

# Medical Negligence Disputes in Malaysia: Resolving through Hazards of Litigation or through Community Responsibilities?

Puteri Nemie Jahn Kassim and Khadijah Mohd Najid

**Abstract**—Medical negligence disputes in Malaysia are mainly resolved through litigation by using the tort system. The tort system, being adversarial in nature has subjected parties to litigation hazards such as delay, excessive costs and uncertainty of outcome. The dissatisfaction of the tort system in compensating medically injured victims has created various alternatives to litigation. Amongst them is the implementation of a no-fault compensation system which would allow compensation to be given without the need of proving fault on the medical personnel. Instead, the community now bears the burden of compensating and at the end, promotes collective responsibility. For Malaysia, introducing a no-fault system would provide a tempting solution and may ultimately, achieve justice for the medical injured victims. Nevertheless, such drastic change requires a great deal of consideration to determine the suitability of the system and whether or not it will eventually cater for the needs of the Malaysian population.

**Keywords**—Medical Disputes, Litigation, Malaysia, No-Fault Compensation.

## I. INTRODUCTION

THE tort system has, for many centuries, remained to be the preferred system of compensation for medical disputes. The main reason being that the tort system has a unique feature of presenting the medically injured victims with a financial incentive to pursue a claim against the person claimed to be responsible. Financial compensation is afforded to the victims of medical disputes so as to put the victims in the original position as though the injury did not occur. However, being adversarial in nature, the tort system has its inherent weaknesses. Compensation is often unpredictable and success may not be due to the merits of the claims. These unpredictable outcomes of tort litigation are the result of several factors surrounding the case such as the availability and dependability of evidences and witnesses, the quality and expertise of legal representation [1], the financing of the litigation [2], the attitude of the judges [2], and many more. O'Connell employs the term "lottery" to describe the unpredictable outcomes of tort litigation and explains how the lottery metaphor works; "Most crucial criteria for payment are

largely controlled by chance: 1) whether one is lucky enough to be injured by someone whose conduct or product can be proved faulty; 2) whether that party's insurance limits or assets are sufficient to promise an award or settlement commensurate with losses and expenses; 3) whether one's own innocence of faulty conduct can be proved; and 4) whether one has the good fortune to retain a lawyer who can exploit all the variables before an impressionable jury, including graphically portraying whatever pain one has suffered." [3]. The problems created by the tort system had triggered much discussion on the merits of the tort system as an efficient and suitable mechanism to compensate for medical injuries.

## II. RESOLVING MEDICAL DISPUTES THROUGH THE TORT SYSTEM

Medical disputes in Malaysia are resolved through the tort system or also known as the fault-based system. The success of a case adjudicated through the tort system depends very much on the respective abilities of the parties to construct a convincing case. In order to achieve this, they have to receive a positive expert medical report, which gives favourable opinions about their case. This is not an easy task for the injured patient who is always at a disadvantage in terms of procuring an accurate picture on the merits of the case due to difficulties in procuring the necessary evidence, which often posed an insurmountable obstacle to the victim who routinely has to face the unwillingness of one doctor to provide evidence, which might impose liability on another colleague. What aptly has been dubbed as "conspiracy of silence" has effectively prevented numerous medical negligence claims from prevailing at trial and deterred others from instituting litigation. The judge in the Supreme Court of California in *Salgo v Leland Stanford Jr. University Board of* [4] commented: "Gradually the courts awoke to the so-called "conspiracy of silence". No matter how lacking in skill or how negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil liability from the wrong he had done, but his professional colleagues would take no steps to insure that the same results would not again occur at his hands." [4]

There is also a fundamental inequity amongst injured patients as their success depends very much on whether they

Puteri Nemie Jahn Kassim is a Professor at Civil Law Department, Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, PO Box 10, 50728, Kuala Lumpur, Malaysia. (Tel: 6019-3309935; Fax: 603-61964854; E-mail: puterinemie@hotmail.com).

