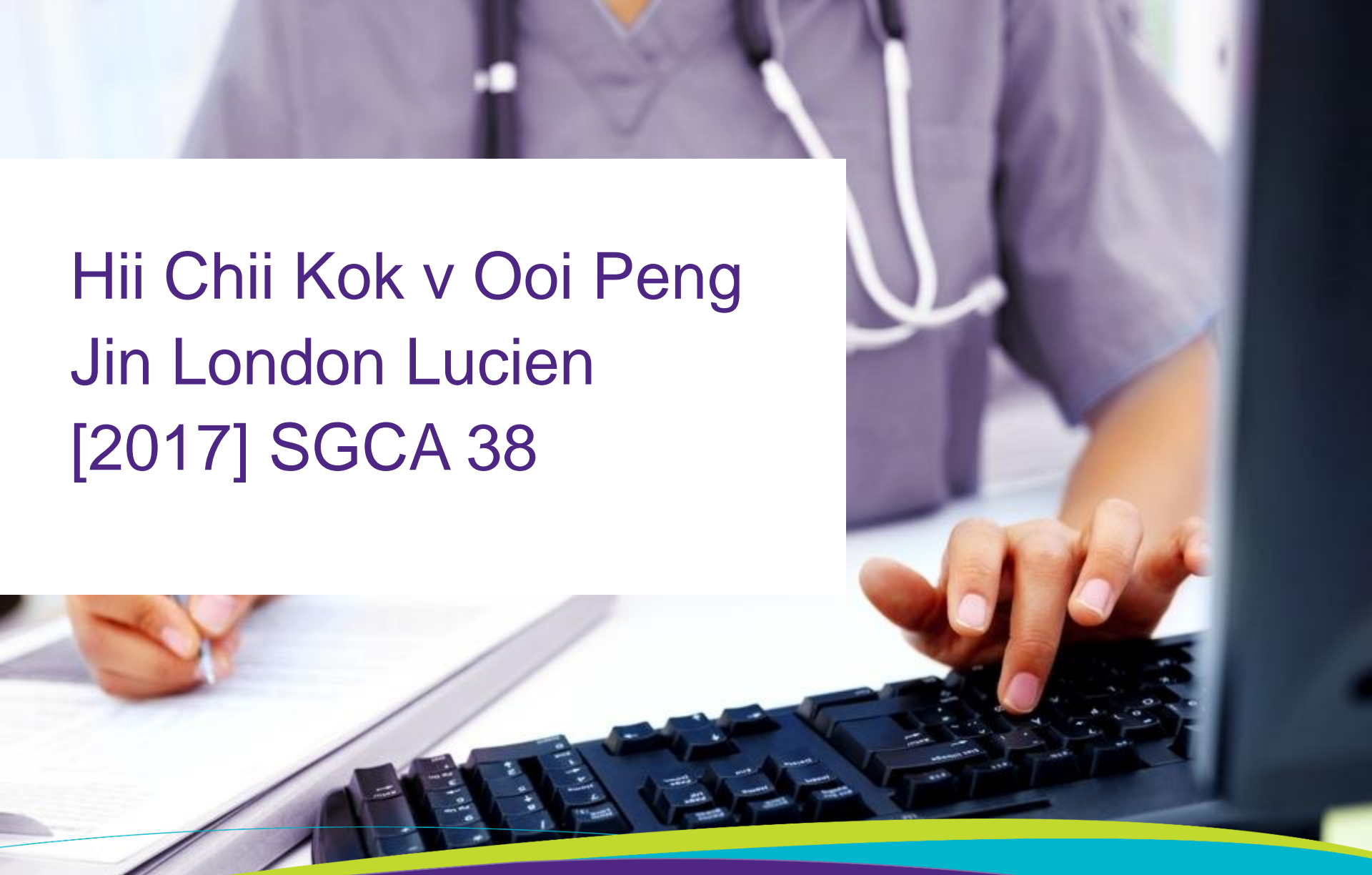


The Relevance of Mediation

Post-Hii Chii Kok

Khoo Yingxiang
Head, Mediation Unit
13 September 2018





Hii Chii Kok v Ooi Peng
Jin London Lucien
[2017] SGCA 38

- Three aspects:
 - Diagnosis
 - **Advice**
 - **Includes provision of information on treatment options and risks**
 - **includes risks of diagnostic tests**
 - Treatment
- Dynamic
 - May “emerge and submerge repeatedly at different points in the relationship”

