DUTY OF CARE TO PATIENTS AND NON-PATIENTS IN EMERGENCIES: SHOULD THE CASE OF LOWNS BE APPLICABLE IN MALAYSIA?

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ABSTRACT

Doctors are sometimes unaware of the extent of the legal duty of care that they may or may not owe to patients and non-patients in emergency situations. It is well-established in common law that the duty of care is present once a doctor-patient relationship is shown to be substantiated but the duty of care to non-patients is less distinct. This paper aims to determine how the duty of care is found in patients in emergencies and by what means that same duty may be lawfully extended to non-patients as well in life threatening situations, through the lens of the decided case of *Lowns v Woods* in Australia. Specifically, it investigates whether this duty is present in the Malaysian jurisdiction and if it is not existent, whether it ought to be applied to the medical professions of this country. In this context, non-patients in emergency situations are injured persons whom the "ordinary man" does not owe a duty to act as a Good Samaritan to come to the aid of the said persons, but whom the bystander doctor may somehow startlingly incur liability by being idle to the situation. The duty to treat both patients and non-patients may be argued from an ethical and moral point of view but there is legal basis for those obligations which are "fair and reasonable" as they are inferred from society's expectations of the medical profession. Although there exist true liabilities when a doctor chose to treat a non-patient in an emergency situation, especially in jurisdictions without the protection offered by Good Samaritan laws, it is hoped that when the situation calls for such a service, the bystander doctor will rise to the occasion and fulfil their professional vocation.

Keywords: Duty of care, patients, non-patients, Good Samaritan, emergency, medical negligence, professional ethics

INTRODUCTION: MEDICAL NEGLIGENCE AND DUTY OF CARE

One of the elements that need to be established by the patient-claimant in an action in medical negligence is to prove that he or she is owed a duty of care by the defendant who is usually the doctor (and the employer by vicarious liability). The foundation of the concept of duty of care in negligence claims is the legal "neighbour" principle which was articulated by Lord Atkin in *Donoghue v Stevenson*[i]. His Lordship defined the legal "neighbour" as a person who has adequate proximity and who one must take reasonable care to avoid acts or omissions which can reasonably be foreseen to be likely to injure him/her. Therefore it is not difficult to appreciate how the patient is the legal "neighbour" of the doctor who treats him/her and to infer that the doctor owes a duty of care to said patient in a clinical encounter. The common law position that a duty of care is imposed upon the doctor once she has assumed responsibility for the patient's care long antedates the case of *Donoghue*, where in *R v Bateman*[ii], Lord Hewart CJ opined: "If a person holds himself out as possessing special skill and knowledge and he is consulted, as possessing such skill and knowledge, by or on behalf of the patient, he owes a duty to the patient to use due caution in undertaking the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment."

DUTY OF CARE TO PATIENTS IN EMERGENCY SITUATIONS

In general, the common law does not recognise a legal obligation on the doctor to play a "Good Samaritan" and render assistance to a stranger who is sick or even in an emergency, if that person is one whom the doctor is not and has never been in a professional doctor-patient relationship with[iii]. Therefore, it is clear that the doctor's duty to act arises only when a relationship with the patient is established and that the doctor assumed the responsibility for the patient's care[iv]. However, in hospitals that run a casualty department, the doctor's duty may arise as soon as the patient presents herself for treatment, before she is actually seen by a doctor such as the case in *Barnett v Chelsea and Kensington Hospital Management*

Committee[v]. Interestingly, the duty of care to patients is not just owed by the doctor alone when it comes to treatment in the casualty department. Apart from being vicariously liable for its employee's negligence, the health authority such as the NHS may also owe primary duty of care to ensure that patients receive adequate treatment by means of providing qualified medical staff such as the case in *Wilsher v Essex AHA*[vi]. Also, other non-medical staff such as a receptionist at the casualty department can owe a duty of care to patients who come in contact with them during the consultation such as the case in *Darnley v Croydon Health Services NHS Trust*[vii] where a head injury patient was not given accurate information about waiting times in the casualty department. As the patient was not seen after 19 minutes of waiting, he opted to go home. However at home, his condition unfortunately deteriorated. Lord Llyod-Jones found that the trust acting through the receptionist owed a duty of care to provide accurate information about waiting times, that the duty was breached and had caused the claimant's brain damage.

DUTY OF CARE TO NON-PATIENTS IN EMERGENCY SITUATIONS

Duty Imposed Through Common Law

In the previous section, it is understood that in general doctors do not owe a duty of care to persons who are not their patients even in emergencies. However, this is not always true as in the case of *Lowns v Woods*[viii] which has opened up liability of doctors for negligent failure to attend and treat non-patients in an emergency. In this case Dr Lowns was found liable for failing to render assistance to a young epileptic when he was approached by the boy's sister at his surgery and was asked to come the short distance to where the boy was fitting. Dr Lowns was not yet seeing patients and there was no good reason not to attend. The court had to satisfy itself regarding the issue of proximity as the claimant was never his patient prior to this and hence no circumstantial proximity can be shown based on a doctor-patient relationship. The court however relied upon the case of *The Council of the Shire of Sutherland v Heyman*[ix] to establish the 3 types of proximity: (1) physical proximity as the claimant was only 300m away from the defendant's surgery; (2) causal proximity as the defendants was apprised with the claimant's condition, recognised it as a life-threatening emergency and had the knowledge and skills to administer treatment; and (3) circumstantial proximity from the fact that the defendant

was at his surgery for the purpose of practicing medicine and is in no way impeded to come to the aid of the claimant.

