

WHEN CONDUCT CROSSES THE LINE: AGGRAVATED DAMAGES IN MEDICAL NEGLIGENCE CASES

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In medical negligence cases, aggravated damages are normally awarded to compensate for the injury to the feelings, pride or dignity of the plaintiff. They are compensatory damages where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

In *Kralj v McGrath* [1986] 1 All ER 54, it was held that aggravated damages should not be awarded in medical negligence claims – if the manner in which treatment was provided increased the Plaintiff's pain and suffering, this should be reflected in a higher award under pain suffering and loss of amenity (PSLA). However, following the Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 CLJ 427, the Malaysian Courts have awarded substantial aggravated damages in several medical negligence claims. The conduct of the healthcare facility and practitioners before and during litigation may have a serious impact on the financial outcome of the claim.

Aggravated or Exemplary Damages?

Aggravated damages differs from exemplary damages in that the former represent additional compensation whereas exemplary damages contain a punitive and deterrent element.

Exemplary damages are damages awarded for cases when the Courts find the actions of the wrongdoers to be reprehensible and a conscious complete disregard of another's rights. It is not compensatory in nature but intends to reform or deter the defendant and others from engaging in conduct similar to that which formed the basis of the lawsuit. Lord Devlin in the often quoted case of *Rookes v Barnard* (1964) 1 AC 1129 puts it this way:

*"There are certain categories of cases in which the award of **exemplary damages** can serve useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to criminal."*

The Court of Appeal in the case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 outlined the difference between aggravated and exemplary damages:

¹ *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 at [32]

*"[32] Now, aggravated damages are classified as a species of compensatory damages, which are awarded as **additional compensation where there has been intangible injury to the interest of personality** of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.*

*[33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, **to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant.** Exemplary damages may be awarded where the defendant has acted with **vindictiveness or malice**, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be **deterrent, or punitive and retributory**, and the award may also have an important function in vindicating the rights of the plaintiff"*

Aggravating factors which justified the award of aggravated damages

The Malaysian Courts have awarded aggravated damages in several medical negligence claims for the following aggravating factors:

- pushing blame to patient or family members²
- making insulting remarks when confronted³
- downplaying severity of injury⁴
- failure or delay in disclosing the plaintiff's medical records⁵
- deliberately suppressing findings of internal inquiry report⁶
- suppression of evidence⁷
- delay in admitting liability⁸
- lying under oath when giving evidence⁹
- filing unnecessary interlocutory applications midway trial to stifle litigation¹⁰

RM 1 million award for aggravated damages - *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 CLJ 427

The Plaintiff presented with a retinal tear and detachment in his right eye and sought treatment from Dr Hari, a consultant ophthalmologist. Following complications from the 1st operation, the Plaintiff underwent a 2nd operation during which he regained consciousness while Dr Hari was using a laser to strengthen the retina. During this time, the Plaintiff bucked, resulting in a Supra-Choroidal Haemorrhage. Consequently, the Plaintiff suffered a total loss of vision in his right eye.

The High Court awarded the sum of RM 1 million as aggravated damages in addition to the sum of RM 200,000 as general damages for pain, suffering and loss of amenities ("**PSLA**") to the Plaintiff.

The Federal Court in upholding the said award for aggravated damages, held:

² [2019] 8 MLJ 331; [2020] 10 MLJ 459; [2021] MLJU 86

³ [2019] 8 MLJ 331

⁴ [2018] 3 MLJ 281

⁵ *Ibid.*

⁶ [2018] MLJU 1158; [2024] MLJU 2699

⁷ *Ibid.*

⁸ [2021] MLJU 2439; [2023] 8 MLJ 110; [2023] 10 MLJ 272; [2023] 10 MLJ 272; [2024] MLJU 795

⁹ [2019] 11 MLJ 628

¹⁰ *Ibid.*

"...aggravated damages can be and have been awarded as a separate head of damage in tort. For example, aggravated damages are frequently awarded in defamation cases for injury to a person's reputation. There is no reason to exclude this kind of damages from medical negligence cases, which involve real injury to a person's body."

