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Preventing negligence suits against doctors

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IN response to the increasing number of malpractice suits and staggering amounts of damages awarded, doctors in the West, in particular the United States, are protecting themselves by resorting to defensive medicine out of fear that they may be subject to litigation.

"The doctor eliminates all possibilities so that nobody can say with hindsight 'oh you should have done this or you should have done that'.

"One simple way of explaining the concept of defensive medicine is by way of an equation. Litigation + Worried Doctor = Defensive Medicine," says Medico-Legal Society Malaysia president S. Radhakrishnan.

The advocate and solicitor says there are basically two aspects to defensive medicine: positive and negative.

Positive defensive medicine involves undertaking additional procedures, such as diagnostic tests and X-rays, which in the doctor's professional judgment are unnecessary.

Negative defensive medicine involves avoiding procedures which in the doctor's professional judgment are necessary in the patient's best interests because of the risk of something going wrong.

So, positive defensive medicine is wasteful in terms of time and resources and possibly increases the risk to patients of medical intervention while negative defensive medicine deprives patients of potentially beneficial treatment.

A survey conducted by the American Medical Association in 1984 found that 40 per cent of doctors involved in the survey had ordered additional tests and 27 per cent ordered additional procedures in response to the fear of malpractice claims.

In 1993, the New England Journal of Medicine carried a report which stated that defensive medicine was practised by 84 per cent of US physicians. In the very same year, the American Medical Association estimated that defensive medicine was costing the US approximately US\$25 billion (RM95 billion) a year!

And the irony is defensive medicine which has proven to be so costly has not been effective in protecting doctors from malpractice suits. After all, the number of medical negligence claims and size of awards continue to rise in the West despite the fact that defensive medicine is being practised on a big scale?

In Britain, awards of STG1 million (RM6.1 million) or more for medical negligence are now commonplace. In April 1990, Nicholas Almond was awarded STG1,156,348 for cerebral palsy sustained through medical negligence at his birth in 1980.

On Dec 22, 1990, Hugo Cassel was awarded STG1,198,110 for medical negligence having been born severely disabled due to perinatal hypoxia in September 1982.

The situation is, of course, much worse in the US and it has driven insurance premiums for doctors through the roof. The average insurance premium for an obstetrician in Florida was from US\$11,000 in 1983 to US\$38,000 in 1989. In 1993, it was US\$203,000 - an increase of 1,745 per cent in only 10 years!

But is defensive medicine being practised in Malaysia? This is a very difficult question to answer as no study has ever been done on the practice of defensive medicine in the country.

Universiti Kebangsaan Malaysia lecturer Anisah Che Ngah says she tried

to speak to doctors and nurses about the issue while carrying out a survey for her thesis on informed consent but they were generally very evasive in their answers.

In any case, says Anisah, it is not always easy to determine whether a doctor is practising defensive medicine when he orders extra tests and procedures to be done because one doctor's defensive medicine could well be another doctor's good practice.

She also says that sometimes these extra tests, procedures or referrals may end up benefiting patients because they may help doctors arrive at a more accurate diagnosis.

Radhakrishnan, on his part, feels that we have to acknowledge the existence of defensive medicine in the country but it is certainly not the norm.

Medical Protection Society chief executive John Youngman who was interviewed over the telephone from London, likewise, says he does not think that defensive medicine is an issue yet in Malaysia because the society has not encountered any such cases.

"I can't recall any case we have handled where defensive medicine has occurred," he says.

Malaysian Medical Association president Dr P. Krishnan, meanwhile, says defensive medicine is not being practised in Malaysia but adds that it will happen if Malaysians become more litigious.

So, are Malaysians getting more litigious as far as medical negligence claims are concerned? That, too, is a difficult question to answer as there are no reliable statistics.

However, it is possible to get a rough idea of the number of cases that are brought to court every year.

According to one report based on a survey conducted from 1986 to 1990, there were 61 negligence cases filed against the Government, averaging 12 cases a year. About 20 claims were filed in 1991 and 16 in 1992 (source: Malaysian Doctor February 1994 issue).

However, government doctors only make up 45 per cent of the 12,000 doctors in the country.

Doctors in the private sector belong to one of two medical indemnity organisations - Malaysian Medical Indemnity, a local professional indemnity insurance scheme initiated by the Malaysian Medical Association and the London-based Medical Protection Society.

MMI, which was introduced in 1994, has a membership of 725 and has two or three new malpractice cases a year.

The Medical Protection Society, which has a membership of 2,500, has an average of 50 new cases a year.

However, it should also be noted that a good proportion of doctors are not covered by any form of medical indemnity.

