

# Can I sue for an inaccurate breast cancer diagnosis?

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## I. Introduction

In December 2020, over 200 patients of Khoo Teck Phuat Hospital (“KTPH”) were found to have been misdiagnosed with an aggressive form of breast cancer called “HER2”.<sup>1</sup> The misdiagnosis resulted from the false-positive results of HER2 tests conducted by KTPH’s laboratory.<sup>2</sup> While the patients did have breast cancer, the misdiagnosis of the more aggressive condition led to more expensive treatment.<sup>3</sup> This treatment caused severe side effects as well.<sup>4</sup>

A review committee found that inadequate checks and the “suboptimal” testing protocol adopted by KTPH led to the inaccurate test results.<sup>5</sup> KTPH has since offered to refund the full cost of the unnecessary treatment and include further compensation.<sup>6</sup>

While KTPH admitted to its errors in this case, other patients who experience such an inaccurate diagnosis might not be as fortunate. Patients might be alone in their claims against a hospital or laboratory that refuses to admit liability. In such a situation, how can one seek redress through the courts? This article will assist such a patient by informing her of who she can sue, how she might be able to establish a viable claim, and the type of compensation that she can claim for.

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<sup>1</sup> Rachel Phua, “KTPH breast cancer error: 200 received wrong test results, affected patients to get refunds” (4 January 2021) <<https://www.channelnewsasia.com/singapore/breast-cancer-test-error-khoo-teck-puat-hospital-refunds-384146>> (accessed 14 October 2021).

<sup>2</sup> Salma Khalik, “Parliament: Breast cancer patients who received unnecessary treatments to receive full refund by KTPH” (24 May 2021) <<https://www.straitstimes.com/singapore/politics/parliament-patients-diagnosed-with-wrong-type-of-breast-cancer-by-khoo-teck-puat>> (accessed 14 October 2021) (“*Parliament*”).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> National Health Group website <[https://corp.nhg.com.sg/Media%20Releases/NHG%20Review%20Committee%20Findings%20on%20KTPH%20HER2%20incident%20Press%20Release\\_3%20May%202021\\_final.pdf](https://corp.nhg.com.sg/Media%20Releases/NHG%20Review%20Committee%20Findings%20on%20KTPH%20HER2%20incident%20Press%20Release_3%20May%202021_final.pdf)> (accessed 14 October 2021) (“*NHG*”) at [3] – [4].

<sup>6</sup> Today Online, “Khoo Teck Phuat Hospital to compensate misdiagnosed breast cancer patients, 5 staff disciplined” (3 May 2021) <<https://www.todayonline.com/singapore/khoo-teck-puat-hospital-compensate-misdiagnosed-breast-cancer-patients-five-staff>> (accessed 15 October 2021).

## II. Discussion

A case of medical misdiagnosis falls under the area of medical negligence.<sup>7</sup> In order for a patient to succeed on a claim of medical negligence, she must show that:<sup>8</sup>

- (a) the healthcare provider owes her a duty of care;
- (b) the healthcare provider has breached this duty; and
- (c) the patient suffered a loss as a result of the breach.

The patient has to prove that it is more likely than not that these requirements will be satisfied.<sup>9</sup>

### A. *Who can be sued?*

We will first consider requirement (a). A “duty of care” refers to the responsibility that a person or organisation has to avoid harm to the individual who is bringing the suit.<sup>10</sup> To determine who to sue, we will consider when a hospital, laboratory (that is not a part of the hospital) and laboratory staff will owe a duty of care.

#### (1) *Duty of care of the hospital/laboratory*

First, a hospital has the duty of ensuring that a patient will not be harmed because of its “organisational failure”.<sup>11</sup> This includes the failure to provide suitable medical equipment,<sup>12</sup> or the failure to implement a proper follow-up system that will ensure an accurate diagnosis.<sup>13</sup> Independent laboratories also have the responsibility of ensuring that tests are conducted with “reasonable skill and care” to achieve accurate test results.<sup>14</sup>

In *Noor Azlin*,<sup>15</sup> the patient suffered from lung cancer.<sup>16</sup> However, none of the doctors she saw diagnosed her with this condition.<sup>17</sup> The court found that although the hospital’s system

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<sup>7</sup> *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] 2 SLR 492 (“*Hii Chii Kok*”) at [221].

<sup>8</sup> Gary Chan Kok Yew & Lee Pey Woan, *The Law of Torts in Singapore* (Singapore Academy Publishing, 2<sup>nd</sup> Ed, 2016) (“*Law of Torts*”) at p 79.

<sup>9</sup> *Law of Torts*, *supra* n 8, at p 5.

<sup>10</sup> *Id.*, at p 80.

<sup>11</sup> *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2019] 3 SLR 1063 at [114].

<sup>12</sup> *Ibid.*

<sup>13</sup> *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2019] 1 SLR 834 (“*Noor Azlin*”) at [99] – [100].

