International Journal of Psychosocial Rehabilitation, Vol. 24, Issue 08, 2020
ISSN: 1475-7192

Legal Position of Medical Negligence in Malaysia

[1]Ahyuni Yunus, [2]Sufirman Rahman, [3]Husni, [4]Muhammad Hatta, [5]Hardianto Djanggih

Abstract--*Doctors could not guarantee regarding recovery of their patient. Doctors can only work according to the knowledge they have. However, doctor's failure to cure patients is often accused of doing medical negligence. The issue of medical negligence is not a new phenomenon in the doctoral profession, and even medical negligence has become a global issue. Although Malaysia is one of the few countries where medical emergencies occur, but the number of medical negligence increases each year. The Bolam v Friern Hospital Management Committee 1957 case has long been a measure of cases in medical negligence in Malaysia. However, after the Federal Court's decision in the case of Foo Fio Na v Dr. Foo Sook Mun & Anor 2007, there was a change in the approach taken by a Malaysian court, which showed that the courts in Malaysia now no longer prioritize the Bolam test in medical negligence cases. In Civil Act 1956 and the Medical Act 1971, medical negligence is only regulated in a civil aspect so that the guilty physician will be punished to pay compensation to the patient. Generally, medical negligence cases are resolved through the court. However, it is difficult to prove the negligence done by the doctors and the length of time needed to take the case of medical negligence through the court has prompted physicians and patients to bring their case through the mediation forum.*

Key words--*Legal Position, Medical Negligence, Malaysia.*

I. INTRODUCTION

The legal system in a country is characterized by its history. The Malaysian legal system is influenced by two forms of legal system namely Islamic law influenced by the sultanate of the late 15th century, which Islamic law has begun to be applied (Z, 2004). While the British expanded its territorial powers to the land of Malaya, the British brought together the concept of the European constitutional government and common law principles (Rusnadewi Abdul Rashid, 2013).

The English law is brought into the Malay states drafted in accordance with British law model and Indian law. Some of these statutes include the Printing Presses and Publications Act, the Sedition Act, the Criminal Procedure Code and the Penal Code. Almost all law makers and judges at that time were trained and received education in the field of English law so that the use of this law was given priority over Islamic law and custom which was more appropriate to the culture of the local people.

After the country became independent, Malaysia established federal constitutional law, which formed the basis of all subsequent laws. Malaysia's federal constitution is the ultimate parent law and law. This means

[1]*Faculty of Law, Universitas Muslim Indonesia, Makassar, Indonesia, Email: ahyuni.yunus@umi.ac.id*
[2] *Faculty of Law, Universitas Muslim Indonesia, Makassar, Indonesia, Email: sufirman.rahman@umi.ac.id*
[3]*Faculty of Law, Universitas Malikusssaleh, Aceh, Indonesia, Email: husni@unimal.ac.id*
[4]*Faculty of Law, Universitas Malikusssaleh, Aceh, Indonesia, Email: muhammad.hatta@unimal.ac.id*
[5]*Faculty of Law, Universitas Muslim Indonesia, Makassar, Indonesia, Email: hardianto.djanggih@umi.ac.id*

Received: 05 Apr 2020 | Revised: 21 May 2020 | Accepted: 12 June 2020

there is no other law made in this country that can be recognized legally unless the law that does not conflict with any provision contained in the federal constitution. Furthermore, in addition to applying British law, the Malaysian legal system re-establishing Islamic law which is considered more appropriate to the culture of the local community so Malaysia is one of the countries with a legal framework that combines or adopts a dual system approach i.e. civil law with Islamic law (ER, 2010).

In the aspect of medical negligence, the law used to handle medical cases in Malaysia is the Civil Act 1956 and the Medical Act 1971. Both of these laws put the physician's fault in a civil aspect only until a physician who proved guilty was punished by paying compensation only. However, Zahidul said there is no special Act for medical negligence in Malaysia. Currently, the tort system is used to regulate medical negligence in Malaysia. This system provides compensation only. The job of the court is to do fair dealing based on the available evidence and the law (Islam, 2013).

In handling cases of medical negligence in court, judges are still using medical negligence cases from various countries that deal with common law systems. For example, the approach used in determining that the doctor has done medical negligence is the case of *Bolam v. Friern Hospital Management Committee* [1957, 2All ER 118]. The case of Bolam has long been used as a benchmark in medical negligence cases in Malaysia. However, there have been changes after the Federal Court’s decision in the case of Foo Fio Na in 2007 whereby after that decision the courts in Malaysia no longer used the approach that was decided in the case of Bolam in medical negligence cases. The Bolam test was considered to be the protector of the medical profession and was paternalistic. The changes can also be contributed to the current development in the world regarding the doctrine of informed consent that shows the influence of the concept of patient autonomy. This doctrine aims to protect the rights of patients to receive full information particularly the risk inherent in a medical treatment before consent is given.

The objectives of this study was to introduce and expose the development of health law in Malaysia especially the various instruments relating to the handling of medical negligence cases in Malaysia. In addition, this article exposed the various mechanisms of handling medical negligence cases in Malaysia and any detention found in resolving medical negligence cases in Malaysia.

II. RESEARCH METHODOLOGY

This is a qualitative study using normative juridical approach (McCracken, 1998). This study is a legalistic or doctrinal substance using analytical techniques (content analysis). Content analysis is a research technique that is carried out systematically by analysing legal instruments pertaining to medical negligence cases (Maanen, 1979). The purpose of legalistic or doctrinal research is to find, explain, examine, analysis and propose in a systematic way of facts, principles, concepts, theories, certain laws and law enforcement institutions to find knowledge and new ideas to be a change or renewal (Yaqin, 2007). This type of research is also known as pure theoretical research and all material derives from library, archive and other database.

The History of Medical Negligence Laws in Malaysia

The invation of the British colonialist into Malaya has retained colonial rule until now. Although gradually, the government has made many changes by enacting various laws that are relevant to the needs and

cultures of the Malaysian race but at the same time there is still a legacy law from the colonial state adopted today.

