

### Kertas Asli/Original Articles

## Dento-Legal Issues in Malaysia: A General Guide for Dental Practitioners (Isu-Isu Dento-Legal di Malaysia: Panduan Umum untuk Pengamal Pergigian)

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#### ABSTRACT

*Dentistry is a noble profession where dentists often manage to bring smiles and create confidence in patients. Nonetheless, as with other medical professionals, dentists too often encounter legal suits brought against them by their patients. Legal actions against dentists are not new in Malaysia, where several actions have been litigated in court. The rise in legal actions against medical professionals including dentists is associated with the increased awareness of patient's rights and autonomy. Legal actions can cause several repercussions on dentists such as loss of reputation, shame and anxiety. As such, it is imperative for dentists to have the basic legal knowledge on the potential legal liability that they may face should something go wrong during the course of dental treatment. This is the main crux of this paper where several dento-legal cases that have been reported in Malaysian law journals are identified and analysed. This is followed with a brief discussion on the legal issues surrounding those cases. Legal principles governing the issues identified are provided in brief so as to provide dentists with basic legal knowledge on the legal aspect of dentistry.*

*Keywords: Medical law; dental law; negligence; confidentiality; criminal liability*

#### ABSTRAK

*Bidang pergigian adalah satu profesion yang mulia di mana pengamal pergigian selalu membawa keceriaan dan senyuman kepada pesakit dan mengembalikan keyakinan diri pesakit. Namun begitu, seperti pengamal perubatan lain, pengamal pergigian turut berdepan dengan tindakan undang-undang yang boleh dibawa ke atas mereka oleh pesakit. Tindakan undang-undang terhadap pengamal pergigian di negara ini bukanlah suatu fenomena baharu di mana beberapa kes telah dibawa dan dibicarakan di mahkamah. Pertambahan jumlah kes litigasi guaman ke atas pengamal pergigian selalunya dikaitkan dengan peningkatan dalam kesedaran pesakit mengenai hak dan autonomi mereka sebagai pesakit. Tindakan undang-undang ke atas pengamal pergigian boleh membawa kesan buruk kepada mereka seperti kehilangan reputasi, malu dan tekanan. Oleh yang demikian, adalah penting untuk pengamal pergigian melengkapkan diri dengan ilmu dan pengetahuan mengenai liabiliti undang-undang yang mungkin dihadapi sekiranya berlaku sesuatu yang tidak diinginkan semasa proses rawatan pergigian diberikan kepada pesakit. Ini merupakan isu dan objektif utama artikel ini dimana beberapa kes 'dento-legal' yang telah dibawa dan diputuskan di mahkamah telah dikenalpasti dan dibincangkan. Ini diikuti dengan kupasan dan penerangan mengenai prinsip undang-undang yang berkaitan dengan kes-kes yang dibincangkan tersebut. Tujuan utama perbincangan ini adalah untuk memberi penerangan dan panduan asas kepada pengamal pergigian mengenai isu-isu dan prinsip-prinsip undang-undang yang terpakai dalam amalan sebagai pengamal pergigian.*

*Kata kunci: Undang-undang perubatan; undang-undang pergigian; kecuaiian; prinsip kerahsian; liabiliti jenayah*

#### INTRODUCTION

Dentistry is a noble profession where dentists have the chance to “restore broken tooth, create smile designs and renewed confidence in patients” (Chidambaram 2021). Nonetheless, with the growing awareness of patients' rights and autonomy, dentists nowadays work in a highly litigious

environment. In an English case of *Montgomery v. Lanarkshire Health Board [2015] UKSC 11*, the court remarked that:

...patients now are widely regarded as persons holding rights, rather than as the passive recipients of the care of the medical profession. They are also widely treated as

consumers exercising choices: a viewpoint that has underpinned some of the developments in the provision of healthcare services.

Dental negligence claims are also not new in Malaysia where legal actions have been commenced against dentists over the years (Cheah et al. 2005). There are several avenues for patients to bring a claim against dentists for alleged negligence such as commencing a civil action in court and lodging a complaint to the Malaysian Dental Council (Cheah et al. 2005). In addition, it is also possible for dental practitioners to be criminally prosecuted for their alleged negligent misconduct. A legal action can cause several repercussions on dental practitioners including loss of reputation and embarrassment (Jasuma et al. 2014). As such, dentists should be equipped with basic legal knowledge on their potential liability in the case of any untoward incident following a dental procedure. This paper, thus, undertakes the task of analysing some dento-legal cases that have been litigated in Malaysian courts and provide a basic explanation on the legal issues arising therein.

#### AN ANALYSIS ON SOME DENTO-LEGAL CASES IN MALAYSIA

The term 'dento-legal' refers to "dentistry and the law" (The Free Dictionary-Medical Dictionary) or "the legal aspects of dentistry" (<https://en.glosbe.com/en/en/dentolegal>). This commonly includes dental negligence which is further defined as:

Avoidable injury caused by a dentist who fails to take the proper care. Any case where a dentist has performed poorly, negligently or inappropriately which results in avoidable harm being caused to a patient can lead to a dental negligence compensation claim (The dental law partnership solicitors).

Examples of dental negligence reported in other jurisdictions are removal of the wrong tooth, failure to enquire about the patient's medical history before injecting local anaesthesia and tooth disfigurement resulting from root canal treatment (Rai & Acharaya 2014). In Malaysia, several dento-legal cases have been reported against dental practitioners, in particular, claims for dental negligence and breach of confidentiality. In this section, some cases that have been reported in Malaysian law journals are identified and discussed.

