

Mediation as a Suitable Dispute Resolution Method in Medical Negligence Cases: Special Reference to the Malaysian Position

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ABSTRACT

Medical negligence is an act or omission by a medical professional that departs from the accepted medical standard of care. Currently, medical negligence claims fall under the law of tort adversarial system. The objective of this paper is to study the practice of mediation as a dispute resolution for medical negligence cases in Singapore and the United Kingdom and thereafter, make a recommendation of the application of mediation as an alternative to litigation in resolving medical negligence cases in Malaysia. Mediation offers positive benefits, amicable dispute settlements, and speedy process to affected parties. Further, it may overcome the challenges faced by the parties in litigation, such as a lengthy period in pursuing claims. This paper adopted both quantitative and qualitative research methods. The former involves library research and interviews, and the latter is in

the form of survey questionnaires using a structured questionnaire. The results showed that >80% of the respondents agreed that mediation was a suitable dispute resolution method and should be applied in medical negligence. Mediation resolves the dispute and preserves the trust in the doctor-patient relationship. It is hoped that Malaysia will offer mediation as either a separate dispute resolution method for medical negligence cases or mediation to be offered under the current court-annexed system with a

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modification whereby the parties may opt for mediation at any time upon registration of the case without the need to wait for pretrial case management stage.

Keywords: Dispute resolution, litigation, mediation, medical negligence, Malaysia

INTRODUCTION

In the law of tort, negligence is one of the most important areas which covers and protects various interests of human life. Medical negligence is one of them which is focused specifically on medical healthcare provision. The case of *Berger v. Becker* (2000) defines medical negligence as an omission or an act done by doctors negligently during the meeting with a patient where they fail to observe the procedures in medical practice and cause injuries or death to the patient. There can be many ways where a doctor may be said to have omitted certain act such as not following the procedures, giving patients wrong advice, prescribing the wrong medication, deterioration of patient's condition right after surgery, and others as in the case of *Bolam v. Friern Hospital Management Committee* (1957). Over the years, medical negligence cases have increased tremendously in Malaysia, and they keep increasing whether it is reported or non-reported cases. Chin (2013) in her article discussing a quick solution to medical disputes shared that the claims for various cases related to medical negligence and medical ethics were increasing each year despite campaigns and talks organised

by the Medical Healthcare of Malaysia (KKM). She further shared in her article that the Medical Defence Malaysia (MDM) reported the claims could be up to RM5.4 million per case excluding interest which was awarded up by a local court in the year 2011. In the year 2014-2015, about 3,526 medical negligence cases occurred and reported to the Patient Safety Unit of the Health Ministry (Lum, 2017).

As for the years post-2015, there is no comprehensive and systematic collection of data and statistic on medical negligence cases in Malaysia but other sources such as the news media, academic researchers, and government annual reports prompt the government policymakers and relevant agencies to take appropriate action on the escalation of medical negligence cases in Malaysia. It is found that the top five (5) incidents that resulted in damage to the patient's health are: medication error, the adverse outcome of clinical procedure, dislodgement of the catheter, and injury to the neonate (Patient Safety Council of Malaysia, 2018).

The law of tort offers an adversarial system which refers to litigation in making claims for medical negligence. However, there are many challenges faced by the affected parties and the lawyers while undergoing litigation procedure, such as; length of time to come into the final judgement, the abstraction of medical reports from the hospital or medical authorities, getting a suitable expert witness, the relationship doctor-patient will be affected, the cost of the litigation fee is

expensive (Kassim & Najid, 2013). Another challenge faced by the affected parties in almost all countries is to get cooperation from the health institution. In many cases, doctors do not want to participate either because they are busy or they do not want to face the patient or have the insurers settle the issue (Amirthalingam, 2017).

Further, under the tort system, the compensation and damages in medical negligence cases itself is a challenge to the affected person. The victim must prove to the court that the medical practitioner is negligent. Later the court will pass judgment on the compensation available for the victim. If the victim cannot get a witness because there is no cooperation from the doctor or healthcare, he will not get anything. It either he gets everything or gets nothing under the adversarial system (Kassim & Nijad, 2013).

