Medical Negligence Dispute in Malaysia: Choosing Mediation as the Best Constructive Approach to Address the Paradoxes in Medical Negligence Claims

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Abstract

In professional negligence the most challenging and arduous is medical negligence, which consists of various claims. Medical negligence will usually involve doctors and other medical practitioners. In medical negligence the claimant is allowed to bring a personal injury claim to a court which has the jurisdiction under adversarial system. However it is evident from reported cases that medical negligence claims were mostly unsuccessful. The reason lies on the notion of the burden of proof, which cast a heavy burden on the plaintiff according to the fault system. In medical negligence claims, plaintiffs will more often than not, find it very difficult to discharge their burden of proof. In most countries, professional negligence claims are recommended to be dealt with by way of mediation under Alternative Dispute resolution (ADR). Mediation is believed to be easier than litigation and is less complicated. Malaysia is among those countries which has enhanced significantly the utility of ADR. This paper will endeavour to address the problems in proving medical negligence cases by using one of the strongest tools of ADR which is mediation.

Keywords: Medical Negligence Claims, Adversarial System, Burden of proof, ADR, Mediation, Malaysia

1. Introduction.

Medical negligence denotes the wrongdoings committed by doctor or medical practitioner such as in misleading treatment cases, diagnosis and in failure to perform and deliver the obligations with care and prudent advice. [1] As consequences, medical negligence can occur and cause injury and further bring damage to the patient and third party. Tort Law has been selected to intersect medical negligence disputes

[1] Ali Mohammad Matta, 'Medical Negligence: New Issues and Their Resolution' [2000] 3 MLJ clxxxiv

because of its 'unique feature' and it also help the claimant to gain the financial reward. [1] Hence, comes under the domain of "Adversarial System".

Medical negligence cases are dealt according to the civil law in Malaysia and which means that the plaintiff or claimant[2] should provide sufficient evidence to shoulder the burden of proof and adequate balance of probabilities[3] based on the law of evidence[4]. Evidence Act 1950 (Act 56) is the substantive law, which deal with such nature of cases. In medical negligence for a successful claim patient or the claimant has to deal with the substantive and procedure law very well. Hence, for the substantive purposes the Claimant has to deal with both the Evidence Act and the law of Tort[5] and should address in well-defined manner. However, for the purposes for the procedural law the claimant has to file a suit according to the Rule of Court 2012. [6]

This adversely system has been adopted by many societies as it believe to be the best system to resolve the cases. Furthermore, the said laws i. e (substantive and procedural) give adequate opportunities to both the parties to establish their cases. [7] As Adversely system is consists of a legal system hence, claimed to be the right method of solving the disputes of medical negligence. [8] However, these declarations on behalf of adversely system are very hard to accept. The Author will endeavour in the paper and argue that the "Mediation" is the only systematic and effective system to resolve the medical negligence cases.

2. The Challenge of Adversely System for Medical Negligence Claim.

In cases like Medical negligence it is very hard to fulfil the formalities prescribed in Law of Tort (current fault system). Adversely system requires a lot of procedures to be followed and a lot of evidences to be produced to be able to satisfy the court.

For the sake of arguments in medical negligence cases it's the claimant in most cases it is a patient has to shoulder the burden of proof and that is to provide the evidence of medical report treated wrongly and evidence from a medical expert. Now it's quite difficult for a claimant and a patient to produce such evidences, how could he ask a

[1] Ibid.

[2] Please refer Illustration under section 102 'On whom burden of proof lies' of Evidence Act 1950 (Act 56)

[3] According to the case of Ratna Ammal & Anor v Tan Chow Soo [1967] 1 MLJ 296 on the Balance of Probabilities is defined as: "When one speaks of a court having to be satisfied on a balance of probability one means that the higher degree of probability favours the conclusion since, if the probabilities were equally balanced, the court would not have been satisfied on a balance of probability."

[4] Sin Yoong Ming B Econs, 'Tilting the Scales of Balance for Dismissal' [1994] 3 MLJ cxxi

[5] Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (First published 2003, Revised 2008,International Law Book Services, 2008) 149

[6] The main statute for procedural in civil claims including medical negligence claims is Rules of court 2012.