Duty Imposed Through Statute and Ethical Code of Conduct

A duty to render emergency treatment to non-patients can also be imposed by statute. In parts of Australia, section 27(1)(h) of the Medical Practitioners Act 1938 (NSW)[x] stated that: "refusing or failing, without reasonable cause to attend, within reasonable time after being requested to do so, on a person for the purpose of rendering professional services in the capacity of a registered medical practitioner in any case where the practitioner has reasonable cause to believe that the person is in need of urgent attention by a registered medical practitioner" will amount to "professional misconduct". Although this Act do not make any express provision creating a civil cause for action, its presence nevertheless leads to an expectation by the society in regards to the duty of a doctor and the court found that the law should accord with this expectation in assessing "reasonableness of conduct". Furthermore, the ethical conduct guidelines self-imposed by the medical fraternity seem to echo this sentiment. The Medical Board of Australia's Good Medical Practice: A Code of Conduct for Doctors in Australia[xi] does say, at [2.5] (with emphasis): "Treating patients in emergencies requires doctors to consider a range of issues, in addition to the patient's best care. Good medical practice involves offering assistance in an emergency that takes account of your own safety, your skills, the availability of other options and the impact on any other patients under your care; and continuing to provide that assistance until your services are no longer required."

Limits of the Duty Imposed: "Fair and Reasonable"

With *Lowns* decision, a claim that "doctors are not legally required to assist non patients in emergency" is at least 'uninformed' and at worst 'ignorant'. Despite this, there is a silver lining as the extension of liabilities in the tort of negligence has always advanced in a "fair and reasonable" manner as set out in *The Council of the Shire of Sutherland v Heyman*[xii]. The liabilities imposed should also be adjudicated from case to case basis depending on the facts of the case as Badgery-Parker J opined in *Lowns*, "… circumstances may exist in which a medical practitioner comes under a duty of care, the content of which is a duty to treat a patient in need of emergency care, such as will give rise to a cause of action for damages for negligence in the event of a breach of that duty consisting in a failure to afford such treatment as is requisite and as is within the capacity of the individual practitioner to give… Whether in a particular case a

medical practitioner comes under such a duty of care must depend upon … the facts of the particular case…"

POSITION IN MALAYSIA

Zooming in to our locality, there is no legislative provision such as the New South Wales Medical Practitioners Act 1938 nor does the Good Medical Practice[xiii] by the Malaysian Medical Council advises medical practitioners to "offer assistance in an emergency" to non-patients. The common law of Malaysia imposes general duty to avoid loss or injury to another only when there exists the requisite element of proximity in the relationship between the parties with respect to the relevant act or omission[xiv]. Therefore, doctors are not legally obligated to attend to non-patients even in emergencies. They however, have a legal duty to attend to patients under their care or who presented to them in their practices (whether clinics or hospitals) in emergencies. Particularly in the private healthcare setting, this is also provided by section 38(1) of the Private Healthcare Facilities and Services Act 1998[xv] and Regulations (P.U.(A) 137/2006) which mandates that "every licensed and registered private healthcare facility or service shall at all times be capable of instituting, and making available, essential life saving measures and implementing emergency procedures on any person requiring such treatment or services".

LIABILITIES OF A GOOD SAMARITAN DOCTOR

There is no legal duty for a doctor to play the "Good Samaritan" to treat non-patients in emergencies but if he/she chooses to treat the injured victim who was not his/her patient to begin with, then a duty of care and liability can be incurred if there is cause for an action in negligence. As Windeyer J puts it in *Hargrave v Goldman*[xvi], "He obviously was a person whom they had in contemplation and who was closely and directly affected by their action. Yet the common law does not require a man to act as the Samaritan did. The lawyer's question must therefore be given a more restricted reply than is provided by asking simply who was, or ought to have been, in contemplation when something is done. The dictates of charity and of compassion do not constitute a duty of care. The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may

lead him to the rescue. This the law recognizes, for it gives the rescuer its protection when he answers that call. But it does not require that he do so. There is no general duty to help a neighbour whose house is on fire." The risk of liability can deter doctors who may resist treating non-patients in emergencies. A defence for the liability incurred can however arise from the provision of Good Samaritan legislation such as that found in New South Wales, Australia's Civil Liability Act 2002 (NSW)[xvii] s 56 which was written with doctors who are reluctant to assist, in mind. It reads: "A good samaritan does not incur any personal civil liability in respect of any act or omission done or made by the good samaritan in an emergency when assisting a person who is apparently injured or at risk of being injured." However, there are no Good Samaritan Laws in Malaysia to offer such defence[xviii].

