

# CLIENT NOTE



## Legislative Standard of Care for Medical Advice

23 October 2020

### Introduction

1. In December 2019, the Workgroup to Review the Taking of Informed Consent and the Singapore Medical Council's Disciplinary Process (the "**Workgroup**") made recommendations on *inter alia* a new test for the standard of care expected of doctors in the provision of medical advice and the taking of informed consent.
2. Building on the foundations of the Workgroup's recommendations, the Civil Law (Amendment) Bill (the "**Bill**") was introduced in Parliament on 3 September 2020 to amend the Civil Law Act (Cap. 43) to set out the legal test in respect of the standard of care for medical advice given by healthcare professionals ("**HPs**"). This article will summarise the main features of the Bill, which has since been passed by Parliament on 6 October 2020.

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### Overview of the Bill

3. The Bill seeks to amend the Civil Law Act by inserting a new Section 37 titled "*Standard of care for medical advice*" ("**Section 37**"). Having been passed by Parliament, it will be enacted as law and will come into force on a date notified in the *Gazette*.
4. In the event of inconsistency between the common law (i.e. the modified-Montgomery test set out by the Court in *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492 ("**Hii Chii Kok**")) and Section 37, the Explanatory Statement in the Bill states that Section 37 will prevail.

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### A new Section 37

5. The new Section 37 is intended to set out the standard of care for medical advice given by HPs. The term "HP" is widely defined in the Section to include doctors/medical practitioners, dentists, and oral health therapists.

### The Bolam-Bolitho aspect

6. Under Section 37(1), a HP meets the standard of care in relation to the provision of medical advice to a patient, if: -
  - a. the manner in which the HP acts is accepted by a respectable body of medical opinion ("**peer professional opinion**") as reasonable professional practice in the circumstances; and
  - b. such peer professional opinion is logical.

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7. The Section also clarifies that the fact that there are differing professional opinions does not, by itself, prevent the peer professional opinion from being relied on. These provisions are reminiscent of the common law *Bolam-Bolitho* test.

## The Hii Chii Kok aspect

8. As regards the standard by which the peer professional opinion must assess the medical advice given by the HP, Section 37(2) provides that: -
  - a. the peer professional opinion must require the HP to have given to the patient information that: -
    - i. a person in the same circumstances as the patient (which the HP knows or ought reasonably to know) would reasonably require to make an informed decision; and
    - ii. information that the HP knows or ought reasonably to know is material to the patient for the purpose of making an informed decision; and
  - b. the peer professional opinion must support the non-provision of any information only where there is reasonable justification. Such situations include: -
    - i. emergencies where the patient is unconscious and unable to give informed consent, and there is no person present with legal capacity to make medical decisions on behalf of the patient; or
    - ii. where the HP is satisfied that the patient has waived his right to hear the information, having appreciated the seriousness of such waiver.
9. In addition, Section 37(3) bases the assessment of whether information is material on any specific concern/query the patient has which: -
  - a. the patient expressly communicates to the HP (even if the HP would not ordinarily provide a patient with such information); or
  - b. the patient does not expressly communicate to the HP, but which ought to be apparent to the HP from the patient's medical records that the HP has reasonable access to and ought reasonably to review.
10. The patient-centric perspective adopted in the assessment of the peer professional opinion, draws from the modified-Montgomery test espoused in *Hii Chii Kok*.

## The "Normal Patient", the "Eccentric Patient" and the "Shy Eccentric Patient"

11. In our view, there are 3 types of patients that can be gleaned from the provisions/illustrations in Sections 37(2) and 37(3). We will call these patients the "Normal Patient", the "Eccentric Patient", and the "Shy Eccentric Patient".

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## (1) The “Normal Patient”

12. Section 37(2)(a) provides that at the very minimum, an HP must give to a patient information that a person in the same circumstances as the patient (which the HP knows or ought reasonably to know) would reasonably require to make an informed decision.
13. In our view, most patients are “Normal Patients”. A “Normal Patient” would only require the same amount as information as a person in the same circumstances as him (which the HP knows or ought reasonably to know) would reasonably require to make an informed decision. A “Normal Patient” would not have a specific concern/query which an HP would not ordinarily provide a patient with information on.