*Case 1: Chai Hoon Seong v. Wong Meng Heong [2010] 8 MLJ 104*

This is an appeal to the High Court against the decision of the Magistrates court that allowed the plaintiff's/respondent's (Wong Meng Heong) claim against the

defendant/appellant (Dr. Chai Hoon Seong), a dentist, for negligence in dental treatment, namely crowning on the plaintiff's tooth. The plaintiff/respondent claimed that as a result of the defendant's/appellant's negligence, she has endured pain and suffering where the said tooth has lost the ability to hold and chew food and there was infection at the root of the tooth. The plaintiff/respondent claimed that the defendant's/appellant's has:

"(1) Failed and neglected to do a proper crowning on the Plaintiff's upper right molar.

(2) Failed and neglected in fitting the cones of the Plaintiff's root tooth as it was extended into the Plaintiff's tooth bone.

(3) Negligent in fitting the Plaintiff's cones' root tooth as one of it was too long and curled into the Plaintiff's tooth bone.

(4) Made a wrong decision and negligent in doing a deep scaling after the Plaintiff's complaint of pain which caused Plaintiff suffered more pain and trauma.

(5) Negligent in making proper crown on the said teeth as it was higher from the rest of the tooth caused Plaintiff suffered pain and made her had no alternative but to consult to other dentist to cure it (p. 110)."

was inserted. In this case, the issue of the standard of care to be applied was also raised by the defendant/appellant where it was argued that the learned magistrate has applied the wrong standard of care by applying the standard of care of a specialist in endodontics in a private dental clinic. Since the defendant/appellant is a general practitioner in a private clinic, he asserts that the standard of care that should be applied is one that is required from a general practitioner in prosthodontics.

The appeal was allowed by the High Court and the claim for negligence was dismissed on two grounds namely, that there was no breach of duty and failure to prove causation. On the issue of breach of duty, the High Court was of the view that the magistrate has erred on the question of the standard care of a dental practitioner. Here, the standard of care that is expected of the defendant/appellant should be that of a general dental practitioner in a private clinic in the area of prosthodontics and not the standard of care expected of a specialist in endodontics as crown fitting falls under the area of prosthodontics. On the issue of causation, the High Court held that the alleged breach of duty (which was not proven) did not result in a reasonably foreseeable damage to the plaintiff/respondent. This finding

is based on the expert evidence tendered that the said crown was not the cause of the plaintiff/respondent's complaint. Instead, such injuries were related to the root canal treatment performed by another dentist.

*Case 2: Jade Evangeline Teh Jia Ying v. Dr. Perlin Loke Jee Kwan & Anor [2019] MLJU 1535*

The plaintiff is a 4-year-old child suing through her father as her next friend and on her behalf as she is a minor. The claim is for professional negligence against the first defendant (D1) who is a dental practitioner and the second defendant (D2), a company that owns the dental clinic. The plaintiff visited the dental clinic for a dental treatment with her mother and grandfather but refused to open her mouth. D1 then suggested for the plaintiff to be put under general anaesthesia for her surgery. After the surgery, the plaintiff's mother noticed swelling on the plaintiff's right side of the mouth and lips and that the plaintiff was crying. The plaintiff claimed that the said injury was caused by the malfunction of the dental hand piece that was used by D1 in treating her. The plaintiff, therefore, argued that D1 was negligent in failing to take "proper and reasonable pre procedure care and treatment, and had also failed to give any advice for an alternative method to be used in the plaintiff's dental treatment." The plaintiff further alleged that as a result of the said negligence, she suffered permanent scarring and disfigurement and claimed for general and special damages. The plaintiff also claimed that D2 is vicariously liable for the action or negligence of D1 as D2 is the owner of the clinic.

The High Court, on appeal by the plaintiff, upheld the decision of the Sessions Court that dismissed the plaintiff's claim with costs. The High Court affirmed the Sessions Court findings that D1 was not negligent for the injury suffered by the plaintiff which was caused by the malfunction of the dental hand piece. According to Rohani binti Ismail, JC:

...this Court is satisfied that there is no evidence led by the Plaintiff in the present case to show that the 1st Defendant was negligent and consequently had caused injury to the Plaintiff. In medical negligence cases, it is trite that the injury per se does not in any way constitute proof of negligence or fault.

The High Court further opined that the onus is on the plaintiff to prove that it was D1's negligence that has caused the dental piece to malfunction and consequently caused the alleged injury to the plaintiff and that:

...in the absence of any evidence to support the Plaintiff's allegation of negligence by the 1st defendant, and in the absence of any expert witness to testify on the treatment undertaken by the 1st defendant in this medical negligence case, in the opinion

of this Court the Plaintiff's allegation remain unproven as diagnosis and treatment are purely in the realm of medicine as held by the Federal Court in the case of *Zulhasnimar bt. Hasan Basri & Anor v. Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438*.

*Case 3: Dr. Tan Ah Ba v. Dr. Wong Foot Meow [2012] 7 MLJ 467*

In this case, the plaintiff, Dr. Tan Ah Ba sued the defendant, a consultant oral maxillofacial surgeon for breach of professional duty of confidence. The plaintiff has sought treatment and consultation from the defendant on the dental implants carried out on him by another dentist, Dr. How. The plaintiff claimed that the implants were causing him pain and discomfort. On his visit to the defendant's clinic, the defendant's nurse has taken an orthopantomogram X-ray (OPG). After being examined by the defendant, the plaintiff was informed that nothing could be done as the implants has been placed. The plaintiff went to the defendant's clinic again for the second time asking for assistance to be referred to a specialist implantologist as his pain continued to worsen. Again, the defendant informed him that he could not be of any assistance to the plaintiff and handed over the OPG which was taken during the plaintiff's first visit. The plaintiff had then alleged that the defendant has prepared and issued a dental report on the plaintiff's condition without his consent and has disclosed the said report to a third party. The plaintiff claimed the sum of RM1m on the grounds that the said dental report was prepared by the defendant in order to jeopardise the plaintiff's legal claim against Dr. How.