Khadijah Najid is a Doctor of Philosophy (PhD) in Law student at the Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia. (E-mail: khadijahnajid@yahoo.com).

are able to attribute fault to a particular identified individual. As establishing fault is the key to a successful negligence action, the tort system leaves many victims uncompensated for their injuries. This is due to the fact that the tort system is shaped to work on an "all or nothing" basis, that only those who are capable of demonstrating medical negligence can gain monetary compensation. The ones that failed to establish as such will walk away empty-handed. *J. Fleming*[5] observed that "the most controversial aspect of the negligence system is that it discriminates between different accident victims not according to their deserts but according to the culpability of the defendant: a claimant's success is dependent on his ability to pin responsibility for his injury on an identifiable agent whose fault he can prove. Put differently, negligence deems as deserving only those who can trace their harm to someone's wrongdoing." [5] Adding to the burden is the fact that the "but for" test employed in medical negligence cases only awards full compensation to plaintiffs who are successful in proving causation. In medical cases, however, it is often more difficult to determine causation as the disease or injury may develop naturally at a later time and without the existence of a negligent conduct. The pathogenesis of many diseases is unknown as are many of the predisposing factors in individuals to such diseases. As Lord Bridge said in *Hotson v East Berkshire Health Authority*[6] that "in some cases, perhaps particularly medical negligence cases, causation may be shrouded in mystery that the court can only measure statistical chances" [6].

Thus, a situation may exist in which there are two individuals with two identical bad results from their medical treatment but who are treated differently in terms of legal remedy. Such result is clearly at odds with common contemporary notions of fairness. The outcome of the litigation causes uncertainty on whether the patient might receive compensation after years of stressful legal action and suffering serious financial damage. This approach can be of considerable benefit to those who can establish the causal connection but will operate to the detriment of those who, for whatever reason, cannot.[7] Inequity will thus, arise when one individual is being denied compensation while another with identical injuries obtained recompense.[8]

### III. THE HAZARDS OF TORT LITIGATION

Litigation through the tort system is costly, cumbersome, prone to delay, capricious in its operation [9] to which *T. Drabsch*[9] alleges that the concept of negligence "is not used to assist the injured but to avoid payments to large numbers of them on grounds of economy" [9]. Administrative costs are high due to the nature of the two principal criteria for compensation, namely, case-by-case determinations of fault and lump sum findings of damages under indeterminate guidelines. The main contributor to the costliness of the tort system is the delay involved in the pursuit of a claim. The situation is made worse with regards to medical negligence claims as these cases take a long time to try. In Malaysia for instance, the entire litigation process for medical negligence

case requires an average of about a minimum period of 15 years, and may take up to 25 years, from date of injury to the conclusion of the case [10].

The high administrative cost of tort litigation is viewed as a major defect in tort as a compensation scheme for medical injuries. Compensation is the end product of tort litigation, and the main purpose of its existence, where it restores the disturbed equilibrium in the theory of corrective justice underlying the tort liability system [11]. Ironically, the main problem with torts is that it hardly compensates, and when it does, it does it unsatisfactorily. The existing levels of compensation are often insufficient to meet the continuing needs of the victim as time passes. This is because for the patient, the cost of trying a medical negligence case and the length of time required have an adverse effect on the amount of compensation received as any damages awarded must be reduced by the high administrative costs incurred in bringing the suit [12]. Therefore, cost inefficiency and the long windy road to compensation are among common discouraging factors in pursuing tort litigation, to the extent that The President of Consumer Association of Penang, *S.M. Idris* [13] alleges that for every case of medical error reported, 10 cases go unreported [13]. *A. Matta* [14] explains the reason why "a significant number of such cases go unreported either because of the out of court settlement, or because the patients accept the incidents as matters of fate, or they are ignorant about their rights, or are too poor to afford litigation particularly when there is no speedy and inexpensive system of administration of justice in medical negligence cases in Malaysia"[14].

Lump sum payment awarded in a tort action is another unsatisfactory factor of tort compensation as the judge must include an estimation of the costs that the plaintiff expects to incur in the future because of the defendant's conduct. The problem occurs because the estimation is usually inaccurate due to unpredictability in predicting future outcome. Consequently, the tort system tends to over-compensate in certain cases, and under-compensate in certain others. For example, over-compensating might happen in cases where future losses turn out to be less than the amount awarded, or when the victims die before the estimated age, and thus the award fails to serve any compensatory purpose, but result in unnecessary windfalls for tort victims or their survivors [11].

The risk of under-compensation occurs in cases where the victim suffers from serious injury which requires continuing medical care, where in such cases the courts are prone to miscalculate the amount of appropriate awards because the victims' recovery often varies and without any specific pattern [11] and the amount of awards might not be enough to cover the recovery expenses. In both situations, lump sum payments are seen as a poor compensation to victims of medical negligence. Lump sum awards may also contribute to the mismanagement, squandering, or dissipation of such awards by either the victim himself, or the relatives in charge of that money [15]. Further, there are no legal controls on the way lump sum damages awards are to be used by the recipients [11].

