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Kertas Asli/*Original Articles*

Healthcare Professionals' Standard Of Care During COVID-19 Pandemic
(Piawaian Penjagaan dan Rawatan Kesihatan Semasa Pandemik COVID-19)

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ABSTRACT

Since the beginning of the year 2020, Malaysia has been gravely affected by the COVID-19 pandemic where to date over four million of its population have been infected with the virus. At the time of writing this paper, the number of infections is still alarming. This situation undoubtedly places a strain on the healthcare system, particularly on healthcare professionals who have been entrusted to treat COVID-19 patients. Treating a high number of patients in an unprecedented situation may pose a challenge for doctors to fulfil their legal duties that arise from the usual doctor-patient relationship particularly in discharging the established standard of care imposed by the law. This is the main issue that this paper seeks to explore. In addition, this paper also examines doctors' duty of care towards non-COVID-19 patients amidst limited medical resources and policy consideration that inevitably causes a delay in giving medical treatments and elective surgeries. In answering these questions, the method employed in this paper is qualitative analysis. In conclusion, it is suggested that keeping up to the established standard of care is crucial in maintaining public confidence in the medical profession and also to protect public health and welfare.

Keywords: COVID-19 pandemic; Hospital Resources; Medical law; Negligence; Standard of Care.

ABSTRAK

Sejak awal tahun 2020, Malaysia telah dilanda pandemik COVID-19 dimana sehingga kini lebih empat juta rakyatnya telah dijangkiti dengan virus ini. Semasa artikel ini ditulis, jumlah jangkitan harian COVID-19 di Malaysia masih lagi membimbangkan. Situasi ini telah memberi tekanan dan cabaran yang hebat kepada sistem penjagaan kesihatan negara ini terutamanya kepada profesional penjagaan kesihatan seperti doktor yang dipertangungjawabkan untuk merawat pesakit COVID-19. Merawat jumlah pesakit yang tinggi pada masa yang sama dalam situasi yang tidak pernah berlaku sebelum ini boleh memberi cabaran yang getir kepada doktor untuk memenuhi tanggungjawab asas mereka yang timbul dari hubungan doktor dan pesakit terutamanya dari aspek memenuhi piawaian yang telah ditetapkan oleh undang-undang. Isu ini merupakan objektif utama yang dikaji dalam artikel ini. Selain itu, artikel ini turut menyentuh isu tanggungjawab doktor kepada pesakit bukan COVID-19 yang turut terjejas akibat pandemik ini berikutan kelewatan menerima rawatan khususnya pembedahan elektif. Untuk menjawab persoalan-persoalan ini, artikel ini mengunakan kaedah kualitatif. Sebagai kesimpulan, artikel ini mencadangkan bahawa mengekalkan piawaian penjagaan kesihatan sedia ada adalah penting untuk memelihara keyakinan masyarakat kepada sistem penjagaan kesihatan dan melindungi kepentingan awam.

Kata kunci: Pandemik COVID-19; Sumber hospital; Undang-undang perubatan; Kecuaian; Piawaian penjagaan

INTRODUCTION

Since the beginning of the year 2020, Malaysia has joined all other nations in the quest to fight against the COVID-19 pandemic. At the time this paper is written, Malaysia is still struggling with the pandemic where over four million of its population has been infected (COVIDNOW. Covidnow.moh.gov.my). Amongst the highest number of COVID-19 cases recorded in Malaysia was on 24 February 2002 where 32,670 new infections were reported (Teoh Pei Ying 2022). This extraordinary situation inevitably results in strenuous pressure on the Malaysian healthcare professionals who have to work long hours due to a high number of patients each day. An empirical study conducted by Zakaria, Remeli, Shahamir et. al (2021) in a teaching hospital in Malaysia in Emergency Medicine Department reveals that medical professionals exhibit a high rate of burnout during this COVID-19 pandemic. In these exceptional and trying circumstances, fulfilling a doctor's usual professional duties that is derived from the doctor-patient relationship appears challenging. Kelleher (2020) succinctly put:

> In this unprecedented COVID-19 pandemic, healthcare providers have been forced to walk a fine line between their longstanding and well-documented professional resources, new and unusual practice settings, and unfamiliar and ever-changing patient care needs.

