7-2018

Medical negligence proceedings in Singapore: Instilling a gentler touch

Dorcas QUEK ANDERSON
Singapore Management University, dorcasquek@smu.edu.sg

National Report submitted for topic "Compensation schemes for damages caused by healthcare and alternatives to court proceedings" in General Congress of the International Academy of Comparative Law (IACL) at Kyushu University, 22-28 July 2018. Not to be distributed or copied without author's permission.

Medical Negligence Proceedings in Singapore: Instilling a Gentler Touch

- Dorcas Quek Anderson*

A. Introduction

Medical malpractice is an area that traverses a wide range of issues in any society – the quality and cost of healthcare, the insurance industry, the cost of litigation, the impact on medical practice and the heightened emotions arising from injuries or even loss of lives. Evidently, the question of compensation for medical malpractice impinges on each of these challenges. Like many countries, Singapore has been grappling with these issues through implementing various reforms in the legal and healthcare sectors. Although compensation has historically been obtained through legal proceedings in the Singapore courts, there is a growing shift towards adopting a much gentler touch to deal with the unique issue of medical malpractice.

This article examines the current legal framework for medical negligence in Singapore and the different ways in which the adversarial approach to medical malpractice proceedings is being changed. It concludes with several proposals on how to consolidate and refine the current reforms.

B. The healthcare industry in Singapore

The healthcare industry in Singapore has been regulated by principally two bodies – the Ministry of Health and the Singapore Medical Council. The former is a public body that manages policies relating to the public healthcare system and general medical issues, including regulating the practices of healthcare facilities. More than twenty legislative regimes come under its purview, such as the Medicines Act (on the regulation of drugs), the Medical Registration Act, Private Hospitals and Medical Clinics Act, Human Organ Transplant Act and Human Biomedical Research Act.[1]

The Singapore Medical Council is a statutory board established under MOH for self-regulation of the medical profession. It maintains the register of medical practitioners, and regulates the professional conduct and ethics for medical practice. Complaints arising from medical malpractice as well as other misconduct by doctors are dealt with by the SMC by way of disciplinary proceedings. SMC is empowered to strike off the medical practitioner's name from the register, suspend the registration, impose a financial penalty or censure the practitioner.[2]

* Assistant Professor, Singapore Management University School of Law; LLM (Harvard Law School), LLB (National University of Singapore School of Law).

[1] Ministry of Health Singapore. https://www.moh.gov.sg/content/moh_web/home/about-us.html. Accessed 30 January 2018.

[2] Section 53 of Medical Registration Act (Cap 174).

Claims for compensation due to medical malpractice are not handled by these two bodies. There are also no special compensation schemes or administrative systems that have been established for this purpose. These claims may be privately settled between the medical practitioner and patient with the insurer's involvement. In the absence of settlement, the patient has to commence a civil suit in the court system for compensation arising from medical negligence.

C. The current legal framework for determining medical malpractice

Obtaining compensation in court hinges on successfully establishing a claim based on the tort of negligence. Singapore, having adopted a common law system, has been influenced by the English legal principles underlying the tort of negligence. Negligence is established based on three elements: (a) the practitioner owes the patient a duty of care; (b) he or she has breached that duty by failing to exercise the required standard of care; and (c) when the patient suffered injury as a result of this breach. The duty of care is only found when it is foreseeable that the patient would suffer a loss due to the negligence of the doctor; when there is proximity between the patient and doctor in terms of the closeness and directness of their relationship; and there are no policy considerations that negate the necessity of a duty of care.[3]

Standard of care

Most of the Singapore jurisprudence on medical negligence concerns the standard of care of a medical practitioner. The law generally requires a standard of a reasonable person. Until 2017, the standard of a reasonable medical practitioner used to be understood according to the English case of *Bolam v Friern Hospital Management Committee* – based on whether the practice is "accepted as proper by a responsible body of medical men skilled in that particular art".[4] The Court of Appeal in 2002 affirmed that the judiciary would not hold a doctor negligent as long as there was a respectable body of medical opinion that supported his or her decision. However, the Court further stated that the expert view must first satisfy a threshold test of logic by showing that the expert directed his or her mind to the risks and benefits relating to the decision, and arrived at a defensible conclusion.[5] The underlying rationale for having a specific test for medical negligence is the reality in medical practice of a diversity of views on one matter. A defendant medical practitioner could therefore not be expected to demonstrate that all his peers agreed with his decision; it sufficed to show that a body of other competent members of the procession agreed with him.[6] Thus the *Bolam* test was deemed a "convenient and efficient means of determining what an ordinary skilled member of the profession would reasonably have done in the defendant's shoes".[7]

