

**APPLICATION OF NEGLIGENCE PRINCIPLES IN MALAYSIA: AN  
OPHTHALMOLOGY CASE REVIEW**

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**ABSTRACT**

Medical negligence is not a new and peculiar issue in Malaysia. It is one of the dilemmas and endless legal issues. Growing public awareness of legal rights and protection has led many medical practitioners to face legal action in court. Other than providing protection of rights to the patients and also compensation, medical negligence laws also explicitly aim to ensure that the medical practitioner's duties and standards are at their best. Based on a review of one case on eye treatment, this article aims to shed light on some of the questions regarding what constitutes medical negligence, the application of basic principles of negligence in resolving disputes in medical negligence and what is the recent approach taken by the courts in Malaysia in dealing with medical negligence issues. This paper analyzing the legal principles that have been decided in recent cases regarding medical negligence. In general, this article gives the public a clearer picture of how the court reached an amicable decision by applying the principles of negligence introduced in law of Tort.

**Keywords:** Negligence, medical negligence, negligence principles

***PEMAKAIAN PRINSIP-PRINSIP KECUAIAN DI MALAYSIA: SATU TINJAUAN KES  
OFTALMOLOGI***

***ABSTRAK***

*Kecuaian perubatan bukanlah merupakan isu baru dan asing di Malaysia. Ia merupakan salah satu dilema dan isu perundangan yang tidak berpenghujung. Peningkatan kesedaran masyarakat berhubung hak dan perlindungan undang-undang menyebabkan ramai pengamal perubatan berhadapan tindakan undang-undang di mahkamah. Selain daripada memberikan perlindungan hak terhadap pesakit dan juga pampasan, undang-undang kecuaiian perubatan juga secara tersiratnya bertujuan memastikan tugas dan standard berhati-hati pengamal perubatan berada pada tahap paling baik. Melalui sorotan sebuah kes kecuaiian rawatan mata, penulisan ini bertujuan menjelaskan beberapa persoalan berkaitan apakah kecuaiian perubatan, bagaimanakah pemakaian prinsip-prinsip asas kecuaiian dalam menyelesaikan satu pertikaian undang-undang berkaitan dan apakah pendekatan terkini yang diambil oleh mahkamah di Malaysia berhubung penyelesaian isu-isu kecuaiian perubatan. Penulisan ini menganalisis prinsip-prinsip undang-undang yang telah diputuskan dalam kes-kes semasa berhubung kecuaiian perubatan. Secara umumnya, penulisan ini memberikan gambaran yang lebih jelas kepada umum bagaimana mahkamah mencapai satu keputusan yang baik dengan mengaplikasi prinsip-prinsip kecuaiian yang diperkenalkan dalam Undang-undang Tort.*

***Kata kunci :*** *Kecuaian, kecuaiian perubatan, prinsip-prinsip kecuaiian*

## **INTRODUCTION**

In the discussion on Tort of Negligence, medical negligence and malpractice is one of the most popular issues and dilemmas that became focus of the dispute as it involved a patient, a human being that has been affected in life and health on one side and a medical practitioner who is a professional possessing special skill and knowledge on the other side. Growing public awareness with regard to medical malpractice and negligence has increased the number of medical negligence lawsuit in court. In Malaysia, although comprehensive annual statistics on medical negligence claims are not available as such data are not collected and recorded systematically, there are increasing number in indemnity subscriptions which disclosed that there seems to be an increasing number of legal actions against medical practitioner. In addition, Ministry of Health Annual Report in 2010 disclosed that compensation for court cases rose from RM1.2 million in 2006 to RM5.7 million in 2010 (Siti Naaishah Hambali, Solmaz Khodapanahandeh, 2014).

Court cases relating to medical negligence usually involve a claim for misdiagnosis, incorrect treatment, surgical mistakes, non disclosure of risk and others. Generally, a medical practitioner is negligent if he discharged his duty of care under the degree of skill and competence expected or accepted practice of the members of his medical profession. It is the task of the court to determine what is the accepted practice. Obviously it is not an easy task to determine negligence and what the best standard of care applicable to resolve the issues. This recent case analysis tempt to give clearer explanation on how the Malaysian court resolving disputes in medical negligence by applying principles of negligence and what is the recent approach taken in dealing with recent medical negligence issues.