In addition to treating the rising number of patients in this emergency, some healthcare professionals are also faced with the challenge of working beyond their usual expertise. For example, in June 2021, Hospital Pakar Kanak-Kanak Universiti Kebangsaan Malaysia has to change its primary role from a paediatric hospital to a COVID-19 hospital to cater to the increasing number of infections in this country (Ahmad Suhael Adnan 2021a). In these circumstances, the possibility of medical negligence cannot be denied and this triggers the question of whether the law affords any compromise to doctors' legal duties in treating COVID-19 and other patients in this emergency situation. This is the overarching issue that this paper seeks to address. First, however, the legal position on doctors' duty of care is briefly presented. This is followed by an analysis of the standard of care imposed on healthcare professionals in three situations during this pandemic namely, emergency, lack of skill or experience and limited resources.

METHODS

This paper adopts a pure legal research methodology by using qualitative analysis in answering the main objectives of this paper. By using content analysis, this paper analyses the aspects of the standard of care, hospital resources and negligence from the Malaysian legal perspective. The data gathered is based on primary and secondary sources, concentrating on secondary sources.

DUTY OF CARE DURING PANDEMIC

It is undisputed that a doctor owes a duty of care to his patients when he has undertaken to treat the patient. This duty is derived from the English common law case of Donoghue v Stevenson [1932] AC 562 where the "neighbourhood principle" propounded by Lord Atkin clearly places patients within the contemplation of persons who are reasonably foreseeable to be affected by the doctor's act of negligence. Furthermore, doctors' duty of care is also established from the doctor-patient relationship as stated in R v Bateman [1925] 19 Cr App R8:

> 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…

In the current pandemic situation, it has been argued that doctors owe a duty to treat infected patients on both legal and ethical grounds. According to Sokol (2006: 1238):

> By virtue of their profession, doctors and nurses have more stringent obligations of beneficence than most. They have more obligations of beneficence than most. They have obligations to a specified group of persons (their patients) that nonmedical personnel have no obligation to help. The term "duty of care" refers to these special obligations.

Clarke (2005) argues that this duty to treat patients during a public emergency is based on several grounds including the special skills possessed by doctors that places them in a position to participate in treating patients during this pandemic and their entrance into the profession on free will with full knowledge of the risks and obligations the profession entails. Henceforth, doctors in hospitals and COVID-19 treatment centres owe a duty of care to patients who turn out for treatments regardless of the large numbers of patients or other constraints that they may encounter.

This proposition finds support in an English case of Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 Q. B. 428. Here, although the defendant doctor in charge of the emergency department was himself unwell, that does not dissolve him from his duty to treat the deceased. Neild J remarked:

> Without a doubt, the casualty officer should have seen and examined the deceased. His failure to do either cannot be described as an excusable error as had been submitted. It was negligence. It is unfortunate that he was himself at the time a tired and unwell doctor, but there was no one else to do that which it was his duty to do. (at p. 437)

The duty to treat the deceased in Barnett v Chelsea and Kensington Hospital Management Committee was placed since the defendant doctor was working in an emergency department that opened its door to treat any patient who walks in. According to Nield J:

> …since the defendants provided and ran the casualty department to which the deceased presented himself complaining of illness or injury, such a close and direct relationship existed between them and him that they owed him a duty to exercise the skill and care to be expected of a nurse and medical casualty officer acting reasonably notwithstanding that he had not been treated and received into the hospital wards. (p. 429)

Nonetheless, concerns have been raised as to whether the law should provide exemptions or immunity for doctors working with COVID-19 patients in these exceptional circumstances. With the rising number of patients, healthcare workers are overburdened and some of them may have to work beyond their skills and expertise and with a lack of resources. The question now is whether these factors are accepted in law as reasons to reduce the standard of care set on healthcare professionals.

STANDARD OF CARE DURING PANDEMIC: IS THERE A COMPROMISE?

For the purpose of determining the standard of care, a doctor's duty of care is categorised into three duties namely, the duty to diagnose, advise and treat. In Malaysia, the standard of care for the duties to diagnose and treat is distinct from the standard of care for the duty to advise patients of risks. This legal position has been reaffirmed in the Federal Court decision in Zulhasnimar bt Hasan Basri v Dr. Kuppu Velumani P & Ors [2017] 5 MLJ 461. Here, the Federal Court ruled that the standard of care required of doctors for the duty to diagnose and treat patients is the standard established in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 and Bolitho v City & Hackney HA [1997] 4 All ER 771. On the duty to advise patients of the risks involved in medical treatments, the standard of care to be applied is as stipulated in an Australian case of Rogers v Whitaker [1993] 4 Med LR 79 where it was held that:

> 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.

