CONSENT FORM, DUTY TO ADVISE AND MEDICAL NEGLIGENCE

by Tan Jun Yu

A patient who has sought medical opinion has the right to be duly advised. The reverse is also true – that the doctor who has been approached has a duty to advise properly. A reasonable man on the Clapham omnibus or a RapidKL bus would expect that that duty to advise is even more manifest when it comes to seeking the patient's consent before undergoing the contemplated medical procedures.

It is, thus, a common practice for the doctor to give the patient a consent form to be signed before proceeding with the treatment. One of the standard terms of the consent form is that the patient has been explained and advised on the nature and purpose of the procedure to be carried out, and that the patient fully understands the same, and agrees to it. The question that arises is, what are the legal implications when a doctor breaches his duty to advise but his patient has nonetheless signed a consent form that says otherwise?

Duty of Care Owed by a Doctor

The duty of care owed by a doctor arises from the doctor-patient relationship.[1] The notion that a doctor owes duties to his patient is not a legal fantasy. It has been a standing moral and ethical expectation for the medical profession. The Hippocratic Oath that doctors have been swearing over centuries goes as follows:[2]

> *"Into whatever houses I enter, I* ***will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption;*** *and, further from the seduction of females or males, of freemen and slaves. Whatever, in connection with my professional practice or not, in connection with it, I see or hear, in the life of men,* ***which ought not to be spoken of abroad, I will not divulge,*** *as reckoning that all such should be kept secret."*

That a doctor owes a duty of care to his patient is accepted without any contest in most if not all of the reported cases.[3] Instead, the dispute often revolves around whether that duty of care has been breached. This necessarily brings into question the standard of care.

The Standard of Care in Duty to Advise

The locus classicus of ***Donoghue v Stevenson*** **[1932] All ER Rep 1** sees the modern law of negligence being turned into a fault-based tort and the neighbour principle being accepted as establishing the general concept of reasonable foresight as the

1 *R v Bateman [1925] All ER Rep 45, p 48.*

2 *Anon, Hippocratic oath https://www.britannica.com/topic/Hippocratic-oath (2.6.2024).*

3 *Arjun Gopal Subramaniam v Subang Jaya Medical Centre Sdn Bhd & Ors [2022] MLJU 1406, paragraph 115.*

criterion of negligence.[4] A person should not injure those *"who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question"*,[5] with the latter known as one's neighbour in law.

The standard of care is the test of the notional reasonable man, who is the man on the Clapham omnibus,[6] for he represents a man of ordinary sense and sensibility who is neither perfectionist nor lackadaisical.[7] When it comes to skilled professions such as the medical profession, by analogy, the reasonable man turns into the ordinary skilled man exercising and professing to have that special skill.[8] McNair J described it this way in ***Bolam v Friern Hospital Management Committee*** **[1957] 2 All ER 118**:[9]

> *"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 men skilled in that particular art*** *... a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time,* ***that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion.*** *Otherwise you might get men today saying: "I don't believe in anaesthetics. I don't believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century". That clearly would be wrong."*

This test, known as the Bolam test, was accepted as good law in common law until the High Court of Australia departed it in ***Rogers v Whitaker*** **(1992) 109 ALR 625** and the English Supreme Court qualified it in ***Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority*** **[1997] 4 All ER 771.**

Essentially, the High Court of Australia in Rogers case classified a doctor's duty of care into two scenarios – the first is the duty to diagnose and treat, and the second to advise. For the second category of duty to advise, the Australian High Court substituted the Bolam test with the test of materiality: [10]

> *"Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play;* ***whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order.*** *Generally speaking, it is not a question the answer to which depends upon medical standards or practices ...* ***no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment.***

...

> *The law should recognise* ***that 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*

4 *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561, p 586.*

5 *Donoghue (or McAlister) v Stevenson [1932] All ER Rep 1, p 11.*

6 *Sidaway v Board Of Governors Of The Bethlem Royal Hospital And The Maudsley Hospital And Others [1977 S. No. 8248] [1984] QB 493, p 505.*

7 *James Badenoch, Brushes With Bolam. Where Will It Lead?, Medico-Legal Journal 72 (127).*

8 *Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, p 121.*

9 *Ibid, p 122.*

10 *Rogers v Whitaker (1992) 109 ALR 625, p 633 & 634*

practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it ..."

Thus, in regard to the duty to advise, the Australian High Court in *Rogers* case grabbed the power to decide the breach from a responsible body of medical men (Bolam test) and vested that power in itself (materiality test).

