



## Medical Negligence: Current Position of Malaysia and Bangladesh

**Md. Zahidul Islam**

*Department of Civil Law, Ahmad Ibrahim Kulliyah of Laws (AIKOL), International Islamic University Malaysia (IIUM), Malasia.*

### ABSTRACT

Every day medical negligence is being committed worldwide. Medical negligence by doctors is a violation of the right to health which is granted by the constitution of Malaysia and Bangladesh. To protect the health of the citizens, many developed countries have enacted and established special laws, but in Bangladesh and Malaysia, there are no special laws associated with medical negligence. The main purpose of this paper was to focus on the current challenges of medical negligence in Malaysia and Bangladesh and to discuss the current laws related to medical negligence. The article also tried to highlight and explain reforming the existing system. It was a qualitative and comparative research. Primary and secondary resources were utilized in this paper. The information was obtained from many readings, articles, books, case law, and status. The result revealed that Bangladesh and Malaysia are following Medical Negligence from a long time ago. We have different issues to solve this situation. The problem is more severe in a society like Malaysia and Bangladesh where the issue of medical negligence is still thought to be an outcome of misfortune, and people superstitiously assume that the effect of medical negligence is sometimes the result of sin on the part of the parents of the patient. It is assumed that the current study helps to facilitate the improvement of the legal regime of medical negligence and the enforcement of laws for the better future of the medical negligence of Bangladesh and Malaysia.

**Keywords:** Medical; Negligence; Bangladesh; Malaysia.

**Corresponding author:** Md. Zahidul Islam

**e-mail** ✉ [zahidul@iium.edu.my](mailto:zahidul@iium.edu.my)

**Received:** 18 February 2019

**Accepted:** 20 July 2019

### 1. INTRODUCTION

Negligence in the medical field refers to a breach of duty to take reasonable care towards the patients, as a result of that breach, the patients suffer damages (Bernstein, 2008). To prove the medical negligence, a patient must establish four elements including (a) a duty of care was owed by the doctor to the patient; (b) the doctor was in breach of the appropriate standard of care imposed by the law; (c) the breach of duty caused the patient harm or injury recognized by the law; (d) the extent and quantum of the loss that has followed from the breach of duty is recoverable in law (Islam, 2013). This paper has opposed the position of medical negligence between Bangladesh and Malaysia. The reason for choosing these two countries to compare is, Malaysia is a common law country like Bangladesh. Malaysia is not only a common law country but also a Muslim country like Bangladesh. Most of the people of them are Muslim. Besides, Malaysia was a colony of British like Bangladesh. They also adopted their law from the British. So, Bangladesh and Malaysia have many identities.

### 2. CONCEPTUAL ANALYSIS

The word "negligence", when applied in the law of torts means more than mere carelessness. Many years ago, Baron Alderson

stated that negligence is the breach to do something which a wise and careful man cannot do. Curzon, in *Dictionary of Law*, described the term 'negligence' as a breach of the legal duty to take care, leading to damage to the climate which was not wanted by the defendant. In the case of *Blyth vs. Birmingham Waterworks Co.* (1856)11 EX.78, the concept 'negligence' was interpreted as the neglect to do something which a wise man, guided upon those concerns which usually manage the conduct of human affairs, would do, or doing something which a prudent and sound man would not do (Islam, 2013). Medical negligence indicates medical malpractice.

To succeed in a claim of negligence, the victim must further show, on a balance of probabilities, that the conduct of the doctor falls below the expected standard of care. The definition of the standard of care is reasonable care. If a person obtains reasonable care suitably by the doctor, he will not be capable of getting remedies under common law.

