



الجامعة الإسلامية العالمية ماليزيا  
INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA  
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

**MEDICAL NEGLIGENCE IN MALAYSIA:  
REFORMING THE LAW**

**BY**

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INTERNATIONAL ISLAMIC UNIVERSITY  
MALAYSIA**

**JULY 2002**

*In the name of Allah, Most Gracious, Most Merciful*

*So verily, with every difficulty,*

*There is relief.*

*Verily, with every difficulty,*

*There is relief.*

*Therefore, when you are free (from immediate task),*

*Still labour hard.*

*And to your Lord,*

*You should turn your attention.*

*(Surah al-Inshirah 94: 5-8)*

**MEDICAL NEGLIGENCE IN MALAYSIA:  
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**BY**

**PUTERI NEMIE BT JAHN KASSIM**

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## ABSTRACT

The deficiencies of the tort system in handling medical negligence claims have been apparent for a number of years. Most of the criticism is directed at whether the action of negligence is a suitable means to compensate victims of medical injury. For a medical negligence claim to succeed, the patient has to overcome the substantive law as well as the procedural law inherent in the tort system. Often, both the substantive and the procedural law tend to work against the interest of the patient. The inaccessibility of the litigation system and particular difficulties of proving medical negligence deter many potential litigants from pursuing their claim. This means that those cases that are pursued are unrepresentative of the number of medical mishaps that have occurred. Furthermore, the current fault-based system seems ill equipped to provide non-legal remedies such as explanation and investigation of events leading to the mishap. There is a cry for reform within the tort system itself and also for the implementation of alternatives to the fault-based system such as a no-fault compensation scheme and methods of alternative dispute resolution. Such methods can be seen to do away with the rigours of litigation and offer settlement through a fairer, cheaper and helpful approach. Developments in other countries such as New Zealand and Sweden shows how medical mishaps are tackled without resorting to the tort system. However, to have such radical change implemented in Malaysia would require consideration of many factors. At the moment, it is more realistic to suggest that the tort system should exist as the traditional and primary avenue available to medically injured victims seeking remedy. However, incremental changes such as adopting measures to complement the tort system should be introduced to promote efficiency, predictability and accountability.

## ملخص

إن القصور في نظام المسؤولية التقصيرية عند معالجة طلب التعويض نتيجة الإهمال الطبي قد ظهرت جلية منذ عدة سنوات. وقد وجهت معظم الانتقادات إلى صلاحية حالة الإهمال كوسيلة مناسبة لتعويض ضحايا الإصابات الطبية. من أجل فوزه في الحصول على التعويض بسبب الإهمال الطبي على المريض أن يتغلب على مشاكل تتعلق بكل من جوهر القانون وشكله في نظام المسؤولية التقصيرية الذان غالبا ما يكونان ضد مصالح المريض. وقد أدت الصعوبات في نظام المقاضاة خاصة في إثبات الإهمال الطبي إلى عدم رفع كثير من القضايا إلى المحكمة وبالتالي لا تكون القضايا المرفوعة معيارا ومقياسا لواقع الإهمال الطبي. ويبدو أن النظام المعمول به حاليا عاجز عن حل غير قانوني مثل تزويد البيانات والتحقيقات في كارثة ما. ومن هنا جاءت النداءات والدعوات إلى طلب إصلاح نظام المسؤولية التقصيرية نفسه وإيجاد بديل آخر لتسوية النزاع مثل نظام التعويض من دون اللجوء إلى المحكمة وعدة طرق أخرى. وتمتاز هذه الطرق بإزالة عقبات التقاضي وإيجاد التسوية عن طريق أعدل وأرخص وأرفق بالطرفين المتنازعين. وتشير التطورات في دول أخرى مثل نيوزيلندا والسويد إلى أن الكوارث الطبية تمت معالجتها دون اللجوء إلى نظام المسؤولية التقصيرية. ولا يمكننا في ماليزيا اتباع نفس النهج إلا بعد إحداث التغيير الجذري في هذا النظام الأمر الذي يحتاج إلى دراسة عميقة واطعة في الاعتبار عدة عوامل متعلقة به. وفي الوقت الحالي نكون أكثر واقعا إذا اقترحنا بقاء هذا النظام كوسيلة تقليدية متاحة لضحايا الإصابات الطبية في طلب التعويض مع استمرار الجهود لتغييره تدريجيا مثل تبني وسائل مكملة له من أجل ترويج الكفاءة والتوقع والمسؤولية.

