

**Editor's Note**

The SMA Lecture 2001 on "Testing the Bolam Test: Consequences of Recent Decisions" was delivered by Mr K Shanmugam, Senior Counsel and partner in Allen & Gledhill. The citation was given by A/Prof Mary Rauff from the Department of O&G in NUH. We reproduce here the citation and highlights from Mr Shanmugam's talk. The full text for the latter will be published in the January issue of the SMJ.

# Citation for SMA Lecturer 2001, Mr K Shanmugam

Delivered by A/Prof Mary Rauff

President of the 42<sup>nd</sup> SMA Council, Professor Low Cheng Hock, President of the SMC, Dr Lee Suan Yew, distinguished members of your Council, ladies and gentlemen, the SMA Lecturer for the year 2001 is Mr K Shanmugam, Senior Counsel, Partner of Allen and Gledhill and Member of Parliament.

Mr Shanmugam, an extremely well regarded litigation lawyer, has often appeared in the news. He is definitely more widely known to many than, I am sad to say, our SMA President, Professor Low Cheng Hock.

He was born on 26<sup>th</sup> March 1959 and graduated from the National University of Singapore in 1984 with the very rare LLB (Hons) First Class. He had distinguished himself with a glorious undergraduate career having earned scholarships for being the top student from the first to the third year, book prizes for academic merit in the second and third years, the Adrian Clark Memorial Medal (top student in 1984), Leow Chia Heng Prize (top student final year 1984), External Examiner's prize (1984) and Montrose Memorial Prize (Jurisprudence in 1984). He was a member of the team that represented the National University of Singapore in the Jessup Moots, Washington in 1984 – the team came in second in the International Division.

He was offered a partnership in Allen and Gledhill 3 years after qualifying as a lawyer and he is now a senior partner, Co-head of the Litigation Department and Executive member of the firm. Four years ago, at the age of 38, he was appointed as a Senior Council by a Selected Committee headed by the CJ in recognition of his having the

necessary knowledge, experience, ability and integrity in his profession.

He handles trial work in major corporate and commercial disputes for several public listed companies, major international banking and financial institutions, MNCs and professional practices. He has acted both for individuals as well as for newspapers, including the Business Times and the International Herald Tribune. In white-collar crimes, he has defended among others, Mr Glenn Knight, the former Head of the CAD, and is probably the only person to have been in the unique position of having acted both for the Prime Minister, Mr Goh Chok Tong and against him (defending the IHT).

Mr Shanmugam has acted in numerous cases, of which more than 60 have been reported in the Law reports, in the past 10 years. Many of these cases have become landmark cases. Some of the areas have been Commercial and Corporate, as alluded to earlier. He has also extended himself to Banking, Property, Insolvency, Trust Law, Media Law, Commercial Crime and Arbitration.

He has now extended his expertise to cover Medical and Professional negligence, regularly providing advice to medical practitioners on matters where negligence or alleged breaches of professional standards might be an issue. He has acted for doctors in Coroner's enquiries, disciplinary proceedings and civil suits. One of his cases involved Dr Chuang Wei Ping who had been found guilty by the SMC on certain charges in 1994. Mr Shanmugam successfully acted for Dr Chuang in an application for Judicial Review of the decision of the SMC resulting in the

SMC's orders being set aside. Allen and Gledhill is on the panel of the Medical Protection Society and the United Medical Protection Society. He is also an Honorary Legal Advisor to the Singapore Medical Association.

Among his professional appointments are:-

- Panel of Accredited Arbitrators of the Singapore Arbitration Centre
- Steering Committee of the Law Faculty, National University of Singapore
- Panel of Mediators of the Singapore Mediation Centre

He is regarded as among the leading 6 litigation lawyers in Singapore by the Euromoney Legal Media Group 2 years consecutively, in 1999 and 2000, by the Law Business Research – an International Who's Who of Commercial Litigators, 2000 and the Asia Law Leading Lawyers Survey, 2000. Euromoney Guide to the World's leading Insolvency and Restructuring Lawyers 2001 had also regarded him as one of the leading Insolvency lawyers.

Mr Shanmugam has also been a Member of Parliament since 1988 and is on several Government Parliamentary Committees, Health being one of them. He is an advisor to the Criminal Law Advisory Committee, to the Amalgamated Union of Public Daily Rated Workers and SINDA.

Professor Low Cheng Hock and guests, we are greatly honoured that Mr Shanmugam has been able to spend some time with us today, and it is with great pleasure that I present to you, Mr K Shanmugam who is eminently suited to deliver the SMA Lecture this afternoon. ■

# Highlights from the SMA Lecture 2001

## Testing the Bolam Test: Consequences of Recent Developments



Mr K Shanmugam speaking on the Bolam test.

### **BOLAM TEST DEFINED:**

".....it is the measure of whether one has discharged his or her standard of care in the management of the patient. It is not a test which applies only to doctors; it applies to all professionals. This test was developed through a series of English cases culminating in ***Bolam v Friern Hospital Management Committee*** (1957) 1 WLR 582."

"The test is the standard of the ordinary skilled man exercising and professing to have that special skill – he does not have to be the best doctor. Often therefore, the burden is discharged by calling expert evidence to show what other doctors, of similar standing and exercising that particular skill, would have done for the patient, in that situation."

