Legal update: The Report on Recommendations issued by the Ministry of Health (MOH) Workgroup to Review the Taking of Informed Consent and Singapore Medical Council (SMC) Disciplinary Process

DENTONS RODYK

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In a major shake-up to the local medicolegal landscape, the MOH announced on 3 December 2019 its decision to accept the Workgroup's recommendations. The Workgroup had issued its report dated 28 November 2019 which contained comprehensive and wide-ranging recommendations that would be of interest to hospitals, doctors and patients alike. The Workgroup's recommendations concerned two main areas, the taking of informed consent and reforms on the SMC disciplinary process. This article focuses on the informed consent aspect of the Workgroup's recommendations.

The Workgroup's recommendations on informed consent arose in light of certain recent case developments that had an impact on informed consent. As the Workgroup's recommendations on informed consent sought to revise the SMC Ethical Code and Ethical Guidelines (ECEG) and introduce a new legal test on the taking of informed consent, it would be helpful to first understand the current position.

The SMC ECEG (2016 Edition) provides an extensive list of 20 points on what constitutes good consent taking, in an attempt to guide medical practitioners on as many types of scenarios as possible.

In 2017, the Singapore Court of Appeal decided that the *Bolam-Bolitho* test used to determine the appropriate standard of care applicable to a medical practitioner in the provision of medical advice to his patient (and the other aspects of diagnosis and treatment) should no longer apply. Instead, the Court of Appeal introduced a new 3-stage patient-centric legal test (commonly referred to as the *Modified Montgomery* test (MM test) to determine if informed consent has been obtained, or in other words, whether the doctor has fulfilled his duty to advise.

Briefly, the MM test is as follows: (1) the first stage involves an assessment of whether the information given to the patient is sufficient from the patient's perspective (i.e. whether all relevant and material information has been given to the patient), (2) if the information given was insufficient, the Court determines at the second stage whether the doctor was in possession of the information said to have been relevant and material for disclosure but not disclosed, and (3) if the doctor possessed the said information, the doctor has the burden at this third stage to justify why he chose to withhold the information, for e.g. in an emergency situation, waiver situation, or where the impairment of the patient's decision-making capabilities warrants this. In deciding that it is necessary to have a new legal test for medical advice, the Court of Appeal considered that the essential feature of the aspect of medical advice which differs from the aspects of diagnosis and treatment is the active role played by the patient in the decision making process; it is for the patient (and not the doctor) to make his decision whether to accept treatment (at [93] of the judgment).

Please also see: Dentons Rodyk's article in May 2017 titled "Medical Negligence - The new legal test in Singapore to determine the standard of a doctor's duty in advising his patient" for details on the MM test.

The Workgroup's recommendations on the taking of informed consent

One of the commonly cited "driving forces" behind proposing changes to the MM test was the penalty meted out by the Disciplinary Tribunal (DT) in *Singapore Medical Council v Dr Lim Lian Arn* [2018] SMCDT 9 for failing to inform a patient of the risks associated with the administration of a steroid injection, which the medical profession considers a relatively simple procedure (see [16] of the Workgroup's Report on Recommendations dated 28 November 2019). While Dr Lim's conviction was eventually set aside by the Court of Three Judges on appeal (*Singapore Medical Council v Lim Lian Arn* [2019] SGHC 172), the DT decision was said to have left the medical profession concerned that the MM test established "unrealistically high standards" if it is left entirely to the Court or the DT, as the case may be, without taking into account peer professional opinion to decide what constitutes informed consent (see [38] to [56] of the Workgroup's Report on Recommendations dated 28 November 2019).

After collating the sentiments on the ground, the Workgroup suggested reverting the legal test on taking of informed consent back to a peer-review based approach but which still takes into account patient autonomy and choice and what is material to the patient. The proposed legal test is reproduced below:

1) A healthcare professional shall be regarded as having discharged his duty of care in the provision of medical advice to his patient if the medical advice he has provided is supported by a respectable body of medical opinion as competent professional practice in the circumstances (peer professional opinion).

2) For the purpose of paragraph 1, the respectable body of medical opinion must consider whether the healthcare professional gave (or arranged to give) to the patient relevant and material information that a patient in those circumstances would reasonably require in order to make informed treatment decision(s), and information that the healthcare professional knows (or ought to have known) would be relevant and material to the patient.

3) However, peer professional opinion cannot be relied on for the purpose of paragraph 1 if the Court determines that the opinion is illogical.

4) The fact that there are differing peer professional opinions by a significant number of respected practitioners in the field concerning a matter does not in itself mean that the peer professional opinion being relied on for the purpose of paragraph 1 should be disregarded as evidence of a respectable body of medical opinion.

Simply put, the Workgroup's proposed legal test reminds the medical profession of the need to respect patient autonomy, and can also be said to have reinstated the *Bolam-Bolitho* test in that peer professional opinion would be used to determine what "relevant and material information to the patient" is.

The Workgroup also recommended the (a) introduction of specialty-specific guidelines on advice for standard commonplace treatments and procedures in each specialty so as to provide practical guidance to doctors, and (b) distillation of the 20 points on what constitutes good consent taking in the SMC ECEG (2016 Edition) into basic irreducible principles in the SMC ECEG with accompanying specialty-specific guidelines.

In particular, the Workgroup explained that it was necessary to distil the extensive guidance from the SMC ECEG (2016 Edition) on consent taking into basic irreducible principles in light of the SMC's submission at the hearing before the Court of Three Judges in *Singapore Medical Council v Lim Lian Arn* that it proceeded on the basis that a breach of a "basic principle" in the SMC ECEG (2002 Edition) (which applied in Dr Lim's case) amounted to professional misconduct (see [60] of the Workgroup's Report on Recommendations dated 28 November 2019). The Court of Three Judges (at [33] and [34] of the judgment) reiterated that only a serious disregard or persistent failure to meet the standards in the SMC ECEG may lead to disciplinary proceedings.

To implement these recommendations, legislative amendments will have to be made.

Our comments

The Workgroup's recommendations on the taking of consent go a long way in providing a clearer marker for doctors when taking consent. It would hopefully obviate the tendency to undertake information dumping or defensive medicine, while also making clear that patient autonomy should be respected, in so far as reasonable efforts have been made to determine what would be material and relevant to that patient. Practically, it would be prudent to check with patients if they have any specific queries or concerns, and also ensure that this is documented.

The legislative process for the enactment of new laws takes time. In the interim, medical professionals will be well advised to assume that the MM test continues to apply, while also complying with the Workgroup's recommendations.

Looking forward, medical professionals may wish to take the opportunity to give feedback for the preparation of specialty-specific guidelines to ensure that the resulting guidelines fairly reflect the standard of care applicable to their particular area of specialisation. Drafters of specialty-specific guidelines may wish to bear in mind that the guidelines should be flexible and not over-prescriptive, as those guidelines could in turn be used against doctors in medicolegal litigation and disciplinary proceedings.

Dentons Rodyk thanks and acknowledges Senior Associate Yvonne Ong for her contributions to this article.

Key contacts

Siang Pheng Lek
Deputy Managing Partner
Litigation

D +65 6885 3606
E siangpheng.lek@dentons.com

Christopher Chong
Senior Partner
Litigation

D +65 6885 3629
E christopher.chong@dentons.com

Vanessa Lim
Senior Partner
Litigation

D +65 6885 3637
E vanessa.lim@dentons.com

Seow Hwei Mar
Partner
Litigation

D +65 6885 3618
E seowhwei.mar@dentons.com

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