11 OCTOBER 2021

Can Medical Practitioners Be Automatically Held Liable In Medical Negligence Suit?

Contact Persons:

Datuk D P Naban
Senior Partner
+603 6209 5405
naban@rdslawpartners.com

Nagarajah Muttiah
Partner
+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner
+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
+603 6209 5400
kenny@rdslawpartners.com

Shaun Tan Cheng Hong
Senior Associate
+603 6209 5400
shaun@rdslawpartners.com

REIMAGINING LEGAL SOLUTIONS

The Latin maxim *semper necessitas probandi incumbit ei qui agit* means 'he who asserts must prove'. This principle is well adopted in Malaysia under Section 101 of the Evidence Act 1950, where the onus falls on the plaintiff to prove his claim against the other party.

However, it has been observed that in most medical negligence cases, it would be arduous for the plaintiff to prove negligence of a medical practitioner. The reason is that the patients, more often than not, are unconscious when the acts performed by the medical practitioners cause damage.

This brings about the doctrine of *res ipsa loquitor* which means evidence speak for itself. Under the doctrine of *res ipsa loquitor*, if a plaintiff successfully establishes a prima facie case of negligence, the plaintiff's burden of proof would have been deemed discharged and the burden shifts to the defendant to prove that he is not negligent.

Elements Of Medical Negligence

One of the most important elements that a plaintiff must prove in a medical negligence claim is that the medical practitioner has breached the standard of care.

The test for standard of care is well settled in the Federal Court case of *Dr. Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor & Another Appeal* [2018] 3 MLJ 281, where:

(a) Bolam Test as set out in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 is essentially the applicable test with regard to the standard of care for diagnosis and treatment subject to the qualifications as laid down in Bolitho (administratrix of the estate of *Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771.

(b) the applicable test for standard of care with regard to the duty to advise of risks associated with any proposed treatment is *Rogers v Whitaker* (1992) 175 CLR 479, adopted in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593.

Elements Of *Res Ipsa Loquitor*

To invoke doctrine of *res ipsa loquitor*, there are three elements which the plaintiff has to prove as stated in *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596 (*Scott v London*) wherein it was held as follows:

(a) the event is of a nature that would not have occurred if it had not been caused by negligence.

(b) the act that caused the harm was under the defendant's sole management and control, or whoever he is in charge of or entitled to control.

(c) no evidence exists as to the reason or how the event occurred; if such evidence exists, then the *res ipsa loquitor* is not appropriate to apply for the matter of the defendant's negligence must be decided based on that evidence.

Scott v London was cited with approval in *Ang Yew Meng & Anor v Dr Sashikannan a/l Arunasalam* [2011] 9 MLJ 153.

Applicability Of The Doctrine Of *Res Ipsa Loquitor* In Malaysian Cases

In Malaysia, there are cases where the plaintiffs attempted to rely on *res ipsa loquitor* for medical negligence claims.

In *Foong Yeen Keng v Assunta Hospital (M) Sdn Bhd & Anor* [2006] 5 MLJ 94, the plaintiff underwent an operation to remove appendicitis and ruptured right ovarian cyst. However, the plaintiff still experienced severe pain after the 1st operation, leading to the second operation conducted on her to clear the pus found in the right paracolic gutter. After being discharged from the hospital, she sought medical treatment to reduce her abdominal pain. Subsequently, the plaintiff filed a medical negligence claim against the doctor

and hospital. She sought to rely on the doctrine of *res ipsa loquitor* which was unsuccessful at the lower court and on appeal to the High Court. It was held that the fact that a patient left the hospital in a worse state or condition than when they arrived does not mean that the medical staff was negligent. The occurrence of injury is not always indicative of a lack of appropriate care as medical treatment entails risks.

In *Professor Dr Hj Mohammed Feizal bin Abdullah @ Balakrishnan a/l Krishnan & Anor v Harvender Jeet Kaur a/p Kaka Singh & Anor* [2010] 1 MLJ 271, the 1st plaintiff worked as a consulting surgeon in the 2nd plaintiff's private hospital, where the first defendant had delivered a healthy new-born baby. However, the new-born baby experienced breathing difficulties but neither doctor nor nurse was available at the hospital. At that time, Abdul Azeez was the only person available in the hospital and he carried out suction on the baby. After that, Abdul Azeez looked for the 1st plaintiff. Meanwhile, the 1st defendant also searched for assistance, but she had been locked in a premise and no one was there. She called her sister-in-law for help to break the lock open. At the same time, she was trying to push her baby through the door grills but unsuccessful. Abdul Azeez returned together with the 1st plaintiff and attempted to resuscitate the baby. Unfortunately, the baby died due to respiratory distress syndrome.

This incident was widely reported by the 2nd defendant. Thus, the plaintiffs sued the defendants for defamation. Then. the 1st defendant filed counterclaim for *inter alia* negligence on the part of the plaintiffs. In this case, the court discussed on whether the 1st defendant could rely on *res ipsa loquitor* to prove the plaintiffs are in fact negligent. The court eventually dismissed the 1st defendant's counterclaim on the following grounds:

(a) The 1st defendant had burden to prove on balance of probabilities that the 1st plaintiff was negligent and the maxim of *res ipsa loquitor* must be pleaded before the 1st defendant could rely on the same.

