

# **RODYK & DAVIDSON LLP**

## **2<sup>ND</sup> AMM-AMS-HKAM TRIPARTITE CONGRESS & 47<sup>TH</sup> SINGAPORE-MALAYSIA CONGRESS OF MEDICINE**

### **Informed Consent – Setting the Professional Standards The Legal Standards in Singapore**

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# TOPICS

- > Standard of care – general principles
- > Why the standards matter
- > Sources of evidence of the standards
- > Determination of the legal standards

# STANDARD OF CARE

## > General Principles

### Legal Test

*“The test is the standard of the ordinary skilled man exercising and professing to have that special skill.”*

*“negligence means [the] failure to act [with reasonable care] in accordance with the standards of reasonably competent medical men at the time” [but there may be one or more proper standards].*

McNair J

**Bolam v Friern Hospital Management Committee**

# WHY THE STANDARDS MATTER

- > Failure to act in accordance with the standards
  - > Professional / ethical liability
  - > Legal liability
- > Can change what is considered as the appropriate practice

# WHY THE LEGAL STANDARDS MATTER

## Case example :

> Singapore Medical Council case – *Dr Eu Kong Weng* (2010)

> Brief :

One of the charges – omission by the surgeon to obtain informed consent for surgery without informing the patient of any alternative treatment options or sufficiently explaining the possible risks and complications.

Failed to obtain an informed consent.

# WHY THE LEGAL STANDARDS MATTER

## Case example :

- > Singapore High Court case - *Tong Seok May Joanne* (2012)
- > Singapore Court of Appeal (July 2013)
- > Brief :

The patient alleged that the anesthesiologist failed to advise her on the options of RA versus GA for LSCS, and claimed that the intubation during GA caused a neck injury.

If the obstetrician has already advised on the options of RA versus GA, must the anesthesiologist himself also advise?

Can doctors work as a team in relation to the provision of information for consent taking?

# SOURCES OF EVIDENCE OF THE STANDARDS

- > Medical evidence
- > Sources of medical evidence:
  - > Expert's testimony
  - > Expert's evidence citing medical literature in support
  - > MOH clinical practice guidelines
  - > Professional bodies' guidelines
  - > Hospitals' policies / protocols and forms
  - > SMC Ethical Code & Ethical Guidelines

# SOURCES OF EVIDENCE OF THE STANDARDS

- > Expert's testimony
- > Expert's evidence citing medical literature in support
- > Who is an expert?



# SOURCES OF EVIDENCE OF THE STANDARDS

(continued)

## > Why the need for medical literature and supporting evidence?

### Medical Registration Regulations 2010

#### Regulation 44

- (1) The Disciplinary Tribunal may, at any stage in the proceedings, refer to any written statement or medical reference material, notwithstanding that its author or, in the case of medical reference material, a medical expert may not be called, if —
  - (a) the practitioner consents; or
  - (b) after consultation with the legal assessor, the Disciplinary Tribunal is satisfied that the reception of the written statement or medical reference material is desirable to enable the Disciplinary Tribunal to perform its duty or discharge its functions.
- (2) A copy of the written statement or medical reference material referred to in paragraph (1) shall be made available to the practitioner at the inquiry.
- (3) Where, notwithstanding that any written statement or medical reference material has been referred to by the Disciplinary Tribunal under paragraph (1), the Disciplinary Tribunal is of the opinion that it should be supplemented by oral testimony —
  - (a) the Disciplinary Tribunal may request that the author or, in the case of medical reference material, a medical expert be called as a witness and adjourn the hearing for the purpose; and
  - (b) on subsequently resuming the hearing, unless the author or medical expert, as the case may be, gives oral evidence, the Disciplinary Tribunal shall be entitled to disregard the written statement or medical reference material.

# SOURCES OF EVIDENCE OF THE STANDARDS

(continued)

- > Tong's case – Plaintiff's experts' inability to cite medical literature to support their opinion

# SOURCES OF EVIDENCE OF THE STANDARDS

- > MOH clinical practice guidelines
- > Weight?
  - > SMC cases - reliance (Eu's case)
  - > Court cases - reliance

# SOURCES OF EVIDENCE OF THE STANDARDS

## > Professional bodies' guidelines

Including codes of practice, clinical guidelines

# SOURCES OF EVIDENCE OF THE STANDARDS

(continued)

## > Weight?

> Tong's case – Plaintiff cited the Singapore Society of Anaesthesiologists Guidelines Judge : “Although guidelines ... are useful in assessing the standard of care that a doctor should be held to, they are not sacrosanct. It must be remembered that guidelines often set out best practices and a departure from best practice is not necessarily improper.”

“One must look at all the facts and circumstances to determine if the defendant's conduct would be regarded as proper by a responsible body of medical men.”

# SOURCES OF EVIDENCE OF THE STANDARDS

- > Hospitals' policies / protocols and forms
  - > Cited in Eu's case
  - > JCI standards also cited in Eu's case
  - > Consent form cited in Tong's case

# SOURCES OF EVIDENCE OF THE STANDARDS

- > SMC Ethical Code & Ethical Guidelines
- > SMC Disciplinary Committee decisions?
  - > Tong's case – Plaintiff tried to rely on a SMC decision (regarding consent taken in OT)

# DETERMINATION OF THE LEGAL STANDARDS

- > How is the standard of care proved in a court case?
- > Decided by the court based on medical evidence



# DETERMINATION OF THE LEGAL STANDARDS

(continued)

- > Weighing the expert evidence in a form of risk-benefit analysis
- > *“the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion **has a logical basis**. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as been responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.”*

Lord Browne-Wilkinson

**Bolitho v City and Hackney Health Authority**

# DETERMINATION OF THE LEGAL STANDARDS

## > “Common practice”

Not conclusive that it is the proper standard

Reason(s) – could be convenience, cost, habit

## > Deviation from normal practice

Not conclusive proof of negligence

To allow for progress in medical science

# DETERMINATION OF THE LEGAL STANDARDS

(continued)

## > Inexperience

Not a defence

Standard of care (of a reasonable doctor) is an objective test

# THANK YOU

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