



Benefits and Drawbacks of Imposing a Non-Delegable Duty of Care on Private Healthcare Facilities in Malaysia – A Comparative Analysis on the Common Law and the Malaysian Law Approach

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Abstract:

The recognition of tortious liability between private healthcare facilities and their independent contractor or consultants is undeniably one of the most difficult conundrums in today's Malaysian jurisprudence. Although the common law has long established the doctrine of non-delegable duty of care and a few Malaysian courts have followed suit, it is still debatable on how imposing such strict liability would affect the private healthcare facilities due to the very nature of the relationship between the private hospitals and their independent contractor or consultants. On that note, this article will conduct a comparative analysis on the common law and Malaysian law approach in addressing non-delegable duty of care through existing case laws and infer the benefits and drawbacks from imposing such liability to these private healthcare facilities in Malaysia. By the end of the discussion, this article aim to establish that it is appropriate to impose non-delegable duty of care to the private healthcare facilities in Malaysia notwithstanding the identified benefits and drawbacks.

Keywords: *non-delegable duty of care, private healthcare, tortious liability, common law, Malaysian law*

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Introduction

The principle of non-delegable duty of care has long been present in the common law realm particularly in employment relationships. As a general rule, an employer can be held vicariously liable for the negligence of its employee in the course of the employment. However, it is different in the case of independent contractor as an employer will not be held vicariously liable for any act done by their independent contractor¹. Contrary to this traditional view, the common law has evolved and recognized a separate liability governing the employment relationship between a party or organization who engages independent contractors which is known as non-delegable duty of care.

In the context of Malaysian private healthcare system, it is not unusual for the private healthcare facilities to employ their consultants as independent contractors². The consultants will give services on their own accord while collaborating with the hospital, and the hospital in return will provide the premises, tools and assisting staffs to these consultants³. In such circumstances, it is always an issue as to whether these private hospitals should be held liable for the consultants' negligence or tortious acts since the nature of the employment were not based on the traditional contract of service which would otherwise render private hospitals vicariously liable for the conduct of its consultants.

On that note, this article aims to identify the benefits and drawbacks of having non-delegable duty of care imposed on private healthcare

¹ Foster, N.J. 'Vicarious Liability and Non-Delegable Duty in common law actions based on institutional child abuse', (2015) University of Newcastle- From the Selectedworks of Neil J Foster.<http://www.academia.edu/29652790/Vicarious_Liability_and_Non-Delegable_Duty_in_Common_Law_Actions_Based_on_Institutional_Child_Abuse>

² Under the Malaysian Private Healthcare Facilities & Services Act 1998, "private healthcare facility" means any premises, other than a Government healthcare facility, used or intended to be used for the provision of healthcare services or health-related services, such as a private hospital, hospice, ambulatory care centre, nursing home, maternity home, psychiatric hospital, psychiatric nursing home, community mental health centre, haemodialysis, centre, medical clinic, dental clinic and such other healthcare or health-related premises as the Minister may from time to time, by notification in the Gazette, specify.

³Sarah Lau, 'The doctrine of non-delegable duty of care: a commentary on Dr Kok Choong Seng and Sunway Medical Centre Berhad v Soo Cheng Lin', 2017, Skrine, <http://skrine.com/?option=com_content&view=article&id=1796>

facilities and following the analysis of these arguments, this article will be concluded on whether it is appropriate or inappropriate to impose a non-delegable duty of care on the private healthcare facilities in Malaysia.

The Doctrine of Non-Delegable Duty of Care

Historically, private healthcare facilities were considered as charitable institutions which provide medical services to poor people and in those days, private healthcare facilities would provide facilities for individual physicians to administer actual care to the patients⁴. Due to their charitable concept, not only it was inappropriate, but it is also inconsistent with the societal interest to impose any sort of liability on these private healthcare facilities. Thus, private healthcare facilities were given absolute immunity from any tortious liability arising from the negligence of its physicians⁵.

Throughout the years, the roles of these private healthcare facilities are no longer limited to providing mere facilities to its physicians. This is due to the fact that private healthcare facilities had began to provide full healthcare services to the public, just like public hospitals⁶.

