A BRIEF OVERVIEW OF THE ELEMENTS TO SUCCEED IN A CLAIM OF CLINICAL NEGLIGENCE AND THE MALAYSIAN LEGAL POSITION—AN EXAMINATION OF RECENT DECISIONS INVOLVING OPHTHALMOLOGISTS

Clinical litigation is a subset of a body of law known as *Tort Law*. The word 'tort' has its origins in Latin, meaning 'twisted' or 'wrong'. Tort law is concerned with providing compensation to claimants who have suffered an injury due to the negligence of another. This restitution often takes a monetary form, or *damages.*

What is the relevant law governing clinical litigation in Malaysia?

There are two sources of law governing clinical litigation –

(1) Written Law, also known as statute, and
(2) court developed law, or common law.

The relevant statute in Malaysia includes the Civil Law Act 1956 that provides for the application of United Kingdom (U.K.) common law in West Malaysia, Sabah and Sarawak[1], hence the frequent application of U.K. judicial decisions by our judiciary. The time window to file a suit is limited by the Limitation Act 1953[2](West Malaysia) that limits the initiation of a claim to 6 years from the date the alleged negligence took place. This time limit is different in Sarawak, where the window is limited to 3 years[3]. This limitation has implications for certain types of negligence. For example, a doctor's failure to diagnose glaucoma may not be suspected until significant visual loss has occurred, which by that time may have exceeded the limitation period.

Common law in Malaysia is the second source of legal rules, according to the concept of '*stare decisis'* or '*stand by what is decided'.* This means that factually similar cases must follow a court decision or legal rule formulated or applied by a higher court.

How does one succeed in a claim of medical negligence?

For a plaintiff to succeed in a medical negligence claim, they bear the burden of proof to demonstrate three elements[4].

1. That the defendant owed them a Duty of Care
2. That in the course of disclosure, diagnosis and treatment, the defendant had breached the expected Standard of Care (SOC)
3. That the breach had caused in an injury

Duty of Care

In general, once a hospital or individual doctor undertakes a patient's care, responsibility for a patient or a 'duty of care' exists.

Standard of Care

The SOC concerns the 'level' or 'quality' of the care that can be reasonably expected from the attending doctor when managing a patient. But how do the courts decide what the standard is concerning examination, diagnosis and treatment?

In 1957 the U.K court formulated the *Bolam*[5] test holding that 'a doctor is not negligent if his actions were in keeping with a practice deemed proper by a responsible body of medical men despite there being an alternate view'[6]. In *Bolam,* the plaintiff was advised by his psychiatrist to undergo electro-convulsive therapy (ECT). He was neither warned about the risk of fractures, given relaxing drugs or restrained during treatment. During treatment, he suffered spasms and hip fractures. The issue at trial was whether the defendant was negligent for not disclosing risks and for not restraining the plaintiff during treatment. At the time, there were two schools of thought that differed regarding the need to warn and the need for restraints. The sitting judge decided that there should be allowances for difference of opinion in medical care and that a doctor should not be held negligent just because there were others who disagreed with him or her.

The *Bolam* test was subsequently applied in a series of high-profile cases in the 1980s involving

[1] Civil Law Act 1956 Section3
[2] Limitation Act 1953 Section 6(1)(a)
[3] Sarawak Limitation Ordinance (Sarawak Cap. 49)
[4] Jonathan Herring, Medical Law and Ethics (8th Edition Oxford University Press, 2020)
[5] [1957] 1 WLR 582
[6] MacNair J at para.

allegations of negligent treatment[7]. The test received widespread criticism that it allowed the medical fraternity to self-litigate its members out of allegations of negligence for as long as the defendant could produce a witness who agreed with their content of disclosure or conduct, application of the test would clear them of any wrongdoings.

A turning point came in 1997 with the formulation of the *Bolitho*[8] clause that required defendants to demonstrate that their conduct was not only in keeping with that of their peers but was also logically defensible. The plaintiff's 2-year-old son Patrick, was admitted in January 1984 with acute croup. He suffered episodes of respiratory distress in the ward, from which he recovered well. Despite being paged for, the senior houseman (SHO) never attended the child. He acutely deteriorated and collapsed, suffering cardiac arrest. At trial the SHO argued that even had she seen the child, she would not have intubated him. Expert witnesses for the defence agreed, testifying that because the child had been well between episodes, the risk of respiratory failure was low and that intubation was not without risks. The House of Lords considered the facts and held that although the SHO was negligent in failing to attend the child, she had not caused the child's death as a decision not to intubate was both in keeping with a 'responsible body of professional opinion espoused by distinguished and truthful experts' and that the view they held was capable of being logically supported, in that they had 'directed their minds to the question of comparative risks and benefits and had reached a defensible conclusion on the matter.

