Introduction

There are two typical situations where a doctor might be held liable for negligence: the first is negligence in the performance of a medical procedure; and the second is failure to disclose the risk of a medical procedure to the patient for the purpose of getting consent.

In our previous article “Medical Negligence – Know the Duty a Medical Practitioner Owes to a Patient”, we have discussed the application of Bolam test in determining the standard of care required in the first aspect. For the second aspect, as a result of the UK Supreme Court decision in Montgomery v Lanarkshire Health Board [2015] UKSC 11, the traditional test laid down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (the “Bolam test”) is no longer applicable in UK. In this article, we will explore the implications of Montgomery on the new standard for the duty of disclosure owed by doctors to their patients.

The Old Test (the “Bolam” Test)

According to the Bolam test, a doctor would not be found negligent if he had acted in accordance with a practice accepted as proper by a responsible body of medical practitioners. Further, in Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital [1985] AC 871, it was decided that the Bolam test should be applied in deciding whether a doctor is negligent in relation to disclosure of information for the purpose of seeking consent from a patient.


Brief Facts

In Montgomery, Mrs. Montgomery was a tiny woman with diabetes. Women who suffer from diabetes are likely to have larger babies. In particular, they have an increased risk of 9-10 per cent of shoulder dystocia, meaning that during virginal delivery the baby’s shoulders would be too wide to pass through the birth canal. However, Mrs. Montgomery was not informed of the risk of shoulder dystocia. Sadly during delivery, shoulder dystocia did occur and her baby was deprived of oxygen, resulting in severe brain injury.

Mrs. Montgomery brought a claim against Lanarkshire Health Board, alleging that she should have been advised of the risk of shoulder dystocia associated with vaginal delivery, and the alternative option of delivery by caesarean section ought to have been offered.
The UK Supreme Court's Decision

Applying the Bolam test, the lower courts rejected Mrs. Montgomery's claim. Mrs. Montgomery appealed to the UK Supreme Court, which eventually ruled that Mrs. Montgomery should have been warned of the risk of shoulder dystocia and provided with the alternative of a caesarean section.

The Supreme Court adopted a more “patient-centered” test. Instead of the idea of “doctors know the best”, leaving the medical profession to decide on what and how much should be disclosed to patients, the court acknowledged that a doctor has a duty to disclose to the patient any material risks involved in any recommended treatments, and any alternative treatments. In deciding what amounts to “material risks”, the appropriate consideration is not only from the doctor’s perspective, but also whether a reasonable person in the patient’s position would be likely to attach significance to the risk. As a result, the long-standing application of the Bolam test no longer applies in UK for cases that involve negligence in disclosure of risk. However, the Bolam test will continue to apply in negligence cases of diagnosis, treatment and the other aspects of medical care.

Development in Hong Kong

In Hong Kong, following Sidaway, the Bolam test is applicable and therefore, only the views of the medical profession are considered in determining whether the medical practitioners are negligent in disclosure of risk.

In recent years, patients' groups have advocated their demand for more thorough disclosure of information and proper communications between doctors and patients. To better reflect the change of values of society, the Medical Council of Hong Kong had revised its Code of Professional Conduct (the “Code”). In particular, section 2.10.2 of the Code has been amended to include the consideration of the individuality of each and every patient in the provision of medical service and communication between doctors and patients.

If the UK Supreme Court’s decision in Montgomery is followed in Hong Kong, the Bolam test will no longer apply in deciding whether the medical practitioners are negligent in disclosure of risk and consideration must be given from the perspective of the particular patient.

Conclusion

After Montgomery, the Bolam test has been replaced in UK in respect of the cases involving information disclosure and advice given by medical practitioners, in which the new test requires the consideration of the actual individual patient from the perspective of the patient apart from the doctor alone. Although there has been by far no judicial decision in Hong Kong applying the new test laid down in Montgomery, it is foreseeable that this “patient-
oriented" test would be brought up to the court when cases of medical negligence in the provision of information for the purpose of seeking consent arise.

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Important: The law and procedure on this subject are very specialised and complicated. This article is just a very general outline for reference and cannot be relied upon as legal advice in any individual case. If any advice or assistance is needed, please contact our solicitors.

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