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DOCTOR DOES NOT ALWAYS KNOW BEST

Foo Fio Na v. Dr. Soo Fook Mun

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I. INTRODUCTION

In determining whether a medical practitioner has acted negligently, courts may choose between two basic approaches. The first, articulated in the English case of *Bolam v. Friern Hospital Management Committee*,[1] effectively requires a court to be guided by the standards of the medical profession. The second, laid down in the Australian decision of *Rogers v. Whitaker*[2] allows a court—while taking account of the relevant medical evidence—to decide for itself whether or not the defendant doctor has been negligent. The *Bolam* test (subject to the qualifications imposed by the decision in *Bolitho v. City & Hackney Health Authority*[3]) is still generally applied—at least in the area of negligent treatment—in England, and the Singapore Court of Appeal confirmed in *Dr. Khoo James v. Gunapathy*[4] that it is similarly favoured in Singapore. However, in recent years a number of Malaysian decisions have followed the Australian approach, and now in *Foo Fio Na v. Dr. Soo Fook Mun*[5] the Federal Court has rejected *Bolam*, apparently adopting *Rogers* as the applicable test for assessing all forms of medical negligence.

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1 [1957] 1 W.L.R. 582 [*Bolam*]. Although framed in the context of a medical negligence action, the *Bolam* test of "the standard of the ordinary skilled man exercising and professing to have that special skill" (*ibid*. at 586) was designed to apply to all professions.

2 [1992] 175 C.L.R. 479 [*Rogers*].

3 [1998] A.C. 232 (H.L.) [*Bolitho*]. For further discussion of the impact of *Bolitho*, see *infra* note 39.

4 [2002] 2 S.L.R. 414 [*Gunapathy*].

5 [2007] 1 M.L.J. 593 [*Foo Fio Na*].

II. The Facts

Ms Foo Fio Na, the claimant, was injured on 11th July 1982[6] when a car in which she was a passenger hit a tree. The most serious of the injuries she sustained was a dislocation of two of her vertebrae with bilaterally locked facets, which caused extreme pain to her neck when she moved her head. The doctor who treated her immediately after the accident took X-rays and placed a cervical collar around her neck before contacting the first respondent, Dr Soo Fook Mun, an orthopaedic surgeon. Dr Soo advised that the collar should be left in place and that Ms Foo should be prevented from moving her head.

The next morning, Dr Soo examined Ms Foo and placed her on weighted traction to treat the dislocated vertebrae, but this proved unsuccessful. A few days later, on 14th July, he performed a manipulation (or closed reduction) procedure under general anaesthetic in an attempt to unlock the locked facet joint. When, after three attempts, this also proved unsuccessful, he performed a procedure on 19th July in which he opened Ms Foo's neck surgically at the nape to move the dislocated vertebrae to their original positions, securing them by grafting bone and inserting a wire loop.[7] This procedure also failed. The next day Ms Foo became paralysed.

Suspecting that the paralysis might be caused by restricted blood supply to the affected area, Dr Soo prescribed a four-day course of medication, which was administered by injection. When there was no improvement, he called in Dr Mohandas, a neurosurgeon. On 5th August, Dr Mohandas examined Ms Foo and performed a myelogram test. This apparently showed that the paralysis was attributable to the wire loop, which was pressuring the spinal cord.[8] The same day, Dr Soo performed further surgery to remove the loop, but Ms Foo was by then irreversibly paralysed.

III. The Decisions of the High Court and the Court of Appeal

Ms Foo sued both Dr Soo and his employer, Assunta Hospital. In the High Court, Dr Soo argued that, left untreated, the neck injuries which Ms Foo sustained in the car accident would have resulted in paralysis sooner or later, and that he had for this reason resorted to surgery when the initial conservative treatment proved unsuccessful. The trial judge—who declined to follow the *Bolam* test—rejected this argument and held Dr Soo primarily liable and the hospital vicariously liable to Ms Foo. He found that the paralysis was attributable to the operation of 19th July, not the car accident; that Dr Soo had been negligent in tying the wire loop, and that this had led to the pressure on the spinal cord which resulted in the paralysis; that he had

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6 It is not clear why the action took so long to make its way though the courts. According to the report, the suit was filed in January 1987, but there was a delay in its determination by the trial judge, and the case was not lodged with the Court of Appeal until 1999 (Civil Appeal No. W-02-281-1999). Although the Court of Appeal's decision was reported in 1996, leave to appeal from the judgment of that court was not given until 2002 and it was a further four and a half years before the Federal Court delivered its judgment on 29th December 2006. See too text accompanying *infra* note 37.

