The Medical Profession On Trial: A Case Comment

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The case of *Chelliah a/l Manickam & Anor* v. *Kerajaan Malaysia (1997) 2 AMR 1856* serves to illustrate the special relation between a doctor and his/her patient and the duty/standard of care on the part of the doctor. There is also the question of professional ethics which should be upheld by the medical profession.

The question before the High Court was the issue of negligence, namely whether the misdiagnosis and the consequent treatment administered by the respondent's servants amounted to negligence.

The facts of the case are as follows:

"The plaintiffs/appellants were the parents of a 10 year old girl who died while being treated at the Penang General Hospital. The appellants maintained that the 10 year old died as a result of the misdiagnosis and the wrongful treatment administered by the respondent's servants. On the morning of July 4, 1990, a private practitioner examined the appellant's daughter, Nithiah a/p Chelliah (the child) and refered her to the Penang General Hospital. At the hospital, the child was diagnosed as suffering from a perforated appendicitis, and an appendectomy, the surgical removal of what should have been an inflamed appendix was performed at about 5.45 p.m on July 4, 1990. However as the doctors were performing the said appendectomy, they realised that the child, contrary to their earlier prognosis, was not suffering from acute perforated appendicitis but from pancreatitis. They closed the abdomen and sent the child to the recovery room to be nursed. After remaining for 2 hours where she was closely observed, she was sent back to the ward. The following morning, July 5, 1990 at about 5.25 a.m., the child died. The trial court held that the doctors were not negligent and dismissed the appellants' action for damages. The parents/appellants appealled to the high court."

At the trial it was not in dispute, that the child died from acute haemorrhagic pancreatitis that the doctors at the Penang General Hospital had wrongly diagnosed as acute perforated appendicitis. The treatment for pancreatitis and appendicitis are different, namely in the case of acute appendicitis the treatment is surgical intervention while that for acute pancreatitis is conservative treatment.[1] In the High court the appeal was allowed for the following reasons:

1. The there was failure on the part of the respondents/doctors to review the x-ray when there was time to do so.
2. Failure to use diagnostic test despite its applicability to confirm appendicitis.
3. Failure to consider pancreatitis when undertaking the appendectomy.

THE LAW ON NEGLIGENCE

To maintain an action in negligence the plantiff must establish (i) that the doctor owed the patient a duty of care, (ii) that the duty was breached, (iii) that the patient suffered harm caused by the breach.

In the case concerned, there is no doubt that there was a duty of care on the part of the doctor who had admitted the patient and undertook treatment. As Lord Hewart CJ said in *R.* v. *Bateman*:[2]

> *"If a person holds himself out as possessing special skill and knowledge, and he is consulted as possessing such skill and knowledge, by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his discretion and treatment accordingly,* ***he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment*** *No contractual relation is necessary, nor is it necessary that the service be rendered for reward."*

Needless to say that there is a special relationship between the doctor and the patient and the former owes the latter the duty to use diligence, care, knowledge, skill and caution in treating the patient. Broadly a doctor's functions may be divided into three phases: diagnosis, advice and treatment. The next question to ask is how do you measure the doctor's duty of care. Using the words of McNair J, conveniently refereed to as the Bolam Test, "*The test is the standard of the ordinary skilled man exercising and professing to have the special skill.*"[3] The standard of care differs between an ordinary general practitioner and a lay man, as stated in the case of *Chin Keow* v. *Government of Malaysia*:[4]

> *"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on top of the clapham omnibus (intrakota bus[5] because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill."*

The same analogy could be used for a specialist or a consultant for the standard of care would be much higher depending on the individual doctor. When a doctor holds himself out as being a specialist the standard of care expected by the law was laid down in the case of *Maynards* v. *West Midlands Regional Health Authority*[6] where Lord Scarman said, "*I would only add that a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality.*"

In the *case of Chelliah*, what was at issue is the standard of care owed by the doctor to his patient. This is crucial to the case because the doctors themselves are clearly not unanimous on the standard of care and skill. The court observed:[7]

"The doctors at the trial did not quite agree on the standard of skill of a medical doctor managing the child and on the standard of care and attention that a medical doctor should have exercised in the said circumstances."

