

**Medical Malpractice: Preliminary Matters for  
Intending Claimants to Consider**

**Introduction**

1 An intending claimant in medical malpractice would usually be confronted by the following matters early on:-

- access to lawyers
- access to litigation funding
- access to medical records
- access to experts
- limitation periods for claims
- the need to prove fault
- quantum.

**Access to Lawyers**

2 The specialised field of medical malpractice remains very much a small area of legal practice. Often enough, intending claimants still find it difficult to find a lawyer who is willing and able to undertake such work.

**Access to Litigation Funding**

3 Access to litigation funding remains a serious problem for the victims of medical accidents who are thinking of suing.

4 Legal aid has hardly ever been given in medical malpractice.

5 Contingency fee (meaning “no-win, no-fee”) agreements are illegal.

- 6 Intending claimants must, at the least, be ready to pay to their lawyers the expenses that would be incurred at the initial and subsequent stages.
- 7 A lawyer cannot properly finance litigation for a client.
- 8 A lawyer may properly delay charging fees in the hope that a client's financial circumstances would improve.
- 9 If a claimant succeeds in a claim, whether by judgment or settlement, the claimant's lawyer, upon receipt of the judgment or settlement sum, may lawfully deduct from the sum his or her solicitor and client costs, after having given notice to the client of the intention to do so.
- 10 A client who fails in a claim would still owe costs to his or her lawyer.
- 11 It is proper for a lawyer to fix the solicitor and client costs according to such factors as the value of the claim; the standing of the lawyer; the benefit arising from his or her services; the absence of such a benefit; etc.

### **Access to Medical Records**

- 12 Following changes in the law, it has become much easier nowadays for intending claimants to obtain copies of the medical records concerned before suing for malpractice.
- 13 Early disclosure would help an intending claimant to obtain expert opinion and advice before deciding whether or not to sue. Such

disclosure may be made voluntarily or by order of the court. Some costs would be incurred in the process by the intending claimant.

### **Access to Medical Experts**

- 14 Much of medical malpractice litigation requires the services of medical experts.
- 15 Nowadays it has become easier, but it is still not easy enough, for intending claimants to find suitable medical experts.
- 16 Experts must be given a complete enough set of copies of the medical records and reports; and the cause papers, if available. An expert must be given proper instructions, including regarding the factual and legal issues involved. Sometimes a medical examination of the patient too would be necessary.
- 17 Experts must be paid their reasonable fees, including for their reports and for attending court.

### **Limitation Periods**

- 18 The law does not recognise stale claims.
- 19 The law of limitation in Malaysia is quite complex, with a number of statutes and relevant decided cases to be considered when computing the period within which a claim must be brought to court.
- 20 In some situations, the limitation period can be as low as three years. In another case, limitation may never set in during the life of the victim of the medical accident concerned. For example, in the case of a victim

who suffers from permanent and insufficient mental capacity, time will not run during the life of the victim. In the case of a minor, the commencement of the limitation period will be postponed until that person attains the age of majority, which is eighteen years.

### **Fault, Not Need**

21 No matter how great the needs of a victim of a medical accident, in order to succeed in a claim based on the accident, the victim has to prove that the accident was caused or materially contributed to by fault on the part of the defendant.

### **Liability and Quantum**

22 In recent years, there have been legislative developments and case-law developed by the courts which have led to better chances in pursuing medical malpractice claims and also rising quantum. As a result it has become more cost-effective to sue for medical malpractice.

### **Costs**

23 If a claim is successful, party and party costs would usually be awarded to the claimant in addition to the compensation awarded by the court. Such costs can include a large part of the expenses incurred before judgment, e.g. the costs of obtaining copies of medical records and reports; the costs of obtaining from the court grant of representation of a deceased person's estate; and experts' fees.

24 If a claim fails, the plaintiff can be ordered by the court to pay costs to the defendant.

25 As a matter of principle, the party and party costs awarded by the court to a party would not be sufficient to pay the solicitor and client costs that a lawyer should be paid. A litigant must not profit from litigation by receiving money as costs from another party but paying only a smaller sum to his or her own lawyer.

### **Conclusion**

26 Clearly, claimants find it easier nowadays to proceed with medical malpractice claims because of there now being slightly better access to lawyers; much better access to medical records; and somewhat better access to experts, and also because of some changes in the law. However, much more would need to be done before a claim may be taken to court and is successfully prosecuted.

27 This note is intended to be a brief one, touching on some important preliminary points to be kept in mind when deciding whether or not to sue for medical malpractice. More detailed material will be included in later postings.

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