THE PARADIGM SHIFT IN ESTABLISHING STANDARD OF CARE IN MEDICAL NEGLIGENCE CASES IN MALAYSIA: THE RELEVANCY AND CLARITY OF THE BOLAM'S TEST TODAY

by

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ABSTRACT

One of the key areas of concern in medical negligence in Malaysia, is the standard of care of doctors. The *Bolam test* was established by McNair J in the English case of *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582 to determine the standard of care demanded of a doctor. The test was first applied and accepted by the Privy Council in the case of *Chin Keow v. Government of Malaysia & Anor* [1967] 1 LNS 25; [1967] 1 MLJ 138. In 2002, the Federal Court decision in *Dr. Soo Fook Mun v. Foo Fio Na & Anor* [2002] 2 CLJ 11; [2002] 2 MLJ 129 created an ambiguity about the continued use of the *Bolam test* in Malaysia**.** However, via the Federal Court decision in *Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors* [2017] 8 CLJ 605; [2017] MLJU 1108, the apex court reaffirmed the application of the *Bolam test* in terms of medical negligence involving diagnosis and treatment. Despite the ambiguities and inconsistencies, there is criticism as to the precise application of the *Bolam test* in medical negligence cases in Malaysia. This paper aims to conduct a case analysis of judicial decisions in medical negligence cases in Malaysia to gauge the extent of the application of the *Bolam test* to provide clarity and consistency in its application in determining the standard of care in all medical negligence cases in Malaysia today.

Keywords: Medical Negligence, Standard of Care, *Bolam test*, *Rogers v. Whitaker test.*

INTRODUCTION

A patient who consults a doctor expects medical treatment with all the knowledge and skill that the doctor possesses to bring respite to his medical condition. The relationship takes the shape of a contract to some extent because of informed consent, payment of fee, and performance of surgery/providing treatment, etc. while retaining essential elements of tort. A doctor owes duties to his patient and a breach of any of these duties gives rise to a cause of action for negligence against the doctor.[1] In the tort of negligence, the issue of duty of care must be considered prior to establishing whether there has been a breach of the duty. This sensible sequence is connected to the fact that an omission is at the heart of the analysis, which presents the question as to the standard against which any omission is to be assessed for establishing liability.[2] The state through its organs might commit a multiplicity of omissions and it will be illogical to suggest that each one of them should give rise to liability. Not only is the question of the duty of care central to tort law, but the existence of a duty is not presumed. There is thus no *prima facie* duty of care.[3] In English tort law, the approach of incrementalism has been used, which implies obtaining analogies with established categories of liability when asking the question whether a duty exists. If such analogies cannot be established, the case will be viewed as novel and it needs to be determined whether a duty should be imposed.[4] This question implies an inquiry as to whether 'as a matter of law liability in negligence is countenanced in this category of case'.[5] Whilst the existence of duty is not presumed in general negligence, in terms of medical negligence, it is automatically presumed that a doctor owes a duty of care to his patient.[6] Expectations of a patient are two-fold: doctors and hospitals are expected to provide medical treatment with all the knowledge and skill at their command and secondly, they will not do anything to harm the patient in any manner either because of their negligence, carelessness, or reckless attitude of their staff. Though a doctor may not be able to always save his patient's life, he is expected to use his special knowledge and skill in the most appropriate manner keeping in

mind the interest of the patient who has entrusted his life to him. Therefore, it is expected that a doctor carries out necessary investigation or seeks a report from the patient. Furthermore, unless it is an emergency, he obtains informed consent of the patient before proceeding with any major treatment, surgical operation, or even invasive investigation. Failure of a doctor and hospital to discharge this obligation is essentially a tortious liability. A tort is a civil wrong (right *in rem*) as against a contractual obligation (right *in personam*) – a breach that attracts judicial intervention by way of awarding damages. Thus, a patient's right to receive medical attention from doctors and hospitals is essentially a civil right. In medical negligence cases, the standard of care of a medical doctor is based on the *Bolam test* which is established by McNair J in the landmark English case of *Bolam v. Friern Hospital Management Committee*.[7]

1. DEVELOPMENT OF THE BOLAM TEST

In view of the uncertain scope of liability and subjective nature of medical practice, courts have recognised that the medical profession needs to be treated differently, leading to different tests to be used in medical negligence.[8] While *Donoghue v. Stevenson*[9] had a leading role under general negligence cases, it was the *Bolam test* which set out the traditional test through the case of *Bolam v. Friern Hospital Management Committee*[10] for evaluating the appropriate standard of reasonable care in negligence cases concerning doctors. It soon became the "universal test" that was used not only for negligence cases involving doctors but also all professionals (and, in some situations, non-professionals).[11] The *Bolam test* subsequently gained prominence in the House of Lords decision of *Whitehouse v. Jordan*.[12] Since taking root as the universal test in English Law, it was soon approved in other common law jurisdictions, including Malaysia.[13] In the nearly 60 years since its inception, it has gone through different cycles of acknowledgment, criticism and eventually re-construction.[14]

Under the general tort of negligence, it is the judiciary that determines issues of breach of standard of care. However, under the *Bolam test*, the breach of standard of care in medical negligence is determined by medical judgment,[15] whether the medical professional has fallen below a particular standard of care in his treatment of the patient.[16] Further, the standard of care must be in accordance with a responsible body of opinion, even if others differ in opinion. Justice McNair in his judgment in *Bolam*[17] went on to state that liability will not be imposed upon a medical professional "*if he has acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular art"*.[18] In other words, the *Bolam test* states that, "If a doctor reaches the standard of a responsible body of medical opinion, he is not negligent". McNair J at the first instance in *Bolam*[19] noted that what was common practice in a particular profession was highly relevant to the standard of care required. A person falls below the appropriate standard, and is negligent, if he fails to do what a reasonable person would do in the circumstances. But when a person professes to have professional skills, as doctors do, the standard of care must be higher. "It is just a question of expression," as stated by justice McNair J. In applying the *Bolam test* a doctor must demonstrate that at *least one other* medical professional with *ordinary level of skills* would have acted in the same way in delivering an *ordinary level of care.*

McNair J was persuaded by the earlier Scottish case of *Hunter v. Hanley*,[20] wherein the judge had argued that:

> *"In the realm of diagnosis and treatment, there is ample scope of genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved guilty of such failure as no doctor of ordinary skill would be guilty of, if acting with ordinary care."*

According to *Puteri Nemie*,[21] the *Bolam test* acted as a gatekeeper to medical negligence cases against doctors and eventually led to a trend which provided medical professionals with considerable discretion and an edge on how a patient should be treated, leading to the view that a lower standard of care had been imposed on medical professionals compared to other negligence cases. Hence, two significant outcomes of the *Bolam test* are firstly, the medical practitioner is gauged by a standard that is confirmed by his/her peers. As such, the degree to which the courts can interfere in a particular medical negligence case is restricted as the decisions of medical professionals seem to override the courts authority, leading to the view that the test relies too heavily upon medical testimony supporting the defendant.[22] It is worth highlighting that the *Bolam test* does acknowledge that the medical profession may differ in the opinions and choices of treatment for medical conditions.[23] The second significant outcome is that the test is based on policy consideration founded on a notion that medical professionals should not be found subjected to medical negligence if there is a body of professional opinion that accepts their action as proper. This *"custom test*" according to *Puteri Nemie* is purely descriptive, as it is based on what is done by doctors regularly, rather than what should be done by the doctors.[24] According to Samantha, this failure to draw a distinction between 'what is done' and 'what ought to be done' has become one of the main criticisms of the *Bolam test*.[25] The *Bolam test* seems to set the standard of care based on what is done, hence, permitting medical practitioners to fix the standard of care by gaining support of "a responsible body of medical men". This standard is not followed in other professional liability claims where it is determined by the court.[26] As a result, this second limb provides considerable protection and a blanket immunity to medical professionals as they are not held accountable for a medical negligence action.