The threat of litigation also destroys proper relationship between doctor and patient by introducing confrontational element between them. For the patient, having a day in court achieves retributive justice and appeased their vengeance. For the doctor, the threat of litigation compels the doctor to view his patient as a future adversary in a courtroom proceeding [16]. Even if the negligence claim is settled out of court, there is still an effect on the doctors as settlements out of court leave them with no chance of vindicating themselves. At the end of the day, they still feel that there is a cloud hanging over their head. A retired Canadian doctor stated: "I'd rather not talk about it, even though in the end no fault was found. For 7 years it went on, months of sitting in court listening to what a terrible person you are, no one recovers from that. It is on your mind every day, every minute. It changed the whole way I practiced. The empathy I had, that I was known for, just wasn't there anymore. Every patient was a potential law suit"[16].

Furthermore, the hostile approach of tort litigation entails an attack and assault on the credibility of medical doctors, who would in turn respond with aggressive denial, and refusal in admitting mistakes. This would be a loss to the medical field because advancement cannot be done without learning from past mistakes. Further, litigation threats can also cause doctors to deviate from their normal practices by practicing "defensive medicine." Lawton J in *Whitehouse v Jordan* [17] describes "defensive medicine" as "adopting procedures which are not for the benefit of the patients but safeguards against the possibility of the patient making a claim of negligence"[17]. Such a practice can either be positive and negative. Positive in way that it encourages supplemental care, such as additional testing or treatment, or replaced care, such as referral to other physicians; and negative in a way that it caused reduced care, including refusal to treat particular patients. However, while some regard supplemental care as "positive" so as to reduce the risk of mistakes, it may serve more harm than benefits. Each additional procedure, no matter how cautiously performed, would carry with it a fresh possibility of error. For example, "CT and M.R.I. scans can lead to false positives and unnecessary operations, which carry the risk of complications like infections and bleeding, and the more medications patients are prescribed with, the more likely they are to accidentally overdose or suffer an allergic reaction"[18]. Supplemental care is also regarded as a waste of time and resources, which may lead to the increased healthcare cost, thereby, limiting access to healthcare. Ultimately, practices of "defensive medicine" may be an unhealthy trend which would eventually lead to a distorted goal of medicine.

The adversarial nature of the tort system tends to deny the giving of adequate explanations and apologies when things go wrong. Litigation often starts because the patient cannot get the information he is seeking, explanation or apology from the appropriate persons. Not all patients want to obtain financial compensation, some merely want to ensure that there is no repetition of the mishap that had occurred and to receive an apology for what had happened. According to *Action for*

*Victims of Medical Accidents (AVMA)* [19]. "What they want is 'satisfaction'...what that means is a full explanation of what went wrong and if appropriate, an apology for what actually happened.... there are times when financial compensation is also necessary and that will form part of the 'satisfaction' that the patient wants"[19].

The problems inherent in the tort system have encouraged the birth of alternative compensation schemes such as the no-fault compensation schemes. Even if the amount of compensation offered are lower than litigation awards, it will spare the medically injured the intense emotional experience of a court trial. Subsequently, it serves the compensation objectives better by affording the money of which the victim needs to embark on the road to physical and financial well-being.

#### IV. MEDICAL NEGLIGENCE CLAIMS IN MALAYSIA: THE RECENT TRENDS

Undeniably, medico-legal complaints, potentially medico legal cases and cases filed in Malaysian courts are showing an increasing trend. According to the *Malaysian Ministry of Health Annual Report 2010*, the amount of compensation paid for court cases has risen from MYR1,224,990.00 in 2006 to MYR5,652,242.91 in 2010 [20]. Payment for potential medico-legal cases and settled out of court has also risen from MYR25,000.00 in 2006 to MYR906,365.21 in 2010. This means that the total of compensation paid from 2006 to 2010 was MYR12,919,083.12, with a noticeable increase in the amount of payment made in 2009 from MYR2,848,914.00 to MYR 6,558,608.12 in 2010 [20].

In a period of 5 years from 2005 to 2009, 113 negligence cases involving government healthcare providers, mainly doctors, have been settled in and out of court, of which Obstetrics and Gynaecology (O&G) accounted for 42 of them, or 37 per cent.[20] During that period of 5 years, a total of MYR6,664,248.00 has been paid out as compensation through court orders and *ex gratia*, making it approximately MYR58,000 average per case. Recently in 2011, the High Court in Johor awarded a total of MYR870,000 to a couple as compensation for the irreversible injury suffered by their son, which resulted from negligence handling of his delivery process [21].