One classic example of the application of non-delegable duty of care on a private hospital was expounded in the English Court of Appeal case of **Gold v Essex County Council**⁷. In this case, an infant Plaintiff was treated by a radiographer who was in the employment of the Respondents at one of their county hospitals. The radiographer failed to provide adequate screening material in giving Grenz-ray treatment to the infant Plaintiff and as a result, the infant Plaintiff suffered injury to her face.

It was held that the hospital owes a duty to provide radiography treatment to the infant with care and the hospital would be liable if

⁴ R Montefusco, "Hospital Liability for the Right Reasons: A non-delegable duty to provide support services", 2012, <<https://pdfs.semanticscholar.org/ea62/26993e0d29ef823c9f7406ae3d03a63782ca.pdf>>

⁵ Prof Dr Puteri Nemie John Kassim and Su Wai Mon @ Faridah, "The Workings of Vicarious Liability in Medico-Legal Cases: A judicial Analysis", *Malayan Law Journal Articles* (2014) 1 MLJ cxlv

⁶ *Ibid*

⁷ *Gold v Essex County Council* [1942] 2 KB 293

the radiographer, who was employed to perform the duty on behalf of them, act without due care and committed tortious act. The Court of Appeal had agreed in unison that the hospital in this case was indeed liable for the radiographer's failure to provide adequate screening materials to the infant plaintiff.

Another example of the application of non-delegable duty of care of a private hospital in common law was seen in the landmark case of ***Roe v Minister of Health and Another***⁸. In this case, the Appellants were both anesthetized by the 2nd Respondent who was the spinal anaesthetic for their operations. Unknown to any of them, the spinal anaesthetic used, which was contained in glass ampoules, were contaminated by phenol and this had caused both Appellants to be paralysed from waist downwards. The trial judge however held the hospital was not responsible for any of the 2nd Respondent's negligent act because the 2nd Respondent was in fact a visiting anaesthetist to the hospital and the claimants had also failed to establish negligence on the 2nd Respondent's part.

On appeal, his Lordship Denning LJ disagreed with the trial judge's findings and/or reasonings. According to his Lordship, the hospital authorities are responsible not only for their nurses and doctors, but they are responsible for the whole staff including their anaesthetists and surgeons and regardless of their employment status whether permanent or temporary, resident or visiting, whole-time or part-time as they are still the agent that the hospital hired to give treatment to the patients. The 2nd Respondent was held to be the servant or agent of the hospital and the hospital therefore was liable for the 2nd Respondent's act. However, the Court of Appeal agreed in unison on the part of negligence, that neither the 2nd Respondent's or any of the staff in the hospital had been guilty of negligence in failing to detect the presence of the phenol in the ampoules as it is reasonably impossible for them to detect the crack with their medical knowledge at that time.

⁸*Roe v Minister of Health and Another* (1954) 2 QB 66

Based on the above authorities, it can be concluded that non-delegable duty of care is not merely a duty to take care, but a duty to ensure that care is taken or given. Thus, if a hospital had a function to be performed and the hospital then delegates that function to its consultant and negligence occurs in the performance of the delegated function, then the consequence of such negligence will constitute a breach of duty on the part of the hospital who had delegated the duty to the consultant in the first place⁹.

The Benefits and Drawbacks of Imposing Non-Delegable Duty of Care to Private Healthcare Facilities in Malaysia

As of to-date, literature review on few landmark decisions have shown that the Malaysian courts have followed the common law approach and recognized the doctrine of non-delegable duty of care of private healthcare facilities. However, it is still debatable whether the imposition of this non-delegable duty of care would bring any benefits or drawbacks to the private healthcare facilities in general.

There are two notable benefits that can be achieved from imposing non-delegable duty of care to private healthcare facilities.

First of all, regardless of whom the private healthcare facility has engaged to perform their task, the concept of non-delegable duty of care can be used to impose liability on the private healthcare facility for the breach of their own duty towards their patients based on the relationship between the hospital and the patient¹⁰. This is especially important in situation where there is no vicarious liability in the first place, for example where the patient was harmed due to system failure and no individual tortfeasor can be identified or where the patient was actually harmed by a third party while patient was under the custody of the healthcare facility.