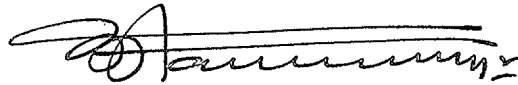
# APPROVAL PAGE

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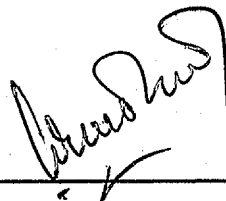


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# DECLARATION

I hereby declare that this thesis is the result of my investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

Name: PUTERI NEMIE BT JAHN KASSIM

Signature: 

Date: 16.7.02

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*For my beloved*

*Guguda, Melly, Piigie, Jaegie and Bambino*

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# TABLE OF CONTENTS

Abstract.....	ii
Approval Page.....	iv
Declaration.....	v
Acknowledgements.....	viii
List of Tables.....	xiv
List of Cases.....	xv
List of Statutes.....	xviii
List of Abbreviations.....	xix
Transliteration.....	xxi

<b>CHAPTER 1 : INTRODUCTION.....</b>	<b>1</b>
1.0 Aim and Purpose of Research.....	1
1.1 Scope of Research.....	1
1.2 Method of Research.....	2
1.3 Content of Research.....	3

<b>CHAPTER 2 : MEDICAL NEGLIGENCE.....</b>	<b>4</b>
2.0 Introduction.....	4
2.1 The Historical Aspects of Medical Negligence.....	5
2.2 Medical Ethics.....	6
2.2.1 Conflict between medical paternalism and patient autonomy.....	8
2.3 Legal Intervention in Medicine.....	10
2.4 The Growth of Medical Negligence Claims.....	11
2.4.3 Reasons for not suing.....	14
2.5 The Current Fault-based System.....	14
2.6 Problems with the Current Fault-based System.....	15
2.6.1 The Substantive Law - The Law of Negligence.....	15
2.6.2 The Procedural Law.....	16
2.6.3 Accountability.....	17
2.6.4 Deterrence.....	18
2.6.5 Compensation.....	18
2.6.6 Effect of a Medical Negligence Claim on the Defendant Doctor.....	19
2.6.7 Defensive Medicine.....	20
2.6.8 Rise in medical insurance premium rates.....	22
2.7 Accountability outside the Tort System.....	22
2.8 Conclusion.....	25

<b>CHAPTER 3:THE SUBSTANTIVE LAW OF MEDICAL NEGLIGENCE</b>	<b>28</b>
3.0 Introduction.....	28
3.1 The Basis of Liability.....	28
3.2 Tortious Liability.....	29
3.2.1 The Meaning of the word “negligence”.....	29
3.3 The Duty of care.....	30

3.3.1	When does a duty of care arise?.....	31
3.3.2	The neighbour principle.....	32
3.3.3	Requirement of foreseeability.....	33
3.3.4	Requirement of proximity.....	33
3.3.5	The patient as the doctor's legal neighbour.....	34
3.4	Duty to emergency patients.....	36
3.4.1	The impact of the decision in <i>Lowns</i> on the Malaysian courts.....	42
3.5	The Duty to third parties.....	42
3.6	Conclusion.....	52

**CHAPTER 4 : THE STANDARD OF CARE..... 54**

4.0	Introduction.....	54
4.1	The Standard of care: The <i>Bolam</i> principle.....	56
4.2	The Background of <i>Bolam</i> principle.....	58
4.3	The Essential elements under the <i>Bolam</i> principle.....	63
4.3.1	Accepted medical practice.....	63
4.3.1.1	Accepted practice to be current practice.....	64
4.3.1.2	Departing from accepted practice.....	65
4.3.2	Responsible body of medical men skilled in that art.....	67
4.3.2.1	Can the judge decide whether the expert opinion held was responsible?.....	70
4.4	The Position of <i>Bolam</i> in Malaysian cases.....	76
4.5	Doctor's duty is a single and comprehensive duty.....	78
4.5.1	Implications of applying negligence principles to duty to warn.....	80
4.5.2	Duty to warn or disclose material risks.....	80
4.5.2.1	The Doctrine of informed consent.....	81
4.5.2.2	The Development of the doctrine in the United States.....	82
4.5.2.3	The Present position in the United States.....	87
4.5.2.4	The Rationale behind the doctrine of informed consent.....	87
4.5.2.5	The Approach of the Canadian courts.....	91
4.5.2.6	The Stand of the English courts.....	95
4.5.2.7	The Rejection of the <i>Bolam</i> principle by the Australian courts	101
4.5.2.8	Abandonment of the application of the <i>Bolam</i> principle	110
4.5.2.9	The Impact of Australian decisions on Malaysian courts.....	114
4.5.3	Duty to Diagnose.....	117
4.5.4	Duty to Treat.....	122
4.6	Conclusion.....	123