On the issue of breach of professional duty of confidence, the court found in favour of the plaintiff. The existence of a doctor-patient relationship between the plaintiff and defendant has been established where in the course of his consultations with the defendant, confidential information has been disclosed. The defendant has also made his conclusions and findings on the plaintiff's dental condition and this according to the court, constitutes "confidential matters which the doctor in the relationship owes to the patient keep confidential" (p. 488). Therefore, the plaintiff's claim is allowed and the defendant is ordered to pay to the plaintiff general damages of RM25,000.

The above strain of cases illustrates the potential legal liability of a dentist in the event of any unfortunate incident that occurs during the course of a dental treatment and/or surgery. A dental practitioner may be liable in civil proceedings under the law of negligence and may also be prosecuted for criminal offences under the Penal Code. In addition, it is also pertinent for dentists to preserve patient's confidentiality as breach of which will also give rise to a civil claim. The potential civil and criminal liability of dental are discussed in the following section.

## LAWS RELATING TO DENTAL PRACTICE IN MALAYSIA

Generally, dental practitioners in Malaysia are governed by the Dental Act 2018 (Act 804) which was passed in 2018 to repeal and replaced the Dental Act 1971 (Act 51). However, at the time this paper is written, the Dental Act 2018 has yet to be enforced. Section 2 of Act 804 defines a “dental practitioner” as “(a) a dental surgeon; or (b) a dentist.” A “dental surgeon” is defined in the said Act as:

“(a) a dental surgeon registered in Division I of the Dental Register under the Dental Act 1971; or

(b) a person registered as a dental surgeon under section 31 and for the purposes of Part IV, Part V and Part VI includes any person who is deemed to be registered as a dental surgeon under subsection 40(6);”

Meanwhile, a “dentist” is stated to mean “a person registered in Division II of the Dental Register under the Dental Act 1971 [Act 51].” In this paper, however, the term ‘dentists’ and ‘dental practitioners’ are used interchangeably to include healthcare professionals who specialise in oral health including dental surgeons.

The Dental Act 2018 (and 1971) provides for the establishment of the Malaysian Dental Council (MDC) with the functions specifically stated in section 4 of the said Act. In summary, the MDC is entrusted with the role of regulating the profession of dentistry in Malaysia including the issuance of registration and annual practicing certificate (section 4(a)-(k)). The MDC is also empowered to initiate disciplinary proceedings against registered practitioners as provided under section 51(1) for offences listed in section 51(2) of the said Act. The punishments that can be imposed on dental practitioners are enumerated in section 58(1)(a)-(d) which includes the removal and suspension from the Register.

Another important piece of legislation governing dental practice in Malaysia is the Private Healthcare Facilities and Services Act 1998 (Act 586) which is intended to regulate private healthcare providers in Malaysia including private dental clinics. According to Omar (2021):

In the enforcement, the Private Healthcare Facilities and Services Act 1998 (PHFSA) 1998 is used most of the time, compared to the Dental Act 1971, as the sections provide for regulation and control of Private Healthcare facilities and services and other health-related facilities and services for the matters related hereto (pp.2-3).

It is, however, not within the scope of this paper to provide a detailed analysis on the provisions of Act 804 and Act 586 as the main objective of this paper is to identify

and elaborate the potential civil and criminal liability that is applicable to dental practitioners that may arise from the doctor-patient relationship. These liabilities are largely guided by and derived from the law of tort, common law principles and other statutes. While the objectives of both Act 804 and 586 are mainly to regulate the dental industry and the private healthcare services providers in general.

## CIVIL LIABILITY FOR DENTAL NEGLIGENCE (CASES 1 AND 2)

Cases 1 and 2 discussed above are examples of civil actions commenced against dental practitioners for alleged negligent dental treatments. Civil suit for negligence in Malaysia is mainly based on the law of tort where the purpose of the action is to claim for compensation for the injury suffered by the victim as a result of negligent conduct of the tortfeasor (Mah 2020; Yunus et al. 2020). Dental negligence falls within the scope of medical negligence where a dentist owes a duty of care towards his patients, breach of which may cause the dentist to be liable for negligence. In short, in a negligence claim, a patient must prove that:

1. The dentist owes a duty of care to the patient;
2. that duty has been breached by the dentist; and
3. the breach caused injury to the patient (Talib 2010).

### Dentists’ Duty of Care

It is generally undisputed that dentists owe a duty of care to their patients which stems from the doctor-patient relationship as stated in *R v Bateman [1925] 19 Cr App R 8* and the ‘neighbourhood principle’ expounded in *Donoghue v Stevenson [1932] AC 562*. In *R v Bateman*, it was held that:

If a person holds himself out as possessing special skill and knowledge, and he is consulted, as possessing such skill and knowledge by a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment...