In Malaysia, the civil cases registered with the court must go for a compulsory mediation session that is handled by the court as provided by the Rules of Court 2012. However, the parties need to first initiate a case. Hence, it is time for Malaysia to think of offering an alternative dispute resolution method to litigation. Mediation would be one of the best alternatives. Khan and Hak (2015) defined mediation as a process where an impartial and neutral third party assisted the disputant by facilitating them to discuss and negotiate their own settlement terms. There are a few approaches in mediation that may be adopted such as facilitative, directive, and evaluative. The suitable approach for medical negligence would be facilitative where the parties

may negotiate without the interference or direction from the mediator. Khan and Hak (2014) further explained that mediation might be applicable in many disciplines and areas such as the community to resolve a complex issue involving different races, cultures, and religions like in Malaysia.

Singapore has been practising mediation over the centuries. Mediation is also made applicable in medical negligence cases and has been a successful way of resolving disputes. The Ministry of Health of Singapore has been working together with the Medical Mediation Scheme (MMS) since the year 2008. There were 79 medical negligence disputes being referred to Medical Mediation Scheme, only two of the disputes went further for litigation suits and others were resolved by the mediation process. These 79 medical negligence cases were initially filed in the Subordinate Court of Singapore. As for the year 2016, about 465 out of 538 cases have been mediated (Lum, 2009).

Whereby, in the United Kingdom, mediation is not a new method of resolving disputes since it has been in practised for many years and there are mediation centres in every state that include medical negligence cases as part of the areas covered. Mediation in medical negligence in the United Kingdom was introduced in the year 2016 which was launched by the National Health Service ('NHS') after receiving a positive result from the pilot programme launched in the year 2014 (Gray, 2017). Almost 67.8% of claims on medical negligence disputes have been resolved

instead of attending court trials due to the establishment of the mediation process in medical negligence disputes (Alkhenizen & Shafiq, 2018).

The objective of this paper is to study the practice of mediation as a dispute resolution for medical negligence cases in Singapore and the United Kingdom and thereafter, make a recommendation of the application of mediation as another method or the alternative to litigation in resolving medical negligence cases in Malaysia. This paper discusses the challenges faced in litigation in Malaysia which also discusses the current practice in Malaysia; the practice in Singapore and the United Kingdom; and the reason to choose mediation. This paper also discusses the outcome or findings of the research conducted that support the idea of using mediation as the dispute resolution method for medical negligence cases. Thereafter, this paper suggests Malaysia offers mediation as either a separate method dispute resolution for medical negligence cases with the legal rights of parties remain in-tact or to offer court annexed-mediation as per current practice with a modification.

METHOD

This study involved library-based research as well as field research, that focused on medical negligence in Malaysia, Singapore, and the United Kingdom. Literature related to mediation and medical law that was referred from the articles in Malaysia, Singapore, and the United Kingdom was being looked upon since the concept of

mediation in medical negligence was well developed and well-applied over the past years. The data and materials were compiled on the development of mediation and how mediation had been applied in medical negligence in Singapore and the United Kingdom.

Besides that, the qualitative research method had been adopted by interviewing doctors, patients, lawyers, academicians, or medical negligence experts and mediators as the respondents in order to obtain opinions on the alternative resolution to resolve medical negligence disputes and views on mediation and medical negligence. The interview was limited to six respondents only. These respondents were experienced people in mediation and handled medical negligence based on their professional qualifications. They had at least more than ten (10) years of experience. Meanwhile, a quantitative research method was adopted by using survey questionnaires via the online Google Form. Upon completion of the survey, the data collected and analysed was to arrive at the conclusion of this paper.

RESEARCH FINDINGS

The research findings are divided into two parts i.e., the quantitative and qualitative findings. The quantitative findings are derived from the questionnaire distributed, whilst the qualitative findings are data collected from interviews that were conducted. The followings are the results of the findings.