[7] Strengths of The Adversary System, (Sdemirova Global- Australia, 2009), <http://sdemirova.global2.vic.edu.au/2009/08/26/strengths-and-weaknesses-of-the-adversary-system/> Accessed 12 January 2016

[8] Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' (*Mazirow Real Estate Dispute Resolution,* 2008)
< https://sites.google.com/a/mazirow.com/mazirow-com/articles> Accessed 12 January 2016
This paper was presented by the author to The Counsellors of Real Estate on 13 April 2008 at Chicago, Illinois.

doctor to write a report for him against the other doctor mentioning his negligence in medical treatment?[1] Moreover, its quite obvious that the judge who is taking the cognizance of such cases must have an adequate knowledge of dealing the cases of medical negligence, which is quite rare. Not every judge is expert in knowing the medical terminologies and its treatment hence rely only on the medical reports, medical expert opinions and the evidences provided by the medical staff. [2]

In this scenario it's evident to say that the medical negligence trial in the adversely system may last for years and make the case more complicated than ever. [3] For instance we have a couple of cases which are evident to this fact that the medical negligence trials need longer period than usual to be finally decided. In one of the case Dr. Chin Yoon Hiap v Ng Eu Khoon & ors[4] which took 16 years to solve, while started 21 years ago before its final judgement. The other case Dr. Soo Fook Mun v Foo Fio Na & anor[5] which took almost 24 years to finally reach to the end of the case. [6] While, perusing the cases relating to medical negligence astonishingly some interesting data has been collected which, revealed that in Malaysia medical negligence cases needs approximately 15 to 20 years[7] to be finally resolved. There are other difficulties faced by the injured parties and the significant one is finances. It has been observed that many patients, who are eligible for the medicine negligence, refuse to claim because of the financial crunches[8]. In adversely system medical negligence claim appear to be one of the expensive suit[9].

Apart from that there are other factors which are involved in adversely system to make it sabotage and another important one is the dissatisfaction of the parties, in one of the report Lord Woolf which published in 1996 disclosed that the adversely system in dealing with medical negligence cases though satisfies the law but not the parties. [10] This system consists of many loop holes and it takes quite long time than usual to filling the gap. It is evident from the book Essentials *of Medical Law*[11], in which author reveals that the Tort law which is being practised nowadays has failed to satisfy the dispute parties in cases relating to medical negligence. He further claimed

[1] Puteri Nemie Jahn Kassim and Khadijah Mohd Najid, 'Medical Negligence Dispute in Malaysia' [2013] International Journal of Social, Human Science and Engineering vol:7 no:6

[2] Strengths of The Adversary System, (Sdemirova Global- Australia, 2009) <http://sdemirova.global2.vic.edu.au/2009/08/26/strengths-and-weaknesses-of-the-adversary-system/> Accessed 12 January 2015

[3] Puteri Nemie Jahn Kassim, 'Mediating Medical negligence Claims in Malaysia: An Option for Reform' [2008] 4 MLJ cix

[4] [1998] 1 MLJ 57

[5] [2007] 1 MLJ 593

[6] Puteri Nemie Jahn Kassim, 'Mediating Medical negligence Claims in Malaysia: An Option for Reform' [2008] 4 MLJ cix

[7] Ibid.

[8] Update: International Report – No-fault Compensation in New Zealand: Harmonizing Injury Compensation, Provider Accountability, and Patient Safety by Marie Bismark and Ron Paterson [2006] Health Affair Volume 25. Number 1, January/February 2006

[9] Puteri Nemie Jahn Kassim, *Medical Negligence Law in Malaysia* (First published 2003, Reprinted 2007, revised 2008, International Law Book services, Kuala Lumpur, 2008) page 149.

[10] Section IV Special Areas Chapter 15 Medical Negligence (Access to Justice - Final Report Lord Wolf 1996) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec4a.htm#c15> accessed 17 March 2016

[11] Khee Quan Yeo, *Essentials of Medical Law*, (Singapore: Sweet & Maxwell Asia, 2004) page 355.

that in medical negligence cases which, involve a lot of procedural formalities, and if lacking any one of them will result in the discharge of the claim. [1] The inaccessibility of the Tort Law, which results in great difficulty put many potential litigants in jeopardy (who suffered from medical negligence) to purse their claim. [2]

3. The difficulties of Burden of Proof in Medical Negligence Claim.

As it has been described above that the Law of Tort in adversarial system set up specific legal requirements in order to establish the medical negligence claim. The most important one is the notion of the "burden of proof" on the "balance of probabilities". Law of Tort expect from the claimant to prove the breach of duty and causation. It is evident from the fact that to prove such negligence by a claimant if not impossible very hard in medical negligence than comparing to other personal injury cases. [3]

Standard Duty of Care and Breach of Duty.