CONCLUDING REMARKS

Notwithstanding the advice of Mahoney JA in *Lowns*[xix] and Lord Reid in *Home Office v Dorset Yatch Co Ltd*[xx] that moral or professional obligations should not be confused with legal obligations, I humbly opined that it is "fair and reasonable" to extend the duty of care of doctors to attend non-patients in emergencies especially when they are not impeded by factors that threaten their own safety or are limited by their lack of skills, the unavailability of other options and the impact on any other patients under their care at the time. This is due to the fact that a doctor is "by virtue of his training, qualification, registration, permitted by the community who alone are recognised as having the capacity and accorded the privilege of affording medical treatment to those who require it."[xxi] Doctors have always been regarded as altruistic noble professionals and therefore are accorded with respect and expectations by general public to attend to persons in dire need of life-saving emergency treatment. A doctor, who thinks otherwise and puts their legal liability concerns ahead of their moral and professional role to afford care when necessary, probably needs to rethink their vocation in the profession. It is not counter-intuitive but to quote Mark Twain, doctors like all professions should "Do the right thing. It will gratify some people and astonish the rest."

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ENDNOTES

[i] [1932] AC 562. While consuming a bottle of ginger beer bought by her friend from Wellmeadow Café in Paisley, Mrs Donoghue noticed that it contained the decomposed remains of a snail causing her alleged shock and severe gastro-enteritis. Mrs Donoghue was not able to claim through breach of warranty of a contract: she was not party to any contract. Therefore, she issued proceedings against Stevenson, the manufacture, which snaked its way up to the House of Lords.

[ii] (1925) 94 LJKB 791. A qualified medical practitioner was convicted of gross negligence manslaughter arising out of the delivery of a patient in child birth. During the delivery of the claimant's child, the doctor eventually resorted to an operation which required 'considerable force.' The delivered child did not survive. During the operation, the doctor accidentally removed a portion of the claimant's uterus. Initially refusing to do so, the doctor eventually transferred her to an infirmary where she was found unfit to undergo an operation and died two days later. A post mortem examination revealed various internal ruptures and substantial removal of the uterus.

[iii] Lowns v Woods (1995) 36 NSWLR 344, 354 (trial at first instance)

[iv] Michael Jones, *Medical Negligence* (Sweet and Maxwell 2017)

[v] [1969] 1 QB 428. Mr Barnett presented himself along with two other men who fell ill after drinking tea contaminated with arsenic. Dr Banerjee who was on duty at the time was unable to attend to them and instructed the nurse to advise the men to go home and call their own doctors. The men died hours later from the arsenic poisoning. Nield J held that Dr Banerjee had owed the men a duty of care, which he had breached by failing to examine them himself.

[vi] [1987] QB 730. Sir Nicholas Browne-Wilkinson V-C explained, "a health authority which so conducts its hospital that it fails to provide doctors of sufficient skill and experience to give the treatment offered at the hospital may be directly liable in negligence to the patient.'

[vii] [2018] UKSC 50.

[viii] (1996) Aust. Torts. Rep. 63,151.

[ix] (1985) 157 CLR 424. In this case, Deane J said, "The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss or injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the plaintiff and the person or property of the defendant, circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of

the closeness or directness of the causal connection or relationship between the particular act or course of conduct and the loss and injury sustained."

[x] This Act has now been repealed and replaced by the Medical Practice Act 1992 (NSW). Section 36 of the new Act is substantially identical to the previous section 27(1)(h).

[xi] 'Good medical practice: a code of conduct for doctors in Australia' (Medical Board of Australia 2014)

[xii] *The Council of the Shire of Sutherland* (n9). Dean J opined, "Given the general circumstances of a case in a new or developing area of the law of negligence, the question what (if any) combination or combinations of factors will satisfy the requirement of proximity is a question of law to be resolved by the processes of legal reasoning, induction and deduction. On the other hand the identification of the content of that requirement in such an area should not be either ostensibly or actually divorced from notions of what is 'fair and reasonable' or from the considerations of public policy which underlie and enlighten the existence and content of the requirement.'

[xiii] 'Good Medical Practice' (Malaysian Medical Council 2019)

[xiv] Puteri Nemie Jahn Kassim, *Medical Negligence Laws in Malaysia* (International Law Book Services 2016)

[xv] Act 586

[xvi] (1963) 110 CLR 40

[xvii] The Civil Liability Act was enacted in 2002 to address perceived problems with the application of tort law and resulting increases in insurance premiums. The Civil Liability Act applies in most circumstances where negligence is alleged against a defendant.

[xviii] Chang Keng Wee, 'The PHFS Act (1998) and Regulations (2006) – an update' *The Star* (Malaysia 17 Sept 2006) <https://www.thestar.com.my/lifestyle/health/2006/09/17/the-phfs-act-1998-and-regulations-2006--an-update> accessed 25 September 2020

[xix] *Lowns* (n8) 169

[xx] [1970] AC 1004

[xxi] *Lowns* (n3) 359