Five to six-figure court awards are now becoming the trend for medical negligence cases, and with the notion of binding precedent that our legal system adheres to, it is unlikely that the number would go down in the future. While some victims undeniably deserved large awards, these escalating numbers do not indicate a healthy trend for the country nor doctors nor the society at large. *Medico Legal Society of Malaysia (MLSM)* president, *Datuk Dr NKS Tharmaseelan*, [22] in an interview shared the opinion that doctors have gone bankrupt from paying up large awards, while some – even if found innocent of negligence – have given up their practice due to the stress, suffered reputation and social standing, and pressures of being in the spotlight during the course of the court case [22]. Large awards would also lead to a reduction in

the amount of money available for patient care, where large award can distort the amount government or private hospitals can use to enhance healthcare.

#### V. INCREASING SUBSCRIPTION RATES FOR MEDICAL MALPRACTICE INSURANCE PREMIUMS

Frequency of medical malpractice suits and the amount of awards against doctors can lead to sharp increases in the cost of doctor's liability insurance. According to the *Medical Defence Malaysia (MDM)*, subscription rates for medical malpractice insurance premiums have been on the rise annually, varying by specialties, levels of risk and the history of past litigation within those specialties. On top of the list is Obstetrics & Gynaecology (O&G) where insurance premiums for specialists in this area had increased sharply from MYR15,300 in 2004 to MYR43,610 in 2009, rising averagely between MYR5,000 to MYR6,000 annually.[23] To date, Malaysian Obstetricians have to pay MYR62,000 to protect themselves from the threat of litigation,[23] and the numbers are expected to rise in the future. Insurance premiums for specialists in neurosurgery, spinal surgery and plastic surgery are also on the rise averagely from MYR3,000 to MYR4,000 annually, from MYR10,000 in 2004 to MYR27,150 in 2009, and MYR39,500 in 2013.[23] Premiums for orthopaedics had risen from MYR10,000 in 2004 to MYR21,120 in 2009, and MYR39,500 in 2013,[23] averaging from MYR2,000 to MYR3,000 annually.

Consequently, the burden rendered against a few doctors who committed such negligence is borne equally by all doctors having the same insurance coverage,[11] adding burden to practicing doctors in that specialty. This phenomena had eventually caused many doctors to drop out of the field leading to recruitment crisis.[24] Some also chose not to pay, thus, practicing without indemnity insurance cover. *NKS Tharmaseelan*, the *Malaysian Medical Association (MMA)*, estimated that around 20-30% of their members are not covered by indemnity programmes, while *Medical Defence Malaysia (MDM)* board member, *Dr. Milton Lum* estimated that around 40% of doctors in private hospitals are uninsured.[22] Uninsured practitioner would not only cause financial hardship to the doctor should anything go wrong, but also to his potential victims of medical negligence suit. As such, the coming of the new Medical (Amendment) Act 2012[25] make it legally compulsory for all doctors to "produce evidence of professional indemnity cover"[26] when applying for their annual practicing certificate.[26] Compulsory indemnity insurance for doctors would mean even more possibilities of specialists leaving high-risk areas of practice due to the overly expensive premiums, and discouraging fresh recruitments of the same. *Dr Krishna Kumar*, the president of Obstetrical and Gynaecological Society of Malaysia reveals in an interview[24] that Malaysia is experiencing a drop in number of practicing obstetricians, in fear of litigation. He estimated that we have 700 obstetricians with most of them in the private sector in Malaysia,[24] a comparatively low number if we take into consideration the

number of women anticipating deliveries every day. He further reiterated that if the trend continues, the number will keep on declining.[24]

The problem, however, does not end here. These liability costs are then passed along and returned to be borne by patients as part of the price of medical service.[11] Thus, in the long run, the society is the one eventually paying the price, in the form of raising costs for medical services. The "escalating costs of medical liability insurance to defend lawsuits have usually been the impetus for reform, thereby, triggering legal and administrative changes"[16].

#### VI. EMPHASISING ON COMMUNITY RESPONSIBILITY RATHER THAN INDIVIDUAL RESPONSIBILITY

The issue of providing compensation for medical injuries has been recognized as a social problem, which necessitates community's attention and participation in ensuring fair disbursement of compensation to deserving victims. According to *I. Englard*, [27] "...the physical impairment of the body is conceived to be a matter of collective responsibility. Medical care, rehabilitation, and sustenance are social goals independently of the cause, which necessitates them. Modern welfare society assumes, to various degrees, collective responsibility for the misfortunes affecting a person's bodily integrity." [27] Tort litigation, often justified on *Aristotle's* principle of 'corrective justice', is concerned with personal responsibility and relationship between individuals.[28] The hazards of tort litigation have caused a shift away from a system that is based on individual responsibility towards a no-fault system that is based on collective support. Unlike the tort system, no-fault compensation system is motivated by the principle of 'distributive justice', which highlights the role of society and community's responsibilities [28]. As explained by *E.J. Weinrib*, [29] "distributive and corrective justices are the structures of ordering implicit in two different conceptions of interaction. In corrective justice, the interaction of the parties is immediate; in distributive justice it is mediated through a distributive arrangement, ...which...activates a compensation scheme that shifts resources among members of a pool of contributors and recipients in accordance with a distributive criterion"[29].