Malaysia is a common law-based country so the applicable law in England is also applicable here on the provisions of section 5 of the Civil Law Act 1956. England's common law will be adopted in this country if it is in accordance with local tradition and culture. For example, despite the fact that the legal and medical issues that need to be resolved fall under the tort law, then the common law tort applied in England will apply in that situation.

In terms of medical law, medical laws have been used by some of England medical laws. There are many statutory provisions relating to cases of medical negligence applicable in Malaysia. In England, medical law came to an end two ago, in the early 1980s as a separate subject in the academic world as well as in legal practice. While in Malaysia, medical legislation is a new subject and it is being taught at local universities around 2000 (Ngah, 2007).

Medical law is essentially governing the relationship between professional healthcare, healthcare institutions and patients. Various public health laws are formulated to ensure public health is protected. There are several acts relating to public health have been enforced in Malaysia such as the Medical Words 1971, the Dental Act 1971, the Optical Act 1991, the Midwives Act 1966, and the Nurse's Act 1850. Furthermore, to regulate the medical practitioners in handling medical services also established the Code of Professional Conduct 1987 to promote medical professionalism and medical practice well among medical practitioners. This code is based on ethical principles in the Geneva Declaration and International Code of Ethics, in addition to referring to the General Conduct and Discipline of the United Kingdom General Medical Council (Nawi, 2011).

However, the principles of the Malaysian Medical Law are taken and borrowed from several other types of laws such as tort law, criminal law, public law and family law. Dickens is of the view that it may be questionable whether the medical law is a form of law that stands by itself, free from the influence of other laws or it is a constellation of legal principles that are formed from the principle of tort law, contract, crime and family among others (Dickens, 1993). This is because the issues that arise in the medical field that need to be resolved by law will often require the application of the law in its sole discretion.

The development of medical law cannot be separated from tort law because tort law is an important part of its formation. But not all the substances of the tort law are covered but it is only part of the medical law itself. This is because medical law is more widely known and its principles not only consists of the principle of private law but also include the principles of public law (Deakin, 1999).

According to Anisah, the development of medical law in Malaysia can be categorized as below (Ngah, 1999):

a. The development of Malaysia's healthcare and public healthcare system;
b. Legal and medical practice;
c. Hospital rights and responsibilities to patients;
d. Medical law and ethics.

According to him, from the four branches of knowledge, until today only the categories of law and medical practice are actively developing and gaining public attention. Developments in this aspect may be

influenced by the close relationship between healthcare staff and patients from the point of advice, consultation and subsequent treatment either surgery or not. The first case of Malaysia involving negligence is the case of *Chin Keow v. Malaysia government*. In that case, a father found his legs and thighs were swollen due to ulcer. He met Dr. Devadeson, a medical officer at a government clinic for treatment. After checking the amah, Dr. Deava injected a penicillin drug which was then claimed to be the cause of his death after an hour of injection. The family sued the doctor for negligence on the basis of death-leading duty violation.

During the trial, the doctor did not refer to the patient's card which contained penicillin allergy warning. It should have been a good clinical practice for the doctor to ask the patient whether it would have any side effect if the injection treatment was given. The court ruled that doctors had violated cautious duties for not acting based on the doctrinal practices from other doctors. In achieving this decision, the court used Bolam test as a measurement to assess whether the doctor's action is reasonable.

In the next development, Bolam approach to medical negligence cases in Malaysia has already been abandoned as it is seen to be protecting the medical profession and is paternalistic. This change can be seen in the Federal Court's decision in the case of *Foo Fio Na v Dr Foo Sook Mun & Anor*. Furthermore, it can be seen that the Bolam test in the cases of medical negligence in Malaysia seems to be irrelevant. This change is also due to the global developments on the informed consent doctrine influenced by the patient's autonomy concept that emphasizes on patient's communication and their independence in decision-making related to medical treatment. The primary goal of this doctrine is to protect patients or the welfare of patients as well as to promote the patient's autonomic power (Berg, 2001).

Currently, a lot of medical negligence cases involving public doctoral, specialist doctors and nurses have been identified. Statistics from the Ministry of Health of Malaysia suggest that during the period of 1995-1999 there have been 117 cases of medical negligence (Saliza, 2007). In a period of 5 years from 2005 to 2009, 113 negligence cases involving government healthcare providers, mainly doctors, have been settled in and out of court (Puteri Nemie Jahn Kassim & Khadijah Mohd Najid, 2013). Milton Lum, The Medical Defence Malaysia (MDM) board member said, in 2011, the number of medical negligence cases involving doctors amounted to 56 cases (Hambali & Khodapanahandeh, 2014).

Health Ministry's official figures showed that between 2016 and 2018, the number of incidents involving wrong surgery, unintended retention of foreign objects (URFOs), transfusion and medication errors and patient falls have nearly doubled in both public and private hospitals. Over the three-year period, the number of wrong surgeries has increased from six cases to 11, while URFOs went up from 27 cases to 32 cases. Transfusion errors rose from 40 cases to 47 cases, while medication errors jumped from 3,104 cases to 3,741 cases. Patient falls recorded the highest increase, with those involving adult patients rose from 2,374 cases to 3,547 cases and those involving children increased from 441 cases to 696 cases (Zainuddin, 2019).

According to the Malaysian Ministry of Health Annual Report 2016, the amount of compensation paid for co (Zainuddin, 2019)urt cases has risen from MYR1,224,990.00 in 2012 to MYR5,652,242.91 in 2016 (Ministry of Health Malaysia, 2017). Payment for potential medico-legal cases and settled out of court has also risen from MYR25,000.00 in 2006 to MYR906,365.21 in 2016. This means that the total of compensation paid from 2012 to 2016 was MYR12,919,083.12, with a noticeable increase in the amount of payment made in 2009 from MYR2,848,914.00 to MYR 6,558,608.12 in 2016 (Abdullah, 2017).