<sup>14</sup> *Farraj and another v King’s Healthcare NHS Trust and another* [2006] EWHC 1228 (QB) at [79].

<sup>15</sup> *Noor Azlin*, *supra* n 13.

<sup>16</sup> *Id.*, at [34].

<sup>17</sup> *Id.*, at [10] – [26].

allowed for patients with abnormal X-ray results to be followed up by a senior doctor,<sup>18</sup> the follow-up doctor did not have records of what previous doctors wrote in their notes or the tests conducted.<sup>19</sup> These records would have alerted the follow-up doctor of the persistent nodule and lead to an early diagnosis of lung cancer.<sup>20</sup> The hospital had failed in its duty to implement a system that ensures that doctors will have sufficient information to make an accurate diagnosis.<sup>21</sup>

Similarly, when there is an inaccurate diagnosis of breast cancer, a patient could potentially find that the hospital or laboratory had failed to implement proper systems that will ensure an accurate test result and diagnosis. For instance, KTPH could have been liable for their suboptimal testing protocol and their failure to establish a system of checks to ensure the accuracy of the HER2 tests.<sup>22</sup>

(2) *Duty of care of the laboratory staff*

Next, we will consider a laboratory staff's duty of care. The inaccurate laboratory test result would likely involve either laboratory technicians or pathologists.<sup>23</sup>

Laboratory technicians must exercise sound judgment and care when conducting tests.<sup>24</sup> Pathologists have the duty to exercise due diligence when interpreting the results of a test.<sup>25</sup> In *Armstrong*,<sup>26</sup> the court found that the pathologist failed this duty when he stated unequivocally that the skin sample was benign when it was cancerous.<sup>27</sup> He had failed to note the presence of traces of malignancy.<sup>28</sup>

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<sup>18</sup> *Id.*, at [95].

<sup>19</sup> *Id.*, at [99] – [100].

<sup>20</sup> *Id.*, at [116].

<sup>21</sup> *Id.*, at [99].

<sup>22</sup> *NHG*, *supra* n 5, at [3] – [4].

<sup>23</sup> “Medical laboratory professionals: who’s who in the lab”, *Testing.com* (9 April 2021) <<https://labtestsonline.org/articles/medical-laboratory-professionals>> (accessed 5 November 2021) (“*Medical laboratory professionals*”).

<sup>24</sup> George D. Pozgar, *Legal and ethical issues for health professionals* (American Psychological Association, 7<sup>th</sup> Ed, 2020) at p 234.

<sup>25</sup> *Armstrong, Carol Ann v Quest Laboratories Pte Ltd and another and other appeals* [2020] 1 SLR 133 (“*Armstrong*”) at [67].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.*, at [60] – [61].

Usually, the hospital or laboratory would be liable for their employees' negligence if the negligent act was committed during the course of their work.<sup>29</sup> This is because the hospital or laboratory had the power to "control the tasks performed".<sup>30</sup> Further, the hospital or laboratory will have greater financial ability to compensate the patient.<sup>31</sup> Therefore, if the misdiagnosis stems from the negligence of the laboratory staff, it will be more appropriate to sue the hospital or laboratory.

**B. How can one establish a viable case?**

We will now consider the next two requirements in a claim of medical negligence: (1) whether there was a breach of the duty of care, and (2) whether the patient suffered a loss as a result of the breach.

(1) *Breach of duty of care*

(a) Hospital/laboratory

To establish the breach of a duty of care against a hospital or laboratory, one should prove that:<sup>32</sup>

- (a) an action or system that was not implemented is a "standard in the healthcare industry";
- or
- (b) the action taken or the system at the time of the breach was unreasonable.

Regarding (a), one could use the opinions of experts or established guidelines to show the standard of practice.<sup>33</sup> The failure to adopt this practice could be a breach of the duty of care.<sup>34</sup>

Regarding (b), even if the hospital or laboratory has taken an action or has a system in place, one could still show that it was unreasonable.<sup>35</sup> In *Noor Azlin*, the court found that the follow-up system was unreasonable because it did not allow the reviewing doctor to know the medical

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<sup>29</sup> Jones M. A. *et al*, *Clerk & Lindsell on torts* (Sweet & Maxwell, 22<sup>nd</sup> Ed, 2020) at p 385. See also *Farraj and another v King's Healthcare NHS Trust and another* [2006] EWHC 1228 (QB).

<sup>30</sup> *Law of Torts*, *supra* n 8, p 685.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd and others* [2019] 3 SLR 1063 at [116].

<sup>33</sup> *Darling v Charleston Community Memorial Hospital* 50 Ill. App. 2d 253 (1964) at [279] to [285].

<sup>34</sup> *Law of Torts*, *supra* n 8, p 194.