(b) In view of the pleadings disclosed solely on material facts and not evidence, the 1st defendant's failure to

plead did not preclude her from raising the maxim at the end of the trial.

(c) However, in order to invoke such the maxim, the 1st plaintiff must show that the baby was under the defendants' sole management and control.

(d) The baby was clearly not under the sole administration and control of the plaintiffs, as evidenced by incontrovertible evidence that the baby was given over to the 1st defendant's mother-in-law, and the plaintiffs had no peculiar knowledge about his death.

(e) Thus, maxim of *res ipsa loquitor* did not apply in this circumstance.

Similarly, in *Ang Yew Meng & Anor v Dr Sashikannan a/l Arunasalam* [2011] 9 MLJ 153, the plaintiffs were the parents of the deceased child, who was brought unconscious and with high temperature to the clinic (the 3rd defendant). However, the only person available at the clinic was the 1st defendant being a qualified medical doctor undergoing an internship at government hospital and attachment with the 2nd defendant (the person in charge at the clinic). The 1st defendant did not want to treat the child, but the 2nd plaintiff implored him to treat. As a result, the 1st defendant gave an injection of voltaren and advised the plaintiffs to send their child to the hospital. Unfortunately, the child died upon arrival at the hospital. The cause of death was myocarditis due to infection of likely typhoid.

The plaintiffs then sued the defendants for negligence by invoking *res ipsa loquitor*. The court held that for the doctrine of *res ipsa loquitor* to apply, the plaintiffs must meet the three conditions enunciated in *Scott v London*. In this case, the court in dealing with the applicability of *res ipsa loquitor*, held that:

(a) The emergency treatment administered by the 1st defendant was safe and appropriate for treating high fever and it was an accepted medical practice.

(b) The defendant's expert witness testified that the 1st defendant had acted as any reasonable doctor would have done under the same scenario. As such, there was no breach of care on the 1st defendant's part and the plaintiffs had failed to prove that the 1st defendant had not attained the standard of care required in law.

(c) Since the circumstances and the cause of death were peculiarly known, the plaintiffs did not meet the third condition to infer negligence of the defendant. Thus, the doctrine of *res ipsa loquitor* does not apply.

In *Shalini Kanagaratnam v Pusat Perubatan University Malaya & Anor* [2016] 6 CLJ 225, the Court of Appeal held that in most cases, the maxim of *res ipsa loquitor* will not apply as the plaintiff is required to discharge legal burden by adducing evidence, i.e. expert evidence to prove that the standard of care has been breached. The defendant only has to justify that he did not breach the legal duty after plaintiff discharged his legal burden.

Commentary

Looking at the trend of the cases attempting to invoke the doctrine of *res ipsa loquitor* in medical negligence cases in Malaysia, it is observed that the courts are indeed reluctant to invoke the said doctrine.

As expressed in *Shalini*, the plaintiff must discharge the legal burden to prove that there is a breach of standard of care before the defendant is to rebut the plaintiff's allegation of breach. Similar approach had been adopted in *Ang Yew Meng*, where the court declined to invoke *res ipsa loquitor* as the plaintiffs failed to prove that the medical practitioner breached the standard of care required under the law.

Unlike accident cases, approach taken by the court for medical negligence cases is the correct approach as demonstrated in the cases cited above, where the plaintiff has a burden to prove that the medical practitioner has breached the required standard of care before invoking *res ipsa loquitor*, to safeguard the well-established tests concerning 'standard of care' and to avoid floodgates to be

opened to the medical negligence claims to rely on *res ipsa loquitor* without having to prove the breach by the defendant.

Lastly, an important note for the patients or any litigation representative of deceased is that the doctrine of *res ipsa loquitor* must be pleaded in pleadings before one can rely on it. Otherwise, the court may refuse to invoke the said doctrine as parties are bounded by the pleadings. In the event one does not plea the doctrine of *res ipsa loquitor*, amendment to the pleadings can be made with leave or without leave of court, which is fact dependant.

Authored by Clarence Hng Ying Hui, an associate with the firm's Dispute Resolution practice.

Contact Persons:

Datuk D P Naban
Senior Partner
+603 6209 5405
naban@rdslawpartners.com

Nagarajah Muttiah
Partner
+603 6209 5400
naga@rdslawpartners.com

Nur Syafinaz Vani
Partner
+603 6209 5422
syafinaz@rdslawpartners.com

Rosli Dahlan
Partner
+603 6209 5420
rosli@rdslawpartners.com

R Rishi
Partner
+603 6209 5400
rishi@rdslawpartners.com

Kenny Lam Kian Yip
Senior Associate
+603 6209 5400
kenny@rdslawpartners.com

Shaun Tan Cheng Hong
Senior Associate
+603 6209 5400
shaun@rdslawpartners.com

About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

REIMAGINING LEGAL SOLUTIONS