The implementation of a no-fault scheme usually involves the introduction of a comprehensive national social welfare or social insurance system in place. Proponents for the adoption of no-fault schemes of compensation assert that the community or part of the community should be responsible for the harms or injuries associated with particular forms of conduct, if there are in the interests of the society. *Lawton L.J.* in *Whitehouse v Jordan* [30] reiterated that "as long as liability... case rests on proof of fault, judges will have to go on making decisions, which they would prefer not to make. The victims of medical mishaps of this kind should ... be cared for by the community, not by the hazards of litigation." [30]. In other words, implementing a no-fault scheme would depict principled social or community response to personal injury

which includes a recognition of “community responsibility; comprehensive entitlement; full rehabilitation; fair and adequate compensation; and administrative efficiency.”[31] Such responsibility is seen as asserting some sense of accountability amongst members of the public including medical profession to collectively be responsible for the mishaps suffered by the community.

#### VII. NO-FAULT COMPENSATION AS AN ALTERNATIVE TO THE TORT SYSTEM

By implementing a no-fault compensation scheme, fault becomes irrelevant, as a social insurance plan provides compensation for all personal injuries arising out of accidents, including medical mishaps, whatever may have been their cause. The community now shares the burden of compensating and this, in a way, promotes collective responsibility. *M. Woodrow*, [32] Scottish Secretary to the British Medical Association stated: “The BMA believes that no-fault compensation offers a less adversarial system of resolving the process for compensating patients for clinical errors. A system of no-fault compensation with maximum financial limits would benefit both doctors and patients, speeding up the process and reducing the legal expenses incurred by the current system. More importantly, however, it would address the blame culture within NHS which discourages doctors from reporting accidents and would end the practice of defensive medicine” [32].

There are various types of no fault compensation schemes, each are designed individually to cater for different reasons. A number of developed countries have implemented workable schemes of no-fault compensation, and demonstrated mature prototypes of the system that are available for study and consideration. New Zealand is the proud pioneer of a comprehensive no-fault scheme since it replaced the tort system after the report of the Woodhouse Commission in 1972 [33]. After going through several modifications over time, scholars are of the view that the scheme seems to work well in the field of medical litigation [33]. This step was followed by Sweden in 1975, Finland in 1987, Norway in 1988, and Denmark in 1992 [34]. Each of these Scandinavian countries’ no-fault schemes closely resembles each other with a number of distinctive elements which reflected national preferences.[34] Some states in the United States had also adopted a narrower version of the same, which provide no-fault compensation for babies with birth-related neurological injuries. This neo-natal no-fault was first introduced in Virginia in 1987 and was followed a year later by Florida in 1988, and demonstrate a workable model of a limited no-fault compensation scheme that does not involve negligence [35]. Japan had recently followed the footsteps of these two states in implementing a birth-related no-fault in 2009 [36]. Many other countries have their own version of a no-fault compensation system in various schemes, particularly in relation to workers’ compensation or motor accidents.

#### VIII.COMMON CHARACTERISTICS OF A NO-FAULT SCHEME

As the name suggests, it involves the abandonment of the requirement to prove fault as in negligence. In other words, this system provides awards to injured patients irrespective of the requirement of proving fault on the part of the medical personnel. Under no-fault principles, anyone who has become injured in a mishap should receive compensation for their injuries irrespective of the cause of their accident. Those who injure themselves through their own fault, those who are injured by the fault of others and those who are injured through no-one’s fault will all be in the same position [37]. Their entitlement will depend solely on the fact that they suffered an injury. However, some cause-based criteria are devised for allocating compensation. A no-fault scheme would thus, compensate a person suffering from a medical mishap without the need for him to proof negligence.