7 *Supra* note 5 at para. 18. The Federal Court's judgment indicates that the loop was inserted to stabilize the spinal cord. However, Dr Soo maintained that the wire had been inserted to stabilize the spine, not the spinal cord. For further discussion, see *infra*, text accompanying note 36.

8 *Supra* note 5 at para. 19. Dr Soo also disputed this finding. For further discussion, see *infra*, text accompanying note 36.

also been negligent in failing to take appropriate remedial action on discovery of the paralysis; and that he had acted negligently in performing the final operation on 5th August without the assistance of Dr Mohandas. The judge also held that Ms Foo ought to have been informed of the risk of paralysis before giving her consent to the surgery, but that the risk had not been communicated to her.

Both Dr Soo and the hospital appealed the judgment of the High Court to the Court of Appeal, which reversed the trial judge's decision on the ground that the evidence did not establish the surgery as the cause of the paralysis.[9] Gopal Sri Ram J.C.A., while recognizing that, as an intermediate court, the Court of Appeal could not have changed the test for assessing medical negligence even had it wished to do so, concluded that there were, anyway, good reasons for continuing to prefer *Bolam* over *Rogers*:

> … as a matter of practical justice, the *Bolam* test places a fairly high threshold for a plaintiff to cross in an action for medical negligence. It is right that this be so. If the law played too interventionist a role in the field of medical negligence, it [would] lead to the practice of defensive medicine. The cost of medical care for the man on the street would become prohibitive without being necessarily beneficial. For the time being the *Bolam* test maintains a fair balance between law and medicine. There may perhaps come a time when we will be compelled to lower the intervention threshold if there is a continuing slide in medical standards. But that day has not yet come.[10]

Ms Foo then applied for leave to appeal to the Federal Court, which, in granting leave, indicated that the time was ripe to reconsider *Bolam* in the light of *Rogers*. The question framed was "whether the *Bolam* test … should apply in relation to all aspects of medical negligence."[11]

IV. The Decision of the Federal Court

The Federal Court [12]—in a decision which, at times, conflated the issues of negligent non-disclosure of medical risks and negligent medical treatment[13]—examined the significance of the *Bolam* test and its satellite cases, as well as the sphere of influence of *Rogers* and the cases which have followed it.

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9 [2001] 2 M.L.J. 193.

10 *Ibid*. at 208. The Federal Court—perhaps somewhat misleadingly given this analysis of the law—described the Court of Appeal as having steered clear "of making any pronouncement on the *Bolam* principle" (see s*upra* note 5 at para. 29). This assessment was presumably based on the Court of Appeal's specific statement that it was not its place to make final pronouncements on the law.

11 [2002] 2 M.C.L.J. 11. In granting leave to appeal, the court (which comprised Steve Shim C.J. (Sabah and Sarawak), Abdul Malek and Mokhtar Abdullah F.C.JJ.) saw the question as "one of importance upon which further argument and a decision of the Federal Court would be to public advantage" with respect to "the rectitude of the '*Bolam* Test,' in particular the duty and standard of care of a medical practitioner in advising a patient on the inherent or material risks of the proposed treatment" (at 12). However, the somewhat broader form in which the question was actually framed also encompassed the application of *Bolam* to diagnosis and treatment.

12 The Court comprised Mohammed Dzaiddin C.J., Ahmad Fairuz C.J. (Malaya) and Siti Norma Yaakob F.C.J. (who delivered the Court's judgment).

13 For further discussion, see *infra* text accompanying note 38.

Using as its starting point the "conclusive" statement by McNair J. in *Bolam* that "[a] doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art,"[14] the Federal Court pointed out that

> the *Bolam* principle … in substance restrains the courts from scrutinizing and evaluating the professional conduct of a doctor possessed of a special skill and competence … he is not negligent if he has acted within a practice accepted as proper by a body of his own peers who possess similar skill and competence… It matters not that there exists another body with a differing opinion that does not accept the action taken by the doctor. It is enough that he … acted in accordance with one of the bodies of opinion and the courts can never declare his action to be … negligent. This over protective and deferential approach perhaps conforms to the well known phrase that "A doctor knows best."[15]

