

MEDIATION RESOLVING MEDICAL NEGLIGENCE LITIGATION

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ABSTRACT

This project paper is a social-legal research study on the rights of people to initiate medical negligence claims in Malaysia. Currently, medical negligence litigation in Malaysia is regulated by the tort system in which the fault-based system is used. However, due to certain deficiencies which caused the fault-based system to become harsher since it demands a lot of money, time and obligation on the part of the victim to commence a claim, the system is now considered as inefficient to be used as a method to resolve medical negligence disputes. Hence, the most likely possible solution to overcome the harshness and difficulties that medical negligence victims have to go through to initiate a claim is by using alternative dispute resolution (ADR).

This research paper shall cover mediation as a solution to medical negligence litigation since due to the loopholes in the current litigation system, many medical negligence victims fail to even bring their claim to the court because they fail to fulfill the requirements demanded by the fault-based system and because of the rigidity of the litigation system, many fail to seek the justice that they deserve. The flexibility and the fact that it consumes less time and money compared to litigation make mediation a mechanism that most people favor in solving medical negligence dispute. A comparative study with Australia and United Kingdom is done to show the need to change our ways to claim for medical negligence which is by resorting to mediation, instead of litigating it at the court. With the recent enforcement of the Mediation Act, it will be easier for victims in Malaysia to initiate a claim for medical negligence which is by choosing mediation since there will be some form of regulations that can be referred to.

Thus, through this basic research paper, the victim of medical negligence may gain awareness of their rights to claim and seek remedy by way of mediation.

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CHAPTER ONE: INTRODUCTION

1.0 Introduction

A Study on how Mediation can resolve Medical Negligence Litigation.

1.1 Research Backgrounds

The focus of this study is on the matters relating to the system adopted in Malaysia to regulate the disputes of medical negligence¹ and the loopholes in the system. Standards and regulations for medical negligence may vary by countries and jurisdiction within countries.² Currently the solution available for victims of medical negligence to seek compensation is by going to the court room, which is medical litigation. The system adopted to regulate medical negligence litigation by the government is the fault-based system.

The harshness of the fault-based system is one of the loopholes that can be found in medical negligence litigation nowadays. Due to the difficulties of the system, many potential litigants were deterred from pursuing their claim.³ The fault-based system is too harsh to the victim of medical negligence since the element of fault required to be proven is just too demanding. It must be noted that

¹ Medical negligence is a situation that happens when the treatment provided by the medical professionals fails to adhere to the accepted standard of care practiced in the medical fraternity which causes injury or death to the patient with most cases involving medical blunder.

² According to Malaysian Medical Association (MMA), some of the duties that doctors owe to patients and their own profession are to always ensure that patients are their first priority, be held accountable for any form of treatment given to patients, respect the rights of patients to be included in decisions about their health problem, to recognize the limits of their professional competence and to where a patient claims misconduct by another doctor, confirm that the patient is fully notify about the appropriate procedure to take to lodge a complaint. Malaysian Medical Association, "Code of Medical Ethics," adopted at the 41st Annual General Meeting on 26-27th May 2001, <http://www.bhanot.net/MMA/EthicsCode.pdf> (accessed April 20, 2012).

³ Dr. Puteri Namie Bt Jahn Kassim, "Medical Negligence Litigation in Malaysia: Whether Should We Travel," (2004), at pg 2.