The *Bolam test* has been applied on many occasions in cases of medical negligence litigation. A strong endorsement of this test was provided in the

House of Lords by Lord Scarman in the case of *Maynard v. West Midlands Health Authority*[27] His Lordship stated:

> *"I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed and honestly held, were not preferred. ...For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another."*

The rationale for his Lordship taking such a stance is that there are, and always will be, diverse opinion and practice within the medical profession. One answer exclusive of all others is rarely the solution to a problem that requires professional judgment. A court may prefer one body of medical opinion to another, but that does not tantamount to a finding of clinical negligence.[28] In practical terms, the effect of the *Bolam test* is that a finding of negligence is not made where the defendant doctor has acted in accordance with a responsible body of medical opinion. This test has been repeatedly approved at the appellate level and is enshrined in law.

2.1. CRITICISM OF THE BOLAM TEST

The universal application of the *Bolam test* has made this the litmus test for the standard of care in all cases in relation to medical negligence litigation, including ethical issues. Several legal academics perceive this as an unwarranted reliance on medical testimony and an inadequate focus on the interests of the patient. The mere application of *Bolam* is enough to defeat claims sufficiently contestable to reach the courts.[29] In recent times, the *Bolam test* has been subject to much criticism by legal academics as the test is considered deficient.[30] The main criticism is that the standard of care required by the medical profession are regulated and fixed solely by the medical profession, as opposed to the court. According to Teff[31] in

such situations, it should be the courts rather than a body of medical opinion that should determine the appropriate standard of care. The courts regular deferment to medical opinion has led to the view that the *Bolam test* expands on medical paternalism.[32] Other criticisms of the *Bolam test* are the perceived "conclusiveness" of the opinion of expert evidence brought in by the Claimant doctors.[33] However, according to Samantha[34] it is unlikely that McNair J in *Bolam* intended the opinion of a body of medical opinion to be conclusive to enable exclusion of liability in medical negligence cases as in his judgment the judge did state:

> *"If the result of the evidence is that you are satisfied that his practice is better than the practice spoken of on the other side then it is really the stronger case."*[35]

The *Bolam test* does not specify the number of doctors required to make up a "responsible body" of opinion. As such, even one group of medical professionals, that goes against the majority view could be considered sufficient to excuse the act of the doctor. This was an issue that arose in in *De Freitas v. O' Brien*,[36] wherein only 11 surgeons out of 1,000 supported the doctor's action. So, while the court did find that it had to be vigilant in carrying out its duty wherein the evidence that a body of medical opinion relied upon by the defendant was very small, the court nevertheless still found that this small group to be a reasonable body of medical opinion.

Another criticism was that the *Bolam test* is thought to be "over protective and deferential" towards doctors, as explained by Rachael Mulheron leading to the view that doctors were "above the law", that judges were not able to exercise their own judgment and make the necessary changes needed in the medical profession.[37] Other views in regard to the *Bolam test*, is a lack of external objective as applied in practice, such as in the context of diagnosis in *Maynard* and information disclosure in *Sidaway v. Governors of Bethlem Royal Hospital*[38] for the purposes of consent to treatment. Further, one of the more damming criticisms of the *Bolam test* was that it allowed for dangerous medical practices to continue.[39]

Many of the above criticisms of the *Bolam test* were addressed in the case of *Bolitho v. City & Hackney Health Authority*.[40] The possibility of the court asserting a more active role can be seen in the case of *Bolitho*.[41] *Bolitho* was a clinical negligence case that reached the House of Lords. The facts of the case were that Patrick Bolitho, a two-year-old child, suffered catastrophic brain damage because of cardiac arrest due to respiratory failure. The senior paediatric registrar did not attend to the child, as she ascribed to a school of thought that medical intervention, under those circumstances, would have made no difference to the result. Liability was denied on the grounds that even if she had attended, she would not have done anything that would have materially affected the outcome. This view was supported by an impressive and responsible body of medical opinion. The central legal issue was whether non-intervention by a doctor caused the plaintiff's injury. Although the ratio of *Bolitho* relates to causation and not the standard of care, Lord Browne Wilkinson's *obiter* comments qualified the *Bolam* standard by stating that the body of opinion relied upon should have a logical basis, which means it should be capable of bearing logical analysis and external scrutiny, leading to the "Bolitho Addendum".[42] In other words, in the two step *Bolam/Bolitho* framework, if there were two differing bodies of opinion regarding the standard of care, it is for the court to scrutinise these and accept the one that is more plausible. The two-step *Bolam/Bolitho* framework has been considered the "correct approach" in English medical cases,[43] tilting towards the judiciary as the final decision makers in medical negligence litigation.[44] So whilst *Bolitho* may not have altered the substance of the *Bolam test*, it has provided some clarity to it as seen in the case of *Penny, Palmer and Canon v. East Kent Health Authority*.[45] In *Penny*, three women developed cervical cancer, although cyto-screeners had previously reported their cervical smears as being negative. In considering the expert evidence for the plaintiff, the judge stated that he did not consider the evidence provided by the defendant experts as logical.[46] The decision was upheld by the Court of Appeal where Lord Woolf said:

> *"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity".*

As such, the decision demonstrates that a coherent and reasoned opinion of a suitably qualified expert will be weighed and considered against a coherent reasoned rebuttal. By the comparison, the court would be able to ascertain the appropriate standard of care, applying a 'logical analysis' approach.[47] Thus, peer approval of medical practice alone would not be sufficient to establish the standard of care based on the *Bolam* principles.

Bolam was re-examined and revised in 2015 by the UK Supreme Court in *Montgomery v. Lanarkshire Health Board*[48] where the UK Supreme Court rejected the use of the *Bolam test* on the duty of advice in the case of *Montgomery v. Lanarkshire Health Board*[49] and adopted the test of materiality.[50] Here the Supreme Court, persuaded by the 2008 Guidance by the General Medical Council, the dissenting view of Lord Scarman in *Sidaway v. Governors of Bethlem Royal Hospital*[51] as well the judgment of the High Court of Australia in *Rogers v. Whitaker*,[52] were of the view that while medical skill and judgment were required in relation to diagnosis and treatment of patients, in today's context, the duty to advise sits on a different axis and patients were no longer quietly accepting medical advice. As such prior to obtaining consent, a doctor is under a duty to take reasonable care to ensure that the patient is aware of any material risk involved in the recommended treatment as well alternative treatments. Further, medical experts were not required to determine the extent to which a doctor may be inclined to discuss risks with patients. The responsibility to determine the nature and extent of a person's right rests with the court and not with the medical profession.