Quantitative Findings

The questionnaire involved 109 respondents. More than half of the total respondents were female i.e., 50.5%. The respondents’ academic qualifications were divided into few categories which were medical specialist, Doctor of Philosophy, master, bachelor, diploma, and others. For clarification purposes, ‘others’ refers to the Malaysian Higher Certificate of Education (Sijil Tinggi Pelajaran Malaysia) and the Malaysian Certificate of Education (Sijil Pelajaran Malaysia). The respondents comprised patients, legal practitioner i.e., lawyers; medical practitioners such as doctors, medical assistants, neurosurgeons; administrative staff of health institutions, persons who were working with the insurance company; and persons who were working in the financial fields such as accountant and bankers.

The respondents were posted a few questions related to this research in order to appreciate their understanding of dispute resolution in medical negligence cases. First, the researchers posted a question related to medical negligence. There were 85.3% (93 respondents) respondents who confirmed that they understood the term ‘medical negligence’, whilst 16 (14.7%) respondents answered in negative. This is shown in Figure 1.

Second, the researchers would like to check whether the public in Malaysia has information on medical negligence cases. Hence, the next question that was posed to the respondents related to the rising trend of medical negligence. There were 87 (77.1%) respondents affirmed that it was a rising trend and 25 (22.9%) of the respondents think it was not. The following figure illustrates the opinion of the respondent i.e., Figure 2.

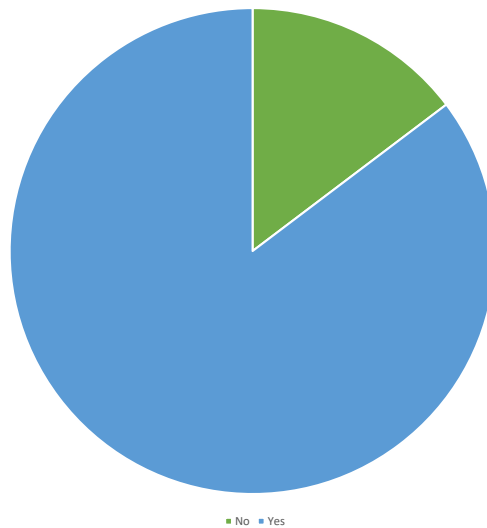


Figure 1. The meaning of medical negligence

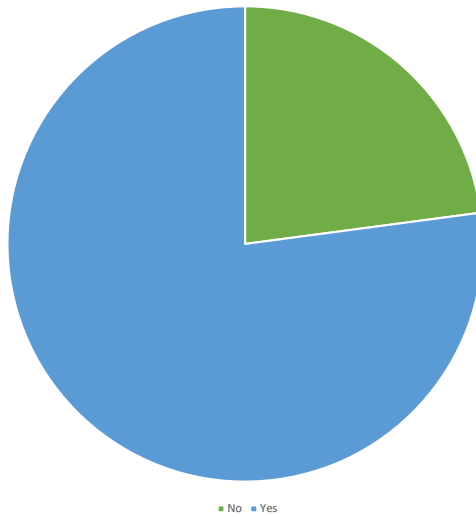


Figure 2. The rising trend of medical negligence

Next, the respondents were posted with a question related to mediation as dispute resolution. There were 86 respondents who understood the nature of the mediation process and believed it could save time and cost in resolving a dispute. Fourthly, the

respondents were asked what they thought about mediation. 98 respondents believed that mediation was a win-win situation (89.9%). Whilst the rest of the respondents did not think so (10.1%). This is shown in Figure 3.

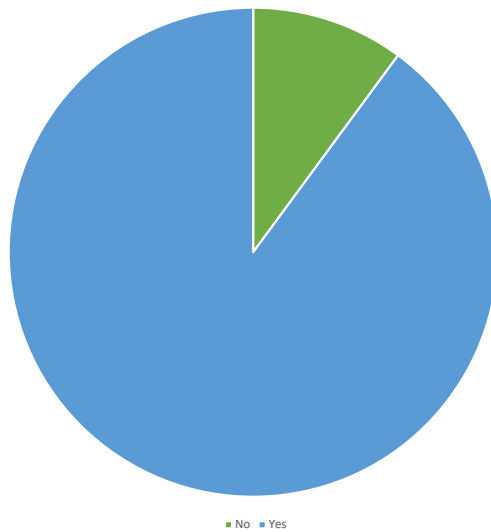


Figure 3. Mediation is a win-win situation

Lastly, the respondents were asked about their opinion on the usage of mediation in resolving medical negligence cases. There were 74 (67.9%) of the respondents who agreed that mediation could be applied in

resolving medical negligence cases. Hence, more than half of the respondents support the idea to adopt mediation in resolving medical negligence cases. This is illustrated in Figure 4.