The Federal Court did not explicitly identify the specific facts of the case that justified the award of aggravated damages. However, based on the facts, the following circumstances may have influenced the Federal Court's decision to uphold the award:

- (i) downplaying the severity of the plaintiff's injury;
- (ii) failure of D1 to explain/tell the patient that his right eye was blind;
- (iii) D1 removed the patient's right lens without consent after suprachoroidal haemorrhage occurred; and
- (iv) D1 gave the patient false hope by advising that the right eye would regain vision.

RM 500,000 award for aggravated damages – *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331

The plaintiff's wife (the deceased) had initially sought treatment at a private hospital for severe pain and swelling in her right ankle. On being diagnosed as having septic arthritis of the ankle, the deceased decided to immediately have the condition treated at the Hospital Kuala Lumpur (HKL) where she had once been Head of its Outpatient Department.

The 2nd defendant ('D2'), an orthopaedic surgeon and the 7th defendant ('D7'), who attended to the deceased, felt that she was not having septic arthritis but only osteoarthritis. They took her off the antibiotics she had been given at the private hospital and gave her the drug Tramadol, even though she had specifically said that she was allergic to it.

Subsequent tests and procedures confirmed that she not only had septic arthritis of the ankle joint but had also suffered a massive and fatal stroke.

Awarding the Plaintiff RM 500,000 in aggravating damages, the following factors were considered to warrant the award:

- (i) The evidence showed that the defendants failed to follow up on the blood investigations and this led to a downhill spiral in the deceased's condition. The callous attitude of the attending doctors and nurses, particularly D2 and D7, in failing to ensure that an accurate and speedy diagnosis of the deceased's ailment was made was one of the aggravating factors which entitled the plaintiff to be compensated for the injury to his feelings;
- (ii) The defendants attempted to place the blame on the deceased and her family members by making a late entry in the medical records which stated '*can try*

Tramadol in the ward, family agreed to try'. This was insulting and contumelious behaviour which had increased the plaintiff's mental pain and suffering;

- (iii) D2's words and conduct during his meeting with the deceased's family members following her death were disturbing, appalling and an insult to his profession and to the plaintiff and his family. It was painfully cruel for the plaintiff and his family members who attended the meeting to hear such utterances from a professional medical doctor. There could be no clearer illustration of insulting conduct which justified an award for aggravated damages; and
- (iv) There was credible evidence to support the plaintiff's contentions that the deceased's medical records post-event were embellished. The defendants did not call any of the makers of the alleged late entries to challenge or provide any explanation regarding the same. Such despicable conduct enhanced the plaintiff's case for aggravated damages to be awarded.

RM1 million award for aggravated damages - *Prince Court Medical Centre Sdn Bhd v Lim Yoke Har & Ors and another suit* [2024] CLJU 2332

Lim Yoke Har, 75 years old at the time of the incident, suffered a fall from a hospital bed in September 2018, when she was admitted to Prince Court Medical Centre ("PCMC") for dengue. Due to the fall, she suffered severe brain damage. The High Court concluded that the patient's fall was caused by a malfunction of an old hospital bed.

The High Court awarded the patient damages of over RM 4.2 million, to be paid by PCMC. Judicial Commissioner YA Tuan Leong Wai Hong's comprehensive 101-page written judgment, released on October 23, provides a striking account of PCMC's alleged conduct, as outlined by the High Court in its rationale for awarding aggravated damages to Lim. The High Court awarded RM 1 million as aggravated damages in this case.

YA Tuan Leong Wai Hong stated that:

"A court of law will award aggravated damages if a defendant's conduct towards the plaintiff was motivated by spite or malevolence [or if] a defendant's conduct was high-handed so as to increase the plaintiff's mental pain and suffering"¹¹,

In this case, the High Court held that the following facts show that an award of aggravated damages is justified¹²:

1. The shifting of blame to the Patient for her fall.
2. The shifting of blame to the Patient's family for her fall. This shift relied on a lie which was exposed in cross-examination.
3. The deliberate non-disclosure of material evidence i.e. incident reports prepared by the nurses on duty and the internal nursing review conducted into the fall.

