The medical negligence case law medical essay

Law

Medical Negligence & Negligent Misstatement

Group Members:

Ng Kah Siang / J08003991Course Code: LAW3000 N1Program: BMMNULecturer: GOMATHY NAIR D/O M R NAIRDate of Submission: 5-3-2013

Introduction

The definition of negligence is the breach of a duty caused by the omission to do something which a reasonable man, which is guided by those considerations which ordinarily regulate the conduct of human affairs, would do (Agarwal, 2011). Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglecting the plaintiff has suffered injury to his/her person or property (Agarwal, 2011). The birth of negligence started by the court case of Donoghue V Stevenson (1932), apparently Donoghue's friend had purchased a bottle of ginger beer which is manufactured by Stevenson and gave it to Donogue. She drank most of the bottle but then noticed the decomposed remains of a snail in the bottom of the bottle and sued Stevenson for causing negligence in a form of injuries or losses. From there on, Donoghue V Stevenson (1932) is the hallmark case for negligence.

Medical Negligence

Medical negligence or malpractice is defined as the failure or deviation from medical professional duty of care such as a failure to exercise an accepted standard of care in medical professional skills or knowledge, resulting in injury, damage or loss (Thirumoorthy, 2011). Medical negligence comes

under the laws of Tort, and a Tort is a wrongful injury, a private or civil wrong which is not a breach of contract (Thirumoorthy, 2011). Torts may be intentional, when the professional intends to violate legal duty or negligent, when the professional fails to exercise the proper standard of case established by law. In principle, the social aims of the Tort system in medical indemnity have three main purposes which are providing compensation for injuries, creating accountability for actions and fostering patient safety and quality (Thirumoorthy, 2011). The elements that make up medical negligence are a duty of care is owed. The plaintiff must show that the doctor or hospital owes him a duty of care as a patient. A breach of duty of care, the standard of care administered falls below the legal standard. There is causation; the injury suffered was a directly or significantly caused by the breach of duty. Lastly, there is damage; the patient suffered Injury as a result of the breach of duty. If a breach of duty occurs, but does not lead to injury, then negligence cannot be proved. In a bad medical outcome, there are several causes for injury or damage. The hallmark case for medical negligent is Mahon V Osborne (1939) which is about swab being left in a patient’s body after an operation which causes complication to the patient.

Negligent Misstatement

There are two important types of negligence which are required for this assignment; one of its which is negligent misstatement and the other is medical negligence. A negligent misstatement is a claim or action which is brought up by one party against another party at common law in tort (O’Riordan, 2007). This claim takes places if the party against whom the claim is brought made a statement which was considered to be negligent

which is the " Defendant" and the party which is bringing the claim which is the " Claimant" relied this statement to its injury and suffered a loss as a result (Serota, 2012). In order for a claim for negligent misstatement to be successful, the claimant must be able to show the court that on a balance of probabilities the defendant owed them a duty of care (O'Riordan, 2007). This duty of care is not to case such harm which was suffered by their negligent misstatement, further that the defendant had breached the duty of care owed and that the claimant has indeed suffered loss. If the claimant cannot satisfy the aforesaid then they will not have a claim for negligent misstatement (O'Riordan, 2007). Lastly, if the claimant can show that there was a contract in place between the parties then he or she may be able to sue under the contract for negligent misrepresentation as well as under tort. The hallmark case for Negligence misstatement is Hedley Byrne & Co Ltd V Heller & Partners Ltd (1964) which is an advertising agency sought references from a bank as to the creditworthiness of their client, as they were to act as personal guarantors for payment of advertising, and the bank stated that the client was creditworthy when it was not.