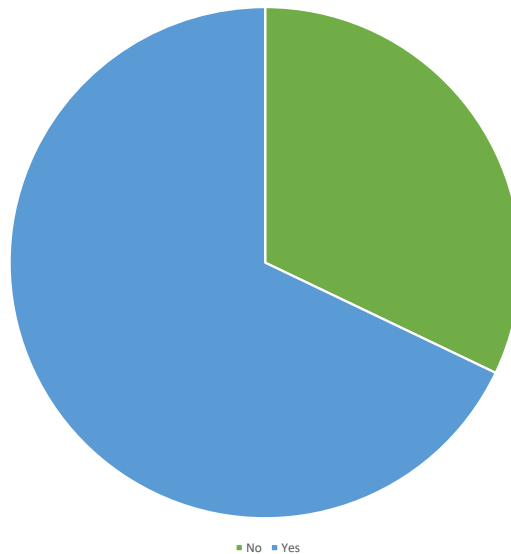


Figure 4. The usage of mediation in resolving medical negligence cases

From the results of the questionnaire, it is concluded that basically, the respondents understood the meaning of mediation and believed medical negligence cases were a rising trend. Further, it was a win-win situation. From the questionnaire and the answers given, it is suggested that the respondents who understand the meaning of mediation and its process, support the idea of having mediation or the usage of mediation in resolving medical negligence cases in Malaysia.

Qualitative Findings

The findings from the interview sessions

support the idea of adopting mediation as the method of resolving medical negligence cases. In describing the importance of mediation, the respondents made the following comments:

“It helps the doctor and the patient relationship to be intact”

“It is a better choice, saves cost for litigation fees, and saves court time and could achieve a fair settlement.”

“Less of winning/losing party situation”

“Both parties are able to bring their issues to the table and find a possible amicable solution”

“With the assistance of a mediator, the

parties can deeply discuss their interests and concerns”

One of the respondents agreed that mediation was a better choice with an exception that “a mediator is a person well versed in medical negligence and medical ethics”. Another respondent explained that mediation was advantageous to both parties as the institution’s reputation would be protected and the affected party would be able to have a speedy way of resolving disputes and moved forward in life. He said;

“Mediation is, in fact, advantageous in resolving medical negligence disputes as it is confidential. It protects the hospital and the doctor’s reputation. It also allows the patient and or their families to obtain a quick resolution and move on with their lives instead of having to deal with protracted litigation.”

The other respondent believed that if the parties were given chances to explain to each other and the respondent also shared that the hospital had a mediation group. He said;

“it is a better choice, as we understand hospital have their very own Mediation group but let’s make it known to the public so that they can understand better what they are facing rather than getting angry and wanting to sue the doctor because of the death, sometimes, the patient died due to secondary diseases not because of doctors’ negligence”

The followings are some of the comments made by the respondents with regards to mediation;

“It takes a shorter time”

“It saves time because of no need to go through lengthy procedures”

“I have a neighbour that got involved with medical negligence and they opted for Mediation after consulting a few of their friends and they managed to understand the issue with an open heart”

“(there is) no need to appoint lawyer, just to the mediation centre”

“It just occurs on the fixed day and the decision will be made instead of filing the case to the Court”

“We don’t need to go through the lengthy court process”

“Speedy process”

“obtain an early settlement without the lengthy process of a civil trial”

“compared to court litigation, yes.”