There are also certain eligibility and threshold disability criteria which need to be satisfied in order to receive compensation. The level of compensation payable will depend on the nature of their injuries and amounts provided under a no-fault compensation scheme [37]. Usually, compensations are disbursed to victims once the pre-determined eligibility criteria have been met. These eligibility criteria are usually distinct from one country to another and tailor-made to suit national preference. Awards afforded by no-fault scheme are comparatively lower than tort litigation awards. According to *L. Klar*,[37] “no no-fault system in the world can afford full compensation to all victims and no no-fault systems in the world purports to do so” [37]. The reason being it will be financially prohibitive to offer full compensation to everyone. The more people who are covered in the system would mean the levels of benefits for all victims would be reduced. Under a no-fault system, there may be restrictions on non-pecuniary losses such as pain and suffering and loss of amenities and ceilings are usually imposed loss of earnings and earning capacity.[37] There may also be caps on certain categories of compensation and compensation for non-pecuniary losses such as pain and suffering may not be available [31].

#### IX. ADVANTAGES OF HAVING A NO- FAULT COMPENSATION SYSTEM FOR MEDICAL INJURIES

Adopting a no-fault scheme would overcome problems inherent in the tort system such delays, uncertainty of outcomes and arbitrariness of decision-making. The difficulties in establishing fault and causation and the need for expert evidence would no longer be pertinent. According to a report by the *King’s Fund Institute*, [38] “a no-fault scheme would overcome many of the shortcomings such as the expense and time involved in pursuing a tort claim; the strong element of lottery; the small proportion of injured patients who receive compensation; and the adversarial nature of the legal process.”[38]. Further, a no-fault system would also offer greater access to justice for patients who have suffered medical injury, which includes providing a clearer “road map” towards obtaining suitable redress. *T. Douglas*, [39] stated the

tort system was “expensive to administer, long and arduous process of pressing a case impaired rehabilitation of injured claimants and the susceptibility of the procedure to chance meant that it was difficult to predict the outcome of a particular claim ... but recommendations for reform is an expanded system in which the victims of all injuries would be included within the bounds of the injury compensation scheme in which wisdom, logic and justice require that every citizen who is injured must be included, and equal losses must be given equal treatment”[39]. Nonetheless, this is what the no-fault system seeks to achieve.

On the positive side, a no-fault system would enable victims of medical mishaps to be compensated quickly and at little administrative cost. According to *M. Bismark, and R. Paterson*, [40] “no-fault systems have potential to compensate many more patients than malpractice litigation can, depending on compensation criteria, level of awards and social context and this need not result in greatly increased costs. For instance, the New Zealand system does not incur large legal and administrative costs. The system has been very cost-effective, with administrative costs absorbing only 10% of ACC’S expenditures compared with 50-60% among malpractice systems in other countries”[40]. On the same note, *A. Silversides*,[16] opined that a no-fault system would offer “prompt redress to victims for comparatively cheaper administrative and legal costs of about 5%-30% as compared with 40% - 60% in the tort liability system.”[16] In the long run, a no-fault compensation system would achieve greater efficiency in terms of both time and costs than would be the case in relation to the management of medical negligence claims brought under the tort system.

The arguments for a no-fault system also include the “promotion of better, as well as less defensive, relationships between patients and medical practitioners when medical injury has occurred. Rehabilitation can proceed in a more timely fashion, and not hindered by the long wait until legal action in the courts is resolved. This would certainly ease the pressure and stress on medical practitioners with regard to escalating insurance premiums, the availability of liability and the threat of litigation.”[41] *P. Weiler*,[42] quoted the positive impact on doctor-patient relationship as experienced by Swedish no-fault scheme, as “some doctors will often help their patients secure disability benefits for treatment-related injuries, rather than fight tooth-and-nail against such an outcome.”[42] Similarly, *D.E. Seubert*,[43] demonstrated how the operation of no-fault is able to provide compensation to victims of medical mishaps without having to do it at the doctor’s expense. He observed that “a no-fault system encourages health care professionals to identify the system malfunction and take a proactive approach to fixing it...at the same time, where a patient has suffered harm, the no-fault system must assure appropriate compensation. Such an approach accomplishes two goals: first the patient is compensated for the injury, and, secondly, society’s health care is upgraded and enhanced by fixing an error in the system. Such an error may in fact be a physician with a deficit.

The no-fault process can identify this deficit and allow for physician retraining and rehabilitation” [43].

No-fault schemes are designed with the main objective to reduce administrative cost and delay associated with tort litigation. Thus in no-fault schemes, the function of court in tort litigation would be substituted by a tribunal to decide if the party could recover. In return, claimants have to waive their rights to sue in the courtroom. This would mean that individual doctors would be shielded from liability. [44] Instead, liability would be attributed to the doctor’s affiliated hospital or health organization. At the end of it, an injured person receives a reasonable amount of compensation without incurring litigation costs.

