

## THE STANDARD OF LEGAL LIABILITY FOR MALPRACTICE IN USING TRADITIONAL MEDICINE

Asmaa I. Atiyah<sup>1</sup>

<sup>1</sup> Iraq- Baghdad- legal advisor, Doctor of Philosophy (Ph.D), Ahmad Ibrahim Kulliyah of Laws, International Islamic University Malaysia, Email: asmaalaw2012@gmail.com

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### ABSTRACT

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#### **Keywords:**

*Legal Liability;*  
*Traditional Medicine;*  
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*Malpractice;*

This research aims to clarify the standard of legal liability for traditional medicine practitioners in the case of malpractice. Traditional Medicine is "the sum total of the knowledge, skill, and practices based on the theories, beliefs, and experiences indigenous to different cultures, whether applicable or not, used in the maintenance of health as well as in the prevention, diagnosis, improvement or treatment of physical and mental illness. Determining the standard of legal liability for traditional practitioners guarantees consumer protection and provides judges with a stable legal system to hold accountable for those who violate the standards of care and practice. This paper makes an original contribution on existing literature because there is no a stable standard to judge in malpractice cases of traditional medicine whether in same or different jurisdiction. Accordingly, this research displays points of view for different legal and jurisdictional applications such as (United States of America, Australia, United Kingdom) in determining the standard of this liability whether apply standards of modern medicine to traditional practitioners or adopt a new appropriate standard. This study adopts two basic judicial standards in determining that liability, namely, ordinary standard of care and professional efficiency standard. So, to examine this issue, this

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study clarifies how apply these two standard to malpractice lawsuits of traditional medicine. The study concludes that no single standard of liability can apply to all traditional medicine practices and that the standard of liability must vary depending on the nature of traditional practice and how it is exercised.

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## INTRODUCTION

Standard of legal liability means the scale that determines whether a medical practitioner committed medical malpractice and is, therefore, subject to legal liability. Generally, the courts determine this scale through its judicial provisions and case law in the absence of legal texts. In modern medicine field, the case of *Bolam v Friern Hospital Management Committee* is the most important judicial precedent in establishing a standard of legal liability in malpractice suits.

According to this case, the “Bolam test” established to state that a medical practitioner is responsible legally for malpractice when his/ her behaviour falls short of standard of practice of their colleagues in the same profession and under the same conditions. The court decided in this case that it is sufficient that the person exercises ordinary skill of an ordinary competent person exercising the same profession. As such, the person is not required to have a high degree of expertise to be charged for negligent . In contrast to modern medicine standard, jurisprudence and judicial views in general differ in determining the nature of standard of liability to apply in malpractice cases of traditional medicine practices. Some jurists have called for the need to apply a standard of modern medicine on traditional medicine practices because of the fear that traditional medicine practitioners will deviate from accepted medical standards due to the lack of scientific evidence for its success. Others said that applying standards of modern medicine to traditional medicine is inapplicable and called for a new standard. This is because modern medicine relies on scientific evidence to practice which making its standards inappropriate to be applied to practitioners of traditional medicine, especially each field of medicine has different rules of practice .

Significantly, from our point of view, traditional medicine based on psychological-spiritual and mental-physical practices. Each traditional practice requires a certain approach, skills and competencies from a practitioner. Noticeably, the nature of psychological-spiritual practices relies deeply on the personal intuition of traditional practitioners in diagnosis and treatment, making it based on a personal approach. While

mental-physical practices mostly apply modern medicine methods. Accordingly, standards of practice for traditional medicine are not unify and stable like as modern medicine.

This study argues that a standard of legal liability for traditional medicine practitioners in malpractice cases should take into account the nature and type of traditional medicine practices. Judicial applications adopted two standards in resolving issues related to this matter. First, apply an ordinary standard of care of modern medicine when traditional medicine practice was similar to modern medicine. The second standard depends on professional efficiency standard for traditional practitioner when his/her practice based on personal skill and ability even in diagnosis and treatment process.

Accordingly, we will present both standards separately and their judicial applications in malpractice lawsuits of traditional medicine as follows: (a) Ordinary Standard of Care, (b) Professional Efficiency Standard.

