A NEW LEGAL FRAMEWORK IN RELATION TO THE PROVISION OF MEDICAL ADVICE

A CASE STUDY:

HII CHII KOK v OOI PENG JING LONDON LUCIEN & NCCS

[2017] SGCA 38

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THE 3 ASPECTS OF MEDICAL CARE

1. **DIAGNOSIS**
   - What are the patient's complaints and the clinical and other findings
   - What is the patient's medical condition
2. **ADVICE**
   - In the narrow sense: the proposed course of treatment
   - In the wider sense: the provision of information regarding the patient's condition, whether there are alternative treatments and the treatment risks
3. **TREATMENT**
   - What medical care and management the patient receives
   - In cases of surgical intervention, includes pre- and post-operative treatment and care

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THE 3 ASPECTS OF MEDICAL CARE

The Court of Appeal recognized that there will be overlaps:

"Indeed, it will often be the case that a single step in the medical care process will engage more than one aspect of the doctor's duty, and the different aspects will then be in play concurrently."

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THE POSITION IN SINGAPORE PRIOR TO *HII CHII KOK*

The standard of care for **all aspects** of a doctor's interaction with a patient (diagnosis, advice and treatment) was governed by the *Bolam* test supplemented by the *Bolitho* addendum

("Bolam-Bolitho test")

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THE *BOLAM* TEST

- A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical opinion skilled in that particular art.
- The law recognizes that it will often be impossible to identify a single professional consensus on the correct course that should have been taken in a medical context.
- So long as a doctor is able to show that there were other competent members of his profession who concurred with him, he does not need to show that a majority of his fellow doctors agreed with him.

THE *BOLITHO* ADDENDUM

- To meet the criterion of "responsible body of medical opinion", such medical opinion relied upon must have a logical basis.
- The Court must be satisfied that the experts have:
  1. Directed their minds to the comparative risks and benefits; and
  2. Arrived at a defensible conclusion.
- The opinion must be internally consistent, and not "fly in the face" of proven extrinsic facts relevant to the matter.
- Ultimately, the Court independently assesses whether there was a real divergence of professional opinions on the issue which should be deferred to and the medical experts' views are not the last word on the matter.

THE SHIFT TOWARDS A MORE PATIENT-CENTRIC APPROACH

- As the *Bolam-Bolitho* test places emphasis on peer review to determine medical negligence, the test has been described as laying down a "physician-centric" approach.
- In the interest of patient autonomy, the *Bolam-Bolitho* test has been abandoned in various countries in favour of a more **"patient-centric" approach** in relation to the provision of medical advice where the patient's circumstances are taken into consideration.

THE DECISION IN *MONTGOMERY*
Montgomery v Lanarkshire Health Board

- The Plaintiff's son was born with severe birth complications as a result of shoulder dystocia and umbilical cord occlusion during delivery
- She alleged that the doctor failed to advise her of the risk of shoulder dystocia involved in vaginal birth and the option of caesarean section delivery
- The doctor testified that she did not highlight this risk because:
  - Most cases of shoulder dystocia can be managed and the risk of a devastating complication was very low
  - If informed about shoulder dystocia, most women would opt for a caesarean section, which was not in their interest
  - The Plaintiff did not specifically ask about exact risks

THE DECISION IN *MONTGOMERY*

- The UK Supreme Court set out the applicable test in analyzing a doctor's duty to advise the patient, as follows:
  - The doctor is under a duty to take reasonable care **to ensure that the patient is aware of any material risks** involved in any recommended treatment, and of any reasonable alternative or variant treatments.
  - A "material risk" is a risk that a reasonable person in the patient's position would be likely to attach significance to, or a risk that the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

THE DECISION IN *MONTGOMERY*

- The UK Supreme Court recognised the following situations where a doctor may be entitled to withhold material information from a patient:
  1. Therapeutic exception: where disclosure would be seriously detrimental to the patient's health
  2. Necessity: where the patient is unconscious and the situation is an emergency

THE DECISION IN *MONTGOMERY*

- Applying the test it had formulated, the UK Supreme Court found that:
  - The doctor should have advised the Plaintiff about the risk of shoulder dystocia because it was a substantial risk. The option of a caesarean section delivery should also have been discussed.
  - The therapeutic exception did not apply. The doctor cannot withhold information simply because the information would likely have caused the Patient to request a caesarean section.
  - This was a decision for the Plaintiff to make and the doctor's responsibility was to explain why one treatment is medically preferable to the other.

