CASE UPDATE

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The Court of Appeal considers the standard of care expected of doctors in providing information and medical advice to their patients.

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Introduction

1. What is the extent of a doctor's duty to disclose information regarding treatment to his patient? By what standard should the sufficiency of such disclosure be assessed? Should it be judged solely by reference to what a respectable body of medical professionals would consider to be sufficient? Or is it also to be assessed by what patients would reasonably regard to be material to their decision?

2. This was the question facing the Court of Appeal in the recent decision of *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, which involved claims of negligence brought by a patient who had undergone a major pancreatic surgery that later turned out to be unnecessary. Although the claims were eventually dismissed, the Court of Appeal took the opportunity to review the law on medical negligence, particularly in respect of the doctor's duty of disclosure to his patient, and in doing so introduced substantive changes which have implications for the medical professional community at large.

Brief Facts

3. The appellant was a patient based in Malaysia ("the patient") who was referred to the second respondent, the National Cancer Centre of Singapore ("NCCS"), after discovering a neuroendocrine tumour ("NET") in his right lung. He was advised to undergo a particular procedure ("the Gallium scan") to ascertain whether certain other nodules observed in his lungs were also NETs.

4. During the course of the Gallium scan the head and body of the patient's pancreas also lit up, which indicated that there were two *potential* NETs in his pancreas ("the PNETs") as well. For convenience's sake, the two lit-up areas of his pancreas will be termed "lesions".

5. The patient then underwent a magnetic resonance imaging ("MRI") scan to determine if there were masses in his pancreas that corresponded to the lesions from the Gallium scan, which might confirm that the lesions were in fact PNETs. However, the MRI scan did not detect any masses.

6. The patient was then informed of the outcome of a meeting of the NCCS Tumour Board, which comprised a multi-disciplinary team of doctors with relevant sub-specialities. During the meeting the Tumour Board had expressed considerable uncertainty over whether the lesions in the patient's pancreas were PNETs or pancreatic polypeptide hyperplasia ("hyperplasia"), which is a relatively benign accumulation of *normal* cells. While the consensus view was to recommend surgical removal, at least of the lesion in the body of the pancreas, a second option of waiting was also tabled,

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despite the risk of the disease spreading should it turn out that the lesions were indeed PNETs.

8. The patient considered these recommendations with Dr Ooi, who did not disagree with the opinion of the Tumour Board. Dr Ooi's advised course was surgery to remove both of the supposed PNETs, although he was also open to the options of either removing only one of the lesions or simply waiting. The patient agreed to surgical removal of both lesions.

9. The surgery was carried out successfully. However, the histopathology report conclusively indicated that the lesions were hyperplasia and not PNETs, and therefore the surgery was unnecessary.

10. The patient suffered life-threatening complications as a result of the surgery and required further operations. He subsequently brought proceedings against Dr Ooi and the NCCS for negligent diagnosis, negligent advice, and negligent treatment. The claims were dismissed by the trial Judge and the patient appealed, focusing in particular on his claims for negligent diagnosis and negligent advice. It is the last claim that prompted the Court of Appeal to introduce changes to the law which are the focus of this case update.

The Decision of the Court of Appeal

11. The patient alleged that the advice he was given leading to his decision to undergo surgery was inadequate to enable a reasonable patient to make an informed decision. In particular, he submitted that the quality of the respondents' advice on the Gallium scan was sorely deficient, and that he should have been advised about other investigative procedures before surgery to determine whether the lesions were in fact PNETs.

12. The question facing the Court of Appeal was therefore whether the respondents fell below the requisite standard of care in relation to the information and advice that was provided to the patient for the purposes of deciding whether he ought to go undergo surgery. The Court began with a review of the established law on medical negligence.

The established position in Singapore

13. The legal position in Singapore had been well settled since the Court of Appeal's decision in *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024 ("*Gunapathy*"). In *Gunapathy*, the Court of Appeal held that the established test to be adopted in determining whether a doctor had met the requisite standard of care in *all* aspects of his interaction with the patient was the *Bolam* test read with the *Bolitho* addendum (collectively the "*Bolam/Bolitho* test").

14. The *Bolam* test required that the defendant doctor's conduct was supported by a responsible body of opinion within the profession, even if there is another body of opinion which disagrees. The *Bolitho* addendum required further that the experts holding the opinion had directed their minds to the comparative risks and benefits relating to the matters, and that such opinion was logically defensible. If both requirements are met, the doctor would not be considered to have fallen short of the standard of care expected of him.