The Federal Court went on to observe that while the *Bolam* test continued to govern the majority of medical negligence cases in England, with the result that a doctor's liability was still ordinarily "determined by medical judgment,"[16] cases such as *Hucks v. Cole*[17] had indicated "a shift in attitude"[18] by holding that the determination of medical negligence lay ultimately with the courts. Although this shift had not been fully embraced by the House of Lords in *Bolitho*, *Bolitho* had nevertheless "somewhat changed"[19] the *Bolam* position by acknowledging that if the body of medical opinion on which a doctor sought to rely in order to justify his conduct was not capable of withstanding logical analysis, the judge would be entitled to hold that that body of opinion was not reasonable or responsible.[20] Moreover, even in England, a number of judicial pronouncements (including Lord Scarman's dissenting judgment in *Sidaway v. Governors of Bethlem Royal Hospital*[21]) indicated

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14 *Supra* note 1 at 587, quoted in *Foo Fio Na*, *supra* note 5 at para. 10.

15 *Supra* note 5 at para. 28.

16 *Ibid*. at para. 47.

17 (1968) 112 S.J. 483, reported [1993] 4 Medical Law Reports 393. In *Hucks v. Cole* the English Court of Appeal held that the court was entitled to weigh up the evidence of expert witnesses.

18 *Supra* note 5 at para. 43. The Court also referred in this respect to the decisions in *Gascoine v. Ian Sheridan & Co.* [1994] 5 Medical Law Reports 437 (H.C.), and *Joyce v. Wandsworth Health Authority* [1995] 6 Medical Law Reports 60 (H.C.) (subsequently approved by the Court of Appeal at [1996] P.I.Q.R. P.121).

19 *Supra* note 5 at para. 47.

20 *Ibid*. at para. 51, quoting Lord Browne-Wilkinson in *Bolitho*, *supra* note 3 at 243: "[T]here are cases where, despite a body of professional opinion sanctioning the defendant's conduct, the defendant can properly be held liable for negligence… In my judgment that is because, in some cases, it cannot be demonstrated to the judge's satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of the opinion… But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible."

21 [1985] 1 A.C. 871 [*Sidaway*]. In Lord Scarman's view (*ibid*. at 876), "… the question whether or not the omission to warn constitutes a breach of the doctor's duty of care towards his patient is to be determined not exclusively by reference to the current state of responsible and competent professional opinion and practice at the time… but by the court's view as to whether the doctor in advising his patient gave the consideration which the law requires him to give to the right of the patient to make up her own mind in the light of the relevant information whether or not she will accept the treatment which he proposes."

that *Bolam* had not been consistently approved of or applied in cases relating to information and advice about the risks of medical treatment.[22]

In Australia, the High Court in *Rogers* had rejected the *Bolam* test with respect to non-disclosure of risks, preferring a "prudent patient" approach similar to that articulated by Lord Scarman in his dissenting judgment in *Sidaway*, under which a doctor must take account of the patient's right to make an informed choice by conveying information which a reasonable patient would wish to receive. In a ground-breaking decision—and one which the Federal Court noted was subsequently extended in *Naxakis v. Western General Hospital*[23] to embrace negligent diagnosis and treatment—*Rogers* had established that "it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to the 'paramount consideration that a person is entitled to make his own decisions about his life."'[24]

Turning to Malaysian jurisprudence, the Federal Court noted that although *Bolam* had been applied extensively in the pre-and immediate post-*Rogers* era,[25] in more recent years there had been a marked preference for *Rogers*. The first decision to adopt a *Rogers* approach had been *Kamalam a/p Raman v. Eastern Plantation Agency (Johore) Sdn Bhd Ulu Tiram Estate, Ulu Tiram, Johore*.[26] From this decision the Court quoted with approval the observation of Richard Talalla J. 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 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.[27]

Noting that *Kamalam* had been followed in Malaysia by decisions such as *Tan Ah Kau v. The Government of Malaysia*,[28] and referring to the opinion of Michael Jones that the *Bolam* test fails to distinguish between the reasonably competent doctor and

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22 *Supra* note 5 at para. 39. In this respect the Court indicated: "We are of the opinion that the *Bolam* test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment." For further discussion of the current English position on information and advice about medical treatment, see *infra* text accompanying note 41 *et seq*.

23 (1999) 197 C.L.R. 269 [*Naxakis*].

