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Medical Negligence Concept in Malaysia: A Legal Study

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Abstract: *Doctors could not guarantee regarding recovery of their patient. Doctors can only work according to the knowledge they have. However, the failure of doctors to cure patients 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 each year the number of medical negligence increases. 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 only so that the guilty physician will be punished to pay compensation to the patient. Generally, medical negligence cases are resolved through court. However, it is difficult to prove the negligence done by the doctor and the length of time needed to tackle the case of medical negligence through the court has prompted physicians and patients to bring their case through the mediation forum.*

Keywords: *Medical Negligence; Concept; Malaysia; Legal Study*

1. 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.[1] 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. 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.[2]

1 Z. Nasohah, *Pentadbiran undang-undang Islam di Malaysia: Sebelum dan Menjelang Merdeka*, (Kuala Lumpur: Utusan Publications & Distributors Sdn. Bhd, 2004).
2 A. Ibrahim, "Undang-Undang Islam di Malaysia," *Journal of Malaysian Comparative Law*, 8, no. 25 (1981): 1-12.

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 lawmakers 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 became the basis for all its subsequent legislation. Malaysia's federal constitution is the ultimate parent law and law. This means there is no other law made in this country that can be recognized legally unless the law 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.[3]

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 only punished with pay compensation only. However, Zahidul said there is no special Act for medical negligence in Malaysia. Currently, the tort system is using to regulate medical negligence in Malaysia. This system provides compensation only. The job of the court is to do fair dealing based on the available evidence and the law.[4]

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 the doctor has done medical negligence is the case of *Bolam v. Friern Hospital Management Committee*.[5] 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 uses the approach that was decided in the case of Bolam in medical negligence cases. The Bolam test was considered to be protective 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 is to introduce and expose the development of health law in Malaysia especially the various instruments dealing with the handling of cases of medical negligence in Malaysia. In addition, this article will expose the various mechanisms of handling medical negligence cases in Malaysia and what are the obstacles found in the settlement of medical negligence cases in Malaysia.

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3 ER. Adawiah, "Isu-isu Perundangan dan Kehakiman dalam Kewangan Islam," *Islamic Finance Conference*, Kuala Lumpur, (2010): 146.

4 MD. Zahidul Islam, "Medical Negligence in Malaysia and Bangladesh: A comparative study." *Journal of Humanities and Social Science*, 14, no. 3 (2013):, 82-87.

5 Bolam v Friern Hospital Management Committee [1957] 2 All E.R 118.

2. METHOD

This is a qualitative study using normative juridical approach. This study is a legalistic or doctrinal substance using analytical techniques (content analysis).[6] Content analysis is a research technique is carried out systematically by analysing legal instruments pertaining to medical negligence cases.[7]

The purpose of legalistic or doctrinal research is 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.[8] This type of research is also known as pure theoretical research and all material in where all material derives from library, archive and other database.

3. RESULTS AND DISCUSSION

3.1 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 custom and local 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.[9]

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

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6 GD. McCracken, *The Long Interview*, (London: Sage, 1988).

7 JV. Maanen, "Reclaiming Qualitative Methods for Organizational Research, *Administrative Science Quarterly*, 24, (1979): 520-526.

8 Anwar Yaqin, "Legal Research and Writting," *Malayan Law Journal*, 1, no. 10, (2007): 12.

9 AC. Ngah, "Perkembangan Undang-Undang Perubatan di Malaysia: Cabaran dan Masa Depan, (Kuala Lumpur: Universiti Kebangsaan Malaysia, 2007).

Declaration and International Code of Ethics, in addition to referring to the General Conduct and Discipline of the United Kingdom General Medical Council.[10]

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 gathering of legal principles that are formed from the principle of tort law, contract, crime and family among others.[11] This is because the issues that arise in the field of medicine 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 comprise the principle of private law but also include the principles of public law.[12]

According to Anisah, the development of medical law in Malaysia can be categorized as below:[13]

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, to this day only the category of law and medical practice is only 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*.[14] In that case, a father finds his legs and thighs swollen due to ulcer. He has met Dr. Devadeson, a medical officer at a government clinic for treatment. After checking the amah, Dr. Deava has injected a penicillin drug that results in his death within an hour of injection. The family had sued the doctor for negligence on the basis of violation of cautious duty resulting in death.