---

[3] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology* [2007] 4 SLR(R) 100, at paragraphs 73-85.
[4] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 587; [1957] 2 All ER 118 at 122.
[5] *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024.
[6] *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, at paragraphs 55-56. This test was used to be applied to the issues of diagnosis, treatment and advice to the patient, at paragraph 137.
[7] *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, at paragraph 57.

Last year, the Court of Appeal in *Hii Chii Kok v Ooi Peng Jin London Lucien* decided that the *Bolam* test would only apply to the areas of diagnosis of the patient's condition and medical treatment, but not to the practitioner's advice to the patient. A new legal test which is more patient-centric has been formulated for the latter area of medical practice. Stressing the reality of the evolving doctor-patient relationship into one that was less physican-centred and more of a collaborative process, the court decided that a patient had to be equipped with information reasonably required to arrive at an informed decision. It was therefore incongruous to ignore the patient's perception in ascertaining the standard of care for advice.[8]

There are three stages to this new test. First the patient must identify the exact nature of information he or she alleged was not provided, and show why it is material. This stage is assessed from the patient's perspective. Second, the court determines whether the doctor possessed that information. Finally, the court examines the reasons why the doctor withheld the information. The doctor bears the burden here to justify any non-disclosure.[9]

This recent change in the test for standard of care in medical negligence reflects judicial acknowledgement of the importance of patient autonomy.[10] It is also consonant with the shift in global sentiment on the nature of the doctor-patient relationship. As the court noted, the principle of patient autonomy has been gaining ascendance in many countries even as the countervailing principle of physician paternalism has been on the wane.[11]

The need to show a causal connection between injury and negligent act

Although patient autonomy has been given higher regard in the standard of care for medical negligence, the patient still bears the burden of proof of showing the third element of negligence – that injury was caused by the negligent act. Thus, while the patient may successfully argue that the standard of care was breached in the doctor's discharge of advice, he may fail at this final stage of showing a causal nexus between the harm caused and the negligence. It has been pointed out that this state of affairs reveals a glaring contradiction since a test that recognizes the centrality of patient autonomy ultimately bars claims in relation to

[8] *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, at paragraphs 113-125.
[9] *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, at paragraphs 131-135.
[10] Leo Zhi Wei. "What role should autonomy play in the law of medical negligence." *Singapore Law Watch* (July 2017).
[11] *Hii Chii Kok v Ooi Peng Jin London Lucien and another* [2017] SGCA 38, at paragraphs 114-120. See also Chief Justice Sundaresh Menon (2014, 28 October). Evolving Paradigms for Medical Litigation in Singapore, at paragraph 21 (noting that there is a growing alternative view that where giving of advice to patients is concerned, the opinion of doctors should not be determinative since it must ultimately contend with the question of patient autonomy, and that the question of how much information to give does not seem to be beyond the competence of the judicial mind). https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--speech-at-the-ogss-annual-oration-and-banquet---evolving-paradigms-for-medical-litigation-in-singapore. Accessed 30 January 2018; and Kumaralingam Amirthalingam. "Medical Negligence and Patient Autonomy: Bolam Rules in Singapore and Malaysia-Revisited." 27 *Singapore Academy of Law Journal* 666 (2015).

purely autonomy-based negligence when the risks of a patient's treatment are not materialized.[12]

In sum, there have been incremental steps taken in Singapore to give more credence to patient autonomy within the negligence framework. However, the patient still faces a rather arduous and uncertain task in successfully establishing a case of medical negligence in the courts. The adversarial litigation system does not make the task any easier, due to the often prohibitive cost of the litigation process. It is to this topic that the article now turns to.