On the standard of care for the duty to diagnose and treat patients, the Bolam's test enunciated in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 states as follows:

> 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…

Accordingly, Bolam's test stipulates that:

> …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 according with such practice, merely because there is a body of opinion that takes a contrary view.

The Bolam's test is to be applied with the ratio in Bolitho v City & Hackney HA [1997] 4 All ER 771 where the House of Lords held that although Bolam's test remains applicable, the practice that is considered proper by a responsible body of medical opinion must be "capable of withstanding logical analysis." In Bolitho v City & Hackney HA, the defendant doctor argued that even if he had attended to the child, he would not have intubated him. This decision was supported by medical experts and the House of Lords agreed that the decision not to intubate was not illogical and found that the defendant did not breach his standard of care. Having established the applicable standard of care, the next section proceeds to analyse the application of this standard of care in the light of three emerging situations faced by healthcare

professionals during the COVID-19 pandemic.

EMERGENCY SITUATION

The surge in COVID-19 infections that recorded thousands of cases daily may be seen as an emergency where public hospitals are overcrowded with COVID-19 patients each day (Mohd Iskandar Othman 2021). Challenges such as lack of manpower and medical resources to treat patients are, thus, unavoidable. This situation invites a consideration on what is the appropriate standard of care to be placed on healthcare professionals. In this context, Jackson (2010: 136) rightly argues that:

> Once a doctor has undertaken to offer care to an injured person, she undoubtedly assumes a duty of care. But since what is expected of doctors is 'reasonable care', it is appropriate to take into account the situation in which the doctor who has been called out to the site of a train crash to provide the level of care that would be available in a well-equipped intensive care unit.

The same sentiment was propounded in Wilsher v Essex Area Health Authority [1988] 3 BMLR 37 where Mustill LJ opined that:

> Again, I accept that full allowance must be made for the fact that certain aspects of treatment may have to be carried out in what one witness (dealing with the use of a machine to analyse the sample) called 'battle conditions'. An emergency may overburden the available resources, and, if an individual is forced by circumstances to do many things at once, the fact that he does one of them incorrectly should not lightly be taken as negligence. (p. 50)

Therefore, it can be argued that in treating a rising number of patients during this pandemic, the standard of care expected from healthcare professionals should be different when compared to treating the usual number of patients on ordinary days. In Mulholland v Medway NHS Foundation Trust [2015] EWHC 268 (QB), Green J opines that: "…in my judgment, the standard of care owed by an A&E doctor must be calibrated in a manner reflecting reality." It is sufficing if healthcare workers prove that they have done what is reasonable in that situation of emergency. As decided in Ang Yew Meng & Anor v Dr Sashikannan a/l Arunasalam & Ors [2011] 9 MLJ 153 where in finding for the defendant, the court held that:

> I found that in that emergency case scenario, the treatment that the first defendant provided to the deceased child was appropriate and in accordance with the standard of care required of a medical doctor in the circumstances of the case. (at p. 182)

Herring (2008) concludes that generally, the court will take into consideration the particular situation that the doctor is faced with. If the doctor is treating a patient in an emergency situation, it may not be necessary for the doctor to exhibit the same standard of skill as compared when there is plenty of time for the doctor to diagnose and treat the patient. Therefore, in summary, it is arguable that it will be "exceptionally difficult" to successfully prove negligence in this pandemic unless the conduct of healthcare professionals are deemed as "blatant and egregious errors." (Tomkins, Purshouse, Heywood, Miola et.al. 2020).

LACK OF SKILL OR EXPERIENCE

The application of Bolam's test propounded in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 requires a doctor is to be judged according to what other reasonable competent doctor in that specialty would have done. This literally means that a general practitioner is judged according to what other general practitioners would do in that situation. The law does not expect a general practitioner to act according to the standard expected of a specialist. In Chai Hoon Seong v Wong Meng Heong [2010] 8 MLJ 104, one of the issues raised in the appeal to the High Court is on the standard of care to be applied. The appellant argued that the trial court has erred in law in applying the standard of care of a specialist in endodontics rather than that of a general practitioner as the appellant is a general practitioner in a private clinic and crown fitting is under the field of prosthodontics. The High Court accepted this argument. Nonetheless, a general practitioner may be considered as negligent for failure to refer patients to a specialist as seen in Gordon v Wilson [1992] 3 Med LR401.