Today the *Bolam test* has been applied in medical negligence cases where the issue is in relation to diagnosis and treatment of patients. Whether this is the correct approach is questionable as it involves fundamental rights of

individuals and issues in relation to ethics especially in situations involving persons unable to articulate a valid consent.

3. APPLICATION OF THE BOLAM TEST IN MALAYSIA

English common law was introduced into the Malaysian legal system by virtue of the Civil Law Ordinance 1956. This legislation continued to be in force even after Malaysia gained independence from the British in 1957, except that it was renamed the Civil Law Act 1956 (CLA 1956). By virtue of Section 3 of the CLA, Malaysian courts have in practice taken into consideration English judicial decisions and examined its suitability in developing domestic jurisprudence.[53] In medical negligence cases, Malaysian judges have readily adopted the *Bolam test* since the 1960s as the basis for determining the standard of care in cases concerning issues of medical diagnosis and treatment. It would be interesting to see to what extent the English characteristics of the *Bolam test* have been adopted in Malaysia to suit local conditions.[54]

3.1 ANALYSIS OF JUDICIAL DECISION AND APPLICATION OF BOLAM TEST IN MALAYSIA

There are three key Malaysian appellate court decisions which adopted a '*pure transplant'* approach to the English *Bolam* test in Malaysia.[55] These precedents were extensively cited by judges in subsequent medical negligence cases dealing with issues of diagnosis and treatment and, hence, can be considered as important. Two of the earliest Malaysian cases were the Privy Council decision in *Chin Keow v. Government of Malaysia*,[56] followed by the Federal Court case of *Swamy v. Matthews*.[57] The subsequent Court of Appeal in *Dr Chin Yoon Hiap v. Ng Eu Khoon*[58] confirmed this approach in the late 1990s.

Chin Keow v. Government of Malaysia & Anor[59]

The *Bolam test* was first applied in Malaysia through the Privy Council decision of *Chin Keow v. Government of Malaysia & Anor*.[60] Here, the

High Court judge had applied the *Bolam test* and found that the doctor was negligent in prescribing a penicillin injection to the Plaintiff, an amah, without seeking her medical history. The Plaintiff, who was allergic to penicillin, died within an hour of receiving the injection.[61] The High Court judge had to determine whether any duty lay on the doctor to make inquiries as to the patient's medical history. Hence, the doctor's failure to inquire about the patient's medical history prior to administering the medical treatment was the acceptable practice by a responsible body of medical opinion at that time. Therefore, the High Court judge adopted the *Bolam test*, and found the doctor liable. However, the Federal Court rejected the finding of the High Court judge, dismissing the action with cost.[62] It was on appeal, that the Privy Council found that the Federal Court was wrong in rejecting the finding of the High Court judge. The Privy Council reaffirmed the High Court's decision, endorsing the use of the *Bolam test* which became the prescribed test to determine the standard of care in medical negligence cases in Malaysia.

Swamy v. Matthews[63]

One of the earliest appellate court decisions in Malaysia which applied the English *Bolam test* in verbatim is the Federal Court decision in *Swamy v. Matthews*.[64] This decision is distinct because instead of referring to *Chin Keow's* decision it relied on several English precedents[65] before the case of *Bolam*. *Swamy's* case also dealt with the issue of negligent medical treatment. The appellant in *Swamy* suffered from an itch on his hands and legs and sought medical treatment from the second respondent doctor. The doctor was uncertain of his diagnosis, suspecting the disease to be either ringworm or psoriasis. The doctor treated the appellant with three doses of arsenical drugs by way of injections on separate occasions. The first two injections consisted of heavy doses while the third was a reduced dosage. After the third injection, the appellant's hands and legs became paralyzed and he claimed that the injury was caused by the administration of the arsenical drug.

The Federal Court had to consider whether the paralysis of the appellant was attributable to the arsenical drug and if so, whether the doctor was negligent in injecting three separate doses of the drug into the appellant. Medical opinions were divided on these matters, two of which supported the patient and one of which was in favour of the doctor. Despite the doctor's testimony that the prescription and dosage was not in line with the manufacturer's recommendation, the Federal Court held the doctor was not negligent by a majority of two to one.[66] Despite the reference to expert evidence to determine the negligence of the doctor, there was in fact no mention of the *Bolam* case nor *Bolam test* in the Federal Court judgment. The only mention of the *Bolam test* can be traced back to the High Court judgment by Ismail Khan J. Rather, the Federal Court chose to refer to English precedents pre-dating *Bolam*. The majority judgment at the Federal Court was delivered by Barakbah LP where his Honour relied on an aged-old English decision of *Lanphier v. Phipos*[67] to support the Court's reasoning. In *Lanphier* Tindal CJ stated that all professionals undertake to exercise 'a fair, reasonable and competent degree of skill', not the highest professional standard. This principle of law was interpreted by Barakbah LP in *Swamy* as follows:

> "A man or woman who practices a profession is bound to exercise the care and skill of an ordinary competent practitioner in that profession – be it the profession of an accountant, a banker, a doctor, solicitor or otherwise."[68]

Considering this principle, their Lordships accepted the medical evidence of the doctor's sole expert that the arsenical drug did not cause the paralysis of the appellant and the three injections of the drug was an acceptable practice of the medical profession.

Elizabeth Choo v. Government of Malaysia[69]

The case of *Elizabeth Choo v. Government of Malaysia*[70] addressed the issue of medical diagnosis. The outcome is significant because its

reasoning laid the groundwork for the subsequent ruling in the Federal Court decision in *Kow Nan Seng v. Nagamah*.[71] The plaintiff in *Elizabeth Choo* suffered from piles and was admitted to hospital for a medical procedure to remove the piles. The second defendant doctor performed a sigmoidoscopy procedure[72] under a general anesthesia with the intention of examining the lining of the plaintiff's colon. During the diagnostic procedure, the plaintiff felt a perforation of her colon. The plaintiff suffered nervous shock because of the perforation and did not undergo the piles operation. She commenced legal action for medical negligence against the second defendant doctor.

The central issue in the High Court was whether the second defendant doctor was negligent when performing the sigmoidoscopy procedure. The second defendant adduced several bodies of medical opinion in support of the view that sigmoidoscopy performed under anesthesia was the accepted practice at the material time. This overwhelming medical evidence was contrary to only one medical opinion adduced by the plaintiff. The plaintiff's expert stated that the diagnostic procedure should be carried out without anesthesia because this would enable the patient to forewarn the doctor of any pain. The trial judge Raja Azlan Shah J applied the *Bolam test* and stated that the practice performed by the second defendant doctor was not in itself negligent.

His Honour stated that:

> "... The principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced...".[73]

Nonetheless, his Honour further qualified this statement of law:

> "... It was stated by [counsel] for the plaintiff that the courts are always reluctant to find negligence against a medical man. With

> respect that proposition cannot be true. To say the least, I am no advocate of the right of medical men occupying a position of privilege. They stand in the same position as any other man. Their acts cannot be free from restraint; where they are wrongfully exercised by commission or default, it becomes the duty of the courts to intervene...".[74]

Based on the above statement, Raja Azlan Shah J went on to consider whether the sigmoidoscopy examination by the second defendant doctor had been wrongly performed. On this issue, his Honour accepted the evidence of the doctor's expert that the plaintiff had had bicornuate uterus.[75] This medical condition, according to the expert testimony, may have contributed to the 'slight perforation' that the plaintiff sustained.