The imposition of such liability can be seen in the Malaysian Federal

⁹ Kanchana Chandran and Kaipana Chandran, "Negligence: Non-delegable Duty of Care, the Malaysian Perspective", *Malayan Law Journal*, (2017) 1 MLJ ci

¹⁰ *Dr Kok Choong Seng & Anor v Soo Cheng & another appeal* [2018] 1 MLJ 685

Court case of ***Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal***¹¹. In this case, the Respondent had a giant retinal tear with detachment to his right eye and upon the 1st Appellant's advice, the Respondent undergo an operation at the 3rd Appellant's hospital which was then performed by the 1st Appellant. However, the Respondent's post-surgery condition deteriorated and he underwent a second surgery based on the 1st Appellant's suggestion. The Respondent had then developed an extensive haemorrhage in his right eye after the said surgery and his eye was permanently blind due to a later retinal detachment.

The High Court allowed the Respondent's claim on medical negligence against the two doctors and found that the hospital was vicariously liable. The Court of Appeal was of the opinion that a hospital has a reasonable duty to provide a patient his medical needs upon the patient's admission to the hospital and the hospital cannot be mere custodial institution to just provide a place where consultants meet and treat their patients. Therefore, on appeal, the hospital was held vicariously liable for the 1st and 2nd Appellants' actions and the Court of Appeal had relied on the doctrine of non-delegable duties in coming to this conclusion.

The Federal Court however was of the opinion that the High Court and Court of Appeal had erred in concluding that the hospital's liability was the same as the liability for non-delegable duty of care regardless of the employment status of the two doctors. The Federal Court nevertheless concluded that the hospital had owed a non-delegable duty of care to the patient to ensure that reasonable care was taken in the anaesthetic services provided and therefore the hospital was indeed liable for the breach of this duty. The Federal Court also acknowledged that the applicability of the UK Supreme Court case of *Woodland v The Swimming Teachers' Association and Others*¹² in Malaysia in which a non-delegable duty of care should be

¹¹ *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* (2018) 3 MLJ 281

¹² *Woodland v The Swimming Teachers' Association and Others* [2013] UKSC 66

imputed only insofar as it would be fair, just and reasonable in the circumstances of each individual case, and concluded that it could extend to private healthcare institutions in relation to its consultants, who as independent contractors, perform medical treatment within its facilities.

Thus, it can be said that the non-delegable duty of care is beneficial as it does not exempt private healthcare facilities from liability despite them outsourcing their duty to their consultants, but it is must be so far as it is fair, just and reasonable in the circumstances of the case.

Secondly, non-delegable duty of care helps the court to impose a primary duty on hospitals to ensure their patients' safety by monitoring their physician practice within the hospital facility. This was also in consonance with the words of his Lordship Md Raus Sharif CJ in the Malaysian Federal Court case of ***Dr Kok Choong Seng & Anor v Soo Cheng Lin and another***¹³ appeal whereby his Lordship stated that this non-delegable duty is in essence a positive duty to ensure that reasonable care is taken to protect the claimant as a patient from any harm.

In this regard, it is argued that despite being a private hospital, the hospital is still a healthcare facility which provides healthcare services to the public. Thus, the hospital owes a duty of care to its patients regardless of its business arrangement with its professional consultants¹⁴. A patient knows nothing of these arrangements and a patient only know that he was treated in the hospital by people whom the hospital authorities appointed for which the hospital authorities must be answerable for the way in which he was treated¹⁵. Therefore, by imposing this responsibility to the hospital, it is beneficial as it sorts of giving an undertaking to the patient that the hospital would take reasonable care in providing the patient's medical needs.

¹³ *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* (2018) 3 MLJ 281

¹⁴ V. Sharveena Thevy, "Malaysia: Are private hospitals now responsible for doctors who are independent contractors thanks to "common sense"?", 2017, <<http://www.conventuslaw.com/report/malaysia-are-private-hospitals-now-responsible-for/>>

¹⁵ *Cassidy v Ministry of Health* [1951] 2 KB 343

On the other hand, there are also several notable drawbacks from imposing this non-delegable duty of care to private healthcare facilities in Malaysia.