### **BOLAM OR BOLITHO:**

".....there have been questions raised as a result of some recent cases as to whether Courts are increasingly beginning to impose their own judgment and opinion on the matter; and be less reliant on the expert witness who comes to Court to say what he or she would have done in a similar situation. These cases include ***Bolitho v City & Hackney Health Authority*** (1997) 4 ALL ER 71 (which has sometimes been treated as an exception to the *Bolam* test) and some recent Singapore cases."

".....these cases do not contradict or qualify the *Bolam* test.....while doctors are understandably concerned about increased medical litigation, nevertheless, the Courts have generally been trying to adhere to the principles set out in *Bolam*."

".....the *Bolam* test strikes the correct balance between the rights of doctors, patients and the general public. If the *Bolam* test is not adhered to, there can be adverse consequences to the medical profession as well as to society. There are 3 consequences which are easy to identify:-"

- "1. doctors will opt for 'defensive medicine'.....
2. it will encourage more medical litigation, which in turn will increase premiums and overall health care costs; and
3. it will affect good doctor/patient relationships....."

### **ESTABLISHING 3 ELEMENTS IN A CLAIM FOR NEGLIGENCE**

#### **"i. Duty of Care**

.....A patient who brings a claim against his doctor or a hospital will easily establish that the doctor or hospital owes him a duty of care. A general practitioner accepting a patient undertakes a duty to him."

#### **"ii. Breach of the Duty**

The patient has to prove that the doctor was careless. He must show that the doctor fell below the required standard of care. This is the *Bolam* test."

"The Standard of Care that a doctor has to show, as set out in *Bolam* is as follows:-

1. ....He need not possess the highest expert skill; it is sufficient if he exercises the ordinary skill of an ordinary competent doctor exercising that particular field; and
2. a doctor who had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion skilled in the particular form of treatment in question was not guilty of negligence merely because there was a body of competent professional opinion which might adopt a different technique."

#### **"iii. Causation – The breach caused the injury**

The breach must have caused or at least contributed to the injury suffered."

### **APPLICABILITY OF THE BOLAM TEST**

"In England and Singapore, the Courts have applied the *Bolam* test to determine if a doctor has adequately explained the treatment or warned the patient (see for example, ***Sidaway v Governors of the Bethlem Royal Hospital***). This approach is based on very sensible considerations. If the doctor is required to explain **every** possible risk, he could do more harm. For instance, where the risks involved are relatively remote, a Court in England has held that there were obvious disadvantages in warning a patient of such risks....."

"In the vast majority of cases, the fact that distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, as set out in ***Bolitho v City & Hackney Health Authority*** (1997) 4 ALL ER 71, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible. This does potentially open the door for the Court to impose its own views and disregard expert opinion, though in exceptional cases."

### **RECENT CASES IN SINGAPORE**

"In the cases after 1997 when *Bolitho* was decided, two trends appear to have emerged:-

1. The number of cases against doctors had risen suggesting that there is indeed some truth in the contention that *Bolitho* encourages medical litigation; and
2. The amount of damages awarded to successful patients in medical negligence cases have also increased, most notably in *Mdm Gunapathy's* case where the amount of damages awarded was well above the next highest case."

## **IMPACT OF INCREASED MEDICAL LITIGATION**

“.....current trends suggest that the number of complaints, claims, quantum of awards and insurance premiums are and will be on the rise. This appears true of medical litigation in the US, the UK and Singapore. Statistics show that the number of cases against doctors have risen; and damages awards have also risen. And if the American experience is anything to go by, then the actions of doctors will be increasingly challenged resulting in higher malpractice costs, increasing malpractice premiums and most significantly, a substantial increase in the practice of defensive medicine.”

“The negative effects can be categorised as follows:-

i. Medical procedures which may not be

in the best interests of the patients.....

ii. Rising insurance premiums and health care costs.....

iii. Denial of access to health care.....

iv. Stress for doctors.....

v. Erosion of trust in the patient-physician relationship.....”

## **AFFIRMATION OF THE BOLAM TEST**

“.....the rights of the doctors have to be balanced by the rights of the patients, while at the same time keeping the societal interests in perspective. My view is that the *Bolam* test, properly applied, does balance the rights. It protects doctors who act in accordance with the provisions accepted by their profession; and it allows a patient to sue, when he can show that his doctor had fallen below what the profession considers acceptable.....*Bolitho* simply requires the judge to scrutinise medical

evidence in the same fashion as they would expert evidence in any other type of negligence case.....”

“.....if we move away from the *Bolam* test, either by frequently resorting to and misapplying the *Bolitho* exception, or by going around *Bolam*, then the risk is vastly increased medical litigation. That is a consequence that we should seek to avoid, because that is not in the interests of our society.”

“.....all recent decisions have consistently reaffirmed the *Bolam* test.....Of course, there are individual decisions which the medical profession may not agree with. However, the point remains that in general, the *Bolam* test is strictly applied and generally a patient can succeed only when he shows that his doctor has practised in a way that the rest of the medical profession will find unacceptable. The medical profession should take comfort from that.” ■