

Medical peer review in UAE Civil proceedings: A case study

Ahmed Allouz - Partner, Head of Litigation - Dubai - Litigation / Family Business
a.allouz@tamimi.com - Dubai International Financial Centre

Hiam Abdullah - Associate - Litigation
- Dubai International Financial Centre

June - July 2015

Whichever route is taken against healthcare professionals and hospitals, medical evidence will be required to substantiate a malpractice claim. This article will provide a general overview of the role of medical experts (with an emphasis on civil proceedings in medical claims) and discuss a case which sheds light on the Dubai civil court's approach to situations where there are conflicting medical opinions.

Medical Liability

Article 14(1) of Federal Law No. 10 of 2008 ("The Medical liability Law") defines malpractice as an error that occurs due to a practitioner's unfamiliarity with the technical aspects of a procedure being undertaken, or due to his negligence.

The Medical Liability Law (article 14(2)) sets out the circumstances in which a physician will not be liable:

- If the damage was sustained due to the action of the patient (i.e. refusing to receive treatment or due to an external cause).
- If the physician followed a certain medical method which, although not the generally accepted method, is a method which followed recognized medical principles.
- If the medical side effects and complications are known in the medical practice.

The Duty Of Medical Experts

A medical expert will address the following two main questions amongst others, which occur in almost all medical malpractice cases:

- Did the doctor follow the standard of care expected of doctors in the same field of specialty?
- Did the doctor's failure to follow the standard of care harm the patient?

The medical expert will determine what a competent doctor would have done in the same situation at issue in the case; whether there were any medical errors; and the causal link between the doctor's actions or inactions and the harm suffered by the patient. The expert will then give an opinion as to whether the doctor met the required standard of care.

Civil Court

Patients can take medical complaints before the civil courts to claim monetary compensation against healthcare providers and professionals for material, moral and psychological damages. There are no precedents on the figures awarded by the courts in medical malpractice claims. The amounts awarded by the court varies from case to case and is in the discretion of the judge, who assesses the level of damages suffered by a patient following a review of the evidence which usually includes the patient's medical file,

medical expert reports or opinions, and other documentation which substantiate medical expenses incurred by a patient.

In awarding compensation for damages, the guiding principle in accordance with the UAE Civil Code (Federal Law No 5 of 1985) is that compensation should be equal to the harm suffered. Damages are the remedy that is used to restore the victim to the position they were in prior to the harm suffered. Direct damages, loss of profit, loss of opportunity, consequential damages and moral damages are the types of damages recognized under UAE law.

Article 389 of the Civil Code provides that:

“The criterion for the entitlement of an aggrieved party to compensation is that the damage should have been suffered as a direct result of the default, and that it has already happened or will occur in the future. Potential damage that is not ascertained will definitely happen in the future is not the subject of mandatory compensation unless it has in fact happened.”

In order to receive compensation under the Civil Code, a patient or victim of medical malpractice would need to establish that the healthcare professional or physician was at fault in some way (article 282 Civil Code).

When assessing damages, the court will look into the harm and damage suffered by the patient, the healthcare professional’s actions or inactions and the causal link between the two.

Article 292 of the Civil Code provides that:

“In all cases the compensation shall be assessed on the basis the amount of harm suffered by the victim, together with loss of profit, provided that is a natural result of the harmful act.”

Case Study

Al Tamimi & Company recently represented a hospital in a case which demonstrates different opinions of medical experts and how the court rendered its decision based on two contradictory reports from medical expert committees in Dubai.

Background

A patient was admitted to a hospital in Dubai (the “Hospital” or “Second Defendant”) in May 2009 suffering from symptoms arising out of a disorder in his digestive system. The case had been diagnosed through primary examinations (a colonoscopy), the results of which confirmed the presence of a carcinogenic tumor in the patient’s colon which required immediate surgery.