- Standard required for giving advice
- 3-stage test:

Stage 1

- P identifies exact nature of the **information** he alleges was not given to him and establishes why it would be regarded as relevant and material

(a) Relevant and material to a reasonable P in the particular P's position

(b) Information that D knows is important to the particular P in question

Stage 2

- Was the doctor in possession of that information?
 - If yes, proceed to stage 3
 - If no → wrong diagnosis/treatment? → Bolam+Bolitho

Stage 3

- Why did D choose to withhold information from P?
 - Was D justified in withholding the information? Examples:
 - Waiver
 - Emergency
 - Therapeutic privilege
 - Was this a sound judgment?
 - Standard: reasonable and competent D

1. Shifting ethical principles

- Medical paternalism → patient autonomy
 - Doctor-patient relationship has evolved
 - Before: P was passive recipient of information
 - Now: Active **collaboration** between D and P
 - Ps are now more educated and have better access to knowledge
- Challenge: Balancing P's autonomy and D's beneficence
 - “autonomy”:
 - Norm of respecting the **decision-making capacities** of autonomous persons
 - “beneficence”:
 - Group of norms for providing benefits
 - Balancing benefits against risks and costs

What were the Court's considerations?

2. Information asymmetry

Doctor	Patient
Has information	Limited information
Knows potential significance of information	May not be able to understand complexities of conditions and treatment
Can make judgement calls about weight/significance	Prone to make inappropriate emphasis on risks (insufficient/excessive)
Objective, dispassionate	Emotional

3. Old test doesn't allow for **P's perspective**

- P must decide whether to undergo recommended treatment and procedure
- Under Bolam test:
 - D can withhold whatever info as long as his peers would have done so too
- But P
 - Should be entitled to decide on risks
 - May be influenced by non-medical considerations
 - Personal concerns and priorities
- Treatment decision “not a matter of purely professional judgment”
→ Argument for peer-review standard not compelling

- Court takes P's perspective when evaluating whether D's advice was up to the legal standard
 - Peer's views about disclosure no longer relevant
- Possible increase in number of claims/complaints
 - Despite safeguards built in ("common sense approach")
 - Despite general trend in favour of P autonomy in practice even before HCK
- Implications for court cases
 - Less certainty as to whether the court will rule for D or P
 - Incentive for parties to settle claim out of court