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THE DECISION IN *MONTGOMERY*

- The UK Supreme Court made the following observations:
  - The *Bolam*-era conception of the patient as a passive recipient of treatment no longer prevailed within the profession or wider society.
  - Overwhelming evidence showed that developments within the medical profession and society at large had shifted the balance towards recognizing *patient autonomy* as a principle of paramount importance.

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PER COURT OF APPEAL IN *HII CHII KOK*

"In our judgment, it is now necessary and justified for the Singapore courts, like those in the UK and many other jurisdictions, to depart from the Bolam *test in relation to advice. This is so because the developments that were considered in* Montgomery *are also mirrored in our milieu, and because merely incorporating those developments as relevant facts under the* Bolam *test fails to address the fundamental problems with the* Bolam *test…"*

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HII CHII KOK: BRIEF FACTS

- The Patient underwent a Gallium PET/CT scan which detected two lesions in the body and uncinate process of the pancreas that were suspected to be either pancreatic endocrine tumours (PNETs) or pancreatic polypeptide hyperplasia.
- The Patient consulted doctors from NCCS who made a provisional diagnosis of PNETs although they noted that there was no discernable mass on MRI.
- The Patient was referred to the Surgeon who was of the view that both lesions were probably PNETs and recommended a Whipple procedure to surgically resect both lesions.
- The Patient also received advice from the Tumour Board that the lesion in the body of the pancreas was probably a PNET, but the nature of the lesion in the uncinate process was more uncertain.

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HII CHII KOK: BRIEF FACTS

- The Surgeon agreed that there was no certainty in the diagnosis and explained the pros and cons of surgery.
- The Patient said he was "all for aggressive treatment" and decided to undergo the Whipple procedure.
- The histopathology report confirmed hyperplasia rather than PNETs. The Patient subsequently developed significant complications from the surgery.
- The Patient commenced legal proceedings claiming that the Surgeon and NCCS were negligent for recommending and going ahead with the Whipple procedure.
- Before the Court of Appeal, the Patient claimed that he was not adequately advised on various technical details regarding the limitations of the Gallium PET/CT scan.

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THE DECISION OF THE COURT OF APPEAL

1. DIAGNOSIS
2. ADVICE → Modified *Montgomery* Test
3. TREATMENT

Bolam Test & *Bolitho* Addendum Retained

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THE DECISION OF THE COURT OF APPEAL

Why is there a different test in relation to provision of medical advice?

*"…the aspect of advice has a **significantly different complexion** from the other two aspects of medical care in that the patient is not (or at least, need not be) a passive recipient of care, but **an active interlocutor in whom ultimately rests the power to decide what course to pursue**."*

THE DECISION OF THE COURT OF APPEAL

- Why is there a different test in relation to the provision of medical advice?
  - The importance of patient autonomy is already reflected in the SMC's Ethical Code and Ethical Guidelines 2016 which states that doctors are to uphold their patients' "desire to be adequately informed and (where relevant) their desire for self-determination".
  - The nature of the doctor-patient relationship has evolved together with the level of education and access to knowledge of the ordinary Singaporean.
  - The Court did not accept that there was sufficient evidence to show that a carefully calibrated shift in standard of care expected of a doctor would result in a drastic increase in the frequency and value of medical negligence suits.

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THE APPROPRIATE TEST IN RELATION TO *DIAGNOSIS AND TREATMENT*

- The Court affirmed that there remains strong grounds to justify the application of the *Bolam-Bolitho* test in cases involving diagnosis and treatment, because:
  1. Medical science will always be in a state of discovery and learning. There will frequently be legitimate differences of opinion within the profession as to the appropriateness of a doctor's diagnosis and treatment.
  2. Innovation should be encouraged, and not discouraged over concerns of the risk of liability and litigation.
  3. Legal principles are not the best tools to use to assess and resolve controversies within medical science.

