Medical Negligence: Private Hospitals & Vicarious Liability

In the case of Dr Hari Krishnan & Anor v Megat Noor Ishak Megat Ibrahim & Anor and Another Appeal,¹ the Federal Court held that hospitals owe a non-delegable duty to patients to ensure that reasonable care was taken in the hospital and that hospitals could be liable if the duty is breached, regardless to whom performance of that duty is delegated.

This alert will focus on the appeal filed by the hospital, examining the reasoning behind the Federal Court’s decision and its significance to medical negligence suits brought by patients against private hospitals.

Background Facts

The respondent (Patient) had a giant retinal tear in his right eye and consulted one Dr Hari Krishnan (Dr Hari) at his private clinic. Dr Hari advised the respondent to undergo a retinal detachment operation immediately and performed the operation (First Operation) at the Tun Hussein Onn National Eye Hospital (Hospital). Thereafter, the Patient complained of continuous pain and strong pressure in his eye and upon inspection, Dr Hari informed the Patient of the need and urgency to have a second operation. The Patient initially requested to have a scan to confirm the findings. However, such request was denied by Dr Hari who did not think that a scan was necessary.

The Patient was later admitted to the Hospital on the same day for the operation where he had requested to have the anaesthetic services to be carried out by the same anaesthetist during his First Operation. Again, Dr Hari denied the Patient’s request and assured the Patient that the anaesthetist on duty, one Dr Namazie, was equally competent.

¹ [2018] 3 CLJ 427
After the second operation was carried out, the Patient was told that he regained consciousness during the operation (Second Operation). As a result, the Patient suffered Supra-Choroidal Haemorrhage and subsequently, a total loss of vision in his right eye. The Patient then filed a civil suit against Dr Hari, Dr Namazie and the Hospital.

The High Court's Decision

The High Court allowed the Patient’s claim and held all three defendants liable; Dr Hari and Dr Namazie were negligent in failing to warn the Patient of the risks of bucking and blindness, and in the care and management of the Patient. The High Court too found the Hospital to be vicariously liable for the negligence of Dr Hari and Dr Namazie.

The Court Of Appeal’s Decision

The Court of Appeal affirmed the decision of the High Court and held that:

- Dr Hari had wrongly advised the Patient to undergo the Second Operation, thereby subjected the Patient to unnecessary risks including the instance of bucking which led to blindness in the Patient’s right eye.

- Dr Namazie had failed in his responsibility to keep the Patient anaesthetised completely, relaxed and pain free throughout the operation.

- Relying on the doctrine of non-delegable duties, by which employer of independent contractors is strictly liable for contractors’ negligence, the Hospital was vicariously liable for the actions of Dr Hari and Dr Namazie.

The Legal Issue At The Federal Court

Dr Hari, Dr Namazie and the Hospital appealed to the Federal Court, but this alert will only focus on the legal issue raised in the Hospital’s appeal, that was:

“Whether the doctors are qualified professionals in a private hospital and working
as independent contractors by virtue of a contract between the private hospital and the doctor, can the private hospital be held vicariously liable for sole negligence of the doctors?"

At the outset, the Federal Court held that the doctors were independent contractors and not agents, servants, or employees of the Hospital. As such, the Hospital could not be held vicariously liable for the negligence of the doctors. Nevertheless, the Federal Court found:

- That the Hospital owed the Patient duty in respect of the provision of anaesthetic services.
- That this duty is non-delegable.
- Accordingly, the Hospital was liable for Dr Namazie’s negligence.

Insofar as Dr Hari’s negligence was concerned, the Federal Court in this case found that:

- The Patient was only admitted to the hospital for both the First and Second Operations upon Dr Hari’s advice and referral.
- The role of the Hospital was confined to providing the necessary facilities and services for the Second Operation.
- By taking the sequence of events as a whole, the Hospital had not assumed responsibility to the Patient for the advice and conduct of the Second Operation.

On the other hand, the Federal Court made an express finding that the Hospital is liable for Dr Namazie’s negligence for the following reasons:

- It was the Hospital who requested Dr Namazie to provide anaesthetic for the Second Operation and that he was the only anaesthetist on duty at the Hospital on the day of the operation. The Patient was left with no choice of anaesthetist for the Second Operation. In fact,
the Patient had initially requested to have the anaesthetic services to be carried out by the same anaesthetist during his First Operation.

- The Hospital, being the provider of anaesthetic services through Dr Namazie, had assumed a positive duty to the Patient to ensure that reasonable care was taken in the provision of such services by whomever the Hospital engaged to do so.

- The Patient had no control over how the Hospital chose to provide anaesthetic services for operations conducted therein, whether by delegation to employees or otherwise.

- The Hospital had delegated to Dr Namazie the responsibility to administer doses properly so as to keep the Patient anaesthetised throughout the Second Operation. This is an integral part of the positive duty assumed by the Hospital to the Patient, to ensure that care is taken in the provision of anaesthetic services.

- Dr Namazie was negligent in the performance of the duty delegated by the Hospital to him, in mistiming the top-up dose and thereby causing the Patient to regain consciousness and buck during the Second Operation.

Commentary

The Federal Court’s decision in this case is crucial as this represents the first time a non-delegable duty has been imposed on a private hospital in Malaysia. However, one should be slow to treat this case as having effect erga omnes in the hospital-patient context. This is evident from the painstaking analysis undertaken by the Federal Court on whether the Hospital in this case had assumed responsibility towards the Patient.

In fact, the Federal Court had cautioned that in developing the doctrine of non-delegable duty, it should “proceed with caution, incrementally by analogy with existing categories, and consistently with some underlying principle” and to impose liability “only in so far as it would be fair, just and reasonable”. Besides, the Federal Court had also clarified
the distinction between vicarious liability and non-delegable duty where the former imposes liability on the defendant for the tortfeasor’s breach of duty towards the plaintiffs, based on the relationship of employment between the defendant and the tortfeasor. Meanwhile, the latter imposes personal liability on the defendant for the breach of his own duty towards the plaintiff, based on the relationship between the defendant and the plaintiff, regardless of whom the defendant has engaged to perform the task.

To summarise, a hospital will not be vicariously liable towards the patient for its independent contractor’s negligence. However, if the hospital had assumed responsibility to its patient to ensure that reasonable care is taken in his treatment, then the hospital will be liable for negligence in his treatment, even if it was carried out by an independent contractor – for the duty owed is non-delegable.

Authored by Li Sa Yong, an associate with the firm’s Dispute Resolution practice.