Before proceeding further with the matter it is quite important to discuss the issue of "Breach of Duty" which is the essence to prove the negligence exists under the Tort Law. According to the said law it is the plaintiff or claimant who must prove the breach of duty before the court. To prove the breach of duty it is crucial to determine the "standard of care" applied by the defendant in performing the obligation whether the defendant act accordingly with the standard or not. If the duty performed by the medical practitioners bellow the standard duty of care, then his this conduct amount to the breach of duty.

What is the standard of care the law expect from medical practitioner? To determine the standard of care it is essential to first determine the "standard" and then declared the authority who will determine that standard. i. e whether by "the court" or by the 'the standard according to the professional body'.

The standard of care can be understood generally as the legal standards that require by law for defendant to meet in perform the duty. The landmark case that lay down the principle of the standard of care is Bolam v. Friern Hospital Management Committee[4] also known as *Bolam Test* whereby the McNair J recognised the medical board to determine the standard duty of care associated to the professional skill by the medical practitioners. Based on the principle lay down by the McNair J it can be concluded that the Bolam test means first; that the standard by which the court measure is not by way of applying the court or (reasonable man test) but by the standards of a reasonable professional of similar calling, hence there is consistency

[1] Interviewed was conducted between High Court Judge of Malaysian Court (Kuala Lumpur), the Honourable Tuan Vazeer Alam bin Mydin Meera on 8th September 2014.
[2] Puteri Nemi Jahn Kassim, Medical Negligence Litigation In Malaysia: Whither Should We Travel?, [2004] The Journal of the Malaysian Bar XXXIII No 1
[3] Section IV Special Areas Chapter 15 Medical Negligence (Access to Justice - Final Report Lord Wolf 1996) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec4a.htm#c15> accessed 17 March 2016
[4] [1957] 2 All ER 118

and no lower standard of care, for example for inexperience, and secondly; under this test, there is no finding of negligence if the defendant conforms to and complies with the available practices of members of the similar calling. [1]

Hence, under Bolam Test if a person is not amount to negligence and breach of duty and if the action taken according to the practice accepted by the "responsible professional board" even though the duty of care is lower than the standard. In consequences, the standard of care set up by the medical body seem favour on the interest of medical practitioners, therefore the claimant or the injured party having heavy burden to prove the damages suffered by the patients due to the negligence.

The Bolam principle has been overruled in one of the case Roger v Whitaker[2], in which the court determines the "standard duty of care" by declaring that the court and not the "medical body" responsible to determine the "Standard of Care" However, the court will consider the opinion of the medical body as part of the evidence. The development of the medical standard in Roger v Whitaker also influenced the medical negligence cases in Malaysia in established the standard of care. Kamalam v Eastern Plantation Agency[3], the court held that:

The standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. That standard of care is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade. The ultimate question is whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community. [4]

The legal issue of standard duty of care in medical negligence case can be determine easily from of the leading case mentioned above in Malaysia, which asserted that the medical body (partially or fully) cannot be authorized to determine any "standard of care" and it is discretion with the court to make the standard of care for the Medical practitioner. Therefore, the court first need to determine the standard of care according to the law and then see whether the doctor's action is according to the standard or not before making him responsible of any breach of duty.