Table 1. Amount of Compensation Paid by Court Order and Out of Court (Ex Gratia Payment), 2012-2016

Year	Payment for Court Cases (RM)	Payment for Ex Gratia Cases (RM)	Total (RM)
2012	1,224,990.00	25,000.00	1,249,990.00
2013	1,084,212.00	0.00	1,084,212.00
2014	772,263.00	405,096.00	1,177,359.00
2015	2,000,969.00	847,945.00	2,848,914.00
2016	5,652,242.91	906,365.21	6,558,608.12
Total	10,734,676.91	2,184,406.21	12,919,083.12

However, Anissah noted that the number of medical negligence cases in Malaysia is not high compared to other countries such as England and the United States where once there was a crisis of medical negligence cases in the 1970s. Judge Low Hop Bing states that "*...civil litigation founded upon medical negligence are few and a part in Malaysia...*" (Ngah, 2007). Puteri said that although the occurrence of incidences of medical malpractice cases in malaysia is not as frequent as those in other countries, its number has been increasing each year (Puteri, 2004).

Definition of Medical Negligence

Medical negligence is one of the branches in the field of professional negligence. These medical negligence cases are often discussed under tort carelessness laws. The Tort Law is based on an offense (fault) which refers to the failure of a party to perform the duty to be cautious in accordance with the law (Yeoh, 2004). According to Siti Zubaidah Ismail, negligence is considered the biggest tort as compared to other tortions such as defamation, trespassing, nuisance and others (Siti Zubaidah Ismail, 2011).

Medical negligence takes place when the doctor is less cautious and less careful in carrying out medical services until the claim for injuries suffered due to medical negligence becomes one of the personal injury claims which are usually brought into the court by those involved. However, not all failures in medical practice are considered a legal negligence because patients also have the responsibility to cooperate and ensure that doctors' instructions are followed and provide a complete and truthful description of their health status (Buang, 1999). If the patients do not cooperate in medical practice, then this is considered a patient's mistake or it has a role to the extent of a contributory negligence (Harder, 2014).

The House Dictionary defines negligence as an act of caution in making something (Anonymous, 2004). This definition is in accordance to a description *not being careful enough*; *lack of care*, which means that there is no one to do something that is not careful enough (Anonymous, 2006).

According to Norchaya, the term negligence is a concept, and to prove that there is negligence in the law aspect that the Plaintiff must generally indicate that the Defendant had acted as a reasonable person would not, or the Defendant did not act as will be done by a reasonable person (Talib, 2006). Meanwhile, according to Ramdlon, doctors are involved in negligent action in the treatment of either minor or major treatment, a doctor and dentist have failed to utilize the level of expertise and knowledge common to the same standard in curing the patient resulting in injuries, disabilities and even the patient died (Naning, 2005).

The World Medical Association stated that medical negligence is due to the fact that doctors or other medical practitioners fail to carry out standard medical services against patients, or lack of expertise, or neglect of care for patients so that these are some direct causes of injury to the patient. However, doctors are not responsible for the adverse effects on the medical practices carried out on the patients who are not caused by the effects of the lack of specialist medicine and the lack of knowledge from the doctor (World Medical Association, 2014).

"...involves the physician's failure to conform to the standard of care for treatment of the patient's condition, or a lack of skill, or negligence in providing care to the patient, which is the direct cause of an injury to the patient".

Based on the definition given by the court in the case of *Donogue v. Stevenson* [1932, A.C. 562], negligence occurs when a person who has a duty to guard against another party has violated it and has caused the other party to suffer losses. In the case of *Blyth v. Birmingham Waterworks Co* [1998, A.C 332]. Judge Anderson stated that:

Negligence is the omission to do something that a reasonable person, guided by the usual judgment that controls the human nature of the conduct, will do, or do something that a prudent and reasonable person will not do.

The negligence as a separate tort has been defined by Lord Wright in the case of *Loghelly Iron & Coal v. M'Mullan* [1934, AC 1: 25], he mentioned that:

Negligence is not merely a matter of caring or negligent behaviour but presents a complex concept of the obligations, possibilities and losses suffered by many people against the obligation.

Medical negligence generally occurs when the physician has fulfilled the following three elements, which are the duty of guard duty, violation of the obligation and consequences of damage or injury. Regarding the standard of treatment required by a physician, the applicable principle is based on the Bolam test but the winds of change eventually resulted in the Lord Browne-Wilkinson decision in the case of *Bolitho v. City & Hackney Health Authority* [1998, A.C 332] and after that in the case of *Penny, Palmer and Cannon v. East Kent Health Authority* [2000, 41]. Bolam tests are seen as protecting the medical profession until the Bolam test is left abandoned. In the case of *Foo Fio Na v. Dr Foo Sook Mun & Anor* [2007, 1 MLJ 593], Federal Court Judge is more likely to accept the principle in cases of Christopher Roger v. Lynette Whitaker that emphasizes on reasonable medical practice such as paying attention to patient rights, disease risk, medical treatment and so on (Rogers, 2006).

Elements of Medical Negligence

Duty of Care

Precautionary obligation or also known as a cautious obligation is a necessity that must be done by a physician in carrying out medical treatment to the patient. The first measuring stick to make sure the doctor does the medical negligence while it does not observe the obligation to keep medical attention on his / her patient.

Bolam case vs. The Friern Hospital Management Committee has become a standard measure for assessing treatment in claims regarding medical negligence. In this case, plaintiffs who are mentally ill, have

been hospitalized and given electro-convulsive therapy (ECT) treatment. He signed the inform consent. Before the treatment was initiated, the plaintiff was not given any sedative and his hands and feet were not tied to prevent possible uncontrolled movements during ECT. He was also not informed about the risks or side effects of the treatment. As a result of ECT treatment, he experienced fractures on his hips. In medical practice at that time, medical practitioners felt there was no need to use sedatives, bind patients or tell patients about the side effects of treatment (Siti Zubaidah Ismail, 2011). Judge McNair is of the opinion that the case is a professional negligence. He mentioned that: (Sappideen, 2010)

"*It is not a physician considered to be guilty of having committed a medical negligence when it has taken action either medical or surgical treatment that has been in line with the doctoral practice generally and has been recognized by the public and the existing doctors' professional organization*".

The Bolam test defines that the defendant does not have to have the greatest skill, but must have the skills at the usual level that a doctor should have. In addition, the care action must be consistent with the practices that the responsible body considers to be right. However, the problem is how to define proper practice and common competence. The interpretation of the correct practice and common skills is the main issue of debate since Bolam became a benchmark for assessing medical negligence. A professional must meet the reasonable standards of skill like the other professionals in the field as explained by Lord Scarman in the case of *Maynard v. The West Midlands RHA* mentions "*a doctor who has certain skills must perform the skills that are common in his field of expertise*" (Rogers, 2006).