**CHAPTER 5 : CAUSATION..... 125**

5.0	Introduction.....	125
5.1	Proving Causation.....	126
5.2	Factual Causation.....	127
5.2.1	The "but for" test.....	127
5.2.1.1	Difficulties in applying the "but for" test to medical cases.....	128
5.2.2	Materially contributing to the damage test.....	129
5.2.3	Loss of chance.....	138

5.2.3.1	A brief historical background on loss of chance cases.....	139
5.2.3.2	Disadvantages of not allowing damages to be awarded.....	144
5.2.4	The common sense of approach.....	147
5.2.5	Omission to treat.....	153
5.3	Remoteness of Damage (Causation in law).....	157
5.3.1	Intervening acts ( <i>Novus actus interveniens</i> ).....	159
5.3.2	Intervening act by a third party.....	160
5.3.1	Intervening act by the plaintiff.....	161
5.4	Conclusion.....	163

## **CHAPTER 6 : PROCEDURAL PROBLEMS IN MEDICAL NEGLIGENCE CLAIMS.....**

6.0	Introduction.....	166
6.1	Funding the claim.....	167
6.2	Limitation period.....	167
6.3	Access to Health Records.....	171
6.4	Discovery.....	172
6.4.1	Pre-action discovery.....	173
6.4.2	Pre-trial discovery.....	175
6.5	The Expert medical witness.....	175
6.6	Out of court settlement.....	178
6.7	Damages and compensation.....	179
6.8	Lump sum payment.....	180
6.9	Conclusion.....	181

## **CHAPTER 7 : ALTERNATIVES TO THE CURRENT FAULT-BASED SYSTEM.....**

7.0	Introduction.....	182
7.1	No-fault compensation scheme.....	183
7.1.1	Introduction.....	183
7.1.2	What is "No-fault"?......	184
7.1.3	New Zealand No-Fault Compensation Scheme.....	184
7.1.3.1	Background.....	184
7.1.3.2	The Administration of the scheme.....	186
7.1.3.3	Funding the scheme.....	187
7.1.3.4	The scope of coverage.....	188
7.1.3.5	The meaning of medical misadventure.....	190
7.1.3.6	The Accident Rehabilitation and Compensation Insurance Act 1992.....	191
7.1.3.7	Benefits or Compensation payable under the Act.....	192
7.1.4	Swedish Patient Insurance Scheme.....	194
7.1.4.1	Background.....	194
7.1.4.2	The Administration of the scheme.....	196
7.1.4.3	Funding the scheme.....	196
7.1.4.4	Application.....	196
7.1.4.5	The scope of coverage.....	197

7.1.4.6 Appeal.....	200
7.1.4.6 Limitation.....	200
7.1.5 Comparative Aspects of New Zealand and Swedish's schemes.....	201
7.1.6 The Medical Profession's perception towards a no-fault scheme.....	203
7.1.7 The Present Malaysian position with regards to no-fault scheme.....	204
7.1.8 Can Malaysia adopt a "No-fault" scheme for medical injury?.....	205
7.1.8.1 Population.....	205
7.1.8.2 Welfare State.....	205
7.1.8.3 Political Influence.....	206
7.1.8.4 Disparity in income.....	206
7.1.8.5 Deterrent Effect.....	207
7.1.8.6 Affordability of a no-fault compensation scheme.....	207
7.1.8.7 Limit an individual's right to bring civil action against the wrongdoer.....	208
7.1.8.8 The difficulty of proving causation in a no-fault scheme.....	209
7.2 Alternative dispute resolution.....	209
7.2.1 Negotiation.....	210
7.2.2 Arbitration.....	211
7.2.3 Mediation.....	212
7.2.4 Ombudsman.....	215
7.3 Conclusion.....	216
<b>CHAPTER 8: AGENDAS FOR REFORM.....</b>	<b>219</b>
8.0 Introduction.....	219
8.1 Moving to a "No-fault" system.....	221
8.1.1 Designing a suitable no-fault alternative.....	222
8.1.2 Finding a substantive criteria for compensation.....	223
8.1.3 Benefits.....	225
8.1.4 Compensation levels and funding.....	226
8.1.5 Administration.....	227
8.1.6 Overcoming the problems of deterrence, accident reduction.....	228
8.1.7 Overcoming the problem of causation.....	229
8.2 Retaining the present fault-based system but reforming the discrepancies....	230
8.2.1 Lifting the barriers in making claims.....	231
8.2.2 Reversing the burden of proof.....	232
8.2.3 Standard of care and causation.....	233
8.2.4 Medical expert evidence.....	234
8.2.5 Replacing lump sum payment with structured settlements.....	235
8.2.6 Implementing effective case management.....	235
8.3 Medical Review Bureau.....	237
8.3.1 Independent accountability mechanism.....	238
8.3.2 Procedure.....	239
8.3.3 Time limit.....	240
8.3.4 Composition.....	240
8.3.5 Remuneration.....	241
8.3.6 Appeal.....	241
8.4 Health Service Commissioner.....	242