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THE APPROPRIATE TEST IN RELATION TO *DIAGNOSIS AND TREATMENT*

- The Court of Appeal reiterated that the standard of care for medical practitioners is ultimately that of the **reasonable and competent doctor**. The *Bolam* test is a practical mode or heuristic for implementing this standard.
- A doctor's duty to his patient is dependent on **context-specific circumstances**.
- A *general* rule supported by a responsible body of medical opinion may not be determinative if it does not take into consideration the appropriateness of the doctor's conduct in the *specific* circumstances which arise in the case.

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THE MODIFIED *MONTGOMERY* TEST

A **three-stage inquiry** in considering a doctor's duty to advise:

1. Was the information which the patient alleges was negligently withheld from him (i) information which would be relevant and material from the perspective of a reasonable patient in the particular patient's position, or (ii) information which the doctor knew or should have known would have been considered relevant and material by the particular patient for reasons specific to this patient?
2. Was the doctor in possession of this information at the material time, and if not, was the doctor negligent (under his duty of diagnosis or treatment) in not obtaining or having this information?
3. If the information was relevant and material and in the doctor's possession at the material time, was the doctor reasonably justified in withholding the information?

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THE MODIFIED *MONTGOMERY* TEST

Three-stage inquiry:

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THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

- Materiality is considered **from the patient's perspective**:
  1. Relevant and material information from the perspective of a reasonable patient in the particular patient's position
     - Personal circumstances of the patient are taken into account
     - e.g. if a patient is an aspiring model, the slight risk of scarring during facial surgery would be objectively material to that patient and therefore ought to be disclosed, even though it could be objectively immaterial to other patients.

THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

- Materiality is considered **from the patient's perspective**:
  2. Information which the doctor knew or should have known would have been considered relevant and material by the particular patient for reasons specific to this patient e.g. the patient asked a particular question/ highlighted particular concerns
     - The Court considers whether the questions or concerns raised by the patient to the doctor *did lead or should have led* the doctor to conclude that the information in question was material to the patient
     - "*The doctor has no open-ended duty to proactively elicit information from the patient, and will not be at risk of being found liable owing to idiosyncratic concerns of the patient unless this was made known to the doctor or the doctor has reason to believe it to be so.*"

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THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

- What information is relevant or material "is largely a matter of common sense".
- "*Information dump*" should be avoided:

  "Indeed, it has been observed that indiscriminately bombarding the patient with information…tends to have the opposite effect of leaving the patient more confused and less able to make a proper decision."

- The courts will also consider expert medical evidence and guidelines (e.g. SMC's ECEG) when assessing what information
  - Should have been obtained from patients, and
  - Would be considered material information that should be conveyed to the patient.

THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

Broad types of material information:

1. Diagnosis of the patient's condition
2. Prognosis of that condition with and without treatment
3. Nature of the proposed treatment
4. Risks associated with the proposed treatment
5. Reasonable alternatives to the proposed treatment and the advantages and risks of those alternatives
6. Consequences of forgoing treatment

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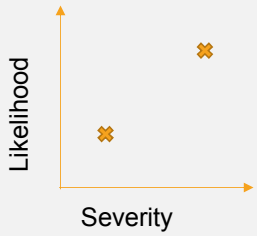
THE MODIFIED *MONTGOMERY* TEST: THE FIRST STAGE

- The importance of each category of information varies and has an impact on whether the information is considered material.
- Would be influenced by **certainty** and **consequence**
  - If the diagnosis is uncertain, more information relating to other possible diagnoses become material. Relevant information would then include the degree of certainty, the reasons for the lack of certainty, and whether more can be done to clarify the uncertainty.
  - Generally, the possibility of and reasons for a differential diagnosis will also be regarded as material.

THE MODIFIED *MONTGOMERY* TEST: THE FIRST STAGE



- Advising on risks
  - What makes a risk sufficiently material to the reasonable patient?
  - **Likelihood** and **Severity**
    - Remote risks with minor consequences = Generally immaterial = Need not be disclosed
    - Remote risks with severe consequences = Material = Must be disclosed
    - Likely risks with minor consequences = Material = Must be disclosed
    - Likely risks with severe consequences = Material = Must be disclosed

THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

- Advising on risks
  - Where the likelihood of a severe consequence is so low that the possibility is not worth thinking about, it is possible that such a severe consequence would not require disclosure.
  - There is no need to state obvious risks laypersons would be aware of, e.g. risks that are patent or matters of common knowledge.
  - There is no need to state risks that are "so plainly unlikely that it would not concern the reasonable person".