Winfiel believes that justifiable liability can only be imposed on a reasonable person who is a sane person and has knowledge of the risks involved and is at risk in everyday life (Rogers, 2006). A reasonable person is not seen physically but is seen to his ability in anticipating the cautious attitude that will take place. A reasonable person will think logically and based on the knowledge, knowledge and experience that has been carried out in medical perophesion.

Bolam's principles and approaches have been tried and have been abandoned, this can be seen in the case of *Ng Eu Khoon v. Dr. Gwen Smith and 2 others* [1996, 4 MLJ 674], *Hor Sai Hong v. University Hospital* [2002, 5 MLJ 167] and *Glasgow Corporation v. Muir* [1943, AC 448.]. Subsequently, the winds of change have begun to be detected when many cases in Australia are mainly beginning to shift from Bolam and reviewing the standard questions and practices of medical personnel. The Bolam principle was first accepted in the case of *Elizabeth Choo v. The Government of Malaysia* [1967, 2 MLJ 45.] asserted that, although a physician chose different steps from the usual steps taken in decision-making, his measure would not necessarily amount to negligence as long as it (the move) in line with what the medical profession. On the other hand, if the doctor's actions are so obviously beyond the usual practice, then he will be liable.

The case that also challenged the Bolam principle is the case of *Dr Soo Fook Mun v. Foo Fio Na and SL* [2007, 1 MLJ 593.]. At a hearing in the Federal Court, Siti Normah Yaakob, more likely to switch from Bolam and accept the principle in the case of Australia *Christopher Roger case v. Lynette Whitaker* [1992, 175 CLR 479.], it is of the view that the practice of a doctor cannot be the only measure of the treatment standard. The determination of the standard must be balanced with good practice such as among others, paying attention to the patient's rights to make their own decisions, be informed about the risks of illness and treatment and so on.

International Journal of Psychosocial Rehabilitation, Vol. 24, Issue 08, 2020
ISSN: 1475-7192

According to the above view, cases of medical carelessness can now be tried using the patient's perspective and no longer in accordance with the Bolam test which is more concerned with the principle of doctors who know the best rule. In carrying out the practice, the doctor is legally responsible to inform the risk of surgical procedures to patients at serious risk and can result in death or injury for life.

Breach of Duty

Once identified that the defendant had a duty of guard against the plaintiff, the next thing to prove was the breach of the obligation. This element interprets that the effect created by a doctor's act is directly from the obligation as a medical practitioner. The duty of the doctor is the same as the other doctors' obligations under the same conditions and conditions.

Violation of the obligation is said to occur when the defendant is seen to be acting under the minimum standards of the precautionary expectation of the defendant to caution as necessary (Jone, RN & Buston, 1995). This is measured by the standard of the person who is reasonable or sane. The Court shall determine how in a situation the defendant needs to act or act. The standard of the sane person is that one will act reasonably in any situation. Therefore, the duty of duty is said to be infringed when a person is acting improperly regarded as the measure of a sane person under their level of action.

According to Winfield, the expression of a reasonable person means a sane person who has the common knowledge in dealing with the risk of life (Rogers, 2006). Therefore, a reasonable person does not symbolize a person who is perfect, brave, mature, brave and can predict what is likely to happen but it is expected to be wary of the reasonable possibility. If a person performs an act below this expected level which should be on a reasonable person he / she will be negligent.

The interpretation of the element of this breach of duty is evident in the case of *Hor Sai Hong v. University Hospital* [2002, 5 MLJ 167.], where a baby suffered from a brain defect due to the delay in receiving treatment as her mother is in the process of giving birth. The doctors have been found responsible under the Bolam principle, because the evidence presented in the court showed that other doctors will not act like a doctor in this case.

The interpretation of the violation element of the guard duty can be seen in the case of *Bolam v. Friern Hospital Management Committee* [1957, 2All ER 118]. The issue raised in this case was a careless doctor in handling the Electro Convulsive Treatment (ECT) medical treatment method for patients who experienced mental disorders resulting in fractures in the patient's spine. The doctor was considered guilty because the patient was not given a sedative, the doctor did not directly hold the patient's body or instructed the nurse to hold the patient's body.

There is a difference in opinion among physicians regarding the requirements of the third reason. One view mentions that the patient's body should be held during ECT treatment. The second view mentions that the body of the patient should not be held because in general the patient's ECT treatment of the patient does not need to be held. The court finds that the defendant is not liable for having performed the injury treatment method which is in accordance with the reasonable standard of an ordinary doctor. The Defendant does not hold the Plaintiff's body while the treatment is not an improper act.

Doctors will not be considered to be in breach of duty obligations if the doctor has performed general medical treatment where other specialists do the same. In Bolam's test, the decision of medical treatment is on the doctor. A doctor does not commit negligence if his action to disclose or not disclose information to patients are accepted and supported by a group of doctoral organizations as a professional body responsible for overseeing the members. Hence, the Bolam test is further evaluated to protect the interests of medical practitioners and is still maintaining a paternalistic approach.

The issue of risk exposure in medical records is the basis for the refusal of bulbs test for cases of medical negligence. This change of wind was seen in the judgment of *Christopher Roger case v. Lynette Whitaker* [1992, 175 CLR 479.] decided by the Australian High Court of Australia has begun shifting from Bolam's principle or test and has re-evaluated the question of the standards and practices of medical officers.

In the case of Rogers, a forty-eight-year-old plaintiff named Maree Whitaker was almost blind to his right eye because of the wound he had suffered at the age of nine, but his left eye was normal. The plaintiff had been advised by the defendant who was an ophthalmic expert to undergo a surgery on his right eye, which aims to remove scar tissue and improve vision on the eye. The plaintiff had expressed his intention to the defendant for information and warnings that might occur as a result of the operation. However, the defendant himself did not provide information regarding the adverse effects that could arise on his normal left eye. After undergoing surgery, the plaintiff has lost sight of his left eye due to the formation of ophthalmic symptoms.