Although the standard duty of care set up by the medical body shifted to the court as the principle lay down on the Roger v Whitaker case, however in Malaysia, there are cases that adopted the Bolam test is Chin Keow v Government of Malaysia[5], Chin Yoon

[1] K Kuldeep Singh, The Standard Of Care In Medical Negligence Cases In Malaysia — Is There A Diminution Of Judicial Supervision By Adopting The 'Bolam Test'?, Malayan Law Journal Articles, [2002] 3 MLJ xci
[2] [1992] 109 A.L.R
[3] [1996] 4 MLJ 674
[4] see pp 688F-G, 689A; Rogers v Whitaker (1992) 175 CLR 479 followed; Bolam v Friern Hospital Management Committee [1957] 2 All ER 118 and Elizabeth Choo v Government of Malaysia & Anor [1970] 2 MLJ 171 distinguished
[5] [1967] 2 MLJ 45

Hiap v Ng Eu Khoon[1], Hong Chuan Lay v Eddie Soo Fook Mun[2], Liew Sin Kiong v Sharon Paulraj[3], Inderjeet Singh v Mazlan bin Jasman[4], Mariah bte Mohamad v Abdullah bin Daud[5], Kow Nan Seng v Nagamah[6], Elizabeth Choo v Government of Malaysia[7] and Swamy v Mathews[8]. [9] Although, there are cases follows the Roger v Whitaker case and rejected Bolam principle, for example in case titled Kamalan v Eastern Plantation Agency[10] however Malaysian's court, still preferred to use both the principles in determine the authority which make the Standard of care.

It can be concluded by viewing the above mentioned arguments and the principle laid down in both cases that no matter if the standard of care is made by the court or by any medical authority it will be very difficult for the claimant to shoulder the burden of proof.

Causation

It is very important to mention here that after proving breach of duty it is essential for establishing the negligence the next step is to prove the Causation for the claim of damages. The "causation" can be define as 'actual' cause of the damages. In the other words, the causation must be established in order to prove the damages have occurred. In order to establish the causation under the tort law, there is the test known as 'But For' Test which based on the question that does the harm suffered by the plaintiff would be less if the defendant takes a reasonable action and behaved properly? The answer in affirmative can make the defendant liable for the damages. According to Giesen*".. establishing a causal connection between medical negligence and the damages alleged is often the most difficult task for a plaintiff in medical malpractice litigation.. "*. [11] However causation will be much complicated and difficult to identify if there is more than one possible cause that amount to the medical negligence.

The plaintiff has to prove that because of the action taken by the defendant cause the injury to the patients or third party. However the most crucial questions raise here "what is the legal requirement to establish the causation in medical negligence cases?" There are two stages developed by courts to determine whether plaintiff has proven

[1] [1998] 1 MLJ 57
[2] [1998] 7 MLJ 481
[3] [1996[5 MLJ 193
[4] [1995] 2 MLJ 646
[5] [1990] 1 MLJ 240
[6] [1982] 1 MLJ 128
[7] [1970] 2 MLJ 171
[8] [1967] 1 MLJ 142
[9] Gopal Sri Ram J, Court of Appeal of Malaysia (2002), The Standard Of Care: Is The Bolam Principle Still The Law?, Malayan Law Journal Articles, [2000] 3 MLJ lxxxi
[10] [1996] 4 MLJ 674
[11] Giesen, D., *International Medical Malpractice Law* (Landon: Sweet & Maxwell, 1988)

the causation which is the *question of factual causation* (causation applies the "*but for test"*) and the second stages is the *question of legal causation* (causation in law). [1]

In Chappel v Hart[2], the judge makes the most interesting question which is *'What would or would not have happened if Dr Chappel had provided her with adequate information as to the risks involved?'* If Dr Chapel did inform to Mrs Hart about the risk does this will change Mrs Hart decision to undergo the surgery?[3] Before answering the question, the most crucial task to the plaintiff is to prove that the defendant in the first place failed to give such information what is the risk involved. The plaintiff needs to establish the case by identify the significant and most relevant information that should be informed and for ordinary people is beyond the capability to determine such information before the occurred events. The patients most likely will depend on medical practitioners to disclose the detail of treatment including the risk. Then the question can be established whether such risks disclose will give any effect to Mrs Hart decision. If Mrs Hart can prove that she might change the decision to undergo the surgery if the risk been provided to her therefore the failure to provide the information about the risk by Dr Chapel can amount to the causation Mrs Hart suffered the injury due to the risk involved. This case however applied the principle in the case of Roger v Whitaker[4] and exercised the concept of patient autonomy. [5]