THE MODIFIED *MONTGOMERY* TEST: **THE FIRST STAGE**

- Advising on treatment
  - Only *reasonable* alternatives need to be disclosed. There is no need to provide information on fringe alternatives or "alternative medicine" practices.
  - There is no need to provide information on mainstream treatment options which are obviously inappropriate for the patient.
  - The option of non-treatment should also be discussed if it is an alternative that the reasonable patient in the particular patient's situation would consider.

THE MODIFIED *MONTGOMERY* TEST

Three-stage inquiry:

1. Was the information which the patient alleges was negligently withheld from him (i) information which would be relevant and material from the perspective of a reasonable patient in the particular patient's position, or (ii) information which the doctor knew or should have known would have been considered relevant and material by the particular patient for reasons specific to this patient?
2. **Was the doctor in possession of this information at the material time, and if not, was the doctor negligent (under his duty of diagnosis or treatment) in not obtaining or having this information?**
3. If the information was relevant and material and in the doctor's possession at the material time, was the doctor reasonably justified in withholding the information?

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THE MODIFIED *MONTGOMERY* TEST: **THE SECOND STAGE**

- In this situation, the doctor claims that he/she did not have the material information that the patient says should have been disclosed.
- The Court will consider whether the doctor ought to have ordered the tests or appraised himself of the medical knowledge which would have given him the information.
- This is a question of diagnosis or treatment (for which *Bolam-Bolitho* test would still apply).

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THE MODIFIED *MONTGOMERY* TEST

Three-stage inquiry:

1. Was the information which the patient alleges was negligently withheld from him (i) information which would be relevant and material from the perspective of a reasonable patient in the particular patient's position, or (ii) information which the doctor knew or should have known would have been considered relevant and material by the particular patient for reasons specific to this patient?
2. Was the doctor in possession of this information at the material time, and if not, was the doctor negligent (under his duty of diagnosis or treatment) in not obtaining or having this information?
3. **If the information was relevant and material and in the doctor's possession at the material time, was the doctor reasonably justified in withholding the information?**

THE MODIFIED *MONTGOMERY* TEST: **THE THIRD STAGE**

- The Court will adopt a **physician-centric approach** for this third stage.
- The burden is on the doctor to justify why the information, although material and in the doctor's possession, was withheld.
- The Court will consider supporting expert evidence on medical practice and judgment which the doctor is relying on to justify the withholding of information.
- The Court of Appeal provided 3 *non-exhaustive* examples in which non-disclosure might be justified:
  1. Waiver;
  2. Treatment provided in emergency situations; and
  3. Therapeutic privilege.

THE MODIFIED *MONTGOMERY* TEST: **THE THIRD STAGE**

1. **Waiver**
   - When the patient exercises his autonomy by deciding that he does not wish to hear further information about the proposed treatment or its alternatives.
   - The doctor must be satisfied that "the patient properly appreciates the seriousness of his decision".
   - The waiver should be express, or extremely clear if it is to be inferred.

THE MODIFIED *MONTGOMERY* TEST: **THE THIRD STAGE**

2. **Treatment provided in emergency situations (necessity)**
   - When there is a threat of death or serious harm to the patient, and the patient lacks decision making capacity and there is no appropriate substitute decision maker.
   - The *Bolam-Bolitho* test will be applied to determine whether the treatment was so urgent that there was no opportunity to seek solutions which would have allowed for the provision of adequate information to the patient.

THE MODIFIED *MONTGOMERY* TEST: THE THIRD STAGE

3. **Therapeutic privilege**
   - In this situation, the doctor reasonably believes that the very act of giving particular information would result in serious physical or mental harm to the patient.
   - The following factors are taken into consideration:
     a) The benefit of the treatment to the patient;
     b) The relatively low level of risk presented; and
     c) The probability that even with suitable assistance, the patient would likely refuse such treatment owing to some misapprehension of the information stemming from the impairment.