In his defense, doctors use the Bolam test where all decisions regarding the medical practice that determine it are the physician including the risk exposures to the patient. Medical practice has been practiced well because the practice was accepted at that time as a proper practice by a group of well-trained doctors in the field as a responsible professional body overseeing its members. The defendant assessed that too far to expose the patient to the risk of the occurrence of sympathetic ophthalmic formation is within 1 to 14,000.

The New South Wales Supreme Court rejected the defense of a defendant's doctor and was found to have committed a negligence. The defendant was assessed to have contravened the duty of duty when failing to disclose information regarding the risks from the surgery resulting in the normal left eye plaintiff being blind and the plaintiff became completely blind because the right eye of the surgery did not heal. If the plaintiff is exposed to the risk then the plaintiff will not agree to undergo surgery. Although the risk of blind likelihood is minimal within 1 to 14,000 but is considered as a real risk if it results in serious implications.

The court ruled that the test to determine the level of awareness were no longer a doctor's decision but the court had more rights to determine what precautions were appropriate and that each individual had the right to make decisions in relation to himself. The patient has the right to make decisions regarding medical procedures, while the doctor must provide sufficient opinions, suggestions and explanations so that the patient can make his own decisions whether to accept the proposed treatment or reject it. Doctors can not force patients, provide incorrect information such as major surgical risk but doctors mention minor surgical risk, or doctors intentionally create a condition in which the patient must approve the treatment proposed by the doctor.

Damage and Injury

The next element that also needs to be proven by the plaintiff is the details of the defendant's duties resulting in damage or injury affecting the interests of law-abiding patients. This element looks at the adverse

impact of medical treatment performed by a doctor so it can affect the health of the patient. These impacts not only create injuries but also cause the patient to be injured, disabled or bring patient to death.

According to Buang, the damage done by the physician must seriously affect the benefit of the patient or to bring harm to the patient's health (Buang, 1999). In fact, the patient's damage must have been caused by the breakdown of the duty of the doctor rather than by other factors (Talib, 2006). In the case of The Wagon Mound [1961, AC 388], it is mentioned that the plaintiff's loss must be directly attributable to the act of the physician who cared for it. If there is any other cause then the doctor is not responsible for the loss of the plaintiff. Doctors cannot be prosecuted because the harm received by the patient is not caused by the negligence performed by the doctor during the course of surgery or medical treatment.

Causation

Causative factor is an important element in cases of medical negligence. Damage or loss suffered by the plaintiff must be caused by the negligence of the defendant's actions and not by other factors. If the plaintiff cannot prove that the damage or injury is due to the defendant's violation, then the defendant cannot be blamed for medical negligence. When the patient wishes to succeed in the case, then the patient must prove that there is a clear relationship between the doctor’s action and the injuries suffered by the patient. The patient's failure to prove the causative factor in the trial of the medical negligence case will cause the claim to fail. The causative factor is one of the important elements in medical negligence cases because it will provide information on the extent of injuries sustained during medical treatment.

This causative factor is divided into causative factor of fact and causative factor of law. In the aspect of medical negligence, the causative factor of fact is that the patient's injury occurs because of a violation committed by the doctor in performing medical treatment rather than other factors. When a patient has difficulty in proving that an injury is a result of a doctor's negligence, the patient can use material tests that contribute to damage (Abdul Monir Yaacob, 2009). This test stipulates that although there are two or more contributing factors but if one of them is due to the negligence of the doctor as a defendant that is enough to prove that the accused's negligence contributed materially to the plaintiff's injury.

While in the element of law the defendant is defamatory if his act is reasonably shown to cause injury to the plaintiff. This is known as a far-reaching injury of remoteness of damages. However, the cause of the law is rarely raised in medical negligence cases because the reason for a medical treatment can often be demonstrated (Puteri, 2003).

Settlement of Cases of Medical Negligence through Courts

From time to time, courts have been used as official institutions in resolving disputes. Each dispute has been referred to the court regardless of whether the dispute is small or large. This awareness is primarily a result of the education received by the community. The community have been educated with an understanding that the court is one of the most legitimate disputes and the court is the ideal place for people who are seeking justice.

In the aspect of solving medical negligence cases, the mechanism used is the mechanism of civil assessment in accordance with their respective modalities. The jurisdiction of the Civil Courts in Malaysia is the jurisdiction that is broken down into sections according to the court hierarchy set by the judiciary. In general, the jurisdiction of civil courts whether civil or criminal jurisdiction is placed in each hierarchy of court. Civil

courts can be divided into two categories namely the Superior Court and the Subordinate Court. The High Court consists of the Federal Court, the Court of Appeal and the High Court. The Subordinate Courts consists of session's court and magistrate (Brazier & Miola, 2000).

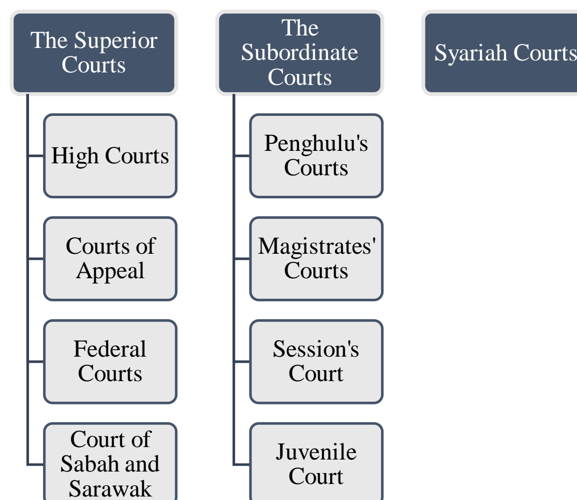

Figure 1. Hierarchy of Malaysian Courts

Some issues related to court institutions in resolving disputes include overdue cases, delays in case settlements, high cost discussion expenses and court decisions that do not give satisfaction to the disputing parties. In the process of trial in court, every judge will seek and find evidence to support his argument in deciding the quality so that his decision creates truth and justice for both parties. While the trial has lasted for 16 or 20 years, this situation is not good for any party who comes to court (Puteri, 2003).