First of all, unlike the general application of tort of negligence, a non-delegable duty is not a duty to take reasonable care but it is actually a duty to oversee that care is taken¹⁶. Since it is not a form of strict liability unlike the doctrine of vicarious liability, there are always options for a duty-ower to take in order to avoid from being subjected to this duty. One example would be in case of no antecedent patient-hospital relationship, which will be further elaborated below.

Secondly, even though the liability for the breach of this duty is similar to vicarious liability, it is pertinent to note that a non-delegable duty is only imposed on the employer alone as it is a primary and non-derivative liability¹⁷. Regardless of the hospital's arrangement with the consultant, the consultant is not and will not be caught liable under this doctrine. In that sense, it is somewhat unfair to impose this non-delegable duty to the hospital especially when such duty to take reasonable care is not even within the job scope of the hospital.

Thirdly, the doctrine will only be imposed on the hospital if it is just, fair and reasonable. This point was in fact based on the Woodland case where the UK Supreme Court has extended the law of negligence to include a non-delegable duty of care on the part of the duty owed to the extent that it is just, fair and reasonable. The UK Supreme Court in that case held that the school owed the Claimant a non-delegable duty as the school had assumed responsibility and control over the student during the swimming lesson since it was within school hours and that it was fair, just and reasonable to hold the school liable for injury caused by the negligence of the swimming company to whom the school had delegated its educational function and control over the student¹⁸.

¹⁶“Non-Delegable Duties and Vicarious Liability”, Law of Negligence Review, <https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_NonDelegable.pdf>

¹⁷ Ibid

¹⁸ *Woodland v The Swimming Teachers' Association and Others* [2013] UKSC 66

This concept of fair, just and reasonable was also upheld in the Malaysian Federal Court case of *Dr Kok Choong Seng*¹⁹. In that case, the claimant brought an action against Dr Kok Choong Seng and the Sunway Medical hospital whereby the claimant claimed that he suffered injuries due to Dr Kok Choong Seng's negligence and that the Sunway Medical hospital owed him a non-delegable duty to ensure that he was treated with care by the healthcare personnel in the hospital. The trial High Court judge held that Dr Kok Choong Seng was liable for his negligence and the hospital owed a non-delegable duty to ensure care is taken for the Claimant regardless of Dr Kok Choong Seng's capacity as an independent contractor.

On appeal, the Court of Appeal dismissed the hospital's appeal on liability as the Court of Appeal affirmed the non-delegable duty of care imposed on the Sunway Medical hospital. The Court of Appeal held that the claimant became a patient of the hospital upon admission and therefore had established an antecedent relationship with the hospital. Since the hospital is a healthcare service provider, there was an assumption of a positive duty (also known as non-delegable duty of care) on the hospital to protect the claimant from harm.

The Federal Court however disagreed with the findings of the Court of Appeal and his Lordship Md Raus Sharif CJ concurred with the decision of the English Supreme Court in *Woodland* that the non-delegable duties should only be imposed on private hospital where it is fair, just and reasonable which would depend on the circumstances of the case²⁰. Thus in that case, the Federal Court held the Hospital not liable for breach of a non-delegable duty to the patient as the patient had reasonably expected the operation to be conducted by Dr. Kok Choong Seng himself and the Hospital was merely providing the relevant facilities for the patient's admission and operation.

Fourthly, non-delegable duty of care can only be applied when there is an antecedent patient-hospital relationship²¹. In deciding so, the

¹⁹ *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* (2018) 3 MLJ 281

²⁰ *Ibid*

²¹ *Ibid*

personal choice of the patient is a relevant factor in determining this relationship. The author RK Nathan back in 1998 was of the opinion that private hospitals are not liable for the negligence of their doctors because the hospital's liability would depend on who employs the doctor²². According to the author, if it was the patient himself who appoints and employs the doctor, the hospital will not be liable for the doctor's negligence. However, if the doctor, whether he is a consultant or not, was employed and paid by the hospital themselves and not the patient, the hospital will be vicariously liable for his negligence in treating the patient.

