

# Rising Medicolegal Awards



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I find myself in the unusual position of having too many things to write about. Should I discuss the recently concluded Trans-Pacific Partnership Agreement (TPPA)? Perhaps I should wax philosophical on dress codes and their place in a pluralistic society. Maybe I could comment on how social media are being used to vilify doctors. However, in the end I have decided to expand on the theme of a recent Medico-Legal Society seminar.

The subject of the seminar was "Rising Medicolegal Awards". I suppose it is a testament to how seriously MMA is taking this, that besides me, the seminar was also attended by the President-Elect and the Hon. General Secretary.

Several prominent legal practitioners spoke on recent trends in medicolegal awards. All the figures show a steep upward curve, and if we do not come up with concrete, practical measures, the entire landscape of healthcare in Malaysia will change, and not for the better. Following the talks, there was a panel discussion where two private O&G specialists and a lawyer discussed possible solutions.

In understanding why malpractice awards are going up so rapidly, we have to remember that both the law and medical practice are evolving. In the case of medicine, we are to some extent the victims of our own success. Patients who would have died two decades ago now have a good chance of surviving. For instance, smaller and smaller premature babies are surviving, but generally with some physical or neurological deficits. If they survive, their lifespan is also increasing, so that it is now not unusual for individuals with significant handicaps to survive into their 40s, 50s and 60s. If an action is brought against the doctors involved in the management of these cases, any awards made will have to be calculated to cover the expected lifespan.

The law is also changing, though not through new statutes. Instead, judges are allowing claims that would not have been allowed before. For instance, it now seems normal that the awards will include an allocation for annual holidays for the plaintiff and one caregiver. In a recent case, payment for Ayurvedic massages was allowed. Furthermore, even though many of the treatments and procedures deemed necessary were available for free or at reduced rates in Government facilities, courts have been allowing claims for private treatments, which are obviously more expensive. When more and more items are allowed, and the total is multiplied by the increased expected lifespan, the amount becomes astronomical.

When higher courts give such awards, lower courts will follow, unless the case they are hearing can be distinguished from the precedent cases. Thus when one award goes up, the stage is set for them all to go up.

It should be remembered that judges depend on the testimony of medical experts to decide on the various claims and defences put forward to them. For instance, the plaintiff might claim that his life expectancy is 60 years, while the expert for the defence might rebut that, saying that 40 years is a more reasonable figure. Who the judge will believe will depend a lot on the authority and the persuasiveness of the experts, so investing in getting the best experts to testify for you is probably a wise idea.

Assuming that judges are being unbiased, never giving into their sympathetic impulses towards the disabled patients and never succumbing to the temptation to help the patient with the available insurance money, compensation costs will still go up, because all the charges for which awards can be made will go up. Is there nothing to be done? Well, perhaps not nothing, but it is a very difficult task and will require a clear vision and political will.

One of the solutions proposed by many (including the MMA) was no-fault compensation. However, as a

A third proposal relates to the fact that once an award is made and paid out, the way in which the money is spent is totally unsupervised and unregulated. An award might make provision for a specially modified vehicle, but there is nothing to stop whoever manages the funds from spending it on a Ferrari. This seems to most doctors to be unfair, perhaps unjust. While being found to have been negligent is a bitter pill, at least knowing that the disabled plaintiff is enjoying a slightly easier life is some compensation. Seeing the money spent otherwise removes even that crumb of comfort.



moderator at the event pointed out, only New Zealand and Sweden have this system in place. It has to be funded from general taxation. It works best when there is a strong universal healthcare system in place, because then only incidental expenses like house and car modification and holiday expenses need to be paid from this fund. In a country where much of the healthcare expenses must also be paid from the fund, the cost of maintaining a no-fault scheme might be prohibitive.

Another proposal from the panellists was arbitration. However, arbitration as a process is often expensive. According to lawyers, it is also not much faster than conventional court proceedings. It is, however, confidential, and this might appeal to doctors, as they could avoid the trial by media which is inevitable in court cases. However, this confidentiality does cause problems, because it would make it difficult to make awards uniform. The same injury might attract widely differing compensation from different arbitrators, which is not just.

In some countries, the award money is administered by a State authority, and the funds are disbursed when the invoices for services or goods approved in the award are presented and verified. Thus there is some degree of certainty about the appropriate use of funds. Of course, the administrative machinery for this sort of "fund manager" must be efficient and cost-effective.

Yet another pathway to restraining the rise in malpractice awards would be through legislation. If Parliament decides to cap awards or restrict the heads under which compensation may be claimed, this would mitigate rises. However, this could take a long time.

For now, the best way to fight back against these rising awards is to practice with care. Communicate with your patient and his family. Document everything carefully and contemporaneously. Be aware of recent developments in medicolegal cases. Above all, do not be afraid to ask for help or advice.