24 *Supra* note 2 at 487, quoting *F. v. R*. (1983) 33 S.A.S.R. 193 (S.A.S.C.) (referred to by the Federal Court, *supra* note 5 at para. 52).

25 Cases referred to by the Court in this respect included *Swamy v. Matthews* [1967] 1 M.L.J. 142 (O.C.J) and [1968] 1 M.L.J. 138 (F.C.), *Chin Keow v. Government of Malaysia* [1967] 2 M.L.J. 45 (P.C.), *Elizabeth Choo v. Government of Malaysia* [1970] 2 M.L.J. 171 (O.C.J.), *Kow Nam Seng v. Nagamah* [1982] 1 M.L.J. 128 (F.C.), *Asiah bte Kamsah v. Dr Rajinder Singh* [2001] 4 M.C.L.J. 269 (H.C.), *Hor Sai Hong v. University Hospital* [2001] 8 M.C.L.J. 208 (H.C.), and *Liew Sin Kiong v. Dr Sharon DM Paulraj* [1996] 2 M.C.L.J. 995 (H.C.).

26 [1996] 4 M.L.J. 674 (H.C.) [*Kamalam*].

27 *Ibid*. at 691.

28 [1997] 2 M.C.L.J. Supp. 168.

the ordinary skilled doctor,[29] the Federal Court stated that it ought to be for judges, not doctors, to determine what a reasonable doctor would have done. Quoting Jones, the Court indicated that while what the profession would actually do in a given situation would be an important indicator of what ought to have been done, it would not necessarily be determinative, and in the final analysis the court should set the standard of care in negligence, drawing upon the evidence presented.[30] The Federal Court concluded that

> there is a need for members of the medical profession to stand up to [their] wrong doings … as is the case of professionals in other professions… On this basis we are of the view that the *Rogers* … test would be a more appropriate and viable test [for] … this millennium than the *Bolam* test. To borrow a quote from Lord Woolf's inaugural lecture in the new Provost Series … the phrase "Doctor knows best" should now be followed by the qualifying words "if he acts reasonably and logically and gets his facts right."[31]

In allowing the appeal, the Federal Court held that the trial judge's finding that Ms Foo's paralysis had been caused by the wire loop was one of fact, as was his finding that Dr Soo had not informed her of the risk of paralysis. The law on appellate interference against findings of fact was so well settled "as to deter us from upsetting such a finding,"[32] and there was, moreover, "sufficient evidence …to justify [the High Court] in concluding as it did."[33] The appeal was therefore allowed with costs and the order of the High Court with respect to quantum of damages was restored.[34]

V. Discussion

The significance of the Federal Court's endorsement of *Rogers* in *Foo Fio Na* should not be underestimated, and, as the discussion below will indicate, the decision is to be welcomed for introducing a fairer, less paternalistic, approach to establishing medical negligence. However, its impact is likely to be reduced by reason of several procedural and substantive criticisms which may be levelled against it.

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29 The reference in this respect was to M.A. Jones, *Medical Negligence*, 2d ed. (London: Sweet and Maxwell, 1996) at 95. (The same observation appears at 191-2 in the book's 3d edition, published in 2003).

30 *Supra* note 5 at para. 74, quoting Jones, *ibid.* at 95.

31 *Supra* note 5 at para. 78. While the Federal Court in *Foo Fia Na* did not specifically spell out the fact that it was embracing *Rogers* with respect to all aspects of medical negligence, this was implicit in the passage quoted here. It was also demonstrated both by the Court's initial criticisms of the *Bolam* test (*supra* note 15) and by its espousal of Jones's views (*supra* note 29). Moreover, in upholding the trial judge's finding that Dr Soo had been negligent not only in his failure to warn Ms Foo of the risks inherent in the treatment but also in his performance of that treatment, the Federal Court's decision certainly suggests that it was applying *Rogers* across the board.

32 *Supra* note 5 at para. 37.

33 *Ibid*. at para. 37. In this respect the Court referred to *Renal Link (KL) Sdn. Bhd. v Dato' Dr. Harnam Singh* [1997] 3 M.C.L.J. 225 (C.A.), *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd.* [1996] 3 M.C.L.J. 163 (F.C.) and *Maynard v. West Midlands Regional Health Authority* [1985] 1 All E.R. 635 (H.L.). The Court went on to observe at para. 38: "More importantly, the facts of the instant appeal differ vastly [from] … the facts of *Bolam*" (although it did not explain the legal significance of this factual distinction).

