Singapore Journal of Legal Studies
[2003] 601–609

DR. KHOO JAMES & ANOR. v. GUNAPATHY D/O MUNIANDY AND ANOTHER APPEAL: IMPLICATIONS FOR THE EVALUATION OF EXPERT TESTIMONY

DISA **SIM***

I. INTRODUCTION

In *Dr. Khoo James & Anor v. Gunapathy d/o Muniandy and another appeal*,[1] the Court of Appeal affirmed the *Bolam* test and justified it primarily on the basis that the courts did not possess the necessary technical expertise to be a competent arbiter of medical standards. The court also indicated that the *Bolam* test was confined to cases involving the medical profession.

Although the significance of *Gunapathy* lies primarily in the way it clarified the scope of the *Bolam* test, the case has two implications for the way the courts should approach expert testimony in general. First, if it is true that the judges do not possess sufficient expertise to adjudicate on issues of medical practice, it undermines the widely-held assumption that judges can choose between conflicting testimony from medical experts on issues of fact. Second, if the general tenor of *Gunapathy* is followed, the testimony of medical experts should be treated with more deference than the testimony of other experts.

II. THE SCOPE OF THE *BOLAM* TEST IN MEDICAL NEGLIGENCE CASES

In *Gunapathy*, the parties disagreed over the interaction of the tests expressed in *Bolam v. Friern Hospital Management Committee*[2] and *Bolithio v. City*

* LL.B. (Hons) (NUS); LL.M. (Harv); Advocate & Solicitor (Singapore); Attorney and Counsellor-at-Law (New York State); Assistant Professor, Faculty of Law, National University of Singapore. I would like to thank Associate Professor Michael Hor for his invaluable comments and guidance. All errors, however, remain mine alone.

1 [2002] S.L.R. 414 [*Gunapathy*].

2 [1957] 1 W.L.R. 582 [*Bolam*].

and Hackney Health Authority.[3] According to *Bolam*:

> A doctor is not guilty of negligence if has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.[4]

The 'pro-doctor' cast of this test meant that it was very difficult for a plaintiff to prove that a medical professional had been negligent. For example, a doctor accused of negligent treatment would be able to escape liability as long as responsible members of his profession testified that he had adhered to sound medical practice. The plaintiff would not succeed even if he adduced evidence that others in the same profession disagreed.

In *Bolithio*, however, Lord Browne-Wilkinson expressed the view that the court was not bound to find for a defendant doctor simply because a body of experts testified in his favour:

> [I]n my view the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice ... the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.[5]

In the opinion of the Court of Appeal, *Bolithio* did not materially change the ambit of the *Bolam* test. Rather, it simply gave expression to an underlying assumption of the *Bolam* test—that the court would not find for the defendant doctor unless the expert testimony first fulfilled the threshold test of logic.[6] This was essentially a two-stage enquiry.

At the first stage, the court had to be satisfied that the expert had directed his mind to all the comparative risks and benefits relating to the matter. At the second stage of the enquiry, the court had to be satisfied that the expert had arrived at a "defensible conclusion" as a result of the balancing process. The Court of Appeal expressly warned that this open-textured

---

3 [1998] A.C. 232 [*Bolitho*].

4 *Bolam, supra* note 2 at 587.

5 *Bolitho, supra* note 3 at 241–2.

6 *Gunapathy, supra* note 1 at 433, para. 63.

phrase should not be interpreted in a manner that gave the courts the power to determine whether the impugned medical practice was 'reasonable'.[7] Rather, all the courts had to do at this stage was ensure that the medical opinion was internally consistent on its face and that it did not fly in the face of "proven extrinsic facts" or "known medical facts or advances in medical knowledge".[8]

Provided that the expert testimony satisfied this two-stage test of logic, it would be considered as representative of a 'responsible' body of the medical opinion and the defendant doctor would not be found guilty of medical negligence. According to the court, the *Bolam* test applied equally to issues of negligence arising from medical treatment, advice and diagnosis.

III. Implications for the Treatment of Medical Expert Testimony on Issues of Fact

The Court of Appeal gave two main reasons for its reserved approach towards medical negligence cases. First, it perceived that the judiciary did not possess the necessary expertise for a more interventionist approach. Second, it feared that a more interventionist approach would lead to defensive medical practices. However, as is clear from the passages below, the primary reason why the court approved of the *Bolam* test was because it perceived that the judiciary did not possess sufficient expertise in medical issues. The spectre of defensive medicine was but a secondary factor in the court's deliberations:

> While we were ably aided by counsel from both sides in their painstaking exposition of the medical issues at hand, we note that a lawyer-judge undertakes such an enterprise at his own peril. As the appeals have aptly demonstrated, medical arguments often take on a life of their own. Riposte follows rebuttal, as no two doctors seem to agree on the thorny issues that inhabit the frontiers of medical science. *The lawyer-judge, while eminently equipped to follow such arguments, finds himself quite out of his depth when called upon to adjudicate over them.* This is why the legal principle in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118[1957] 1 WLR 582 restrains the judiciary from treating medical experts as they would any other … *It would be pure humbug for a judge, in the rarified [sic] atmosphere of the courtroom and with the benefit of hindsight, to substitute his opinion for that of the doctor in the consultation room or operating chamber. We often enough*

7 *Gunapathy, supra* note 1 at 433, para. 65.