Former Chief Justice Tun Zaki Azmi believes that a good judge cannot only be judged from his judgment but covers all aspects. A judge should be fair, patient, handling the case before him correctly and making good and perfect decisions, but not for that reason until the case does not work. While the judge does not care about the time of judgment in the trial in court then there will be other problems that would harm the conflicting parties such as increasing the cost of the trial by collecting the evidence and the witnesses required in his submission.

The main purpose of establishing these courts is to resolve disputes that take place in the community as well as there are many other tasks. The court's position as an institution of dispute settlement still won the trust from the community. Although the solution to the cases of medical negligence has been an alternative dispute resolution channel that is mediation, but does not reduce the role of the court in carrying out judicial functions. Mediation is a challenge for court institutions to work in various ways to reduce weaknesses in the judicial process of medical negligence cases.

Barriers to the Settlement of Medical Negligence Matters through the Court

Medical negligence is one of the faults of a professional group involving physicians and other health workers which are very difficult to prove. According to Puteri, the difficulties in proving medical malpractice cases could be a factor that makes it difficult for patients to file a lawsuit against doctors in court (Puteri, 2003). US Department of Health, Education and Welfare mentioned that cases of medical negligence are among the

most difficult to prove. The enforcement authorities usually take two or three times longer than personal injury cases due to the difficulty of proving and understanding information from expert witnesses. Therefore, despite the small number of cases of medical negligence, it contributes to the arrears of the number of cases in court (Dato' James Foong, 2003).

In the context of time-lapse, Tengku Noor Azira considered that the trial of medical negligence cases takes a longer time than personal cases of negligence as judges need to take time to study complicated medical records (Azira, 2011). Tay Pek San explained that judges who hear hearings of medical negligence cases need to take time to immerse themselves in technical medical records and complicated medical expert statements (Walsh & Abelson, 2008). Puteri Nemie mentioned that the longer the trial of medical negligence cases in court would then contribute to rising cost of trial (Puteri, 2003).

The judicial process of medical negligence took a very long time in Malaysia, even to complete one case of medical negligence in Malaysia took years. For example, in the case of *Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals* [1998, 1 MLJ 57], 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* [2001, CLJ 457], the court took 24 years. The cause of action arose on July 1982 and the judgement was delivered by the honourable High Court in October 1999 and the decision of the Court of Appeal was delivered in April 2001 [1999, 6 MLJ 738.]. Against the decision of the Court of Appeal, an application for leave to appeal to Federal Court was made in November 2001 [Foo Fia Na v. Dr Soo Fook Mun & Anor, 2002, 2 MLJ 129]. 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 (The Joint Commission, 2015).

Puteri Nemie believed that in the trial process in court, every judge will seek and find evidence to support his argument in making quality decisions so that their decision to create truth and justice for both parties. While the trial has lasted for 16 or 20 years, this situation is not good for any party who came to court (Katherine, 2000). Former Chief Justice Tun Zaki Azmi is of the opinion that a judge should be fair, patient, properly handling the case and making good and perfect decisions, but not for that reason until the case is not running (Lega, 2011). When the judge does not care about the time of the trial in the court, other problems will arise that would harm the parties who are in conflict such as the increased cost of the trial, the wasted time and the psychological pressure on the parties involved in the conflict.

Due to the weakness of the court system, most jurisdictions around the world have begun to pay attention to other rules to resolve disputes other than to bring charges into court. An alternative dispute resolution is called an alternative dispute resolution, which is a forum where conflicting parties will negotiate well and achieve mutual consent (MacFarlane, 1997). Some of the alternative methods of dispute resolution that are most attentive and practiced are mediation, arbitration and negotiation as well as other alternative dispute resolution rules.

The Alternative Dispute Resolution mechanism aims to assist, complement and reduce the culpability of cases in court. All the rules in the Alternative Dispute Resolution deal with faster and lower cost cases

because formal procedures, the proving process and not positioning opposing parties do not bind them (Othman, 2002). Mackie mentioned that the existence of Alternative Dispute Resolution was born as a result of disappointment or dissatisfaction with court performance (Mackie K, Miles D, Marsh W, 2000).

Solving the Medical Negligence Cases through Mediation

An alternative Dispute Resolution method can also be applied to medical negligence cases. According to Puteri, all the methods found in the resolution of alternative disputes can be considered for applying to the resolution of medical negligence cases in Malaysia (Puteri Nemie Jahn Kassim & Khadijah Mohd Najid, 2013). However, Azira is more on mediation methods that are considered more appropriate to apply for medical negligence cases (Mulcany, 1999). In England, a mediation scheme for medical negligence claims in 1995 resulted from an increase in the number of claims of medical negligence to court (Glenn, 2005).

To implement the mediation method in Malaysia, the government established the Malaysian Mediation Center in November 1999 by the Malaysian Bar Council under the chairmanship of Bar Council's Alternative Dispute Resolution Committee. Currently through Practice Direction on Mediation No. 5 of 2010, the High Court Judge, Sessions Court Judge, Magistrate and Registrar of the High Court have the power to instruct the parties to try to settle their case through the mediation method first. These instructions can be given at the stage of case management at pre-trial levels (Othman, 2002).

To further strengthen the application of the mediation method in Malaysia, the enforcement of the 2012 Mediation Act has been enacted. By this Act, all parties can submit applications for mediation processes to resolve their cases including disputes by medical practitioners with patient and family members of the patient. The Mediation Act 2012 has been approved to ensure the smooth running of the mediation process and this Act detailed the features of recognized mediation (Section 3 of The Mediation Act 2012). This Act does not imply a special body established to advance the mediation process in Malaysia. However, this act stipulated that the parties may request from the institution to appoint a mediator or several mediators on their behalf and the mediation of the intermediary is made through mediation agreements. If there is more than one intermediary, then the intermediaries shall act jointly in mediation (Section 7 of The Mediation Act 2012).

According to Chief Justice Tun Arifin Zakaria, mediation proceeding was taken to help the court reduce delinquent cases. Mediation is carried out in accordance with the agreement of both parties. The court must not urge the parties to choose mediation. Instead, mediation must be done carefully after obtaining approval from both parties (Tun Arifin Zakaria, 2014). Katherine Stone admits that mediation is a procedure in which a third party is neutral, facilitating communication and negotiation between the parties to the conflict in order to achieve resolution with the agreement of the parties. Mediation is not bound by any procedure; there is no format set for mediation. In fact, one of the interesting aspects of the mediation method is that parties can adopt any of the best structure to resolve their conflict (Ware, 2001).