### **ORDINARY STANDARD OF CARE**

Judicial applications established a fundamental standard in determining the liability of the medical practitioner that called "Reasonable Care". This standard first adopted in the Bolam case, which stated that standards of care for medical practitioners based on the level of ordinary person's care within a same or similar community. Therefore, any practitioner who does not take an "average" standard of care as a reasonable person under similar circumstances would have committed medical malpractice. This standard is judicially applicable in determining a standard of liability for any medical practitioner, especially since the latter is obliged to take due care and is not required to achieve a certain result.

Later on, the judge toward malpractice cases of traditional medicine adopted the same standard in the case of "*Shakoor v. Situ*", which was the first case in such malpractice issue. However, a traditional practitioner should not be compared with his/her peers in same profession, but to peers in same educational and training style who practice same traditional model. It is important to note that, in the nature of traditional practices, the standard of "reasonable person" cannot be applied to all practitioners. The therapeutic relationship in traditional psychological practices does not fix in itself to apply this standard because some practitioners work on spiritual rather than physical aspects making it difficult for the judges to determine which standard of due care should traditional practitioners follow, thus making it difficult to find a measure of their legal liability. Such standards "Reasonable Person" can apply to traditional physical practices that are similar in its diagnostics and therapies to modern medicine practice. Here, both traditional and modern practices require standards of care including training in medical sciences, anatomy, physiology, and sometimes pharmacology such as chiropractic and Chinese acupuncture. These practices sometimes adopt same scientific standards as in modern medicine to provide a level of efficiency and

security in its practice. As a result, there are commonalities or overlaps, both cognitive and therapeutic, between traditional and modern practices, even in the case of malpractice. In such a case, professional problems expected to be same in both practices, including failure to examine, diagnose, refer and cure, maintain an appropriate record, and obtain prior consent. Based on the above, applying "a Reasonable Person" standard to traditional practices will be strictly in the case of a cognitive-educational overlap between traditional and modern practices. Regardless of the lack of standard, that governing traditional medicine practices or applying such standard to malpractice cases. The researcher concludes from judicial applications that apply a "Reasonable Person" standard to malpractice cases of traditional medicine that judges are vary between two situations:

A: "Shakoor" Case Standard, which is a standard of an ordinary traditional practitioner, since he/she is subject to appropriate standards of care for their profession. A chiropractic practitioner, for example, should measure by another chiropractor to determine the extent of his/her legal liability. In case, if a user or patient claims for malpractice, he/she must bear the burden of proving the degree of skill and competence possessed by other chiropractors in the same profession and circumstances. A traditional practitioner is subject to the principle of "Reasonable Person" but within standard of care that govern a traditional therapeutic model that provided, rather than a modern model. He/she can determine his/her liability by following a standard of their peers who providing same traditional model. In this case, standard of care for modern medicine cannot apply to a traditional medicine practitioner because it is unfair and bias dealing toward the last .

However, medical boards have objected by insist that traditional medicine practitioners should be subject to modern medicine standard that based on accepted practices and approaches. On the other hand, linking the practice of traditional therapies by physicians to become suitable with accepted practices of modern medical community based on scientific evidence is contrary to the nature of practice of traditional treatments. From courts point of view in general, it seeks to apply an especial standard for each practice, or a traditional treatment model separately. Because when any traditional practitioner realise that he/she will be subject to standard of care for his/her practice, he/she will feel protected. Although, most of these standard do not exist due to lack of professional recognition for such traditional practices. For example, the Acupuncture Act of Florida states that, among professional malpractice is "Gross or repeated malpractice or the failure to practice acupuncture with that level of care, skill, and treatment which is recognised by a reasonably prudent similar acupuncturist as being acceptable under similar conditions and circumstances". In addition, the procedures of Traditional Medical Board in investigation and trial of Chiropractic Law in Mississippi states that the Board may appoint one or more authorised chiropractors whose task is to investigate the efficiency of the accused .

It is evident from legal texts above that the task of confirmation the appropriate standards to follow by a traditional practitioner is usually the responsibility of an expert with same level of competence and in same circumstances. An expert's task is to prove that a practitioner of traditional medicine has violated the level of experience and skill required from a regular specialist who practices same profession. Therefore, standards, which put to each traditional therapeutic model, will govern the lawsuits of its practices, not the scientific standard that proves their effectiveness and security .

It should be noted that the difficulty of defining standards of each traditional practice can be avoided, and a causal connection in malpractice cases can be established even if partially, by referring to standards of practice and professional standards established by law, legislation, organisations or professional and voluntary associations. These standards contribute significantly to establishing standard of care that a traditional practitioner should follow.

