



Medical Negligence from Syariah and Legal Perspectives

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The Qualities of Muslim Doctors

- *The doctor should be of tender disposition and wise in nature. He cannot be of tender disposition if he fails to recognize the nobility of human soul nor can he be of wise nature unless he is acquainted with logic and strengthened by Allah's aid. Further, if he is not of wise nature, he will not arrive at a correct understanding of any ailment.*
- Source: Nizami Arudi, *Chahar Maqala*, translated by Browne, E.G. in E.J.W. Gibb Memorial Series, London: Luzac & Co., 1921, Vol. XI, at p. 76.

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Introduction

- The profession of medical doctors is among the professions that offer tremendous benefit to the entirety of humanity.
- In Surah al Maidah: 32, Allah clearly praised such duty :
"And if any one saved a life, it would be as if he saved the life of the whole people".
- Doctor must have the required skills and knowledge. Islam expects the highest standard of care.
- The general rule is that a doctor, or a medical professional, must exercise care according to the standards of reasonable competent medical men of his age.

Responsibility of Medical Profession

- Doctors are fully responsible for any act committed while carrying out their duties.
- They must be cautious in performing all their duties, so that they do not inflict harm on other parties. The Prophet Muhammad said: "Harm is neither inflicted nor tolerated". Sunan Ibn Majah
- Allah says to the effect: Nor kill or destroy yourselves: for verily Allah has been to you Most Merciful! If any do that in rancour and injustice, soon shall we cast them into the fire (4: 30-31).

Fuqaha's View

- He who does [the work of a] medical doctor and does not know his medical profession is liable to pay compensation for willful treatments (Ibnu Qayyim).
- "A doctor is liable to pay compensation if he is negligent". (Imam Shafii)
- (Imam Al-Nawawi): A surgeon who bleeds a patient or apply leeches to him does not incur any responsibility, even though the sick man succumbs, provided that the operator does not overstep the limits imposed by science in operations of that nature.

The Requirements for Medical Treatment

- (1) Rida al-marid (the consent of the sick person): medical contract (al aqd al-tibby).
- (2) Izn al-Hakim (permissible by the authority): Qualification must conform to the regulations set by the authority of the particular country in which he practices.
- (3) Necessity to follow a code of practice: Code of practice prescribed by the country in which he is practising.

Doctor's Civil Liability

- Ibn Qayyim, a doctor's liability may or may not arise:
- (a) An unqualified doctor who causes injury to his patient will be liable. However, if the patient knows, and wilfully agrees, then the doctor will not be liable.
- (b) A qualified doctor who performs his duties correctly, and does not contravene with the Shariah principle, will not be liable.
- (c) A qualified doctor who performs his duties on a person without his consent, or his guardian's, will be liable for negligence.
- (d) A qualified doctor who mistakenly causes injury to uninjured parts of the patient's body will be liable for his mistake.
- (e) A qualified doctor who develops new treatments which, subsequently, causes injury or death to the patient will be liable. If the government endorses the treatments, then they will be liable to the patient.

Conditions necessary to establish doctor's liability

- (1) al-Taaddi (Breach of duty). Two types of breach, a direct breach (taaddi ijabi), and an indirect breach (taaddi salbi).
- (2) al-Darar (Damage/Injury): The wrongful act must cause injury to the patient, whether physical injury (darar hissi), or moral injury (darar ma'nawi).
- (3) al-Ifdhai (Relationship): al-Mubasharah (Direct Relationship) and al-Tasabbub (Indirect Relationship).

Methods of proving a doctor's liability

- (Surah al-Naml: 64) Allah says: "... Bring forth your argument if you are telling the truth.
- (a) al-Iqrar (Admission)
- (b) al-Shahadah (Witness)
- (c) Ra'yu al-Khabir (Opinions of specialists)
- (d) al-Kitabah (Written documents)

Medical Law in Malaysia

- The tort system is used to regulate medical negligence litigation in Malaysia. This system provides for compensation only when a doctor or any other medical personnel assisting in the treatment of a patient is negligent.
- Previously, in determining whether a doctor was negligent in diagnosis, treatment and advice, the court had shown a deferential attitude towards medical judgment.
- This deferential attitude which is encapsulated in the phrase “a doctor knows best” is slowly dissipating.

Doctor Knows Best

- *Bolam v Friern Hospital (1957)*
- During this period, the general view was that the doctor knows best and even judges should not question the doctor's opinions.
- The test of determining negligence in *Bolam's* case was not to state doctors could not be negligent, but if the doctor had followed one of the responsible divergent opinions, he could not be faulted.
- Judges were not at liberty to question the validity or appropriateness of the opinion followed. In other words, the negligence of a medical practice should be determined by fellow medical practitioners, not judges.
- As long as the practice of a doctor is supported by a body of medical opinion, it is not the business of the court to question the appropriateness of that body of opinion.

A Patient Can Decide for Himself

- *Rogers v Whitaker*. Rather than allowing medical opinion to prevail even on patients' decision making, the court is willing to re-examine the appropriateness of the standard adopted by doctors.
- There was no allegation of negligent in the performance of the surgery itself. What was in question was the failure of the surgeon to inform her of the danger of sympathetic ophthalmia in her other eye. The Court found the surgeon to be negligent in failing to inform her of the said risk, despite the incessant inquiries of the patient on any side-effects of the surgery over her "good" eye.

Judges Also Can Think

- *Bolitho v City and Hackney Health Authority* (1997): A judge could pierce through the medical opinions and determine the reasoning of such opinions. Although in most cases, “distinguished experts in the field are of a particular opinion and will demonstrate the reasoning of that opinion.” However, similar to standard of care for other professions, the court now has the ultimate responsibility to determine the reasoning of such standard.

New Millennium Approach

- *Foo Fio Na v Dr. Soo Fook Mun* (2007): Judges could disagree with medical opinions.
- The court found that the doctor was negligent in failing to inform the patient of the risk.
- The Court viewed the *Bolam's* approach as being “over protective and deferential” to the medical profession. It is the court that determines reasoning of doctors’ conduct, and not the profession.

Conclusion

- Muslim doctors must perceive themselves as being commissioned by Allah to reflect Islamic values in pursuit of their vocations.
- As medical treatment is important to protect human life, medical practitioners should execute their duties with the greatest care and skill for the best interest of their patients.

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