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THE STANDARD OF CARE APPLICABLE TO PRACTITIONERS OF ALTERNATIVE MEDICINE

Shakoor v *Situ*[1]

I. INTRODUCTION

THE proposition that a doctor who is sued in negligence is to be judged by the standard of competence applicable to his profession as a whole rather than by his own individual level of experience or expertise is well established and generally accepted.[2] Equally well established and generally accepted, however, is the proposition that the level of expertise required of a professional under tort law is to be determined in the light of that professional's qualifications and background, taking into account the area of his profession in which he practises and level of specialisation or expertise which he claims to possess.[3] For this reason, a general practitioner is not expected

1 [2001] 1 WLR 410 *("Situ").*

2 *Wilsher* v *Essex Area Health Authority* [1987] QB 730 (Court of Appeal), [1988] AC 1074 (House of Lords). Mustill LJ in the Court of Appeal (at 750) rejected the notion that the standard of care required of a doctor should be lowered to take account of his lack of experience: "... this notion of a duty tailored to the actor, rather than the act which he elects to perform, has no place in the law of tort ... To my mind it would be a false step to subordinate the legitimate expectation of the patient that he will receive from each person concerned with his care a degree of skill appropriate to the task which he undertakes to an understandable wish to minimise the psychological and financial pressures on hard-pressed young doctors."

3 See the direction to the jury by McNair J in *Bolam* v *Friern Hospital Management Committee* [1957] 1 WLR 582, at 587 *("Bolam"):* "The test is the standard of the ordinary skilled man exercising and professing to have *that special skill.* A man need not posses the highest expert skill at the risk of being found negligent ... it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising *that particular art*" (emphasis added). For further discussion of this case, see *infra,* note 13 *et seq.* A practical example of the fact that the standard required depends on what a professional 'holds himself out' as able to do, can be seen in the earlier case of *Philips* v *William Whiteley Ltd* [1938] 1 All ER 566 *("Philips")*, in which a woman who had her ears pierced by a jeweller, and who subsequently suffered from an infection, claimed that the jeweller had not conformed to the highest standards of hygiene and skill when carrying out the procedure. It was held that, even if the infection was due to the piercing, it was not reasonable to expect a jeweller to adopt the standards of a surgeon.

to demonstrate a level of skill in a specific area equal to that of a specialist, nor is a doctor specialising in a very limited area required to demonstrate a wide range of abilities in other areas (although in either situation a doctor will, of course, be negligent if he fails in appropriate circumstances to refer a patient to another doctor who does possess the requisite levels of knowledge and skill).

The inherent tension between the two propositions – that there is a common standard applicable to all doctors, but that different doctors are recognised as specialising in different areas and even different forms of medicine – can lead to particular difficulties when a court is asked to determine whether a practitioner in an esoteric or unusual field who adopts unorthodox forms of treatment has acted negligently.

Some thirty years ago, such a difficulty was discussed briefly in the Singapore case of *Ang Tiong Seng* v *Goh Huan Chir,*[4] in which a Chinese physician (or "sinseh") was sued in negligence by a patient whose arm became gangrenous and had to be amputated following his inadequate treatment. The physician argued that he should not, as a Chinese physician, be held to the same standard of care and skill as that expected from a medical practitioner with conventional qualifications. Since, however, the facts showed that the physician had been negligent by any standards, the Court of Appeal did not, in the event, have to address the issue of whether he ought to have been judged by a different (and effectively lower) standard. In the middle of the last decade, *Ang Tiong Seng* was followed by the High Court in Johor Bahru in the case of *Abdul Rahman bin Abdul Karim* v *Abdul Wahab bin Abdul Hamid,*[5] in which a patient lost the sight in his right eye following two operations which were carried out by a traditional eye healer. The healer was held liable to the patient in negligence. However, in view of the fact that the operations in that case were of a kind which ought to have been performed by a qualified eye doctor rather than by a traditional eye healer who did not possess the necessary training or expertise to perform them, the decision was based simply on the fact that the defendant had wrongly done something which he was unqualified to do.[6] The question of whether he would have been negligent had he offered alternative treatment of the kind associated with his calling was not, therefore, at issue.