## **FACT OF THE CASE**

Plaintiff in this case, Megat Noor Ishak Megat Ibrahim brought claim against the first Defendant, ophthalmologist Dr Hari Krishnan, the second Defendant, anaesthetist Dr Mohamed Namazie and the third Defendant, the Tun Hussein Onn National Eye Hospital. In 1999, the Plaintiff had a giant retinal tear with detachment in his right eye. After consulted by a general practitioner Plaintiff was referred to a consultant ophthalmologist at Subang Jaya Medical Centre and again was referred to the first Defendant's private clinic, Klinik Pakar Mata Dr Hari. On 26 August 1999, the first Defendant advised the Plaintiff to undergo a retinal detachment operation immediately and the first operation was performed. After this first operation, the Plaintiff's right eye was painful and could only see faint light. After four days, Plaintiff was discharged and an appointment date was fixed to see the first Defendant a week later. Plaintiff then complained that his right eye became watery and he had bullish vision. Two days later, the Plaintiff sneezed twice and there were tears of blood. The first Defendant then assured Plaintiff that it was not alarming condition and he did not have to see him for the bleeding in the plaintiff's eye but advised him to return for an appointment on 7 September 1999.

Plaintiff went to see the first Defendant at his private clinic on 4 September 1999 on his own accord and the first Defendant visual check confirmed that there was bleeding in the Plaintiff's right eye. However, the 1st Defendant did not scan the same. On 5 September 1999, an external bruise had appeared on the Plaintiff's right eye but he and on the appointment date

that was on 7 September 1999, he was reassured that there was no cause for concern but that recovery process would be slow. Plaintiff was told to come back for another appointment on 14 September 1999. On 12 September 1999, the Plaintiff suffered continuous pain and felt strong pressure in his right eye. On the appointment date which was on 14 September 1999, after a physical and visual inspection by the first Defendant, Plaintiff was told that the retina of his right eye had folded outward, and that a second operation had to be carried out immediately the same afternoon to repair it. However, later on Plaintiff was informed by the first Defendant that his earlier finding of the folded retina was incorrect and the proposed operation was then called off.

The third appointment was fixed on 21 September 1999 and was supposed to be a routine check-up. On this third appointment, Plaintiff was informed by the first Defendant that the retina in his right eye had folded or partially detached. The first Defendant also recommended a second operation to be carried out that same afternoon. The Plaintiff was shocked and requested for a scan to confirm the findings because he felt that his vision had improved and there was no sign of any deterioration. However the Plaintiff was told by the first Defendant that a scan was unnecessary as the condition can be verified by physical inspection and the improved vision in the Plaintiff's right eye was only temporary and may subsequently worsen. The second operation was then fixed on the same same day at 2 pm. Plaintiff initially requested for the anaesthetic services of Dr Manavalan but was reassured by the first Defendant that another anaesthetist (Dr. Mohamed Namazie, the second Defendant) was equally competent for the second operation. The Plaintiff also claimed that the second Defendant did not examine or interview him in respect of his medical history. A sedative was administered by a nurse prior to the operation, but without any supervision by the second Defendant at about 1.00 pm and the second operation commenced at about 3pm.

The Plaintiff regained consciousness at about 6.30 pm during the operation and felt numb in his right eye. He was told that the first Defendant would come to examine him in the evening on 22 September 1999. The first Defendant examined and then informed him that some problems had occurred during the second operation. The Plaintiff had regained consciousness during the operation and bucked while the first Defendant was strengthening the retina using a laser. As a result, the Plaintiff suffered supra-choroidal haemorrhage (SCH), an extensive haemorrhage with profuse bleeding in his right eye. It was reassured by the first Defendant that Plaintiff would regain his eyesight provided that the retina remained intact after the bleeding in the eye subsides. It was obvious that Plaintiff never been informed of the possibility of his right eye being blind. During this period, the Plaintiff suffered severe nervous shock, mental agony, extreme anxiety and distress over the condition of his right eye. After this operation, Plaintiff experienced severe pain, continuous bleeding and a total loss of vision in his right eye and was advised by the first Defendant to stay in the hospital longer and to sit in an upright position at all times so that the blood in his eye could subside.

Plaintiff was discharged on 26 September 1999 and was not told of the true status of his right eye. He was referred the next day to one Dr Pall Singh for a second opinion on the status of his right eye. Plaintiff then discovered that the first Defendant had removed the lens in his right eye during the second operation without his consent and/or knowledge. He was also informed that his retina was badly uprooted with a lot of internal blood clotting. Dr Pall Singh declined to

operate him because he said the Plaintiff's chance of recovery would be slim. He was of the opinion that the first Defendant's suggestion to wash the front part of the eyes would be futile. He was of the opinion that continuous bleeding within the eyeball would continue to cause blood occupy the cornea. The Plaintiff then went back to consult the first Defendant on 1 October 1999. Upon the said consultation, the Plaintiff was told that there was still bleeding in his right eye and a procedure to be performed on 5 October 1999. The Plaintiff claimed that this was contrary to what the first Defendant's earlier assurance which was that when the blood subsided the retina would still be intact.

