Can I Have My Medical Records?

By Shona Anne Thomas

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There are times when medical negligence is so evident that a court victory in the patient's favour seems almost a foregone conclusion. Regardless of the degree of one's conviction of having received negligent medical treatment or care, a successful claim needs to be substantiated by evidence. Herein lies the problem with medical negligence litigation.

In most cases, the patient will require his or her medical records to ascertain what could have gone wrong during diagnosis/treatment and for the purposes of obtaining a second opinion. Unfortunately, this process is not always an easy one as it is often met with resistance. This is because the prevalent practice among medical practitioners and institutions is to deny patients such access unless ordered by the court to furnish copies of the medical records.[1]

Are patients entitled access to their medical records?

Yes, they are. Though ownership of a patient's medical record vests with the medical institution or practitioner, such records must be dealt with by the medical institution or practitioner keeping in mind the patient's best interests. The patient's right of access to his or her medical records is recognised by the Malaysian Medical Council (**MMC**) in its guidelines:[2]

> "*The patient may be entitled to access medical records as part of the contract between him/her and the medical practitioner, for various purposes, ranging from need to seek second opinion, to seek further treatment elsewhere, or for litigation. This privilege is also extended with the patient's consent to the patient's appointed agents*.
>
> "*Normally, medical practitioners and persons in charge of healthcare facilities and services should not object to the release of results and reports of the patient's laboratory investigations, X-rays and scans, and other such diagnostic tools, which the patient would have paid for personally or through insurance*.
>
> "*Medical practitioners and persons in charge of healthcare facilities and services are generally expected to cooperate and release all parts of the medical records, or certified true copies of the records, when so requested by the patient*."

It is pertinent for medical practitioners and institutions to note that the MMC guidelines have also emphasised that the withholding of information on the care, diagnosis, treatment and advice given to the patient, and relevant copies of the medical records, is unethical.

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1 As noted by Vazeer Alam J (as his Lordship then was) in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* [2015] 1 CLJ 825 (HC)

2 MMC Guideline 002/2006, cl 1.15

Are there any exceptions to this?

In certain justifiable circumstances, however, a medical practitioner may deny a request for disclosure of medical records. According to the MMC guidelines, such instances apply if:[3]

(a) in the medical practitioner's considered opinion, the contents if released may be detrimental or disparaging to the patient, or any other individual, or liable to cause serious harm to the patient's mental or physical health or endanger his life;

(b) the patient is deceased; or

(c) there is no written consent from the patient, or his legal next of kin or guardian, for release of the contents of the medical record to a third party.

What else can a patient do to obtain his or her medical records?

In the event a patient is refused access to his or her medical records despite efforts to reason with the medical practitioner or institution, the patient will have to make an application seeking the court's intervention to order production of the medical records by the medical practitioner or institution. This is called a "pre-action discovery application" and is made pursuant to O 24 r 7A of the Rules of Court 2012. Such legal proceedings will, however, cause patients to incur delays and unnecessary costs (which could have been otherwise avoided).

Author's comments

To be fair to medical practitioners and institutions, their guarded approach to producing medical records upon request perhaps stems from, among others, the concern of:

(a) breaching confidentiality;

(b) needlessly upsetting the patient any more than they have to; or

(c) getting entangled in a lawsuit.

As private medical institutions use and process personal data of patients in commercial transactions, they must comply with the Personal Data Protection Act 2010 (**PDPA**). Given that healthcare information such as a patient's medical records is deemed to be "sensitive data" under s 40 of the PDPA, medical institutions will not, and should not, release such data without the explicit consent of the patient concerned.

Medical practitioners and institutions should understand that victims of medical negligence face an uphill battle when it comes to medical negligence litigation as they have to overcome numerous hurdles at each stage of litigation. Intentionally complicating the process for the patient, with the unreasonable denial of the patient's right of access to his or her medical records, may therefore be a breach of the MMC guidelines and subject to disciplinary sanction. If you find yourself staring down the barrel of a gun (as a patient, medical practitioner or institution), do get in touch with your lawyer for legal advice.

If you have any queries, please contact the author, **Shona Anne Thomas** (sat@lh-ag.com).

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[3] MMC Guideline 002/2006, cl 1.17