The main advantage of mediation proceeding is to resolve financial and personal issues arising from medical negligence, which in the course of law cannot be justified. To resolve the problem, both parties need a space in which their dissatisfaction can be discussed and resolved in the mediation forum. Through mediation, both parties can speak openly to relieve all the stresses of the dispute. Disputes can be dealt with effectively in mediation as long as the doctor acknowledges that he made a mistake in the treatment by apologizing to the

patient. The doctor may feel more comfortable in acknowledging his violation that he has made a mistake because the mediation forum is confidential where only doctors, patients and intermediaries know (Studdert, Mello, & Brennan, 2004).

In many advantages of the mediation proceeding, there have been no cases of medical negligence using the mediation proceeding. Puteri stated that the Malaysian Mediation Center was open to the public and companies and could be used for all kinds of disputes but according to the Secretariat of the Malaysian Mediation Center, most of the cases that have come to the institution were about family matters only (Nemie, 2008).

III. CONCLUSION

Malaysia is a British colonial state and most certainly the Malaysian legal system embraces the common law system of law as applied in the United Kingdom. However, in addition to common law systems, Malaysia also applies Islamic law in its national legal system. Islamic law coexists with conventional law dynamically and complements each other with its own authority.

In terms of health law, Malaysia places the fault of a doctor under civil law by only punishing a doctor who is found guilty to pay compensation to the patient. Malaysia also regulates the ethical violation set out in the Malaysian Professional Code of Ethics in 1987. This ethical instrument stipulates that medical practitioners should avoid abuse of authority in their profession or refrain themselves from committing serious violation. According to the Malaysian Professional Code of Ethics in 1987, a person is found guilty of neglecting or ignoring profession's responsibilities, abusing profession privileges and proficiency, the conduct of profiling medical profession and advertising, fraud and other related profession errors.

In resolving medical negligence cases, Malaysia implemented two channels, they are adjudication through court and mediation. Generally, all medical negligence cases are brought to court to be resolved, but various detentions found in court such as patients who have difficulty in proving medical negligence cases in court, the number of cases that have accumulated in court, the length of time it takes by the court to resolve medical cases, the number of cases and the costs required for litigation in the court are several factors that have hampered the settlement of cases through mediation forum.

Mediation is more effective in resolving the conflicts between doctors and patients. The advantage of mediation is that parties can discuss all aspects of the problem in the forum of intervention. Both parties are open to each other and communication between them will take place in a family manner so that both parties can freely communicate whatever desirable or undesirable.

The mediation forum is confidential so those who can attend here are only parties such as patients, doctors and intermediaries. The confidentiality of this mediation forum will bring convenience to both parties because doctors or hospitals are very sensitive to publications so that the reputation of doctors and hospitals will be maintained in the forum.

REFERENCES

1. Abdul Monir Yaacob. (2009). Perlaksanaan Perundangan Islam di Malaysia: Satu Penilaian. *Jurnal Fiqh*, *9*(6), 1–20. Retrieved from http://myais.fsktm.um.edu.my/12423/

2. Abdullah, H. (2011). Court awards RM870,000 to couple and son over medical negligence. Retrieved February 2, 2018, from http://thestar.com.my/news/story.asp?file=/2011/1/21/nation/20110121141028&sec=nation
3. Anonymous. (2004). *Kamus Dewan* (2nd ed.). Kuala Lumpur: Dewan Bahasa dan Pustaka.
4. Anonymous. (2006). *Kamus New Oxford* (2nd ed.). Selangor: Oxford Fajar Sdn. Bhd.
5. Azira, T. N. (2011). Pengaplikasian Kaedah Pengantaraan bagi Menyelesaikan Pertikaian Kecuaian Perubatan di Malaysia. In *The National Conference on Dispute Resolution* (pp. 14–15). Kuala Lumpur: Universiti Kebangsaan Malaysia.
6. Berg, J. (2001). *Informed Consent Legal Theory and Clinical Practice* (2nd ed.). New York: Oxford University Press.
7. Brazier, M., & Miola, J. (2000). Bye-bye Bolam: a medical litigation revolution? *Medical Law Review*, *8*(1), 85–114. https://doi.org/10.1093/medlaw/8.1.85
8. Buang, S. (1999). *The Law of Negligence in Malaysia*. Kuala Lumpur: Dewan Bahasa dan Pustaka.
9. Dato' James Foong. (2003). *Medical Neg. Claim: Evidence, Procedure, Trial & Assessment of Damages, Issues in Medical Law & Ethics*. (A. H. M. A. Puteri Nemie Jahn Kassim, Ed.). Kuala Lumpur: IIUM.
10. Deakin, B. (1999). *Tort Law*. Oxford: OUP.
11. Dickens, B. (1993). *Medicine and the Law*. Aldersho: Dartmouth.
12. ER, A. (2010). Isu-isu Perundangan dan Kehakiman dalam Kewangan Islam. In *Islamic Finance* (p. 146). Kuala Lumpur: Published paper to Islamic Finance Conference.
13. Glenn, H. (2005). Solving Civil Justice Problems: What Might Be Best? Retrieved November 12, 2017, from http://www.scotconsumer.org.uk/civil/seminars/speakers/Glenn
14. Hambali, S. N., & Khodapanahandeh, S. (2014). A Review of Medical Malpractice Issues in Malaysia under Tort Litigation System. *Global Journal of Health Science*, *6*(4), 76–83. https://doi.org/10.5539/gjhs.v6n4p76
15. Harder, S. (2014). Contributory Negligence in Contract and Equity. *Otago Law Review*, *13*(2), 307–332.
16. Islam, M. Z. (2013). Medical Negligence in Malaysia and Bangladesh: A comparative study. *IOSR Journal of Humanities and Social Science*, *14*(3), 82–87.
17. Jone, RN & Buston, F. (1995). *Medical Negligence Case Law*. London: Butterworths.
18. Katherine, V. (2000). *Private Justice: The Law of Alternative Dispute Resolution*. New York: Foundation Press.
19. Lega, Z. (2011). Kes Tertunggak Di Mahkamah Turun Secara Drastik. Retrieved January 31, 2018, from http://www.bernama.com/bernama/v8/bm/newsindex.php?id=610934
20. Maanen, J. Van. (1979). Reclaiming Qualitative Methods for Organizational Research: Preface. *Administrative Science Quarterly*, *24*, 520–526.
21. MacFarlane, J. (1997). *Rethingking Disputes: The Mediation Alternative London*. London: Cavendish Publishing Limited.
22. Mackie K, Miles D, Marsh W, A. T. (2000). *The ADR Practical Guide, Commercial Dispute Resolution*. London: Butterworths.
23. McCracken, G. . (1998). *The Long Interview*. London: Sage.
24. Ministry of Health Malaysia. (2010). Ministry of Health Malaysia Annual Report 2010. Retrieved February 1, 2018, from http://www.moh.gov.my/images/gallery/publications/md/ar/2010- 2.pdf
25. Mulcany, L. (1999). *Mediation and Medical Negligence Claims:An Option for the Future?* London: TSO.
26. Naning, R. (2005). Malpraktek Profesyion Doktor. In *Dialogue medical malpractice* (p. 2). Jakarta: Published paper to seminars and dialogue medical malpractice.
27. Nawi, M. (2011). Skop Kelakuan Buruk Dalam Kod Kelakuan Profesional 1987: Satu Analisis Menurut Etika Perubatan Islam. *JUUM*, *1*(15), 53–74.
28. Nemie, P. (2008). Mediating Medical Negligence Claims In Malaysia: An Option For Reform? Retrieved January 3, 2018, from http://www.asiapacificmediationforum.org/resources/2008/31-PUTERI_NEMIE_JAHN_KASIM.pdf
29. Ngah, A. C. (1999). Medical Negligence Litigation: Is defensive Medicine Now the Norm? Retrieved May 14, 2018, from http://www.lexisnexis.com.my/free/articles/anisah.htm
30. Ngah, A. C. (2007). *Perkembangan Undang-Undang Perubatan di Malaysia: Cabaran dan Masa Depan*. Kuala Lumpur: Universiti Kebangsaan Malaysia.
31. Othman, A. (2002). Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges. *Malayan Law Journal*, *2*, ccxxiv.
32. Puteri, N. J. (2003). *Medical Negligence Law in Malaysia*. Kuala Lumpur: International Law Book Services.
33. Puteri, N. J. (2004). Medical Negligence Litigation in Malaysia : Whither Should We Travel ? *Journal of Malaysian Bar*, (1), 14–25.
34. Puteri Nemie Jahn Kassim, & Khadijah Mohd Najid. (2013). Medical Negligence Disputes in Malaysia :