D. Towards a less adversarial approach

A few years ago, Singapore's Chief Justice Sundaresh Menon called the legal and medical professions to "reimagine our medical litigation paradigm".[13] Referring to the experiences in other countries, CJ Menon pointed out the urgent need to avoid rising insurance costs for doctors and the practice of defensive medicine due to the fear of litigation, while also protecting the needs of patients who have meritorious medical malpractice claims.[14] CJ Menon further noted that patients who commence legal proceedings do not necessarily do so for financial gain, but for an explanation, apology or a real gesture of empathy. The solution may be found more in righting the real problems of dashed expectations and miscommunication than in awarding financial compensation. In addition, medical malpractice cases often have a significance going beyond the immediate facts of the case, such as systemic weaknesses in the practice of medicine that have to be dealt with holistically. [15]

As such, the Singapore judiciary has spearheaded a drive towards adopting a less adversarial approach to resolving medical malpractice disputes. This gentler touch is being implemented through four strategies:

(a) The promotion of mediation as a primary way of resolving such disputes;
(b) Greater court case management and use of pre-action protocols to encourage negotiations and to streamline court proceedings;
(c) Shifting the adversarial style of court proceedings to a more inquisitorial judge-led approach; and
(d) Appointing medical assessors to assist judges presiding over medical negligence trials.[16]

---

[12] Leo Zhi Wei. "What role should autonomy play in the law of medical negligence." *Singapore Law Watch* (July 2017) (pointing out that the court, in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 198, disallowed a claim based on reproductive autonomy).

[13] Response of Chief Justice Sundaresh Menon, Opening of Legal Year 2016, paragraph 44. Accessed 30 January 2018.

[14] Response of Chief Justice Sundaresh Menon, Opening of Legal Year 2016, paragraphs 24 and 43.

[15] Chief Justice Sundaresh Menon (2014, 28 October). Evolving Paradigms for Medical Litigation in Singapore, at paragraphs 38, 39, 46. https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--speech-at-the-ogss-annual-oration-and-banquet---evolving-paradigms-for-medical-litigation-in-singapore2014. Accessed 30 January 2018.

[16] Response of Chief Justice Sundaresh Menon, Opening of Legal Year 2016, paragraph 43.

These ideas are largely drawn from existing tools used by the Singapore courts in the litigation process. Court-connected mediation programmes were introduced in the State Courts and Family Justice Courts more than two decades ago. The State Courts, that handle civil claims less than S$250,000, also have used pre-action protocols for motor accident cases and personal injury claims to encourage private settlements. Ten years ago, these courts introduced a pre-action protocol for medical negligence cases after consultation with the healthcare and legal sectors. Under this protocol, potential claimants are required to request for a medical report and write to the relevant doctor to arrange for a without prejudice meeting to discuss the matter, prior to filing any legal proceedings. The doctor and healthcare institution are obliged to disclose such a report setting out clinical findings, treatment prescribed, whether alternatives to treatment were disclosed and an assessment of the claimant's condition or the cause of death. These steps are intended to encouraged early communication, disclosure of essential documents and a more collaborative approach to resolve the dispute as early as possible.[17] If legal action is still required, the case will be called for a Court Dispute Resolution session in the State Courts' Centre for Dispute Resolution Centre. The process of mediation or early neutral evaluation will be conducted by a judge or other mediator of the Centre to facilitate early settlement of the matter.[18]

In addition, the Singapore courts have been actively promoting the use of mediation for all civil disputes. Both the Supreme Court and State Courts rely heavily on a procedural rule empowering the courts to give adverse costs orders at the conclusion of a trial to take into account any party's unreasonable refusal to attempt alternative dispute resolution earlier.[19] The State Courts require all litigants to file an "ADR Form" at an early stage of proceedings, indicating their decision whether to use a form of ADR and reasons for any refusal to do so. The judge presiding over the pre-trial conference may note any reasons that are deemed unreasonable, and these could form the basis for a future adverse costs order. If all parties consent to using ADR, the courts will make a referral of the case to the State Courts Centre for Dispute Resolution or any other institution chosen by the parties.[20] Similarly, the Supreme Court in 2016 introduced an "ADR Offer" that could be filed by a party who wanted to suggest ADR. The opposing party would be obliged to file an "Response to ADR Offer" to indicate his or her decision concerning the use of ADR. Once again, the court at a pre-trial conference may evaluate the reasons given for refusing the use of ADR.[21]