### 3. LEGAL FRAMEWORK TO PREVENT MEDICAL NEGLIGENCE IN MALAYSIA

The increasing growth in science and technology has generated wide changes in terms of health services, which has resulted in the demand for retraining to maintain competencies and job skills (Hojat and Karimyar-Jahromi, 2017). Protection of public health is assured by the Federal Constitution of Malaysia. The Federal Constitution extensively treats this problem. Part-II (Art.5-13) of the Federal Constitution of Malaysia explains fundamental rights. Article 5(1) of this part lays down that "No person shall be deprived of his life or personal liberty saves in

accordance with the law". Part II concerns with judicially enforceable rights subject to such limitations as stated in those provisions. If any of these rights are violated, the victim or the aggrieved person can go to the High Court Division. So, according to the Malaysian Federal Constitution, if any person deprived of proper treatment, he or she will be capable to go court for protecting his health. Medical negligence is being committed in Malaysia from the beginning like other countries. There is no particular act for medical negligence in Malaysia (Islam, 2013). Currently, the tort system is being utilized to manage medical negligence in Malaysia. This system provides compensation only. The tort system is adversarial in nature. The role of the court is to do fair dealing according to the possible data and the law. Sometimes it happens that litigation fails to reach real fairness for this adversarial system. There are many actions which explain health protection against medical negligence. Section 304A of the Malaysian penal code describes that, if any person dies by doing any rash or neglectful act, shall be punished with jailing for a term which may extend to two years, or with fine, or with both (Kassim, 2003). Based on this section, if any patient is being died by any negligent of the doctor, he or she will be sentenced under this section. Furthermore, a doctor can be convicted under section 301,302 and 304 of the Penal code (Elango, 2003). If a doctor commits any mistake without the consent of the person, he or she will also be liable under this act. If a medical officer or a registered medical practitioner considers sensible grounds that a child who is being examined or treated hurt due to being ill-treated, neglected, abandoned or exposed, or is sexually abused, a protector should immediately be informed (protector means the Director General, the Deputy Director General, a divisional Director of Social Welfare, the state Director of Social Welfare of each of the state, and any Social Welfare Officer appointed under section 8). If the officer or medical officer or registered medical practitioner fails to inform, he or she shall be convicted under this section (Ismail, 2011).

Section 19(2) of the Medical Act 1971 allows the council to perform disciplinary jurisdiction over medical practitioners who are sentenced of a punishable offense with imprisonment, found guilty of "offensive conduct in any professional respect. Any members of the public can complain against medical negligence to the president of the MMC with the name of the practitioners, the place of practice, nature, and details of complaint and records and evidence in support of the complaint. Malaysia Medical Council Will makes three Preliminary Investigation Committees (PICs). MMC holds a tribunal to inquire into the complaints about medical professionals (Shuaib, 2009). One of the Preliminary Investigation Committees is particularly selected to look into matters concerning advertisement, ethics, and conduct. PICs can immediately dismiss an allegation if it is revealed to be indefensible. On the other hand, PICs may suggest an injury by the MMC if they find a logical area to support allege. MMC may take disciplinary action if a doctor is known to be guilty of "infamous conduct in a professional respect" during the inquiry. If any party is provoked by the decision of the MMC, he or she may appeal to the High Court.

#### 4. LEGAL FRAMEWORK TO PREVENT MEDICAL NEGLIGENCE IN BANGLADESH

lack of knowledge about the illness and identifying its symptoms will have a negative influence on patients' quality of life (AL-Anazi et al., 2018). Quality of life shows patients' mental evaluation of their state of health and their response to it (Marzangi et al., 2018). Protection of public health is guaranteed by the Constitution of the People's Republic of Bangladesh. Constitution comprehensively covers this problem. Based on Bangladesh Constitution health is a basic right and if any person deprived of his fundamental rights, he or she will be capable of going High Court Division of the Supreme Court. There is no special law for medical negligence. The tort system is not following for medical negligence in Bangladesh (Islam, 2015). Penal Code is being utilized for medical negligence litigation. The criminal cases against the doctors were recorded under section 304 of penal code, 1860 (Culpable homicide amount to murder) and 304A of the Penal code 1860 (rash and negligence act) against the doctor. When people are influenced by medical negligence, they file a case under the Penal Code. For example, if any person dies because of medical negligence, his guardian files case for murder under penal code. For instance, Asma was a patient who was influenced by medical negligence. Her mother filed a suit against doctors under Section 307 (attempt to murder), 326 (voluntarily causing grievous hurt by dangerous weapons) of penal code (Islam, 2013).