Similarly, the ‘neighbourhood principle’ introduced by Lord Atkin in *Donoghue v Stevenson* can be summarised to mean the duty to take “reasonable care” in order to prevent the occurrence of reasonably foreseeable harm to other people who are likely to be affected by the conduct of the tortfeasor. In the context of the dental practice, it is reasonably foreseeable that any negligent action by dentists

would directly affect their patients such that dentists owe a duty of care to their patients to act in a prudent manner so as to avoid reasonably foreseeable harm. In simple terms, once the patient walks into the treatment room to seek treatment from the dentist who holds himself out as one, a duty of care is imposed on the dentist. This position is illustrated in *Dr. Teh Bee v. Dr. Joshua Mohanraj & Anor* [2018] MLJU 117 where the court held that the doctor owes a duty of care to the patient when he carried out the tests using the samples given. The next pertinent issue to determine liability in negligence is whether the dentist has breached that duty. To answer this question, dentists must know the standard of care that is being placed on them.

#### Standard of Care of a Dentist

As with other medical practitioners, the duty of a dentist can also be classified into three components namely the duty to diagnose, advise and treat patients for the purpose of determining the applicable standard of care. The Malaysian courts have applied different standard of care for the duty to diagnose and treat, to that of the standard of care for the duty to advise of risks. This legal position has been clarified by the Federal Court in *Zulhasnimar bt Hasan Basri v. Dr. Kuppu Velumani P & Ors* [2017] 5 MLJ 461 where it was held that the test in *Rogers v. Whitaker* [1993] 4 Med LR 79 is only applicable to the duty to advise risks while Bolam's test and Bolitho's case is maintained for duties to diagnose and treat.

In *Zulhasnimar bt Hasan Basri v. Dr. Kuppu Velumani P & Ors* [2017] 5 MLJ 461, the plaintiff, a pregnant woman, came to the hospital with abdominal pain and high blood pressure and was admitted. Later, she suddenly collapsed with severe bleeding and was rushed to the operation theatre. Her baby was delivered alive but hysterectomy was performed due to a ruptured blood vessel at the placenta. Her baby suffered severe birth asphyxia cerebral injury. The plaintiff claimed that the defendants were negligent in failing to diagnose that she was in labour and that the defendants should have foreseen that a uterine rupture might occur if a caesarean section was delayed. She also alleged that if she were adequately resuscitated, her baby would not have suffered injury. At the Federal Court, one of the issues that was deliberated was:

Whether the Bolam test or the test in the Australian case of *Rogers v Whitaker* (1993) 4 Med LR 79 in regard to the standard of care in medical negligence should apply, following conflicting decisions of the Court of Appeal in Malaysia and legislative changes in Australia, including the re-introduction there of a modified Bolam test.

In deciding that Bolam's test should apply with regards to the duty to diagnose and treat, the Federal Court explained:

Thus, it is our judgment that in respect of the standard of care in medical negligence cases, a distinction must be made between diagnosis and treatment on the one hand and the duty to advise of risks on the other...Given the fact that there are genuine differences in opinion in diagnosis and treatment, it is therefore not a matter that the court can, or is equipped to resolve. It is in this context that the Bolam test makes good sense. It requires the court to accept, not just the views of medical experts simpliciter, but the views of a responsible body of men skilled in that discipline. It removes the courts the responsibility of resolving a dispute that is not equipped to resolve.

The Federal Court also provided an explanation on the reason for adopting the test in *Rogers v. Whitakers* for the duty to disclose risks:

On the other hand, different consideration ought to apply to the duty to advise of risks as opposed to diagnosis and treatment. That duty is said to be noted in the right of self-determination. As decided by the Australian High Court in *Rogers v Whitakers* and followed by this court in *Foo Fio Na*, it is now the courts' (rather than a body of respected medical practitioners) which will decide whether a patient has been properly advised of the risks associated with a proposed treatment. The courts would no longer look to what a body of respectable members of the medical profession would do as the yardstick to govern the standard of care expected in respect of the duty to advise. (p.473)

This position has been affirmed by the Federal Court in *Dr. Hari Krishnan & Anor v. Megat Noor Ishak bin Megat Ibrahim* [2018] 3 MLJ 281 where it was held that:

The case of *Rogers v Whitakers*, which was followed in *Foo Fio Na* in regard to the standard of care in medical negligence was restricted only to the duty to advise of risks associated with any proposed treatment; it does not extend to diagnosis and treatment. With regard to the standard of care for diagnosis and treatment, the Bolam test still applies subjects to qualifications in *Bolitho*.

The Bolam's test was enunciated in *Bolam v. Frien Hospital Management Committee* [1957] 1 WLR 582. In this case, the plaintiff consented to the treatment but alleged that he was not informed of the risks involved. During the treatment, he was not given relaxant drugs and consequently suffered injuries. He argued that the doctor was negligent for failing to warn him of the associated risks and for the failure to give relaxant drugs. To determine the standard of care required of doctors, McNair J formulated the Bolam's test:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest skill...It is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art...

Therefore, according to Bolam's test:

...in the case of a medical man, negligence means failure to act in accordance with the standard of reasonably competent medical men at the time.....he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. A doctor is not negligent if he is acting in accordance with such practice, merely because there is a body of opinion that takes a contrary view.