34 *Supra* note 5 at para. 79.

A. *Procedural Issues*

Procedurally, a number of jurisdictional issues give rise to concern. The most significant of these is that the Federal Court upheld the trial judge's findings of fact, and made them the basis for reinstating the orders of the High Court, when these findings had been specifically rejected by the Court of Appeal. Under sections 69 and 96 of the *Courts of Judicature Act 1964*, the Court of Appeal is the only Malaysian appellate court with the power in civil matters to re-hear cases, draw inferences of fact and make orders similar to those of the High Court.[35] This certainly suggests that the Federal Court exceeded its jurisdiction in this respect.

Also troubling is the Federal Court's characterization of disputed matters as having been undisputed at trial,[36] and the lapse of almost twenty-five years between the conduct complained of and the final disposition of the appeal. This extreme delay is of particular concern given the complexity of the medical evidence involved. Moreover, the fact that the Federal Court itself took over four and a half years to deliver its judgment also made it difficult for it to deal disinterestedly with the negative observations made by the Court of Appeal about the procedural delays which had occurred in the High Court.[37]

B. *Substantive Issues*

Substantively, the decision displays not only a rather confusing conflation of the various aspects of medical negligence,[38] but also a somewhat idiosyncratic approach to the relevant authorities and their significance.

In examining the English cases which have demonstrated a more relaxed approach to the *Bolam* test, the Federal Court may have overestimated the significance of *Bolitho*, a decision which, with the benefit of hindsight, most commentators now recognize to have had a limited impact on judicial attitudes to negligent treatment.[39] On the other hand, in the area of informed consent, the Federal Court seems—in

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35 *Courts of Judicature Act*, Act 91 of 1964 (as amended in 1994 and 1998). Under s. 69(1) (as amended): "Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner." Section 96 on the other hand provides that: "… an appeal shall lie from the Court of Appeal to the Federal Court (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage…".

36 These included findings that the wire loop had been inserted to stabilize the spinal cord (see *supra* note 5 at para. 18), that the myelogram test had shown the loop to be compressing the spinal cord (*ibid.* at para. 19), and that Ms Foo had consented to the various procedures at the time of her admission to hospital, before the risks of the various procedures could be explained (*ibid*. at paras. 34-7).

37 See too *supra* note 6.

38 See *e.g.*, paras. 33 and 47 of the judgment (*supra* note 5), which move between discussion of cases relating to negligent treatment and cases relating to negligent failure to advise of risks without clearly differentiating the two areas.

39 Although *Bolitho* has on occasion engendered greater judicial caution in evaluating medical opinion (see, *e.g.*, *Marriot v. West Midlands Health Authority* [1999] Lloyd's Rep. Med. 23 (C.A.)) it is generally agreed not to have had the impact which might have been predicted. See, *e.g.*, Kumaralingam

relying on Lord Scarman's dissenting judgment in *Sidaway*[40] rather than on more recent cases—to have understated the degree to which the courts have moved away from *Bolam*. There is for example, no reference in the decision to Lord Woolf's judgment in *Pearce v. United Bristol Healthcare NHS Trust*,[41] or, more significantly, to the 2005 decision of the House of Lords in *Chester v. Afshar*.[42] Although *Chester* (which closely resembled the High Court of Australia's decision in *Chappel v. Hart*[43]) was decided on the issue of causation, it is generally regarded as having heralded a more patient-friendly approach to the duty to inform, based on normative values and the vindication of rights—in general, a patient's right to autonomy, and more specifically, the right not to be subjected to an undisclosed risk.[44]

With respect to Australian law, the Federal Court's decision offers a strong analysis of both *Rogers* and *Naxakis*. However, in recent years there has been a deliberate retreat in that jurisdiction from the high-water mark represented, in particular, by the extension in *Naxakis* of the "prudent patient" test to cover diagnosis and treatment as well as non-disclosure of medical risks. In 2002, the Chief Justice of the High Court of Australia warned that, "[i]n many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act,"[45] and in the same year the Ipp Committee[46]—formed in the wake of the collapse of a major medical indemnity provider in 2001—recommended the adoption of a test for establishing negligence in cases of medical treatment which was far closer to *Bolam/Bolitho* than to *Rogers/Naxakis*.[47] Following the Ipp Committee's report, most Australian states enacted legislation to limit litigation and cap damages in general,[48] and to restrict professional negligence actions and re-impose a modified

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Amirthalingam, "Medical Negligence Law: What Options for Singapore and Malaysia" in Alan Tan Khee Jin and Azmi Sharom, eds., *Developments in Singapore and Malaysian Law* (Singapore: Marshall Cavendish Academic, 2006) 269 at 275-6. The author suggests that while "[t]here has been some confusion as to whether *Bolitho* has modified *Bolam* or merely restated the test; the better view seems to be that little has changed."

