Singapore codifies the legal test to determine the standard of care for the provision of medical advice

DENTONS RODYK

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Amendments were recently made by Parliament to the Civil Law Act (Chapter 43) (the Act) to introduce a new section 37 which sets out a codified legal test to determine whether a healthcare professional has met the standard of care for the provision of medical advice. The amendments to the Act were passed in Parliament on 6 October 2020, and section 37 will come into force on a date to be determined by the Minister.

The amendments to the Act came in the wake of the Ministry of Health's (MOH) acceptance of the MOH Workgroup's recommendations on the taking of informed consent (our earlier article on this can be found here).

The new statutory test replaces the current 3-stage common law test for a doctor's duty to advise, as laid down by the Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38 (our earlier article on the 3-stage test can be found here). Compliance with the *Hii Chii Kok* test (also commonly known as the Modified Montgomery test) requires a tailored approach to consent-taking, as the doctor is obliged to give relevant and material information and advice, customised to the particular patient. According to the MOH Workgroup, doctors perceived that the *Hii Chii Kok* test introduced an element of uncertainty as to what constitutes relevant and material information from a patient's perspective.

In place of the *Hii Chii Kok* test, the Workgroup had proposed a test based on peer professional opinion, which respects patient autonomy and takes into account what is material to the patient. The test proposed by the Workgroup has now been given effect by the amendments to the Act.

The statutory test will apply to all healthcare professionals including doctors and dentists for the standard of care for the provision of medical and dental advice after the date the amendment comes into effect. The Modified Montgomery test will continue to apply for medical and dental advice provided prior to that date, if the treatment has already been completed. However, where the medical or dental care (diagnosis, treatment or advice) on the same matter straddles the period before and after the Act comes into force, the statutory test will apply.

It should be noted that the *Bolam-Bolitho* test remains the applicable law for the determination of the standard of care for the aspects of diagnosis and medical/dental treatment.

The standard of care for the provision of medical advice

Under the new statutory test, a healthcare professional will meet the standard of care for the provision of medical advice to a patient (or a person responsible for making medical decisions for a patient under a legal disability) if the following criteria are met:

1. the manner in which the healthcare professional acts is accepted by a respectable body of medical opinion (called the peer professional opinion) as reasonable professional practice in the circumstances; and
2. the peer professional opinion is logical.

The peer professional opinion is logical where:

1. the body of healthcare professionals holding the opinion has directed its mind to the comparative risks and benefits relating to the matter; and

2. the opinion is internally consistent and does not contradict proven extrinsic facts relevant to the matter.

The fact that there are differing professional opinions held by other respected healthcare professionals does not, by itself, prevent the peer professional opinion from being relied on, provided that the opinion is logical.

What should the patient be advised on?

The peer professional opinion must require the healthcare professional to have given or caused to be given to the patient:

1. information that a person in the same circumstances as the patient (which circumstances the healthcare professional knows or ought reasonably to know) would reasonably require to make an informed decision about whether to undergo a treatment or follow a medical advice; and
2. information that the healthcare professional knows or ought reasonably to know is material to the patient for the purpose of making an informed decision about whether to undergo the treatment or follow the medical advice.

What is information that is material to the patient?

Material information falls into either of the two categories below:

1. a specific concern or query the patient has, which the patient expressly communicates to the healthcare professional; or
2. a specific concern or query the patient has, which the patient does not expressly communicate to the healthcare professional, but which ought to be apparent to the healthcare professional from the patient's medical records that the healthcare professional has reasonable access to and ought reasonably to review.

To what extent must a healthcare professional review a patient's old medical records?

During the second reading of the Civil Law (Amendment) Bill, the Second Minister for Law clarified that the litmus test is that of reasonableness.

Factors relevant to the assessment of reasonableness may include:

1. the age of the medical records;
2. the discussion between the patient and the doctor – for example, whether the patient's remark was made in passing; and
3. whether the patient's query or concern featured prominently in past medical records.

The example cited by the Minister was that it would not ordinarily appear reasonable for a doctor to trawl through old medical records going back 10 years; but if a particular old record is being taped to the front of the patient's file in a prominent way, then it would appear reasonable for the doctor to review that old record.

Can information be withheld from patients?

Healthcare professionals can withhold information from the patient during the giving of medical advice only when there is reasonable justification. The Act contains some illustrations in this regard.

In the following circumstances, there may be reasonable justification for not providing information:

- in a medical emergency, when the patient is unconscious/mentally incapacitated and there is no person present with legal capacity to make medical decisions on behalf of the patient, and there is insufficient time to locate or appoint such a person; or

- where the patient expressly tells the healthcare professional that he/she had earlier consulted other doctors who had already advised him/her of the treatment options including their risks and benefits, and that he/she does not want to be given this information again. The healthcare professional is also satisfied that the patient appreciates the seriousness of his/her decision to waive the right to hear such information.

However, a healthcare professional is not entitled to withhold information e.g., on the risks of a procedure, merely because he thinks the procedure is in the best interests of his/her patient, and hearing about the risks would dissuade the patient from undergoing it.

Implications

The new statutory test provides assurance to healthcare professionals that the provision of medical advice will be evaluated on the basis of peer professional opinion. Healthcare professionals need to make reasonable efforts to ascertain what would be reasonably required and material to a patient, including checking with the patient directly and reviewing the patient's medical records where appropriate. A specific concern or query ought to be addressed.

As a risk-management measure, healthcare professionals should also ensure that the patient's concerns or queries, as well the advice provided to the patient, are adequately and properly documented in the medical records.

The Second Minister for Law has indicated in parliament that the Ethical Code and Ethical Guidelines of both the Singapore Medical Council and Singapore Dental Council, insofar as the taking of informed consent is concerned, will be revised in step with the amendments to the Act. Medical and dental practitioners should keep an eye out for the revisions to the ECEG in the near future.

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