Legally, for example, Articles 13 and 19 of the British Chiropractic Act of 1994 provide that the General Council in this act shall from time to time determine the professional and practice standards required for safe and professional practice. Determining these standards will help the judge to know the terms and scope of a practitioner's good practice, and thus determine what standard of care the chiropractor must adhere toward the user.

Moreover, Article 11 of the Chiropractic Law of Mississippi State provides the standards of practice that must apply to practitioners and their assistants that they must keep correct and readable records for patients. Each record must include history, symptoms, examination, diagnosis and treatment. These procedures are acceptable standards, and any lesser behaviour is unprofessional practice from a chiropractor.

While judicially, we refer to *Shakoor v. Situ* case, in which the judge established the first precedent in determining the standard of legal liability in traditional medicine practices field. The defendant was a member of Chinese Medical Association and a Chinese and modern medicine expert. He practised for several years in England, but he was not a registered general practitioner. The case is that the deceased "*Shakoor*" husband of plaintiff, asked the defendant to treat him from benign lipid tumours, which Western medicine offers surgery as a treatment only. The defendant described a therapeutic course of herbs consisting of 12 herb for this purpose, after taking the plaintiff's husband nine doses of the drug died because of liver failure. It found through investigation that one of the herbs used in treatment leads to liver damage. On it, the deceased's wife filed a negligence suit against defendant in wrong treatment description and failure to warn the patient about potential risks .

The plaintiff, wife of the deceased, protested that defendant had presented himself as a general practitioner of skin problems. Therefore, he should be tried according to standards of care for general practitioner in

modern medicine after a recent medical journal article pointed to the dangers of using Chinese herbs on the liver.

However, the Complainant did not provide evidence of the accepted professional practice of a Chinese practitioner, which would be difficult to prove malpractice action against the defendant. The defendant, in turn, demanded that he follow the standard of traditional Chinese medicine practitioners. In addition, Chinese medical sources indicated that the treatment is safe, and has tested for many centuries, with no side effects recorded against it. Accordingly, the judge supported the defendant's claim to adhere to standards of a Chinese medicine practitioner and not to prosecute him according to general practitioner standards. The defendant did not held responsible after the deceased refused modern medicine and resorted to traditional medicine. This rejects the right to complain against a traditional practitioner because he did not provide the level of care and skill according to the standards of modern medicine .

In general, the judge depend on a character definition that traditional practitioners would introduce him/herself to the user in determining the standard of legal liability. When a medical practitioner presents him/herself as a practitioner of traditional medicine, or modern medicine, he/she legally complies with the ordinary standard of care in practice each treatment. Thus, a practitioner will be measured by another practitioner introduced same treatment in same circumstances. It is not permissible to apply other standards for different treatment. In other words, the standards of modern medicine should not apply to traditional medicine when a practitioner presents him/herself as a traditional practitioner and vice versa .

B: "Bolam" Test Standard is a standard of ordinary medical practitioner practice in modern medicine. This standard should apply if a traditional practitioner uses modern medicine methods in his/her practice, because cognitive and therapeutic overlap permits the application of standards of care for modern medicine. In such a way, a traditional practitioner enters into the scope of modern medicine and becomes legally accountable under its provisions. Many cases of malpractice for traditional practitioners apply standards of modern medicine, whenever he/she introduces diagnostic or therapeutic methods within the modern practice. Even if practitioners did not use these methods and they obliged to apply modern standards of care, then they should be accountable for failing to observe expected standard of practice. Having this consideration helps to regulate the practice of traditional medicine .

For example, as provided in Chiropractic Law in Mississippi State for cases where a chiropractor's performance includes any action of practicing medicine such as radiation and others, "...the chiropractor shall be held to the same standard of care as would license doctors of medicine who are qualified to and who actually perform those acts under similar conditions and like circumstances ."

Moreover, the Bolam standard also applied in the case where a traditional practitioner is a doctor, so he/she is subject to standards of

modern medical community. To clarify, a physician who provides traditional medicine practices should be subject to standards of modern medicine on the basis that he/she have licensed under it . The general medical license renders physicians to become subject to the legal rules governing his/her medical practice .