An illustration of this principle can be derived from the case of *Chai Hoon Seong v. Wong Meng Heong* [2010] 8 MLJ 104 discussed above (case 1) where it was decided by the court that the standard of care that is expected of the defendant/appellant is that of a general dental practitioner in a private clinic in the area of prosthodontics as the defendant/appellant is a general practitioner, and not the standard of care expected of a specialist in endodontics as crown fitting falls under the area of prosthodontics. In this case, the expert evidence tendered on behalf of the appellant by a specialist in prosthodontics affirmed and supported the appellant's treatment and management of the respondent. Therefore, the appellant has discharged his standard of care to the respondent as according to Bolam's test, the doctor is not liable in negligence if his course of treatment or action is endorsed and accepted by a body of medical opinion with similar expertise and knowledge in that area of practice.

The Bolam's test, however, has been reconsidered in *Bolitho v. City & Hackney HA* [1997] 4 All ER 771 where the House Lords held that the Bolam's test remains applicable to determine the standard of care for doctors' duty to diagnose and treat. However, the court in *Bolitho v. City & Hackney HA* further held that the medical opinion tendered by experts must be "capable of withstanding logical analysis" and that the court is at liberty to reject the medical evidence tendered by the defendant doctor. The tests in Bolam and Bolitho are now the tests adopted by Malaysian courts to determine breach of standard of care as illustrated in the cases of *Zulhasnimar bt Hasan Basri v. Dr. Kuppu Velumani P & Ors* and *Dr. Hari Krishnan & Anor v. Megat Noor Ishak bin Megat Ibrahim* mentioned earlier.

Finally, on the duty to diagnose and treat, it is pertinent to note is the standard of care imposed on junior doctors that was established in *Wilsher v. Essex Area Health Authority* [1988] 3 BMLR 37. Here, the House of Lords held that a junior doctor owes the same standard of care as a senior doctor. However, in that case, the junior doctor

has discharged his duty when he sought the opinion of a senior doctor and requested the senior doctor to check on his work as the standard is not judged by the conduct of an individual doctor but according to the post or role that the doctor is fulfilling. The court explains:

In a case such as the present, the standard is not just that of the averagely competent and well-informed junior houseman (or whatever the position of the doctor) but of such a person who fills a post in a unit offering a highly specialised service. But, even so, it must be recognised that different posts make different demands. If it is borne in mind that the structure of hospital medicine envisages that the lower ranks will be occupied by those of whom it would be wrong to expect too much, the risk of abuse by litigious patients can be mitigated, if not entirely eliminated. [p.52]

However, with regard to the duty to advise of risks associated to medical treatment, Malaysian courts have adopted the Australian position laid out in *Rogers v. Whitaker* [1993] 4 Med LR 79. According to *Rogers v. Whitaker*, to determine whether the doctor has breached the standard of care in the duty to advise of risks:

The law should recognise that as doctor has a duty to warn a patient of material risks inherent in the proposed treatment. A risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is, or should reasonably be aware that the particular patient, if warned of the risks would be likely to attach significance to it.

It must be emphasised that in discharging the required standard of care for the duty to advise risks associated with dental treatments, dental practitioners should be aware that the standard of care imposed by the law requires them to reasonably comprehend and understand the patient's situation. Dental practitioners should anticipate the risks that the patient would want to know by taking into consideration the patient's situation such occupation, age etc. and inform the patient accordingly. An example can be seen in *Tan Ah Kau v. The Government of Malaysia* [1997] 2 CLJ Supp 168 where the High Court ruled in favour of the plaintiff who sued the Government of Malaysia for the negligent conduct of its doctor and a servant/agent. The plaintiff claimed that he was advised to undergo a surgery to remove a cancerous growth which was subsequently performed. As a result of the surgery, the plaintiff's spinal cord was damaged and he was paralysed waist downwards. The plaintiff claimed that he was not sufficiently informed of the risks of the surgery and that he was only told that without the surgery, he is

unlikely to walk in the future. In finding for the plaintiff, Low Hop Bing explained:

The plaintiff is 40 years old and according to the defence expert, low grade astrocytoma is a slow growth cancer. It does not seem to be logical that a man would wish to subject himself to instant paralysis when the operation is done. The plaintiff has a wife and eight children, Therefore, his priority is to provide for his family. Although without the operation, there was the prospect of slow paralysis, as opposed to instant paralysis caused by an operation, the plaintiff would first wish to think about his family, even if it means being able to provide for his family for 20 years. The plaintiff was not given the opportunity to decide whether to opt for or opt out of the operation. He was not fully explained the fact that:

- (a) this was a slow growing tumour;
- (b) in the absence of an operation, it would take at least 20 years to lead to paralysis;
- (c) if operated on immediately, he would immediately become paralysed” (pp. 186-187).

Similarly, dental treatments and surgeries pose some form of risks to patients. It is pertinent for dental practitioners to disclose material risks to the patients along with other possible treatments available to enable patients to make an informed decision. Oral surgeries are often riskier than general dental procedures. As such, it is crucial for dental surgeons to identify the potential risks and discuss them with their patients before embarking on the surgery (Moore et al. 2019). Important risks such as the implications of nerve damage on a particular patient’s career must be assessed and informed by the surgeon to the patient together with the risks of pain, swelling, bleeding and infection (Moore et al. 2019). A teacher, for example, will be more seriously affected by the risk of nerve damage following a dental surgery that may affect the ability to speak, as compared to a housewife. Thus, dental surgeons should be vigilant and disclose this important risk together with other possible options to enable the patient to give an informed consent for the surgery.