RK Nathan's opinion was based on Lord Denning's decision in **Cassidy v Ministry of Health**²³. In that case, the claimant was a patient at a hospital run by the Defendant and he requires routine treatment to set the bones in his wrist. During the operation, one of the Defendant's doctors were negligent and had caused the claimant's fingers to become stiff. Due to this, the claimant sued the Defendant on the basis of vicarious liability. The English Court of Appeal held that it must be established that the doctor is a servant of the Defendant before they can impose liability on the Defendant. A person is said to be a servant of the defendant if he was chosen for the job by the defendant and is fully integrated into the defendant's organisation.

The opinion of RK Nathan was then followed by the Malaysian High Court in the case of **Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor**²⁴. In that case, the High Court judge was of the opinion that the deceased and the 1st Plaintiff were in fact bound by the hospital's conditions of service which stated that all consultants at the hospital were independent practitioners whose instructions would be carried out by the hospital and its nursing staff. Furthermore, the evidence revealed that the deceased has specifically chosen the 1st Defendant as her obstetrician and she has engaged the 1st Defendant herself. On

²² RK Nathan, "Nathan on Negligence", (1998), Malayan Law Journal Sdn Bhd.

²³ In the Cassidy case, the doctors in the hospital were appointed by the Defendant and was not chosen by the patients themselves. Furthermore, they were fully integrated into the hospital thus making them the Defendant's servants.

²⁴ *Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor* [2012] 4 MLJ 673

the preponderance of these evidence, the High Court concluded that the doctrine of non-delegable duty is inapplicable to the hospital.

Similarly, in the Federal Court case of *Dr Kok Choong Seng*, the patient himself engaged the service of Dr Kok Choong Seng and he was admitted to the Sunway hospital on the recommendation of Dr Kok Choong Seng. The apex court inferred from this circumstances that the patient had reasonably expected the operation to be conducted by Dr Kok Choong Seng with due care regardless of where Dr Kok Choong Seng would refer him to and in such situation, it can be seen that the Hospital was merely providing the relevant facilities required for his admission and operation. Due to this, the apex court was of the opinion that the hospital cannot be held liable under the non-delegable duty of care in the absence of such antecedent relationship with such patient.

An antecedent patient-hospital relationship however would be established if the patient enters into the hospital and then relies on the hospital's internal system to refer him to any suitable doctor on duty. In such situation, the apex court in *Dr Kok Choong Seng* case held that the hospital having accepted the patient and undertaken to treat him may well be under a non-delegable duty of care to ensure that he is treated with due care, by whomever the hospital engages to do so. The Federal Court however stated that the extend and scope of the hospital's duty of care towards the patients however would still vary from patient to patient especially when it involved the patient's personal choice of medical treatments and physicians and whether in such circumstances it is fair, just and reasonable to impose liability to the private hospital.

Finally, in order to succeed in a claim made under the doctrine of non-delegable duty of care, the claimant must expressly plead the doctrine on non-delegable duty of care as against the private hospital ab initio. In the Malaysian Court of Appeal case of ***Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) and other appeals***²⁵, the patient and her parents filed a counterclaim against

²⁵ *Kee Boon Suan & Ors v Adventist Hospital & Clinical Services (M) and other appeals* [2018] MYCA 188

the hospital's claim for unpaid medical bills. It was clear that their counterclaim against the hospital was based on vicarious liability and not on the cause of action of non-delegable duty of care and it was only during the late stage of the submissions that this doctrine was brought up in Court. The Court of Appeal in dismissing the appeal on the counterclaim emphasized on the importance of expressly pleading the doctrine of non-delegable duty of care against the hospital from the very beginning of the suit. Even if it was not expressly pleaded, the Federal Court in *Dr Hari Krishnan* case held that it is sufficient so long that the claimant pleaded particulars of the hospital's own negligence and pleaded the essence of a non-delegable duty of care, that is the hospital has a duty of care to ensure that reasonable care is taken to the plaintiff²⁶.