Resolving through Hazards of Litigation or through Community Responsibilities ? *International Journal of Social, Human Science and Engineering*, *7*(6), 1–9.

35. Rogers, W. (2006). *Winfield & Jolowicz on Tort*. London: Sweet & Maxwell.
36. Rusnadewi Abdul Rashid. (2013). Memartabatkan Undang-Undang Islam Dan Mahkamah Syariah Dalam Undang-Undang Tanah Di Malaysia. *Jurnal Hadhari*, *5*(2), 26. https://doi.org/10.1017/CBO9781107415324.004
37. Saliza. (2007). *Prinsip Bolam Lwn. Prudents Patient Test, Manakah Membawa Manfaat Kepada Masyarakat: Satu Rujukan ke Atas Kes-kes yang Diputuskan pada Tahun 1990-2005*. Bangi.
38. Sappideen, C. (2010). Bolam in Australia: More Bark than Bite. *UNSW Law Journal*, *33*(2), 386–424.
39. Siti Zubaidah Ismail. (2011). Medical Negligence According To The Law of Tort And Its Authority From the Shariah. *Journal Syariah*, *19*(2), 133–162.
40. Studdert, D., Mello, M., & Brennan, T. (2004). Health Policy Report. Retrieved July 4, 2017, from http://economics-files.pomona.edu/marvasti/data/HealthCareClassArticles/Iglehart,2002.pdf
41. Talib, N. (2006). *Prinsip-prinsip Asas Tort*. Selangor: Sweet & Mazwell Asia.
42. The Joint Commission. (2015). Patient safety systems. *Comprehensive Accreditation Manual for Hospitals Update 2*, *1*(January), PS1-PS54. Retrieved from https://www.jointcommission.org/assets/1/18/PSC_for_Web.pdf
43. Tun Arifin Zakaria. (2014). Mediasi Mampu Kurangkan Kes Tertunggak. Retrieved November 23, 2017, from http://www.themalaysianinsider.com/bahasa/article/mediasi-mampu-kurangkan-kes-tertunggak-kata-ketua-hakim-negara#
44. Walsh, C., & Abelson, H. T. (2008). Medical Professionalism: Crossing a Generational Divide. *Autum Journal*, *51*(4), 554–647.
45. Ware, S. J. (2001). *Alternative Dispute Resolution*. Retrieved from http://books.google.co.ke/books/about/Alternative_Dispute_Resolution.html?id=8lVLAQAAIAAJ&pgis=1
46. World Medical Association. (2014). Statement on Medical Malpractice. Retrieved March 24, 2014, from http://www.wma.net/en/30publications/10policies/20
47. Yaqin, A. (2007). Legal Research and Writting. *Malayan Law Journal SDN BHD*, *1*, 10.
48. Yeoh, K. Q. (2004). *Essentials of Medical Law*. Singapore: Thomson, Sweet & Maxwell Asia.
49. Zainuddin, A. (2019, December 27). *Cases on Medical Negligence on The Rise, Health Ministry's Data Shows*. Retrieved December 27, 2019, from Malaysian Reserve: https://themalaysianreserve.com/2019/09/18/cases-on-medical-negligence-on-the-rise-health-ministrys-data-shows/
50. Z, N. (2004). *Pentadbiran undang-undang Islam di Malaysia: Sebelum dan Menjelang Merdeka*. Kuala Lumpur: Utusan Publications & Distributors Sdn. Bhd.