The Treating Surgeon (First Defendant) explained the nature of the surgery that needed to be performed on the patient, which would entail removing the left part of the colon (a left hemicolectomy) and the approval of the patient was obtained for conducting the surgical procedure.

The first surgery was conducted in mid May 2009 and the patient was released from the intensive care unit the following day as his condition was stable. However, after four days the patient’s condition started to worsen as he began to suffer from symptoms of intestinal and bowel obstruction that necessitated another surgical intervention. Again, the surgeon obtained the patient’s approval for the second surgical procedure and on conducting a colostomy. The second surgical procedure was accordingly conducted five days following the first procedure.

Four days after conducting the second surgery, the patient started to suffer an infection in the spot of the surgical intervention and developed a fever and deterioration in his health which required admission to the intensive care unit. The diagnosis confirmed a wound infection which needed to be treated by re-opening the surgical wound for debridement to identify the nature of the infection and commence treatment with

the suitable antibiotic, in addition to some accompanying treatments in the intensive care unit and daily attention and care to the wound.

The patient's health started to stabilize after being admitted to the intensive care unit.

In June 2009, the patient wished to continue his treatment abroad with another doctor and was transferred by a medical evacuation plane to a hospital outside the UAE at the request of his family.

In December 2012, when the patient noticed the deterioration in his health (anorexia, lack of energy and weight loss), he consulted the same treating doctor outside the UAE who decided to conduct a Computerized Tomography Scan ("CT-scan") on the patient's abdomen, the results of which indicated that his illness had become fourth-degree colorectal cancer.

The patient started chemotherapy and all necessary treatment in another hospital in Dubai in December 2012 until he died in March 2014.

Medical Complaint Before The Regulator

In February 2010, a year following the patient's discharge from the Defendant Hospital, a complaint was filed before the Regulator in Dubai against the First and Second Defendant for alleged medical negligence in the surgical procedures performed on the patient.

The Regulator's medical committee found medical errors and substandard care in the First Defendant's treatment and management for the following reasons:

- The first surgery should have been done laparoscopically and not via open cut surgery (open colectomy). The Hospital did not perform the latter surgery due to lack of equipment and skilled surgeons.
- The patient developed a wound infection because the necessary drugs and equipment were not available at the Hospital.
- The patient's colon fistula and open stomach wound were unable to heal which led to the patient going into a coma and needing artificial ventilation owing to pulmonary complications.

The Hospital (on behalf of the Treating Surgeon) responded and appealed the medical committee's decision on the following grounds:

- The medical committee's allegation that the first surgery should have been done via laparoscopy was incorrect as medical literature has shown that the outcome of both open cut surgeries and laparoscopy have the same effect and outcome. In addition, the morbidity and mortality figures are no different and open colectomy therefore remains an acceptable method of treatment.
- The Hospital is well equipped for laparoscopic procedures and has various doctors who are licensed, qualified and skilled to perform laparoscopic procedures, contrary to the medical committee's allegation in this regard.
- All the appropriate medication was given to the patient to treat the wound infection.
- Wound infections are well known complications of such surgeries and the patient was managed by laparotomy and colostomy at the time.
- The allegations of a colon fistula, an open stomach wound unable to heal, and the patient going into a coma and needing artificial ventilation were incorrect. The patient had a colostomy for sound reasons and the wound was being treated by keeping it open with regular irrigation and dressings in accordance with standard medical practice.
- The patient himself as well as his family refused treatment and was discharged from the Hospital against the Treating Surgeon's medical advice, and transferred to another hospital outside the UAE.
- The Hospital adheres to strict infection control policies and its infection control committee monitors infections in accordance with international medical norms.
- All the documentation in the patient's medical file at the Hospital (which were enclosed to the response and appeal before the medical committee) demonstrate and confirm there was no substandard care or

any medical malpractice in the Treating Surgeon's treatment of the patient.

The medical committee nonetheless upheld its previous decision against the Treating Surgeon.