Salleh Buang pointed out that it is not easy to determine what is the standard of care required from medical doctor.[8] *In the cases of Sidaway*[9] Lord Bridge had this to say:

"... in performing his functions of diagnosis and treatment, the standard by which English Law measures the doctor's duty of care to his patient is not open to doubt. The test is the standard of the ordinary skilled man exercising and professing to have that special skill..."

He added that, with regards to specialist:

"... clearly requires a different degree of skill from a specialist in his own special field than from a general practitioner."

Who then sets the standard? Lord Scarman's comments in *Sidaway*:

"..., the Law imposes the duty of care, but the standard of care is a matter of medical judgement."

The case law clearly shows that it is indeed the medical profession which sets the standard and which is accepted and recognised by the law, that is:-

i) Compliance with approved practice

In the case of Vancouver General Hospital v. McDaniel[10] *Lord Alness said, "a defendant charged with negligence can clear his feet if he shows that he has acted in accordance with general and approved practice." What is most important for the doctor is to show that he has conformed to the proper standards of reasonably competent medical men at that time.*

ii) A departure from approved practice.
Another proposition worth quoting is in the case of *Hunter* v. *Hanley*[11] where Lord Clyde said this:

"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men....." The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has prove to be guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care."

What is important is for the doctor to justify his choice of actions, that what he did is proper and reasonable considering the facts before him, and that he had not been careless or had made a mistake in performing his duty, but an error of judgement is a different matter:

> *"... The true point is that an error of judgement may, or may not, be negligent, it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, might have made, then it is not negligence."*

The case of *Maynard* v. *Midlands Regional Health Authority*,[12] illustrates this issue. The doctors were sued because the patient had to undergo the diagnostic procedure which carried certain risks even when correctly performed. Unfortunately the risk in fact materialised which was the cause of the claim for negligently subjecting her to the operation.

The Court of appeal held that this was a case of clinical error of professional judgement where the two experts were reluctant to diagnose the case as tuberculosis contrary to strong medical indications because of other unusual factor (swollen glands). *It was held that a doctor is not negligent merely because his opinion/ conclusion is different from other professional men, what is most important to establish negligence is whether he has failed to exercise due care/skill which should be expected from a doctor.*

If a doctor had wrongfully diagnosed a patient, the question is whether he is guilty of negligence. It would depend on whether or not he had exercised due care and diligence as one would expect from a doctor of his standing, if he is a specialist the standard set would be that of an ordinary skilled specialist professing that particular skill. In the *case of Chelliah* the error was detected in the operating theatre.

According to Brazier[13] *"a patient alleging that a wrong diagnosis was negligent must establish either that the doctor failed to carry out an examination or a test which the patient's symptoms called for, or that his eventual conclusion was one the no competent doctor would have arrived at."* In other words, the doctor concerned must be alerted to the various possibilities i.e the symptoms complained of, patient's background and medical history. In the case of a patient who had just returned from East Africa, the doctor failed to test and diagnose malaria but instead diagnosed flu was held liable when the patient died.[14] A diagnosis which was hastily done will often be negligent because a thorough checking might reveal certain clues leading to the sickness of the patient. In the *case of Serre* v. *De Filly*[15] the doctor concerned made a diagnosis of hysteria on a patient in a hasty manner and consequently the physical symptoms were not investigated.

A wrong diagnosis per se is no evidence of negligence unless the doctor failed to act on information available to him at the time or failed to perform routine tests. In the case of *Chin Keow* v. *Government of Malaysia*, the doctor was found negligent

because he failed to act on information where her medical card did show that she was allergic to penicillin.

Back to the case of Chelliah, two questions that could be raised are:-

i. Whether the diagnostic procedure/routine tests were done according to the accepted practice.
ii. Whether the misdiagnosis amounts to negligence.

Considering the evidence as a whole, it is submitted that the judge was correct in coming to the conclusions that the routine tests were not done according to the accepted practice and that the misdiagnosis amounts to negligence. Further more, what happened in this case is the apathetic attitude of the doctors who were not willing to review their opinion to ensure that all necessary precautions/diagnostic procedure were observed. The x-ray would have enabled the doctors to rule out their diagnosis, namely perforated appendix. The evidence did show that there was sufficient time to review the x-ray before the surgery. Other tests would have revealed clues which would have helped doctors in their diagnosis, but none of these was done. Indeed if the doctors had taken reasonable steps worthy of their profession in treating the patients they on the balance of probabilities would not have arrived at the conclusion (diagnosis) that theY did. Lord Edmund-Davies had this to say:[16]