#### X. VIABILITY OF IMPLEMENTING A NO-FAULT COMPENSATION SCHEME FOR MEDICAL INJURIES IN MALAYSIA

Many factors are to be considered in order to adopt a no-fault scheme to our local scenario. Such changes, if to be made, were rather ‘radical’ if we are to take into consideration the differences between countries that have successfully maneuver no-fault schemes and Malaysia in social standing, the size of population, political ideology, and financial commitment. “The main hurdle in implementing a no-fault compensation scheme is funding difficulties. It is difficult to predict the number of cases eligible for compensation per year. Presumably, the number of people seeking no-fault compensation would be greater than the number who can sue for damages or accept settlements as there are less obstacles to encounter in such a scheme compared to recourse to the courts. The sources of funding are critical. For example, to fund its scheme, the New Zealand Accident Compensation Scheme established a social insurance scheme, which is funded through levies of the employers and self-employed persons, motor vehicles and drivers of motor vehicles and general revenues. Thus implementing a no-fault insurance scheme would not be welcomed if it means increasing taxes on a society that are already overburdened with taxes.”[45] Furthermore, the idea that a no-fault may offer *full* compensation to the injured is clearly a myth. The reason is of course an economic one. Since no-fault system compensates all victims, it would simply be financially prohibitive to offer full compensation to everyone. If more people are to be covered under a compensation system, the level of benefits would naturally be reduced.

Among the disadvantages of no-fault as argued by critics is that the funding of such scheme would be more expensive than maintaining the traditional tort system, as no-fault tends to compensate a large number of victims. *D.E. Seubert*, [43] denies such allegation by stating that “while this model did show a slightly increased cost over the malpractice model, the no-fault model was more effective at getting the compensation into the proverbial right hands. Clearly, it is much more beneficial for the patient and for society to have the compensation given mostly to the patient rather than to have a large percentage drift to the plaintiff attorney.”[43] Lack of affordability is another hurdle to overcome in the

implementation of a no-fault compensation scheme, in particular in the context of large national populations. No-fault compensation schemes only work well in terms of providing adequate financial compensation/entitlements for medical injury in the context of a well-funded national social security system within a small population.

To construct a workable no-fault tailored to suit our local scenario is not an easy task, as it depends heavily on what principles and priorities inherent in the society. The Attorney General had on 29 July 2007, proposed a No-Fault Liability Scheme to be made applicable for victims of motor-vehicle injuries.[46] but to no avail. This proposal is made to remedy the increasing number of motor-vehicle accidents and the backlog of such cases at the court which causes delay in obtaining compensation. The proposal was criticized by the Malaysian Bar, fundamentally because there is no in-depth study on the viability and relevance of such a scheme in Malaysia, and neither has there been a detailed structure put forward by the said proposal by the Attorney-General's side.[47] The Malaysian Bar is also concerned about the issue of funding of the said proposal and the issue of accountability if the no-fault system is to replace the current fault-based system.[47] Thus, in constructing a workable no-fault model in Malaysia, a thorough study must be undertaken on the viability and relevance of such scheme to Malaysian situation, as well as addressing the inherent weaknesses of no-fault to demonstrate its relative worth as opposed to the traditional tort system currently in operation.

Nevertheless, among the argued weaknesses of the no-fault scheme to be addressed are;

**Rigid Eligibility Criteria.** An expanded eligibility criteria for cover under a no-fault system facilitates greater access to justice for patients who suffered medical injury than would be the case in relation to clinical negligence claims brought under tort systems. However, many no-fault schemes have a significant rate of rejection due to a failure to satisfy eligibility criteria. To satisfy the eligibility criteria, there is usually the requirement to prove causation. Difficulties in establishing causation may therefore act to prevent greater access to justice under no-fault schemes.

**Low Levels of Compensation.** It is not easy to design a compensation scheme that will afford full compensation to everyone. The reason being it will be financially prohibitive to do so. The more people who are covered in the system would mean the levels of benefits for all victims would be reduced. Under a no-fault system, there may be restrictions on non-pecuniary losses such as pain and suffering and loss of amenities and ceilings are usually imposed loss of earnings and earning capacity.