With *Bolitho*, the test for negligence was now a two-step test, first, whether the doctor had acted in accordance with a 'responsible body of medical men' and second, if the plaintiff can prove that this course of action was logically indefensible.

In assessing whether a defendant's conduct is acceptable by one's peers but also logically defensible, the U.K. courts currently regularly apply the *Bolam/Bolitho* test with the assistance of expert witnesses, clinical practice guidelines formulated both by NICE[9] and the various Royal Colleges[10]. As long as one's conduct is found to be 'reasonable'[11], the court has been reluctant to readily hold that one has fallen below the expected standard.

Various other tests regarding the duty to disclose risks have been formulated and are beyond the scope of this article.

Causation

Once the standard of care has been breached, the claimant still has to prove that there is a causal link between the negligent act or omission and the injury. In general, the courts apply the 'but for' test, which asks whether the injury suffered would not have happened 'but for' the negligence. The standard of proof requires the claimant to show on the balance of probabilities (i.e >50% or more likely than not) that the injury would not have occurred in the absence of the negligence. The 'but for test is a difficult hurdle for a claimant to clear as an injury may be an inevitable, natural consequence of a disease process[12], or may be caused by multiple risk factors, only one of which is the negligent act[13]. The 'but for' test may seem unjust for claimants who have been otherwise wronged but cannot clear the legal hurdle the test represents. The courts have, at different times, formulated various other tests to lessen the burden of causation. In general, however, the 'but for' test still applies.

[7] Maynard v West Midlands Regional Health Authority [1984] 1 WLR 634 involved allegations of negligence in performing a premature mediastinoscopy leading to nerve damage; Whitehouse v Jordan [1980] 1 ALL ER 650 involved allegations of unnecessarily rough forceps delivery causing brain damage

[8] Bolitho v Hackney City Health Authority [1997] UKHL 46

[9] National Institute of Clinical Excellence

[10] Ash Samanta, 'The role of clinical guidelines in medical negligence litigation: A shift from the Bolam standard.' (2006), (14), Medical Law Review, 321

[11] In C v North Cumbria University Hospitals NHS Trust [2014] EWHC 61 (Q.B.) the judge held that the defendant's conduct did not have to be 'more reasonable' than that of the alternative that the claimant put forth, but whether the conduct put forth by the claimant was 'the only reasonable one.'

[12] Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428 Although the defendant's failure to attend to the plaintiff who eventually died of arsenic poisoning was held to be negligence, no liability was established due to the poisoning being too advanced for any treatment to have had made a difference.

[13] In Wilsher v Essex County Health Authority [1988] AC 174 the court held that although the defendants were negligent in failing to diagnose an improperly sited umbilical catheter, leading to oxygen supersaturation of a premature neonate who subsequently developed retinopathy of prematurity (ROP) and blindness, the 'but for' test was not satisfied as the negligence was but one of five present risk factors that could have caused the ROP

The Malaysian Legal Position

The current position of Malaysian law is that the *Bolam/Bolitho* tests still applies to allegations of negligence in diagnosis and treatment. The Court of Appeal took this legal position in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim*[14] in finding, after examining literature and expert witness statements, that the defendant had adopted an indefensible approach in managing a suprachoroidal haemorrhage during surgery, thus failing the *Bolam* test. The Court of Appeal's decision was approved by the Federal Court.

As regards causation, the 'but for' test is still applied by the Malaysian courts.

In *Lai Ping v Dr Lim Tye Ling & Ors*[15] the claimant, who presented with endogenous endophthalmitis, alleged that the defendant was negligent in delaying intravitreal antibiotics that led her to lose her vision. The court decided that there was no negligence by the doctor as expert witnesses agreed, with reference to clinical guidelines and experience that it was reasonable and defensible (*Bolam/Bolitho* test satisfied) to withhold injections until the inflammation and swelling had subsided. The court considered the question of causation and held that even if the defendant had been found negligent, the 'but for' test was not satisfied as expert witnesses from both parties agreed that endogenous endophthalmitis would likely result in visual loss regardless of treatment measures[16]. Therefore, on the balance of probability, a delay in intravitreal antibiotics was unlikely to have caused the visual loss (but for test not satisfied).

Conclusion

Generally, the Malaysian legal position is that the *Bolam* and 'but for' tests are applicable to allegations of negligence in treatment and causation subject to the qualifications as decided by the House of Lords in *Bolitho*. The courts are able to assess whether conduct approximates best practice by way of assistance from expert evidence, up-to-date clinical practice guidelines and literature. Clinicians should wisely adhere to established techniques, recommendations, and up-to-date clinical practice guidelines to maintain acceptable, defensible standards of care.

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[14] [2018] 1 AMR paras 79-81 of judgement
[15] [2014] 3 AMR
[16] Ibid at para 55-56