In the trial, the doctor did not refer to the card of the patient's card which contained allergic warning to penicillin. It should be a good clinical practice for the doctor to ask the patient whether it has any side effect if given the injection treatment. The court ruled that doctors had violated cautious duties for not acting on the basis of the doctrinal practices of other doctors. In achieving this decision, the court has used Bolam test as a measure to assess whether the doctor's action is reasonable or as a professional practitioner who is trained in treating patients.

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[10] M. Nawi & AC. Ngah, "Skop Kelakuan Buruk Dalam Kod Kelakuan Profesional 1987: Satu Analisis Menurut Etika Perubatan Islam," *Jurnal Undang-undang & Masyarakat*, 15, no. 54 (2011): 34-54.

[11] BM. Dickens, *Medicine and the Law*, (Aldershot: Dartmouth, 1993).

[12] BS. Markesinis & S.F Deakin, *Tort Law*, (Oxford: OUP, 1999).

[13] AC. Ngah, *Medical Negligence litigation: Is defensiv Medicine Now the Norm?* 12th Commonwealth Law Conference. Kuala Lumpur, [12 January 2018].

[14] Chin Keow v. Kerajaan Malaysia [1967] 2 MLJ 45.

In the next development, Bolam approach to medical negligence cases in Malaysia has already been abandoned as Bolam is seen to be too 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*.[15] After that, it can be seen that the Bolam test in cases of medical negligence in Malaysia seems irrelevant. This change is also due to global developments regarding the informed consent doctrine influenced by the patient's autonomy concept that emphasizes patient communication and independence in decision-making regarding 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.[16]

Currently, a lot of medical negligence cases involving public doctoral, specialist doctors and nurses found. According to statistics from the Ministry of Health of Malaysia states that in 1986-1990, the number of medical negligence cases are a total of 61 cases and in 1991-1992 as many as 20 cases. Later in the year 1995-1999 there were 117 reported cases of medical negligence and only 13 cases are canceled as well as 95 cases have been resolved.[17]

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.[18] Milton Lum, The Medical Defence Malaysia (MDM) board member said, in 2011, the number of medical negligence cases involving doctors amounted to 56 cases.[19] According to the Malaysian Ministry of Health Annual Report 2010, the amount of compensation paid for court cases has risen from MYR1,224,990.00 in 2006 to MYR5,652,242.91 in 2010.[20] 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 2010. This means that the total of compensation paid from 2006 to 2010 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 2010.[21]

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15 Foo Fio Na v. Dr Foo Sook Mun & Anor [2007] 1 MLJ 593.

16 JW. Berg, et. al, *Informed Consent Legal Theory and Clinical Practice*, 2nd edition, (New York: Oxford University Press, 2001).

17 Saliza, Prinsip Bolam Lwn. Prudents Patient Test, Manakah Membawa Manfaat Kepada Masyarakat: Satu Rujukan ke Atas Kes-kes yang Diputuskan pada Tahun 1990-2005, *Kertas Kerja*, (Bangi: Fakulti Undang-undang, Universiti Kebangsaan Malaysia, 2007).

18 P. Nemie and KM. Najid, "Medical Negligence Disputes in Malaysia: Resolving through Hazards of Litigation or through Community Responsibilities?" *International Journal of Humanities and Social Sciences*, 7, no. 6 (2013): 1757-1765.

19 SN. Hambali1 & S. Khodapanahandeh, "A Review of Medical Malpractice Issues in Malaysia under Tort Litigation System," *Global Journal of Health Science*, 6, no. 4 (2014): 76-83.

20 Ministry of Health Malaysia, *Ministry of Health Malaysia Annual Report 2010*, Ministry of Health Malaysia Website, 2010. Retrieved from http://www.moh.gov.my/images/gallery/publications/md/ar/2010-2.pdf, [1 February 2018].

21 HR. Abdullah, *Court awards RM870,000 to couple and son over medical negligence*, The Star Online, Retrieved from http://thestar.com.my/news/story.asp?file=/2011/1/21/nation/201101211 41028&sec=nation, [2 February 2018].

