MEDICAL MALPRACTICE IN THE PHILIPPINES: PRESENT STATE AND FUTURE DIRECTIONS
PCP ANNUAL CONVENTION
MAY 2014

Prof. Rudyard A. Avila III
UP College of Law
Dean, Araullo University College of Law
Editor in Chief, Journal of the Integrated Bar of the Philippines
Particular form of negligence which holds a physician to apply to his practice that degree of care and skill which is ordinarily employed by the profession generally under similar conditions and like circumstances.
Death: US 98,000/year (8th leading cause of death)

Philippines- lower
POINT OF VIEW OF PHYSICIANS

No Crisis Yet
CASES IN THE SUPREME COURT

1st 90 Years: One (1)
1990-2000- seven (7)
After 2000 – 22
LOWER COURTS AND THE PRC

No Credible Data
EXTENT

Which Specialty?
ISSUE OF MALPRACTICE LIABILITY: TWO SIDES

Doctors: Crisis that affects the practice of the medical profession: conspiracy among lawyers and insurance companies;

Patient Advocates: Medical profession lacks adequate sanctions
MANIFESTATIONS

Increased Cost of Health Care
Rise in Insurance Premiums
Alienation of well-intentioned practitioners from active practice (particularly cutting specialties)
HARD TO BLAME PHYSICIANS

Decided Cases

- Lack of Understanding of the Medical Culture
- Inability to distinguish between negligent and non-negligent behavior.
- Expectation of perfection in an imperfect science: “Medicine is both an art and a science.”
CONSPIRACY OF SILENCE

Courts have had to frame strategies to go around the unique culture among physicians to close in and maintain a wall of silence when threatened with a malpractice suit:

Eg. *RES IPSA LOQUITUR*
BAD MEDICINE

Practice Better Nowadays
BAD DOCTORS?

[Bar chart showing comparison between Non Surgical and Surgical and Anesthesia categories.]
Inherent Risk:
• certain procedures have a higher probability of producing adverse outcomes
• Errors in these specialties more detectable
More seriously ill
Last resort
TYPICAL CASE

Failure to diagnose.
Instrument left in body cavity.
Overdose
Drug reaction.

Poverty
Duty of care
Lucas vs. Tuano

• important and indispensable to establish such a standard because once established, a practitioner who departed thereof breaches his duty and commits negligence rendering him liable.

• Without testimony or from an expert, the court is at a loss as to what is then the established norm of duty of a physician against which defendant’s conduct can be compared with to determine negligence.
Tuano

- [D]id not present any medical expert to testify that Dr. Tuano’s prescription of Maxitrol and Blephamide for the treatment of EKC on Peter’s right eye was not proper.
- Peter testified that Dr. Manuel Agulto told him that he should not have used steroid for the treatment of EKC or that he should have used it only for two (2) weeks, as EKC is only a viral infection which will cure by itself. However, Dr. Agulto was not presented by [petitioners] as a witness to confirm what he allegedly told Peter and, therefore, the latter’s testimony is hearsay.
Lasam vs. Remolete

- D & C
- No expert witness presented by plaintiffs
- Respondent physician presented her expert
- Expert ably explained what happened and r/o negligence as a cause
Lasam vs. Remolete

• Q: As a matter of fact, doctor, you also give telephone orders to your patients through telephone?
• A: Yes, yes, we do that, especially here in Manila because you know, sometimes a doctor can also be tied-up somewhere and if you have to wait until he arrive at a certain place before you give the order, then it would be a lot of time wasted. Because if you know your patient, if you have handled your patient, some of the symptoms you can interpret that comes with practice. And, I see no reason for not allowing telephone orders unless it is the first time that you will be encountering the patient. That you have no idea what the problem is.
Q: But, doctor, do you discharge patients without seeing them?
A: Sometimes yes, depending on how familiar I am with the patient. We are on the question of telephone orders. I am not saying that that is the ideal thing to do, but I think the reality of present day practice somehow justifies telephone orders. I have patients whom I have justified and then all of a sudden, late in the afternoon or late in the evening, would suddenly call they have decided that they will go home inasmuch as they anticipated that I will discharge them the following day. So, I just call and ask our resident on duty or the nurse to allow them to go because I have seen that patient and I think I have full grasp of her problems. So, that’s when I make this telephone orders. And, of course before giving that order I ask about how she feels.[53] (Emphases supplied)
JUDGE MADE LAW