4 [1970] 2 MLJ 271 *("Ang Tiong Seng").*

5 [1996] 4 MLJ 623 *("Abdul Rahman").*

6 The judge, Abdul Malik Ishak J, referred (at 636) to the *Bolam* test (see *supra,* note 3, and i*nfra,* note 13), and observed: "It is obvious that the law does not impose a very high standard. The question to ask is whether what the defendant did was in accordance with the practice accepted by reasonable persons. Although traditional eye medicine does play a role in our society, yet it is wrong for a traditional eye healer like the defendant to conduct an eye operation if he is not trained to perform it."

The standard of care applicable to persons practising Chinese or other forms of alternative medicine, rather than orthodox or "western" medicine, was thus left open in the wake of both *Ang Tiong Seng* and *Abdul Rahman,* and so it has remained until recently. Now, though, in the English case of *Situ*, the question has finally been addressed directly, and a conclusion with respect to the issue of differing standards for different types of medicine has been reached. The decision is particularly interesting and timely in the Singapore context, given the recent enactment here of the Traditional Chinese Medicine Practitioners Act 2000,[7] which is designed to control the registration of traditional practitioners of Chinese medicine.[8]

II. The Facts

In *Situ,* the defendant, Mr Kang Situ, was a practitioner of traditional Chinese herbal medicine ("TCHM"), who had trained in China for five years in the theoretical and practical application of both traditional Chinese medicine – which included herbal medicine – and what was described as 'modern' medicine. Mr Situ had qualified in 1982 (with an excellent grade) and he had subsequently obtained a diploma in acupuncture. He had then practised as a doctor in Beijing for five years, before moving to Britain in 1988, where he began to practise TCHM in 1993. Mr Situ was not qualified to practise as a doctor in Britain, and was therefore not subject to regulation by licensing or registration. He was, however, a voluntary member of an association called the Register of Chinese Herbal Medicine, which was established in 1987 with the aim of "safeguarding and promoting the interests of practitioners of traditional Chinese medicine and the welfare of their patients." As a member of this association, Mr Situ was required to meet standards of competence by examination, and he was subject to a code of ethics similar to that governing the medical profession in Britain.

The plaintiff, Mrs Kauser Shakoor, was the widow of a Mr Abdul Shakoor, who had died from acute liver failure after being treated with a classic formula of traditional Chinese herbal medicine by Mr Situ. Mr Shakoor was thirty-two years old when he died, and had always enjoyed good general health, apart from the fact that he suffered from multiple benign lipomata. This is a condition in which fatty tissue collects just below the surface of the skin. It does not pose any threat to the overall health of a sufferer, but there is no known treatment in western medicine other than surgery.

[7] No 34 of 2000. With the exception of ss 24 and 25, the Act came into operation on 7th February 2001.

[8] For further discussion of the Act, see *infra,* text at note 25 *et seq.*

In November 1994 Mr Shakoor, presumably seeking an alternative to surgery, consulted Mr Situ. As a result of this consultation, Mr Situ gave Mr Shakoor ten individual sachets of herbs, which were to be boiled for two hours, reduced to a decoction, and taken every two days. Mr Shakoor took nine doses, but then became very sick. He consulted his general practitioner in December 1994, and in early January 1995 he was referred to a medical centre where it was concluded that he was probably suffering from Hepatitis A. Liver function tests showed acute liver failure. Liver transplant surgery was performed in the middle of January, but Mr Shakoor died three days later. On his death, the remaining sachet of herbs was examined by the coroner. There was no evidence that any of the herbs failed to meet acceptable standards of quality.[9]

The expert evidence on both sides established that, on the balance of probabilities, the cause of the damage to Mr Shakoor's liver (and thus the cause of his death) was the decoction, but that although the ingredients in the decoction were biologically active, they were neither toxic nor hepatotoxic either individually or collectively. The conclusion was that Mr Shakoor had experienced a rare and unpredictable idiosyncratic reaction to them. The reaction was extremely severe, and it was impossible to determine whether it had been caused by one or all of the doses – it was possible that even a single dose could have "set the whole process into irreversible motion",[10] although the risk of catastrophic damage to the liver might have been increased by further doses.