---

[17] State Courts ePractice Direction 3 pf 2006, paragraph 2. https://www.statecourts.gov.sg/Lawyer/Pages/Amendments-to-State-Courts-Practice-Directions.aspx. Accessed 30 January 2018.

[18] State Courts Practice Directions paragraph 39. https://www.statecourts.gov.sg/Lawyer/Pages/StateCourtsPracticeDirections.aspx. Accessed 30 January 2018.

[19] Order 59 rule 5(c) of the Rules of Court (Cap. 322, Section 80).

[20] State Courts Practice Directions paragraph 39. https://www.statecourts.gov.sg/Lawyer/Pages/StateCourtsPracticeDirections.aspx. Accessed 30 January 2018.

[21] Supreme Court Practice Directions paragraph 35B. https://www.supremecourt.gov.sg/rules/practice-directions/supreme-court-practice-directions. Accessed 30 January 2018.

Leveraging on these existing mechanisms, the Supreme Court recently introduced a series of measures to cumulatively bring about a less adversarial approach towards medical litigation.[22] A protocol for medical negligence cases had introduced pre-action disclosure of documents that is similar to the system in the State Courts. After a suit is filed, early disclosure of documents is still required through the filing of the relevant medical together with the claimant's statement of claim. The court then engages in pro-active case management by calling the parties for a first meeting early in the civil proceedings to discuss the possibility of attempting mediation. Parties are required to submit their "ADR Offer" and "Response to ADR Offer" prior to this meeting.

One novel mechanism introduced by the Supreme Court is the appointment of a medical assessor to assist the judge during the trial.[23] Chief Justice Menon explained in 2014 that this is necessitated by the limitations of judicial expertise in the area of medical practice. The judge is often placed in a quandary when confronted with conflicting expert medical evidence.[24] There is existing legislation empowering the court to appoint an assessor – a person of skill and experience in the relevant subject matter of the proceedings – to assist the judge to understand the material that is beyond his usual range of expertise.[25] Working together with the Singapore Medical Council and the Singapore Judicial College, the courts have appointed a panel of medical assessors comprising senior doctors.[26] The medical assessor is expected to sit with the judge in open court while expert evidence is being canvassed. The judge may ask the assessor questions in the presence of all parties to assist him or her to understand the technical issues. If the court permits, the assessor may direct pose questions to the witness, but the assessor is not treated as a witness and is not subject to any cross-examination.[27]

E. The advent of mediation for medical disputes

As discussed above, mediation forms the bedrock of the push towards a less adversarial approach towards medical malpractice. Back in 2014, the Ministry of Health started a pilot healthcare mediation scheme with the assistance of the Singapore Mediation Centre. Mediation

---

[22] Supreme Court Practice Directions (Amendment No. 3 of 2017). https://www.supremecourt.gov.sg/rules/practice-directions/supreme-court-practice-directions/recent-amendment. Accessed 30 January 2018.

[23] Supreme Court Practice Directions (Amendment No. 3 of 2017), Appendix J paragraphs 7-10. https://www.supremecourt.gov.sg/rules/practice-directions/supreme-court-practice-directions/recent-amendment. Accessed 30 January 2018.

[24] Chief Justice Sundaresh Menon (2014, 28 October). Evolving Paradigms for Medical Litigation in Singapore, at paragraphs 50-55 and 60. https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--speech-at-the-ogss-annual-oration-and-banquet---evolving-paradigms-for-medical-litigation-in-singapore2014. Accessed 30 January 2018.

[25] Section 10A of Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). See also Chief Justice Sundaresh Menon (2014, 28 October). Evolving Paradigms for Medical Litigation in Singapore, at paragraphs 61-69.

