

# Court rules on applicable test in medical negligence suits

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Litigation, Malaysia

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## Introduction

In *Zulhasnimar Hasan Basri v Dr Kuppu Velumani P(1)* the Federal Court examined the following question of law:

*"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's decision provides a clearer legal position with regard to the distinction between diagnosis and treatment on the one hand and the duty to advise of risks on the other hand.

## Facts

The first appellant was pregnant and had chosen the first respondent to be her obstetrician and gynaecologist. At 36 weeks of pregnancy, the first appellant went to the hospital complaining of abdominal pain. She was attended to by a staff nurse and admitted into the hospital after various checks. Some medications were given as ordered by the first respondent.

The first appellant subsequently suddenly collapsed as a result of severe bleeding. An emergency caesarean section was conducted by the first respondent and the second appellant was delivered alive. A hysterectomy to remove the first appellant's uterus was performed on discovering that she had a ruptured blood vessel at the placenta. During the emergency hysterectomy, the first and second respondents discovered that the blood vessels at the fundus of the first appellant's uterus had ruptured and hence caused the first respondent's sudden acute bleeding and eventual collapse. The collapse had resulted in a sudden and significant loss of oxygen to the second appellant, as a result of which she suffered severe birth asphyxia which resulted in a cerebral injury.

## High court decision

Based on all the evidence, at no point was the first appellant conclusively in labour, as there were no regular uterine contractions nor dilation of her cervix. The appellants' contention that a caesarean section should have been performed before her collapse was hindsight wisdom, and hence baseless.

There was sufficient evidence to show that the first appellant suffered from an abnormal presentation of the uterus of the rarest kind, known as placenta percreta, which was undetectable without surgery. The first respondent could not have expected or foreseen this.

Thus, the high court dismissed the appellants' claims against the respondents and held that the appellants failed to prove on a balance of probabilities that the respondents had breached their duty and standard of care to them.

### **Court of Appeal decision**

The Court of Appeal, by a unanimous decision, affirmed the high court's judgment.

### **Federal Court decision**

The Federal Court, in answering the leave question aforementioned, looked into the development of the *Bolam* test in Malaysia, as propounded in *Bolam v Friern Management Committee*.**(2)**

#### ***Development of Bolam test***

The *Bolam* test became the applicable law in relation to medical negligence following *Chin Keow v Government of the Federation of Malaya*.**(3)** Practically, the *Bolam* test means that while the law imposes a duty of care, the standard of care owed by a doctor to a patient is left to the medical fraternity (ie, the "practice accepted as proper by a responsible body of medical men skilled in that particular art"). In other words, medical practitioners have the final say regarding whether negligence has occurred, not the courts.

However, in *Foo Fio Na v Dr Soo Fook Mun***(4)** the Federal Court adopted the test set out in the Australian case of *Rogers v Whitaker*.

In *Rogers* the High Court of Australia made a specific distinction between treatment and diagnosis on the one hand and advice on risks on the other hand, emphasising that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment and that this has nothing to do with medical expertise.

As such, in *Foo Fio Na* the Federal Court held as follows:

*"We are of the opinion that 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 the proposed treatment. The practitioner is duty bound by law to inform his patient of the risk involved in any proposed treatment so as to enable the patient to make an informed decision."*

As a result, since *Foo Fio Na*, there have been two inconsistent lines of court decisions on the principles to be applied in medical negligence cases.

### **Present case**

To resolve the uncertainty as to whether the *Bolam* or *Rogers* test should apply, the Federal Court made the following observations:

- *Rogers v Whitaker* was entirely concerned with the duty to advise, and specific reference was made to this fact in *Foo Fio Na*. Thus, the decision in *Foo Fio Na* must necessarily be limited only to the duty to advise of risks, as it did not address the standard of care expected in respect of either diagnosis or treatment.
- Thus, 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, because medical experts do genuinely and frequently differ in opinion on diagnosis and treatment. Therefore, it is not a matter that the courts are equipped to resolve. In this context, the *Bolam* test makes sense.
- However, the duty to advise relates to the right of self-determination. It is the courts which will decide whether a patient has been properly advised of the risks associated with a proposed treatment.
- As such, the test in *Rogers* is restricted only to the duty to advise of risks, whereas the *Bolam* test applies to the standard of care for diagnosis or treatment.

This Federal Court decision has resolved the perennial question in the Malaysian courts as to what is the proper applicable test in determining standard of care in medical negligence. This will allow litigants to receive consistent court decisions in the future.

### **Comment**

This decision has provided a meticulous and thoughtful insight into the law surrounding medical negligence cases by exploring the actual reasoning behind the courts' precedents. Lawyers can now give clear and positive advice on the relevant law, so that potential litigants have a clearer understanding as to where they stand before initiating a legal suit for medical negligence.

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### **Endnotes**

(1) [2017] 8 CLJ 605.

(2) [1957] 2 All ER 118.

(3) [1967] 2 MLJ 45.

(4) [2007] 1 MLJ 593.

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