This is the second of two articles about the Montgomery test for medical negligence. In the first article, it was explained that the Montgomery test applies only to the provision of medical advice. The Montgomery test does not apply to the doctors’ duties to diagnose and treat the patient. In those two areas of medical practice, the Bolam test continues to apply.

Under the Montgomery test, doctors must strive to ensure that they do not unilaterally decide what treatment would be in the patient's best interests, and omit to inform the patient about the full risks and alternatives. Ultimately, doctors must remember that it is the patient who decides and bears responsibility for the choice of treatment. Therefore, doctors must give their patients enough information to allow their patients to properly bear that responsibility. Is there any practical difference between the Montgomery and Bolam tests? That is the question this article seeks to answer.

Practical concerns
One large concern with the Montgomery test is that its adoption would result in “defensive medicine”, where doctors provide excessive amounts of information to patients in order to avoid charges of professional negligence.1

The application of the Montgomery test is largely common sense.2 The ultimate question is whether a doctor has failed to take reasonable care in his relationship with his patient. If, as a matter of common sense, a doctor has given his patient such relevant and material information which the doctor ought to have known his patient would reasonably have wanted, the doctor is unlikely to have been negligent on the Montgomery test.

At the same time, such a doctor is also unlikely to have been negligent under the Bolam test, since it is likely that a responsible body of doctors, using their common sense, would have done the same thing. Indeed, in Hii Chii Kok, the Court of Appeal reached the conclusion that the doctor in question had not been negligent, whether the Bolam test or the Montgomery test was applied.

Practical differences
In some cases, however, the Bolam test and Montgomery test could lead to different outcomes. Two examples are given below.

Example 1
In the case of Montgomery itself, the doctor had failed to advise the patient, who was of small stature, diabetic and pregnant with a larger-than-usual baby, of a substantial 9% to 10% risk of shoulder dystocia involved in vaginal birth. While the doctor accepted that the risk was high, she stated that her practice was not to discuss such risks in detail (if at all) because her assessment was that the risk of a grave problem resulting from shoulder dystocia was small, and that if she disclosed such information, her experience was that most women would elect to undergo a caesarean section, but, in her view, it was not in the “maternal interest” for a woman to have a caesarean section. In the event, the risk of shoulder dystocia materialised, and the patient’s baby was born with severe disabilities.

The doctor produced several expert witnesses who supported her approach, and as their opinions could not be shown to be illogical, the Bolam test was met and the doctor was held not to have been negligent by the lower courts. The UK Supreme Court, however, applied the Montgomery test and held the doctor to have been negligent in failing to advise the patient of the risk of shoulder dystocia.

Example 2
Say a patient is diagnosed by an oncologist of having early Stage 2 Non-Hodgkin Lymphoma. The oncologist advises the patient to undergo CHOP chemotherapy. In the oncologist’s professional opinion, CHOP chemotherapy is well established, has a high success rate in such cases, and he is confident that in the present case, CHOP chemotherapy is likely to achieve a complete remission. The oncologist is aware that radiation therapy is available as an alternative, but since he is less experienced with radiation therapy, which is less widely available in Singapore and might even require the patient to go to Australia for treatment,
the oncologist does not tell the patient of that alternative. The patient agrees to
CHOP chemotherapy, which does not work. The cancer spreads.

Assume that the doctor’s decision not to mention radiation therapy is
supported by many of his colleagues. Under the Bolam test, the doctor would
not be negligent. But things would be
less clear under the Montgomery test: (a) the existence of the alternative of
radiation therapy would be relevant
and material to the patient, and (b) the
doctor knew of the alternative. So Stages
1 and 2 of the Montgomery test are met.

The key issue then becomes whether the
doctor can persuade the court
that he was justified not to advise the
patient on radiation therapy (ie, Stage
3 Montgomery test). In our view, the
doctor’s lack of experience with radiation
therapy and its relative lack of availability
in Singapore per se are unlikely to be
sufficient justification.4

Areas of uncertainty
The shift from the Bolam test to the
Montgomery test raises many new
issues for medical professionals and
doctors to consider. Two of them are
highlighted below.

Diagnosis, advice, or treatment
Clinical practice does not rigidly
demarcate diagnosis, the provision of
advice, and treatment. In practice, and
as the Court of Appeal recognised, the
three aspects of diagnosis, advice, and
treatment can sometimes overlap.

For example, a proper diagnosis
might first require invasive procedures
or exploratory surgery, the nature and
risks of which the patient needs to be
informed and advised about in order to
understand. Similarly, the administration
of a course of drugs (treatment) might
form part of an initial diagnosis, the
preliminary nature of which the patient
should be advised of.

It can therefore be quite arbitrary
whether a material event is characterised
as diagnosis, advice or treatment. Take
for example, the case of an obstetrician
who notes that a foetus is larger than
average, attempts a vaginal delivery and
dystocia occurs.5 The obstetrician takes
emergency measures but the baby is
born with a brachial plexus injury to the
right arm. Does the Bolam test or the
Montgomery test apply?

On one hand, the issue could be
framed as negligent diagnosis/treatment –
the obstetrician failed to recognise
that a caesarean section delivery was
indicated in the circumstances. Under
this characterisation, the applicable test
for determining whether the obstetrician
was negligent would be the Bolam test.

On the other hand, the issue could also
be framed as negligent advice – the
obstetrician failed to advise of the risk
that shoulder dystocia increases in large
foetuses, which resulted in the patient
being deprived of the opportunity to opt
delivery by caesarean section. Under
this characterisation, the Montgomery
test would apply.

Until further guidance from the
courts, medical professionals are likely
to have to live with this uncertainty of
characterisation.

Further modifications to the Bolam test
The Court of Appeal in Hii Chii Kok
left open the question of whether, in
applying the Bolam test, the court ought
to take into account the experience and/
or special expertise of the doctor.6 This
could, possibly, mean that the standard
of care expected from a doctor with
special expertise in a field may be higher
than one without that special expertise.

For example, an experienced and
expert oncologist defending his
diagnosis/treatment might have to
show that there are oncologists of
similar experience and expertise who
support his diagnosis/treatment. In the
same vein, a GP might not be judged
by the standards of a specialist (unless
the GP was negligent in not recognising
that the matter ought to be referred to
a specialist).

Conclusion
The decision in Hii Chii Kok represents a
landmark change in the law of medical
negligence. Medical professionals should
be prepared to involve their patients to
a greater extent when advising possible
therapies or discussing treatment plans.
Care should also be taken to record what
the patient’s particular concerns are,
and what medical advice and
information has been imparted to the
patient as a result. 

References
1. Hii Chii Kok v Ooi Peng Jin London Lucien [2017] SGCA 38 at [84].
2. Khoo EKH. Engage patients? Yes, but don’t expect doctors to mind-read. The Straits Times 27
May 2017.
3. Hii Chii Kok v Ooi Peng Jin London Lucien [2017] SGCA 38 at [139].
4. Although it may be that the patient would
have made the same decision even if told of that
alternative – ie, the negligent advice may not have
caused any harm.
5. To borrow an example referred to in the
Attorney-General’s Submissions to the Court of
Appeal in Hii Chii Kok dated 30 November 2016.

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