On the other hand, in some jurisdictions, the judicial application of some countries have confirmed that traditional practitioners are not subject to standards of modern medicine, but they are subject to their own standard. Accordingly, traditional practitioners from among physicians should not judge according to accepted standards of care within the general medical community, but by standards established through treatment agreement between physician-user, although it is difficult to define the nature of standards of care established by the contract between them. However, at least a doctor will not be responsible for merely using traditional medicine instead of modern medicine .

This is what doctor Nicholas protested in front the Supreme Court of New York State in *Julianne Charrell v. Nicholas J. Gonzalez*. The medical council accused him of neglect for using alternative medicine to cure his patients. The doctor explained that the reason for the accusation is due to the bias that Council against treatments of this medicine. The doctor also stressed in his defence that he should not judge according to standards of modern medicine, especially since he got the consent of his patients to use traditional treatment.

In our point of view, a doctor who wants to practice traditional medicine model should first obtain a certificate, or a license, which makes him/her qualified to practice this medicine. In case that he/she presents him/herself as a traditional practitioner to the user, he/she is subject professionally and legally to the conditions and healing arts of this practice, and standards of legal liability for its malpractice. A traditional practitioner cannot be subject to standards of modern medicine, because he/she practices traditional medicine, only if his/her presents him/herself as a practitioner of modern medicine in practising traditional medicine, then, they will be subject to standards of modern medicine. Thus, when a traditional practitioner or physician has introduced traditional practice, they will be automatically subject to traditional standards of practice, and whenever they present modern medicine model, they will be subject to professional and legal liability rules for its malpractice.

Overall, in both situations (A and B), the judge applies the principle of “ordinary person” in traditional physical practices. The judge will evaluate the degree of care given by traditional practitioner through measuring his/her perform by another reasonable practitioner under same circumstances. This done according with general legal principle in determining standards of medical practice, which based on “those doctors have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. ”

In this case, general practitioner may allow testifying in cases of medical malpractice relating to traditional practices after has being prevented from

performing in accordance with his/her professional standards of care . The judge should allow evidence of causality in which the doctor allowed to give his testimony as an expert and does not require that he must be from the defendant's field but has knowledge in standards of care in such practice.

For example, the Court of Appeals of California State, USA, adopted an important principle in the case of *Kevin M. Enslen v. Robert Kennedy*. The principle prescribes that physicians can testify against the failure of chiropractor to inform the patient that his condition is outside the scope of chiropractic. Especially since this doctor is aware of standards of care for medical practitioners, including chiropractors.

Significantly, judicial permission here is been broadened to include the testimony of traditional medicine practitioners against doctors in cases of malpractice against them if they have the same experience in standards of care. The court approved in *Miss. Farm Bureau Mut. Ins. Co. v. Garrett* that a chiropractic practitioner may qualify to give an expert opinion regarding the diagnosis, proof of causal relationship, and guessing the damage.

Accordingly, the scope of applying ordinary standard of care in determining liability in cases of malpractice of traditional medicine practices is different in content between situation of ordinary traditional practitioner and ordinary medical practitioner. Each situation has a specific scope of application among cases of using traditional mental-physical practices and using modern approaches to assessing patient's case. However, according to one researcher's view, the application of this standard is flexible, and the scope of its application can be broadened to include traditional psycho-spiritual practices. The difficulty in applying the modern standard in these practices that depend in its diagnosis and treatment on practitioner's personality and self-experience may not always be absolute.

This is because traditional practitioners prescribe treatment based on the user's personal situation, so it is only appropriate for his condition and is not suitable for another user. This makes it impossible for a second practitioner who, at the same time, did not see the user to determine whether he could handle or prescribe the same treatment for him. This is make from principle of personal treatment sometimes excuse against the user in not denying rational justification for traditional practitioner when he/she choose the user's treatment and therefore making it difficult to determine practitioner's acts of violation .

Noticeably, this difficulty may sometimes be relative in these practices, especially when related to the stage of diagnosis without treatment. Where several cases arise permit to use ordinary objective standard to measure the extent to which practitioner has violated his/her practice by comparing on another practitioner in same case. This is the case when a practitioner violate the act of other ordinary practitioner, such as spiritual practitioner who recommends patient to not resort to modern medicine, failure to follow the user's condition or poor care. Another



