The New Section 37 – A Mirror Image of Current Case Laws?

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The Civil Law (Amendment) Act Section 37[1] became law on 6 September 2020 and is now awaiting ratification by President Halimah Yacob. The amendment stipulates a new legal test in respect of the standard of care for medical advice given by healthcare professionals (including doctors, dentists and oral health therapists).

Medical professionals always have an edge in the interpretation of medical negligence cases over their legal counterparts. They know the medical settings, treatment protocols and terminology, and even nuances during incidents as opposed to dry memory by rote of legal practitioners.

The Bolam-Bolitho test

Medical consent-taking has always had its bedrock in the so-called Bolam test[2] with Bolitho addendum.[3] What most readers may have failed to realise is that the period between Bolam and Bolitho spans about 40 years and there were numerous case laws and court pronouncements in between these two landmark cases. In Bolam (1957), the doctor's defence is satisfied if he can gather a respectable group of medical professionals who practise in a similar way, even if another group may take another route or hold a contrary view. The Bolam test is totally doctor-centric, and was in fact a case of a patient who suffered a hip fracture during electroconvulsive therapy (ECT). The issue before the court then was whether patients receiving ECT should always be given a muscle relaxant.

The Bolitho addendum or "gloss" just adds on to the ruling in Bolam. The doctor's defence is not always satisfied by gathering a respectable body of practitioners with similar views, even though there may be a group holding contrary views. The deliberation of all views in the court must be logical to the *judge*. This signalled a slight shift away from a totally doctor-centric defence – the test of logical analysis lies with the *judge*. In Bolitho, a young child with croup was not immediately attended to by the paediatric registrar, and subsequently died. In her defence the paediatric doctor submitted that even if she had attended to the child immediately, she would not have performed endotracheal intubation, as the child had two similar episodes of respiratory difficulty before and had recovered well with no sequelae without endotracheal intubation after each episode. Moreover, endotracheal intubation was invasive and not without adverse side-effects. So, while she was in breach of her duty of care in not attending to the child immediately, she was not the "factual" cause of the child's death.

In the 40 years between Bolam and Bolitho, there were rumblings in the courts and a change in judicial tone to a more patient-centric rubric. This is exemplified in the cases involving Sidaway (1985),[4] when the patient developed paraplegia after a cervical spine operation and was not told of the small risk of this happening during consent-taking. Then there was the case of Wilsher (1988),[5] where a premature child became blind after over-oxygenation. The case was complicated in that there were also four other causes accounting for the child's blindness. Finally, the Australian court joined in giving more autonomy to patients in *Roger v Whitaker*,[6] where the patient became blind in the good eye from sympathetic ophthalmia after operation on the bad eye, and was not told of this risk before operation.

All the above three cases before Bolitho involved medical professionals not informing patients of the risks of operations or medical procedures, however low the incidence and it was left to the court to determine the degree of liability on the part of the medical professional – a clear shift in giving patients more autonomy in participating in their own treatment.

Even after Bolitho, there was the case of Chester (2005)[7] after a spine operation. This patient developed cauda equina syndrome after a spine operation. The patient was not warned of this small risk even though the operation may be performed meticulously, and said that if warned she would have postponed this operation to a later date. After escalation to the House of Lords, their Highnesses found for the patient in that the surgeon had breached his duty of care in not informing her of this small risk.

The Modified Montgomery test

The importance of patient autonomy finally culminated in the landmark decision in Montgomery (2015).[8] Here, a child suffered disability following traumatic brain injuries during childbirth. The mother, who was diabetic, already had a previous difficult delivery and was not told that she could have a C-section. The Montgomery test now shifts the decision-making to the patient after being informed of material risks of each alternative treatment or having no treatment. It allows for the patient's particular needs to be considered in the treatment plan.

Chief Justice Sundaresh Menon developed the decision in Montgomery further in *Hii Chii Kok v Ooi Peng Jin London Lucien*.[9] Here, the doctor in the course of history-taking or from reasonable reading of past notes has to take into consideration the patient's particular needs, and weigh the material risks relevant to each patient to help the patient arrive at a decision. The doctor can only choose not to inform when knowing the material risks in three circumstances: (a) during an emergency, (b) when the patient requests not to know more details, and (c) "therapeutic privilege" where the patient's best interest may be compromised when the doctor reveals certain material risks.

Post-Montgomery till the present Civil Law (Amendment) Act 2020, there has also been a spate of cases involving informed consent both in the English and Singapore courts. Generally, in cases where the risks are not material, the courts have found for the defendants, the converse also being true. Doctors now have to tailor advice to the particular and peculiar features of each patient. The English court affirmed this assiduously in Webster (2017)[10] where the court found the doctor's failure to advise a patient with a nursing degree appropriately, especially so when she had many unusual features in her pregnancy. It was submitted that the patient was not induced just before her due date and was allowed to go post-term with many adverse features complicating her pregnancy, namely low-lying placenta, head circumference being more than abdominal circumference, polyhydramnios, and the fetus being small for gestational age. The child later suffered from cerebral palsy.

The final question

Is the Civil Law (Amendment) Act Section 37 a complete mirror image encompassing all the case laws as pronounced by the English and Singapore courts?

The medical community has been issued with a medical advisory from law firm Drew & Napier[11] following the passing and enactment of the new Civil Law (Amendment) Act. Although the advisory is certainly welcomed, scholarly and useful, it is perhaps pertinent to look for the slight differences and the ways we try to improve with the passing of this new law:

1. Bolitho's test of logic was previously decided by the *judge*. The Singapore law has thrown this test of logic back for *medical professionals to decide* in the new Section 37(5). This is perhaps as it should be.
2. While the decisions reached in the Modified Montgomery test in *Hii Chii Kok* are intact, the new Act also allows for *anybody with the legal capacity to make medical decisions on behalf of a mentally incapacitated patient* similar powers of patient autonomy in the new Section 37(6).
3. The Bolam-Bolitho test is still good law and retained insofar as diagnosis and treatment of patients are concerned.
4. A mention at the end of the Bill holds that the new law will not involve any extra financial expenditure. The Ministry of Health Workgroup on the Singapore Medical Council (SMC) disciplinary process has called for the creation of a Legal Advisory Unit to improve legal resources to the Complaints Committee and Disciplinary Tribunals, together with the establishment of an in-house Prosecution Unit to conduct prosecution on behalf of SMC instead of making use of private law firms. Perhaps this may result in some cost savings as well – both for the prosecution (SMC) as well as the doctor being complained of. ◆

Disclaimer: The views expressed in this article are the author's own after reading the Goverment Gazette Bill 33 in early September 2020.

References

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5. *Wilsher v Essex Area Health Authority [1988] 1 AC 1074(HL).*
6. *Rogers v Whitaker [1992] 175 CLR 479.*
7. *Chester v Afshar [2004] UKHL 41.*
8. *Montgomery v Lanarkshire Health Board [2015] UKSC11.*
9. *Hii Chii Kok v Ooi Peng Jin London Lucien [2017] 2 SLR 492.*
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