## (2) The “Eccentric Patient”

14. Section 37(3)(a) alludes to a patient who expressly communicates a specific concern/query to the HP (even if the HP would not ordinarily provide a patient with such information). We call this patient an “Eccentric Patient”.
15. Section 37(3)(a) provides an illustration of how information would be material even if it is not information which is typically communicated to patients: -

*Patient B asks Doctor A about the risks of influenza vaccination, and expresses his concern about weakness of paralysis after being administered the influenza vaccine (i.e. Guillain-Barré syndrome). Although Patient B is not a high risk patient for developing the syndrome from influenza vaccination and doctors would not ordinarily advise a patient in his circumstances about the syndrome (it being a very rare side effect of the vaccine), information on the risks of Guillain-Barré syndrome is material to Patient B for the purposes of him making an informed decision about whether to receive the influenza vaccination, as he has expressly communicated such a concern to Dr A.*

16. In our view, most patients receiving an influenza vaccine would not be concerned about the Guillain-Barré syndrome. It is an “Eccentric Patient” who would have such concerns.

## (3) The “Shy Eccentric Patient”

17. Section 37(3)(b) alludes to a patient who does not expressly communicate his concern to the HP, but the reasonably accessible medical records of the patient reveal certain concerns/queries of the patient. This patient is “too shy” to expressly communicate his concerns to the HP he is seeing, but is “brave enough” to expressly communicate these concerns to a previous HP he saw, and this HP recorded his concerns in the medical records. We call this patient a “Shy Eccentric Patient”.
18. Section 37(3)(b) contains the following illustration: -

*Slightly dry skin at the surgery site is a rare but possible consequence of knee replacement surgery, and general medical opinion is that a patient would not reasonably require information about the possibility of dry skin at the surgery site to make an informed decision as to whether to undergo knee replacement surgery.*

*Although Patient B has the unusual concern of dry skin but did not communicate this to Dr A, but had communicated this to Dr C (working in the same hospital as Dr A) a year earlier, it ought to be apparent to Dr A from Patient B’s medical records that information about dry skin being a possible consequence of knee replacement surgery is material to Patient B for*

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*the purpose of Patient B making an informed decision about whether to undergo the surgery.*

19. In our view, it would be an “Eccentric Patient” who would be concerned about the possibility of dry skin at the surgery site for a knee replacement surgery; most patients would not have such a concern. It would be rare for such a patient to be “too shy” to mention his concern to the HP who is advising him about the surgery, but yet “brave enough” to mention this concern to an earlier HP who was advising him about the surgery, and who recorded his concern in the medical records. We consider such a patient to be a “Shy Eccentric Patient”.
20. In our view, perhaps one possible way to deal with this provision is to have a special section in the medical records (whether computerised or not) in which an HP can record all advice given to a patient and the patient’s concerns. This special section should be easily retrievable at all times, so that other HPs who subsequently see this patient can easily tell what advice was given to the patient and what concerns the patient had expressed.
21. Another possible way to deal with this provision is for an HP to expressly ask a patient whether he had a similar discussion with another HP before, and to retrieve and review the medical records for that discussion.

## Conclusion

22. In conclusion, while the new Section 37 brings peer professional opinion in the *Bolam-Bolitho* test back into focus, it seeks to give due weight to patient autonomy by ensuring that the peer professional opinion takes into account the individual circumstances and concerns/queries of the specific patient. Overall, HPs should be comforted that the new test on medical advice and informed consent incorporates the *Bolam-Bolitho* test.
23. At the end of the day, regardless of the legal test for medical advice and informed consent, it is important that an HP documents his advice to his patient properly in the medical records. For common procedures, it will also be useful if an HP gives an information sheet to his patient setting out the benefits and risks of the procedure in question. After all, there are cases wherein there is an agreement between the patient and HP on what risks an HP should advise a patient on, but there is an evidential dispute as to whether the HP did actually advise the patient of these risks. Proper recording and information sheets would assist an HP when there is such an evidential dispute.

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