Plaintiff was advised by the first Defendant to perform a procedure as there was still bleeding in his eye. Due to the condition, Plaintiff was referred to one Dr Seshan Lim of the Lions Eye Centre. Dr Seshan Lim was of the opinion that the plaintiff's right eye was in bad condition and beyond saving. The Plaintiff said that was the first time it was clearly made known to him the real position and condition of his right eye, that his right eye was blind since the second operation and that no possible medical procedure may rescue the situation. Plaintiff who was still hopeful to rescue his right eye then sought medical assistance in Singapore. On the advice of Dr Pall Singh, he consulted one Dr Ong Sze Guan of the Singapore National Eye Centre. Plaintiff was told that his right eye was badly damaged, having been drenched in blood for more than 25 days. On the recommendation of Dr. Ong Sze Guan, he underwent a surgical procedure on 15 October 1999 to remove the blood clots and patching of the retina in an attempt to salvage his vision. Unfortunately, the efforts were unsuccessful.

The first Defendant then confirmed in a medical report dated 24 November 1999 that the plaintiff's right eye is permanently blind due to retinal detachment and that his left eye needs prolonged follow up treatment. The Plaintiff then filed a civil suit of medical negligence against the first Defendant ( the doctor ), the second Defendant ( the anaesthetist ) and the hospital as the third Defendant ( the hospital). It was alleged by the Plaintiff in his claim that the injuries and loss of vision in his right eye were caused by the negligence of all three Defendants, and also by the first Defendant and the second Defendant as servants or agents of the hospital. In the High Court, the Plaintiff's claim was allowed and all the three Defendants were held liable. The learned Judicial Commissioner found that both the first Defendant and the second defendant were negligent in failing to warn the Plaintiff of the risks of bucking and blindness during the operation. Both Defendants were also responsible in the care and management of the Plaintiff. The hospital was found vicariously liable for the negligence of the first and second Defendants as the internal arrangements between the Defendants and the hospital were exclusively within their knowledge and that the hospital had allowed them to hold themselves out as the hospital's agents, servants or employees. The Plaintiff was awarded RM200,000 as general damages, RM1,000,000 as aggravated damages and RM8,014 as special damages.

Both the first and second Defendants filed an appeal against the High Court decision and the hospital filed another appeal against the same. The Court of Appeal held that the first Defendant was negligent in his care and management of the Plaintiff in the second operation. The Court of Appeal found no evidence to support that either the first Defendant or the second Defendant had explained the risk of bucking to the Plaintiff. The first Defendant had wrongly advised the Plaintiff to undergo the second operation, and thereby subjected the Plaintiff to unnecessary risks including the instance of bucking which led to blindness in the Plaintiff's right

eye. Furthermore, the procedure adopted by the first Defendant after the haemorrhaging occurred was found to be against all textbook and established clinical teachings. The second Defendant failed to explain the risk of bucking, based on the fact that the Plaintiff had never met the second Defendant nor been interviewed of his medical history prior to the administration of the anaesthetic. He had failed in his responsibility to keep the Plaintiff anaesthetised completely, relaxed, and pain-free throughout the operation. It was found that bucking could have been avoided and controlled by additional drugs. The Court of Appeal considered the fact that the muscle relaxant drug wore off as a clear indication of negligence, and held that there was clear mistiming of the top up dose.

On the issue of vicarious liability, the Court of Appeal in view of the inextricable relationship between hospitals and doctors, the hospital's liability for the negligence of the first and second Defendants are not absolved by pure internal arrangements. The court affirmed on finding vicarious liability on the part of hospital taking consideration the facts that the Plaintiff's fees were paid to the hospital, the hospital held out the first Defendant as a doctor of the hospital, the Plaintiff did not have a choice as to the anaesthetist, since the second Defendant was only one on duty at the material time and the hospital provided all the facilities, drugs and nurses for the operation. The Court of Appeal agreed with the damages awarded in the High Court in consideration of plaintiff's severe pain, loss of vision, nervous shock, distress, embarrassment and humiliation, deprivation of ordinary life experience and lost promotion prospects. The defendants who were dissatisfied with the Court of Appeal's decision then obtained leave to appeal to the Federal Court on various questions of law. They sought an order for a retrial on the ground, amongst others, that the trial judge had failed to give reasoned judgment for his conclusions and merely makes a finding without explaining why he was persuaded to that end (also known as a non-speaking judgment).