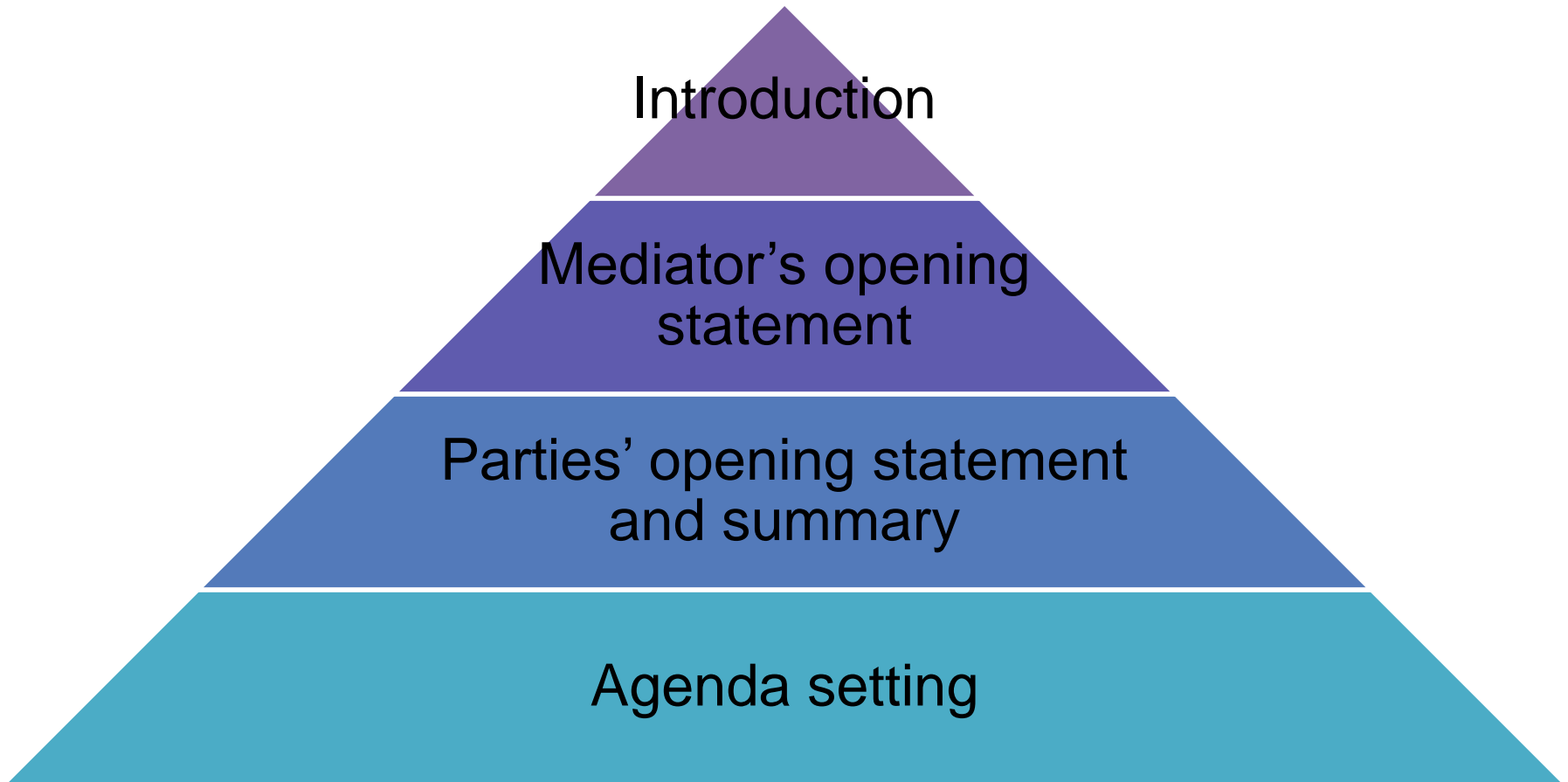
Negligent Advice and Mediation

What is Mediation?

- Amicable dispute resolution
- Voluntary process
- Neutral, independent third party (the mediator)
- Works with parties to discuss their dispute
- Mutually agreeable solution
 - Recorded in writing
- Confidential & without prejudice
 - Mediation Act 2017



Problem Defining Stages of Mediation





Exploring issues

Private caucus

Joint negotiation
sessions

Agreement

Some ways in which allegations of negligent advice arise

- P unable to appreciate risks of procedure
 - What does it mean that a procedure has e.g. 1% risk?
 - Risks that have a low probability, but are severe/life-changing
 - Risks that have a high probability, not severe, but cause frustration and unhappiness
 - Risks not disclosed/explained inadequately
 - Example: Lasik complications
- Assumptions and the knowledge gap
 - Ps often lack knowledge about their condition and the healthcare system and make wrong assumptions
 - Hospital staff often don't realise that Ps don't know
 - But this leads to disputes
 - Example:
 - P thought pre-operative tests could detect cancer

Some ways in which allegations of negligent advice arise

- The pitfalls of terms like “complications”
 - Ps do not have a clear idea of what this means
 - Often used to explain why an adverse event happened without further elaboration (or elaboration that’s too technical)
 - Either way P assumes the hospital is trying to hide something
 - Can’t fill in the blanks
 - Can’t understand the explanation
- Some questions Ps have:
 - What does it mean that it was a complication?
 - How did it arise? e.g. what are the mechanics of a stroke arising from angiogram?
 - Were precautions taken to prevent the complications from arising?
 - Were mistakes made that led to the complication?
 - Why did complication arise even though precautions were taken?