8 *Gunapathy, supra* note 1 at 433–4 at paras. 64–65.

> *tell doctors not to play god; it seems only fair that, similarly, judges and lawyers should not play at being doctors.*[9]
>
> …
>
> *At the heart of the Bolam test is the recognition that judicial wisdom has its limits. A judge, unschooled and unskilled in the art of medicine, has no business adjudicating matters over which medical experts themselves cannot come to agreement. This is especially where, as in this case, the medical dispute is complex and resolvable only by long-term research and empirical observation.* Furthermore, the lawyer-judge in "playing doctor" at the frontiers of medical science might distort or even hamper its proper development. Excessive judicial interference raises the spectre of defensive medicine, with the attendant evils of higher medical costs and wastage of precious medical resources.[10]

Thus put, the court's reasoning is a departure from the standard explanation that the *Bolam* test must be adopted because there is always ample scope for disagreement when it comes to medical issues.[11] One doctor, for example, could legitimately disagree with another over the appropriate diagnosis, or even the proposed course of treatment. A medical professional, therefore, should not be found negligent simply "because his conclusion differs from that of other professional men, nor because he has displayed less skill or knowledge than others would have shown".[12] Thus framed, this explanation does not call into question the extent of judicial expertise in medical matters.

Contrary to what was decided in *Gunapathy*, it is submitted that the courts may in fact possess the necessary expertise to adopt a more 'interventionist' approach and determine whether the medical professional has fallen below the standard of care reasonably expected of him or her. While medical professionals are in the best position to testify on what is common medical practice, they are not necessarily more equipped than the courts to decide if that practice is a reasonable one.[13] While it is true that some issues concerning the appropriate standard of care require some knowledge of medical science,[14] others require not medical expertise, but an appreciation of the social, moral and political values of society. To use an example, the fact that doctors agree that they would not order a prohibitively expensive test to eliminate a miniscule medical risk cannot mean that the practice is

---

9 *Gunapathy, supra* note 1 at 419, para. 3 [emphasis added].

10 *Gunapathy, supra* note 1 at 454, para. 144 [emphasis added].

11 *Hunter v. Hanley* 1955 S.L.T. 213 at 217 [*Hunter*]. Referred to in *Gunapathy, supra* note 1 at 429, para. 53.

12 *Ibid.*

13 I am indebted to my colleague, Associate Professor Michael Hor, for this point.

14 For *e.g.*, whether the surgeon performed a liver transplant properly.

therefore a reasonable one.[15] Whether that practice is 'reasonable' or not can only be determined by reference to the extent to which society is willing to tolerate a trade-off between costs and safety. In this respect, the courts, by virtue of their experience with policy issues, may well be in a better position than the medical profession to make such a determination.[16]

Assuming however, that the Court of Appeal's comments on judicial expertise were right, they have interesting implications for situations in which the courts are faced with conflicting testimony from medical experts on issues of fact. It is not uncommon in criminal matters, for example, for the judge to require the assistance of medical experts to determine whether the accused was of unsound mind or suffered from diminished responsibility at the time of the commission of the crime. The judge is unable to determine the matter alone because such matters fall outside the scope of his knowledge and experience.

Unlike a case involving the standard of medical care, however, it is not enough that the expert testimony satisfies the threshold test of logic.[17] The court must actually choose between the conflicting versions of fact or reject both.[18] The choice lies at the very heart of the judge's role as a neutral arbiter on all matters. Regardless of whether he or she is an expert in the area or not, judges are not, and are not expected to be, fazed by the task of making these findings of fact. In *Gunapathy* itself, the Court of Appeal recognised that the *Bolam* test had no application to questions of fact.[19]

Unfortunately, as it is in a case involving medical standards, experts from opposing sides will often differ on just what inference should be drawn from the facts. Although the prosecution and the defence expert may both be agreed on the underlying substratum of fact, they may disagree on the inference that should be drawn from those facts. The defence expert, for example, may advance the theory that the accused suffered from diminished responsibility.[20] The prosecution expert, however, may disagree and testify

---

[15] Yet this is the position under the *Bolam* test.