Thus, with regards to doctors' duty to diagnose and treat patients in COVID-19 pandemic, it is arguable that the same standard of care applies in that a doctor will be judged according to his capacity. Inexperience or lack of skills in treating COVID-19 patients is not an excuse acceptable in law for doctors to act below the required standard of care. Lord Hewart CJ in R v Bateman [1925] 19 Cr App R8 explained that:

> As regards cases where incompetence is alleged, it is only necessary to say that the unqualified practitioner cannot claim to be measured by any lower standard than that which is applied to a qualified man…In the case of a quack, where the treatment has been proved to be incompetent and to have caused the patient's death, juries are not likely to hesitate in finding liability on the ground that the defendant undertook, and continued to treat, a case involving the gravest risk to his patient, when he knew he was not competent to deal with it or would have known if he had

paid any proper regard to the life and safety of his patient. (at p. 794)

Further, in Ang Yew Meng & Anor v Dr. Sashikannan a/l Arunasalam & Ors [2011] 9 MLJ 153, one of the issues raised is the standard of care required of a junior and inexperience doctor who has undertaken the responsibility of treating the plaintiff's son in an emergency situation. The plaintiff came to the second defendant's clinic with her son who was unconscious and had a high fever. The first defendant at that time was a qualified doctor undergoing an internship at a government hospital and attachment at the second defendant's clinic. On the question of the standard of care to be applied in this case, the High Court stated that: "The test here is: what the reasonable medical doctor ought to have done in the circumstances of the present case attributing to such person the care and skill of an ordinary competent medical doctor."

In addition, it is useful to note the decision in Wilsher v Essex Area Health Authority [1988] 3 BMLR 37 it was held that a junior doctor owes the same standard of care as a senior doctor. Glidewell L.J. remarked that:

In my view, the law requires the trainee or learner to be judged by the same standard as his more experienced colleagues. If it did not, inexperience would frequently be urged as a defence to an action for professional negligence.

However, a junior or inexperienced doctor is deemed to have discharged his standard of care by referring to or consulting a senior doctor or a specialist or his superior. As His Lordship continued in Wilsher v Essex Area Health Authority [1988] 3 BMLR 37:

If this test appears unduly harsh in relation to the inexperienced, I should add that, in my view, the inexperienced doctor called on to exercise a specialist skill will, as part of that skill, seek the advice and held of his superiors when he does or may need it. If he does seek such help, he will often have satisfied the test, even if he may himself have made a mistake. (p. 72)

LIMITED MEDICAL RESOURCES

COVID-19 pandemic has affected medical treatments for non-COVID-19 patients. Due to limited medical resources and fear of infections, elective surgeries and other treatments for non-COVID-19 patients could not be performed since the outbreak began (Ahmad Suhael Adnan 2021b). As of 30 September 2021, it was reported that 53, 785 surgical-based cases and 3570 medical treatments are on the waiting list in government hospitals (Anon 2022). This situation raises a concern on whether healthcare professionals could be held liable for the delay in providing medical treatment to non-COVID-19 patients.

The issue of delay in giving treatment to patients was dealt with in several cases. In Abdul Ghafur bin Mohd Ibrahim v Pengarah Hospital Kepala Batas & Anor [2010] 6 MLJ 181, the plaintiff, inter alia, claimed that there was a delay in sending the deceased from Hospital Seberang Jaya to Hospital Pulau Pinang for a CT scan. On this point, the High Court held that:

I hold that there is no merit in putting the blame on the defendants for not sending the deceased directly from Seberang Jaya Hospital when there was no approval from Penang Hospital, being the receiving hospital, to do so. The medical officers cannot be faulted for complying with the rules and procedures or standard practice laid down by and enforceable in the public hospitals. Policy consideration is for the authority. If there are bad policies, rules or procedures or standard practice, it is for the public to bring the attention of the authority to change them. Otherwise, so long as the policies, rules or procedures or standard practice remain valid and enforceable, any doctors in the public hospitals are bound to comply with them. It will be unjust for the court to hold doctors negligent or breach of their duties of care to patients for complying with the policies, rules or procedures or standard practice which they are bound to follow. (p. 207) (emphasis added)