¹¹ At [110]

¹² At [114]

4. When the Court ordered the disclosure of the incident reports prepared by the nurses on duty and the internal nursing review conducted into the fall, there was a deliberate failure to disclose the complete documents.
5. The suppression of evidence and knowledge of the cause of the fall had resulted in the Patient suing her doctor Dr Nick Chong and Nurse Zulia. This no doubt caused unnecessary stress to them, not to mention an attack on their reputations as professionals from the time the suit was filed in 2019 to the decision on 27-08-2024.
6. The failure to report the fall to the MOH (Ministry of Health) within 24 hours or immediately thereafter and thereby avoiding a statutory inquiry into the fall¹³.
7. Perversion of the course of justice.
8. According to Dr Nick Chong, it was common knowledge that the cot sides suffer mechanical failures. The old beds should have been checked immediately and replaced before a tragic fall happens. It required the tragic fall in this case before PCMC decided to replace all the old with new beds.

Risk Management

To minimise exposure to claims involving aggravated damages, medical practitioners and healthcare facilities should adopt the following risk management measures:

- 1. Transparent Communication:** Maintain clear, respectful, and honest communication with patients and their families, particularly when adverse events occur. Avoid assigning blame¹⁴ or downplaying the severity of injuries.
- 2. Accurate and Timely Documentation:** Ensure all medical records, including internal reports, are accurate, complete, and promptly disclosed when required or requested¹⁵. Deliberate omissions or embellishments may lead to aggravated findings.
- 3. Proactive Response to Incidents:** Report incidents to relevant authorities, such as the Ministry of Health, within the stipulated timeframe to avoid allegations of concealment or regulatory non-compliance.
- 4. Ethical Conduct During Litigation:** Uphold professional and ethical standards throughout the litigation process. Avoid unnecessary interlocutory applications¹⁶ or misleading testimony.
- 5. Risk Assessments and Preventive Measures:** Conduct regular audits of equipment and facilities to ensure safety standards are met. Address potential hazards proactively to prevent avoidable injuries or accidents. Regular audits of complaints and follow-ups so that they are not repeated.

By adopting these practices, medical practitioners and healthcare facilities can

¹³ Director General Directive No. 1 of 2010 dated 13-12-2010

¹⁴ Prince Court Medical Centre Sdn Bhd v Lim Yoke Har (bertindak melalui anak lelaki dan wakil litigasinya, Goh Seng Cha) & Ors and another suit [2024] MLJU 2699 at [144]

¹⁵ Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors [2015] 1 CLJ 825 - a patient is entitled to a copy of their medical records.

¹⁶ Pyu Pyu Ma v Dr Lim Soo How & Ors [2019] 11 MLJ 628 at [66]

mitigate the risk of legal liability, safeguard their professional reputations, and maintain the trust and confidence of their patients.

Conclusion

From the above cases, it is evident that the defendants' egregious conduct following the negligent act, particularly their behaviour, as well as that of their legal counsels during the course of litigation, often leads to the high award of aggravated damages. Aggravated damages are to compensate plaintiffs for the mental distress and emotional harm resulting from defendants' reprehensible actions, whether during or after the commission of a tort. The courts have demonstrated that conduct such as blame-shifting, suppression of evidence, and disrespectful behaviour can significantly influence the outcome of a case, often leading to substantial awards.

In light of this, healthcare providers and practitioners must adopt robust risk management strategies to avoid situations that may exacerbate claims and result in aggravated damages. By ensuring amongst others, transparent communication, accurate documentation and proactive incident reporting, healthcare facilities can effectively manage risks and reduce the likelihood of damaging conduct that could lead to aggravated awards. Proper training, regular audits, and risk assessments are essential in fostering a culture of accountability and preventing avoidable incidents that may contribute to the escalation of legal claims and risk in aggravated damages.