<sup>35</sup> *Law of Torts*, *supra* n 8, p 195.

history of the patient to make an accurate diagnosis.<sup>36</sup> This system had breached the hospital's duty to implement a proper follow-up system.<sup>37</sup>

(b) Laboratory staff

Next, although a hospital or laboratory will likely be liable for the laboratory staff's negligence, we still need to consider whether the laboratory staff had breached their duty and the losses that resulted from the breach.

To determine whether a pathologist has breached his duty of care, the court will consider whether he had acted reasonably with reference to the "practices and opinions of a responsible body of medical practitioners."<sup>38</sup> These practices and opinions must also be "logically defensible" – they have to be logically consistent and they cannot contradict known medical facts or advances in medical technology.<sup>39</sup>

It is unclear if these considerations apply to laboratory technicians.<sup>40</sup> However, it has been applied by the courts to non-professional jobs<sup>41</sup> that require special skills or experience.<sup>42</sup> Therefore, as laboratory technicians possess specialised accreditation,<sup>43</sup> they could be subjected to these considerations as well.

On this note, it is critical for patients to call on expert witnesses to show that a laboratory staff had acted unreasonably. If the expert witnesses differ in their opinions, the court will consider if the opinion of the laboratory staff's expert witnesses is "logically defensible".<sup>44</sup> In *Gunapathy*,<sup>45</sup> the doctor's expert witnesses testified that a reasonable doctor would diagnose the brain nodule as a tumour.<sup>46</sup> However, the patient's expert witnesses disagreed.<sup>47</sup> Nevertheless, the court decided that the doctor did not breach his duty (when he diagnosed the

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<sup>36</sup> *Noor Azlin*, *supra* n 13, at [99].

<sup>37</sup> *Id.*, at [101].

<sup>38</sup> *Hii Chii Kok*, *supra* n 7, at [2].

<sup>39</sup> *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024 ("*Gunapathy*") at [65].

<sup>40</sup> *Law of Torts*, *supra* n 8, at p 203.

<sup>41</sup> See *Adams v Rhymney Valley District Council* [2000] 3 EGLR 25.

<sup>42</sup> *Gold v Haringey Health authority* [1988] QB 481 at 490.

<sup>43</sup> *Medical laboratory professionals*, *supra* n 23.

<sup>44</sup> *Gunapathy*, *supra* n 39, at [73].

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.*, at [94].

<sup>47</sup> *Id.*, at [72] – [74].

nodule as a tumour) because the opinion of the doctor's expert witnesses was consistent with existing medical theory and there were no facts that contradicted their opinion.<sup>48</sup>

(2) *Losses from breach*

Next, a patient must show that the breach resulted in a loss. In *Noor Azlin*, the doctors would have diagnosed the patient with cancer early if they had information of the persistent nodule.<sup>49</sup> Therefore, the breach caused the patient's loss – the delay in treatment increased the severity of her cancer.<sup>50</sup>

**C. What can one claim for?**

In the current context, patients would have received more treatment than required. While the compensated amount can vary between cases, one could claim for the following losses:<sup>51</sup>

- (a) travel expenses;
- (b) cost of the unnecessary treatment;
- (c) loss of income from the time taken off work for the treatment;
- (d) loss of enjoyment of life due to the side effects; and
- (e) pain and suffering of living with the false belief that she had an aggressive condition.

**III. Conclusion**

Facing the prospect of a lawsuit alone against a hospital or laboratory can be intimidating. However, a lawyer can assist one in analysing the requirements of a medical negligence claim to determine who to sue, how to establish a viable case, and the losses that one could claim.

Nevertheless, litigation can be a costly and lengthy process. For instance, the trial for *Noor Azlin* went on for 6 years.<sup>52</sup> The patient had her claim dismissed by the High Court before it was eventually allowed by the Court of Appeal in 2019.<sup>53</sup> However, the Court of Appeal only decided on the compensation amount recently, almost two years after the patient had passed

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<sup>48</sup> *Id.*, at [94].

<sup>49</sup> *Noor Azlin*, *supra* n 13, at [116].

<sup>50</sup> *Id.*, at [123].

<sup>51</sup> See *Cormack v East London and City Health Authority* [2000] Lexis Citation 4521. See also *Froggatt v Chesterfield and North Derbyshire Royal Hospital NHS Trust* [2002] All ER (D) 218 at [47] – [56].

<sup>52</sup> *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] SGCA 59 at [11].

<sup>53</sup> *Ibid.*

on.<sup>54</sup> Therefore, it might be better for one to settle the issue out of court first through platforms such as mediation<sup>55</sup> before resorting to litigation.

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<sup>54</sup> *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] SGCA 111 at [2].

<sup>55</sup> Quek Anderson, Dorcas, “Medical negligence proceedings in Singapore: Instilling a gentler touch” (2018) International Academy of Comparative Law 20th General Congress 2018, July 22-28.