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Standard Of Care For Medical Negligence In Malaysia: *Does The Bolam Test Still Apply?*

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The Bolam Test

Prior to December 2006, the Malaysian courts have adopted the test laid down in *Bolam v Friern Hospital Management Committee*[1] for medical negligence. Commonly known as the Bolam Test, it is applied to determine the standard of care owed by a medical practitioner to his/her patient. In essence, the Bolam Test means that a doctor is not negligent if he had acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. In other words, the standard of care is to be determined by reference to the standard of medical practitioners and not to be determined by the courts.

At this juncture, it has to be noted that the Bolam Test is a wide encompassing test which captures all aspects of medical practice. It makes no distinction between diagnosis, treatment or the duty to advise patients *vis-à-vis* the risks associated with a medical treatment.

Foo Fio Na v Dr Soo Fook Mun & Anor [2]

The applicability of the Bolam Test was thrown into doubt by the Federal Court decision in *Foo Fio Na (supra)*. In *Foo Fio Na (supra)*, the appellant became totally paralysed after undergoing surgery for neck injuries at the second respondent's hospital. The appellant sued the respondents for medical negligence. The appellant alleged amongst others that the paralysis was caused by the treatment procedure adopted by the first respondent, an orthopedic surgeon at the hospital and that the first respondent did not explain the risks of the treatment procedure to her. The High Court found for the appellant, but the decision was reversed by the Court of Appeal.

[1] [1957] 2 All ER 118
[2] [2007] 1 MLJ 593

The appellant subsequently sought and obtained leave to appeal to the Federal Court on the following point of law:

> *"Whether the Bolam Test as enunciated in Bolam (supra) in the area of medical negligence should apply in relation to all aspects of medical negligence."*

The Federal Court answered the question in the negative. In doing so, the Federal Court adopted the test set out in the Australian case of *Rogers v Whitaker*[3] and held that the Bolam test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of a proposed treatment.

According to *Rogers v Whitaker (supra)*, a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. There is simply no occasion to consider the practice or practices of medical practitioners in determining what information should be supplied, unless there is some medical emergency or something special about the circumstances of the patient.

Pursuant to the above determination, the Federal Court allowed the appeal.

A point of note is that *Foo Fio Na (supra)* was silent on whether *Rogers v Whitaker (supra)* is of general application or whether its application is limited to the duty to advise patients of inherent and material risks of a proposed treatment. This has resulted in the High Court and Court of Appeal after *Foo Fio Na (supra)* adopting two inconsistent approaches on the applicable test for medical negligence.

There were cases where the Court held that the Bolam Test is no longer applicable in deciding whether there was negligence by medical practitioners and that it is now entirely for the Court to decide whether there has been medical

[3] (1992) 175 CLR 479

negligence. There were also cases where the Court held that the test adopted in *Foo Fio Na (supra)* relates only to a medical practitioner's duty to advise a patient and does not apply in respect of the duty owed when making diagnosis and treatment.

Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors[4]

Such uncertainty was finally settled by the Federal Court in the case of *Zulhasnimar (supra)*. *Zulhasnimar (supra)* involved a claim by the appellants against the respondents for medical negligence during the course of the delivery of the second appellant (an infant). The High Court found against the appellants and the decision was affirmed by the Court of Appeal on appeal. The appellants then obtained leave of the Federal Court to appeal. Out of the two leave questions, Question 1 states as follows:

> *"Whether the Bolam test or the test in the Australian case of Rogers v Whitaker (1993) 4 Med LR 79 in regard to the standard of care in medical negligence should apply, following conflicting decisions of the Court of Appeal in Malaysia and legislative changes in Australia, including the re-introduction there of a modified Bolam test."*

The Federal Court held that:

> *"[94] Thus, it is* ***our judgment that in respect of the standard of care in medical negligence cases, a distinction must be made between diagnosis and treatment on the one hand and the duty to advise of risks on the other. This is because diagnosis and treatment are purely in the realm of medicine and that in the field of medicine, there are genuine differences of professional opinion in respect of diagnosis and treatment****. Although as a discipline, medicine involves specific knowledge, its practice, however, often does not admit to scientific precision. It is not always the*

[4] [2017] 5 MLJ 438

case that there is a definite answer one way or the other. In fact, medical experts do genuinely and frequently differ in opinion on diagnosis and treatment.

[95] Given the fact that ***there are genuine differences in opinion in diagnosis and treatment, it is therefore not a matter that the court can, or is, equipped to resolve. It is in this context that the Bolam test makes good sense****. It requires the court to accept, not just the views of medical experts simpliciter, but the views of a responsible body of men skilled in that particular discipline. It removes from the courts the responsibility of resolving a dispute that is not equipped to resolve.*

[96] On the other hand, ***different consideration ought to apply to the duty to advise of risks as opposed to diagnosis and treatment. That duty is said to be noted in the right of self-determination. As decided by the Australian High Court in Rogers v Whitaker and followed by this court in Foo Fio Na, it is now the courts' (rather than a body of respected medical practitioners) which will decide whether a patient has been properly advised of the risks associated with a proposed treatment****. The courts would no longer look to what a body of respectable members of the medical profession would do as the yardstick to govern the standard of care expected in respect of the duty to advise.*

[97] Based on the foregoing, we will answer question 1 in the following manner. ***The test propounded by the Australian case in Rogers v Whitaker and followed by this court in Foo Fio Na in regard to standard of care in medical negligence is restricted only to the duty to advise of risks associated with any proposed treatment and does not extend to diagnosis or treatment. With regard to the standard of care for diagnosis or treatment,***

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the Bolam test still applies, subject to qualifications as decided by the House of Lords in Bolitho."

Ultimately, the Federal Court dismissed the appellants' appeal in this matter because the appellants failed to show sufficient evidence supporting their claims.

Conclusion

In view of the decision in *Zulhasnimar (supra)*, the current applicable tests for medical negligence in Malaysia can be summarised as follows:

(a) The Bolam Test is the applicable test by Malaysian courts in relation to the standard of care expected of medical practitioners in relation to any diagnosis or treatment, subject to the qualification in *Bolitho v City and Hackney Health Authority*[5], namely that the body of medical opinion needs to withstand logical analysis. Whether there is a breach of the standard of care of medical practitioners in this respect will generally be determined in reference to the standards of such medical practitioners; and

(b) Meanwhile, in relation to the duty of a medical practitioner to advise patients of risks associated with their treatment, the applicable test is the test laid down in *Rogers v Whitaker (supra)* as adopted by the Federal Court in *Foo Fio Na (supra)*. This effectively means that it is the Courts which will decide whether a patient has been properly advised of the risks associated with a proposed treatment.

This alert was authored by Khey Ken Lim, an associate with the firm's Dispute Resolution practice.

[5] [1998] AC 232