The Federal Court in its decision agreed that it does not necessarily follow that the court should always order a retrial merely because there was a non-speaking judgment. The party seeking the retrial has the burden of proving that there was some substantial wrong or miscarriage of justice by the trial court before such relief can be granted. The appellate courts also have a duty to make their own findings of fact based on the evidence available in the records of appeal. In this case, the alleged negligence happened in 1999, the trial commenced in 2007 and concluded in 2010 after 23 days of trial and involving a10 witnesses. Accordingly, the Federal Court held that a retrial would unduly prejudice all parties and was contrary to the best interests of justice.

## **DUTY OF CARE**

Negligence is essentially concerned with compensating people who have suffered damage as a result of the carelessness of others. However, the law does not provide a remedy for everyone who suffers damages. The doctrine of duty of care explained that there must be 'special relationship' between the Defendant and the Plaintiff and the Plaintiff had been directly affected by the Defendant's act (Catherine Elliott & Frances Quinn, 2015). This principle was established in 1932 in the case of *Donoghue v Stevenson* [1932] AC 362 which concerned that there is a duty in tort to take reasonable care to avoid acts or omissions which someone can reasonably foresee would be likely to injure his neighbour. In this case the House of Lords agreed that the

manufacturers owed a duty of care to the end consumer of their products. Lord Atkin in this case introduced The Neighbour Principle which reads as follows :

*“ The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? Receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”*

The facts of *Donoghue v Stevenson* began when Mrs Donoghue and a friend went into a cafe for a drink. The friend had bought her a ginger beer and it was supplied in an opaque bottle. Mrs Donoghue poured out and drank some of the ginger beer, and then poured out the rest. At that point, the remains of a decomposing snail fell out of the bottle. Mrs Donoghue suffered shock and gastroenteritis so she sued the manufacturer. The usual remedy for damage caused by a defective product under law of contract was unavailable to Mrs Donoghue because the contract for the sale of the drink was between her friend and the cafe. The House of Lords held that the manufacturer liable and owed a duty of care towards Mrs Donoghue despite the fact that she had no contractual relationship.

The test for the existence of a duty of care owed by the Defendant to the Plaintiff is the test of Reasonable Foresight and it was laid down by the “Neighbour Principle” (Loganathan Krishnan, Parimaladevi Rajoo, 2018). In *Jaswant Singh v Central Electricity Board* [1967] 1 MLJ 272, it was stated that under the neighbour principle, the foresight of the reasonable man was the key element to the question “Was injury to the Plaintiff the reasonably foreseeable consequence of the Defendant’s acts or omissions in all the circumstances of the case?” If the answer was No, then the decision would be that no duty of care was owed by the Defendant to the Plaintiff. It was understood that a Defendant owed the Plaintiff a duty of care if the Plaintiff was “near or close to” the Defendant that he should have thought about the impact of his actions on the Plaintiff. However this did not mean that the Plaintiff must be a person identifiable by the Defendant.

In 1990, the House of Lords set down a new test known as the three-stage test in *Caparo Industries plc v Dickman* [1990] 2 AC 605 where in determining whether a duty of care should be imposed, the courts to ask three questions :

- i) Was the damage caused reasonably foreseeable?
- ii) Was there a relationship of proximity between Plaintiff and Defendant?
- iii) Is it just and reasonable to impose a duty of care, looking at the circumstances as a whole?

The case considered the liability of an auditor for financial loss suffered by investors. Shareholders in a company bought more shares and then made a successful take-over bid for the company after studying the audited accounts prepared by the Defendants. They later regretted the

move and sued the auditors, claiming that they had relied on accounts which had shown a sizeable surplus rather than the deficit that was in fact the case. This Caparo test has been accepted as the basic test to be applied to decide whether a duty of care exists. The three criteria cannot be precisely defined or evaluated in isolation from one another. It might be said that the more foreseeable the harm suffered by the claimant, the closer the proximity of the parties, and vice versa. The closer the proximity, or the more foreseeable the damage, the more likely it is fair, just and reasonable to impose a duty of care on Defendant (Paula Gilker, 2017).

Nowadays, a Plaintiff need not prove the existence of a contract in order to sue the Defendant for his conduct. The Federal Court in *Lok Kok Beng v Loh Chiak Eong* [2015] 4 MLJ 734 held that an architect rendering his professional service in a construction project can be made liable for negligence if the damage and injury suffered by the purchasers was caused by his act or omission within the scope of duty of care of the architect. Such a duty can be owed to third parties with whom the architect has no contract. It was also held that the preferred test for determining a duty of care is the three-fold test. The requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. In establishing the sufficient proximity ingredient, the Court has to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case.