[26] Response of Chief Justice Sundaresh Menon, Opening of Legal Year 2016, paragraph 44. Accessed 30 January 2018.

[27] Supreme Court Practice Directions (Amendment No. 3 of 2017), Appendix J paragraphs 10. https://www.supremecourt.gov.sg/rules/practice-directions/supreme-court-practice-directions/recent-amendment. Accessed 30 January 2018.

services were offered at subsidised rates to settle medical disputes, and a dedicated panel of mediators was appointed to handle these disputes.[28] This program continues to be available for disputes that have not commenced legal proceedings, and also cases that have already been filed in court. Based on the healthcare mediation programme's publicity materials, the mediation process is a facilitative process comprising the usual opening phase, problem-solving phase and a final phase that includes concluding a settlement. The mediators do not make any decisions or orders on the outcome.[29]

For cases filed in the State Courts, the parties may attempt ADR in the State Courts Centre for Dispute Resolution, a centre established by the courts to offer in-house ADR services. The Centre offers both mediation and early neutral evaluation services, and it appears that both these processes are used for medical negligence disputes.[30] With regard to the latter process, a lawyer who was interviewed about the changes introduced by the Supreme Court spoke favourably about the State Courts' neutral evaluation service in resolving medical malpractice suits at an early stage.[31] This process involves the parties getting an assessment of the merits of their case, so as to help them reach an agreement on highly contentious issues.

The effectiveness of the above ADR programmes has yet to be evaluated in relation to the specific area of medical malpractice. It is also not evident whether the facilitative approach within mediation or the more evaluative approach within neutral evaluation is viewed more favourably by the disputants. The former process, if carried out effectively, would meet the goals of addressing deeper concerns such as mismatched expectations and wider systemic issues in the practice of medicine. The court mediation process has been described by the State Courts to be a largely facilitative approach that respects each party's choice and emphasizes on joint problem-solving.[32] By contrast, a process that focuses narrowly on an evaluation of the legal arguments misses the important opportunity to address broader underlying interests, though it potentially reduces the length of legal proceedings by enabling the parties to have a realistic view of the merits of their respective positions.

It is likely that mediation for medical malpractice will grow in prominence in the future. The push towards a less adversarial approach takes place amidst a consistent drive by the judiciary and the Singapore Ministry of Law to promote the use of mediation alongside the more established processes of litigation and arbitration. Some recent measures taken in this direction include the enactment of a Mediation Act to provide a summary procedure for mediated

---

[28] Business Times Singapore. "Singapore Mediation Centre Revamps for a Better Focus" (2014, 2 August).
[29] MOH Holdings, Healthcare Mediation Scheme. http://www.mohh.com.sg/hms/what-is-mediation.html. Accessed 30 January 2018.
[30] State Courts Practice Directions paragraphs 41-42. https://www.statecourts.gov.sg/Lawyer/Pages/StateCourtsPracticeDirections.aspx. Accessed 30 January 2018.
[31] The Straits Times, Singapore. "CJ seeks to ease doctors' fears of malpractice suits" (2016, January 12) (quoting a lawyer who said that there should be scheme similar to the practice in the State Courts "where are judge can give some indication of any liability involved before the case proceeds to assessment of damages").
[32] Joyce Low and Dorcas Quek (updated by James Leong and David Lim), "An Overview of Court Mediation in the State Courts of Singapore", in Danny McFadden & George Lim, *Mediation in Singapore: A Practical Guide* (2nd Edition, Thomson Reuters, 2017), 259-261.

settlements to be enforced as court judgments, the establishment of the Singapore International Mediation Centre to encourage the use of cross-border mediation and the setting up of the Singapore International Mediation Institute to introduce common mediation standards and professional accreditation.[33] The healthcare mediation scheme is also one of many other industry-specific ADR schemes that have been introduced in Singapore.[34] As such, the gentler touch towards medical malpractice is likely to be increasingly manifested in the use of a less confrontational way of resolving disputes, and resorting to traditional litigation as a last resort.

F. A Gentler Touch – An Attainable Goal?

There have been some strides made in Singapore to ameliorate the conventional adversarial approach in dealing with medical negligence. However, there are probably deeper changes that have to be made to complement the steps taken towards a "gentler touch".