Elements of negligence

The five elements of negligence include duty of care, breached of duty, cause in fact, proximate cause and actual harm. Firstly in duty of care, the outcomes of some negligence cases depend on whether the defendant owed a duty to the plaintiff (Grady, 2006). A duty arises when the law recognizes a relationship between the plaintiff and the defendant. Due to this relationship, the defendant is obligated to act in a certain manner towards the plaintiff. A judge, rather than a jury, ordinarily determines whether a defendant owed a

duty of care to the plaintiff where a reasonable person would find that a duty exists under a particular set of circumstances, the court will generally finds that such duty exists (Grady, 2006). Breached of duty means a defendant is liable for negligence when the defendant breaches the duty that the defendant owes to the plaintiff (Grady, 2006). The duty is breached by failing to exercise reasonable care in fulfilling the duty. Hence the question of whether the duty exists, the issue of whether the defendant breached a duty of care is decided by a jury as a question of fact. Cause in fact under traditional rules in negligence cases, a plaintiff must proof that the defendant’s action actually caused the plaintiff injury (Grady, 2006). This is often referred to as " but for" test causation. The " but for" test is to used to establish whether the damage was caused by the breach of the duty of care. If harm to the plaintiff would not have occurred " but for" the defendant’s negligence, then the negligence can be classed as a cause for the plaintiff’s harm or injury. Proximate cause relates to the scope of a defendant’s responsibility in a negligence case (Grady, 2006). A defendant in a negligence case is only responsible for the harm that the defendant could have foreseen through his actions (Grady, 2006). If a defendant has caused damages that are outside of the scope of the risk then the defendant could have foreseen, then the plaintiff cannot prove that the defendant’s actions were the proximate cause of the plaintiff’s damages (Grady, 2006). Lastly, actual harm means negligence requires actual physical harm, classically a physical impact. Suppose, however, that the plaintiff has not been physically struck, but has merely suffered emotional distress or economic loss. The modern rules of what constitutes actual harm are much broader than what

they used to be. When the defendant's negligence has physically injured the plaintiff or destroyed his or her property, actual harm is usually clear.

Medical Negligence Case – USA

The case that I have chosen for medical negligence is (Rubb V. Balboa Naval Medical Center San Diego). The case shows a medical malpractice involving breach of standard of care. The plaintiff was left with severely brain damaged when the surgeon removed healthy brain tissues in an attempt to treat a mild condition after failing to perform the correct tests. Moreover, the second surgery on the plaintiff ignored standard procedures for this kind of operation and was performed without adequate support staff being available. Thus result in bleeding and brain swelling which left the plaintiff profoundly disabled. The plaintiff was age of 14 which are experiencing several symptoms including headaches, visual defects, balance problems and nausea. The plaintiff is the daughter of retired Marine and army officer and therefore plaintiff seek treatment at Balboa Naval Medical Center San Diego (Guire, 2003). Plaintiff has undergone CT scan and the images from the scan revealed a mild mass comprised of fat and calcification that have developed in the plaintiff's brain (Guire, 2003). However, Dr Grossmith which is the plaintiff's doctor refused to review interpretations of the CT scanned images by neuroradiologists. Instead, Dr Grossmith interpreted the images himself and concluded that plaintiff's symptoms were caused by a tumor. Based on Dr Grossmith interpretation and physical examination, he advised the plaintiff parents that stroke, blindness, or death would result if the tumor was not surgically removed (Guire, 2003). Dr Grossmith attempted to surgically remove the mass, but was unable to reach the mass. Therefore a second

surgery was conducted to the plaintiff 3 days after the initial surgery, Dr Grossmith only able to partially extract the suspected tumor, the procedure was disrupted b bleeding and severe swelling of the brain. During the procedure, Dr Grossmith removed a significant portion of plaintiff's healthy brain tissues. Therefore ultimately lead to the plaintiff injuries. Dr Grossmith own a duty of care to the plaintiff and breached multiple standard of care by misinterpreting the CT scanned images by claiming the complications caused to the plaintiff are indeed a tumor in the plaintiff's brain. Secondly, Dr Grossmith breached the standard of care by refusing to review interpretations of the CT scanned images and pursued on his own interpretations. Thirdly Dr Grossmith breached the standard of care by commencing the second surgery after an initial failed attempt. The operation requires a lengthy and complex procedure to commence earlier in the day to ensure availability of addition surgical staff in the event of unexpected complication (Guire, 2003). Dr Grossmith was unable to identify the source of the bleeding that occurred during the second surgery therefore he summoned a colleague from home, which is also one of the reasons that Dr Grossmith has breached the standard of care. Dr Grossmith has satisfied bolam test as a doctor, he should have the upmost responsibility to treat their patient but however, Dr Grossmith ignored standard procedures while conduction operation on the plaintiff which resulted complications to the plaintiff after the operation. There's a causal link between the plaintiff's complications to Dr Grossmith negligence which satisfied the " but for" test. The injuries caused to the plaintiff are foreseeable as the injuries are the type which a reasonable doctor can foresee will occur because of the negligence act conducted by Dr Grossmith. Therefore, the Dr Grossmith is

liable for causing the damages. Hence the plaintiff is entitled to acquire compensation from the Hospital management amounting to USD $ 3, 500, 000. 00 settlement.