The Applicability of the Doctrine of Non-Delegable of Care in Private Healthcare Facilities in Malaysia

Based on the above discussions, it is submitted that it is currently appropriate to impose such liability on the private healthcare facilities regardless of the identified drawbacks as discussed previously.

First of all, there is now a unifying framework of principles in determining the existence of non-delegable duty of care of a party as discussed in the *Woodland* case. There are five defining features to the framework, namely:

- a) the claimant is especially vulnerable and dependent on the defendant's protection from the risk of injury;
- b) there is an antecedent relationship between the claimant and the defendant that would lead to the assumption of responsibility on the defendant to protect the claimant from harm;
- c) the claimant has no control over how the defendant chooses to perform the duty assumed, whether personally or otherwise;

²⁶ *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal*. [2018] 3 MLJ 281

- d) the defendant has delegated to a third party a function which is an integral part of its positive duty towards the claimant, and also the custody and control incidental to that function; and
- e) the third party was negligent in the performance of the very function assumed by the defendant and delegated to him.

If all the above features are satisfied, it is without a doubt that a hospital would owe a non-delegable duty of care towards its patient. The establishment of this framework itself together with the five defining features are considered a stepping stone in the law of negligence since there was no guideline in the past with regards to the establishment of this duty outside the category of extra-hazardous activity²⁷.

Secondly, the implementation of this non-delegable duty is necessary in order to avoid a person who is accused of a breach of his obligation from escaping liability²⁸. In the context of private healthcare services, imposing this non-delegable duty would prevent the hospital authorities from escaping the liability of its consultant's negligence in treating their patient simply because they have outsourced the healthcare service to the consultant²⁹. It is only in exceptional cases can the hospital escape this liability.

Notwithstanding the above, the law as of to date is clear that non-delegable duty of care for private healthcare facilities in Malaysia should only be imposed so far as it would be fair, just and reasonable to do so³⁰. In cases where the hospital was merely providing the relevant facilities required for the patient's admission and operation or the fact that it was the patient who chose the physician himself thus absolving the contractual obligation between the hospital and the patient, this would definitely defeat the patient's chances of succeeding in a non-

²⁷ Low Kee Yang, "Non-Delegable Duty of Care: Woodland v Swimming Teachers Association and Beyond", 2015, < <http://v1.lawgazette.com.sg/2015-03/1261.htm>>.

²⁸ As per Lord Greene in *Gold v Essex County Council* (1942) 2 KB 293.

²⁹ Ibid.

³⁰ A Parson, "Care home briefing 132 – Care homes, schools, hospitals, prisons: the problem of 'non-delegable duty of care'", London, RadlicffesLeBrasseurLLP, 2014, <<https://www.rlb-law.com/briefings/care-homes/care-homes-schools-hospitals-prisons-the-problem-of-the-non-delegable-duty-of-care/>>.

delegable duty of care claim. In other words, a private hospital could be liable for its independent contractor if the hospital delegates to the contractor the very duty which the hospital themselves has to fulfil. Therefore, this helps to prevent the private healthcare facilities from avoiding duty of care towards its patient especially in cases where vicarious liability is not enforceable.

Finally, in the words of Lord Sumption in the *Woodland* case, it has long been the policy of law to protect the vulnerable and dependant persons which in the hospital context, it would refer to the patients, therefore it would justify the necessity of the duty to see that care is taken for the safety of the patient. Furthermore, it is not a strict liability as it only a duty to ensure that reasonable care is taken. Therefore, it is reasonable for the private healthcare facilities to be answerable for any tortious act by its delegate.

Conclusion

As a conclusion, despite any business arrangement between an independent doctor and the private healthcare facilities, the private health facilities are still providing services to the member of the public and the private health facilities cannot escape the accountability of the negligence done by its consultants practising in their facilities. The first and foremost importance in any private healthcare facilities would be the wellbeing of their patients and since patients are especially dependant on the protection of the hospital from any risk of injury, it is therefore necessary not only for justice to be done to them but that it should be seen done. Therefore, while taking into account the benefits and the drawbacks, it can be concluded that it is appropriate to impose the doctrine of non-delegable duty of care on the private healthcare facilities in Malaysia.