the doctor can be liable to pay compensation under civil law and at the same time, if the degree of negligence is so gross and his act was reckless as to endanger the life of the patient, he would also be made criminally liable for offence under section 304A of the Penal Code, 1860.³⁷ Under this section accused (doctor) shall be punished with imprisonment of either description for a term which may extend to five years or with fine or with both.³⁸ Doctor should use poisonous substance carefully. Under section 284, if any doctor uses any poisonous substance rashly or negligently which endanger to human life any person, such doctor shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand taka, or with both.³⁹ Section 323 of Penal Code 1860 describe that, if doctor execute any offence for voluntary causing hurt, he will be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand taka, or with both. According to section 325 of Penal Code 1860, if doctor commits any offence for voluntary causing grievous hurt, he will be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.⁴⁰ Moreover, many cases have been filed under different section of Penal Code. For example, in 3rd September 2006, a case has been filed in Mohammad pure police station under section 406/420/170/326/109 of The Penal Code 1860.⁴¹

The Medical and Dental Council are being established by the provision of section 3 of the Medical and Dental Council Act 1980.⁴² It has been repealed by The Bangladesh Medical and Dental Council Act 2010. Now Bangladesh Medical and Dental Council (BMDC) is being established by the provision of section 3 of the Bangladesh Medical and Dental Council Act 2010.⁴³ Bangladesh Medical and Dental Council (BMDC) gets its financial and administrative manpower support from the Ministry of Health. The council is body corporate. The functions of the BMDC are to maintain a register of medical practitioners in Bangladesh, to encourage and maintain standards of practice of medical practitioners and to examine complaints made against practitioners and administration of disciplinary provisions. The member of the MMC are drawn from many sources, namely, nominated eight Parliament Members by the Speaker of Parliament, members of different associations (Bangladesh Medical Association, Bangladesh Private Medical Practitioners Association), appointed member

³⁰ An application for leave to appeal to Federal Court against the decision of the Court of Appeal in *Dr Soo Fook Mun v Foo Fia Na & anor* 2 CLJ 457 (2001). The Federal Court its judgment on the 29th December 2006, after a delay of over four and a half years.

³¹ The judgement can be found in in *Dr Soo Fook Mun v Foo Fia Na & anor* 2 CLJ 457 (2001).

³² This can be found in *Foo Fia Na v Dr Soo Fook Mun & Anor*, 2 MLJ 129 (2002)

³³ Puteri Nemie bt. Jahn Kassim. *Medical Negligence Litigation in Malaysia : Current Trend and Proposals for Reform*. Available from: http://mdm.org.my/downloads/dr_puteri_nemie.pdf, accessed on January 2nd, 2013.

³⁴ Bangladesh Const. art. 44, para. 1.

³⁵ Md.Ershadul Karim, *Examining Liabilities Arising from Doctor's Negligence*, 16 Dhaka University Law Journal 166 (2005).

³⁶ Ain O Salishi Kandro, *Medical Negligence*, 12 (2008).

³⁷ Md.Ershadul Karim, *Examining Liabilities Arising from Doctor's Negligence*, 16 Dhaka University Law Journal 166 (2005).

³⁸ The Penal Code, §304A (1860).

³⁹ *Ibid.* §284.

⁴⁰ *Ibid.* §325.

⁴¹ Ain O Salishi Kandro, *Medical Negligence*, 95 (2008).

⁴² The Medical and Dental Council Act, § 3 (1980).

⁴³ Bangladesh Medical and dental Council Act, § 3 (2010).

from the public services and nomination by Universities.⁴⁴ The members shall office for not more than three years. Bangladesh Medical and Dental Council narrate its functions, procedures and disciplinary jurisdiction in their Medical Ethics. Any Medical or Dental Practitioners convicted for false pretences, forgery, fraud, theft, indecent behaviour or assault, is liable to disciplinary action by the council.⁴⁵