40 *Supra* note 21. The majority decision in *Sidaway* is generally acknowledged to have extended the *Bolam* test to the area of informed consent, since although only Lord Diplock specifically applied the test to the duty to inform, the tenor of the decision is clearly in keeping with the spirit of *Bolam*. While Lord Scarman's influential dissent is frequently cited, it clearly represented the minority view in that case.

41 [1999] P.I.Q.R. 53 (C.A.). Lord Woolf observed (at 59) that: "In a case where it is being alleged that a plaintiff has been deprived of the opportunity to make a proper decision as to what course he or she should take in relation to treatment, it seems to me to be the law … that if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself … what course he or she should adopt."

42 [2005] 1 A.C. 134; [2004] UKHL 41 [*Chester*].

43 (1998) 195 C.L.R. 232.

44 In *Chester* a surgeon negligently failed to warn his patient that spinal surgery which he recommended carried a small risk of paralysis. The patient established that, had she been aware of this risk, she would have sought a second opinion. Beyond that, she was uncertain what she would have done, and was certainly unable to establish that she would not have undergone the surgery had she known of the risk. Nevertheless, the House of Lords held the surgeon liable.

45 *Rosenberg v. Percival* (2002) 205 C.L.R. 434 at 439.

46 D.A. Ipp *et al*., *Review of the Law of Negligence: Final Report* (Commonwealth of Australia, 2002).

47 *Ibid.*, Recommendation 3, under which a medical practitioner would not be negligent "if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational."

48 *Civil Law (Wrongs) Act 2002* (A.C.T.); *Civil Liability Act 2002* (N.S.W.); *Personal Injuries (Liabilities and Damages) Act 2003* (N.T.); *Civil Liability Act 2003* (Qld.); *Civil Liability Act 1936* (S.A.) (a renamed

version of the *Bolam* test in particular.[49] Nowhere in the Federal Court's decision are these changes referred to, and in light of these omissions the picture of Australian medical negligence law in *Foo Fio Na* can hardly be described as entirely accurate or fully comprehensive.

That having been said, the Ipp Committee's preference for a modified form of the *Bolam* test did *not* extend to the duty to advise or warn of risks, in which respect the Committee recommended codification of *Rogers*.[50] And in states which have specifically legislated on the duty to warn, the *Rogers* approach to informed consent has indeed survived intact,[51] indicating that the clock has not been turned back entirely in Australia. Moreover, the legislation re-introducing a *Bolam*-esque approach to the determination of medical negligence has been criticized for having been introduced too hastily and without full consideration,[52] in something of a knee-jerk response to a medical insurance crisis which was by no means solely attributable to an overly litigious post-*Rogers* culture.

While the possibility of excessive litigation in the field of medical negligence not surprisingly remains a widely-expressed concern in all jurisdictions—and one which clearly influenced the Court of Appeal in *Foo Fio Na*[53]—there is no empirical evidence that adoption of a *Rogers* approach in Malaysia will necessarily lead to numerous claims or excessive awards. *Rogers*, if interpreted and applied in an appropriately cautious and circumspect manner, requires only that a doctor be judged by what is objectively regarded as the standard of a reasonably competent member of his profession, rather than by what is subjectively deemed acceptable by the profession itself. There is nothing inherently excessive or dangerous about establishing medical negligence in such a manner, and if the choice is between *Rogers* and a strict

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version of the *Wrongs Act* (S.A.), as substantially amended by the *Law Reform (Ipp Recommendations) Act* 2004 (S.A.)); *Civil Liability Act 2002* (Tas.); *Wrongs Act 1958* (Vic.) (as substantially amended by the *Wrongs and Other Acts (Law of Negligence) Act 2003* (Vic.) and the *Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002* (Vic.)); and *Civil Liability Act 2002* (W.A.).