Meanwhile, the English Supreme Court introduced a "withstanding logical test" qualification to the Bolam test in *Bolitho* case, wherein the Court held that in a rare case where it can be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge was entitled to hold that the body of opinion was not reasonable or responsible.[11]

In Malaysia, the Federal Court in ***Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593** adopted *Rogers* case and held that when it came to the duty to advise patients on the risks of treatments, "the Bolam Principle has been discarded and, instead, the courts have adopted the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to the paramount consideration that a person is entitled to make his own decisions about his life".[12]

The Federal Court went further to lay down the scope of the duty to advise that is owed by a doctor:[13]

"... ***it is the duty of a doctor to explain what he intends to do, and its implications, in the way a careful and responsible doctor in similar circumstances would have done.*** *It is my opinion that that is a correct statement of the law, and that* ***the duty extends, not only to the disclosure of real risks of misfortune inherent in the treatment, but also any real risk that the treatment, especially if it involves major surgery, may prove ineffective***."

The distinction between the duty to diagnose and treat and the duty to advise made by the Federal Court in *Foo Fio Na* case was affirmed subsequently in ***Zulhasnimarbt Hasan Basri & Anor v Dr Kuppu Velumani P &Ors* [2017] 5 MLJ 438**. The Federal Court in *Zulhasnimar* case affirmed that in Malaysia, the duty of care of a doctor is divided into two:[14]

- The duty to diagnose and treat. The Bolam test still applies subject to the qualification laid down by Bolitho case. The Court can reject a medical opinion that cannot withstand logical analysis.

- The duty to advise. The Bolam test is discarded and it is now upon the Court to decide whether the non-disclosure of certain information and the failure to advise the same is a breach of the duty of care based on the test of materiality.

Consent Form

The analysis above establishes that in our jurisdiction, a doctor owes his patients a duty to advise and inform them of the material risks of the proposed treatment.

11 *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority [1997] 4 All ER 771, p 779.*

12 *Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, p 606.*

13 *Ibid.*

14 *Zulhasnimarbt Hasan Basri & Anor v Dr Kuppu Velumani P &Ors [2017] 5 MLJ 438, p 473.*

Requiring the patient to sign a consent form is a standard practice.

The consent form is drafted along similar lines. In ***Koay Eng Oon v Dr Wong Twee Juat&Ors*** **[2022] MLJU 1996**, the consent form read:[15]

> *"I hereby acknowledge and fully understand that this consent is required for surgical treatment. The diagnosis of the disease condition and reason why treatment is considered necessary have been explained to, and understood by me. The operation/procedure has been explained to me clearly and comprehensively by Dr ..... In the ..... Language/dialect. I have also been informed of possible alternative medical methods of treatment including no treatment at all. I have also been given the opportunity to ask questions pertaining to the aforementioned and have been given answers which are satisfactory to me."*

Whilst in ***Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor*** **[2012] 4 MLJ 260**, the consent form stipulated that:[16]

> *"I ... of ... the husband/wife of ..., the above-named patient hereby agree to the operation/procedure of ... being carried out on my husband/wife, the nature and purpose of which have been explained to me by Dr/Mr ... and I have fully understood the same."*

It is clear from a perusal of the consent forms in the two cases above that such consent forms have the effect of the patient acknowledging that they have been properly advised by their doctor, irrespective of the truth. The question is, where a doctor fails to advise his patient, but where the patient has signed a consent form that says otherwise, can the doctor be held liable for breach of his duty of care?

Signing An Agreement Without Reading

The law of contract is clear that one's signing of an agreement binds him, and the signatory cannot be heard complaining that he does not read or understand what he signed. In ***Soon Kok Tiang and others v DBS Bank Ltd and another matter*** **[2012] 1 SLR 397**, the Singaporean Court of Appeal as the apex court in Singapore held that:[17]

> *"In view of our decision in this appeal, we think it apposite and timely to remind the general public that under the law of contract,* ***a person who signs a contract which is set out in a language he is not familiar with or whose terms he may not understand is nonetheless bound by the terms of that contract. Illiteracy, whether linguistic, financial or general, does not enable a contracting party to avoid a contract whose terms he has expressly agreed to be bound by.*** *The principle of caveat emptor applies equally to literates and illiterates in such circumstances."*

The House of Lords explained the rationale in ***Saunders (Executrix of Will of Gallie) v Anglia Building Society*** **[1971] AC 1004**:[18]

> *"But the person who signs documents in this way ought to be held bound by them,*

15 Koay Eng Oon v Dr Wong Twee Juat & Ors [2022] MLJU 1996, paragraph 68.

16 Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] 4 MLJ 260, p 272

17 Soon Kok Tiang and others v DBS Bank Ltd and another matter [2012] 1 SLR 397, p 426.

18 Saunders (Executrix of Will of Gallie) v Anglia Building Society [1971] AC 1004, p 1036.

and ought not to be entitled to avoid liability so as to shift the burden of loss on to an innocent third party. ***The whole object of having documents signed by him is that he makes them his documents and takes responsibility for them.***"