Briefly, for a consent to be valid, there are three conditions that must be satisfied. Firstly, the patient must have the legal capacity to consent where he must be an adult above the age of majority that is, 18 years under the Child Act 2001. Consent to treat children below the age of 18 years must be obtained from the child’s parents or legal guardian. Secondly, consent must be voluntarily procured and not given as a result of any influence from others. An example is seen in *Re T (Adult: Refusal of Medical Treatment)* [1992] 3 WLR 782 where the court rejected the patient’s refusal to have blood transfusion on the grounds

that her decision was influenced by her mother, a devout Jehovah’s Witness, who has visited her prior to her refusal. According to Lord Donaldson:

In some cases doctors will not only have to consider the capacity of the patient to refuse treatment, but also whether the refusal has been vitiated because it resulted not from the patient’s will, but from the will of others. (p. 799)

Finally, as indicated above, the patient must be sufficiently informed of the nature and risks pertaining to the treatment. Moores et al. (2019) proposes:

In obtaining informed consent from patients, it is essential that the discussion around any proposed intervention are clearly recorded within the clinical records. The records must reflect the treatment options given to the patient, along with material risks and benefits, including the possibility of providing no treatment at all. Any specific concerns raised by a patient should be noted, as these must be actively considered when deciding on the appropriate treatment plan in the circumstances. It is further recommended that any resources provided to a patient to enable them to make an informed consent are noted within the records, and that the reasons for choosing certain treatment options over other alternatives are recorded.

The Code of Practice issued by the Malaysian Dental Council also contains useful guidance on the procedure of obtaining consent from patients. The important parts in the said Code of Practice are reproduced:

It is accepted that consent is implied in many circumstances by the very fact that the patient has come to the dental practitioner for dental care. There are, however, circumstances where verbal and if appropriate written consent is necessary for investigation and treatment. Consent can only be obtained by a practitioner who has sufficient training and experience to be able to explain the procedure, the risks and benefits and the alternatives.

#### Implied consent

It must be remembered that a patient who walks into a dental surgery gives implied consent only limited to clinical oral examination, consultation and diagnosis.

#### Verbal consent

Verbal consent is acceptable when the procedures are limited to treatment of the problem presented by the patient. It is necessary for a witness to be present during the explanation and the giving of consent.” (section 1.4)

In summary, the Malaysian legal position governing doctor’s standard of care is provided as Table 1.

TABLE 1. Malaysian legal position governing doctor's standard of care

Duty	Standard of Care	Authority
Duty to advise of risks	Doctors should warn patients of material risks inherent with the treatment. A risk is considered as material if a reasonable person in the patient's position would attach significance to it. This issue is determined by the court and not by the medical profession.	<i>Rogers v Whitaker</i>
Duty to diagnose and treat	A doctor is not liable in negligence if he has acted in a manner that is approved by a reasonable competent medical opinion (Bolam). However, that medical opinion must be capable of withstanding logical analysis (Bolitho). This essentially means that although standard of care is determined by the medical profession, the court may reject medical evidence tendered by referring to another competent medical view.	<i>Bolam v Friern Hospital Management Committee;</i>  <i>Bolitho v City &amp; Hackney HA</i>

#### Causation

The final element to be proven by the plaintiff to succeed in a negligence claim is the element of causation. Briefly, the plaintiff must prove that the defendant's action has caused injury to the plaintiff. A clear illustration of this element in dentistry can be seen in the case of *Chai Hoon Seong v. Wong Meng Heong* [2010] 8 MLJ 104 (case 1) and *Jade Evangeline Teh Jia Ying v. Dr. Perlin Loke Jee Kwan & Anor* [2019] MLJU 1535 (case 2) discussed above. The abovementioned cases failed on the grounds of causation as the plaintiff could not prove that the injury suffered is a result of the defendant's negligence. In proving causation, the 'but-for' test is the most common test applied by the courts particularly when there are no multiple causes to the injury. Essentially, the court will ask: 'but-for' the defendant's negligence, would the plaintiff have suffered injury?

In *Swamy v. Matthews* [1968] 1 MLJ 138, the plaintiff's claim failed as he could not show that his paralysis was caused by the injection administered by the doctor. In *Chai Hoon Seong v Wong Meng Heong* (case 1), after considering expert medical testimony, the High Court opined that the defendant/appellant's action did not cause the plaintiff's injury. According to expert evidence, "...after the crown was fitted it showed that the crown was not the cause of the respondent's complaints." Instead, according to the expert, the "Crown is firm and fits well. Gingival healthy"

(p.118). The court explained that:

The evidence showed that the overfilling of the roots, the periapical lesion and the broken file (dental instrument) which cause the respondent to complain were connected to the root canal treatment undertaken by Dr.Chow. (p. 119).

In civil cases, the plaintiff bears the burden of proving his case on the balance of probabilities that is, more than 51% of likelihood. According to Gieson (1988: 268),

"...establishing a causal connection between medical negligence and the damage alleged is often the most difficult task for a plaintiff in medical malpractice litigation."

#### Liability For Breach Of Confidentiality (Case 3)

Other than potential civil liability for negligence, dental practitioners may also encounter civil suit for breach of patient's confidentiality as exemplified in the case of *Dr. Tan Ah Ba v. Dr. Wong Foot Meow* [2012] 7 MLJ 467 (case 4) cited above. Maintaining patient's confidentiality is an established legal and ethical duty imposed on healthcare professionals including on dental practitioners. Breach of such a duty may result in the commencement of a civil suit against dental practitioners and the liability to compensate the plaintiff if the court rules in favour of the plaintiff. Civil suits for breach of patient's confidentiality is actionable under the law of tort and on the basis of the right to privacy entrenched in article 5 of the Federal Constitution. *Chew Soo Ho JC in Lee Ewe Poh v. Dr. Lim Teik Man & Anor* [2011] 1 MLJ 835 opined that:

Even of this court were to err to hold the view that invasion of privacy rights is actionable under our common law, the plaintiff can still come within the cause of action of breach of trust or confidence having satisfied of the three requirements of this liability under this cause of action in tort (p. 844).