15. This was the settled position in Singapore prior to the Court of Appeal's present decision.

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Problems with the existing framework

16. In assessing the suitability of the existing *Bolam/Bolitho* test, the Court schematised the doctor-patient relationship into three broad aspects. First, "diagnosis", which is concerned with establishing what the patient's medical need is. Second, "advice", which is concerned with providing information and recommendations to the patient in order for the patient to make decisions as to treatment. Third, "treatment", which is where the doctor carries out what the patient has agreed to be carried out.

17. The Court, whilst affirming the sensibility of the *Bolam/Bolitho* test when it came to "diagnosis" and "treatment" of the patient, recognised that it was problematic when applied to the provision of information and advice to the patient by the doctor. The Court noted that unlike "diagnosis" and "treatment", the "advice" aspect of the doctor-patient relationship is one where the patient is not merely a passive recipient of care, but an active participant in the process who ultimately holds the power to decide what should or should not be carried out in respect of his treatment.

18. The problem with applying the *Bolam/Bolitho* test to this aspect of the relationship was that it paid little respect to the patient's autonomy. The doctor would be allowed to withhold whatever information he wished to withhold from the patient as long as some of his peers would have done the same. An example of this might be where the doctor withholds material information from the patient believing that disclosure would make the patient less likely to undergo treatment which the doctor judged was best for the patient's well-being. In such a situation, the doctor would not be held to have breached his duty of care in advising his patient so long as he could show that such non-disclosure would be supported by a responsible body of doctors. This, in the Court's view, was incompatible with even a modest notion of patient autonomy.

The new three-stage test to be applied to the provision of medical advice

19. The Court therefore held that the *Bolam/Bolitho* test should no longer apply to the "advice" aspect of the doctor-patient relationship. Instead, a three-stage test should be applied when considering whether a doctor has fallen short of the standard of care expected of him in providing information and advice to the patient for the purposes of helping the patient to reach an informed decision.

20. In the first stage of the inquiry, the Court must consider whether the information withheld from the patient was information that would have been relevant and material to a reasonable patient situated in the particular patient's position, or information that a doctor knew was important to the particular patient in question.

21. If the information withheld was reasonably regarded as material, then the Court moves on to the second stage of the test, which is to determine whether the doctor was in fact *in possession* of that information. If the doctor was not in possession of the information, then he was not negligent in *advising* the patient. However, if the Court considers that the doctor nevertheless *ought to have* possessed the information, then the doctor may still be considered negligent, but under the aspects of "diagnosis" and "treatment", where the *Bolam/Bolitho* test still applied, rather than in *advising* the patient.

22. If the information withheld was reasonably regarded as material, and the doctor was in possession of that information, then the Court proceeds to the third and final stage of the test, which is to determine whether there was any reasonable justification for non-disclosure of the information by the doctor. This stage of the inquiry is undertaken from the doctor's perspective, and so the expert evidence of doctors justifying the withholding of such information as a matter of medical professional judgment will have some significance. However, the Court is *not* to fall back on the deferential attitude of the *Bolam/Bolitho*

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framework, but rather to carry out an objective inquiry as to whether, in all the circumstances, the doctor was justified in withholding the information from the patient. If the Court finds that the doctor was not justified in doing so, then he will be considered to have been negligent in providing information and medical advice to the patient.

23. On the instant facts, even under this new three-stage test, the Court did not consider that Dr Ooi or the NCCS had been negligent in advising the patient, and therefore dismissed the patient's appeal.

Conclusion

24. While the *Bolam/Bolitho* test still applies in assessing the doctor's standard of care in respect of *diagnosing* and *treating* the patient, the Court has effectively carved out an exception for the provision of information and medical advice to the patient, where the new three-stage test would apply.

25. Doctors can no longer adopt a paternalistic attitude in advising their patients by tailoring their level of disclosure to ensure that the patient makes the decision that the *doctor* assesses to be the right one. Doctors must now respect the right of the patient to make decisions for himself, even where they run counter to his professional judgment. In the Court's view, this more patient-centric approach would strike a better balance between the professional judgment of the doctor on the one hand and the autonomy of the patient on the other.

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