The safety of the medications and the degree of patient care have been global concerns (Farhan, 2018). Where a patient died because of the neglectful medical treatment of the doctor, the doctor can be responsible to pay compensation under civil law and at the same time, if the degree of negligence is so obvious and his act was rash as to risk the life of the patient, he would also be made criminally responsible for offense under section 304A of the Penal Code, 1860. Under this section accused (doctor) shall be punished with the jailing of either explanation for a term which may extend to five years or with fine or with both. The doctor should use poisonous substance carefully. Under section 284, if any doctor applies any toxic substance recklessly or negligently which endangers a human life, such doctor shall be punished with imprisonment of either explanation for a term which may extend to six months, or with fine, which may extend to one thousand taka, or with both (Mahbub, 2012). Section 323 of Penal Code 1860 explains that, if a doctor executes any offense for voluntary causing hurt, he will be punished with imprisonment of either explanation for a term which may extend to one year, or with fine, which may extend to one thousand takas, or with both. Based on section 325 of Penal Code1860, if a doctor commits any offense for voluntary causing grievous injury, he will be sentenced with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Furthermore, many cases have been filed under various sections of the Penal Code. For instance, in 3rd September 2006, a case has been filed in Mohammad pure police station under section 406/420/170/326/109 of The Penal Code 1860. The Medical and Dental Council are being established by the provision of section 3 of the Medical and Dental Council Act 1980. It has been repealed by The Bangladesh Medical and Dental Council Act 2010. Now Bangladesh Medical and Dental

Council (BMDC) is being organized by the provision of section 3 of the Bangladesh Medical and Dental Council Act 2010. Bangladesh Medical and Dental Council (BMDC) receives its financial and administrative manpower assistance from the Ministry of Health. The council is a body corporate. The functions of the BMDC are to manage a register of medical practitioners in Bangladesh, to support and maintain standards of practice of medical practitioners and to examine complaints made against practitioners and administration of disciplinary provisions. The members of the MMC are drawn from many sources, namely, nominated eight Parliament Members by the Speaker of Parliament, members of various associations (Bangladesh Medical Association, Bangladesh Private Medical Practitioners Association), appointed member from the public services, and nomination by Universities. The members shall office for not more than three years. Bangladesh Medical and Dental Council details its functions, procedures and disciplinary jurisdiction in their Medical Ethics. Any Medical or Dental Practitioners convicted for false pretenses, forgery, fraud, theft, indecent behavior or assault, is liable to disciplinary action by the council.

#### 5. PROBLEMS OF EXISTING LAWS DEALING WITH MEDICAL NEGLIGENCE IN MALAYSIA AND BANGLADESH

Malaysia and Bangladesh adjust medical negligence by various ordinances which directly or indirectly prosecutes the wrongdoers as mentioned earlier. There is no complete legal forum to address the issue of medical negligence, and most often people are not willing to seek redress of their grievances. There are some problems with existing laws dealing with medical negligence (Rahman, 1998). The first problem is the absence of specific enacted Laws. There are provisions in various statutes, but they are not suitable and codified. So the victims get confused in deciding to which court they should go or under which act they can institute a suit against medical lawbreakers (Rahman, 2007). For example, sometimes criminal cases are filed under the Penal Code which is not appreciable, because allegations do not mean that the doctors are guilty, so it would be a problem for the doctors if criminal cases are filed against them. On the other hand, civil courts can not sentence the defendants; they only have the right to determine the amount of injury (Akter, 2013).

Another problem is higher court fees. Generally to file a suit in a court requires a large amount of money along with higher fees which are not affordable by the poor litigants in Malaysia and Bangladesh. That's why the victim often does not seek assistance from a legal procedure (Karim, 2013).

Challenges regarding proof of negligence are also an issue for the victim as its burden goes on the shoulder of the complainant, but the medical institutes deny providing necessary papers to the patients. Consequently, in the absence of the necessary documents and evidence, it becomes very difficult to prove a case of negligence (Sarker, 2014). Similarly, if he fails to produce material evidence in the court that shows improper treatment on the part of the medical professional then no legal remedy will be available (Akter, 2013).