example like the direct relationship between the practitioner's act of violation and the user's harm or causing it during treatment, such as wound inflammation by a wrong instrument. From researcher's assessment for ordinary standard of care, we can say that this standard is important in determining the legal liability of traditional practitioners. It brings equality and justice to judge traditional practitioners in accordance with standards of care for each practice that he/she provides. In such a way, it seeks to achieve legal stability in dealing with malpractice cases of traditional medicine according to a specifically context defined for practitioners. However, its application is restricted to the existence of ordinary standards of care for traditional medicine practices. It becomes complicated due to the multiplicity of standards of care in traditional medicine practices and bodies that appointed these standards, or in the absence of such standards. Accordingly, it can be suggested firstly determining applicable standards of care for traditional medicine practices, in particular with the lack or absence of legislative recognition for most of such medicine practices. Then, determining the authority that should identify these standards, on condition that they must set these standards to the benefit of both parties and not override the interests of practitioner at the expense of the other party. Later, the judiciary should then apply standards of care set by official professional bodies, or voluntary organisations concerned with the protection of the user and practice.

Another difficulty that arises is that the standards of care in traditional practice and scope of its practice are not been clearly defined. The problem facing most traditional practices is that their standards of care have not laid down or determined, professionally or legally, to this day. This creates a problem for judges in determining who is an ordinary person who adheres to standards of care in the same profession. Thus, it is impossible to implement this standard in such practices, which should enable the judge to apply another standard to determine the legal liability for malpractice of a traditional practitioner.

### **PROFESSIONAL EFFICIENCY STANDARD**

Medical methods require that practitioner must practice with efficiency and skill that qualifies him/her to perform his/her profession. Medical qualifications are the main condition for those who wish to practice medicine. The provisions of health legislation stipulate that practitioner should have spent a period of practical training not less than one year after obtaining scientific qualification or having experience certificates. Such legislation did not refer to the type of treatment provided by licensed practitioners but emphasised on the qualifications that a practitioner should possess to work in medicine.

From the above, it can conclude that practitioners may use traditional remedies as long as they have the necessary skills or qualifications to practice it. However, qualifications of the practitioners in performing traditional treatments differ according to different learning means, training

and knowledge based on cultural differences in receiving such treatments. This leads to different qualifications required among practitioners. In China, for example, the qualification of a chiropractor is different from those in Britain. They have different educational and training curriculum, whether, for example, a chiropractic includes or does not include the study of acupuncture, or the use of dietary supplements .

To ascertain the degree of efficiency of a practitioner's performance, one should refer to their medical license or qualifications. If a medical license exists for recognised traditional remedies, the judge shall charge the practitioner in light of his/her experience and qualifications. In the absence of such license, it proposed that the judiciary should develop a new standard for traditional medicine practitioners to assess the level of skills they possess and the care they provide. The judge shall ask the practitioner about their credentials and other documents that substitute for the license.

Such credentials divided into two categories, main credentials such as medical licensing, official certificates, participation in medical conferences, dissemination of academic research, and insurance against medical malpractice. The second category is optional credits that guarantee greater efficiency in practitioners such as assessment of practice years and character of practice, letters of recommendation, or recommendation from experts .

The provision of two main credentials or qualifications is in itself sufficient to determine the extent to which a practitioner possesses the necessary skill to practice traditional therapy and to ensure patient safety. While at the same time reducing the burden of practitioner's liability. This is important since the field of traditional medicine is witnessing practices by unauthorised persons, which may raise problems of malpractice. Many patients resort to the services of these unlicensed practitioners, expecting a level of skill and care of a specialist. In this case, practitioners bear not only civil liability for their misbehaviour but also have criminal liability for practising medicine without a license .

Accordingly, the role of such credentials or qualifications is to "help assess competence but do not guarantee competence or that the therapist is using treatments proven to be safe or effective". These qualifications used to determine or measure a practitioner's competence to practice their profession. The mechanisms for determining qualifications of traditional practices vary from one state or country to another, although most of countries do not include the provision of such mechanisms or are outside professional regulations. For example, the practice of a massage may require a license in a state and may be nothing more than a personal matter in another state. Thus, regulation the boundaries of traditional practices create a professional and legal basis for incorporation such practices formally into the health system .

Significantly, the requirement of skill and competence for practising traditional medicine practices is important in the judicial field and considered one of the most fundamental motivations for establishing

malpractice cases for using traditional remedies. This is because most of these treatments used in cases of chronic diseases, or those that are hopeless, requiring a practitioner to have a reasonable amount of medical knowledge that qualifies him/her to treat these cases. In this case, a practitioner has the burden of proving that the lack of due care has not affected the patient's health because the damage is in fact present. Accordingly, traditional practitioners are required to have the skills and competence to perform the traditional therapeutic model .