[16] Insofar as the risk of defensive medicine is concerned, it has been argued that this fear is exaggerated and unconvincing. See Kumaralingam Amirthalingam, "Judging Doctors and Diagnosing the Law: *Bolam* Rules in Singapore and Malaysia" [2003] Sing. J.L.S. 125 at 143–6.

[17] The *Bolam* test does not require the court to evaluate the substantive merits of the experts' testimony. The defendant escapes liability as long as long as responsible members of his profession testify that he had adhered to sound medical practice.

[18] *McLean v. Weir* [1973] 3 C.C.L.T. 87; *Muhammad Jefrry bin Safii v. P.P.* [1997] 1 S.L.R. 197; *Tengku Jonaris Badlishah v. P.P.* [1999] 2 S.L.R. 262; *Saeng-Un Udom v. P.P.* [2001] 3 S.L.R. 1.

[19] *Gunapathy, supra* note 1 at 435, para. 70; see also *Shamsul bin Abdullah v. Public Prosecutor* [2002] 4 S.L.R. 176 at 182.

[20] Technically, the defence expert should not testify that accused suffered from diminished responsibility because an expert cannot testify on the very issue that the court has to decide. The fear was that this might usurp the role of the court (see Jeffrey Pinsler, *Evidence, Advocacy*

that the accused was in possession of all his faculties at the time of the crime.[21]

If the Court of Appeal is right, and the courts are ill-equipped to adjudicate over medical issues, it would be unrealistic to expect that the courts would be able to choose which version is more meritorious. There is no reason why the issue should be more amenable to adjudication simply because it is now one of fact, rather than one of standards. To use an example, if two or more doctors cannot agree on whether the accused was of unsound mind at the time of the crime, it is unrealistic to expect that a layman judge would be able to fare any better. As Associate Professor Michael Hor puts it, "[t]he very lack of experience and knowledge which justifies the admissibility of expert evidence ought surely to disqualify the judge from playing the 'super-expert', the authority which decides between experts".[22]

Interestingly, the result is that the courts' approach to expert testimony in criminal cases is very much akin to the *Bolam* test in reverse. This is because a layman judge who finds it difficult to evaluate the substantive merits of conflicting medical testimony would often resort to the (unspoken) presumption that the defence expert has an interest to serve to break the deadlock between conflicting expert testimony.[23] The defence, therefore, will invariably fail to prove its case and the prosecution will succeed in securing a conviction.

Professor Hor's thesis also means that the court may encounter difficulty in applying the *Bolam* test itself. As discussed above, testimony from the defendant's experts will not satisfy the threshold test of logic if it flies in the face of "proven extrinsic facts" or "known medical facts or advances in medical knowledge".[24] Unfortunately, the proof of what these extrinsic facts are will often involve contested expert testimony. If Professor Hor is correct, the judge does not possess the expertise to choose between the two sets of conflicting evidence because he does not possess the expertise to play the super-expert.

IV. A Bolder Approach Outside Medical Matters?

Curiously, the Court of Appeal indicated that the more restrained approach exemplified by the *Bolam* test was confined to issues of medical negligence.

---

and the Litigation Process, 2nd ed. (Singapore, LexisNexis, 2003) at 183). This rule has since been relaxed: *D.P.P. v. A.B.C. Chewing Gum* [1968] 1 Q.B. 159; *R. v. Stockwell* (1993) 97 Cr. App. Rep. 260.

[21] See *e.g. Chua Hwa Soon Jimmy v. P.P.* [1998] 2 S.L.R. 22.

[22] Michael Hor, "When Experts Disagree" [2000] Sing. J.L.S. 241 at 243.

[23] Hor, *ibid.* at 244–6.

[24] *Gunapathy, supra* note 1 at 433–4 at para. 65.

Although the court found that *Bolam* represented the "starting point for the standard of care of all professionals", its specific test applied only to medical professionals.[25] The courts could therefore adopt a bolder approach when dealing with negligence suits involving other professions. The Court of Appeal made this point without qualification and appeared to envisage that this approach could be applied to any other profession, regardless of whether its practices were within the knowledge and experience of the court.[26] As an illustration of an instance where a court was willing to adjudicate over competing expert viewpoints, the Court of Appeal cited the case of *Edward Wong Finance Co. v. Johnson Stokes & Master*.[27] In this case, which involved an allegation of negligence against lawyers, the Privy Council actually disregarded industry-wide norms of legal practice and found the defendant lawyers guilty of negligence. This was because the defendant lawyers had ignored a foreseeable risk that could readily have been avoided.