Ramos vs. CA
Cruz vs. CA
Garcia Rueda vs Pascasio
Cruz vs. CA

The manner and the fact that the patient was brought to the San Pablo District Hospital for reoperation indicates that there was something wrong in the manner in which Dra. Cruz conducted the operation.
PHYSICIANS: HIGHER STANDARD?

Not an ordinary result: deal with human lives.
Physicians: Higher Standard?

Community Standard:

“Doctors have a duty to use at least the same level of care than any other reasonably competent doctor would use to treat a condition under the same circumstances. Breach…constitutes actionable malpractice.”

_Garcia Rueda v. Pascasio_
AREAS OF CONCERN

Informed Consent
Transfers
Clinical Practice Guidelines
Respect for Autonomy
Confidentiality
Careless Remarks
The Medical Record
AVOIDING MALPRACTICE SUITS

1. Keep channels of communication open
2. Golden Rule: observe proper demeanor
3. Maintain good records
4. Don’t act like a collecting agent, use proper channels
5. Observe proper bedside demeanor
6. Get a good lawyer
• Merely because a dispute is defined as justifiable does not necessarily mean that the courts are the only option to seek redress.
Means

- Court based litigation
- ADR
  - The modern civil justice system offers various approaches and options for dispute resolution thus promoting access to justice.
NEW METHODS

• While the courts will always maintain a central place in the civil justice system, it is increasingly recognised throughout the world that, in many instances, there may be alternative and perhaps more appropriate methods of resolving civil disputes in a manner which may be more cost and time efficient for all parties.
Law aims to facilitate access to dispute resolution and to promote the amicable settlement of disputes:
- encouraging the use of mediation and
- by ensuring a functioning interaction between mediation and judicial proceedings.

Mediation is legally enforceable in the United States, European Union, and Asia.
DOCTORS can utilize PRC Mediation as an out-of-court settlement process to avoid lawyer and court costs.
• establishes the institution of mediation aimed at reconciliation, which is an obligatory preliminary stage for those who wish to take legal action to assert their right to compensatory damages against a physician considered responsible for those damages through their professional conduct.
So why mediate?

- In most medical malpractice cases, victims are simply not aware of the possibility of choosing alternative dispute resolution tools such as mediation.
- The attorneys are the ones that should present the complete perspectives of resolving medical disputes. However, it is a fair assumption that attorneys rarely propose mediation to their clients because of their own financial interests (Joy David, 2012).
So why mediate?

• Mediating means choosing a considerably shorter way towards obtaining compensation, whereas a judicial process could last for years. For example, a Philippine malpractice trial reached 14 years, six months and twenty-three days.
So why mediate?

• in the interest of the physician to choose a confidential way of resolving disputes (Harris, 2003). Indeed, medical-related disputes that involve faulty medical acts could have a strong impact on the physician’s reputation because of the publicity of the state justice and also because of the high media impact that medical cases usually present.

• Also, the patient’s emotional suffering is an issue that could be more easily understood in a less formal environment. Moreover, the physician’s suffering should not be denied, as well. Mediation gives the opportunity to compensate the feeling of guilt by giving the opportunity to apologize and give explanations (Joy David, 2012)
So why mediate?

• Finally, in the case of alternative dispute resolutions, no procedural hindrance could affect the ‘final judgment’, as in such cases all matters discussed are related to malpractice *per se*.

• On this basis, in the case of a judicial action, the patient may be embroiled in procedural traps, such as the prescription of his or her action, whereas mediation does not experience such impediments (Giesen, 1988).
MEDIATION

• The term “mediation” is derived from the Latin word “mediare” which means to be in the middle.