Lack of public awareness is another issue for medical negligence. Most of the People of Malaysia and Bangladesh are not aware of their health care rights and they even are not

familiar with the concept of medical ethics. Again, the government does not show much interest to circulate information associated with medical ethics or professional negligence, only when a big incident happens. Then, we find some articles on print media and electronic media, but no awareness-building programs are found, unfortunately.

#### 6. RECOMMENDATIONS

To protect public health, this article offers the following suggestions.

##### (A) Enactment of a separate special law relating to medical negligence

It is high time to enact a separate law to address the issue of medical negligence in Malaysia and Bangladesh. For instance, in the UK, the cases on medical negligence are analyzed under a separate act which suggests a redress package that comprises an offer of compensation, explanation, apology, and report of activities to stop similar events. This act has got much credit by the aggrieved jurists and lawyers in terminating medical negligence litigation suitably. A law should be made as early as possible for solving the cases associated with medical negligence.

##### (B) Establishment of Health court

The concept of health court is quite new but it is now being appreciated by many progressive states. Health courts are recommended specialized courts for managing medical malpractice claims and they are identified by the application of specifically trained adjudicators, independent expert witnesses, and predictable damage awards. Besides, in health courts, expert judges with specific training would resolve healthcare disputes. They would issue written rulings guiding proper standards of care. These laws would set precedents on which both patients and doctors could rely.

##### (C) Ensuring setting up an effective complaint mechanism

Investigation of a procedure to uncover the patient's complaints i.e. suggestion box, patient satisfaction surveys, etc. must be monitored by the administration of the public and private medical institutions. Furthermore, the patient or guardian should be advised about the illness, treatment protocol, and the conversation with the patient should be documented in the patient's chart. This may later become evidence of the statute of limitations. That's how an effective complaint mechanism can be established.

##### (D) Providing information about Medical ethics to professionals, patients and the public at large to build awareness.

There is a 'Code of Medical Ethics' in Malaysia and Bangladesh, but the general public including patients are not aware of it. There should be enough awareness programs about these documents so that the patients do know about the rights and duties and responsibilities of a medical practitioner under this Code. Also, an awareness-raising and training program may be taken for the nurses and ward boys of the hospitals, clinics and for all institutions relating to health care regarding the rights of the patients. Nurses are among the most important

members of primary health care teams in general practice (Fegghi and Malekzadeh, 2018). Awareness programs can be circulated through newspapers and different TV channels to build awareness among the public at large.

#### 7. COMPARISON BETWEEN MALAYSIA AND BANGLADESH

The judicial system of Malaysia and Bangladesh is adversarial. The adversarial litigation systems have been supposed to be uncooperative both to the doctors and patients. Compensation via negligence is substandard. Based on the report of the Royal Commission on Civil Liability and Compensation of England, the dimension of successful claims for injuries in tort is much lower for medical negligence. The Judicial system of Malaysia and Bangladesh is also so long-lasting and costly. Mainly, the cases regarding medical negligence in Malaysia are civil law based. If the defendant is guilty, he has to compensate. Here the plaintiff is getting the financial benefit, but most of the compensation is given by the hospital authority where the defendant was an employee. That means the defendant is not suffering. For this reason, he or she will not be aware of medical negligence. On the other hand, the medical negligence case of Bangladesh is criminal law based. If the defendant is guilty by the evidence, he has to penalize. Here, the plaintiff is not getting any compensation or benefit.

#### 8. CONCLUSION

The researcher believes that the above-mentioned recommendation will be helpful to protect public health. The researcher also believes that doctors are pledge bound by the solemn oath of the health professionals and we entrust them with our lives which they take utmost care to protect and preserve. But it may sometimes occur that because of some difficulties, workload, inventions of scientific instrument, amendment of national legislation, the doctors do something which amounts to negligence. The doctor should be aware of the legal consequences of such a situation so that they act dutifully and meticulously and avoid landing themselves in controversies and litigations.

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