In the recent case, it is clearly undisputed facts that there was a doctor-patient special relationship between the First, the Second Defendant and the Plaintiff. The Plaintiff also was the one who had been closely and directly affected by the advice and treatment given by both Defendants. There was a duty in tort for the ophthalmologist (First Defendant) and the anaesthetist (Second Defendant) to take reasonable care to avoid acts or omissions which they can reasonably foresee would be likely to injure the Plaintiff (their neighbour).

Another issue arose in court is that can a private hospital be held vicariously liable for the sole negligence of doctors who are qualified professionals and working as independent contractors? Previously, private hospitals enhanced their immunity by exploiting the concept of independent contractor which means in other word, if a doctor was an independent contractor, then the hospital was not liable. In the case of *Vincent Manickam s/o David (suing by himself and as administrator of the Estate of Catherine Jeya Sellammah, deceased) & and others v. Dr. S. Hari Rajah and Anor* [2018] 2 MLJ 497, the Court of Appeal held that the Damansara Specialist Hospital was liable because the hospital not just provided the location, but also material, medication, prescription, staff and tools for the surgeon to give his medical treatment to the patient. Moreover, the hospital shared the profits from the doctor's earning and even his medical risks. The terms of the agreement between the doctor and the hospital stated that it was "mandatory" for the doctor rendered medical services at the hospital implied that the doctor was not truly independent of the hospital.

In this recent eye treatment case, the Federal Court held that the doctrine of non-delegable duty of care as expounded by the English Supreme Court in *Woodland v Swimming Teachers Association and Others* [2014] AC 537 could apply to private healthcare institutions. The Federal Court found that the hospital (the third Defendant) liable for breach of its non-delegable duty to ensure reasonable care in respect of the anaesthetic services provided. This

decision is the first positive finding in Malaysia of a non-delegable duty of care by a private hospital for the medical negligence of independent contractors.

## **STANDARD OF CARE**

Having established that a duty of care exists in particular situation and in law, the Plaintiff now need to establish whether the Defendant is in breach of that duty. Breach of a duty of care essentially means that the Defendant has fallen below the standard of behaviour expected in someone undertaking the activity concerned. Medically, standard of care is a diagnostic and treatment process that a medical practitioner should follow for a certain type of patient, illness or clinical circumstances (Daud Momodu & Oseni T.I.A, 2019). In law, the question is about whether the Defendant has not come up to the standard of care required and expected from an ordinary reasonable individual. The standard of care was defined in *Blyth v Birmingham Waterworks* (1856) 11 Exch 781 where a wooden plug in a water main became loose in a severe frost. The plug led to a pipe which in turn went up to the street. However, this pipe was blocked with ice, and the water instead flooded the plaintiff's house. The frost was beyond normal expectation. The plaintiff sued in negligence. The court held that the defendants had done all they reasonably could have done to prevent the damage. There was no liability in negligence for the defendants. The test for deciding whether there has been a breach of duty is laid down in the dictum of Alderson B :

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

The conduct of the Defendant will be measured against that of the reasonable person who is “average” and not perfect. Thus, the ‘reasonable man or reasonable person’ is the so-called average person in our society who has common sense and can logically assess whether his action or omission might cause harm to others. The test applied known as the objective test and the standard is an objective standard. The particular Defendant's own characteristics are irrelevant and he was judged as against a person who possesses the same skill as him. In the case of *Phillips v Whiteley Ltd* [1938] 1 All ER 566, the Defendant was a jeweller. The Plaintiff went to him to have her ears pierced. The Defendant performed the procedure in a white-washed room, dipped the instruments in disinfectant, passed them through a flame, and placed them under running water. The Plaintiff contracted a disease after the procedure. The court held that the standard of care required of the Defendant in this case was that of a skilled jeweller. He should not be compared to a medical practitioner. The Defendant had met the standard required. He was not expected to take the same hygiene measures as a doctor.

The standard of care applied to professionals with a particular skill or expertise is that of the reasonable person with the same skill or expertise (Emily Finch & Stefan Fafinski, 2011). This test was established in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. The Plaintiff suffered from depression and consented to undergo electro-convulsive therapy, a practice which can cause severe muscular spasms. The doctor giving the treatment failed to provide relaxant drugs or any means of restraint and the claimant suffered a fractured pelvis. The Plaintiff maintained that the procedure carried out in this way was negligent but he failed in his

action for damages. The court accepted evidence showing that doctors at the time were divided on whether or not to use relaxant drugs during the procedure. The Defendant was not negligent because he engaged in a procedure accepted by a competent body of medical practitioners skilled in the particular field.