B. Health Related Cases before the Bangladeshi Courts:

There is no judgement of High Court of Bangladesh regarding medical negligence. Here, I have mentioned cases regarding medical negligence which were committed many years back this area. The accused, a Homoeopathic practitioner, administered to a patient suffering from a guinea worm, 24 drops of stramonium and a leaf of *dhatura* without studying its effect; the patient died of poisoning. The accused was held guilty under section 304A of Penal Code, 1860.⁴⁶ Moreover, compounder in order to make up a fever mixture took a bottle from a cupboard where non-poisonous medicines were kept and without reading the label of the bottle which was in its wrapper added its full content to a mixture which was administered to eight persons out of whom seven died. The bottle was marked poison and contained strychnine hydrochloride and not quinine hydrochloride as was supposed. It was held that the compounder was guilty under section 304A of the Penal Code, 1860.⁴⁷

To be criminal in nature, the negligence must be wilful, wanton, gross or culpable. For criminal malpractice the doctor may be prosecuted by the police and charged in criminal court under sections 304A and 337 of the Penal Code, 1860 which deals with causing death by negligence. The provisions of section 304A apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death.⁴⁸ A *hakim* (native physician) performed an operation of the eye with an ordinary pair of scissors and sutured the wound with an ordinary thread and needle. The instruments used were not disinfected and the complainant's eye-sight was permanently damaged. It was held that the *hakim* had acted rashly and negligently, and was guilty under section 336 of the Penal Code, 1860 as there was no permanent privation of the sight of the eye.⁴⁹ In addition, many cases have been filed at many places in Bangladesh. For example, General Register case no.13 (2)2002 (under section 326 of The Penal Code 1860) of khulshi police station of Chittagong, Complain case no. 35(2)99 (under section 304A/338/287/34 of The Penal Code 1860) of Dhaka Chief Metropolitan Magistrate Court, General Register case no. 35(9)99 (under section 304A/338/287 of The Penal Code 1860) of Ramna police station. Due to carelessness of victim most of the case filed under medical negligence fail to proceed.

C. Case Limitation in Bangladesh:

Litigation procedure is so long from lower court to Appellate Division of Supreme Court. We need 10-15 years for final judgement from Appellate Division of Supreme Court. There is no judgement from Appellate Division of Supreme Court about medical negligence because it is long procedure and expensive. Moreover, the patients are poor and less powerful than doctors. Most of the time, doctors settle the case by giving lump sum money to the patients family.

V. Comparison

The judicial system of Malaysia and Bangladesh is adversarial. The adversarial litigation systems has been said to be uncooperative both to the doctors and patients. Compensation via negligence is substandard. According to report of the Royal Commission on Civil Liability and Compensation of England, the proportion of successful claims for damages in tort is much lower for medical negligence.⁵⁰

The Judicial system of Malaysia and Bangladesh is also so long-lasting as well as expensive. Mainly, case regarding medical negligence in Malaysia is civil law based. If the defendant is guilty, he has to compensate. Here the plaintiff is getting financial benefit but most of the compensation is given by the hospital authority where the defendant was employee. That means defendant is not suffering. For this reason, he or she will not aware about medical negligence. On the other hand, medical negligence case of Bangladesh is criminal law based. If the defendant is guilty by the evidence, he has to penalise. Here, the plaintiff is not getting any compensation or benefit. It can be suggested that special law containing civil and criminal liability of doctor as well as authority under which such doctor is acting should be enacted to mitigate number of medical negligent cases. Apart from that proper authority should take necessary steps to reduce this wrong by increasing public awareness.

⁴⁴ Ibid, §4

⁴⁵ Code of Medical Ethics, Bangladesh Medical and Dental Council (2010).

⁴⁶ Md.Ershadul Karim, Examining Liabilities Arising from Doctor's Negligence, 16 Dhaka University Law Journal 166 (2005).

⁴⁷ De Souza, 42All 272. (1920)

⁴⁸ Sukaroo Kobiraj, 14 cal 566 (1887).

⁴⁹ Gulam Hyder Punjabi, 17 Bom LR 384, 39 Bom 523 (1951).

⁵⁰ Royal Commission on Civil Liability and Personal Injury, London: HMSO, vol.1, Cmnd.7054, 1978, at Para. 1337.

VI. Conclusion

It is our strong belief that doctors, generally, is pledge bound by the solemn oath of the health professionals and we entrust them with our lives which they take utmost care to protect and preserve. But it may sometimes happen that due to some difficulties, workload, inventions of scientific instrument, amendment of national legislation, the doctors do something which amount to negligence. The doctor should be aware of the legal consequences of such situation so that they act dutifully and meticulously and avoid landing themselves in controversies and litigations.

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