The legal duty to maintain confidentiality can be traced from the English case of *Hunter v. Mann* [1974] 2 All ER 414, the court eloquently stated that:

[A] doctor was under a duty to his patient not to disclose voluntarily, without the consent of his patient, information which the doctor had gained in his professional capacity unless compelled by law to do so.

The duty to preserve patient's confidentiality was then further developed in *AG v. Guardian Newspapers (No. 2)* [1990] 1 AC 109, where Lord Goff held that:

The duty of confidence arises when confidential information comes to the knowledge of a person in circumstances where has notice,



or is held to have asked, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing information to others. (p. 281)

The Malaysian courts have, in many occasions adopted and applied the English threshold with regards to doctor-patient confidentiality. For example, in *Lee Ewe Poh v. Dr. Lim Teik Man & Anor* [2011] 1 MLJ 835, the court identified three requirements to prove breach of confidence namely:

The information must have the necessary quality of confidence about it, the information must have been imparted in circumstances importing an obligation of confidence and there must be an unauthorised use or disclosure of that information. (p. 841)

Also, in *Repco (Malaysia) Sdn. Bhd. v. Tan Toh Fatt & Ors* [2013] 7 MLJ 408, the court applied the three conditions for breach of confidentiality, namely:

- (a) the information sought to be protected is confidential in nature;
- (b) such information had been communicated in circumstances importing an obligation of confidence; and
- (c) such information was used in an unauthorised way and to the plaintiff's detriment.

The ethical duty to preserve patient's confidentiality has been statutorily incorporated in section 29(2)(b) and (3) of the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006 and section 43(2)(b) of the Private Healthcare Facilities and Services (Private Hospitals or Other Private Healthcare Settings) Regulations 2006, both created under the Private Healthcare Facilities and Services Act 1998 (Act 586). The former, for instance, states that:

- (2) The holder of a certificate of registration or a person in charge of a private medical clinic or private dental clinic shall—
  - (a) ensure that a separate patient's medical record is kept for each patient where each patient is assigned with a registration number; and
  - (b) be responsible to safeguard the information on the patient's medical record against loss, tampering or use by unauthorized persons.
- (3) Any person who contravenes this regulation commits an offence and shall be liable on conviction to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding three months or to both.

Therefore, it is every dentist's duty to ensure that patient's confidential information obtained during the course of dental treatments is kept secret and safe from

unjustified disclosure to other parties. The transmission of dental information or documents such as X-Rays through electronic means such as emails or WhatsApp communication between dentists must be done with great caution. In an unreported case of *Mohd Zairi Rasidi Bin Abd Hadi v. Pengarah Pusat Perubatan UKM & 5 Ors* [21NCVC-238-11/2012], the court allowed the plaintiff's claim for damages against the defendant for breach of patient's confidentiality for revealing his psychiatric medical records. The court warned that patients' medical records are indeed confidential and it is the duty of the hospital to ensure that patients' confidentiality is protected (Sharon 2018).

It is also pertinent for dentists to note that the law provides for three exceptions to the rule of confidentiality where disclosure of patient's dental records or information could be justified:

- (a) with the patient's consent;
- (b) to fulfil statutory requirements; and
- (c) to protect public interest.

These grounds are briefly discussed:

*(a) Disclosure with Patient's Consent:*

Patient's dental records or information may be released to third parties with the patient's consent. Nonetheless, dentists should ensure that the consent is an informed one and given by a mentally competent patient who has reached the legal age of majority (Kassim 2007). In clinical practice, taking photos of the patient's teeth for example, for the record, promotional or educational purposes should be done with the patient's consent especially when the patient's identity is recognisable. This is based on the court's decision in *Lee Ewe Poh v. Dr. Lim Teik Man & Anor* [2011] 1 MLJ 835 where the patient succeeded in her claim against the defendant doctor who took photographs of her private parts during a surgery without her consent.

*(b) Disclosure Under Statutory Provisions:*

There are several statutes that impose a legal obligation on dentists (and other medical professionals) to disclose patients' dental (and medical) records. An example is the Prevention and Control of Infectious Diseases Act 1988 (PCIDA). Section 10 of the said Act places a legal duty on adult occupants of the house who have information that there is a person in the house who is suffering from an infectious disease listed in the Act, such as COVID-19, to notify the relevant authorities namely, the district health office, government health facility, police station or the nearest village head (section 10(1)). Upon such notification,

section 10(2) then mandates medical practitioners who are treating the patient or are aware of the existence of the infectious disease in any premises to inform the nearest Medical Officer of Health in the prescribed form provided in the Act. Additionally, dentists may also be legally required to disclose information on Covid-19 patients under section 6 of the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020 which states that:

Where an authorized officer requests for any information relating to prevention and control of infectious disease from any person, the person shall comply with the request.

Another example of a statutory duty to disclose patient's information is found in section 13 of the Private Healthcare Facilities and Services (Private Medical Clinics or Private Dental Clinics) Regulations 2006:

(1) Any unforeseeable or unanticipated incident that has occurred at any private medical clinic or private dental clinic shall be reported in writing by the private medical clinic or private dental clinic to the Director General or any other person authorized by the Director General in that behalf the next working day after the incident occurred or immediately after the private medical clinic or private dental clinic has reasonable cause to believe that the incident occurred.