Case study: [Redacted]

How mediation can help where P alleges negligent advice

- Neutral, independent (medically trained) mediators
 - If P still enjoys a good relationship with the hospital, allegations of negligent advice can be resolved successfully with a well-timed, well-managed family conference
 - But if trust is lost, P will find it difficult to accept explanations offered by the hospital
- Bridging communication gaps
 - Process designed to uncover gaps + mediators trained to bridge gaps
 - Clarify assumptions
 - Uncover underlying interests
 - Experienced healthcare mediators
 - explain complex medical concepts simply and effectively
 - Corrects knowledge imbalance

How mediation can help where P alleges negligent advice

- Balancing parties' perspective
 - Parties give their own version of events at beginning of mediation
 - Mediators trained to give both parties equal attention to show neutrality
 - Allows P to feel that his perspective is valued
- Respecting autonomy of Ps
 - Mediation is collaborative problem solving
 - Parties decide for themselves what they need to move forward
 - Apology, explanation, acknowledgement of suffering, monetary compensation, etc.
 - Reality testing can lay bare all relevant considerations for P in an objective way
- Mediators manage power imbalance
 - Go between for discussion of sensitive issues
 - Help parties to figure out underlying interests and minimise tussling over positions

- Mediation is a method of dispute resolution that ...
 - Respects patient autonomy
 - Collaborative process
 - Places equal importance on both parties' needs and perspectives
 - Directly addresses the problems that lead to allegations of negligent advice
 - Communication
 - Knowledge imbalance
 - Poor doctor-patient relationship
 - Helps to meet the various needs of parties holistically
 - Can be used to effectively manage and resolve cases that allege negligent advice
- Some questions to consider when managing complaints where P alleges negligent advice:
 - Does P still trust the institution?
 - Are the discussions between P and institution productive?
 - If the answer to either question is no, consider mediating



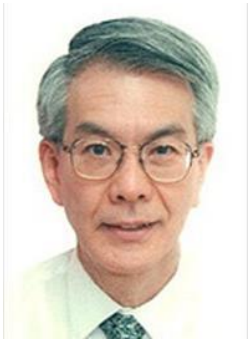
Mediation Unit Services

Healthcare Mediation Scheme (HMS)

- Specialist panel in collaboration with the Singapore Mediation Centre
- Co-mediation
- Typical issues that have been referred to the HMS and successfully settled include patient care and management, malpractice allegations, service quality, and medical fees.

HMS Mediators

- Appointed by the Singapore Mediation Centre.
- Trained and assessed to have requisite skills.



Dr. Joseph H. H. Sheares
Cardiothoracic Surgeon
Mount Elizabeth Medical Centre



Dr. Ronald Paul Ng
Specialist Hematologist
Haem-Onc Clinic Pte Ltd



Shanti Abraham
Founder
Shanti Abraham & Associates



Lim Tat
Managing Partner
Aequitas Law LLP

Healthcare Mediation Scheme Fee Structure

Public HCI	Mediation Fees (per party)
Admin Fee	\$150
Mediation Fee	\$300 per hour
Free hours	2

1. Applicant submits Application Form
2. Unit assesses application
3. Unit contacts Respondent
4. Respondent informs Unit about decision to mediate
5. Unit arranges mediation

OR

Unit informs Applicant that the invitation to mediate was declined by Respondent

<http://www.mohh.com.sg/hms/index.html>



Conflict De-escalation Training

- **Conflict Management for Healthcare Leaders (new in 2019)***
 - introduce participants to an interest-based mediation framework
 - managing conflict colleagues, chair dialogues with patients/NOKs.
 - 2 days, pricing TBC
 - Senior consultants and above
- **Conflict De-escalation for Healthcare Professionals***
 - Understand conflict, manage self, how to de-escalate conflict
 - 2 days, \$480 (without GST)
 - Target audience: front line managers, other middle managers
 - Dates (fully subscribed – additional session possible):
 - 23 & 24 April 2018
 - 27 & 28 August 2018
 - 3 & 4 December 2018

**Subject to availability and completed attendance, doctors and dentists employed by MOHH or any of the public healthcare institutions under the MOHH group will be funded by Health and Medical Practice Insurance Pte Ltd.*

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Thank You



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