The High Court concluded that the second defendant doctor was not negligent although it was not disputed that the plaintiff's perforation of her colon was sustained during the pre-operative examination.

Kow Nan Seng v. Nagamah[76]

Literature describes that the *Bolam test* was broadly applied in the case of *Kow Nan Seng v. Nagamah*,[77] but a reading of the Federal Court judgment would indicate the use of the word "broad" is rather subjective. The respondent in this case had met with an accident and suffered minor fractures. A complete cast had been applied to his leg but due to lack of skills in the application and observation in monitoring the treatment, there was inadequate blood circulation which led to gangrene resulting in the leg having to be amputated.[78] Citing the case of *Bolam*[79] and *Elizabeth Choo*,[80] the Federal Court determined that based on the expert evidence provided, that the respondent had not been given a fair and reasonable standard of care and skill expected by an ordinarily competent medical practitioner in the application of the cast. Applying the *Bolam test*, the Court ruled that since a complete cast was a widely accepted medical practice in Malaysia, the choice of the treatment was not in itself negligent.

Lastly, the Court considered whether the failure of both doctors to give post-operative treatment shortly after realising the second respondent's leg injury which was brought about by the application of the complete cast was also negligent. There was no direct medical evidence on this issue. The Court instead considered several items of circumstantial evidence and arrived at the conclusion that both medical practitioners were negligent. This evidence included: the omission of both doctors to monitor the second respondent's response to the application of a complete cast, the delay in the administration of remedial medical treatment to repair the damage done to the second respondent's leg and the weak excuse given by the doctor that this delay was due to his busy working schedule.[81]

Dr Chin Yoon Hiap v. Ng Eu Khoon[82]

Whilst *Chin Keow* and *Swamy* reestablished the *Bolam test* in Malaysia, the Court of Appeal in *Chin Yoon Hiap v. Ng Eu Khoon*[83] reaffirmed that its interpretation in Malaysia was the same as in the United Kingdom prior to 1997. In *Chin Yoon Hiap*, the case addressed the issues of negligent medical diagnosis and treatment. The plaintiff, Ng Eu Khoon, was born prematurely in late 1975. As a premature baby, he was kept in an incubator with oxygen therapy for nearly one month. A few months after having been discharged from the hospital, Ng began to experience defects in his vision and his father brought this matter to the attention of the appellant doctor, Dr Chin Yoon Hiap. Dr Chin did not provide any medical treatment, advising that Ng's defective vision would improve slowly. Years later, Ng's condition deteriorated, and he was later totally blind. Consultations with eye specialists revealed that he was suffering from retrolental fibroplasias.[84] Having attained the age of majority when legal action was still enforceable,[85] Ng filed a suit for medical negligence in the High Court against Dr Chin alleging, inter alia, that the medical practitioner had failed to inform his parents about the defect so that an ophthalmologist could have been consulted for an early diagnosis of the ailment. Dr Chin appealed the findings of negligence of the High Court in the Court of

Appeal on the grounds that they were not based on the medical evidence that there was no treatment for retrolental fibroplasias. The three members of the Court of Appeal addressed this issue with the application of the *Bolam test*. In affirming the *Bolam test*, the Court cited the case of *Chin Keow* and a series of English precedents which formed the legal foundation of the *Bolam test*.[86] It is noteworthy that the Court relied heavily on two English House of Lords decisions namely, *Maynard v. West Midlands Regional Health Authority*[87] and *Whitehouse v. Jordan*[88] which established the *Bolam test* in the United Kingdom.[89] The case of *Maynard*, in particular, established the principle that the courts are not allowed to choose one medical opinion over another when evaluating expert evidence in medical negligence cases concerning issues of diagnosis and treatment.[90] Based on these two authorities, the Court of Appeal relied on the medical evidence that retrolental fibroplasias was incurable.[91] In addition, the undisputed expert medical opinion that an early ophthalmic diagnosis would not have made any difference to Ng's medical condition was also considered. Based on this medical evidence, the Court of Appeal held that the appellant, Dr Chin, did not breach his duty of care because even if he had informed the first respondent's parents, the result "would have come to nothing".[92]

According to Joseph,[93] the cases of *Chin Keow, Swamy* and *Chin Yoon Hiap* are important appellate court judicial decisions which interpreted and applied the *Bolam test* in its original form. Over the years, these judicial decisions were relied on by a vast majority of lower courts as the legal basis for applying the *Bolam test* when deciding the standard of care in negligence cases regarding issues of diagnosis and treatment.[94]

In some cases, efforts were made by Malaysian judges to place certain qualifications on the *Bolam test*, particularly on the extent to which judges could make findings of liability for medical negligence. The High Court case of *Elizabeth Choo v. Government of Malaysia*[95] and the consequent Federal Court decision in *Kow Nan Seng v. Nagamah*[96] clearly depicts

how the *Bolam test* is adapted based on Malaysian judicial interpretation by the courts.

3.2 DEPARTURE FROM BOLAM TEST IN MALAYSIA

Now while the Malaysian judiciary were starting to slowly implement the *Bolam test* in medical negligence cases, it was around the same time that Australia was starting to move away from *Bolam*. This move, as most would know, would soon have an impact on the application of the appropriate standard of care in medical negligence cases in Malaysia. In the early 1980s, through the decision of *F v. R*[97] the Australian judiciary moved away from *Bolam*, determined to ensure that there was judicial scrutiny of expert evidence. It was of the view that the courts had a responsibility to guarantee that the professional practices met the standard of care that was legally required.[98] This approach was soon adopted by the High Court of Australia in the decision of *Rogers v. Whitaker*.[99]

Rogers v. Whitaker[100]

In *Rogers v. Whitaker*.[101] the respondent, Maree Lynette Whitaker had lost sight of her right eye as result of a penetrating injury when she was a child. At a routine check-up with Dr. Rogers, the appellant, advised Mrs. Whitaker that he could operate on her right eye to remove the scar tissues, improving its appearance and possibly restoring significant sight to her right eye as well at assisting in prevention of glaucoma. However, it was alleged that he had failed to advise her of the risk of developing inflammation and sympathethic ophthalmia (1:14,000). After the surgery, there was no improvement to her right eye, and she developed inflammation and sympathetic ophthalmia in her left eye which led to her losing complete sight in her left eye. This risk that the appellant had failed to advise her was significant as Mrs. Whitaker was already blind in her right eye and had asked the appellant nervously about risks. The question that came before the High Court of Australia was whether the doctor's

failure to advise and warn Mrs. Whitaker of risks inherent in the operation constituted a breach of duty.