Further, according to section 13(4), the Director-General "may request further information of the unforeseeable or unanticipated incident from the private medical clinic or private dental clinic or any other person if he determines that the information is necessary for further investigation." If there is such a request made under these provisions, dental practitioners may lawfully disclose the relevant part of the information sought for but preferably with patient's consent, whenever possible (Dentalprotection.org)

Another statute that may be applicable to dentists is the Child Act 2001, section 27 of which provides that:

If a medical officer... believes on reasonable grounds that a child he is examining or treating is physically or emotionally injured as a result of being ill-treated, neglected, abandoned or exposed or is sexually abused, he shall immediately inform the Protector and failing to comply with this, the medical officer commits an offence and shall on conviction be liable to a fine not exceeding two years or both.

Under this provision, a dental practitioner who believes that the child patient he is treating could be a victim of abuse must report the child to the relevant authority. According to Chidambaran (2021), some injuries

to the "Head Neck Face (HNF)" may indicate that the patient is a victim of domestic violence or "intimate partner violence (IPV)" which may include children too. Based on the literatures reviewed, Chidambaran (2021) suggests that:

Multiple citations have described the common dental injuries of IPV not limiting to petechiae in face, lip trauma, non frenum, soft and hard palate bruises, bruising of edentulous ridges, fractured teeth, non-vital tooth, trauma induced malocclusion, zygomatico-maxillary complex fractures, bruises round eye, chin and neck. If any of the above signs of abuse are noticed, they could be indicators that the patient is victimized (p. 284).

Thus, if a dentist notices any sign of abuse to the child patient he is treating, he is under a statutory duty to inform the relevant authority as stated in section 27 of the Child Act 2001 quoted above.

#### *(C) Disclosure on Public Interests:*

This exception was established in AG v. Guardian Newspaper (No.2) [1990] 1 AC 109 where the court ruled that "Unless disclosure is likely to injure public interest, it will not be protected" (p.282). Also, in *W v. Edgell [1990] 1 All ER 835*, the court condoned the breach of confidentiality on the guise of protecting public interest but with several circumstances:

(a) such a risk is real, immediate and serious; (b) that it will be substantially reduced by disclosure; (c) that the disclosure is no greater than is reasonably necessary to minimise the risk and (d) that the consequence damage to the public interest protected by the duty of confidentiality is outweighed by the public.

In the realm of dentistry, a dentist may learn a piece of information about the patient while providing treatment that may be injurious to the public or a third party (Dentalprotection.org). In this situation, the case of *W v. Edgell* may be applied and the dentist may breach the duty of confidentiality by disclosing relevant and pertinent information only.

In addition, the Personal Data Protection Act 2010 also contains a provision that legalises the disclosure of personal data on the grounds of public interest as envisaged in section 39:

Notwithstanding section 8, personal data of a data subject may be disclosed by a data user for any purpose other than the purpose for which the personal data was to be disclosed at the time of its collection or any other purpose directly related to that purpose, only under the following circumstances:

- (a) the data subject has given his consent to the disclosure;
- (b) the disclosure —

(i) is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations;

or

(ii) was required or authorized by or under any law or by the order of a court;

(c) the data user acted in the reasonable belief that he had in law the right to disclose the personal data to the other person;

(d) the data user acted in the reasonable belief that he would have had the consent of the data subject if the data subject had known of the disclosing of the personal data and the circumstances of such disclosure; or

(e) the disclosure was justified as being in the public interest in circumstances as determined by the Minister.

Other than liability in civil proceedings, alleged negligence or malpractice may also give to criminal liability particularly when the action results in the patient's death.

#### CRIMINAL LIABILITY OF A DENTIST

Criminal prosecution and conviction against healthcare professionals in Malaysia is uncommon but possible. This is due to the difficulty in proving mens rea or the guilty state of mind which is an essential element in criminal law. In addition, the burden of proof in criminal proceedings is high where the prosecution must prove that the accused has committed the offence beyond reasonable doubt (Arumugam 2018). Nonetheless, there are several available provisions in the Penal Code (Act 574) that are applicable for healthcare professionals including dental practitioners. For example, section 304(b) of the Penal Code for the offence and punishment for culpable homicide not amounting to murder:

Punishment for culpable homicide not amounting to murder 304. Whoever commits culpable homicide not amounting to murder shall be punished—...or (b) with imprisonment for a term which may extend to ten years or with fine or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Another applicable provision can be found in section 304A of the Penal Code:

Causing death by negligence

Whoever causes the death of any person, by doing any rash or negligence act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

The Penal Code also contains several offences for causing hurt to others which can be applied to healthcare professionals including dentists. Section 319 states that, "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt." According to section 321:

Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby hurt any person, is said "voluntarily to cause hurt.

The above provisions represent some of the possible criminal charges that can be brought against dentists for dental negligence or conduct that causes injury and death to patients.

#### CONCLUSION

The growth in patients' awareness and autonomy has resulted in increased lawsuits against dentists. These legal actions are mostly based on negligence or dental malpractice that has caused injury or even deaths to patients. This development exposes dentists to potential civil and criminal liability in the event of any mishap that happens during dental treatments or surgeries. As legal suits may bring adverse implications, it is fundamental for dentists and dental students to equip themselves with basic legal knowledge particularly on their legal duty towards their patients. Dentists should also be familiarised with the changing law and legal development on their practice particularly on the law on negligence and be prepared to live up to the standards imposed by the law.

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