“do not (have to) go through several stages like litigation suit”

“Less legal procedure”

The respondents’ point of views in supporting the idea of having mediation as the dispute resolution method for medical negligence cases can be summarised as follows:

1. Mediation preserves the relationship between doctors and patients.
2. Mediation saves time and cost.
3. Mediation allows the parties to come with a possible amicable solution where they can discuss their interest and concerns deeply.
4. Mediation is a confidential process where the parties’ reputation is protected.

5. Mediation process is less procedural.

Therefore, it can be concluded that the advantages of mediation as mentioned by the respondents may overcome the challenges that occurred in the tort adversarial system or litigation.

DISCUSSION

In Malaysia, the adversarial system offered under the tort law has been criticized as to improve the system due to the challenges faced by the parties and lawyers in pursuing medical negligence through litigation and its effect on the parties. According to Kassim and Najid (2013), the challenges and the effects of litigation are first, the process is costly; second; the litigation process takes a long time to get a judgment; third, there is a possibility that the victim may not obtain any compensation due to inability to prove the causal connection in the case; fourth, the litigation process destroys the relationship between the doctor and the patient because of the confrontational elements during the trial; and fifth, the process attacks the credibility of the doctors which causes them to aggressively deny and refuse to admit their mistake. According to Hambali and Kodhapanahandeh (2014), the challenges in pursuing claims under the litigation are a lengthy period of the process, the high cost, obstacle faced by the victim in obtaining medical records to initiate the court action and to obtain the expert medical witness because doctors refuse to testify against another.

Further, under the tort system, the victim has no choice but to pin the responsibility

on a certain person and prove the person's fault to ensure that he gets the compensation. There are situations where doctors have been declared bankrupt and some decided to cease practice due to stress during the trial of the case (Kassim & Najid, 2013). This kind of battle will destroy the chances to have a good relationship between the victim and the doctor or the healthcare in the future. Islam (2013) in discussing medical negligence in Malaysia explains that the adversarial system under tort law provides compensation to the victim after the court makes the decision upon hearing the available evidence and the law. He comments that in certain situations litigation fails to achieve real justice.

Another issue that is worth to be discussed is the issue of compensation. According to Kassim and Najid (2013), compensation is given to the victim to put him in the position as if the negligence never took place. However, the compensation is unpredictable and might not be given according to the merit of the claim *per se*; due to certain reasons such as the availability of witnesses. They further explained that under the tort system the victim or injured party needs to attribute the act of negligence or attribute fault to a particular individual to be compensated. Due to this, many victims fail to get compensation. Hence, the outcome is uncertain. The victim might get compensation after many years of legal battle and suffer financial issues as well. They further discuss in a certain situation that the victim is over-compensated or under-compensated due to the nature of the

tort system. In concluding their discussion, it was suggested for Malaysia to have a satisfactory compensation system.

Hambali and Khodapanahandeh (2014) discussed the matters from the perspective of the plaintiff or the patient where the compensation received was not similar as per the amount mentioned in the judgment since the total amount needed to deduct the cost and the lengthy period of time involved in getting the judgment. They also discussed the matters from the perspective of defendants or the doctor and the healthcare. The claims made due to medical negligence caused them to pay a higher insurance premium to protect them from malpractice in the future. Due to this reason many physicians are driven away from certain specialties to avoid malpractice. Hence, they believe the awards have no deterrent effect on them whilst the purpose of the court to grant award is not only to compensate the victim but to discourage similar mistakes committed by others in the future. Both of them concluded that the victims of medical negligence were not compensated fairly. The tort system needs to be revised to avoid harm towards the parties, the healthcare system, and the government. They suggested that the court system be revised by providing options or alternatives through alternative dispute resolution.

Hence, the practice of Singapore and the United Kingdom in resolving medical negligence cases is studied to see how to resolve matters amicably and without having to face challenges in litigation. It is found that the Singapore judiciary system

has been going towards a less adversarial approach in resolving medical disputes over the years. There is a protocol called “pre-action protocol” in the Singapore judiciary system which promotes early communication between the affected parties and to resolve the disputes earlier without going any further for a legal proceeding. The affected parties can request a medical report from the relevant doctor without prejudice and discuss the matter, prior to filing any legal proceeding. The relevant doctor and his healthcare institution will be obliged to disclose the medical report listing out all the findings, including the affected party condition before and after the treatment or cause of death. If the pre-action protocol fails, the case will be referred to Court Dispute Resolution in the State Court and mediation will be conducted by a judge or a mediator of the Centre to facilitate (Anderson, 2018).