The Bolam test is essentially a ‘Doctors know best’ test. The courts must accept the views of a responsible body of men skilled in the particular discipline, even if there exists another responsible body of men with a different view. The rationale behind such a test is that judges, not being medically trained, are not equipped to resolve genuine differences of opinion on matters that are beyond their expertise. In the local case of *Dr Wong Wai Ping & Anor v Wong Lin Sing & Ors* [1999] 6 CLJ 23, the Defendant doctor was found to be wholly liable for the death of the Plaintiff’s wife consequent upon delivering their baby. The court held that underestimating the loss of blood of a patient had showed that the Defendant had clearly departed from the ordinary reasonable skill of a gynaecologist. The Bolam test has also been criticised for being too protective of professionals. It has been argued that the test allows practitioners to set their own standards rather than having those standards set by the courts.

The House of Lords clarified the situation in *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771. Although there was a recognised body of medical opinion in accordance with the doctor’s practice, a court is not obliged to find a doctor not liable for negligence purely because other medical experts have testified that his or her actions were correct. In this case, a two year old boy was in hospital being treated for croup. His airways became blocked and, despite the requests of the nurses, the doctor on call failed to attend. The boy suffered a cardiac arrest and brain damage as a result. This could have been avoided if a doctor had intubated the boy and cleared the obstruction. The hospital admitted that the doctor was negligent in failing to attend, but claimed that it was not liable because the doctor would not have intubated even if she had attended, so there would have been no difference in the outcome, and that not intubating was acceptable medical practice. In this case, the court emphasised that a judge could find a Defendant negligent despite a body of professional opinion supporting the defendant if the professional opinion was “not capable of withstanding logical analysis”. Courts have interpreted *Bolitho* not as permitting judges to compare and prefer one medical expert’s view over another, but only to scrutinise the logical basis of the medical opinion (Kumaralingam Amirthalingam, 2015).

The different view from Bolam’s case arose in the case of *Rogers v Whitaker* [1993] 4 Med LR 79. The fact of this case is that Maree Whitaker, who had for many years been almost completely blind in her right eye, consulted Dr Christopher Rogers, an ophthalmic surgeon, who advised her that an operation on the eye would not only improve its appearance but would probably restore significant sight to it. Whitaker agreed to the surgery. After the operation there was no improvement to the right eye and Whitaker developed inflammation in the left eye that led to loss of sight in that eye. She sued Rogers in the Supreme Court of NSW for damages for negligence. Campbell J found Rogers liable in that he failed to warn Whitaker that, as a result of the surgery, she might develop a condition known as sympathetic ophthalmia in her left eye. He awarded damages of \$808,564.38. An appeal by Rogers to the Court of Appeal was dismissed. He then appealed to the High Court. Rogers argued that the issue should be resolved on by application of the Bolam Principle as applied in the UK, described by Lord Scarman in

*Sidaway v Governors of Bethlem Royal Hospital* (1985) AC 871 as:

*“The Bolam principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.”*

In their majority judgement Mason CJ, Brennan, Dawson, Toohey and McHugh JJ rejected this principle, noting that in relation to standard of care:

*“In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill... But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade.*

In regards to peer professional opinion:

*“...particularly in the field of non-disclosure of risk and the provision of advice and information, the Bolam principle has been discarded, and, instead, the courts have adopted... the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to ‘the paramount consideration that a person is entitled to make decisions about his own life’”*

In this Australian case, the expounded by the High Court of Australia positions the court as the final arbiter on the question of whether the standard of care has been breached. Under this test, the court is not to delegate its judicial function to the medical profession. This test was applied by the Federal Court in *Foo Fio Na* and has led to some uncertainty as to the correct legal test to be applied in Malaysia. In *Zulhasnimar Hassan Basri & anor v Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605, the Federal Court clarified the position in Malaysian law that a distinction is to be made between diagnosis and treatment in medicine, and the duty to advise the patient of risks. In diagnosis and treatment, it is not within the expertise of the courts and thus cannot be resolved by the courts whereas in duty to advise the patients of risks, it is an issue of fact that the courts are able to determine.