The trial judge in the case of Chester v. Afshar[6] found that the defendant not liable for the negligence that applied the decision in Chappel v Hart, which the plaintiff failed to prove the causation however in the appeal the judge allowed the appeal on the ground that the claimant had established the causation. In this case the court stated that, it is a compulsory for a plaintiff to prove the causation. In addition according to the court the material risk can affect the decision to avoid or minimise the risk of injury. In other words the disclosure of the material risk may change the decision of the claimant to undergo the surgery. Because of the non-disclosure the material risk also cause the loss change to pursue other options for the treatment because of the non-disclosure material risk by the respondent. In proving the causation according to this case may now be less of challenge[7] compared to the previous principle of law applied in causation. It is because the general concept of causation is the injury for instance cause by the action taken by the medical practitioners towards patient. However in this case, although the injury will occur because there is the material risk and is nothing to do with the standard duty of care and breach of duty (during the surgery

[1] Puteri Nemi Jahn Kassim, *Medical Negligence Law in Malaysia* (first published 2003, revised 2008, International Law Book Services 2008) 88
[2] [1998] 156 ALR 517
[3] Puteri Nemie Jahn Kassim (1999), Medical Negligence: Causation and Disclosure of Risks in The Light of The Decision of Chappel V Hart, [1999] 4 MLJ ccii Malayan Law Journal.
[4] [1992] 109 A.L.R
[5] Ibid
[6] [2005] 1 AC 134
[7] Puteri Nemie Jahn Kassim, 'Chester v. Afshar: Loosening The Grip On Proving Causation For Lack Of Informed Consent' [2004] 5 CLJ i

and treatment) but the important legal issue is the disclosure of material risk that cause the injury that maybe can be avoided.

In the landmark Malaysia case Dr Chin Yoon Hiap v. Ng Eu Khoon & Ors & Other Appeals[1], whereby according to the judge, the principle of the causation is not depend on the fact that there are breach of the duty by defendant and the injury suffer by the plaintiff is the presumption of the causation which is the breach of duty cause the injury. The most important in order to prove the causation by the plaintiff in the claim is the causal link between the defendant negligence and the plaintiff injury.

In the case of Lechemanavasagar S. Karuppiah v. Dr. Thomas Yau Pak Chenk & Anor[2], the judge in the case Rohana Yusuf J follows the decision held by Malik Ahmad JCA in Dr Chin Yoon Hiap's case[3] which is finding the causation for this case which is the causal link and the burden to prove the causation remain to plaintiff. The court then went on to find that there was no evidence of causal link between giving of the tablets or the Milo and the infection suffered by the plaintiff. Therefore the plaintiff failed to prove the causation in the claim.

Apparently, in this case it is important for plaintiff to succeed in the claim to prove the causation in which way of giving evidence in the causal link between the injury and the action taken by the medical practitioners. The breach of duty and the injury itself doesn't amount to the causation. Hence, the burden on plaintiff to prove the causation that require by the law is not an easy process, which is lot more complicated although the standard of care and breach of duty by the defendant is proven.

In most cases a simple application of the 'but for' test will resolve the question of causation in tort law. For example the 'but for' the defendant's actions is would the claimant have suffered the loss? If yes, the defendant is not liable. If no, the defendant is liable. But for Test is a doctrine which states that causation exists only when the result would not have occurred without the accused party's conduct. In the landmark cases Barnett v Chelsea and Kensington Hospital Management Committee[4], The issue for this case is whether the death caused by the negligence of the doctor who failed to attend and examine Mr. Barnett. According to Nield J in this case,

".. that the plaintiff, Mrs. Bessie Irene Barnett, has failed to establish, on the balance of probabilities, that the death of the deceased, William Patrick Barnett, resulted from the negligence of the defendants, the Chelsea and Kensington Hospital Management Committee, my view being that had all care been taken, still the deceased must have died.. "

From the above mentioned case we conceived that it is not easy to prove the case while applying this doctrine in making the causation in negligence cases especially

[1] [1998] 1 CLJ
[2] [2008] 3 CLJ 76
[3] [1998] 1 CLJ
[4] [1969] 1 QB 428

when the patient already suffer from the illness or injured or maybe the patients is old. Failure to prove causation will affect the claim for medical negligence. It evidently that the "But for Test" is not the best test to use to prove the causation because the plaintiff must prove that but for the negligence of the defendant the plaintiff has suffered the injury and damages.

