



MINISTRY OF HEALTH
SINGAPORE

Seminar on the Doctor's Duty to Advise

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Terence Ang

Outline

- Brief background of *Hii Chii Kok v Ooi Peng Jin London Lucien and NCCS*
- New test for doctors' duty in giving medical advice
- Q&A

Please note that only general information (and not legal advice) will be provided in this seminar. You may wish to seek legal advice if you require specific assistance.

Background facts

- Dato' Hii, the appellant, underwent a Gallium PET/CT scan in July 2010 to ascertain if nodules found in his right lung were neuroendocrine tumours (NETs). The scan instead revealed that he might have an additional NET each in the head and body of his pancreas (PNETs).
- Dato' Hii subsequently consulted with doctors in the NCCS, whose “working” diagnosis was that he had PNETs, and referred him to Dr Ooi.

Background facts

- Dr Ooi offered the surgical options of pancreatic resection of the lesion at the body of the pancreas plus Whipple procedure in relation to the lesion at the head of the pancreas. He also said that:
 - it would be **difficult for anyone to be conclusive** whether the lesions in the pancreas are tumours or hyperplasia.
 - Dato' Hii could undergo surgery for only one of the lesions, or wait 6 months for a repeat PET scan (though there is a risk of the lesions spreading, if they were tumours).
 - the Whipple procedure was associated with higher morbidity.
- Dato' Hii underwent the Whipple procedure.
- Serious post-operative complications resulted, and Dato Hii' sued Dr Ooi and NCCS for medical negligence.

Legal test before *Hii Chii Kok*

- The general professional standard for all professions is that of “the ordinary skilled man exercising and professing to have that special skill”.
- The *Bolam* test is a means of determining what an ordinary skilled member of the medical profession would do in a particular scenario.
- ***Bolam-Bolitho* test** – no negligence even if the doctor does not disclose material risks of a proposed treatment, so long as “a responsible body of medical opinion” would support the doctor’s non-disclosure, and the threshold requirement of logic is met:
 - comparative risks and benefits have been considered, the opinion is internally consistent, and does not fly in the face of evidence and logic.
- Test applies to doctors’ duty to (i) Advise, (ii) Diagnose and (iii) Treat.

Court's decision in *Hii Chii Kok*

- *Bolam-Bolitho* retained for diagnosis and treatment.
- But, for the provision of information and advice, the Court adopted a modified *Montgomery* test:
 - The patient plays an active role at this stage of the doctor-patient relationship.
 - The decision whether to undergo a particular treatment is the patient's to make.
 - The patient requires all material information to make this decision.
 - Hence, the court must consider the *advice* aspect of the doctor's duty to his patient through the lens of *patient autonomy* and *beneficence*, and ensure that *both* principles are upheld.

Modified *Montgomery* test

- **Stage 1:** Patient must identify the exact nature of the information he alleges was not given to him and establish why it would be regarded as relevant and material to (i) a reasonable patient in his position, or (ii) him.
- **Stage 2:** Establish whether the doctor possessed the information.
- **Stage 3:** Doctor must provide a satisfactory justification for withholding the information.

Modified *Montgomery* test

- **Stage 1**: Patient must identify the exact nature of the information he alleges was not given to him and establish why it would be regarded as relevant and material to him or a reasonable patient in his position
 - The inquiry is an objective one, *ie* what a reasonable person in the patient's position would consider material. This is judged based on basic information about the patient, or what the patient discloses to the doctor.
 - Generally includes information like the diagnosis and prognosis of the condition, the nature and risks of the proposed treatment, and nature and risks of alternative treatments.

Modified *Montgomery* test

- Includes risks that have special significance to the patient *only if* a doctor knew or ought reasonably to have known of the patient's special circumstances. Doctor has no open-ended duty to proactively elicit information from the patient.
- Risks that are obvious, or have such a low chance of occurring such that the possibility is not worth thinking about, do not have to be disclosed.
- Expert medical evidence and guidelines like ECEG will be useful in helping courts ascertain what would be considered material information that should be communicated.
- Only need to disclose *reasonable* alternatives for treatment.

Modified *Montgomery* test

- **Stage 2**: Determine whether the doctor was in possession of the information
 - This is a factual assessment.
 - If the doctor was not aware of the information, it would make little sense to ask whether he should have given it to the patient → one cannot give what one does not have.
 - Whether a doctor ought to have ordered additional tests to obtain more information, or further apprised himself of medical knowledge, will be dealt with under the doctor's duty to diagnose or treat and continue to be considered under the *Bolam-Bolitho* test.

Modified *Montgomery* test

- **Stage 3**: If the doctor possessed but did not disclose the information, determine whether doctor was justified in withholding the information
 - **Physician-centric approach**, ie, expert medical evidence will assume some significance.
 - This is similar to the approach under the *Bolam-Bolitho* test.

Modified *Montgomery* test

- Examples of when non-disclosure may be justified:
 - **Waiver** by patient to hear further information
 - **Therapeutic privilege**: where the doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm. Other doctors' expert evidence will often be helpful in deciding whether therapeutic privilege was properly invoked, similar to the approach under the *Bolam-Bolitho* test.
 - **Emergency situations**: assessed under the *Bolam-Bolitho* test
 - medical expert opinion becomes important

Dr Ooi prevailed

- Dato' Hii alleged that 14 points of material information were not disclosed to him.
- Many of these points related to specific information about the Gallium PET/CT test, such as the number of times it had been used and its diagnostic value in circumstances where no corresponding mass was detected on the CT and MRI scans.
- The Court found that a reasonable patient in Dato' Hii's position would not consider it necessary to be informed of these matters. Hence, Dato' Hii did not even pass the first stage of the test.

Dr Ooi prevailed

- The Court found that there were two key points which Dato' Hii needed to be advised of:
 - There was a risk that his condition might turn out not to be PNETs;
 - One alternative was to remove the lesion in the body of the pancreas only, instead of removing both the lesions at the head and body of the pancreas.
- Since Dato' Hii had been amply advised of both these matters, the Court found that his decision to undergo the Whipple procedure cannot be anything but informed.
- Dr Ooi and NCCS therefore did not breach their duty to properly advise Dato' Hii. → **The fact that the Court adopted the modified *Montgomery* test did not change the outcome.**

Concluding remarks

- A doctor is ***not*** under a duty to provide his patient with an encyclopaedic range of information.
 - A doctor's duty to advise only covers that which would enable the patient in question to make an informed decision.
 - A **common-sense approach** should be taken.
- There must be a balance between autonomy and beneficence.
- A useful tip is to ask the patient if there is anything especially important to him about the planned procedure or treatment.