In arriving at its decision, the High Court of Australia in *Rogers v. Whitaker*,[102] believed that any information communicated to patients by doctors could not be decided solely by the doctors but rather there had to be several factors taken into consideration.[103] These factors included the "nature of the matter to be disclosed; the nature of treatment; the desire of the patient for information; the temperament and health of patient; and the general surrounding circumstances."[104] Further, the High Court of Australia was of the opinion that the *Bolam test* had resulted in restricting the information that was communicated to patients and felt that the dissemination of information only involved communication skills which they felt could be judged by non-medical individuals, including judges.[105] To summarize, there were two key parts to the decision in *Rogers v. Whitaker*, the first part was that through the evidence of acceptable medical practice, it was the judiciary to determine the appropriate standard of care on the advice and information that was given by the doctor to the patient. The second part was that the law recognized that doctors had a duty to warn a patient of material risks inherent in the proposed treatment (the *"test in Rogers v. Whitaker*") As such, the significance of the High Court of Australia's decision is the shift of emphasis from medical opinion to judicial opinion.[106]

The case of *Rogers v. Whitaker*[107] was a question on disclosure of risk, as such, it was not until the High Court of Australia's decision in *Naxakis v. Western General Hospital*[108] was the *Bolam test* completely rejected in Australia in all areas of medical negligence. While there was still a heavy reliance on expert medical opinion by the Australian judiciary, the principles laid down in *Rogers v. Whitaker*,[109] in addition to duty to advise of risk, were also extended to all aspects of the doctor's duty including diagnosis, treatment and care.[110] It is worth noting that the health insurance crisis in 2001 resulted in legislative changes which had an impact

on the test in *Rogers v. Whitaker* being relegated to only duty to advise.[111] Joseph Lee explains that there are two main distinctions between the *Bolam test* and the test used in *Rogers v. Whitaker*.[112] One was that under *Rogers v. Whitaker*, the judges are the ultimate arbiter of the standard of care. Secondly, there is no limitation to judges determining the reliability of expert medical witnesses. Ultimately, judges can decide in professional negligence cases with the help of expert opinions.

3.3 APPLICATION OF *ROGERS v. WHITAKER* TEST IN MALAYSIA

In Malaysian, the *Bolam test* continued to be applied in medical negligence cases without any issues until the 1992 decision of the High Court of Australia in *Rogers v. Whitaker*.[113] According to Professor Amirthalingam, the decision in *Rogers* had a significant influence in medical negligence judicial decisions in Malaysia as the courts became ambivalent[114] varying in its decision either by applying the *Bolam test* or the test set out in *Rogers v. Whitaker*.[115] These two cases were of particular importance due to their influence in the subsequent development of the law in Malaysia: *Kamalam a/p Raman v. Eastern Plantation Agency*[116] and *Foo Fio Na v. Dr. Soo Fook Mun & Anor*.[117] It was finally the Federal Court decision of *Foo Fio Na v. Dr. Soo Fook Mun & Anor*[118] that changed the tide. The validity of the use of the *Bolam test* was questioned and it ultimately confirmed the application of the test set out in *Rogers v. Whitaker* in Malaysian medical negligence cases.

Kamalam a/p Raman v. Eastern Plantation Agency[119]

This case of *Kamalam a/p Raman v. Eastern Plantation Agency*[120] was in relation to the issue of negligent medical treatment. Mr Dinasan had collapsed in his workplace due to a stroke. He had a history of hypertension. In an unconscious state, Dinasan was taken to the clinic of his employer and was examined by the second defendant doctor. The doctor prescribed medication for his pre-existing hypertension but did not diagnose any other condition. A few days later, Dinasan was found

bleeding profusely from the nose and mouth and then became unconscious. He died in the hospital a day later, and it was later found that he had suffered a stroke prior to his death.

There were two pertinent issues concerning liability for medical negligence against the second defendant doctor: whether the second defendant doctor had prescribed inappropriate drugs to Dinasan and whether the doctor was under a duty to refer him to the hospital for specialist treatment. There were differing medical opinions on both matters. Two medical experts for Dinasan's wife, the first plaintiff, testified that the symptoms displayed by Dinasan constituted an impending stroke. They stated that in the circumstances, it was necessary for the second defendant doctor to take precautionary measures such as leaving Dinasan to rest for a while in the clinic and then referring him to a cardiologist in the hospital. The expert for the second defendant doctor, on the other hand, took the view that Dinasan did not exhibit any warning signs of an impending stroke and the stroke suffered prior to his death may have arisen suddenly. According to this expert evidence, there was no reason to prescribe Dinasan drugs specifically for stroke and neither was the second defendant doctor under an obligation to transfer him to the hospital.

When addressing the issue of negligence, the trial judge Richard Talalla J did not apply the *Bolam test* and he referred to the Federal Court's judgment in *Kow Nan Seng*, affirming that the justices in *Kow Nan Seng* neither addressed the *Bolam test* nor applied it.[121] Richard Talalla J further endorsed the *dicta* of the majority justices in the Australian High Court case of *Rogers v. Whitaker* which affirmed the departure of the *Bolam test* in cases of medical diagnosis and treatment. Richard Talalla J stated that the test for determining the standard of care in issues of negligent treatment was like that in general negligence cases:

> "... I should emphasise that while due regard will be had to the evidence of medical experts, I do not accept myself as being restricted by the establishment in evidence of a practice accepted as

> proper by a responsible body of medical men skilled in that particular art to finding a doctor is not guilty [sic] of negligence if he has acted in accordance with that practice. 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 any other case of negligence, unshackled, on the ordinary principles of the law of negligence and the overall evidence."[122]

Considering all the evidence tendered in court, the trial judge concluded that the second defendant should have referred Dinasan to a specialist hospital. As such, the failure to do so amounted to a breach of his duty of care.

Foo Fio Na v. Dr. Soo Fook Mun & Anor[123]

The Federal Court case of *Foo Fio Na* is a landmark decision in the law of medical negligence in Malaysia. The significance of this decision, however, has been eclipsed by the ambiguity regarding the standard of care in diagnosis and treatment, and the uncertainty in its interpretations in subsequent lower court cases. This warrants the question of where Malaysia stands on issues relating to the standard of care in diagnosis and treatment in medical negligence litigation.

The plaintiff, Miss Foo, was injured when a car in which she was a passenger hit a tree on 11th July 1982. She was then admitted to the first defendant hospital, Hospital Assunta. At the time of her admission, the plaintiff was able to move all her limbs and walked unassisted into the emergency room and experienced only some pain in her neck. The next morning, Miss Foo was examined by the second defendant doctor, Dr Soo, an orthopedic surgeon, who told her that two vertebrate bones on her neck were dislocated. Hence, the second defendant administered traction treatment. The treatment was stopped after two days because the surgeon decided that it was unsuccessful and performed a close manipulation procedure under anesthetic as an alternative treatment. The procedure was

once again considered unsuccessful. Subsequently, the second defendant recommended open surgery on the plaintiff's neck. The surgical operation involved grafting bone and inserting a wire loop to move the dislocated vertebrae to their original positions. The surgery was performed on 19 July 1982. One day after the operation, the plaintiff became paralysed. On 5 August 1982, more than two weeks after the first surgical operation, a neurosurgeon was called in to conduct a myelogram test on the plaintiff in the presence of the second defendant. The test revealed that the wire loop was pressing on the plaintiff's spinal cord. The plaintiff was taken into the operating theatre on the same day to remove the wire loop. This second operation was performed successfully by the second defendant; however, the plaintiff was only able to move her hands and her legs remained irreversibly paralysed.