Table 1.1 Amount of Compensation Paid by Court Order and Out of Court (Ex Gratia Payment), 2006-2011.

Year	Payment for Court Cases (RM)	Payment for Ex Gratia Cases (RM)	Total (RM)
2006	1,224,990.00	25,000.00	1,249,990.00
2007	1,084,212.00	0.00	1,084,212.00
2008	772,263.00	405,096.00	1,177,359.00
2009	2,000,969.00	847,945.00	2,848,914.00
2010	5,652,242.91	906,365.21	6,558,608.12
Total	10,734,676.91	2,184,406.21	12,919,083.12

Sorce: MoH Annual Report 2012

However, Anissah noted that the number of medical negligence cases in Malaysia is not much if compared with other countries such as England and the United States where once there was a crisis of medical negligence cases in the 1970s.[22] Judge Low Hop Bing states that "*...civil litigation founded upon medical negligence are few and a part in Malaysia...*".[23] Puteri said that although the incidences of medical malpractice cases in malaysia are not as many of these countries another, but every year the number of medical malpractice has been on the increase.

3.2 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.[24] According to Siti Zubaidah Ismail, negligence is considered the biggest tort as compared to other tortions such as defamation, trespassing, nuisance and others.[25]

Medical negligence takes place if the doctor is less cautious and careful in carrying out medical services until the claim for injuries suffered due to medical negligence is one of the personal injury claims which are usually brought to court by those involved.[26] However, not all failures in medical practice are considered a legal negligence because patients also have the responsibility of cooperating in ensuring that doctors' instructions are followed and provide a complete and truthful description of their health status. If the

[22] AC. Ngah, *Perkembangan Undang-Undang Perubatan di Malaysia: Cabaran dan Masa Depan*, (Kuala Lumpur: Universiti Kebangsaan Malaysia, 2007).
[23] Tan Ah Kow v. The Goverment of Malaysia, 1995, MLJU 183, 1997, 2 CLJ Supp 168.
[24] P. Nemie P, "Medical Negligence Litigation in Malaysia: Whither should we travel?" *The Journal of the Malaysian Bar*, 1, no. 33 (2004): 15.
[25] KQ. Yeoh, et. al, *Essentials of Medical Law*, (Singapore: Thomson, Sweet & Maxwell Asia, 2004).
[26] SZ. Ismail, "Kecuaian dan Penentuan Liabiliti dalam Kes Kemalangan Jalan Raya Menurut Undang-Undang Islam," *Malaysian Journal of Shariah and Law*, 1, no. 2 (2009): 82- 95.

patient does not provide co-operation in medical practice then this is considered a patient's mistake or it has a role to the extent of a contributory negligence.[27]

The House Dictionary defines negligence as an act of caution in making something.[28] This definition corresponds to a description *not being careful enough*; *lack of care*, which means that no one in doing something is not careful enough, or in the conduct of a person's lack of care or lack of care.[29]

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.[30] 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.[31]

The World Medical Association states 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 negligent treatment of patients so this is a direct cause of injury to the patient. However, the doctor is not responsible in the event of a bad effect on the medical practice performed on the patient not because of the effects of the lack of specialist medicine and the lack of knowledge from the doctor.[32]

> *"...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."*

Pursuant to the definition given by the court in the case of *Donogue v. Stevenson*,[33] 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*.[34] Judge Anderson stated:

> *"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*,[35] 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

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27 N. Tomkins , "Getting Contributory Negligence Right," *Journal of Personal Injury Law*, 4, no. 8 (2008): 250.
28 Anonymous, *Kamus Dewan, 2nd edition*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 2008).
29 Anonymous, *Kamus New Oxford*, 2nd edition, (Selangor: Oxford Fajar Sdn. Bhd, 2006).
30 N. Talib, *Prinsip-prinsip Asas Tort*, (Selangor: Sweet & Mazwell Asia, 2006).
31 R. Naning, *Malpraktek Profesyion Doktor*, (Jakarta: Sari Ilmu, 2005).
32 World Medical Association, *Statement on Medical Malpractice*, Santiago, Retrieved from http://www.wma.Net/En/30publications/10policies/20archives/M2/, [24 March 2014].
33 Donogue v. Stevenson, 1932, A.C. 562.
34 Blyth v. Birmingham Waterworks Co, 1856, 11 EXCH. 781.
35 Loghelly Iron & Coal v. M'Mullan, 1934, AC 1: 25.