With respect, there are several difficulties with the Court of Appeal's conclusion that the courts can take a more interventionist approach when it comes to other professions.

Assuming for the moment that a more interventionist approach is indeed the general rule, the court did not explain why the medical profession should be singled out for exceptional treatment. If the court can afford to take a more robust approach in negligence suits involving all other professions, regardless of whether the matter falls within its knowledge and experience, the same should equally apply to negligence suits involving the medical profession.

It is submitted, however, that *Edward Wong* in fact does not illustrate that the *Bolam* test is of no applicability to other professions. Indeed, several cases have held that the same test applies to all professions.[28] In *Bolitho* itself, Lord Browne-Wilkinson cited *Edward Wong*, together with a case called *Hucks v. Cole*,[29] to illustrate his point that the courts could reject professional opinion when it did not withstand logical analysis.[30] Lord Browne-Wilkinson therefore regarded *Edward Wong* and *Hucks* as no more than an application of the two-stage test of logic.

In *Gunapathy*, the Court of Appeal used the facts of *Hucks* to illustrate its point that the court could reject professional opinion when it did not reflect a "defensible conclusion".[31] It used *Edward Wong*, however, to illustrate

---

25 *Gunapathy, supra* note 1 at 435, para. 69.

26 *Gunapathy, ibid.*

27 [1984] A.C. 296 [*Edward Wong*].

28 See *e.g. Hunter, supra* note 11 at 217; *Maynard v. West Midlands Regional Health Authority* [1984] 1 W.L.R. 634 at 638; *Bolitho, supra* note 3 at 238.

29 [1993] 4 Med. L.R. 393 [*Hucks*].

30 *Bolitho, supra* note 3 at 243.

31 *Gunapathy, supra* note 1, at 434, para. 66.

its point that the courts could take a more robust approach when it came to other professions. It gave no reasons for why it chose to depart from the interpretation Lord Browne-Wilkinson had placed on *Edward Wong*. The court must have been aware of the manner in which Lord Browne-Wilkinson had relied upon *Edward Wong* because it expressly recognised that the judge had relied on the case to arrive at his conclusion in *Bolitho*.[32]

Even if *Edward Wong* does illustrate that the courts will take a more interventionist stance in cases involving the legal profession, it does not establish that the courts should take a similar stance in all other cases.[33] While judges, by virtue of their training, are arguably well-equipped to deal with issues of legal practice, the same is not necessarily true of issues involving other specialist professions. A layman judge, for example, may find it difficult to determine whether an engineer fell below the standard of reasonable engineering practice unless, as previously discussed, the issue is one of pure policy.

If, as discussed above, the motivating factor behind the adoption of the *Bolam* test is that judges do not possess the necessary expertise to adjudicate competently over differing expert opinions, there is no reason why the test should not be applied across the board to other professions whose practices are outside the courts' knowledge and experience.[34] Following on from the argument made above, it also means that judges may not necessarily be the best arbiters of competing versions of expert testimony.[35]

---

[32] *Gunapathy, supra* note 1 at 434, para. 68.

[33] In *Gunapathy, supra* note 1 at 435, para. 69, the Court of Appeal held that *Edward Wong* was indicative of the approach the courts would employ in cases involving other professions.

[34] With the possible exception of, perhaps, the legal profession.

[35] The court's willingness to play the 'super-expert' in cases involving the legal profession and its reluctance to do the same with respect to the medical profession probably stand at two extremes. The Court of Appeal could therefore have explained the difference in the two approaches on the basis that they merely represent two extreme positions that a court can choose to adopt in any case involving an allegation of professional negligence, depending on the extent of the judge's familiarity with the profession and his or her comfort-level with playing the "super-expert". A judge confident of his technical expertise could employ the robust approach, while a judge who feels "quite out of his depth" could use the *Bolam* test. This would mean, however, that it would not be possible to determine which approach would apply, except on a case by case basis. This would lead to uncertainty and arbitrariness. A judge who is an engineer by training may, for example, decide to adopt a more interventionist approach in a case involving an allegation of engineering malpractice. On the other hand, a judge schooled only in the law may decide that he or she would be quite of his or her depth in adjudicating over competing expert opinion on the appropriate engineering standard and apply the *Bolam* test. It is therefore submitted that it is better to apply one test or the other across the board.

V. Conclusion

In his article, Associate Professor Michael Hor argued that the judges are ill-equipped to play the super-expert and break the deadlock between conflicting expert opinions. The reasoning in *Gunapathy* underscores his thesis, at least insofar as testimony from medical experts is concerned. What was disappointing, however, was that the Court of Appeal confined its restraint to the medical profession. It is submitted that there is no justification for according deference to the medical profession alone and that the same approach should apply to all other professions.