In 1987 the plaintiff filed a suit in the Malaysian High Court against, inter alia, the second defendant for medical negligence. In her legal action, Miss Foo claimed that the doctor was negligent in performing the first surgical operation which caused the paralysis. She also alleged that the second defendant had failed to inform her of the risks of paralysis in the first open surgery despite her asking about the dangers and possible adverse consequences. Finally, the plaintiff claimed that the second defendant had failed to take immediate remedial action to rectify her paralysis.

The main question before the appellate court was whether the *Bolam Test* should be applied in all three categories of medical negligence. However, in coming to its decision, the Federal Court only referred to the areas of duty and standard of care of doctors in disclosure of risk in a proposed treatment.[124] Here, the Federal Court decided that the test set out in *Rogers v. Whitaker* was more suitable to be applied to the cases of medical negligence involving a doctor's duty to disclose risk. It was held that a doctor is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment to enable the patient to make an election of whether

to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment. Further, the Federal Court stated that it should be the judges rather than the doctors that would have the final say on whether the standard of care had been breached taking into consideration not only medical opinion but other factors surroundings the condition of the patient. The Federal Court was of the view that doctors, similarly to other professionals, had to take responsibility for their errors, and in the process removed the dependence on the medical community.[125]

While the decision in *Foo Fia Na* saw the adoption of the test used in *Rogers v. Whitaker*, it unfortunately also resulted in ambiguity of the continued use of the *Bolam test*. The Federal Court judgment of *Foo Fia Na* was rather unclear as to whether the Federal Court intended to decide on the application of the *Bolam test* for medical negligence in general (the original question) or only in respect of the duty to disclose risk.[126] In fact, the question of disclosure of risk was not raised before the Federal Court. Further, there were references to the High Court of Australia's decision of *Naxakis v. Western General Hospital* which extended the test of *Rogers v. Whitaker* to all areas of medical negligence which confused matters further. It was a rather muddled situation. Academic scholars and judges had differing opinions as to whether the test used in *Rogers v. Whitaker* was to replace the *Bolam test* in diagnosis and treatment.[127] There were High Court and Court of Appeal decisions that held that the *Bolam test* applied, and it was for the courts to decide whether there had been a breach of the standard of care by medical practitioners and then there were High Court and Court Appeal decisions which believed only the test in *Rogers v. Whitaker* applied to advise as to disclosure of risk and did not apply in respect of the duty to diagnose and treat.[128] The difference in approaches by the courts, unfortunately, does not reflect well on our courts, highlighting the court's disregard for the doctrine of precedent.[129]

Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors[130]

The confusion on the use of the test in *Rogers v. Whitaker* because of the Federal Court judgement of *Foo Fia Na*, finally came to an end with the Federal Court decision of *Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors.*[131]

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 collapsed because 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.

At the High Court, based on all the evidence presented in court it was concluded that at no point was the first appellant conclusively in labour, as there were no recurrent uterine contractions nor dilation of her cervix. The appellants' contention that a caesarean section should have been performed before her collapse was in hindsight, 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. The Court of Appeal by a unanimous decision, affirmed the High Court's judgment.

On appeal, the Federal Court was called to clarify a point of law namely:

> *"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."*[132]

To ascertain the uncertainty as to whether the *Bolam test* or *Rogers v. Whitaker test* should apply, the Federal Court made the following observations:[133]

- *Rogers v. Whitaker* was solely concerned with the duty to advise, and reference was made to this fact in *Foo Fio Na*. Thus, the decision in *Foo Fio Na* must certainly be limited only to the duty to advise of risks, as it did not address the standard of care required in respect of either diagnosis or treatment.

- Therefore, in relation to 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, since medical experts very often differ in opinion on diagnosis and treatment. As such, it is not a matter that the courts are equipped to resolve. In this circumstance, the *Bolam test* makes sense.

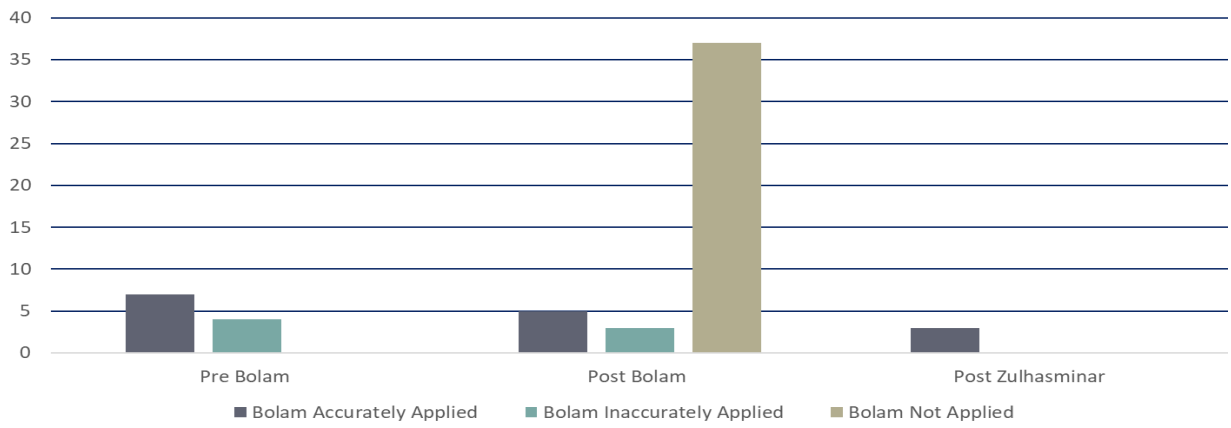
- Nevertheless, the duty to advise correlates to the right of self-determination. It is the courts which will determine whether a patient has been properly advised of the risks related with a proposed treatment.

- As such, the test in *Rogers* is restricted only to the duty to advise of risks, whereas the *Bolam test* relates to the standard of care for diagnosis or treatment.

Based on the Federal Courts observation, when it comes to the standard of care in medical negligence case, a difference had to be made between diagnosis and treatment and the duty to advise on risk.[134] Secondly, the *Bolam test* is subject to the qualification of the *Bolitho Addendum* which remained the test to use to determine the standard of care in diagnosis and treatment, mainly because it felt that the courts were not prepared to resolve these issues[135] and the thirdly, was that the test in *Rogers v. Whitaker* as followed by the Federal Court in *Foo Fio Na* will be used to determine the standard of care on the duty to advise of risk.[136] The Federal Court's decision in *Zulhasnimar* was further cemented by the Federal Court's decision in *Dr. Hari Krishnan & Anor v. Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal,*[137] where it reiterated the grounds of judgment in *Zulhasnimar*. To date, the *Bolam test* is subject to qualification of the *Bolitho Addendum* and continues to be applied to the question of the standard of care in medical negligence and treatment, and the test in *Rogers v. Whitaker* as applied by the Federal Court in *Foo Fio Na* continues to be applied to the duty to advise on risk.

3.4 ANALYSIS OF MEDICAL NEGLIGENCE CASES IN MALAYSIA

An analysis of 57 reported medical negligence cases from 2000 to 2019, have indicated that the *Bolam test* has not always been applied accurately. In a number of these cases, there was no indication that any expert evidence had been relied on to determine whether the acceptable standard of care had been met. To give clarity to the analysis, cases were analyzed according to these categories of cases pre-*Foo Fio Na,* post- *Foo Fio Na* and post-*Zulhasimar*.