The issues in the recent case of Dr Hari Krishnan were which test applicable in deciding the standard of care in medical negligence whether the Bolam test ( ‘Doctors Know Best’ Test ) or the test in *Rogers v Whitaker*; and whether the third Defendant ( the hospital) was liable for the actions of both the first and second Defendants on the doctrine of non-delegable duty. In dismissing the appeal, the Federal Court held that in cases involving the standard of care for diagnosis and treatment, the Bolam test still applicable. The Plaintiff’s evidence was that he was never informed by the first Defendant of the risk of blindness in undergoing the second operation. As against both defendants, the Plaintiff alleged that there were no explanations by the Defendants of the risk of blindness, so as to offer Plaintiff a well informed choice as laid down in the case of *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593. As such, the Bolam test

as qualified in *Bolitho* continues to apply to the question of the standard of care in medical diagnosis and treatment, while the Rogers Test as propounded in *Foo Fio Na* applies to the duty to advise of risks associated with a procedure.

It is pertinent to note the *Bolitho* qualification attached to the Bolam test. Even doctors may know best, the expert opinion before the court must be capable of withstanding logical analysis. If the court finds that it fails to satisfy this criteria, it may hold that such expert opinion is not reasonable or responsible and depart from it. During the trial, the patient had produced an expert witness to testify that the doctors had breached the reasonable standard of care. The doctors too produced their own expert witness to testify that they did not breach that standard of care. Therefore, since both the first and second Appellants had failed the Bolam test, they were held negligent for their advice of risks, diagnosis and treatment, mainly failing to warn the respondent of the risks of bucking and blindness, subjecting the respondent to an unnecessary operation, and failing to keep the respondent anaesthetised completely during the second operation. It can be said that courts have not completely delegated their judicial function in cases of medical negligence as they must still judge the expert evidence on its logical merits.

The court also found that the first and second Defendants were the agents of the hospital (the third defendant) and this rendered the third Defendant vicariously liable in this case. The view is that the hospital is an institution that provides medical service and treatment to sick patients and it cannot exist without such services be given by group of medical practitioners such as doctors, nurses and other support staffs. There is inextricable relationship between doctors and the hospital in context of a provider of medical care and services which would never exist independently without the service provided by such doctors and nurses. In addition, the learned judge referred to an extract from Picard 'The Liability of Hospitals in Common Law Canada' in text book "Medical Law" ( Andrew Grubb, 2000 ) which inter alia states that :

*"The quality of the duties owed by a hospital has led to their sometimes being referred to 'non delegable'. This has the significant effect of making the employer of an independent contractor strictly liable for any negligence of the contractor in carrying out the duty of care which was the employer's but which he had contracted or delegated to the independent contractor. This is an exception to the general rule that an employer is not liable for the negligence of an independent contractor employed by him."*

There is an overriding and continuing duty upon hospitals as an organization, to provide the services and must be regarded as giving an undertaking to take reasonable care to provide for medical needs upon the admission of a patient. In the case of *Dr Wong Wai Ping & Anor v Woon Lin Sing & Ors* [1999] 6 CLJ 23, the finding that the hospital was vicariously liable for the negligent act of the doctor was based on the fact that the gynecologist was the servant and agent of the hospital, despite their contractual arrangement to state otherwise. Furthermore, there was only one bill paid for the service of the gynecologist who was assisted by the nurses of the hospital in the discharge of his duties and no notice was brought to the attention of the plaintiff in this case about the internal arrangement, which is neither legally binding on the patient nor would it exempt the hospital from liability for negligence. In the case of *Cassidy v Ministry of Health* [1951] 2 KB 343, Lord Denning LJ held that hospital authorities are liable for negligence

in the treatment of a patient, which does not depend on whether the contract under which he was employed was a contract of service or a contract for services. He opined that a patient knows nothing of the hospital-staff employment terms. A patient only knows that he was treated in a hospital by people whom the hospital authorities appointed for which the hospital authorities must be answerable for the way in which he was treated. Applying the principles in *Woodland v Essex County Council* [2013] UKSC 66, it was held that the Hospital owed a non-delegable duty to the respondent to ensure that reasonable care was taken in the premises and that such duty was breached by the Hospital thus, holding it liable in negligence.

The Federal Court reconfirmed the liability of the third Defendant hospital based on the following facts established at the trial; the fees paid by the Plaintiff to the third Defendant for the operation instead of payment to the first and second Defendants separately, the third Defendant had held out the first Defendant as a doctor of the third Defendant hospital and there was a signboard at the reception area stated the first Defendant as the 'Visiting Consultant Ophthalmologist'; the second Defendant confirmed that he was the only anaesthetist on duty on the day of the Second Operation and the Plaintiff had no choice in choosing his own anaesthetist; the third Defendant provided all the facilities, drugs and nurses or other assistants for both operations and the fact that the third Defendant controlled the drugs to be prescribed by doctors practicing there, whether they are full time employees or not.