The difficulties of proving the burden of proof which is breach of duty and causation eventually lead to the disadvantages of the adversarial system in resolve the dispute. In mediation process, address all negotiation issues raised by the parties and are not limited to legal cause of action and also the burden to proof. Contrary in mediation, the parties voluntarily agreed to attend mediation are those who fully understood the purpose to resolve the dispute and achieve mutually understanding not to "convict" any party or the action to prove the other part commit any misconduct.

4. The Use of Mediation for Medical Negligence Claim.

Among all of the methods of ADR, mediation has captured the attention of a significant number of scholars as it has been touted as the most reliable and effective method in resolving medical negligence cases. In Malaysia the application of mediation has also been introduced in 2010 by Federal Court in the Practice Direction No. 5 of 2010 Practice Direction on Mediation, however, there are no specific provision in the practice direction for medical negligence but the practice direction is applicable for medical dispute under *4. 1 (a) Claims for personal injuries and other damages due to road accidents or any other tortious acts because they are basically monetary claims*.

Determination of the challenging and complicated legal issues which is burden of proof by proving the breach of duty in adversarial system however differ in ADR whereas ADR process is not rely on laws whereby in mediation process are not reliable on the substantive law which are complicated and difficult to comply. [1] Therefore, there is no specific legal requirement to be proved in mediation process in order to resolve the dispute.

On the other hand, the main objective of this method is to provide a forum or environment where the dispute parties may discuss in peaceful manner to achieve mutual agreement. [2] There are five reasons why mediation works which are: it is economical, fast, in most instances the parties perceive it to be fair, it minimises risk for the parties whether the risk is financial, cultural or any other sort of risk and the whole process and the outcome is confidential unless the parties otherwise agree. [3]

Medical negligence claim in court decided by the court based on the satisfaction of fulfilling the law's requirement for medical negligence (substantive and procedural

[1] Interviewed was conducted between High Court Judge of Malaysian Court (Kuala Lumpur), the Honourable Tuan Vazeer Alam bin Mydin Meera on 8th September 2014.
[2] R.J Veerapan, 'The role of Mediation in Clinical Negligence Disputes' Issues in *Medical Law & Ethics* page 3.
[3] Campbell Bridge (Senior Counsel Maurice Byers Chambers Australia), Mediation Of Personal Injury Litigation- Why It Works [2011], 2nd ama Conference Rediscovering Mediation In The 21st Century (24-25 February 2011)

law), meanwhile in mediation "empowers" parties in that disputing parties understand the process and control the outcome[1]. Furthermore, in fault system, the roles of judge to determine the question of law, however, contrary in mediation, the role of mediator to achieve a good communication among parties, to help the parties understanding the needs, value and emotion each party, to help the parties to have a good relationship and to encourage the parties to have various option of settlement in order to achieve a mutual understand[2]. According to the court in the case of Alvin Mylock v Champion International and Sedgewick Claims Management[3] is "*the main task of facilitative mediator is therefore to clarify and to enhance communication between the parties in order to help them decide on mutually agreeable settlement*". Contrary in medical claim under adversarial system in court, the relationship between doctors-patients can be affected because in order to establish the burden of prove for the case, the parties have to fight against each other.

Although the main objective of medical negligence claims in adversarial system to resolve monetary damages, however other personal issue that unable to be settle via adversarial system that arise among the claimant is personal issue[4] such as the 'story' behind of negligence occur and seeking for apology from the defendant. On the other hand, this personal issue raise by the claimant are able to be resolve via mediation. [5]

Medical negligence claims in fault-based system under adversarial system have the limitation period, whereby, the claimant shall bring the case not more than limitation period as stated in limitation acts. According to Limitation Act 1953 (act 254), any tort claim must be brought to the court not more than 6 years from the cause of action accrued, however for the case brought by the third party on behalf of the deceased, the limitation period are 3 years. Furthermore, for any medical negligence claim against government including government doctor or government hospital the imitation period is 2 years under Government Proceeding Act 1956 (Act 359), the limitation period is 2 years only. As consequences, failed to comply with limitation acts, the court has the discretion according to the law to reject and dismiss the case. Hence, the claimant or injured party will loss the chance to seek for justice and obtain the compensation. Contrary with mediation process, no limitation period applicable, therefore, the claimant or injured party may bring the dispute at any time although under limitation periods acts, the dispute is exceed the limitation period.