of damage or injury. Regarding the standard of care 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*[36] and after that in the case of *Penny, Palmer and Cannon v. East Kent Health Authority*.[37] 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*[38], Federal Court Judge is more likely to accept the principle in Australia case *Christopher Roger v. Lynette Whitaker*[39] emphasizes on reasonable medical practice such as paying attention to patient rights, disease risk and treatment and so on.

3.3 Elements of Medical Negligence

3.3.1 Duty of Care

Precautionary obligation or also known as a cautious obligation is a must must be done by a physician in conducting 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 gauge for assessing the standard of care 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 treatment authorization form. Before the treatment was initiated, the plaintiff was not given any sedative and did not bind the legs and hands to prevent the possible out-of-control movement during the ECT. He was also not informed of the risks or side effects of the treatment. As a result of ECT treatment, he experiences cracking on his hips. In medical practice at that time, medical practitioners did not agree on the need to use tranquilizers, bind the patient or tell patients about the side effects of a treatment.[40]

Judge McNair is of the opinion that the case is a professional negligence. He mentioned that:[41]

> "*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

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36 Bolitho v. City & Hackney Health Authority, 1998, A.C 332.
37 Penny, Palmer, Cannon v. East Kent Health Authority, 2000, 41.
38 Foo Fio Na v. Dr Foo Sook Mun & Anor, 2007, 1 MLJ 593.
39 Christopher Roger v. Lynette Whitaker, 1992, 175 CLR 479.
40 Siti Zubaidah Ismail, "Kecuaian Perubatan Menurut Undang-Undang Tort dan Autoriti Mengenainya dari Sudut Syariah," *Shariah Journal*, 19, no. 22 (2011): 136-137.
41 A. Grubb, "Causation and the Bolam Test; Bolitho v. City & Hackney Health Authority," *Medical Law Review*, 1, no. 2 (1993): 245.

the standard of skill that is reasonable as is the other professional 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*."[42]

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.[43] 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*,[44] *Hor Sai Hong v. University Hospital*[45] and *Glasgow Corporation v. Muir*.[46] 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*[47] 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 also challenging the Bolam principle is the case of *Dr Soo Fook Mun v. Foo Fio Na and SL*.[48] 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*,[49] 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, pay attention to the right of the patient to make his own decisions, be informed of the risks of illness and treatment and so forth.

According to the above view, medical cases of carelessness can now be tried using the patient's eyeglasses and are no longer according to the Bolam test which is more concerned with the principle of doctor knows best rule. In exercising the practice, the doctor has the legal responsibility to notify the risk of a surgical procedure that the patient expects to be either risk is serious and may result in death or injury for life.

3.3.2 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.

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42 Maynard v. West Midlands RHA, 1984, 1 WLR 634.
43 WVH. Rogers, *Winfield & Jolowicz on Tort*, (London: Sweet & Maxwell, 2006).
44 Ng Eu Khoon v. Dr Gwen Smith and 2, 1996, 4 MLJ 674.
45 Hor Sai Hong v. Universiti Hospital, 2002, 5 MLJ 167.
46 Glasgow Corporation v. Muir, 1943, AC 448.
47 Elizabeth Choo v. Government of Malaysia, 1967, 2 MLJ 45.
48 Dr Soo Fook Mun v. Foo Fio Na dan SL, 2007, 1 MLJ 593.
49 Christopher Roger v. Lynette Whitaker, 1992, 175 CLR 479.