**Issues in Accountability.** Financial compensation/entitlements are set much lower than would be the case in successful clinical negligence claims brought under delict/tort-based systems; Failure to promote institutional and professional accountability in relation to (preventable/avoidable) medical injury; the scheme provides universal entitlement for victims of accidents who come within the

scope of the scheme. Claims are settled quickly and at little administrative cost. The adversarial features of the tort system are avoided and those injured do not have to meet legal expenses. But the scheme as a whole contains few incentives to improve safety and encourage prevention of accidents. Although the Accident Compensation Corporation (ACC) under the New Zealand scheme has a role in accident prevention, it has no power to monitor standards of medical care. This rests principally with the medical profession who may not be the appropriate body to provide effective disciplinary steps against negligent doctors.

**No guarantee of non-legal remedies.** No-fault schemes do not automatically guarantee that key elements of redress desired by injured patients, such as explanations, apologies and accountability of health professionals, are provided; Further, it has to be noted that for some plaintiffs, compensation would probably not be the answer to their grievances. What they may be looking for would be an account of what actually had happened that led to the injuries and why it happened. After having such knowledge, they would receive greater satisfaction to know that steps would be taken to ensure that such negligent or mistaken act would not happen again in the future. As *Witcomb* [48] highlighted "for many people the cathartic effect of establishing what happened, that the person responsible will be held to account and that such incidents will be prevented from happening in the future, is as important as, if not more so, than obtaining compensation." [48] Such effect would clearly be missing if no-fault compensation scheme were to be implemented.

**Lack of incentives to avoid unsafe practices.** The rationale behind the fault-based systems is that once the tortfeasors are punished, they will modify their behaviour or practice to avoid future harm. However, no-fault compensation takes negligence completely out of the equation. There is no reason to punish the doctor because there is no proof that the doctor had provided services below is standard of care. This would mean that there would be no incentive for doctors to change or improve his practices. In other words, there will be no deterrence for future harm. The removal of the threat of litigation which provides an incentive for health practitioners and health institutions to avoid unsafe practices in relation to medical treatment provided to patients.

**No access to justice.** Restriction of access to the courts in no-fault schemes may potentially infringe human rights law in certain jurisdictions and may also encourage injured patients to seek redress in other ways. Furthermore, the notion of justice in a fault-based system "demands that the doer of an injurious act compensate an innocent person who has suffered as a direct consequence of that act." [48]. It can be seen that sense of responsibility for the effect of one's actions on others and a sense that one does have a duty of care towards one's fellow citizens, is an essential element in a civilized community. A lapse in the discharge of that responsibility is a matter of blame, which means that the person had incurred fault. The American Bar Association committee suggested "the rights of citizens to bring suit for private wrongs,

reinforced by widespread knowledge of that right, provides an important outlet for conflict that otherwise would break into violence” [49]. The law of tort has been a measure of deterrence against general irresponsibility and a positive encouragement to a sense of individual responsibility towards one’s fellows [50]. *Mahoney* [51] aptly said that “...while a system of no-fault compensation is progressive and salutary ideal (for a jurisdiction that can afford to pay the cost), taking the right to sue from personal injury victims who are able to prove fault is unfair and undesirable” [51].

## XI. CONCLUSION

Given the many problems and hurdles posed by the tort system, it is questionable that it can efficiently play its role as a mechanism affording fair and adequate compensation for victims of medical injuries. However, while a comprehensive no-fault offers tempting alternative to the tort system, to import such a scheme to our local scenario requires a great deal of consideration. There are major differences between countries that have successfully maneuver no-fault schemes and Malaysia in terms of social standing, size of population, political ideology, and financial commitment. Nevertheless, implementing a no-fault compensation scheme in Malaysia is not entirely impossible. A custom-made no-fault model tailored to suit our local scenario can be promising, provided that a thorough research is made on assessing the viability of a no-fault scheme in Malaysia, addressing the inherent problems and consequently, designing a workable no-fault scheme in Malaysia. In constructing a satisfactory compensation system, the criteria can be based on the recommendations laid down by *R.E. Keeton*, [52] in suggesting the eight principles for judging the effectiveness of and fairness of a compensation system. According to him, a satisfactory system should be “equitable as between those who receive its benefits and those who bear its costs...” [52] The system should not only “contribute to the protection, enhancement and appropriate allocation of human and economic resources” [52] but also “compensate promptly, be reliable, predictable, distribute losses and be efficient in minimizing waste and cost.”[52] Further, if feasible, the system should “provide deterrence, avoid inducements and minimize risk of exaggeration, fraud and opportunity for profit from such conduct”[52]. However, it has to be noted that how far these principles ought to be built in a compensation system of a society depends on what principles and priorities inherent in the particular society. Many lessons can be learnt from countries that had experienced workable no-fault to come out with recommendations on the best model to be adopted for the Malaysian situation.

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