Given these findings, the case turned on the single argument that, applying the risk/benefit factor, Mr Situ had been negligent in prescribing the decoction, or at least negligent in prescribing it without warning Mr Shakoor of the risk of injury to which he might be exposed. This argument was based primarily on the fact that a number of papers and letters had been published in "The Lancet" and other medical journals (none of which Mr Situ had read) suggesting that there were certain known risks of damage to the liver associated with the ingestion of Chinese herbal medicines of the kind prescribed by Mr Situ. Since western medicine did not recognise such herbal remedies as being beneficial in treating lipomata, it was therefore argued that Mr Situ should not have prescribed the treatment to Mr Shakoor at all, or that, in prescribing it, he should at least have warned Mr Shakoor of the relevant risks. Addressing this argument, Mr Situ brought evidence that the Chinese medical textbooks and periodicals on which he had relied indicated that the treatment was completely safe with no adverse effects,

[9] Although there was some evidence that one of the ingredients might be hepatotoxic, this evidence was unclear, and it was contradicted by other evidence and rejected by the judge.

[10] *Supra,* note 1, at 413.

and he therefore argued that, having acted in accordance with the highest standards of TCHM, he should not be held to have acted negligently.

III. The Decision

In the Queen's Bench Division of the High Court, the judge, Bernard Livesey QC,[11] considered the criteria by which Mr Situ's standard of care was to be determined as crucial to the outcome of the dispute. In this respect, his Honour asked the fundamental question:

> Is he to be judged by the standards of the reasonably careful practitioner of Chinese herbal medicine or according to the standards applicable to orthodox medical practitioners in this country?[12]

Observing that there were no cases on point in any common law jurisdictions, he therefore set about undertaking the task of deciding this question.

One approach would have been to have accepted the submission of counsel for Mr Situ that the *Bolam* test[13] (described by the House of Lords in *Bolitho* v *City and Hackney Health Authority* as the "locus classicus of the test for the standard of care required by a doctor")[14] should be applied in circumstances such as these without any modification to take account of the fact that this case concerned Chinese herbal medicine, as opposed to orthodox western medicine.[15] Under this test, a doctor:

> ... is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a responsible body of medical men *skilled in that particular art* ... Putting it the other way round, a man is not negligent, if he is acting in accordance with a practice, merely because there is a body of opinion who would take a contrary view.[16]

[11] Sitting as a deputy High Court judge.

[12] *Supra,* note 1, at 414.

[13] See *supra*, note 3.

[14] [1998] AC 232, at 239 *("Bolitho").*

[15] Counsel for Mr Situ argued that, since there had been no evidence from a practitioner of TCHM that the prescription of the herbal remedy was negligent, the court could not hold Mr Situ liable. This argument was based on the case of *Sanson* v *Metcalfe Hambleton & Co* [1998] 2 EGLR 103, in which the Court of Appeal held that the trial judge in that case had not been entitled to find a surveyor professionally negligent based only on the evidence of a structural engineer, since the surveyor did not profess to exercise the same level of skill as the engineer.

[16] *Supra,* note 3, at 587, as referred to in *Situ* at 414. (Emphasis added by Bernard Livesey QC).

However, although his Honour would automatically have applied this test had the case concerned an accepted branch of orthodox medicine, he was less sure whether it should apply as it stood to a case involving an alternative practitioner. In particular, he questioned whether the application of the *Bolam* test should mean that "whatever the alternative therapy, those who practice 'the same art' as the practitioner are able to dictate to the court the standards in accordance with which he is to be judged ...".[17]

The opposite approach would have been to have accepted the submission of counsel for Mrs Shakoor that a person who held himself out in Britain as a medical man specialising in the treatment of skin diseases must be judged not only by the standards of those practising his art but also by the standards of orthodox western practitioners of the same art. However, his Honour was not entirely happy with this approach either. As he observed, a Chinese herbalist (or other such practitioner) does not hold himself out as a practitioner of orthodox western medicine, and a patient who consults such a practitioner has made the conscious decision to use (and pay for) his services rather than those of an orthodox practitioner. The decision might be an enlightened one based on careful research or it might be an ill-informed one based on little more than superstition. Either way, his Honour was of the view that:

> ... the fact that the patient has chosen to reject the orthodox and prefer the alternative practitioner is something important which must be taken into account. Why should he later be able to complain that the alternative practitioner has not provided him with skill and care in accordance with the standards of those orthodox practitioners whom he has rejected?[18]

It had to be borne in mind, though, that since Mr Situ had chosen to practise in Britain, he was obliged to abide by the laws and standards prevailing there. Had his qualification as a doctor been recognised, he could not have avoided a finding of negligence simply by showing that he had complied with the standard of care applicable in Beijing. In light of these conflicting considerations, how was the appropriate standard to be assessed? His Honour reached the conclusion that:

[17] *Supra,* note 1, at 415. His Honour accepted evidence that TCHM has a long and distinguished history, and that, given its continued prevalence in China, a larger proportion of the world's population is treated by it than is treated by modern or western medicine. However, based on the evidence before him, he was unable to determine the standard of care prevailing in China or how that standard would compare with the standard of medicine in Britain.

[18] *Ibid,* at 416.

> ... when a court has to adjudicate on the standard of care given by an alternative medical practitioner it will, pace *Bolitho*[19] ... often (perhaps invariably) not be enough to judge him by the standard of the ordinary practitioner "skilled in that particular art"; it will often be necessary to have regard to the fact that the practitioner is practising his art alongside orthodox medicine; the court will need to consider whether the standard of care adopted by the alternative practitioner has taken account of the implications of this fact. The implications may vary depending upon the area of expertise and specific act or omission which is under scrutiny in the individual case.[20]

In a case such as this one, where an alternative practitioner had prescribed a remedy (whether herbal or chemical) to a patient, there were several implications to be considered:

(a) The alternative practitioner must recognise that he was holding himself out as competent to practise within a system of law and medicine which would review the standard of care which he was giving the patient;

(b) In prescribing a remedy, the alternative practitioner must ensure that the remedy was safe – it would not be sufficient merely to rely on the fact that the remedy was traditional and was not believed to be harmful;

(c) The alternative practitioner must recognise the possibility that anyone suffering an adverse reaction to the remedy might well be treated in an orthodox hospital and that, as a result, orthodox medical journals might contain information about such a reaction. He ought therefore to take steps to ensure that there was no information in such journals which ought to affect his use of the drug. The relevant medical journals would be those which an orthodox practitioner practising at the same level of speciality would have consulted. (This would not, however, require the alternative practitioner to read the relevant journals himself. It would be sufficient for him to subscribe to an "association" which would search out such information and make it known to him. Only if he did not subscribe to such an association would he have failed to discharge his duty to act carefully.)[21]

[19] *Supra,* note 14.
[20] *Supra,* note 1, at 417.
[21] *Ibid.*

Based on these implications, his Honour held that Mrs Shakoor could have succeeded if she had called an expert in the speciality (which in this case he held to be an ordinary careful general practitioner) to show that Mr Situ had failed to exercise the level of care and skill appropriate 'to that art'. This she had not done. Alternatively, she could have succeeded if she had been able to prove that the prevailing standard of care and skill in that art in Britain was deficient in the light of the relevant risks. Having examined the various journals in which the risks of damage to the liver associated with herbal remedies of the kind dispensed by Mr Situ were reported, his Honour concluded that the warnings contained therein were not sufficient, on a risk/benefit analysis, to lead to the conclusion that it was unacceptable to prescribe such remedies.