First, the potential of mediation may be limited if patients and doctors negotiate under the thick shadow of the law of negligence and fear making any concessions that would prejudice their rights at trial. Despite the assurance of confidentiality within mediation, such fears may still exist, particularly because mediation is frequently conducted when a civil suit is pending in the courts. Many other countries, including Hong Kong, British Columbia and parts of Australia, have enacted apology legislation to allow medical practitioners to apologise without the fear of legal reprisal.[35] While it has been argued that apology legislation may not necessarily decrease the practice of defensive medicine, it has been widely accepted that there is therapeutic value in an appropriate apology made in the right circumstances.[36] This is an area that has yet to be examined deeply within Singapore.

More importantly, there are other cultural and policy changes that have to complement and support the drive by the judiciary to encourage mediation and give greater pre-action disclosure. In countries such as Australia, US and UK, open disclosure programmes have been introduced in the healthcare sector to encourage the disclosure of information about adverse events, apologise for the wrong and work towards ways to prevent the wrong from recurring.[37] Many of such changes will help in the prevention of medical malpractice disputes. Once a matter is brought to court, the window of opportunity for candid disclosure may have shut, and

---

[33] See generally George Lim and Eunice Chua, "Development of Mediation in Singapore", in Danny McFadden & George Lim, *Mediation in Singapore: A Practical Guide* (2nd Edition, Thomson Reuters, 2017), 1-24.
[34] See Dorcas Quek Anderson. "Twenty-One Years of Mediation: How Do We Appraise the Development of Mediation Within Singapore?" *Asian Journal on Mediation* 73 (2015).
[35] John C Kleefeld, "Promoting and Protecting Apologetic Discourse through Law: A Global Survey and Critique of Apology Legislation and Case Law". *Oñati Socio-legal Series* [online], 7 (3), 455-496 (2017). https://ssrn.com/abstract=3028811
[36] McMichael, Benjamin J., The Failure of 'Sorry': An Empirical Evaluation of Apology Laws, Health Care, and Medical Malpractice (August 16, 2017). http://dx.doi.org/10.2139/ssrn.3020352
[37] Pru Vines. "The Value of Apologising within a Moral Community: Making Apologies Work". *Oñati Socio-legal Series* [online], 7 (3), 370-389 (2017). https://ssrn.com/abstract=3013328

many obstacles may hinder the likelihood of holistic restoration. As with many other types of claims, dispute prevention probably has to be the focus of healthcare compensation; intervention at the litigation stage is often less effective.

In addition, certain supporting structures as the insurance regime have to be examined in order to encourage the early settlement of brewing disputes. In this connection, the Singapore Medical Council and the Ministry of Health are currently considering making insurance coverage mandatory for all doctors.[38] While most medical practitioners would purchase insurance, the rising cost of premiums have deterred some private doctors from doing so. This lacuna places the patients at severe disadvantage. The Medical Registration Act currently allows the Singapore Medical Council to require insurance as a condition for renewal of practising certificates, but this power has yet to be exercised.[39] It appears that this power is likely to be wielded in the near future.

Healthcare compensation is an issue traversing a host of inter-related issues, including tort jurisprudence, dispute resolution, access to justice, access to affordable healthcare and the practice of medicine. It has been increasingly acknowledged in Singapore that the litigation system that is premised on a fault-based theory is severely limited in providing compensation for medical malpractice in a cost-effective way, without negative ramifications on the healthcare sector and on the doctor-patient relationship. The adversarial elements of the litigation process are therefore being deliberately ameliorated, and a more inquisitorial and facilitative approach being taken to deal with such disputes. The substantive legal principles for medical negligence are also at the cusp of continual reform in order to reflect the changing views of the patient-doctor relationship. The gentler touch for matters that have such great impact on human lives and emotions evidently requires a holistic and multi-dimensional approach.

---

[38] Straits Times, Singapore. "Insurance for All Doctors May Become Compulsory" (27 July 2017).
[39] Section 36(7) Medical Registration Act (Cap 174).