49 See, *e.g.*, *Civil Liability Act* 2002 (N.S.W), *ibid.*, Division 6, ss. 5O(1) and (2), under which a professional will not be liable "if it is established that the professional acted in a manner that … was widely accepted in Australia by peer professional opinion as competent professional practice" unless "the court considers that the opinion is irrational or contrary to written law" and *Civil Liability Act 2003* (Qld.), *ibid.*, Division 5, s. 22(1), under which a professional will similarly escape liability if his conduct "was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice" (again unless, under s. 22(2) it is regarded as irrational). Similar provisions are also contained in the *Civil Liability Act 1936* (S.A.), *ibid.*, ss. 40-41; *Civil Liability Act 2002* (W.A.), *ibid.*, Division 7, ss. 5PA-5PB.

50 *Supra* note 46, Recommendations 5-7. See, in particular, Recommendation 7(b), under which a medical practitioner would be required to "take reasonable care to give the patient such information as the reasonable person in the patient's position would, in the circumstances, want to be given before making a decision whether or not to undergo treatment."

51 See, *e.g.*, *Civil Liability Act 2003* (Qld.), *supra* note 48, Division 5, s. 21(1): "A doctor does not breach a duty owed to a patient to warn of a risk before the patient undergoes any medical treatment … that will involve a risk of personal injury to the patient, unless the doctor … fails to give or arrange to be given to the patient the following information about the risk—(a) information that a reasonable person in the patient's position would, in the circumstances, require to enable the person to make a reasonably informed decision about whether to undergo the treatment or follow the advice; (b) information which the doctor knows or ought reasonably to know the patient wants to be given before making the decision about whether to undergo the treatment or follow the advice."

52 See discussion of this point by Kumaralingam Amirthalingam, *supra* note 39 at 271.

53 *Supra* note 9.

application of *Bolam/Boltiho* such as that adopted in Singapore—where, as a result of the Singapore Court of Appeal's decision in *Gunapathy*,[54] a doctor will escape liability as long as the views of his witnesses are not logically indefensible, even if a court believes he acted unreasonably and even if his practice was wrong—*Rogers* is surely to be preferred.[55]

VI. Conclusion

Although aspects of the Federal Court's decision in *Foo Fio Na* may serve to undermine its authoritativeness, its decision to favour the "prudent patient" approach of *Rogers* rather than the "standard of the profession" approach of *Bolam* has much to recommend it. Perhaps it is time to recognize that although *Bolam* is only fifty years old, it is the product of a less sophisticated and more paternalistic era, founded on a philosophical premise which is out of step with contemporary legal culture. Where once doctors were accorded an unparalleled level of deference, society now expects a more egalitarian approach to all professions. The House of Lords' rights-based decision on the duty to warn of medical risks in *Chester* seems to reflect this view, possibly indicating that, even in its country of origin, *Bolam's* days could be numbered. On the other hand, it is probably too soon to predict *Bolam's* final demise, particularly given the Australian retreat from *Rogers* in cases of negligent diagnosis and treatment. So it remains to be seen how the apparent application of *Rogers* to all aspects of medical negligence will work in Malaysia, and how (or whether) other jurisdictions—including the U.K. and Singapore—will differentiate the standard of care for determining negligent non-disclosure of risks and that for determining negligent diagnosis and treatment. Whatever the long-term prognosis, though, one thing is certain. *Foo Fio Na* represents yet another inroad into the notion that "doctor knows best".

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[54] *Supra* note 4.

[55] This view becomes even more persuasive when one considers that, as *Bolam/Bolitho* is interpreted in Singapore, the medical profession is the only profession to be accorded such protection. See the judgment of Yong Pung How C.J. in *Gunapathy*, *supra* note 4 at 435: "[T]he willingness of the court to adjudicate over differing opinions in other professions should not be transposed to the medical context. While judges are eminently equipped to deal with the practice and standards of, for example, the legal profession, the same cannot be said with the intricacies of medical science." Such a pro-doctor position has been criticized as being extremely difficult to defend in an age when lawyers, accountants and architects are governed by the same rules as everyone else. For further discussion of this point, see Kumaralingam Amirthalingam, "Judging Doctors and Diagnosing the Law: *Bolam* rules in Singapore and Malaysia" [2003] Sing. J.L.S. 125 at 139.