The passage above was quoted with approval by the Malaysian Court of Appeal in ***Lin Wen-chih & Anor v Mycom Bhd*** **[2014] 3 MLJ 691.**[19] There are only three exceptions to this general rule, namely, fraud, misrepresentation and the plea of *non est factum*.[20]

The plea of *non est factum* is Latin for "it is not my deed".[21] The *locus classicus* is ***Saunders (Executrix of Will of Gallie) v Anglia Building Society*** **[1971] AC 1004** where the House of Lords held that the plea was a narrow defence not available to those who did not even bother to find out the purport of what they were signing:[22]

"The plea of non est factum obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century ***it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures*** *when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who* ***were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing****. I think it must also apply* ***in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document****, whether that be from defective education, illness or innate incapacity.*

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document."

Signing A Consent Form Without Reading

Thus, it is clear that as a matter of general contract law, a patient who has signed a consent form is bound by it, which, in most cases, stipulates that the doctor has properly advised the patient. The patient, therefore, cannot be heard complaining about the absence of such advice and cannot proceed to commence a medical negligence claim based on the breach of the duty to advise. In ***Koay Eng Oon v Dr Wong Twee Juat&Ors*** **[2022] MLJU 1996**, the High Court, while finding that the doctor did, in fact, advise the patient of the risks of the surgery, took into account the fact that the patient signed the consent form, proceeded with the medical procedure and attended several follow up consultations.[23]

Nonetheless, in ***Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor*** **[2012] 4 MLJ 260**, the doctor failed to rely on the consent form signed by the patient to exculpate himself of his breach of the duty to fully ensure his patient comprehended the nature of the surgery. In this case, the patient, who only sought to remove her cervical polyp, subsequently found her entire uterus to have been

19 *Lin Wen-chih & Anor v Mycom Bhd [2014] 3 MLJ 691, p 700.*

20 *Wasli bin Mohd Said v Asmi bin Andi Hadji Yakin @ Andi Yakin (substituting Andiyakin bin Mapasere, deceased) [2016] 11 MLJ 251, p 261,*

21 *Lin Wen-chih & Anor v Mycom Bhd [2014] 3 MLJ 691, p 699.*

22 *Saunders (Executrix of Will of Gallie) v Anglia Building Society [1971] AC 1004, p 1015 & 1016.*

23 *Koay Eng Oon v Dr Wong Twee Juat & Ors [2022] MLJU 1996, paragraphs 55 & 58.*

removed. It was not disputed that the consent form executed by her before the surgery did not specify the procedure that was to be administered to her, and the same was only filled up subsequently. The doctor insisted that the removal of the uterus had been explained to the patient before she signed the consent form.

The Court, however, found that the doctor did not advise the patient as to the treatment options available to her, and never informed the patient of the procedure to remove her uterus. The Court opined that the entry on the consent form was doubtful, for among others, there were three handwritings on the consent form, the patient's husband was never asked to sign the consent form while both sides' expert witnesses agreed that the removal of uterus needed the husband's consent, and the nurse who was said to have witnessed the signing of the consent form and explained the consent form to the patient was not called as the doctor's witness.

It is noteworthy that the Court in *Gurmit Kaur* case did not deal with the issue of the binding effect of signing a blank consent form. General contract law is clear that the act of signing a blank agreement will bind the signatory to anything that is subsequently filled in the agreement. See, for example, the Court of Appeal's decision in ***Lin Wen-chih & Anor v Mycom Bhd* [2014] 3 MLJ 691**.[24] Nonetheless, the Author is of the view that *Gurmit Kaur* case was correctly decided for the post-trial finding of fact by the Court showed that the patient therein signed the consent form under the impression that the medical procedure contemplated was simply the removal of the cervical polyp instead of her uterus. Thus, the consent form was presented to her execution under the doctor's or the nurse's active or passive misrepresentation. Alternatively, the plea of *non est factum* would be available to the patient as the mistake of the identity of the treatment happened through no fault of hers.

Conclusion

The signing of a consent form might absolve the doctor of his negligence of failing to advise his patients properly unless the patients can avail themselves of the defence of fraud, misrepresentation or the plea of *non est factum*. Signing a blank consent form does not make a difference. Nonetheless, the signing of a consent form only binds the signatory, i.e., the patient, and bars him from going against the content of the consent form. The patient might not succeed in a medical negligence claim. It, however, does not bar a complaint to be made to the regulatory body for proper disciplinary action against the doctor to be taken. Complaints of this nature are not to recover damages from the doctor, but to govern the profession and penalise any unbefitting doctor, and can be initiated by any stakeholder, ranging from the hospital, the patient's family members to the regulatory body itself.

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24 Lin Wen-chih & Anor v Mycom Bhd [2014] 3 MLJ 691, p 700.