



Conduct Matters, Dear Healthcare Providers

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Where the body detects a threatening stimulus (e.g. a stressful situation), it is natural to adopt a defensive response. This is captured in Darwin's observation of the phylogenetic continuity of emotional behaviours.¹ Hence, an accused party to a dispute naturally adopts a defensive mind set. After all, litigation is often equated to war. But does that mean "*all is fair in love and war*"? The answer is simply, no.

Unlike other civil claims, medical negligence disputes are often more than just about obtaining monetary compensation. The plaintiff being either the patient or the patient's representative is usually also seeking to hold the "wrongdoer" responsible and obtain justification for the events that had transpired. As medical negligence cases are determined on questions of fact centred on complex expert evidence, before commencing a claim, the plaintiff needs to:

- (a) seek out specialists in the particular field to obtain expert reports; and
- (b) obtain medical records from the facility at which the patient was treated.

Due to these preliminary hurdles, the plaintiff will require a substantial time to prepare. To make matters worse for the aggrieved patient, dilatory tactics are sometimes employed by the defendant(s) before and during litigation.

On the opposite spectrum is the defendant(s), i.e. medical practitioners (who risk having their career destroyed) and/or medical institutions (which risk reputational damage). To defend themselves, the defendant(s) may subconsciously or consciously adopt an antagonistic attitude in the course of the dispute out of fear of any adverse effect on the case against them. Notwithstanding this, however, it is important that defendant(s) in a medical negligence litigation comprehend that a court may order aggravated damages against them where the patient's injury has been exacerbated by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong.

For example, in a much-publicised case in 2018,² the court awarded the plaintiff RM500,000 in aggravated damages (in addition to RM140,000 in general damages and approximately RM96,000 in special damages). The hefty quantum for aggravated damages was because the court found the conduct of the defendants to be "*despicable*", "*insulting*" and "*appalling*":

- (a) attempting to place the blame on the deceased patient and her family members by making a late entry in the medical records;
- (b) the second defendant's words and conduct during his meeting with the deceased patient's family members following the patient's death;

¹ Charles Darwin, *The Expression of the Emotions in Man and Animals* (The University of Chicago Press; 1872/1965)

² *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of Puan Suzanna Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331 (HC)



- (c) defendants' attempt to misuse the Bolam test by getting two in-house experts to conclude that there was no negligence.

So what exactly are aggravated damages?

To quote the Malaysian Court of Appeal, aggravated damages are a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.³ In other words, the objective of aggravated damages is to compensate the victim of a wrong for mental distress or injury to feelings in circumstances in which that injury has been exacerbated by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong.⁴ Many have debated (especially in medical negligence cases) that compensation for psychiatric harm, mental distress or injury to feelings should be taken into account by the court as part of the general damages awarded and should not instead be characterised as aggravated damages.⁵ Such arguments, however, have been disapproved by:

- (a) H McGregor, who remarked:

*"The classification of damages given for injured feelings as compensatory and the classification of aggravated damages as compensatory does not mean that one is not independent of the other and that the one should be subsumed within the other. If the scale or the horror of the assault increases the injury to the claimant's feelings, the damage is aggravated, and hence the damages are aggravated, and the courts have recognised this in their awards."*⁶

- (b) The English Court of Appeal:

*"I am unable to accept that the mere fact that the basic award includes an element to compensate for psychiatric harm necessarily precludes an award of aggravated damages. It is now generally recognised that an award of aggravated damages is essentially compensatory in nature, notwithstanding the fact that it may have a punitive effect by increasing the overall amount the defendant is ordered to pay... However, the distinction between basic and aggravated damages will continue to have a part to play as long as the right to recover for intangible consequences such as humiliation, injury to pride and dignity as well as for the hurt caused by the spiteful, malicious, insulting or arrogant conduct of the defendant attaches to some causes of action and not others".*⁷

In Malaysia, the courts have taken the position that in appropriate cases, substantial damages may be awarded for any indignity, discomfort or inconvenience suffered. This is cemented by the Federal Court's decision to affirm the High Court's decision to award the patient an unprecedented sum of RM1 million as aggravated damages, less than three years ago.⁸ This goes to show that the conduct of the healthcare providers (medical institutions, doctors, nurses etc.) before and during litigation may have a profound effect on the outcome of the claim.

³ *Sambaga Valli a/p Pnnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784 (CA)

⁴ The Law Commission, 'Item 2 of the Sixth Programme of Law Reform: Damages'

⁵ Michael Jones, *Medical Negligence* (Sweet & Maxwell, 4th Ed, 2008), para 12-011;
Richardson v Howie [2004] EWCA Civ 1127

⁶ H McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) (and its Second Supplement (2011))

⁷ *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773

⁸ *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281 (FC)