In the ten reported cases pre-*Foo Fio Na*, there were 4 cases where the courts had not fully applied the *Bolam test* accurately. In the Court of Appeal decision of *Dr Jayadevan, a/l Arayan & Anor v. Sharon Simon & Ors*,[138] here, there was reliance that the evidence provided by one expert was more probable than another expert evidence. This approach contradicted the approach under the *Bolam test* where the courts must accept expert evidence even if it is the opinion of the minority. In the High Court case of *Payremalu a/l Veerappan v. Dr Amarjeet Kaur & Ors*,[139] there was no reference to medical experts to determine whether the Plaintiff had breached the standard of care. Even in the High Court decision of *Dr Soo Fook Mun v. Foo Fio Na & Anor*,[140] the *Bolam test* was not applied as the courts were more focused on the issue of causation. In the case of *Asiah bte Kamsah v. Dr Rajinder Singh & Ors*,[141] there were three areas where the *Bolam test* had to be considered by the court; firstly, the issue of technique applied and drugs administered and secondly, the time factor and the post-operative care. While the *Bolam test* had been applied regarding the time factor and post-operative factor, the *Bolam test* had been applied differently with regard to the technique applied and drugs administered. Here, the High Court did not agree with the view of the expert witness, agreeing rather with the approach taken by the defendant.

This trend continued post-*Foo Fio Na*. Due to the complexity and confusion over the judgment of *Foo Fio Na*, an overwhelming number of

courts referred to the test laid down in the High Court of Australia's decision of *Rogers v. Whitaker*. Out of the 45 cases analyzed, 37 cases applied the test as set out in *Rogers v. Whitaker*. So, while most courts chose to apply the test set down in *Rogers v. Whitaker*, a handful of courts continued to follow the *Bolam test.* At this juncture, it was only the Court of Appeal that continued to utilize the *Bolam test* in cases such as *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors*,[142] *Mohd Yusoff@ Mohammad Yusof Bin Abd Ghani & Anor v. Dr. Abd Wahab Sufarian & Anor*,[143] *Dr Noor Aini bt Haji Saád v. Sa-an Sae Lee & Anor*,[144] *Dato Dr V. Thuraisingam & Anor v. Sanmarkan a/l Ganapathy & Anor*[145] In the remaining cases which were predominantly decisions in the High Court, there was no mention of the application of the *Bolam test* or whether the test had been expressly applied. This is reflected in the High Court decisions in *Krishnan Nambiar s/o Parabakaran v. Dr. P Mahendran*[146] and Professor *Dr. Hj Mohammed Faizal bin Abdullah @ Balakrishnan a/l Krishnan v. Harvender Jeet Kaur a/p Kaka Singh*,[147] *Abdul Ghafur bin Mohd Ibrahim v. Pengarah Hospital Kepala Batas & Anor*,[148] *Ngiao Jong Nian v. Lee Chan Faoo & Anor*[149] and in the Court of Appeal decision of *Dr. Gun Suk Chyn v. Kartar Kaur a/p Jageer Singh*.[150]

However, it is interesting to note that among these 45 cases, there were a handful of cases, wherein reading of the judgments indicated that there was potentially no reference to expert evidence. As such, in these cases there was no indication of evidence of acceptable medical practice (through expert evidence) to determine the appropriate standard of care on advice and information that was given by the doctor to the patient. Regardless of whether the *Bolam test* or the test as set out in *Rogers v. Whitaker* was to be applied, reference to medical expert or evidence would be significant to determine the outcome of these cases. While the *Bolam test* has had a long history of application in medical negligence cases in Malaysia, the lack of reference to medical experts (through expert evidence), could be best

explained through the lack of clarity of the application of both the *Bolam test* and the test as set down in *Rogers v. Whitaker*.

The Federal Court decision of *Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors.*,[151] while not only confirming the position and reasserting the continued use of the *Bolam test* in the Malaysian context, it has also provided clarity as to the application of the *Bolam test* going forward. Since the decision in 2017, there has been no reported cases where the courts in applying the *Bolam test*, failed to rely on expert witnesses. It would suggest that since the affirmation of the *Bolam Test* in *Chin Keow*, it took the Federal Court in *Zulhasnimar* to not only qualify but clarify the application of the *Bolam test* in Malaysia.

CONCLUSION

Judicial decisions and the correct application of the *Bolam test* was vague and created ambiguity in relation to the standard of care in medical cases regarding diagnosis, treatment, and the duty to disclose risk in Malaysia as demonstrated by the cases analyzed. The Federal Court's decision in *Zulhasnimar* has settled the perennial question in the Malaysian courts as to what the correct test is to be applied in determining the standard of care in medical negligence cases, allowing for litigants to receive consistent judgments in the future.

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ENDNOTES:

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[14] Dr. Puteri Nemie bt Jahn Kassim, 'Medical Negligence Litigation in Malaysia: Current Trend and Proposals for Reform', 9.

[15] Ahalya Mahendra, 'The Law of Medical Negligence' [2013] 1 MLJ cvi.

[16] *Ibid*.

[17] [1957] 1 WLR 582.

[18] *Ibid*.

[19] [1957] 1 WLR 582.

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[24] Jahn Kassim (n 16) [11].

[25] Samanta & Samanta (n 24) [444].

[26] See *Edward Wong Finance Co Ltd v. Johnson, Stokes & Masters* [1984] AC 296.

[27] *Maynard v. West Midlands Health Authority* [1985] 1 All ER 635.

[28] Samanta & Samanta (n 24) [444].

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[30] Mulheron (n 13) [611].

[31] Teff H. 'The standard of care in medical negligence – moving on from Bolam?' Oxford Legal Studies 1998; 18:473-84.

[32] Kumaralingam (n 25) [667].

[33] Mulheron (n 13), [612].

[34] Samanta & Samanta (n 24) [443].

[35] *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

[36] [1995] P.I.Q.R. P281.

[37] Mulheron (n 13) [612].

[38] [1985] 1 All ER 643.

[39] Mulheron (n 13) [612].

[40] [1997] 4 All ER 771.

[41] *Bolitho v. City & Hackney Health Authority* [1985] 1 All ER at 771.

[42] *Ibid*.

[43] Mulheron (n 13) [613].

[44] *Ibid* [609].

[45] [2000] Lloyds Rep Med 41; see also *Marriot v. West Midlands Health Authority* [1999] Llyods Rep Med 23; *Pearce v. United Bristol Healthcare NHS Trust* [1998] 48 BMLR 118.

[46] *Ibid*.

[47] Samanta & Samanta (n 24) [443].

[48] [2015] UKSC 11.

[49] *Ibid*.

[50] Test of Materiality – In the circumstances of the case, a reasonable person in the patient's position would be likely to attach significance to the risk or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.

[51] [1985] 1 All ER 643.

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[53] Cyrus Das, 'Recent Developments in the Common Law and their Reception in Malaysia' (Paper presented at the Conference on the Common Law in Asia, University of Hong Kong, 15-17 December 1986).

[54] Alan Watson, 'Legal Transplants' (University of Georgia Press, 2nd ed, 1993) 20.