Civil Case

The patient subsequently filed a civil case before the Dubai court in January 2013 against the Hospital and the Treating Surgeon for compensation as a result of alleged loss and damage suffered due to alleged medical negligence committed by the First Defendant. The patient supported his claim with the medical committee's earlier findings of alleged medical error and substandard care and a list of the costs and medical expenses incurred in his treatment in Dubai and abroad.

Since the case contained technical aspects that require expert assessment, the Dubai court decided to refer the case to a specialized medical committee consisting of consultants in the fields of surgery and oncology in Dubai (the "Panel of Medical Experts").

The Panel was instructed by the court to determine whether or not there were any medical errors in the patient's treatment and in the surgical procedures; the person responsible for such medical errors (if any); the causal link between the medical error and the harm suffered by the patient.

Defence to the Patient's Civil Claim:

The Hospital, represented by Al Tamimi & Company, filed a response to the claim and pleaded that the alleged complications suffered by the patient did not amount to medical error as per the provisions of article 14 of the Medical Liability Law.

The defense was supported by medical literature and an opinion from an independent medical specialist who explained, amongst other things, the allegation that the left hemilectomy should have been performed laparoscopically and not by traditional open surgery was misguided for the following reasons:

- There is no consensus that laparoscopic large bowel resection for malignancy is current standard of care. Scientific principles supported by evidence provides that in the short term, laparoscopic large bowel resection confers some advantage in terms of shorter post-operative recovery and hospitalization, but there is no difference in the consequences of postoperative complications with both laparoscopy and open surgery.
- With regard to long-term oncological outcome, there is no difference between the aforementioned two procedures either. However, recent studies from the UK showed poor survival rates in stage 3 patients operated laparoscopically. The vast majority of large bowel resections for cancer in most countries like the United Kingdom, the United States and South Africa are still conducted by conventional open surgery.
- The same complications would have occurred in the patient's case following a laparoscopic left hemilectomy.
- Wound infection is a common complication of large bowel resections for cancer. It can as well as pulmonary dysfunction complicate any surgery and does not imply any inadequate surgical management.
- The post-operative complication of bowel obstruction was appropriately managed in a timely manner by the Treating Surgeon.
- The decision of the Treating Surgeon to resect the bowel for cancer by way of conventional open surgery at the time was in accordance with acceptable medical standards.

The Panel's Medical Opinion

In summary, the Panel concluded by way of a report to the Dubai court that the treating doctor at the hospital abroad failed to carry out the necessary diagnostic tests and refer the patient to oncology at the appropriate time. The Panel members did not make any references of medical error or misconduct against the First Defendant or any negative remarks against the Hospital with respect to the management and

treatment of the patient.

The Dubai Court's Judgment:

The First Instance Court rendered a verdict based on the Panel's findings and dismissed the patient's claim for medical malpractice against the First and Second Defendant. The patient subsequently died, but his heirs appealed the Court's decision before the Court of Appeal and the Appeal Court accordingly upheld the lower court's decision.

The patient's heirs have also appealed the Court of Appeal's decision before the Court of Cassation (the final appeal court) and the case is yet to be heard and concluded by the Cassation Court.

Conclusion

The aforementioned case makes it clear that a doctor will not be held liable for malpractice or negligence under UAE law provided that the treatment is consistent with recognized medical principles, and the medical side effects and complications suffered by a patient are well known in the medical practice (article 14(2) (b) & (c) of the Medical Liability Law). This is so even if the method of treatment is not one followed by other doctors in the same specialty.

Medical experts do not always come to the same conclusion with respect to what constitutes substandard care and malpractice. With several foreign healthcare professionals practicing in the UAE, it is not surprising to see dissimilar or conflicting medical opinions in the same malpractice claim owing to the diverse mindset, experience and variety of doctors from different backgrounds and specialties in the UAE.

This case indicates that the civil court was not entirely convinced and satisfied with the findings of the former medical committee (the Regulator) which were in favour of the patient, and this appears to be the main reason why the court referred the matter for further expert review and assessment.