Based on the advantages and massive contribution of mediation, it has been proven that mediation is the best alternative to resolve medical negligence claim that that

[1] Chief Judge of Malaysia Arifin Zakaria (2010), Responsibility of Judge under Practice Direction No. 5 of 2010. Keynote speech at Seminar on Mediation with Judge John Clifford Wallace on 1 October 2010
[2] Justice Mah Weng Kwai, 'Mediation Practice: The Malaysian Experience' [2012] 5 MLJ clxvi
[3] [2005] 906 So 2d 363 (Florida, District Court of Appeal)
[4] Puteri Nemie Jahn Kassim, 'Mediating Medical Negligence Claims in Malaysia: An Option for Reform' [2008] 4 MLJ cix
[5] Ibid.

capable to overcome the challenge and difficulties of fault based system under adversarial system.

Conclusion

According to Tun Salleh Abbas FJ in his judgement at the Federal Court in the case of Kow Nan Seng v. Nagamah & Ors[1], has come out with compelling commentary in regards to medical negligence law,*"The law on medical negligence is clear enough but its application is often difficult as facts and circumstances are not the same in each case and so must vary from case to case. For the purpose of this judgment it is necessary to state, even if briefly, the law on the subject so as to guide us in determining on the facts of this case. "*

Based on the commentary above, although there is clear medical law but the establishment and the use of medical negligence law is the hardest part. As discussed above the requirement to fulfil the case in the balance of probabilities requires the establishment of burden of proof that consist 2 major legal burdens which are breach of duty and causation is so high and complicated. Lack of evidence in provided the proofs will jeopardise the case and the plaintiff might lose the case. Although, there is suggestion to shift the burden on defendant[2] but it hard to enforce such theory since the plaintiff is the party that "accuse" the defendant and the party who started the case therefore is reasonable for the plaintiff to have the burden of proof. Furthermore, the development in determination of standard of care and breach of duty is no longer upon the medical body but decided by court, this does not mean that less legal burden of proof the case before court. For instance, the claimant still needs to bring the medical expert to prove the case. As consequences, the success rate for medical negligence claim is lower in comparing with other personal injury claim. [3] Therefore, the need to have another alternative method to resolve medical negligence dispute and overcome the weakness exist in current fault based system is crucial.

Mediation a very power full tool of alternative dispute resolution appeared to be the most sophisticated, effective and friendly in resolving the dispute between the parties around the world and even in the Malaysia. The impact of this tool in sorting out the dispute is remarkable, less expensive, less time consuming and very friendly. The author has mentioned some very serious problems in adversely system in solving the claims about medical negligence. However, mediation has proved to be the system with flexible principles and efficient outcome. This is the need of the time, to recognize this system and encourage it in various cases to solve out the dispute specially the cases which are sensitive in nature and which cannot be crumbled under the legal formalities of the law.

[1] [1982] 1 MLJ 128

[2] S Radhakrishnan , Medical Negligence, Malayan Law Journal Articles, [2002] 4 MLJ v

[3] Section IV Special Areas Chapter 15 Medical Negligence (Access to Justice - Final Report Lord Wolf 1996) <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/sec4a.htm#c15> accessed 17 March 2016

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[3] Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' (Mazirow Real Estate Dispute Resolution, 2008) < https://sites. google. com/a/mazirow. com/mazirow-com/articles>
[4] Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428
[5] Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118
[6] Campbell Bridge (Senior Counsel Maurice Byers Chambers Australia), Mediation Of Personal Injury Litigation- Why It Works [2011], 2nd AMA Conference Rediscovering Mediation In The 21st Century (24-25 February 2011)
[7] Chappel v Hart [1998] 156 ALR 517
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[10] Chin Keow v Government of Malaysia [1967] 2 MLJ 45
[11] Chin Yoon Hiap v Ng Eu Khoon & ors [1998] 1 MLJ 57
[12] Elizabeth Choo v Government of Malaysia & Anor [1970] 2 MLJ 171
[13] Evidence Act 1950 (Act 56) s 102
[14] Giesen, D., International Medical Malpractice Law, (Landon: Sweet & Maxwell, 1988)
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