There were four main reasons for this finding. The first was that his Honour was not prepared to hold that TCHM could not alleviate or cure lipomata. Secondly, he was not prepared to hold that an ordinary careful general practitioner would have been negligent if he had failed to read and take notice of the letters and articles in the various journals. Thirdly, even if an ordinary careful general practitioner had read and taken notice of the letters and articles, they would not necessarily have led him to conclude that such a herbal preparation was too hazardous to prescribe.[22] And finally, experts on both sides had acknowledged that adverse drug reactions leading to liver injury could arise with a number of commonly prescribed western medicines – including some antibiotics, anti-epileptics and antipsychotic drugs. Indeed, the evidence established that the risk of unpredictable responses leading to liver disease was substantially lower with Chinese herbal medicines than it was with modern chemical medicines. Given that the chances of an adverse reaction were so small, his Honour therefore concluded that a doctor would not have been obliged to give a warning, and that even if a warning were to have been given, "the risk could legitimately have been presented as being so small that I do not believe an appropriate warning would have had the effect of dissuading anyone, let alone the deceased, from taking the treatment".[23]

IV. Conclusion

Although *Situ* is only a first instance decision, this writer is of the opinion that the judgment is to be applauded for its spirit of compromise and common sense.

[22] Thus, Mr Situ's failure to read or be informed of the content of the letters and articles was not causally relevant to the question of his negligence.

[23] *Supra,* note 1, at 420.

To judge an alternative practitioner by exactly the same standards as those of an orthodox one would be to ignore the sensible and fair rule that a professional should be judged by his "own art" rather than by someone else's. It would also fail to take account of the fact that a patient who consults an alternative practitioner does so for a reason. In disregarding the patient's conscious choice to depart from the established path and to opt for something less conventional, a court would ignore the reality of the situation, and might even allow an action based on a standard of care which the patient did not actually expect at the time when he chose to try an alternative remedy.

On the other hand, to give an alternative practitioner effective *carte blanche* with respect to his practices and procedures would be irresponsible. Even if one were to place on one side cases involving individuals who are members of such obviously eccentric organisations that the courts would not recognise them as a bodies 'engaged in the practice of medicine' in the first place, and even if one were to take into account the fact that in appropriate situations a court has the power, anyway, to find that the professional opinion within an organisation is unsound and thus negligent,[24] it would still be dangerous to establish a rule that in situations falling short of these extremes the only relevant standard for a practitioner who is a member of an organisation which is not controlled by any formal medical regulations is the standard set by the organisation itself.

The middle ground is that represented by the decision in *Situ.* An alternative practitioner is to be judged by the standards applicable to his own art, but with regard being had to the area of orthodox medicine to which that art relates. He will be free to offer a quite different form of treatment from that offered by conventional medicine, but at the same time he must be aware of any significant drawbacks or concerns which conventional medicine would recognise with respect to that treatment.

Is the decision in *Situ,* then, likely to be followed by the local courts? It is clear that the previously fairly liberal approach to the practice of Chinese medicine in Singapore has come to an end with the Traditional Chinese Medicine Practitioners Act 2000, under which persons who wish to practise Chinese medicine must apply to have their names added to the Register of Traditional Chinese Medicine Practitioners. The Register is to be kept by the Traditional Chinese Medicine Practitioners Board, an organisation

[24] See discussion, *ibid,* at 416.

medicine[25] in Singapore. Successful applicants will obtain certificates prescribing the area or areas of traditional Chinese medicine in which they are registered to practise. The Board has wide powers to refuse or cancel registration.[26] Persons who unlawfully practise, or hold themselves out as qualified to practise, traditional Chinese medicine will commit offences under the Act for which fines of up to $50,000 and terms of imprisonment of up to two years may be imposed.[27] The Act has already been supplemented by relevant regulations.[28] It appears from publicity surrounding the legislation that the intention is to improve standards and to keep practitioners of Chinese medicine on a tight rein.[29]

In the light of this Act, and in view of the fact that in the comparatively recent decision in the criminal case of *Lim Poh Eng* v *PP*,[30] the Chief Justice, Yong Pung How, had little sympathy for a practitioner of Chinese medicine who was appealing against a ten month prison sentence for negligent treatment which resulted in a patient permanently losing the use of her rectum, the

25 Under s 2 of the Act, the "practice of traditional Chinese medicine" means (a) acupuncture; (b) the diagnosis, treatment, prevention or alleviation of any disease or any symptom of a disease or the prescription of any herbal medicine; (c) the regulation of the functional states of the human body; (d) the preparation or supply of any herbal medicine on or in accordance with a prescription given by the person preparing or supplying the herbal medicine or by another registered person; (e) the preparation or supply of any substances specified in the Schedule to the Act; (f) the processing of any herbal medicine; and (g) the retailing of any herbal medicine, on the basis of traditional Chinese medicine. Under s 14 of the Act, the Minister may, by order published in the Gazette, declare any type of practice of traditional Chinese medicine as a prescribed practice if he is of the opinion that this is in the public interest.