For example, standards of practice established by the College of Traditional Chinese Medicine Practitioners and acupuncturists of Ontario provided that practitioner should be competent. This means that practitioners possess the necessary knowledge and skill to ensure security, effectiveness, and ethics of treatment provided to the patient and otherwise prevents from practice. In addition, paragraph (1) from Chiropractic Physician Practice Act requires that chiropractor should have speciality training through the completion of a recognised course .

Notably, Standard of professional efficiency applied judicially to determine liability in traditional practices, in cases where it is difficult to prove harm in malpractice cases. The judge refers to qualifications, experience certificates and training of traditional practitioner in determining whether he/she is responsible. Thus, the judge depends on the type and quantity of qualifications that the practitioner possesses, which at the same time demonstrate the extent of his/her competence to exercise the therapeutic model and liability for malpractice. The difficulty of proving harm from malpractice is conceivable in both cases of traditional psychological or physical practices as follow :

#### **Traditional Psychological- Spiritual Practices**

These practices cannot apply modern objective standards in proving malpractice because it depends on a patient's personal situation. It also depends on the special capability and physical abilities of practitioner, such as in the treatment of yoga, meditation, or ruqyah in which the user is entirely subject to the diagnosis of practitioner, making it difficult for plaintiff in such practices to prove damage suffered. This is because the spiritual approach is outside the framework of measurement, or scientific proof of its therapeutic effectiveness .

These practices often affect the psychological side of users more than the physical side, so it is a complicated task to prove it's effective by scientific methods. For this, it is difficult in legal and judicial field to prove that spiritual practices cause any harm to users. However, researchers are trying to impose on traditional medicine practitioners in such practices a system of "scientific proof" as in modern medicine. This study concludes that the act of malpractice in spiritual practices was either specific to the nature of traditional practitioner or to the nature of practice itself. Malpractice may be due to lack of competence, skill and knowledge of practitioner to his/her standard of practice, or that the content or process of these practices involves risks to their users. Therefore, when users

resort to these practices, they should have a presupposed knowledge of these risks.

Based on the above, the Supreme Court of United States of Oregon ruled in *Charoyl M. Creasey v. Charles A. Hogan* that when a person who seeks treatment from a practitioner according to a certain school, it is logical to accept the treatment practices and beliefs of that school. Therefore, when a practitioner treats user by ordinary skill according to his/her school techniques, he/she will not face liability .

It is clear from the case above that a spiritual or psychic practitioner should have the necessary qualifications of practice, and based on their existence or absence, his/her legal liability is determined. Therefore, the evidence of causation in cases of malpractice is not dependent on the testimony of any general practitioner in that task as long as it based on spiritual methods, and personal abilities of their practitioners, making it far from proving the act of malpractice by scientific evidence. Proving causation in such cases based on the qualifications and experience of practitioner in this field, which qualifies him/her to do this task.

From judicial evidence about what mentioned above, *Nina DeMatteo v. Yoga Moments Studio* case, the court relied in its judgment on the testimony of plaintiff without relying on the testimony of an expert in the same field of defendant. Since the malpractice, in this case, was due to the trainer because of her inefficiency and unskilled in performing the traditional practice. So far, it is difficult for a judge to use any other evidence except than verification how the damage occurred and the fitness of practitioner to perform such a practice.

### **Traditional Physical Practices**

Professional efficiency standard applies when it is difficult to prove the harm caused by traditional physical practices since the modern standard is difficult to apply because there is no scientific evidence that the damage caused by treatment or its side effects.

For example, in 2008, plaintiff Dolores Drury in Missouri State of America filed a malpractice suit on a practitioner in traditional Chinese medicine Dr. Zhengang Guo. The case is that the plaintiff treated for several symptoms by a chiropractor, Patrick Kennedy, who asked for her medical herbs from the defendant, owner of several Chinese herb supplement companies, including Life Rising Corp. However, the use of these herbs later caused a kidney failure, which led to prosecution against the defendant on the grounds of failure to act according to a standard of care accepted within his profession.