## **DAMAGE AND COMPENSATION**

In order to establish negligence, it must be proved that the Defendant's breach of duty actually caused the damage suffered by the Plaintiff, and that the damage caused was not too 'remote' from the breach. The Plaintiff must prove a causal link between the Defendant's breach of duty and his injuries. To decide this issue, the first question to be asked is whether the damage would have occurred but for the breach of duty. This test is known as the "but for" test and was introduced in *Barnett v Chelsea & Kensington Hospital Management Committee* (1969) 1 QB 428. In this case, a night-watchman arrived early in the morning at the defendants' hospital, suffering from nausea after having a cup of tea at work. The nurse on duty telephoned the casualty doctor, who refused to examine the man and simply advised that he should go home and consult a doctor if he still felt unwell in the morning. The man died five hours later of arsenic poisoning. The hospital was sued for negligence. The hospital was held not liable as the victim's death was not the result of the breach. The court accepted that the hospital did owe the man a duty of care to examine him and had breached this duty by sending him home. There was evidence that even if he had been examined, it was too late for any treatment to save him. Causation between the defendant's breach of duty and the victim's death was not proved.

It is undisputable that Plaintiff had suffered blindness in one eye due to the Defendants' negligence. This is the harm that Plaintiff suffered from the breach alleged and he must prove that he has suffered an injury which flow directly from the action of the Defendants. Proof of actual injury is the justification for a claim for damages in an action for negligence. Damages for personal injury are divided into pecuniary and non-pecuniary losses. Pecuniary damages are those which can be calculated in financial terms, such as loss of earnings, medical and other expenses, while non-pecuniary damages cover less easily calculable damages, such as emotional well-being, shock, pain, loss of physical amenity and suffering (Louis Visscher, 2010). The

quantification of damages in personal injury cases is particularly complex due to the wide range of heads of damage that may arise such as pre-trial expenses, expenses incurred by another, pre-trial loss of earnings and future losses.

In this recent case, Plaintiff had been awarded RM200,000 as general damages; RM1,000,000 as aggravated damages and RM8014 as special damages by the Court of Appeal. General damages are those which are not capable of being calculated at the time of trial such as loss of future earnings, pain and suffering. Aggravated damages are awarded over and above the damages that are necessary to return the Plaintiff to the position that he would have been in had the tort not occurred. The court can show its disapproval by awarding damages which are higher than would normally be appropriate. Special damages is used to refer to an amount that is claimed because of a breach or wrongful act of another where such an amount can be quantified. If a person is injured in an accident, then the costs involved in being treated at a clinic or any other medical expenses or damage to property can be quantified in terms of money which would be in ringgit and sen (Bhag Singh, 2011).

In awarding the amount of damages the Federal Court noted into consideration various facts and factors such as injuries, severe pain, continuous bleeding and difficulties suffered by Plaintiff during operations, treatments received, he was made to believe that his eye sight would return and also was given false hope that he would regain his eyesight. Plaintiff also suffered severe nervous shock, extreme anxiety, distress and fear of future incapacity in the event something were to happen to his remaining functioning eye (left eye). The Plaintiff also suffered embarrassment, humiliation and discomfort at the workplace and in public due to the lack of vision in his right eyes. He also no longer able to experience the full pleasures in activities and lost prospect of promotion in his job due to his loss of sight in one eye.

## **CONCLUSION**

This paper has discussed in general what constitutes medical negligence under the general law of Tort and in the light of specific reviewed case discussed in this article. In professional relationship, both medical practitioners (an ophthalmologist and an anaesthetist) in this case are expected to have a duty of care towards their patient who came and seek treatment in the clinic or hospital. Medical negligence occurred when both of them breached their duties that failed to warn the patient of the risks of the treatment and also negligent in the care and management of the patient during treatment. As a result of this failure it caused substantial injuries, pains, suffering and loss of vision to the patient. Therefore, it has been suggested that the law of negligence requires a direct nexus between the injury and the negligence action of the medical practitioners. Duty to disclose risks is different from duty to treat and diagnose. A doctor is able to treat or diagnose his patient according to his skill but he also needs to know how much information on risks in treatment to be disclosed to the particular patient in particular circumstances so that it will not scare the patient unnecessarily. In Malaysia, the Bolam Test applicable in determining the standard of care in medical diagnosis and treatment while the Rogers Test applies to the duty to advise of risks associated with a treatment or procedure. Obviously, in this recent medical negligence case, applying a 'doctors know best' test in Bolam's case have not make the courts completely delegated their judicial function in cases of medical negligence but they still consider and judge the expert evidence on its logical merits. It also has

been decided that aggravated damages can be awarded in medical negligence cases which involve real injury to an individual's body.

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