Negligent Misstatement Case – Malaysia

The case that I have chosen for negligent misstatement is (Balakrishnan A/L Devaraj. Girija Devy A/P Gopinathan Nair V Admiral Cove Development Sdn Bhd). The case involves breach of duty of care and contract. The plaintiff (Balakrishnan A/L Devaraj and Girija Devy A/P Gopinathan Nair) is suing the defendant (Admiral Cove Devlopment Sdn Bhd) for negligent misstatement and misrepresentation. The plaintiffs are the purchasers of a unit, namely an apartment in the project from the defendant. However the proposed project purchased from the defendant was different from what the defendant's representative or agent has previously agreed on resulting loss is suffered to the plaintiffs. The plaintiffs have viewed a miniature model of the project displayed at the launching of the project at Shangri-La Hotel, Kuala Lumpur on 13 May 1995. The defendant's miniature model and a printed brochure of the proposed project " showing a sandy beach front, umbrellas, relaxing easy chairs and sail boats close to the beach" and the defendant representatives or agent represented to plaintiffs that the plaintiffs will be able to swim directly upon exiting the said unit. The defendant's sales and purchased agreement even stated that the plaintiffs' apartment will fulfill to the above facilities upon completion of the proposed project. Upon completion of the proposed project and handover of the said premises to the plaintiffs on 30 June 1998, the plaintiffs found out that the aforesaid representations were false when a wall was erected right across the sea fronting and rocks, stones

and boulders all along the front of the sea outside the plaintiffs' property. Moreover sewerage discharges being led off visibly into the sea in front of the plaintiffs' property. The plaintiffs calms that the wall and rocks have affected their enjoyment of the aforesaid unit by the diminished aesthetic and or environmental conditions. To make the matter even worst, road alterations were being conducted in front of the plaintiffs' property and neighboring properties due to sewerage leakage caused by improper fittings. The defendant issued a statement to the plaintiffs notifying them that the plaintiffs' property will not be affected during the alteration process. However the defendant found out that the root cause of the sewerage leakage is within the plaintiffs' premise which requires demolishing a portion of the premises retaining wall which causes inconvenience to the plaintiffs. The plaintiffs contended that as a consequence of the above, they suffered loss and expense and seek compensations amounting of RM 100, 000. 00. However the decision of the court allowed the plaintiffs to entitle RM 45, 000. 00 as compensation from the Defendant. The defendant owes duty of care to the plaintiff as the defendant must take responsibilities as a developer to their purchaser. The defendant has breach the duty of care by making representation which were false due to the presence of a wall, rocks, stone, boulders and the presence of sewerage discharge being led off visibly into the sea in front of the plaintiffs' property. The defendant even further breached the duty of care by providing false statements to the plaintiffs, stating that their property will not be affected during the road alteration process. There's a causal link between the plaintiff damages to the defendant negligence which satisfied the " but for" test. The plaintiffs' damages is reasonable foreseeable. Therefore the defendant is liable for

causing the damages. Hence the plaintiff is entitled to acquire a reduced compensation from RM 100, 000. 00 to RM 45, 000. 00 from the defendant.

Conclusion

In conclusion, negligence is the breach of a duty caused by the omission to do something which a reasonable man, which is guided by those considerations which ordinarily regulate the conduct of human affairs, would do. The two types of negligence required for this assignment are medical negligent and negligence misstatement. The elements that constitute negligence are duty of care, breached of duty of care, causation and damages. Furthermore, it is important for medical practitioners to be aware that they owe a legal duty of reasonable care to their patients and must exercise appropriate reasoned and responsible judgment at all times. Lastly, developers and other people from all traits must also be aware that they owe a duty of reasonable care and responsibilities to their clients and must exercise appropriate ethical standards in providing information which will not cause any damages to their clients.(2437 words)