MPS head of claims Naomi Selvadurai says there has not been an increase in the number of claims involving Malaysian MPS members but the value of claims has definitely been going up. "It's not just an inflationary rise. Patients' expectations are more. People are more knowledgeable now and they have access to better legal advice."

She said the highest amount of damages awarded so far for a medical negligence claim involving an MPS member is just under RM1 million for a case that is being appealed.

However, it's probably fair to say that the quantum of awards in Malaysia for personal injury claims are in the main fair and reasonable.

Radhakrishnan says this is partly due to the position made by the Government. The provisions for damages (except for pain and suffering and loss of amenities) for a living plaintiff and for the dependants of the deceased are essentially regulated by the Civil Law Act 1956.

The Government introduced changes to this Act by enacting the Civil Law (Amendment) Act 1984 in September, 1984 and which came into force on Oct 1, 1984.

At the time, Prime Minister Datuk Seri Dr Mahathir Mohamad was quoted as saying that the changes were necessary to prevent Malaysia from becoming a litigious society like some Western countries. In the long run, he said, it was society and not the insurance companies which would have to foot the cost of bigger court awards.

However, there is concern that Malaysian society could become more litigious in the near future because there is greater awareness among the people of the rights of patients and greater expectations for compensation.

"The patient is mindful of the fact that if he is dissatisfied with the treatment by the doctor he could seek legal redress. There is also the growing tendency to be compensation-minded. Gone are the days when you hear a patient say 'I leave it to you doctor, you are the expert', or 'I put myself in your hands'," says Radhakrishnan.

He says many of the negligence claims are brought to court because of misunderstanding between doctors and patients and their families.

He says lot of the unnecessary suits could be prevented if doctors made more effort to explain to patients and their families when things went wrong.

"When breakdown in communication occurs, problems arise. It's one of the main factors that gives rise to litigation.

"There is an obligation on the part of the doctor to inform the patient and his family fully about what had happened at the earliest instance.

"There is a need to put everything on the table. To explain to them that there was nothing the doctor could do, that it was just unfortunate it happened. It is up to the patient or the family whether they want to accept it or not.

"But sometimes doctor may not bother to explain to the patient and the family what went wrong because he is too busy or he feels that there is a language problem or that they won't understand because of their educational level. The patient or family may think that the doctor is hiding something.

"Often legal proceedings are initiated when the patients or their families are not fully apprised of the facts. Then the full story only comes out at the trial."

Radhakrishnan also complains that the media is making things worse by sensationalising medical negligence claims and ruining the reputation of doctors long before their cases are ever brought to court.

"It is common now to see the publication in advance of the contents of the pleadings of the aggrieved patient in newspapers. It would give a very biased picture of the circumstances leading to the unfortunate outcome and it would not be fair to the medical practitioner.

"The allegations in the statement of claim are sometimes published in newspapers even before the writ/statement of claim is served on the doctor.

"The Press sometimes does not ask the doctor for his side of the story before publishing the allegations. There could well be a satisfactory explanation for the adverse outcome."

This is, of course, most unfortunate as only in a minority of cases are doctors found guilty of medical negligence. Out of every 100 medical negligence claims that MPS receives, Naomi says, 70 fall through at one point or another.

Of the 30 that remain, 27 are settled out of court and only three are brought to court. So, two out of three medical negligence claims actually

have no basis whatsoever but the bad publicity has already damaged the doctor's reputation irreparably.

So, what is to be done? Radhakrishnan says an independent panel of respected doctors who specialise in various aspects of medicine, dentists and members of the Bar Council should be set up so that patients or families who have a complaint could be referred to this panel.

"They can get an expert opinion on whether a doctor has done something wrong or been negligent. A lot of doubts and misgivings could be alleviated.

"The panel might come to the conclusion that there was nothing wrong. But if the panel is not entirely satisfied with the treatment, then the patients and their families will have to decide whether to proceed further."

Dr Krishnan says MMA is now looking into the proposal by the Medico-Legal Society and Bar Council to set up the panel of experts to help prevent unnecessary claims from being filed against doctors.

He is also urging all registered medical practitioners to take up medical indemnity cover to protect themselves and their patients. He says only 5,784 of MMA's 8,337 members are covered.

It is difficult to understand why these doctors do not insure themselves as the insurance premiums are quite affordable.

In the case of the Malaysian Medical Indemnity, premiums range from a low of RM650 for an insured sum of RM500,000 for general medical practitioners to a high of RM3,200 for an insured sum of RM2 million for high-risk specialists involved in areas such as obstetrics and gynaecology, orthopaedic surgery, plastic and reconstructive surgery, neurosurgery and oral and maxillo facial surgery.

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