The plaintiff claimed that practitioner should have been a duty under an ordinary standard of care to know that those herbs cause risks and side effects. He had to perform his duty according to the usual degree of care and caution exercised by other practitioners of Chinese medicine in the same society; also, he should inform her about the dangers of treatment. However, the claimant had difficulties in establishing the causation relationship because the Court had supported that there was no specific

evidence that the amount of herbs provided was unsafe or harmful. Besides, the defendant had the necessary scientific qualification, the training required to practice with a degree of skill and professionalism as a modern medical practitioner, and was licensed in Chinese traditional medicine.

It can be concluded from the above case that difficulty of proving the damage led the judge to rely on the standard of professional competence in determining practitioner's innocence from legal liability. According to the skill and long experience of the practitioner in this area, the judge ruled that the practitioner did not violate the standards of care. Nevertheless, determining standard of care in this case should state that the practitioner should have been aware of the side effects caused by these herbs. This ruling highlights how the professional and practical qualifications of traditional practitioner protect them from undue solicitation while serving as a standard to hold them accountable and guide their practice.

After reviewing (A,B) practices, it can be concluded that required qualifications and certification to perform traditional medicine practices provide professional and judicial guarantees. Professionally, it provides a strict defence system for users that guarantees security, effectiveness of traditional practice and for practitioners in reducing misuse. Judicially, it provides a judge standards and guidelines to measure the extent to which a traditional practitioner has specialised in his/her practice. Therefore, the higher level of a practitioner's qualifications is an indication of his/her efficiency and skill. This level achieved through educational and training experience received by practitioners of traditional medicine and has a significant impact on determining their legal liability as well. Thus, professional efficiency applied as a standard to determine legal liability, based on the level of knowledge and skill required from practitioners who should employ it in their performance .

Some jurisdictions have preferred to use this standard as in Australian judiciary in several cases of malpractice rather than applied ordinary standard of care. Although ordinary standard of care is considered the main standard for determining legal liability in diagnostic and treatment cases, because judge depends on experts' testimony to determine what the standards of care should be.

In Australia's view, professional efficiency standard, and the requirement that a practitioner possesses the required skill has a distinct role in certain situations. Especially when a practitioner performs his/her duty to inform, that includes disclosure the risks, benefits of treatment, and determines the amount of information to disclose. Then, it cannot apply ordinary standard of care, because the duty of inform closely related to how much and type of information that user wants to know, and this varies from case to case .

In our point of view, this is an effective standard in determining the legal liability for malpractice of traditional practitioner in cases where there is a multiplicity of standards of care or in cases of lack such standard. Traditional standards of care are characterised by their diversity

and variety, even among the states of one country, or lack of professional legislation to establish it. This causes confusion to the judge and the instability of judicial decisions in this regard in the case of reference to traditional standard for evaluating the performance of practitioner. Thus, recourse to the skills and experience of practitioner in this field is sufficient, and evidence of his/her competence and efficiency in such practices.

The application of this standard also faces difficulties in the absence of the provision or regulation of qualifications and competencies required to perform traditional medicine. This is because many of these practices are outside the framework of professional organisations. Taking into account that qualifications and certification required to perform medical practice plays a prominent and important role in the formulation of standards of care required for their exercise. These qualifications illustrate the form and type of specialisation required, and therefore determine standard of care for regulated practice. Which makes from drawing the qualifications in performing traditional practice closely linked to the possibility of defining its standards of care.

## CONCLUSION

In conclusion, the determination of a standard of legal liability for malpractice in traditional medicine cannot be based on a single objective standard. Especially with the difficulty of establishing a unified standard of care for most traditional practices, especially Psychological-Spiritual practices. Therefore, it can believe that the determination of standard of legal liability must be specific to the nature of traditional medicine and how it should be exercised. It is not fair to apply a single standard of legal liability to all traditional practices with different natures, purposes and standards of care.

In the absence of such standards, or its diversity and differences, the judge may use the professional efficiency standard to determine the liability of the practitioner. Particularly in traditional practices where it is difficult to prove damage, and thus the difficulty of determining the legal liability arises thereof. This standard provides the judge with legal evidence of a practitioner's eligibility, and his/her skill in carrying out traditional practice. Thus, within the scope of this standard, the judge is able to prove legal liability of a practitioner's malpractice or to deny it. Overall, traditional practitioner in his/her practising of therapeutic model must be subject to standards of practice of that model. Apart from being a doctor or traditional medicine practitioner, as long as both have provided a traditional therapeutic model, they should follow, in turn, principles of their practice and the standards of care required. If both are applied a modern therapeutic model, then they will be able to apply standards of care for such treatment.

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