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.[50] 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.[51] 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*,[52] where a baby has 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 to be liable under the Bolam principle, because the evidence presented in the court shows 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*.[53] The issue raised in this case is a careless doctor in handling the Electro Convulsive Treatment (ECT) medical treatment method for patients undergoing mental disturbances until the patient is cracked on his spine. Doctors are deemed to be in custody because the doctor does not give the patient any sedation, the doctor does not directly hold the patient's body or instructs 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 while doctors have performed general medical treatments where other specialist physicians 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 received 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 denial of bulbs test for medical negligence cases. This change of wind is seen in the judgment of *Christopher Roger*

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50 RN. Jone & F. Buston, 1995, Medical Negligence Case Law, London: Butterworths, p 19.
51 Rogers WVH, *Winfield & Jolowicz on Tort*, (London: Sweet & Maxwell, 2006).
52 Hor Sai Hong v. Universiti Hospital, 2002, 5 MLJ 167.
53 Bolam v. Friern Hospital Management Committee, 1957, 2AIl ER 118.

case v. Lynette Whitaker[54] 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.[55]

In the case of Rogers, the plaintiff, forty-eight-year-old Maree Whitaker, almost blind to his right eye due to injuries sustained at the age of nine, but his left eye was normal. The plaintiff has been advised by the defendant, an ophthalmic expert to undergo a surgery on his right eye, aiming to remove the tissue scar and improve vision on the eye. The plaintiff has expressed his intention to the defendant for information and warnings which may occur as a result of the operation. However, the defendant himself did not tolerate the physician with respect to the adverse effects that could be inflicted on his normal left eye. After undergoing surgery, the plaintiff has lost sight of his left eye due to the formation of symptomatic ophthalmic.

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 degree of alertness was no longer to the physician's decision but the court had more right to determine what precautionary measure was appropriate and that each individual had the right to make decisions in relation to himself. Patients who are entitled to make decisions regarding medical procedures. While doctors should provide sufficient opinion and advice and explanation so that patients can make their own decisions whether to accept the proposed treatment or reject it. Doctors can not force patients, provide incorrect information such as large surgical risk but doctors mention small surgical risk, or doctors intentionally create a condition in which the patient should approve the proposed treatment to be performed by the doctor.

3.3.3 Damage and Injury

The next element also needs to be proven by the plaintiff is the breakdown 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

[54] Christopher Roger v. Lynette Whitaker, 1992, 175 CLR 479.

[55] Naxakis v. Western General Hospital, 1999, 73 ALJR 782; Salgo v. Leland Stanford Junior University Board of Trustees, 1957, 317 P 2d 170 Cal.

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 death to the patient.

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.[56] In fact, the patient's damage must have been caused by the breakdown of the duty of the doctor rather than by other factors.[57] In the case of The Wagon Mound, it is mentioned that the plaintiff's loss must be directly attributable to the act of the physician who cared for it.[58] If there is any other cause then the doctor is not liable 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.

3.3.4 Causation

This causation element is an important element in the case of negligence, damage or loss on the part of the plaintiff must have been caused by the breakdown of the defendant's duty and not by other factors. While the plaintiff cannot prove that damage or injury is due to the offense of the defendant then the defendant cannot be blamed under medical negligence tort. 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 failure of the patient to prove the causal element in the trial of the medical negligence case will cause the claim to fail. The cause element is one of the important elements in the case of medical negligence as it will tell how far the injuries created due to the bursts of duties performed by the doctor in the course of medical treatment.

The causes of the two are the causal factors of fact and the causal factor of the law. In the aspect of medical negligence, the element of causation from the point of fact is that patient injuries are due to a violation of the duty of guardians by the physician in conducting medical treatment rather than other factors. When a patient encounters a problem to prove an injury is a result of a violation of a guardian obligation then the patient may use the test materially contributing to the damage.[59] This test stipulates that although there are two or more contributing factors but if one of them is due to the negligence of the defendant's doctor, it is sufficient to prove that the defendant's negligence contributes 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.[60] However, the cause of the law is rarely raised in medical negligence cases because the reason for a medical treatment can often be demonstrated.

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56 N. Talib, "*Prinsip-prinsip Asas Tort*, (Selangor: Sweet & Mazwell Asia, 2006).

57 The Wagon Mound, 1961, AC 388.

58 Yaacob AM, 1992, Reformasi Undang-Undang Islam di Malaysia: Pentadbiran Mahkamah Syariah, *Jurnal Kanun*, 4(2), 22-23.