26 See ss 15 and 19.

27 See ss 24 to 26.

28 The Traditional Chinese Medicine Practitioners (Registration of Acupuncturists) Regulations 2001 and the Traditional Chinese Medicine Practitioners (Register and Practising Certificates) Regulations 2001. Acupuncture has also been declared as a prescribed practice of traditional Chinese medicine under the Traditional Chinese Medicine Practitioners (Prescribed Practice of Traditional Chinese Medicine) Order 2001.

29 See, *eg,* an article published in "The Straits Times" on 29th May 2001, entitled: "Better sinsehs may see ban on some herbs eased", with the subheading: "Health Ministry offers deal to purveyors of traditional medicine in return for a rethink on standards". The article refers to the Government seeking to encourage dispensers of traditional Chinese medicine to boost their standards and improve training (possibly by using a formal training syllabus) following the introduction of last year's legislation. It goes on to say that if this is done, then some of the traditional Chinese medicines which are currently banned in Singapore may be approved for use here.

30 [1999] 2 SLR 116. The case is a particularly interesting one since the Chief Justice (at 125) held that the standard of negligence in criminal cases should be the civil standard of negligence. This conclusion was reached on the basis that "an intermediate standard of negligence would be too elusive a standard to be workable."

message in Singapore seems to be that those who practice Chinese medicine must tread very carefully. It is therefore possible that the courts here might adopt an even stricter approach than that in *Situ,* and hold that all practitioners of all forms of medicine must be governed by the standards applicable to practitioners of conventional medicine.

This writer would, however, suggest that the standard of care required under *Situ* is sufficiently high to safeguard the interests of the public[31] whilst at the same time allowing them access to less conventional forms of medicine, given that it requires a practitioner of alternative medicine to have a sound knowledge of areas with respect to which substantial concern has been expressed[32] by practitioners of conventional medicine in his field.[33] The case thus gets the balance between fairness to the patient and fairness to his alternative practitioner just about right: The alternative practitioner should be judged by his own art, but it must be borne in mind that the society within which that art is practised has certain legitimate expectations based on its mainstream medical culture. Even in the light of the recent legislative changes which have taken place in Singapore, such an approach offers a sensible starting point for developing the relevant law here.

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[31] The number of people consulting practitioners of traditional Chinese medicine in Singapore cannot be determined with any degree of accuracy. However, it was reported in "The Straits Times" on 29th May 2001 (see *supra,* note 29) that almost half the population here has consulted a practitioner of traditional Chinese medicine at one time or another, and that about 12% of the people seeking medical treatment each day go to such practitioners. The Report on Traditional Chinese Medicine produced in 1995 by the Committee on Traditional Chinese Medicine estimated that there were between 400 and 500 full-time practitioners of traditional Chinese medicine here, with a number of additional part-time practitioners.

[32] In this respect, Mr Situ was actually rather fortunate. He was completely unaware of the British medical journals in which concerns about Chinese herbal remedies were expressed. He escaped liability only because the relevant concerns were held, after the event, to have been of insufficient weight to require practitioners to take account of them. In the light of the decision in this case, he and other alternative practitioners would be ill-advised to risk such a level of ignorance about the concerns of conventional medicine in future.

[33] The way in which the alternative practitioner is to be made aware of such areas of concern and informed of the weight which should be attached to them is, however, one aspect of the decision which might require practical refinement. The workability of the suggestion that the alternative practitioner be kept informed of relevant concerns by subscribing to an appropriate association – which will itself need to possess a high level of knowledge – is perhaps open to doubt. It is, though, probably more realistic than actually requiring the practitioner himself to read and digest numerous medical publications dealing primarily with areas in which he will be unversed.

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