The court in Abdul Ghafur bin Mohd Ibrahim v Pengarah Hospital Kepala Batas & Anor [2010] 6 MLJ 181 appears to accept hospital policy or limited resources as a defence to the claim of negligence caused by the delay in providing treatment. However, a different stance is observed in Lim Zi Hong v Pengarah Hospital Selayang & Ors [2013] MLJU 1613. Here, the High Court took the view that there was failure on the part of Hospital Selayang to provide a safe obstetric system that led to the delay in performing an emergency caesarean section when fetal distress was detected and for not having a specialist to attend to high risks delivery as in the present case. The court also rejected the defendants' contention that lack of resources in public hospitals should be taken into consideration when deciding medical negligence cases. The High Court further referred to an unreported case of Muhammad Yassien Zuliskandar & 2 ors v Kerajaan Malaysia (Guaman Sivil No. MT5-22-763-2008) where the High Court of Johor Bahru held, inter alia, that "a system failure could constitute negligence."

Furthermore, in Dr KS Sivananthan v The Government of Malaysia [2001] 1 MLJ 35, the High Court found that there was a failure on the part of doctors and nurses to provide timely medical treatment to the plaintiff and this delay constitutes a breach of duty to the patient. Similarly,

in Ahmad Thaqif Amzar bin Ahmad Huzairi (Claiming through his mother and legal representative, Majdah bt. Mohd Yusof) v Kuala Terengganu Specialist Hospital Sdn. Bhd. & Ors [2021] 9 MLJ 10, doctors were negligent in failing to order an early CT scan and that the plaintiff should have been referred to a specialist sooner. The court said:

> Despite the seriousness of the plaintiff's condition…, the plaintiff was only attended to by a specialist almost 14 hours after he first arrived at the A&E Department of HSNZ at about 10 pm. Neither the fourth nor the sixth defendant who attended to the plaintiff referred the matter to a specialist on call with promptitude. The plaintiff was at high risk and should have been referred to a specialist without delay. It was evident that the ultrasound and x-ray examinations carried out by the defendants were unnecessary and that an early CT scan should have been done. Although it was planned to be done as early as 9.54 am, as evident from the hospital's progress note, the CT scan was only done about two hours after the plaintiff had collapsed. It was evident that the defendants had breached their duty of care by failing to act with urgency to ensure that the plaintiff's airway was not blocked, for this was what ultimately caused the permanent brain damage to the plaintiff. (p. 12)

As such, doctors and hospitals should take every possible measure to ensure that non-COVID-19 patients receive appropriate treatment within a reasonable time. Jackson (2010: 125) rightly put:

> "Let us take the common example of having to wait to be seen in a busy accident and emergency department. It would not be negligent to expect people with minor injuries to wait a few hours, but a similar failure to attend to someone who had a heart attack would fail to meet this basic minimum standard of care, and the fact that the hospital was operating with limited resources would offer no excuse."

CONCLUSION

COVID-19 pandemic has demanded healthcare professionals work beyond their usual capacities. Working long hours with a rising number of patients proves to be challenging to healthcare professionals and the healthcare system as a whole. In this regard, a question arises as to whether the established standard of care set upon healthcare workers during ordinary times is equally applicable in this pandemic. Alternatively, is there any compromise provided by the law to meet these unprecedented times? This paper has, therefore, analysed the issue of the standard of care to be applied in three situations faced by healthcare professionals during the COVID-19 pandemic. These situations comprise of doctors working in an emergency and their lack of skill or experience (if any) in treating COVID-19 patients. Doctors' duties and standard of care for non-COVID-19 patients whose treatments are affected by the surge in COVID-19 cases are also considered. Overall, it is concluded that the extraordinary tasks undertaken by healthcare professionals in this unprecedented situation should be applauded and a fair consideration should be accorded to the challenges that they face in fulfilling their duties. Nonetheless, that is not grounds to reduce or compromise the standard of care imposed as keeping up to the established standard of care is crucial in maintaining public confidence in the medical profession and protecting public health and welfare. Protecting public health and the opportunity to receive the best standard of physical and mental health is also a fundamental right for all citizens (Zahir, M. Z. M., et. al 2021; Zainudin, T. N. A. T., et. al 2021).

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