8.5 Professional accountability.....	242
8.5.1 Self-regulation - Medical audit.....	243
8.5.2 Disciplining the medical profession.....	244
8.6 Mediation.....	246
8.7 Conclusion.....	249

<b>CHAPTER 9: CONCLUSION.....</b>	<b>251</b>
-----------------------------------	------------

<b>CHAPTER 10: MEDICAL NEGLIGENCE IN ISLAMIC LAW .....</b>	<b>260</b>
10.0 Introduction.....	260
10.1 The Medical Profession.....	260
10.2 The Responsibility of the Medical Profession.....	261
10.3 The Requirements for Medical Treatment.....	264
10.3.1 <i>Rida al-marid</i> (consent of the sick person).....	265
10.3.2 <i>Izn al-Hakim</i> (permissible by authority).....	265
10.3.3 Necessity to follow a code of practice.....	265
10.4 Doctors' Civil Liability.....	266
10.5 Conditions Necessary to establish Doctor's Liability.....	267
10.5.1 <i>al-Ta'addi</i> (Breach of duty).....	267
10.5.2 <i>al-Darar</i> (Damage/Injury).....	268
10.5.3 <i>al-Ifdha'</i> (Relationship).....	269
10.6 Methods of Proving Doctor's Liability.....	270
10.6.1 <i>al-Iqrar</i> (Admission).....	270
10.6.2 <i>al-Shahadah</i> (Witness).....	270
10.6.3 <i>Ra'yu al-Khabir</i> (Opinions of specialists).....	271
10.6.4 <i>al-Kitabah</i> (Written Documents).....	271
10.7 Compensation.....	272
10.8 Conclusion.....	273

<b>BIBLIOGRAPHY.....</b>	<b>274</b>
--------------------------	------------

<b>APPENDIX A.....</b>	<b>296</b>
<b>APPENDIX B.....</b>	<b>298</b>
<b>APPENDIX C.....</b>	<b>299</b>

# LIST OF TABLES

Table No.		Page
2.4.1	The number of medical negligence cases recorded by the Attorney General Chambers over the period of 1990 - 2000	12
2.4.2	The number of complaints lodged at the Malaysian Medical Association over the period of 1990 - 2000	13



## LIST OF CASES

- Accident Compensation Commission v Auckland Hospital Board* [1980] 2 NZLR 97.  
*Abdul Rahman v Abdul Wahab* [1996] 4 MLJ 623  
*Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310.  
*Arndt v Smith* (1997) 148 DLR 48.  
*Ashcroft v Mersey Regional Health Authority* [1983] 2 All ER 245.  
*Baker v Willoughby* [1970] AC 467.  
*Barnett v Chelsea and Kensington Hospital Management Comm.* [1968] 1 All ER 1068.  
*Bater v Bater* [1950] 2 All ER 458.  
*Bennett v Minister of Community Welfare* (1992) 176 CLR 408.  
*Blyth v Birmingham Waterworks Co.* (1856) 11 Ex.781.  
*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.  
*Bolitho v City & Hackney Health Authority* [1997] 4 All ER 771.  
*Bonnington Castings Ltd v Wardlaw* [1956] AC 613.  
*Burton v Islington Health Authority* [1991] 2 Med LR 133.  
*Canterbury v Spence* (1972) 464 F 2d 772.  
*Cartledge v Jopling* [1963] AC 758.  
*Chaplin v Hicks* [1991] 2 KB 786.  
*Chappel v Hart* [1988] 156 ALR 517.  
*Chatterton v Gerson* [1980] 3 WLR 1003.  
*Chin Keow v Government of Malaysia* [1967] 2 MLJ 45.  
*Chin Yoon Hiap (Dr) v Ng Eu Khoon & Ors* [1998] 1 MLJ 57.  
*Christie v Callahan* (1941) 124 F 2d 825.  
*Clark v MacLennan* [1983] 1 All ER 416.  
*Cobbs v Grant* (1972) 502 P 2d 1.  
*Cook v Lewis* [1952] 1 DLR 1.  
*DeFreitas v O'Brien and Connolly* [1995] 6 Med LR 108.  
*Donoghue v Stevenson* [1932] AC 562.  
*Dunham v Wright* 423 F 2d 940.  
*Dunne v National Maternity Hospital and Jackson* [1989] IR 91.  
*Dunning v Board of Governors of the United Liverpool Hospitals* [1973] 2 All ER 454.  
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*F v R* (1982) 33 SASR 189.  
*Fitzgerald v Lane* (1954) 91 CLR 268.  
*Foo Fio Na v Hospital Assunta & Anor* [1999] 6 MLJ 738.  
*Freese v Lemmon* (1973) 210 NW 2d 576.  
*Gascoine v Ian Sheridan & Co* [1994] 5 Med LR 437.  
*Gordon v Wilson* [1992] 3 Med LR 401.  
*H West & Sons Ltd v Shepard* [1963] 2 All ER 625.  
*Hargrave v Goldman* (1963) 110 CLR 40.  
*Heaven v Pender* (1883) 11 QBD 503.  
*Herskovits v Group Health Cooperative of Puget Sound* (1983) 664 P 2d 474.

*Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.  
*Hills v Potter* [1983] 3 All ER 716.  
*Hogan v Bentwick West Hartley Collieries Ltd* [1949] 1 All ER 588.  
*Home Office v Dorset Yacht* [1970] AC 1004.  
*Hong Chuan Lay v Dr Eddie Soo Fook Mun* [1998] 5 CLJ 251.  
*Hopp v Lepp* [1980] 2 SCR 192.  
*Hotson v East Berkshire Health Authority* [1987] 2 All ER 909.  
*Hucks v Cole* [1993] 4 Med LR 393.  
*Hughes v Lord Advocate* [1963] AC 837.  
*Hunter v Hanley* [1955] SLT 213.  
*Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors* [1995] 2 MLJ 646.  
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# LIST OF ABBREVIATIONS

AC	Appeal Cases
ALJR	Australian Law Journal Reports 1958 -
All ER	All England Law Reports
ALR	Australian Law Reports
AMR	All Malaysian Reports
Aust. Torts. Rep.	Australian Torts Reports
CA	Court of Appeal
Cal 3d	California Reports Third Series
Cal Rep	California Supreme Court Reports 1850 -
Ch	Chancery (Law Reports)
CLJ	Current Law Journal
CLJ	Current Law Journal
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports
e.g.	(exempligrana): for example
Ed	Edition
edit.	editor
et.al	(et alia): and others
etc	(et cetera): and so forth
F 2d	Federal Reporter, Second Series (USA) 1924 -
F Supp	Federal Supplement (USA) 1932 -
HL	House of Lords
i.e.	that is
Ibid	(ibidem): in the same place
Id	(idem): the same
IR	Irish Reports 1894 -
Kan	Kansas Supreme Court Reports 1862 -
LJ.	Lord Justice
LJKB	King's Bench (Law Journal Reports) New Series 1831-1946
Med LR	Medical Law Reports
MLJ	Malayan Law Journal

nd	no date
NE 92	North Western Reporter (USA)
NSW	New South Wales
NSWLR	New South Wales Law Reports
NW 2d	North Western Reporter, Second Series
NW	North Western Reporter
NY	New York
NZ	New Zealand
P 2d	Pacific Reporter, Second Series
P.	Pacific Reporter
pbuh	Peace be upon him
QB	Queens Bench (Law Reports)
QBD	Queens Bench Division (Law Reports)
RI	Rhode Island Supreme Court Reports
SASR	South Australian State Reports 1971 -
SC	Session Cases (Scotland)
SJ	Solicitors Journal
SLT	Scots Law Times
swt	Subhanahu Wa Ta'ala
trans.	translated by
UK	United Kingdom
US	United States
v	(versus): against (in legal terms)
Vol	Volume
VR	Victorian Reports (Australia) 1957 -
Wash	Washington
WLR	Weekly Law Reports

# TRANSLITERATION TABLE

ا	a	ز	z	ق	q
ب	b	س	s	ك	k
ت	t	ش	sh	ل	l
ث	th	ص	ṣ	م	m
ج	j	ض	ḍ	ن	n
ح	ḥ	ط	ṭ	ه	h
خ	kh	ظ	ẓ	و	w
د	d	ع	‘	ء	’
ذ	dh	غ	gh	ي	y
ر	r	ف	f		

## short vowels

—َ a

—ِ i

—ُ u

## long vowels

—َ ā

—ِ ī

—ُ ū

## diphthongs

—َ aw

—ِ ay

## doubled

—َ uww

—ِ iyy

# ***CHAPTER ONE***