In fact, there are two bodies that govern healthcare in Singapore which are the Ministry of Health and the Singapore Medical Council which promotes mediation (Khoo & Choo, 2018). Practice Direction 35 which was gazetted on 1 September 2017 provides that in order for the affected parties to proceed with civil litigation suit, the affected parties must undergo a mediation process before they could proceed to litigation to resolve the disputes. A similar procedure is applicable for medical negligence disputes since it falls under civil litigation. Hence, the affected parties must apply mediation then proceed with litigation suit. The results in settlement of

medical negligence disputes in applying mediation have been positive ever since the establishment of mediation in medical negligence which was set up by the Ministry of Health of Singapore together with the Medical Mediation Scheme (MMS). MMS consists of a well-trained mediator who has knowledge of medical ethics and law and is accredited by MMS. Section 43 of the *Medical Registration Act 1997* (Sg.) must be read together with the Medical Scheme Act which states that not all mediators can conduct mediation for medical negligence disputes. Hence only knowledgeable mediators in medical negligence can conduct mediation (Lum, 2009). Even though Malaysia offers mediation to the parties under the court-annexed mediation system, the pre-action protocol in Singapore is not similar to the Malaysian court procedure. Order 34 Rule 2 of the Rules of Court 2012 provides that the parties are required to undergo a mediation process at the stage of pre-trial case management before proceeding with the trial.

Whilst, in the United Kingdom, mediation has been applied in health care over eighteen years whereby the government has been working closely with National Health Service (NHS) and other United Kingdom Health Authorities (Medical and Health Mediation, 2017). The aim of the cooperation is to promote mediation to resolve conflicts involving patients, families, and health practitioners and to come into a settlement without going to the court. In the United Kingdom, mediation maybe applies at any stage in

the court proceeding. Mediation can be applied before or after the legal suit has been filed unlike in Singapore, whereby it is compulsory to go for a mediation session after a complaint has been filed with the Complaints Committee based on Section 42 of the *Medical Registration Act 1997* (Sg.).

Even if it is not a compulsory alternative dispute resolution in the United Kingdom, the judges and other Healthcare Authorities have been promoting mediation as to avoid legal suit. This is shown in the case of *Burne v. A* (2006), whereby mediation is applied to end the envious and distressing case. Besides that, the NHS Resolution (previously known as the NHS Litigation Authority) encourages mediation service to speed up the medical disputes as well as resolve claims. The NHS Litigation Authority collaborated with the Centre for Disputes Resolution to offer a face to face discussion between the affected parties with the support of an independent and accredited mediator. Legal rights are remaining intact during the mediation process and either party can proceed for legal suit if they are unhappy with the settlement or an outcome. The scheme is actually voluntary and an independent process to resolve claims against any healthcare authorities. The mediator who handles medical negligence disputes is well versed with medical law and ethics and also well-trained. The training provided to the mediator is held by NHS (Hyde, 2014).

The United Kingdom has been promoting mediation through its judiciary system even if it is not a compulsory procedure in

medical negligence cases, unlike Singapore but, at least the NHS Resolution encourages the affected parties to opt for mediation instead of litigation. Almost 67.8% of claims on medical negligence disputes have been resolved instead of attending court trials due to the establishment of the mediation process in medical negligence disputes (Alkhenizen & Shafiq, 2018).

In Malaysia, the Court has its mediation centre under court annexed-mediation practice, for example, Kuala Lumpur Court Mediation Centre. According to Practice Direction No 4 of 2016, the mediator for the court may be divided into three categories, first, the court staff or the judge (other than the one who presides the case); second, the mediator from Malaysian Mediation Centre; and third, mediators from Kuala Lumpur Regional Arbitration Centre (KLRCA) which currently is known as Asia International Arbitration Centre (AIAC). The practice in Malaysia is almost similar to the system adopted by the United Kingdom since both countries did not make mediation as a compulsory process prior to the registration of litigation cases and the court in both countries work together with an independent mediation or dispute resolution centre. However, in the United Kingdom the parties may opt for mediation at any stage, but, in Malaysia, as mentioned earlier the parties are directed to the mediation process before trial.

