

 DREW & NAPIER

OVERVIEW OF THE STANDARD OF CARE FOR MEDICAL ADVICE GIVEN BY HEALTHCARE PROFESSIONALS

Civil Law (Amendment) Bill

7 September 2020

LEGAL UPDATE

In this Update

The Civil Law (Amendment) Bill was introduced in Parliament on 3 September 2020.

This Amendment Bill seeks to amend the Civil Law Act to set out the legal test in respect of the standard of care for medical advice given by healthcare professionals.

This update traces the different formulations of the legal test in respect of the taking of informed consent by doctors in Singapore and examines the legal test as proposed by the Amendment Bill.

03
INTRODUCTION

03
BOLAM-BOLITHO TEST

03
MODIFIED MONTGOMERY TEST

04
BEYOND THE MODIFIED MONTGOMERY TEST

05
PROPOSED STANDARD OF CARE – MEDICAL ADVICE

06
COMMENTARY

INTRODUCTION

The Civil Law (Amendment) Bill (“**Amendment Bill**”) was introduced in Parliament on 3 September 2020.

The Amendment Bill seeks to amend the Civil Law Act (by introducing new s37) to set out the legal test in respect of the standard of care for medical advice given by healthcare professionals (including doctors, dentists, and oral health therapists).

In March 2019, the Ministry of Health appointed a 12-member Workgroup to review the taking of informed consent and the Singapore Medical Council’s Disciplinary Process. This Workgroup released a Report comprising 29 recommendations, of which 20 related to the taking of informed consent by doctors.

In a press release dated 3 December 2019, the Ministry of Health stated that it had accepted the Workgroup’s recommendations and that legislative changes will be made to implement the Workgroup’s recommendations.

This update traces the different formulations of the legal test in respect of the taking of informed consent by doctors in Singapore. This update also examines the legal test as proposed by the Civil Law (Amendment) Bill.

BOLAM-BOLITHO TEST

Previously, the *Bolam-Bolitho* test, as laid down in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 (as supplemented by the *Bolitho* addendum in the case of *Bolitho v City & Hackney Health Authority* [1998] AC 232) had been applied to adjudicate the standard of medical care.

Under this test, a doctor is not liable in negligence if he can demonstrate that there is a respectable and responsible body of medical opinion, logically arrived, that accept the doctor’s decisions and practice as proper.

The blanket application of the *Bolam-Bolitho* test to all aspects of medical care, including the taking of informed consent, caused some discomfort.

MODIFIED MONTGOMERY TEST

In 2017, the Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] 2 SLR 492 introduced a three-stage patient-centric legal test (“**Modified Montgomery test**”) to determine if a doctor had obtained informed consent and therefore fulfilled his duty to advise.

From then on, the Modified Montgomery test replaced the *Bolam-Bolitho* test in respect of determining if informed consent had been taken. The *Bolam-Bolitho* test continued to apply to issues relating to medical diagnosis and treatment.

The stages of the Modified Montgomery test are as follows:

1. First stage: Whether the information withheld from the patient was relevant and material from the patient's perspective?
2. Second stage: Was this information in possession of the doctor, and if not whether the doctor was negligent in not obtaining this information?
3. Third stage: If the doctor possessed the said information, was the doctor reasonably justified in withholding such information?

BEYOND THE MODIFIED MONTGOMERY TEST

In November 2018, the Disciplinary Tribunal's decision in *Singapore Medical Council v Dr Lim Lian Arn* [2018] SMCDT 9 to mete out a \$100,000 fine on a doctor for allegedly failing to inform a patient of the risks associated with the administration of a steroid injection caused ripples within the medical fraternity.

While the Court of Three Judges on appeal set aside the doctor's conviction in July 2019, the Disciplinary Tribunal's decision gave cause for concern for medical practitioners that the Modified Montgomery test established unrealistically high standards if left entirely to the Disciplinary Tribunal or the Court. The Workgroup's report recommended that peer professional opinion be taken into account when deciding what constitutes informed consent.

The Workgroup proposed a legal test on the taking of informed consent back to a peer-review based approach but which takes into account patient autonomy and choice and what is material to the patient.

KEYPOINT

This is not dissimilar to the Bolam-Bolitho test in that peer professional opinion would be used to determine what may be relevant and material information to the patient.

It is against this backdrop that amendments to the Civil Law Act were introduced in Parliament on 3 September 2020.

OVERVIEW OF THE STANDARD OF CARE FOR MEDICAL ADVICE GIVEN BY HEALTHCARE PROFESSIONALS INTRODUCED BY THE CIVIL LAW (AMENDMENT) BILL

It has been proposed that a new section, specifically s37, be introduced to the Civil Law Act.

This proposed s37(1) provides that a healthcare professional meets the standard of care in relation to the provision of medical advice to a patient if:

- (a) the manner in which the healthcare professional acts (at the time the medical advice is provided) is accepted by a respectable body of medical opinion (known as the peer professional opinion) as reasonable professional practice in the circumstances; and
- (b) such peer professional opinion is logical.

S37(2) describes the standard by which the peer professional opinion must assess the information given by a healthcare professional in providing medical advice to a patient.

An assessment as to whether information is material to the patient (for the patient's personal reasons) for the purpose of making an informed decision about whether to undergo a treatment or follow a medical advice must be based on the patient's specific concerns or queries about the treatment or medical advice:

- (a) which the patient expressly communicates to the healthcare professional; or
- (b) which are not expressly communicated by the patient 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.

S37(4) states the legal position on a multiplicity of peer professional opinions in respect of the giving of medical advice by a healthcare professional, while s37(5) describes the threshold test of logic for peer professional opinions.

The provisions of the Amendment Bill, when enacted as law, will prevail over existing common law on the standard of care for medical advice, to the extent of inconsistency between those provisions and common law. For avoidance of doubt, the common law in this area will continue to apply where it is not inconsistent with the provisions of the Amendment Bill.

This Amendment Bill does not deal with, and does not affect existing common law on, the standard of care for medical diagnosis and medical treatment carried out by healthcare professionals.

COMMENTARY

The Modified Montgomery test marked a shift towards a more patient-centric approach in the provision of medical advice, as compared to the long-standing *Bolam-Bolitho* test which was controversial for encouraging medical paternalism. With the introduction of the proposed s37 of the Civil Law Act, the law now seeks to blend aspects of both tests into a single legislation so as to strike the right balance between the rights of the doctor and the patient.

KEYPOINT

Like the Bolam-Bolitho test, s37(1) measures the legal standard against a respectable body of medical opinion, which must pass the logic test.

KEYPOINT

However, in a nod to patient autonomy, s37(2) makes clear that such medical opinion must require the doctor to convey information material to a patient for the purpose of making an informed decision, unless there is reasonable justification for not providing such information (eg emergency surgeries).

While it remains to be seen how s37 is applied in practice, a clear legislative framework for the standard of care in the provision of medical advice is certainly to be welcomed.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval.

If you have any questions or
comments on this article, please
contact:



Chia Voon Jiet

Director, Dispute Resolution
Co-Head, Investigations

T: +65 6531 2397

E: voonjiet.chia@drewnapier.com

Drew & Napier LLC

10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906

 **DREW & NAPIER**