• Mediation is an extension of direct negotiation between the parties, using a neutral third party (i.e., a mediator) to facilitate the negotiation process. As a facilitator, the mediator has no authority to impose a solution on the parties nor are the results of the process binding on the disputing parties.
Conciliation is a more formal process than mediation and it could generally involve the engagement of legal representatives, thus making it a more expensive process than mediation. There is, however, the added advantage that should no amicable solution be reached, the conciliator has the duty to attempt to persuade the differing parties to accept his own solution to the dispute.
Conciliation

- facilitative consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement.
• Interest-based dispute resolution processes expand the discussion beyond the parties’ legal rights to look at the underlying interests of the parties; they also address parties’ emotions and seek creative solutions to the resolution of the dispute. The focus of these processes is on clarifying the parties’ real motivations or underlying interests in the dispute with the aim of reaching a mutually acceptable compromise which meets the real interests of both parties.
• It is generally accepted that mediation is a purely interest-based dispute resolution process.
• In conciliation, there can be a greater focus on the legal rights of the parties as opposed to their underlying interests.
Fundamental procedural difference between the role of the conciliator and that of a mediator.

- The conciliator is a more active intervener, and may have an advisory role on the content and the outcome of a dispute. A conciliator may make suggestions, give expert advice and use intervention techniques that not only actively influence the likely terms of an agreement, but also encourage all parties to settle.

- A mediator on the other hand generally helps the parties to communicate with each other so that they can identify, clarify and explore the issues in dispute before they consider their options to reach a mutually acceptable negotiated agreement.
UNCITRAL

The 2002 UNCITRAL Model Law on International Commercial Conciliation defines conciliation as “a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons (the conciliator) to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute”
AIM of this obligatory stage

- Intention is to create an alternative system which would be more agile and speedy than ordinary procedures.
- Now mandatory for specific civil and commercial proceedings and is available in all cases for disputes concerning available rights.
- This method of dispute settlement is indubitably of great significance because, even though it is obligatory, it is not a substitute for the ordinary systems of justice.
Statement of Agreement

• The only pronouncement made by “mediators” which can produce juridical effects between the parties is the “Statement of Agreement” which, once it has been examined by the presiding judge in whose district the professional body is and has been found to be both formally and substantially in order, may become an actual sentence by means of a decree of homologation.
Advantages

• The advantages of mediation over litigation
  • lower costs,
  • more confidential proceedings,
  • and the degree of control enjoyed by the disputing parties over the process and outcome.

• In contrast, the legal system is public, adversarial, lasts longer, clients and lawyers keep track of who has treated whom the worst, and creates an atmosphere of conflict and offers no emotional resolution.
Why go into dispute resolution?

- In resolving allegations of medical negligence, patients tend to favour mediation because it provides a forum in which they can express their concerns and may lead to a recognition of the problem.
- Mediation can be effective in medical malpractice cases in which the patient and the healthcare professional wish to preserve their relationship or where poor communication has led to the dispute.
What laws govern the ADR practice in the Philippines?

- R.A. No. 9285 – AN ACT TO INSTITUTIONALIZE THE USE OF AN ALTERNATIVE DISPUTE RESOLUTION SYSTM IN THE PHILIPPINES AND TO ESTABLISH THE OFFICE FOR ALTERNATIVE DISPUTE RESOLUTION, AND FOR OTHER PURPOSES
- E.O. No. 1008 – CREATING AN ARBITRATION MACHINERY IN THE CONSTRUCTION INDUSTRY OF THE PHILIPPINES
- R.A. No. 876 – AN ACT TO AUTHORIZE THE MAKING OF ARBITRATION AND SUBMISSION AGREEMENTS, TO PROVIDE FOR THE APPOINTMENT OF ARBITRATORS AND THE PROCEDURE FOR ARBITRATION IN CIVIL CONTROVERSIES, AND FOR OTHER PURPOSES
- UNCIITRAL Law – the Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of systems of the world.
MOST OF ALL
Primum Non Nocere