The reason to look for mediation as the alternative for litigation in medical negligence cases is that the affected party or patient or victim (all the terms are used

interchangeably in this paper) is highly emotional and the mediation process is more relaxed, friendly, and allow the parties to ventilate emotions. According to Warshauer (2013), the emotion of the patients is the catalyst to the decision of proceeding with a filing of malpractice cases in the court. The relationship between the doctor and the patient, the expectation of the patients towards the doctor's perfect services, and the doctors' feelings by taking the complaint personally caused both parties to be in high levels of emotions in malpractice cases. Especially when the patients want the doctor to suffer as much as they have suffered. Hence, both parties will hold their grounds. This kind of case would not be a simple one. The best solution for this case is to negotiate a solution through a mediation process.

Further, mediation allows the parties to be in a session where both are given time to tell the stories from their perspectives so the other would understand their stories. Khan (2013) explained that mediation was meant to keep a good relationship between the parties as it was one of the best dispute resolutions in maintaining the relationship. The parties can resolve their dispute amicably, come into a solution that both of them agree upon, and maintain their relationship. Hence, the application of mediation may overcome the delay issues facing by parties in litigation. The application of mediation in Malaysia is supported by the respondents in this case as mentioned in the findings herein.

The respondents believe that mediation may overcome the challenges facing by the

parties in the tort adversarial system. Hence, Malaysia may learn from the practice of Singapore and the United Kingdoms' approach in offering mediation as long as the parties do not have to face the challenges occurred under the tort adversarial system, the relationship of the parties is preserved, the compensation is the outcome of the parties' amicable decision, they can hear each other, and their good names are preserved.

CONCLUSION

Malaysia needs to offer an alternative to the current tort system in overcoming the challenges in the litigation process. Evidence from this study suggests that the parties will opt for mediation in the future given that it saves the parties and court's time, is cost-effective, and allows the parties to come to a resolution of their own while maintaining their relationship. Further, due to the nature of the mediation process of confidentiality, the medical practitioner will not be exposed under the trial and this saves them from the stress. The findings of this paper support that mediation is a suitable dispute resolution method in resolving medical negligence cases.

Therefore, the Government of Malaysia may offer mediation as the dispute resolution method for medical negligence through either as a separate system from litigation (First suggestion) or under court-annexed as what has been offered currently but with certain modification (Second suggestion). The first suggestion offers mediation as the method of resolving disputes for

medical negligence cases without involving litigation at all. The government may offer a compulsory mediation process before the parties register the case at the court where all the parties, the victim, the medical practitioner, the healthcare, the insurance agent or representative of the Ministry of Finance and an expert of medical negligence to assist in negotiating the quantum for the case with the legal rights of the parties intact. This mediation process may be handled by the centres mentioned in the Practice Direction as mentioned herein earlier i.e., AIAC or MMC. The parties have the right to initiate a legal proceeding under tort adversarial systems that are not waived by opting mediation as the first step. They have the right to proceed with litigation if there are still issues that need adjudication. From the experience of Singapore and the United Kingdom, mediation has managed to solve the party's cases, however, certain cases are still being directed to litigation.

The second suggestion offers mediation to the parties upon registration of the litigation case in court without the need to wait until pre-trial case management. It means that the parties may opt for mediation at any time. The categories of the mediator as provided under the practice direction mentioned earlier may be maintained. This is to ensure that the parties do not have to face the challenges that exist under the current system and may opt for mediation upon registration of the case. Both suggestions are made to avoid the parties from facing challenges that occurred in the tort adversarial system and to ensure

the victim gets the justice he deserves. Future research may concentrate on the details of the proposal in offering mediation as the dispute resolution method for medical negligence cases with the parties' legal rights remain in-tact.

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