THE MODIFIED *MONTGOMERY* TEST: THE THIRD STAGE

3. **Therapeutic privilege**
   - Examples:
     a) Patients with anxiety disorders to whom the mere knowledge of a risk alone may cause harm.
     b) Certain geriatric patients who are easily frightened out of having even relatively safe treatments which can drastically improve their quality of life.
     c) Patients whose state of mind, intellectual abilities or level of education may make it impossible or extremely difficult to explain the true reality to them.

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THE MODIFIED *MONTGOMERY* TEST: **THE THIRD STAGE**

3. **Therapeutic privilege**
   - The therapeutic privilege exception should not be abused to prevent a patient who is capable of making a decision from doing so merely because the doctor considers that decision to be against the patient's best interests (recall *Montgomery*).
   - Matters that concern the state and condition of the patient are ultimately issues of fact, and although an expert could be helpful in this context, the Court did not think it will be necessary to apply the *Bolam-Bolitho* test.

THE MODIFIED *MONTGOMERY* TEST: **HOW INFORMATION SHOULD BE COMMUNICATED**

- A doctor must present the information "in terms and at a pace" that allows the patient to assimilate it, hence enabling the patient to arrive at an informed decision.

"Nonetheless, we also observe that while it is important to ensure that a patient has sufficient information to make an informed decision, the mere provision of information is pointless ***if it is not accompanied by a quality of communication that is commensurate with the ability of the patient to understand the information****."*

OTHER OBSERVATIONS:
HINDSIGHT AND OUTCOME BIAS

- The Court of Appeal emphasized the importance of guarding against hindsight and outcome bias which cuts across all aspects of medical care.
- The relevant tests should be applied with reference only to the facts that were known **at the time the material event occurred**.
  - Diagnosis: only information that was available at the time of the diagnosis is relevant.
  - Advice: only information that a reasonable person in the patient's position would consider material at the time the relevant decision (to accept the treatment or undergo the procedure etc.) was made is relevant.

HII CHII KOK: THE DECISION

- Applying the modified *Montgomery* test, the Court of Appeal held that neither the Surgeon nor NCCS had been negligent in advising the Patient.
- With regards the technical details that the Patient claimed were withheld, the Court rejected the claim that it was not information which a reasonable Patient in the Patient's shoes would have considered material.
- There was also no particular reason for the doctor to believe that the Patient would have considered those details material.
- In fact, the Court noted that if a doctor had provided all the allegedly "missing" information, he might have been accused of failing to present the information to the Patient in an understandable fashion: "*A doctor is not under a duty to provide his patient with an encyclopaedic range of information in relation to anything and everything which the patient might wish to know. Instead, a doctor's duty to advise only covers that which would enable the patient to make an informed decision.*"

KEY TAKEAWAYS

1. The doctor-patient relationship is **a dynamic process,** where the parties are engaged in a **collaboration** on what course of treatment to pursue.
2. Doctors are expected to actively communicate and engage with their patients in a manner that the patients understand.
3. Doctors should note the patient's background, occupation, lifestyle choices etc.
4. Doctors should take note of any specific concerns the patient may have and address these concerns.

KEY TAKEAWAYS

However, the Court acknowledged that:

*"The doctor has **no open-ended duty to proactively elicit information** from the patient, and will not be at risk of being found liable owing to idiosyncratic concerns of the patient unless this was made known to the doctor or the doctor has reason to believe it to be so. In the usual case, the standard of care should only extend to materiality on this ground where the **patient has in fact asked** **particular questions** or otherwise **expressed** **particular concerns** that are relevant to the omitted information."*

KEY TAKEAWAYS

- It is the **quality** of the information and advice conveyed that matters, not the quantity.
- Ultimately, the course of treatment to pursue is **the patient's decision to make**.
- A doctor cannot and should not *impose* his preferred/ recommended course of treatment on the patient.
- A doctor's role is to provide patients with the necessary information to empower and enable them to arrive at an informed decision on their preferred course of treatment.

KEY TAKEAWAYS

- **Conscientious note-taking** and **robust documentation** is more important than ever.
- The best defence against allegations of non-disclosure of material information is to properly document the information provided to the patient.
- While standard forms and procedure specific information leaflets are intended to help doctors with their documentation, if used as a *substitute* to proper communication with a patient, it harms rather than helps the process.