> *"... to say that a surgeon committed an error of clinical judgement is wholly ambiguous, for, while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising 'clinical judgement' may be so glaringly below proper standards as to make a finding of negligence inevitable."*

The evidence did show that there were omissions on the part of the doctors to perform various tests, eventhough the learned judge did agree that this was not a case of wrongful diagnosis, but mainly due to the myopic and inflexible approach adopted by the doctors in carrying out the diagnosis. The learned judge had also called upon the profession to exercise due care and diligence even in cases where chances survival are poor (see p.1873 line 43) where in this case the child was finally sent back to the ward after 2 hours in the recovery bay where eventually she died.

We can learn many things from this case:-

1. The best course for a doctor to take in to follow routine procedures, i.e acting in accordance with a particular art, as stated by McNair J in the Bolom case. However if the doctors chose to take the alternative course of action, then the have to justify and show that they had exercised due care and diligence.
2. What happened in the case of Chelliah serves to illustrate that legal

intervention is necessary in order that justice is not only done but seen to be done. What is most important is for professionals especially to undertake duties and obligations with care, caution and diligence. The case of Bolam which had been applied in the Malaysia case of Chin Keow showed that our judges are aware of the rights and liabilities of doctors.

3. The standard of care as enunciated by the Bolam test and adopted in the Malaysian cases is the medical standard, nonetheless the writer submits that to reserve to the medical profession the issues of life and death as a matter of medical judgement is not proper because human life is at stake. The law eventhough imperfect is a least a means of controlling the medical profession in the interest of the public as a whole.[17]
4. Ethics in the practice of medicine is all important. The doctor's conscience would be clear if he does what ought to be done. In other words, the doctor ought to act in such a way as to avoid harm.

As Brazier puts it:[18]

> *"... he is the man with the skill and experience. In his hands, as the patient sees it, rests the power to cure. ... for the patient for whom the doctor's mistake resulted in disability or death, money is poor compensation. Finding out why things went wrong may be more important to the patient and family..."*

such as in the case of the parents (Chelliah) of poor Nithiah, the 10 year old daughter who died.

NOTES

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1. Without surgery
2. [1952] 94 LJKB 791 (CCA). This approach had been adopted in the case of *Kow Nam Seng* v. *Nagamah & Ors (1982)* 1 MLJ and *Elizabeth Choo* v. *Government of Malaysia (1968)* 2 MLJ 271.
3. *Bolam* v. *Friern Hospital Management Committee (1968)* 2 MLJ 271.
4. [1967] 2 MLJ 45.
5. The writer emphasized on the use of intrakota bus because in Malaysia, it is the most common mode of transport as opposed to the omnibus in England.
6. [1985] 1 ALL ER 635.
7. See p. 1862, para 20-25.
8. Utusan Malaysia, Apabila doktor cuai, 5 Ogos, 1997, p.16.
9. *Sidaway* v. *Board of Governor of the Bethlem Royal Hospital & Maudsley Hospital [1984]* 1 All ER 1018 (CA).
10. [1934] 152 LT 56 (Privy Council).
11. 1955 SC 200 (Court of Session (Inner House)).
12. Ibid. N.5.
13. Margaret Brazier, medicine, patient and the law, Penguin Books Ltd, London 1992.
14. *Langley* v. *Campbell*, The Times, 6/11/1975.
15. (1975) OR (2d) 490.
16. *Whitehouse* v. *Jordan [1981]* 1 ALL ER 267.
17. The writer wishes to note that the recent High court case of Kamalam a/p Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Berhad Ulu Tiram Estate, Ulu Tiram, Johor & anor decided on 6th September 1995 held that the standard of care is no longer a medical judgement. Richard Talalla J following the Australian case of Rogers v. Whitaker [1992] 175 CLR 479 was of the opinion that it is for the court to dicide after considering all factors involved. To quote, *"The ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law."* That is the question for the court and the duty of deciding it cannot be delegate to any profession or group in the community. *"... in short I am not bound by the Bolam principle. Rather do I see the judicial function in this case as one to be exercised as in other cases of negligence, unshackled on the ordinary principles of the law of negligence and the overall evidence."*
18. Ibid, n. 13, p. 8.