59 P. Namie, *Medical Negligence Law in Malaysia*, (Selangor: International Law Book Services, 2003).

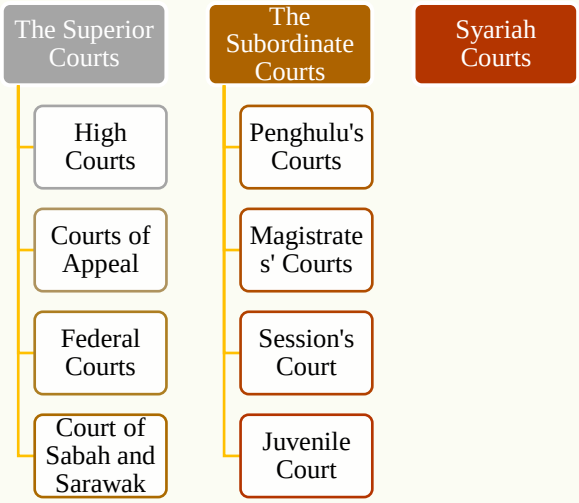
60 T. Thomas, *Is Malaysia an Islamic State? The Malaysian Bar*, Retrieved from http://www.malaysianbar.org.my/constitutional_law/is_malaysia_an_islamic_state_.html, [31 January 2018].

3.4 Settlement of Medical Negligence Cases Through Court

From time to time, courts have been used as official institutions in resolving disputes. Every 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 has been educated with an understanding that the court is one of the most legitimate disputes and court courts is the ideal place for people seeking justice.

In the aspect of solving medical negligence cases, the mechanisms used are civil judgment mechanisms in accordance with their respective modalities.[61] 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 every hierarchy of court.[62] Civil courts can be divided into two categories namely the Superior Court and the Subordinate Court. The High Court comprises the Federal Court, the Court of Appeal and the High Court. The Subordinate Courts consist of session's court and magistrate.[63]

Gafic 1.1 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.[64]

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

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61 M. Brazier & J. Miola, "Bye-bye Bolam: A Medical Litigation Revolution?" *Medical Law Review*, 8, no. 85 (2000): 45-56.

62 P. Nemie, *Medical Negligence Law In Malaysia*, (Kuala Lumpur: International Law Book Services, 2003).

63 Z. Lega, *Kes Tertunggak Di Mahkamah Turun Secara Drastik*, Retrieved from http://www.bernama.com/bernama/v8/bm/newsindex.php?id=610934, [1 January 2017].

64 J. Montgomery, "Medicine, Accountability and Professionalism," *Journal of Law and Society*, 16, no. 2 (2003): 327.

the case does not work.[65] 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 gained 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 in reducing the weaknesses in the judicial process of medical negligence cases.

4. 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 placed a physician's fault under civil law until paying damages to the patient only punished a physician convicted. Malaysia also regulates the ethical misconduct set out in the Code of Professional Conduct 1987 Malaysia. This ethical instrument stipulates that a medical practitioner should avoid being abusive in his profession or refrain from committing serious misconduct. According to the Code of Professional Conduct 1987 Malaysia, 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 the resolution of the case of medical negligence, Malaysia applies two channels ie settlement through court and mediation. Generally, all cases of medical negligence are brought to court for settlement, but the various disabilities found in court such as patients find difficulties in proving the case of medical negligence in court, many cases accumulate in court, the length of time it takes the court to resolve medical cases and the number of cases the costs required for litigation in court are the factors that cause the dispute's interest in resolving the case through mediation forums.

Mediation is more effective in solving disputes between doctors and patients. The advantages of mediation are that parties can discuss all aspects of the problem in the forum of intervention. The two parties are open to each other and the communication of both parties will be family-friendly so that both parties freely communicate anything that is desirable or unwanted. The mediation forum is confidential so that it can be present in the mediation forum only those parties such as patients, doctors and intermediaries. The confidentiality of the confidentiality forum will bring convenience to both parties because doctors or hospitals are so sensitive to the notification so that in the mediation forum of the good name of the doctor and hospital will be maintained.

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[65] Dato' James Foong, *Medical Negligence Claim: Evidence, Procedure, Trial & Assessment of Damages*, Edited by Puteri Nemie Jahn Kassim, Abu Haniff Mohamad Abdullah, Issues in Medical Law & Ethics, (IIUM: AKOL, 2021).

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