[55] Joseph Ming Yong Lee, 'The Standard of Medical Care In Malaysia: The Case For Legislative Reform' thesis submitted for Master of Laws University of Tasmania, November 2012 at page 107.

[56] [1967] 1 LNS 25; [1967] 1 MLJ 138.

[57] *Ibid.*

[58] [1998] 1 CLJ 533; [1998] 1 MLJ 57.

[59] [1967] 1 LNS 25; [1967] 1 MLJ 138.

[60] *Ibid.*

[61] [1964] 1 LNS 22; [1964] 1 MLJ 322b.

[62] [1965] 1 LNS 44; [1965] 2 MLJ 91.

[63] [1967] 1 LNS 174; [1968] 1 MLJ 138.

[64] *Ibid*.

[65] The older cases referred in the case of *Swamy v. Mathews* is *Lanphier v. Phipos* (1838) 173 ER 581: (1838) 8 Car & P 475 and *Hatcher v. Black* [1954] CLY 2289.

[66] Majority of the justices of the Federal Court in *Swamy* consisted of Barakbah LP and Azmi J. Ong Hock Thye J dissented.

[67] (1838) 173 ER 581.

[68] [1967] 1 LNS 174; [1968] 1 MLJ 138, 139.

[69] [1960] 1 LNS 24; [1970] 2 MLJ 171.

[70] *Ibid.*

[71] [1981] 1 LNS 208; [1982] 1 MLJ 128.

[72] A procedure where a tube called a sigmoidoscope is inserted through the rectum to examine the lining of the colon.

[73] [1960] 1 LNS 24; [1970] 2 MLJ 171, 172.

[74] *Ibid*.

[75] A condition where there is female genital malformation where two ‘horns’ form at the upper part of the uterus.

[76] [1981] 1 LNS 208; [1982] 1 MLJ 128.

[77] *Ibid*.

[78] [1981] 1 LNS 208; [1982] 1 MLJ 128 p 129.

[79] [1957] 1 WLR 582.

[80] [1960] 1 LNS 24; [1970] 2 MLJ 171.

[81] [1981] 1 LNS 208 p 209; [1982] 1 MLJ 128 p 131.

[82] [1998] 1 CLJ 533; [1998] 1 MLJ 57.

[83] *Ibid*.

[84] An eye disease that affects prematurely born babies. It may lead to blindness in serious cases.

[85] The age of majority in Malaysia, as defined by Section 3(1) of the Age of Majority Act 1971 (Malaysia), is eighteen years old.

[86] Some of the cases cited were *Hunter v. Hanley* [1955] SC 200 and *Rich v. Pierpoint* (1862) 176 ER 16: [1862] 3 F & F 35.

[87] [1985] 1 All ER 635.

[88] [1981] 1 All ER 267.

[89] Interestingly, for the first time, English House of Lords decisions were cited by the Malaysian appellate court in their decisions dealing with issues of medical negligence of diagnosis and treatment.

[90] [1985] 1 All ER 635, 639 (Lord Scarman).

[91] *Chin Yoon Hiap* [1998] 1 CLJ 533 at 549; [1998] 1 MLJ 57 at 73.

[92] *Ibid*.

[93] Joseph Ming Yong Lee, 'The Standard of Medical Care in Malaysia: The Case for Legislative Reform' thesis submitted for Master of Laws University of Tasmania, November 2012, 113.

[94] See *Hong Chuan Lay v. Dr Eddie Soo Fook Mun* [2005] 4 CLJ 865; [2006] 2 MLJ 218, 220 - the Court of Appeal affirmed the application of the *Bolam test* by the High Court (an alleged misdiagnosis of the plaintiff's numbness in his fingers which led to subsequent surgical operations on cervical spine that brought about partial paralysis of the plaintiff's legs and his inability to maintain urinary and bowel control); *Udhaya*

Kumar A/L Karuppusamy v. Penguasa Hospital Daerah Pontian [2005] 1 CLJ 143 at 167; [2004] 2 MLJ 661 at 685 (High Court) (delayed treatment of a fever and as a result of which the first plaintiff was mentally retarded); *Asiah Bte Kamsah v. Dr Rajinder Singh* [2001] 4 CLJ 269; [2002] 1 MLJ 484, 492 (High Court) (a caesarean operation on the plaintiff which eventually led to brain damage) and *Dr K S Sivananthan v. Government of Malaysia* [2000] 7 CLJ 408; [2001] 1 MLJ 35, 44 (High Court) (internal fixation of the plaintiff's fractured leg which later resulted in leg amputation) which was referred to by Joseph Ming Yong Lee in, 'The Standard of Medical Care in Malaysia: The Case for Legislative Reform' thesis submitted for Master of Laws University of Tasmania, November 2012 at page 113.

[95] [1960] 1 LNS 24; [1970] 2 MLJ 171.

[96] [1981] 1 LNS 208; [1982] 1 MLJ 128.

[97] (1982) 33 SASR 189 (SC of South Australia).

[98] (1982) 33 SASR 189 (SC of South Australia).

[99] [1993] 4 Med LR 79.

[100] [1993] 4 Med LR 79.

[101] *Ibid*.

[102] *Ibid*.

[103] Puteri Nemie Jahn Kassim, 'Abandoning the Bolam Principle in Doctor's Duty to Disclose Risks in Malaysia: Are We Heading in the Right Direction?' [2007] LR 1.

[104] 192-193 [1993] 4 Med LR 79.

[105] Jahan Kassim, 'Abandoning the Bolam Principle' (n 105), 1.

[106] *Ibid*.

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[110] Kumaralingam (n 25) [671].

[111] *Ibid* [671].

[112] Joseph Lee, 'The Standard of Medical Care in Malaysia: The case for Legislative Reform', The Australian Journal of Asian Law, 2013, Vol 14, No. 2 Articled 2: 1 – 19, 2.

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[115] Dr Puteri Nemie Jahn Kassim, 'Law and Ethics Relating to Medical Profession', International Law Book Services, 2016, 113.

[116] [1997] 5 CLJ 250; [1996] 4 MLJ 674.

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[118] *Ibid*.

[119] [1997] 5 CLJ 250; [1996] 4 MLJ 674.

[120] *Ibid*.

[121] [1997] 5 CLJ 250 at p 266; [1996] 4 MLJ 674 at p 690.

[122] *Ibid*.

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[125] Prof. Dr. Puteri Nemie bt Jahn Kassim & Dr. Puteri Shanaz bt Jahn, 'The Medical Profession', Societal Demands and Developing Legal Standards [2014] 5 MLJ cxxxvii, 4.

[126] Kumaralingam (n 25) [678].

[127] Joseph Lee (n 114) [1].

[128] *Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors* [2017] 8 CLJ 605 at p 629; [2017] 5 MLJ 438 at p 460.

[129] Kumaralingam (n 25) [682].

[130] *Zulhasnimar bt Hasan Basri & Anor v. Dr. Kuppu Velumani P & Ors* [2017] 8 CLJ 605 at p 629; [2017] 5 MLJ 438 at p 460.

[131] *Ibid* [682].

[132] [2017] 8 CLJ 605 at p 629; [2017] 5 MLJ 438 at p 461.

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[136] *Ibid*.

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